VOLUME III OF V

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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SC SUPREME COURT

Appeal from Richland County

Robert E. Hood, Circuit Court Judge

RONALD TILLMAN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002499

APPENDIX

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COULD NOT FIND WHAT I HAD ASKED FOR THEM TO GET.
Q DID HE TELL YOU WHICH STORE THEY HAD GONE TO?
A THEY WENT TO THEIR--WELL, THEIR FAMILY STORE.
Q WOULD THAT BE THE PARTY SHOP?
A YES.
Q BUT HE CAME BACK AND TOLD YOU HE LEFT IT ON THE COUNTER?
A YES.
Q AND HOW FAR IS IT TO THE PARTY SHOP FROM WHERE BRIDGETTE'S HOUSE IS?
A IT'S LIKE FIFTEEN MINUTES.
Q WHERE DOES BRIDGETTE LIVE?
A IN COLONY APARTMENTS.
Q IN COLONY APARTMENTS. LET ME SHOW YOU THIS MAP. IF YOU COULD STEP DOWN HERE JUST A MINUTE.
(WITNESS LEAVES STAND)
Q ARE YOU FAMILIAR WITH THE CITY OF COLUMBIA?
A YES.
Q AND YOU ARE FROM COLUMBIA?
A YES.
Q OKAY. CAN YOU SHOW ME ON THIS MAP WHERE BRIDGETTE'S--THE GENERAL AREA WHERE BRIDGETTE'S HOUSE IS?
A OKAY.
(NOTE: THE WITNESS SPEAKS TO THE SOLICITOR.)
THE COURT: WE CAN'T HEAR A WORD YOU ARE SAYING.
A I'M LOOKING FOR BELTLINE.

THE COURT: DON'T HAVE A CONVERSATION WITH THE SOLICITOR. YOU DON'T HAVE A RIGHT TO DO THAT.

A I WAS ASKING HIM IF HE COULD SHOW ME WHERE BELTLINE IS.

MR. BILTON: YOUR HONOR, I CAN DO THIS WITHOUT THE MAP I BELIEVE.

THE COURT: THEY MIGHT STIPULATE IF YOU TURN AROUND AND ASK THEM.

MR. SWERLING: WHATEVER HE WANTS.

THE COURT: CIRCLE IT. HE SAYS HE'LL AGREE TO IT.

MR. BILTON: OKAY. CAN YOU ALSO STIPULATE TO WHERE THE PARTY SHOP IS?

MR. SWERLING: IT IS WHERE IT IS.

Q OKAY. YOU CAN TAKE THE STAND, MS. BRISBY.

(WITNESS RESUMES STAND)

THE COURT: IS THAT IN EVIDENCE?

MR. BILTON: NO, SIR.

THE COURT: I'M JUST ASKING.

MR. SWERLING: YOUR HONOR, HE PROBABLY OUGHT TO PUT IT IN SINCE THERE'S SOME REFERENCE TO IT IN THE RECORD.

THE COURT: SOMEBODY HAS TO MOVE IT.

MR. BILTON: YOUR HONOR, I WOULD MOVE TO HAVE IT MARKED FOR IDENTIFICATION.

THE COURT: OKAY. MARK IT FOR IDENTIFICATION.

MR. SWERLING: YOU CAN PUT IT IN EVIDENCE.

MR. BILTON: AND ALSO PLACE IT INTO EVIDENCE.

THE COURT: ANY OBJECTION?

MR. SWERLING: WE HAVE NO OBJECTION.

THE COURT: MR. BILTON, HAND IT UP HERE, PLEASE. THIS HAS SOMETHING ON THE BACK SIDE OF IT. IT HAS NOTHING TO DO I HOPE WITH--

MR. SWERLING: I AGREE.

THE COURT: YOU BETTER TAKE A LOOK BEFORE YOU START AGREEING WITH THINGS. IT DOESN'T HAVE ANYTHING TO DO WITH THE CASE. IT'S SOMETHING ABOUT THE CLERK OF COURT'S OFFICE HANDLING FUNDS.

MR. SWERLING: THE DIAGRAM IS FINE.

THE COURT: TAKE IT OFF BEFORE IT GOES TO THE JURY.

MR. SWERLING: THIS HAS NOTHING TO DO WITH THE CASE.

THE COURT: IF YOU'VE GOT SOMETHING ELSE YOU CAN PUT IT ON WE'LL DO THAT BUT YOU SHOULD NOT PUT THIS IN.

(MAP IS RECEIVED INTO EVIDENCE AS STATE'S EXHIBIT #55)

THE COURT: NOW IN THE RECORD OF THIS CASE WITHOUT OBJECTION EXHIBIT DESIGNATED AS STATE'S EXHIBIT NUMBER 55. IT'S A SHEET FROM THE COLUMBIA METROPOLITAN AREA, SOUTH CAROLINA DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION. IT APPEARS TO BE SOMEWHERE BETWEEN TWO AND A HALF TO ABOUT FOUR FEET IN SIZE. NOW ENTERED.

Q MS. BRISBY, HOW LONG WOULD IT TAKE YOU TO GET FROM BRIDGETTE'S HOUSE TO THE PARTY SHOP?

A FIFTEEN MINUTES. I HAVE GOTTEN DOWN THAT ROAD IN LIKE

FIFTEEN, TWENTY MINUTES.

Q FIFTEEN TO TWENTY MINUTES. NOW, YOU TESTIFIED THAT YOU DIDN'T FIND IT PECULIAR THEY WOULD GO FOR TWENTY MINUTES AND COME BACK EMPTY HANDED?

A NO. BECAUSE VITO WENT TO THE STORE BEFORE AND CAME BACK AND I'VE BEEN WITH VITO TO THE STORE AND WE LEFT SOMETHING AT THE STORE SO I, YOU KNOW...

Q WHAT, IF ANYTHING, DID RONALD TILLMAN SAY WHEN HE GOT BACK?

A HE TOLD US THAT HE HAD LEFT THE STUFF ON THE COUNTER BUT THEY'LL GO TO THE STORE, GO BACK TO THE STORE FOR US.

Q DID HE SAY ANYTHING ABOUT DONALD SUTTON?

A WHEN THEY CAME BACK THE SECOND TIME?

Q YES.

A NO, RONALD DIDN'T SAY NOTHIN'.

Q DID HE SAY ANYTHING AT ALL ABOUT DONALD SUTTON THAT NIGHT?

A YES.

Q WHAT DID HE SAY?

A WHEN HE CAME OVER THE FIRST TIME. WHEN HE CAME OVER THE FIRST TIME HE MENTION THAT DONALD NEVER CAME TO THE PARTY SHOP AND HE WANTED VITO TO GO WITH HIM TO LOOK FOR DONALD.

Q DONALD HAD NEVER COME TO THE PARTY SHOP?

A YES.

Q BUT HE DIDN'T SAY ANYTHING THE SECOND TIME ABOUT DONALD, DID HE?

A RONALD DIDN'T.

Q DID VITO?
A YES. VITO SAY THEY WAS GONNA GO LOOK FOR DONALD, HIS CAR PROBABLY HAD BROKE DOWN.
Q WHAT TIME DID THEY LEAVE?
A IT WAS AROUND ABOUT NINE OR A LITTLE AFTER NINE WHEN THEY LEFT THE HOUSE.

MR. BILTON: I BEG THE COURT'S INDULGENCE, YOUR HONOR. (PAUSE) NO FURTHER QUESTIONS.

THE COURT: REDIRECT?

MRS. SHEALY: JUST BRIEFLY, YOUR HONOR.

REDIRECT EXAMINATION BY

MRS. SHEALY:

Q LISA, THE ENTIRE EVENING OF THE 26TH WHEN YOU SAW MR. TILLMAN, DID HE HAVE ON THAT SWEATSUIT?
A YES.
Q AT ANY TIME DID HE CHANGE WHAT HE HAD ON?
A NO.
Q DID YOU EVER SEE ANY BLOOD OR ANYTHING ELSE ON THE SWEATSUIT?
A NO.

MRS. SHEALY: I HAVE NOTHING FURTHER. THANK YOU, YOUR HONOR.

THE COURT: YOU MAY STEP DOWN.

(WITNESS TO THE SIDE)

THE COURT: CALL YOUR NEXT WITNESS.

MRS. SHEALY: WE CALL VITO McKIE.

VITO McKIE, AFTER BEING DULY SWORN BY THE CLERK, TESTIFIES AS FOLLOWS:

DIRECT EXAMINATION BY

MRS. SHEALY:

Q VITO, WOULD YOU TELL THE JURY, PLEASE, WHERE YOU LIVE AND HOW OLD YOU ARE?

A I'M TWENTY-THREE. I STAY OFF OF BELTLINE IN COLONY APARTMENTS.

Q AND ARE YOU WORKING AT THIS TIME?

A YES, MA'AM.

Q WHERE DO YOU WORK?

A WELL, WE SELF EMPLOYED. I WORK WITH MY UNCLE, McKIE JANITORIAL SERVICE.

Q AND HOW LONG HAVE YOU BEEN WORKING THERE?

A I'D SAY PROBABLY ABOUT THREE OR FOUR YEARS NOW.

Q OKAY. DO YOU KNOW RONALD TILLMAN?

A YES, MA'AM.

Q DID YOU KNOW DONALD SUTTON?

A YES, MA'AM.

Q LET ME ASK YOU. ON DECEMBER 26TH, 1988, WHEN, IF EVER, DID YOU SEE RONALD TILLMAN THAT DAY?

A IT WAS APPROXIMATELY ABOUT SEVEN O'CLOCK THAT NIGHT.

Q OKAY. WHERE WAS IT THAT YOU SAW HIM?

A HE CAME UP TO THE APARTMENT.

Q WHOSE APARTMENT?

A CAME OVER TO MY APARTMENT.
Q AND IS THAT THE APARTMENT THAT BRIDGETTE SHELL LIVES IN?
A YES, MA'AM.
Q WHO WAS PRESENT AT THE APARTMENT WHEN RON TILLMAN GOT THERE?
A IT WAS ME, BRIDGETTE, LISA. I THINK THAT'S PROBABLY IT. I THINK CHELSEA WAS THERE, TOO.
Q OKAY. TELL THE JURY WHAT HAPPENED ONE RONALD TILLMAN GOT THERE.
A WELL, ONCE RONALD GOT OVER THERE WE CHAT FOR ABOUT A FEW MINUTES AND THEN BRIDGETTE AND LISA--THEY HAD WANTED SOMETHIN' FROM THE STORE.
Q DO YOU REMEMBER WHAT THEY WANTED FROM THE STORE?
A I THINK LISA--SHE HAD WANTED SOME WINE AND BRIDGETTE--SHE HAD WANTED SOME, YOU KNOW, SNACKS LIKE TO EAT.
Q WHAT HAPPENED AFTER THAT?
A AND THEN AT THE TIME RON HAD ASKED IF DONALD HAVE ARRIVE BACK YET AND SO, YOU KNOW, WE HAD TOLD HIM NO AND THEN AT THE TIME WE HAD WENT TO THE STORE FOR THEM, YOU KNOW, TO GET THEM SOMETHIN' TO EAT.
Q WHO WENT TO THE STORE?
A ME AND RONALD.
Q AND DO YOU RECALL WHAT TIME THAT WAS?
A IT COULD HAVE BEEN APPROXIMATELY ABOUT 7:30, SOMETHING LIKE THAT.
Q ARE YOU NOT SURE OF THE TIME?

A NO, MA'AM.
Q WHICH STORE DID YA'LL GO TO ON THAT TRIP OUT?
A OKAY. WE HAD LEFT OUT AND I THINK WE HAD WENT TO THE TEXACO FIRST.
Q AND WHAT HAPPENED AFTER YOU GOT TO THE TEXACO?
A OKAY. WE HAD WENT BY THERE TO GET THE WINE. THEY DIDN'T HAVE IT, YOU KNOW, SO WE GOT LITTLE SNACKS FOR BRIDGETTE AND BROUGHT IT BACK TO THE HOUSE. AND THEN ONCE WE GOT BACK TO THE HOUSE RON HAD ASKED THEM HAVE DONALD COME BACK YET AND, YOU KNOW, THEY RESPOND WITH NO. AND SO WE TOLD 'EM WE WAS GONNA GO UP THERE BY THE SHOP AND LOOK FOR HIM UP THERE. AND, YOU KNOW, ONCE WE WAS ON OUR WAY UP THERE WE WAS GONNA STOP BY THE STORE AND, YOU KNOW, CHECK AND SEE IF THEY HAD THE WINE LISA HAD ASKED FOR.
Q OKAY. SO, THIS IS THE SECOND TRIP OUT OF THE APARTMENT?
A YES, MA'AM.
Q AND WHERE DID YOU GO AT THAT TIME?
A OKAY. WE LEFT THERE AND AS WE WAS GOING UP THROUGH U.S.C. AND WE HAD STOPPED BY THE BINGO HALL ON OUR WAY GOIN' UP TO RONALD TILLMAN AND THOSE SHOP. AND RON HAD STOP AND CHAT WITH A COUPLE OF PEOPLE BEHIND THE DESK WHO HE KNEW AND THEN IT WAS A COUPLE OF PEOPLE OUT THERE PLAYING BINGO HE HAD KNEW AND THEN WE LEFT FROM THERE AND WENT STRAIGHT TO THE SHOP.
Q OKAY. JUST TO MAKE IT CLEAR TO THE JURY, EXPLAIN HOW MANY TRIPS OUT OF THE APARTMENT YA'LL HAD ALREADY BEEN.

A WELL, THAT WAS TWO RIGHT THERE.
Q OKAY. AND AFTER YOU WENT TO THE BINGO HALL, WHERE DID YOU GO?
A STRAIGHT TO RON AND THOSE SHOP.
Q OKAY. HOW LONG DID YA'LL STAY AT THE PARTY SHOP?
A COULDN'T HAVE BEEN NO MORE THAN PROBABLY ABOUT SIX OR SEVEN, EIGHT MINUTES. I'D SAY--LET ME SEE. OKAY, WE HAD WAITED O SOME GIRLS. IT COULDN'T HAVE BEEN NO MORE THAN ABOUT TEN MINUTES.
Q WHEN YOU SAID YOU WERE WAITING ON SOME GIRLS, EXPLAIN THAT.
A OKAY. I WAS INSIDE THE SHOP AND RONALD WAS ON THE OTHER END TALKING TO HIS FATHER. AND, YOU KNOW, HE HAD TOLD THE MAN BEHIND THE DESK, YOU KNOW, TO GET ME WHATEVER I NEEDED FOR BRIDGETTE AND THOSE. AND SO I HAD FORGOT SO I CALL BACK TO THE HOUSE AND ASK THEM WHAT THEY HAD ASKED FOR AND SO WHILE I WAS GETTIN' THAT RONALD WAS ON THE OTHER END TALKING TO HIS FATHER. AND THEN --
Q LET ME INTERRUPT YOU THERE, VITO, FOR JUST A SECOND. EXPLAIN WHAT YOU MEAN BY THE OTHER END. COULD YOU TELL THEM HOW THE PARTY SHOP IS SET UP?
A YES. OKAY, IT'S A LITTLE PARTY, LITTLE STORE, AND ON THE OTHER SIDE IS A LITTLE LIQUOR STORE, TOO, LIKE PARTY SHOP.
Q OKAY. SO, WHEN YOU SAY RONALD WAS ON THE OTHER END, WHAT END ARE YOU TALKING ABOUT?
A OKAY. HE WAS ON THE PARTY SHOP END WHERE THE SALE OF LIQUOR

IS AND I WAS ON THE END WHERE THEY SELL, YOU KNOW, THE SNACKS AND THE POOL TABLES ARE.

Q OKAY. SO, WHAT HAPPENED AFTER THAT?

A OKAY. THEN I HAD--AFTER I TALK TO BRIDGETTE AND ASK HER WHAT SHE HAD WANTED AND THE DUDE BEHIND THE COUNTER, I THINK HIS NAME WAS ARTHUR, HE HAD, YOU KNOW, GAVE ME THE STUFF I HAD NEEDED AND RONALD WAS OVER THERE TALKING TO HIS FATHER AND SO AFTER I GOT THAT THEN I HAD MADE A PHONE CALL FOR US TO MEET THE GIRLS DOWN THE ROAD AT THE SHOP. AND SO, YOU KNOW, AS RONALD WAS COMIN' ON THE OTHER SIDE I TOLD HIM I HAD TALK TO TONYA, YOU KNOW, AND THEY WAS GONNA BE DOWN HERE IN A FEW MINUTES. SO, AT THE TIME I WAS TELLIN' RON, I SAID, YOU KNOW, SOME DUDES ASKED ME--HE ASKED ME WHO THE BOYS WAS TALKIN' TO AND I SAY I DON'T KNOW WHO IT IS BECAUSE THEY ASKED ME ABOUT A WARMUP SUIT I HAD ON AND--

MR. MORTON: YOUR HONOR, I OBJECT TO ALL THIS. HEARSAY.

THE COURT: I SUSTAIN THE OBJECTION. THE JURY IS INSTRUCTED TO DISREGARD IT. MR. WITNESS, SLOW DOWN. I'M HAVING TROUBLE HEARING YOU AND UNDERSTANDING YOU.

Q VITO, JUST TAKE YOUR TIME IN ANSWERING THE QUESTIONS. YOU CAN'T SAY ANYTHING THAT ANYBODY ELSE TOLD YOU.

A OKAY.

Q OKAY. SO, LET'S SEE, YOU WERE AT THE SHOP AND YOU SAY RONALD WAS ON THE OTHER END.

A YEAH.

Q START THEN WITH THE GUYS APPROACHING YOU ABOUT YOUR SWEATSUIT. WHAT HAPPENED THEN?
A OKAY. THEY HAD ASKED ME ABOUT MY WARMUP SUIT. AND, YOU KNOW, HE ASKED ME WHERE DID I BUY IT FROM AND I SAID--
Q OKAY. YOU ARE NOT GOING TO BE ABLE TO SAY WHAT SOMEBODY ELSE TOLD YOU.
A OKAY. ALL RIGHT.
Q LET ME ASK YOU THIS. HOW LONG WERE YOU AT THE PARTY SHOP WITH RONALD?
A IT COULDN'T HAVE BEEN NO MORE THAN ABOUT TEN MINUTES.
Q OKAY. AND DID RONALD EVER LEAVE FROM THE PARTY SHOP WHILE YA'LL WERE THERE?
A NO, MA'AM.
Q COULD YOU SEE RONALD THE ENTIRE TIME YOU WERE AT THE PARTY SHOP?
A YES, MA'AM.
Q OKAY. DO YOU RECALL WHAT HE HAD ON THAT NIGHT?
A YES, MA'AM. HE HAD ON A WHITE "B.K." WARMUP SUIT AND "B.K." TENNIS SHOES.
Q OKAY. COULD YOU TELL THE JURY WHAT "B.K." IS?
A BRITISH KNIGHTS.
Q LET ME ASK YOU IF YOU CAN IDENTIFY THESE ITEMS?
A UH-HUH (INDICATES AFFIRMATIVE).
Q WHAT IS THIS?
A THAT'S THE WARMUP SUIT.

Q THIS IS PRESENTLY MARKED AS I.D. "B." AND DO YOU RECOGNIZE THESE?
A YES, MA'AM.
Q WHAT ARE THESE?
A TENNIS SHOES HE HAD ON.
Q I.D. "C." SO, YOU STAYED AT THE PARTY SHOP YOU SAID FOR ABOUT TEN MINUTES?
A YES, MA'AM.
Q OKAY. WHAT HAPPENED AFTER THAT?
A OKAY. AFTER THAT WE HAVE WENT OUT THE DOOR AND I WAS WAITIN' ON THE GIRLS AT THE TIME, ME AND RONALD. AND SO I WAS TELLIN' RON, SAID, WELL, THEY TAKIN' TOO LONG. SO, I SAID, YOU KNOW, LET'S GO. AND SO WE HAD GOTTEN IN THE CAR AND WE HAD LEFT THE PARTY SHOP THEN AND AS WE WAS GOIN' DOWN THE ROAD WE HAD STOP BY THE GAS STATION. I THINK IT WAS ON THE OTHER SIDE OF THE STREET, ONE BY THE FAIRGROUND. AND WE HAD STOPPED IN THERE TO SEE DID THEY HAVE ANY WINE OVER THERE AND THEY DIDN'T HAVE ANY THERE SO WE LEFT THERE AND, YOU KNOW, START HEADING TOWARDS HOME.
Q OKAY. DO YOU RECALL WHAT TIME THAT WAS?
A IT COULD HAVE BEEN PROBABLY ABOUT 8:15, SOMETHING LIKE THAT. 8:30.
Q YOU DON'T REMEMBER THE TIME?
A NO, MA'AM.
Q OKAY. ONCE YOU GOT HOME, WHAT HAPPENED THEN?

A WE TOLD 'EM THEY DIDN'T HAVE ANY WINE AND SO WE HAD GAVE BRIDGETTE THE FOOD THAT SHE ASKED FOR AND WE HAD TOLD 'EM THAT I HAD MADE UP, YOU KNOW, A GOOD STORY. I SAID, WELL, WE FIXIN' TO GO HELP DONALD FIX HIS CAR. AND SO--

Q NOW, WHO DID YOU TELL THAT TO?

A TO BRIDGETTE AND LISA.

Q AND WHAT WAS THE REASON FOR DOING THAT?

A 'CAUSE WE WAS GOIN' OUT TO THE CLUB, YOU KNOW, TO GET OUR EARLY STAMP.

Q EXPLAIN TO THE JURY WHAT YOU MEAN BY GETTING AN EARLY STAMP AND WHAT CLUB.

A OKAY. WE WAS GOIN' TO THE FOUNTAIN BLEAU THAT MONDAY NIGHT AND, YOU KNOW, BEFORE ELEVEN O'CLOCK IT'S A DOLLAR AND ONE CENT.

Q OKAY. AND THAT'S WHAT YOU ARE TALKING ABOUT THE EARLY STAMP?

A YES, MA'AM.

Q OKAY. SO, YOU LEFT YOUR HOME ABOUT WHAT TIME?

A I LEFT THE HOUSE, IT COULD HAVE BEEN ABOUT 7:30.

Q ON THIS OCCASION?

A NO. OKAY. IT COULD HAVE BEEN--THAT WAS ABOUT 8:30 OR QUARTER TO 9:00 THEN AT THE TIME.

Q OKAY. AND WHERE DID YA'LL GO FROM THERE?

A OKAY. WE WENT STRAIGHT TO THE HOUSE AND THEN AFTER WE DROP THAT OFF WE WENT AROUND THE CORNER. WE STOPPED AT THE TEXACO AND THAT'S WHEN I WAS TALKIN' WITH ONE OF MY FRIENDS OVER

THERE. HIS NAME WAS VIGMON.
Q OKAY. HOW LONG DID YA'LL STAY AT THE TEXACO?
A I'D SAY PROBABLY ABOUT TEN MINUTES.
Q WAS ANYTHING GOING ON AT THE TEXACO?
A NO, MA'AM. WE JUST STOPPED AND TALKED TO 'EM. THAT WAS IT.
Q OKAY. AND WHAT HAPPENED ONCE YOU LEFT THE TEXACO?
A AND WE HAD LEFT THERE AND WE ALL DECIDE WE WAS GONNA MEET AT THE BLEAU THAT NIGHT SO WE WENT STRAIGHT TO THE BLEAU AND ONCE I GOT DOWN AT THE BLEAU I HAD TALKED TO ANOTHER ONE OF MY FRIEND AND ME AND RONALD WAS GOIN' ON THE INSIDE AND THAT'S WHEN I REALIZE I DIDN'T HAVE MY WALLET WITH ME.
Q WHY WAS HAVING YOUR WALLET IMPORTANT?
A OH, 'CAUSE, YOU KNOW, YOU HAVE TO SHOW YOUR IDENTIFICATION TO GET IN THE CLUB.
Q OKAY. SO, WHAT DID YOU DO AT THAT TIME?
A OKAY. RON HAD PAID TO GET HISSELF IN AND I SAID, WELL, LET'S GO BACK TO THE HOUSE AND I CAN GET MY LICENSE.
Q AND WHAT DID YA'LL DO?
A OKAY. WE WAS GETTIN' READY TO LEAVE THE CLUB AND THAT'S WHEN WE BUMPED INTO ANOTHER ONE OF MY FRIENDS DRIVIN' DOWN THE STREET, ME AND RON. SO, WE PULLED OVER TO TALK TO HIM. THAT WAS ABOUT FIVE MINUTES. HIS NAME WAS DWIGHT. THEN WE LEFT THERE AND WENT STRAIGHT BACK TO THE HOUSE.
Q HOW LONG DID YA'LL STAY AT THE HOUSE?
A I'D SAY COULD HAVE BEEN MORE THAN PROBABLY ABOUT FIFTEEN

MINUTES OR SO. FIFTEEN OR TWENTY MINUTES.

Q WHAT DID YA'LL DO AFTER YOU GOT HOME THAT TIME?

A I HAD WENT BACK IN THE ROOM WHILE RONALD WAS OUT THERE TALKIN' TO LISA AND THEM AND GOT MY WALLET AND I SAID WE HAD LEFT FROM THERE AND WENT BACK TO THE CLUB AND GET STAMPED.

Q OKAY. HOW DID YOU GET OUT OF YOUR HOUSE THAT TIME TO GO BACK TO THE BLEAU?

A I JUST TOLD 'EM WE WAS GONNA BE RIGHT BACK AND THAT WAS IT.

Q OKAY. DO YOU RECALL WHAT TIME THAT WAS?

A NO, MA'AM. I'D SAY IT HAD TO BE APPROXIMATELY PROBABLY ABOUT--COULD HAVE BEEN 9:20, 9:30, SOMETHIN' LIKE THAT.

Q AND WHERE DID YA'LL GO ONCE YOU LEFT THE HOUSE THAT TIME?

A OKAY. WE LEFT THERE AND WENT STRAIGHT BACK TO THE BLEAU.

Q AND HOW LONG DID YA'LL STAY AT THE BLEAU?

A OKAY. WE STAYED TO THE BLEAU TO THE REMAININ'--I'D SAY ABOUT--OKAY, RONALD LEFT THE BLEAU ABOUT 2:00 OR QUARTER TO 2:00 AND I STAYED THERE.

Q SO, YA'LL LEFT SEPARATELY?

A YES, MA'AM.

Q NOW, FROM THE TIME THAT RONALD FIRST GOT TO BRIDGETTE'S APARTMENT UNTIL HE LEFT THE FOUNTAIN BLEAU AROUND 2:15, WERE YOU EVER SEPARATED? WERE YOU EVER APART?

A NO, MA'AM. WE WAS TOGETHER ALL NIGHT.

Q OKAY. WHEN YOU WERE AT THE BLEAU WITH RONALD TILLMAN, DID YOU EVER SEE HIM WITH ANY LARGE AMOUNT OF CASH?

A YES, MA'AM.
Q OKAY. WAS THAT SOMETHING UNUSUAL?
A NO, MA'AM.
Q OKAY. DO YOU KNOW HAYES MALLOY?
A NO, MA'AM.
Q DID YOU EVER GIVE RONALD TILLMAN A BLACK PISTOL WITH A WHITE HANDLE?
A NO, MA'AM.

MRS. SHEALY: I BEG THE COURT'S INDULGENCE JUST A MOMENT.

Q VITO, HAVE YOU EVER BEEN CONVICTED OF A CRIME OF MORAL TURPITUDE?
A WHAT YOU MEAN?
Q ANY CRIME OTHER THAN LIKE A DRIVING OFFENSE?
A NO, I HAD A --

MR. MORTON: YOUR HONOR--GO AHEAD.

A I HAD A PETTY LARCENY THAT WAS AGAINST ME WHEN I'LL SAY I WAS ABOUT EIGHTEEN OR NINETEEN BUT I HAVE WENT THROUGH P.T.I.
Q SO, YOU HAD NO CONVICTION FOR THAT?
A NO, MA'AM.

MRS. SHEALY: I HAVE NO FURTHER QUESTIONS. OH, I BEG THE COURT'S INDULGENCE. (PAUSE) I HAVE NOTHING FURTHER. THANK YOU.

THE COURT: CROSS EXAMINATION, PLEASE.

MR. MORTON: YES, SIR.

CROSS EXAMINATION BY

MR. MORTON:

Q VITO, YOU SAY YOU WERE AT BRIDGETTE'S AROUND SEVEN O'CLOCK, IS THAT RIGHT?

A YES, SIR.

Q AND DONALD SUTTON CALLED RONALD TILLMAN ON THE PHONE THAT NIGHT, DIDN'T HE?

A YES, SIR.

Q AND THEN RONALD TILLMAN CALLED HIM BACK, DIDN'T HE?

A WELL, I DON'T KNOW NOTHIN' ABOUT THAT ABOUT HIM CALLIN' HIM BACK.

Q YOU DON'T REMEMBER RONALD CALLING BACK AND ASKING FOR DONALD?

A I REMEMBER RONALD CALLIN' BACK THAT NIGHT AFTER DONALD HAD LEFT AND BRIDGETTE SAID RONALD WAS ON THE TELEPHONE AND I WAS LAYING IN THE ROOM. AND HE ASKED ME, SAY, DONALD THERE? I SAY, NO, DONALD SAY HE BE BACK IN A HOUR. AND THEN HE SAID I HAD TOLD DONALD WAIT HERE 'TIL I COME BACK.

Q LET ME INTERRUPT YOU.

A OKAY.

MRS. SHEALY: YOUR HONOR, I WOULD ASK THAT HE BE ALLOWED TO FINISH HIS ANSWER.

MR. MORTON: I DON'T THINK HE WAS BEING TERRIBLY RESPONSIVE BUT--

THE COURT: WELL, THE WITNESS IS ENTITLED TO COMPLETE THE ANSWER BUT THE WITNESS IS REQUIRED TO BE RESPONSIVE TO

THE QUESTION SO HOW DO I KNOW THAT IF HE HASN'T FINISHED. I DON'T KNOW. I'M IN THE DILEMMA THAT YOU INTERRUPTED HIM BEFORE HE FINISHED SO I CAN'T TELL YOU WHETHER IT WAS RESPONSIVE.

Q OKAY. GO AHEAD.

A OKAY. RONALD HAD CALLED TO THE HOUSE AND ASKED WHERE DONALD WAS. I SAY DONALD SAY HE'LL BE BACK IN A HOUR. AND HE SAID--

Q WELL--

MRS. SHEALY: AGAIN, YOUR HONOR, I'D ASK THAT HE BE ALLOWED TO FINISH HIS ANSWER.

Q YOU CAN GO AHEAD.

THE COURT: DO YOU CONTEND RIGHT NOW HE'S NOT BEING RESPONSIVE TO YOUR QUESTION?

MR. MORTON: YES, SIR.

THE COURT: ALL RIGHT, I AGREE WITH THAT. I SUSTAIN THE OBJECTION. LISTEN, MR. WITNESS. LISTEN TO HIS QUESTION AND YOU ANSWER HIS QUESTION. IF YOU DON'T UNDERSTAND HIS QUESTION, TELL HIM TO REPEAT IT. HE'LL REPEAT IT FOR YOU.

A OKAY.

Q MR. McKIE, IT IS TRUE THAT DONALD HAD TALKED TO RONALD ON THE TELEPHONE THAT NIGHT FROM BRIDGETTE'S, ISN'T THAT RIGHT?

A YES, SIR.

Q AND YOU WERE THERE AT BRIDGETTE'S WHEN THIS HAPPENED, RIGHT?

A YES, SIR.

Q AND DONALD HAD CALLED RON, IS THAT RIGHT?
A YES, SIR.
Q AND YOU DENY THE FACT THAT RON CALLED BACK AND ASKED TO SPEAK TO DONALD? YOU DENY THAT?
A HUH-UH, NO.
Q YOU DON'T DENY THAT. SO, THAT DID HAPPEN?
A RIGHT.
Q OKAY. AND AT THAT POINT YOU WERE PLANNING ON LEAVING AND GOING WITH DONALD TO MEET RON, IS THAT RIGHT?
A WELL, AT THE TIME I WAS ASKING DONALD DID HE WANT ME TO GO WITH HIM.
Q AND ISN'T IT A FACT THAT YOU WERE THEN ASKED NOT TO GO BY DONALD, IS THAT RIGHT?

MRS. SHEALY: YOUR HONOR, I WOULD OBJECT ON THE HEARSAY RULE TO ANYTHING THAT DONALD MAY HAVE TOLD HIM.

THE COURT: ALL RIGHT. COUNSEL, WHAT ABOUT THAT? I SUSTAIN THAT OBJECTION.

Q DID YOU IN FACT--

THE COURT: HE CAN SAY AS A RESULT OF ANY CONVERSATION HE DID SOMETHING BUT HE CANNOT SAY THE CONVERSATION.

Q YOU TALKED WITH DONALD SUTTON THEN, DIDN'T YOU?
A YES, SIR.
Q AND AS A RESULT OF THAT CONVERSATION DONALD LEFT BY HIMSELF TO GO MEET RON, IS THAT RIGHT?
A WELL, HE DIDN'T SAY WHERE HE WAS GOIN' AT.

Q BUT HE LEFT?
A HE LEFT THE HOUSE.
Q AS A RESULT OF THE CONVERSATION YOU THEN CHANGED YOUR MIND AND DID NOT GO WITH DONALD, IS THAT RIGHT?
A NO, I DIDN'T CHANGE MY MIND. I ASKED HIM DID I--I SAID, DONALD--

MRS. SHEALY: YOUR HONOR, I'M GOING TO OBJECT AGAIN TO ANYTHING THAT SOMEONE ELSE SAID TO HIM.

THE COURT: MR. WITNESS, HE IS NOT ASKING YOU WHAT SOMEONE SAID. HE SIMPLY ASKED YOU AS A RESULT OF WHAT HAPPENED WHAT YOU DID OR WHAT SOMEONE ELSE DID. THAT MEANS WHAT YOU SAW THEM DO OR WHAT YOU DID YOURSELF. YOU CAN TELL US WHAT YOU DID.

A RIGHT.

THE COURT: ALL RIGHT.

A THAT'S JUST WHAT I'M TELLIN' YOU.

THE COURT: BUT DON'T TELL US WHAT YOU SAID TO SOMEBODY.

A OKAY. OKAY. ALL RIGHT.
Q AS A RESULT OF THAT CONVERSATION YOU DID NOT LEAVE THE HOUSE AT THAT TIME?
A NO, I DID NOT.
Q OKAY. AND THAT'S THE LAST TIME YOU SAW DONALD SUTTON, ISN'T IT?
A YES, SIR.
Q NOW, WOULD IT BE--YOU SAID THAT YOU WERE WITH RONALD TILLMAN

FROM ABOUT 7:30 UNTIL ABOUT 12:00 THAT NIGHT, IS THAT RIGHT?

A TO ABOUT 2:00 THAT NIGHT.

Q ALL RIGHT. AND YA'LL WERE AT BRIDGETTE'S AND DOWN AT THE PARTY SHOP, IS THAT RIGHT?

A YES, SIR.

Q SO, IF SOMEONE WERE TO TELL YOU THAT RONALD TILLMAN WAS SOMEWHERE ELSE BETWEEN 7:30 AND 8:30 THAT COULDN'T BE TRUE, RIGHT?

MRS. SHEALY: YOUR HONOR, I'M GOING TO OBJECT ON THE GROUNDS THAT HE'S PITTING ONE WITNESS AGAINST ANOTHER AT THIS TIME.

THE COURT: I SUSTAIN THE OBJECTION.

Q IS IT POSSIBLE THAT RONALD TILLMAN WAS NOT WITH YOU BETWEEN 7:30 AND 8:30?

A NO.

Q THAT'S NOT POSSIBLE?

A NO.

Q SO, WHAT YOU ARE TELLING THIS JURY IS THAT IT WAS IMPOSSIBLE FOR RONALD TILLMAN TO BE SOMEWHERE ELSE OTHER THAN WITH YOU BETWEEN 7:30 AND 8:30 THAT NIGHT?

A YES, SIR.

Q OKAY. YA'LL WENT DOWN TO THE PARTY SHOP, IS THAT RIGHT?

A YES, SIR.

Q YOU TALKED ON THE PHONE THERE FOR A LITTLE WHILE, DIDN'T YOU?

A NO, SIR. I TALKED TO HIM FOR ABOUT A SECOND OR TWO.

Q WHO IS THAT?
A RONALD.
Q YOU TALKED TO HIM?
A YES, SIR.
Q OKAY. WHAT WAS HE DOING? HE WAS OUT AND ABOUT IN THE STORE AND STUFF, WASN'T HE?
A NO, SIR, I DIDN'T ASK HIM WHERE HE WAS.
Q OKAY. SO, YOU DON'T KNOW WHERE HE WAS THE WHOLE TIME?
A NO, SIR.
Q OKAY. TELL ME ABOUT THAT NIGHT, LATER ON THAT NIGHT. YOU DID SEE HIM WITH A LOT OF CASH, DIDN'T YOU?
A YES, SIR.
Q AS A MATTER OF FACT, HE HAD ABOUT SIX OR SEVEN THOUSAND DOLLARS IN CASH, ISN'T THAT RIGHT?
A NO. WELL, I NEVER DID COUNT IT UP BUT IT LOOK LIKE ABOUT THAT MUCH.
Q OKAY. DO YOU TRUST RONALD TILLMAN?

MRS. SHEALY: YOUR HONOR, I OBJECT TO THAT QUESTION.

THE COURT: I SUSTAIN THE OBJECTION.

MR. MORTON: THAT'S ALL I HAVE, YOUR HONOR.

MRS. SHEALY: I WOULD ALSO MOVE THAT THAT QUESTION BE STRICKEN.

THE COURT: THE QUESTION IS STRUCK. I WOULD INSTRUCT THE JURY TO DISREGARD THE QUESTION.

Q DID YOU FEEL THAT NIGHT, VITO--

MRS. SHEALY: I'M GOING TO OBJECT TO THAT QUESTION.

THE COURT: LET HIM FINISH THE QUESTION.

MRS. SHEALY: CAN WE APPROACH THE SIDEBAR?

(COUNSEL APPROACH THE BENCH OUT OF THE PRESENCE OF THE COURT REPORTER)

MR. MORTON: THAT'S ALL I HAVE. THANK YOU.

THE COURT: REDIRECT?

REDIRECT EXAMINATION BY

MRS. SHEALY:

Q VITO, YOU TESTIFIED THAT YOU ARE NOT REAL SURE ON THE TIMES THAT NIGHT.

MR. MORTON: OBJECTION.

THE COURT: JUST A MINUTE. DON'T ANSWER. DISREGARD IT. WHAT'S YOUR OBJECTION, MR. MORTON?

MR. MORTON: I DON'T HAVE ANY OBJECTION. I'LL WITHDRAW THE OBJECTION. I'M SORRY.

Q WOULD YOU ANSWER THE QUESTION?

A YES, MA'AM, I WASN'T SURE OF THE TIME.

Q OKAY. AND WHAT ABOUT WHEN YOU AND RON TILLMAN WERE AT THE PARTY SHOP, DID YOU EVER LOSE CONTACT WITH RON TILLMAN WHEN YOU WERE AT THE PARTY SHOP WITH HIM THAT NIGHT?

A NO, MA'AM.

MRS. SHEALY: I HAVE NOTHING FURTHER, YOUR HONOR.

MR. MORTON: JUST A COUPLE OF QUESTIONS.

RECROSS EXAMINATION BY

MR. MORTON:

Q NOW, VITO, I BELIEVE THAT YOU JUST TOLD ME THAT YOU DID. YOU DIDN'T SEE HIM THE WHOLE TIME. ISN'T THAT WHAT YOU TOLD ME?

A NO, I DID NOT.

Q YOU DID NOT TELL ME THAT JUST NOW?

A NO, I DIDN'T.

Q SO, WHAT YOU ARE SAYING IS THAT YOU WERE WITH HIM THE WHOLE NIGHT FROM 7:30 TO 12:00 AND HE NEVER LEFT YOUR EYESIGHT?

A FROM 7:30 TO 2:00.

Q TO 2:00. HE NEVER LEFT YOUR EYESIGHT FOR MORE THAN FIVE MINUTES?

A NO, SIR.

Q HE NEVER DID. YOU WERE A SHADOW ON HIM, IS THAT RIGHT?

A YOU MIGHT AS WELL SAY THAT.

Q YA'LL WERE JUST LIKE GLUE?

A UH-HUH (INDICATES AFFIRMATIVE).

Q THE WHOLE NIGHT, AT THE FOUNTAIN BLEAU AND EVERYTHING?

A YES, SIR.

Q WAS THAT SOME OF RON'S DOINGS? DID HE WANT YOU CLOSE BY HIM ALL THAT TIME?

MRS. SHEALY: YOUR HONOR, I OBJECT. THAT CALLS FOR SPECULATION.

THE COURT: I SUSTAIN THE OBJECTION.

MR. MORTON: THAT'S ALL I HAVE.

THE COURT: ANYTHING ELSE?

MRS. SHEALY: WE WOULD ALSO MOVE THAT THAT QUESTION BE STRUCK.

THE COURT: WELL, HE DIDN'T ANSWER. THE QUESTION IS NOT ANY GOOD IF THERE'S NO ANSWER BUT IF YOU WANT IT STRUCK--

MR. MORTON: YOUR HONOR, CAN I ASK ONE MORE QUESTION?

THE COURT: YES, SIR.

Q (BY MR. MORTON) YOU WEREN'T WITH RON TILLMAN WHEN HE LEFT THE BUILDING OUTSIDE TO GO MAKE A TELEPHONE CALL OR TALK TO SOMEBODY, WERE YOU?

A NO, SIR.

MR. MORTON: THAT'S ALL I HAVE.

MRS. SHEALY: YOUR HONOR, WE'D ASK THAT HE BE EXCUSED.

THE COURT: ANY OBJECTION TO HIM BEING EXCUSED?

MR. MORTON: NO, SIR, YOUR HONOR.

THE COURT: YOU MAY GO. STEP DOWN.

(WITNESS TO THE SIDE)

MRS. SHEALY: WE CALL FRANCES WALKER.

FRANCES WALKER, AFTER BEING DULY SWORN BY THE CLERK, TESTIFIES AS FOLLOWS:

DIRECT EXAMINATION BY

MRS. SHEALY:

Q MS. WALKER, COULD YOU TELL THE JURY HOW OLD YOU ARE AND WHERE YOU LIVE?

A I'M THIRTY-FIVE YEARS OLD AND I LIVE AT

Q ARE YOU PRESENTLY MARRIED?

A NO. ENGAGED.
Q OKAY. DO YOU HAVE ANY CHILDREN?
A THREE.
Q OKAY. HOW OLD ARE THEY?
A NINETEEN, SIXTEEN AND SEVEN.
Q ARE YOU PRESENTLY EMPLOYED?
A YES.
Q WHERE DO YOU WORK?
A DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL.
Q AND HOW LONG HAVE YOU WORKED THERE?
A THIRTEEN YEARS.
Q WHEN, IF EVER, DID YOU WITNESS A FIGHT BETWEEN GABBY WELLS AND RONALD TILLMAN?

MR. MORTON: YOUR HONOR, I OBJECT.

THE COURT: WHAT GROUNDS?

MRS. SHEALY: CAN WE APPROACH THE SIDEBAR?

(COUNSEL APPROACH THE BENCH OUT OF THE PRESENCE OF THE COURT REPORTER)

Q MS. WALKER, I WANT YOU TO LISTEN TO MY QUESTION CAREFULLY. WHEN, IF EVER, DID YOU WITNESS A FIGHT BETWEEN GABBY WELLS AND RONALD TILLMAN? JUST TELL ME WHEN IT WAS.
A IT WAS--HAD TO BE A COUPLE OF MONTHS BEFORE THE INCIDENT WITH DONALD.
Q OKAY. AND COULD YOU TELL THE JURY WHAT YOU SAW?
A MY CAR WAS BEING FIXED AND MY BOY FRIEND TOLD THE GUY TO FIX

MY CAR PARKED ON THE SIDE OF THE PARTY SHOP. I WAS STANDING AGAINST THE CAR LOOKING AT THE CAR AND RON CAME OUT OF THE PARTY SHOP. GABBY FOLLOWED HIM OUT OF THE PARTY SHOP AND TOLD HIM, SAY--

Q YOU CAN'T SAY WHAT ANYBODY TOLD YOU. JUST SAY WHAT YOU SAW.

THE COURT: JUST DESCRIBE WHAT YOU SAW. DON'T SAY WHAT ANYONE ELSE SAID.

A OKAY. OKAY. IT WAS A ARGUMENT AND GABBY GRABBED RON AND RON GRABBED GABBY AND THEY FELL ON TOP OF MY--THEY WERE TUSSLING ON TOP OF MY CAR. LARRY GREEN PARTED THEM AND RON STOOD UP NEXT TO ME TO SEE THE DAMAGE ON MY CAR AND GABBY WALKED OFF AND SAID I'LL--

Q OKAY. YOU ARE NOT GOING TO BE ABLE TO SAY ANYTHING GABBY SAID.

MRS. SHEALY: I HAVE NO FURTHER QUESTIONS.

THE COURT: ANY CROSS?

MR. MORTON: NO, SIR, YOUR HONOR.

THE COURT: YOU MAY STEP DOWN.

MRS. SHEALY: WE'D ASK THAT SHE BE EXCUSED.

THE COURT: YOU ARE EXCUSED.

(WITNESS TO THE SIDE)

MRS. SHEALY: REUBEN EUBANKS.

REUBEN DOUGLAS EUBANKS, AFTER BEING DULY SWORN BY THE CLERK,

TESTIFIES AS FOLLOWS:

DIRECT EXAMINATION BY

MRS. SHEALY:

Q MR. EUBANKS, GET A LITTLE CLOSER TO THE MICROPHONE. WOULD YOU TELL THE JURY HOW OLD YOU ARE AND WHERE YOU WORK?

A I'M FORTY-FOUR YEARS OLD. I WORK FOR PALMETTO SENIOR CARE WHICH IS A MEDICAL DAY CARE CENTER FOR THE ELDERLY WHICH IS RAN BY RICHLAND MEMORIAL HOSPITAL.

THE COURT: SLOW DOWN. TAKE IT VERY SLOWLY. THEY MIGHT CAN HEAR YOU OVER THERE BUT I'M HAVING PROBLEMS. OKAY?

A YES, SIR.

Q HOW LONG HAVE YOU WORKED THERE, MR. EUBANKS?

A I'VE BEEN WORKING THERE NOW A LITTLE OVER TWO YEARS.

Q WHEN, IF EVER, DID YOU WITNESS A PROBLEM BETWEEN RONALD TILLMAN AND GABBY WELLS?

A IT WAS THANKSGIVING DAY, '88.

Q OKAY. WOULD YOU DESCRIBE FOR THE JURY, PLEASE, WHAT YOU SAW THAT DAY?

A I DROVE UP TO THE PARTY SHOP AND AS I WAS GETTIN' OUT OF MY VEHICLE GABBY WELLS CAME OUT THE PARTY SHOP WITH A RIFLE WITH A SCOPE ON IT AND STARTED AIMING IT AT ME. AT THIS TIME, AFTER I GOT OUT MY VEHICLE I WENT AND PUSHED THE WEAPON OUT OF GABBY WELLS FACE. I TURNED AROUND AND STARTED HEADING TOWARD THE PARTY SHOP. RONALD CAME TO THE DOOR AND SAID, REUBEN EUBANKS, HE DON'T HAVE ANY BULLETS. SO, HE WALKED OUTSIDE AND RONALD TOOK THE RIFLE AWAY FROM GABBY WELLS AND

GABBY SAID, HEY--

Q YOU ARE NOT GOING TO BE ABLE TO TELL WHAT GABBY SAID.

A OH, I'M SORRY.

Q I'M SORRY. YOU SAID RONALD DID WHAT WITH THE GUN?

A HE TOOK THE RIFLE AWAY FROM GABBY WELLS.

MRS. SHEALY: I HAVE NO FURTHER QUESTIONS. ANSWER ANY QUESTIONS THAT THE SOLICITOR HAS.

MR. MORTON: NO QUESTIONS, YOUR HONOR.

MRS. SHEALY: WE ASKS THAT HE BE EXCUSED, ALSO?

THE COURT: WITHOUT OBJECTION?

MR. MORTON: YES, SIR.

THE COURT: YOU MAY GO.

(WITNESS TO THE SIDE)

MRS. SHEALY: SCOTT ENGLISH.

SCOTTIE DARNELL ENGLISH, AFTER BEING DULY SWORN BY THE CLERK,

TESTIFIES AS FOLLOWS:

DIRECT EXAMINATION BY

MRS. SHEALY:

Q MR. ENGLISH, TELL THE JURY HOW OLD YOU ARE, PLEASE, AND WHERE YOU WORK?

A TWENTY-SEVEN. SECON, INCORPORATED.

Q AND WHAT TYPE OF BUSINESS IS THAT?

A CONSTRUCTION.

Q DO YOU KNOW RONALD TILLMAN?

A YES.
Q LET ME ASK YOU THIS QUESTION. ON DECEMBER 26TH, 1988, DID YOU SEE VITO McKIE AND RONALD GET INTO A CAR TOGETHER?
A NO.
Q DID YOU EVER TELL HAYES MALLOY THAT YOU SAW THAT?
A NO, I NEVER SAID THAT.

MR. MORTON: YOUR HONOR--

THE COURT: JUST A MINUTE.

MR. MORTON: SHE'S PITTING.

MRS. SHEALY: YOUR HONOR, IT'S OUR POSITION THAT WE ARE NOT PITTING WHEN IT'S--

MR. COLEMAN: YOUR HONOR, MAY WE APPROACH THE BENCH?

THE COURT: YES.

(MRS. SHEALY AND MR. COLEMAN APPROACH THE BENCH OUT OF THE PRESENCE OF THE COURT REPORTER)

Q MR. ENGLISH, DID YOU EVER TELL HAYES MALLOY THAT YOU SAW RONALD TILLMAN AND VITO McKIE GET IN A CAR TOGETHER?
A NO.
Q HAS RONALD TILLMAN EVER PROPOSITIONED YOU TO KILL DONALD SUTTON?
A NO, I AIN'T NEVER GOT ANY PROPOSITION LIKE THAT.
Q DID YOU EVER TELL HAYES MALLOY THAT RONALD TILLMAN OFFERED TO PAY YOU TO KILL DONALD SUTTON?
A NO.

MRS. SHEALY: NO FURTHER QUESTIONS, YOUR HONOR. ANSWER

ANY QUESTIONS THE SOLICITOR HAS.

MR. MORTON: NO QUESTIONS, YOUR HONOR.

THE COURT: YOU MAY STEP DOWN.

(WITNESS TO THE SIDE)

THE COURT: CALL YOUR NEXT WITNESS.

MRS. SHEALY: HERMAN WHALEY.

HERMAN WHALEY, AFTER BEING DULY SWORN BY THE CLERK, TESTIFIES AS FOLLOWS:

DIRECT EXAMINATION BY

MRS. SHEALY:

Q MR. WHALEY, WHERE ARE YOU LIVING AT THIS TIME?

A , COLUMBIA.

Q LET ME ASK YOU A QUESTION THEN. DID YOU EVER SEE RON TILLMAN PICK UP A BOY ON WALCOT STREET AROUND 8:30 ON DECEMBER 26TH, 1988?

A NO, I CAN'T SAY I SAW THAT.

Q DID YOU EVER TELL HAYES MALLOY THAT YOU DID?

A NO.

MRS. SHEALY: I HAVE NO FURTHER QUESTIONS. ANSWER ANY QUESTIONS THE SOLICITOR HAS.

MR. MORTON: NO QUESTIONS, YOUR HONOR.

THE COURT: YOU MAY STEP DOWN.

MR. SWERLING: YOUR HONOR, AT THIS TIME WE HAVE SOME MATTERS OF LAW THAT WE NEED TO TAKE UP WITH THE COURT.

THE COURT: ALL RIGHT. YA'LL APPROACH THE BENCH.

(COUNSEL APPROACH THE BENCH OUT OF THE PRESENCE OF THE COURT REPORTER)

THE COURT: MR. FOREMAN, LADIES AND GENTLEMEN, WE ARE GOING TO STOP WITH YA'LL FOR THE REST OF THE DAY. I'M GOING TO HAVE THEM TAKE YOU DOWN TO WHERE YOU ARE GOING TO REPORT MONDAY MORNING. IT WILL BE DOWN ON THE SECOND FLOOR. WE ARE GOING TO BE IN THE SECOND FLOOR COURTROOM STARTING MONDAY AND I WANT THEM TO SHOW YOU THE JURY ROOM SO YOU'LL REPORT THERE ON MONDAY. IN ADDITION TO WHICH WE ARE GOING TO START AT 9:30 MONDAY MORNING BUT LET ME SUGGEST SOMETHING TO YOU. THEY ARE GOING TO HAVE ROLL CALL UP HERE MONDAY MORNING. THEY ARE GOING TO HAVE AN ADDITIONAL COURT BUT WHAT THEY MEAN BY ROLL CALL IS THEY ARE GOING TO OPEN THIS WALL RIGHT HERE WHERE THIS WILL BE ONE BIG COURTROOM AND THEY ARE GOING TO HAVE ANYWHERE FROM FIVE TO SEVEN HUNDRED PEOPLE, MAYBE MORE, AND THAT STARTS AT 9:00. SO, WHAT THAT MEANS IS THIS PLACE IS GOING TO BE FULL AND THERE ARE GOING TO BE PEOPLE HUNTING PARKING PLACES. SO, WHAT I'M TELLING YOU IS YOU PROBABLY OUGHT TO COME AS EARLY AS YOU REASONABLY CAN UNDERSTANDING WE ARE GOING TO START AT 9:30. I'LL HAVE THE BAILIFFS DOWN THERE. THEY WILL BE THERE AT 8:30 SO IF YOU COME THEY'LL HAVE COFFEE OR WHATEVER BUT I'M JUST TELLING YOU THAT'S GOING TO BE A PROBLEM ON MONDAY. THAT'S THE REASON WE'VE GOT TO MOVE TO ANOTHER COURTROOM. OKAY?

JUROR: DO WE PARK STILL UNDER--

THE COURT: NO, SIR. YOU HAVE TO GO BACK TO THE PARKING YOU DID BEFORE. SHE'S GOT PERMITS FOR YOU. THESE ARE FOR NEXT WEEK AND YOU DO THE SAME TYPE PARKING AS YOU DID MONDAY THROUGH FRIDAY. WE WERE JUST ABLE TO LET YOU PARK IN HERE TODAY BECAUSE ALL THOSE SPACES UNDERNEATH ARE RESERVED. OKAY. AND IT'S USUALLY ALL THE AGENCIES THAT ARE IN THIS BUILDING AND I DON'T KNOW A WHOLE LOT ABOUT IT EXCEPT THAT I KNOW THAT NOBODY ELSE CAN PARK UNDER THERE. OKAY. SO, THEY WILL GIVE YOU NEW PARKING PERMITS FOR NEXT WEEK THAT YOU'LL DISPLAY IN YOUR WINDOW AND WE WANT TO TRY TO START AT 9:30 MONDAY MORNING ON THE SECOND FLOOR. THEY ARE GOING TO WALK YOU DOWN AND SHOW YOU WHAT COURTROOM TO REPORT TO ON MONDAY MORNING. OKAY? ANYBODY GOT ANY QUESTIONS ABOUT THAT? (NO RESPONSE) REMEMBER MY INSTRUCTIONS TO YOU ABOUT NOT DISCUSSING THIS CASE NOR ALLOWING ANYONE ELSE TO DISCUSS IT WITH YOU, NOT TO READ ANYTHING ABOUT THIS IN THE NEWS MEDIA IF THERE BE ANY OR WATCH ANYTHING ON T.V. OR LISTEN TO ANYTHING ON THE RADIO. I HOPE YOU HAVE A NICE AFTERNOON. SEE YOU MONDAY MORNING.

(THE JURY LEAVES THE JURY BOX AT 2:55 P.M.)

THE COURT: ALL RIGHT. ANYTHING FROM THE STATE OR DEFENSE OTHER THAN, MR. SWERLING, AS I UNDERSTAND IT YOU ARE GOING TO HAVE YOUR PEOPLE WHO ARE INCARCERATED AS I UNDERSTAND THAT WE DID NOT REQUIRE YOU TO BE HERE TODAY BECAUSE OF ALL THE PROBLEMS THAT CAUSED READY TO GO MONDAY MORNING.

MR. SWERLING: EVERYBODY WILL BE READY TO GO MONDAY MORNING, YOUR HONOR. WE MAY HAVE ONE OR TWO LAY WITNESSES WHOM WE COULD NOT REACH TODAY BUT WE WILL FINISH MONDAY MORNING. IT'S NOT EXPECTED TO TAKE MORE THAN ABOUT AN HOUR OR TWO. OF COURSE, WE HAVE BEEN UNDERESTIMATING THAT FOR A LONG TIME.

THE COURT: I'M NOT GOING TO COMMENT. YA'LL SHOULD BE PREPARED FOR ANY REPLY TESTIMONY MONDAY. IN ADDITION, DO YA'LL--I'M NOT ASKING FOR IT BUT YOU HAVE THE RIGHT TO SUBMIT TO ME, SO YOU'LL UNDERSTAND THIS, ANY REQUESTS TO CHARGE. IF YOU HAVE ANY, AND I'M NOT ASKING FOR THEM BUT IF YOU HAVE THEM--I MEAN I'M NOT SAYING YOU'VE GOT TO GIVE ME SOME. THAT'S NOT WHAT I'M TRYING TO TELL YOU. BUT IF YOU HAVE SOME YOU WANT ME TO CONSIDER PLEASE HAVE THEM READY FOR ME MONDAY MORNING WHEN YOU COME IN, ALL RIGHT?

MR. SWERLING: YOUR HONOR, JUST STANDARD CHARGES. WE JUST ASK FOR THE CIRCUMSTANTIAL EVIDENCE.

THE COURT: YES, SIR. YOU JUST ASK ME WHICH OF MY CHARGES YOU'D LIKE TO GIVE AND I'LL GIVE THOSE. A LOT OF TIMES YOU FEEL LIKE YOU'VE GOT TO HAND ME--YOU'RE ENTITLED TO HAND ME UP ANY CHARGES. OF COURSE, WHETHER I CHARGE IT OR NOT IS DIFFERENT QUESTION BUT I'M GOING TO CHARGE THE STANDARD MURDER CHARGE. IT APPEARS HE'S GOING TO HAVE AN ALIBI ISSUE IN THE CASE. CIRCUMSTANTIAL EVIDENCE I'LL CHARGE. YOU'VE ASKED FOR PROOF BEYOND A REASONABLE DOUBT.

I'M GOING TO CHARGE THE CONFESSION CHARGE THAT I GIVE.

MR. SWERLING: EXPERTS.

THE COURT: EXPERT CHARGE ON OPINION.

MR. SWERLING: IF HE DOESN'T TESTIFY WE WOULD--

THE COURT: ALL RIGHT. IF HE DOESN'T TESTIFY I'LL INSTRUCT THE JURY--

MR. SWERLING: DO YOU HAVE A STANDARD CHARGE ON PRIOR INCONSISTENT STATEMENTS? I THINK IT'S IN THE BOOK.

THE COURT: IF YOU HAVE SOMETHING YOU'D LIKE ME TO LOOK AT, I'LL BE HAPPY TO DO IT BUT I HAVE ONE.

MR. SWERLING: YOU HAVE A STANDARD--YEAH. I THINK YOUR STANDARD CHARGE WILL BE FINE THAT THEY CAN CONSIDER PRIOR INCONSISTENT STATEMENTS.

THE COURT: ALL RIGHT. CAN YOU THINK OF ANY, MR. MORTON, THAT YOU WANT ME TO LOOK AT?

MR. MORTON: (NODS NEGATIVELY)

THE COURT: WE ALSO NEED TO THINK ABOUT THIS AND THAT IS IF WE DON'T GET THE CASE TO THE JURY UNTIL AFTER LUNCH--DO YA'LL ANTICIPATE YOUR ARGUMENTS BEING VERY LONG? THEY USUALLY ARE WHEN CASES GO THIS LONG.

MR. SWERLING: I'D SAY AN HOUR.

THE COURT: CAN I HOLD YOU TO IT?

MR. SWERLING: SURE.

THE COURT: IT IS AGREED FOR US TO HOLD HIM TO IT, MADAM COURT REPORTER. HOW ABOUT YOU, MR. MORTON?

MR. MORTON: CERTAINLY NO LONGER THAN THAT.

THE COURT: I WOULD THINK YA'LL WOULD DO IT IN AN HOUR, HOUR AND A HALF APIECE. YOU KNOW, THAT'S FINE. I JUST LIKE TO TRY TO FIGURE IT. YOU SEE, IF WE DO THAT AND WE START THAT AFTER LUNCH IT'S GOING TO BE LATE MONDAY AFTERNOON WHEN WE GIVE THE JURY THE CASE. I'M JUST QUESTIONING WHETHER OR NOT WE OUGHT TO TELL THEM AROUND LUNCH TIME THAT WHEN THEY COME BACK JUST PACK A BAG JUST IN CASE WE HAVE TO PUT THEM UP FOR THAT NIGHT. AND I MIGHT DO THAT AT LUNCH TIME. JUST TELL THEM TO GO HOME AND PACK A BAG AND BRING IT WITH THEM FROM LUNCH. GIVE THEM ENOUGH TIME AFTER LUNCH PARTICULARLY IF WE FINISH THE TESTIMONY SO IT MIGHT GIVE YA'LL AN EXTRA THIRTY MINUTES TO THINK ABOUT YOUR ARGUMENTS. OKAY. THAT WAY WHEN WE GAVE IT TO THEM WE'D LET THEM DELIBERATE UP TO A REASONABLE PERIOD OF TIME MONDAY NIGHT IF THEY NEED IT AND THEN PUT THEM IN A MOTEL ROOM UNTIL THE NEXT MORNING AND THEN START BACK. OKAY. CAN ANYBODY THINK OF ANY OTHER PLANNING THINGS THAT WE NEED TO DO? (NO RESPONSE) ALL RIGHT, COURT IS IN RECESS.

(EVENING RECESS AT 3:15 P.M.)

(COURT RESUMES JANUARY 22, 1990)

THE COURT: IS THE STATE READY TO PROCEED?

MR. MORTON: YES, SIR, YOUR HONOR.

THE COURT: DEFENSE READY TO PROCEED?

MR. SWERLING: YES, YOUR HONOR. YOUR HONOR, BEFORE WE

GET STARTED JUST AS A HOUSEKEEPING MATTER MR. TILLMAN HAS DECIDED NOT TO EXERCISE HIS RIGHT TO TESTIFY IN THE CASE AND I DIDN'T KNOW IF THE COURT WANTED TO MAKE AN INQUIRY ABOUT THAT OR NOT RATHER THAN SEND THE JURY BACK OUT AT SOME POINT.

THE COURT: DO YOU WANT ME TO?

MR. SWERLING: I DON'T THINK IT'S NECESSARY. I'VE DISCUSSED IT WITH HIM FULLY AND HE UNDERSTANDS HIS RIGHT TO TESTIFY, HE UNDERSTANDS HIS RIGHT NOT TO TESTIFY AND THE COURT WILL INSTRUCT THE JURY THAT HE DOES NOT HAVE TO TESTIFY AND TAKING ALL THAT INTO CONSIDERATION MR. TILLMAN DECIDES NOT TO TESTIFY. IS THAT CORRECT, RONALD?

DEFENDANT TILLMAN: YES, SIR.

MR. SWERLING: HAVE I FULLY EXPLAINED THAT TO YOU--

DEFENDANT TILLMAN: YES, YOU HAVE.

MR. SWERLING: --AND ALL THE RAMIFICATIONS CONNECTED THEREWITH?

DEFENDANT TILLMAN: YES, YOU HAVE.

MR. SWERLING: I THINK, YOUR HONOR, THAT IS SUFFICIENT UNLESS YOUR HONOR WANTED TO CONDUCT AN INQUIRY. YOUR HONOR, ONE OTHER THING I'D LIKE TO CORRECT. ON FRIDAY JUST SO THE RECORD IS CLEAR ABOUT THIS, I STARTED HAVING SOME DOUBTS IN MY MIND ABOUT THE STATEMENT I MADE CONCERNING THE BANK ROBBERY TRIAL. THE TRIAL WAS HAD AND MR. TILLMAN WAS CONVICTED OF THE BANK ROBBERY AND POSSESSION OF A SAWED OFF WEAPON. THE SENTENCING IS SCHEDULED FOR FEBRUARY 14TH BEFORE

JUDGE BLATT. BUT I'VE LOOKED THROUGH MY FILE AND I HAD MY CLERK CHECK AT THE CLERK'S OFFICE THIS MORNING FIRST THING AT 8:30 AND THERE ARE NO OUTSTANDING MOTIONS SO I WANTED THE RECORD TO BE CLEAR ABOUT THAT.

THE COURT: MR. SWERLING, WHAT IS YOUR CLIENT'S EDUCATIONAL BACKGROUND? HOW FAR DID HE GO IN SCHOOL?

MR. SWERLING: STAND UP.

DEFENDANT TILLMAN: SIR, I WENT TO THE 11TH GRADE IN HIGH SCHOOL BEFORE I GOT ARRESTED.

THE COURT: ARE YOU AWARE OF ANY MENTAL INCAPACITY, ANY PROBLEM? HAVE YOU EVER BEEN TREATED FOR ANY MENTAL PROBLEMS OR EMOTIONAL PROBLEMS?

DEFENDANT TILLMAN: NO, SIR.

MR. SWERLING: I'M NOT AWARE OF ANY EITHER.

THE COURT: ARE YOU ABLE TO READ AND WRITE AND SPEAK AND UNDERSTAND THE ENGLISH LANGUAGE?

DEFENDANT TILLMAN: YES, I CAN, SIR.

THE COURT: ARE YOU SATISFIED THAT YOUR ATTORNEY HAS EXPLAINED TO YOU YOUR RIGHTS CONCERNING YOUR RIGHT TO TESTIFY IN THIS CASE?

DEFENDANT TILLMAN: YES, I HAVE, SIR.

THE COURT: AND THAT IS YOUR RIGHT AND IT DOES NOT BELONG TO THIS COURT OR TO YOUR ATTORNEY?

DEFENDANT TILLMAN: THAT'S RIGHT, SIR.

THE COURT: THAT YOU HAVE THE RIGHT TO TESTIFY IF YOU

CHOOSE TO DO SO?

DEFENDANT TILLMAN: YES, SIR.

THE COURT: YOU ALSO HAVE THE RIGHT NOT TO TESTIFY IF YOU CHOOSE TO DO SO.

DEFENDANT TILLMAN: YES, SIR.

THE COURT: AND THAT IS YOUR DECISION MADE OF YOUR OWN FREE WILL?

DEFENDANT TILLMAN: YES, SIR.

MR. SWERLING: MR. SWERLING, AS HIS ATTORNEY, IS IT YOUR OPINION THAT HE FULLY AND COMPLETELY UNDERSTANDS WHAT HIS RIGHTS ARE CONCERNING THE RIGHT TO TESTIFY?

MR. SWERLING: YES, SIR.

THE COURT: AND IT'S YOUR OPINION THAT HE IS MAKING A KNOWING AND INTELLIGENT WAIVER OF THAT RIGHT?

MR. SWERLING: THAT'S CORRECT, YOUR HONOR. MY OPINION IS HE'S MAKING A KNOWING AND INTELLIGENT WAIVER.

THE COURT: BASED ON THE RESPONSES MADE TO THE COURT AND BASED ON THE STATEMENTS MADE TO THE COURT BY THE ATTORNEY FOR THE DEFENDANT, THE COURT FINDS THAT SUCH IS A KNOWING AND INTELLIGENT DECISION ON HIS PART. ALL RIGHT. YOU MAY PROCEED. READY? BRING THE JURY IN, PLEASE.

(THE JURY RETURNS TO THE JURY BOX AT 9:56 A.M.)

THE COURT: GOOD MORNING, LADIES AND GENTLEMEN. LET THE RECORD REFLECT THAT ALL JURORS ARE NOW PRESENT AND ACCOUNTED FOR. YOU MAY CALL YOUR NEXT WITNESS, MR. SWERLING.

MR. SWERLING: THANK YOU. I CALL ISIAH BENNETT, YOUR HONOR.

ISIAH BENNETT, AFTER BEING DULY SWORN BY THE CLERK, TESTIFIES AS FOLLOWS:

DIRECT EXAMINATION BY

MR. SWERLING:

Q MR. BENNETT, JUST--YOUR NAME IS ISIAH BENNETT?

A YEAH.

Q JUST SO THE JURY DOESN'T THINK YOU ARE A CLEMSON FAN, IS THAT THE NORMAL GARB FROM THE RICHLAND COUNTY DETENTION CENTER?

A YES, SIR.

Q ARE YOU CURRENTLY INCARCERATED?

A YES, SIR.

Q AND, MR. BENNETT, HAVE YOU BEEN CONVICTED OF ANY CRIMES OF MORAL TURPITUDE?

A YES, SIR.

Q WOULD YOU TELL THE JURY WHAT THOSE ARE?

A POSSESSION OF MARIJUANA AND POSSESSION OF HEROIN.

Q YOU PRESENTLY HAVE SOME CHARGES PENDING AT THIS TIME?

A YES, SIR.

Q HAVE I MADE ANY PROMISES TO YOU?

A NO, SIR.

Q ALL RIGHT. HAVE I ASKED YOU TO DO ANYTHING?

A NO, SIR.

Q LET ME ASK YOU IN CONNECTION WITH THIS CASE. LAST WEDNESDAY,

JANUARY 17TH, 1990, DID YOU HAVE AN OCCASION TO BE IN A HOLDING CELL WITH JAMES BYNUM?

A YES, SIR.

Q AND DID YOU HAVE A CONVERSATION WITH HIM?

A WELL, NOT REALLY. HE WAS JUST IN THERE JUST TALKING.

Q OKAY. DID YOU OVERHEAR A CONVERSATION HE WAS HAVING OR SOMETHING THAT HE SAID?

A YES, SIR.

Q WOULD YOU RELATE TO THE JURY WHAT HE SAID CONCERNING HIS SENTENCE AND ANY DEALS AND RON TILLMAN?

A WELL, ONLY THING I HEARD HIM SAID THAT HE SAID THAT HE HAVE FIFTEEN YEARS AND HE WOULD DO ANYTHING TO GET HIS TIME CUT OR EITHER GET TURN LOOSE EVEN THOUGH HE SAID HE WOULD LIE BECAUSE HE SAID THAT HE KNOW RON DIDN'T DO IT.

Q HE SAID RON DIDN'T DO IT?

A YEAH.

Q OKAY. AND IS THAT THE TRUTH YOU'RE TELLING TODAY?

A THAT'S ALL I HEARD HIM SAY.

Q HAS ANYBODY PROMISED YOU ANYTHING TO TELL THAT?

A NO, SIR.

MR. SWERLING: THANK YOU. ANSWER ANY QUESTIONS THE PROSECUTOR MIGHT HAVE.

THE COURT: CROSS EXAMINATION.

CROSS EXAMINATION BY

MR. COLEMAN:

Q MR. BENNETT, DO YOU HAVE A NICKNAME?
A YEAH.
Q WHAT IS THAT?
A NOOSE.
Q DO YOU ALSO HAVE THE NICKNAME OF FROG?
A NO.
Q YOU DO NOT? YOU ARE NOT KNOWN AS FROG?
A NO.
Q YOU ALSO WERE CONVICTED BACK IN MARCH OF '84 FOR SELLING MARIJUANA, TWO COUNTS, ISN'T THAT CORRECT?

MR. SWERLING: THAT'S WHAT HE TESTIFIED TO, YOUR HONOR.

THE COURT: HE'S ENTITLED TO CROSS HIM ON IT, ISN'T HE, COUNSEL.

MR. COLEMAN: YOUR HONOR, I THINK HIS TESTIMONY WAS HE--

MR. SWERLING: YOUR HONOR--

THE COURT: COUNSEL, I'M ALLOWING YOU. IT'S PROPER CROSS.

Q YOU ARE SAYING YOU DO NOT HAVE TWO CONVICTIONS FOR THE SALE OF MARIJUANA BACK IN MARCH OF '84?
A NO, I HAVE ONE SALE CONVICTION OF MARIJUANA. I HAVE ONE SIMPLE POSSESSION OF MARIJUANA THAT I PAID $218.00, A FINE.
Q OKAY. SO, YOU'VE GOT A SIMPLE POSSESSION OF MARIJUANA AND A DISTRIBUTION OF MARIJUANA, IS THAT CORRECT?
A YES.

Q ALSO, BACK IN JULY OF '85 YOU HAVE A DISTRIBUTION OF MARIJUANA AGAIN, ISN'T THAT CORRECT?
A NO.
Q YOU DO NOT? OKAY. WHO ALL WAS PRESENT WHEN THIS STATEMENT WAS MADE, THIS ALLEGED STATEMENT BY JAMES BYNUM?
A JUST LIKE I'M SAYING, I DON'T KNOW THOSE OTHER GUYS WHO WAS IN THERE.
Q YOU DON'T KNOW THEM?
A NO.
Q YOU DON'T KNOW THEIR NAMES?
A I DON'T KNOW THEIR NAME. I KNOW THEM WHEN I SEE THEM. ONE OF THEM IN THE CELLBLOCK WITH ME. ONE OF THEM IS.
Q WHO IS THAT?
A I DON'T KNOW HIS NAME.
Q IS ANTHONY ROGERS ONE OF THEM THAT WAS IN THERE WITH YOU?
A I DON'T KNOW HIS NAME.
Q WHO ELSE WAS IN THERE?
A I DON'T KNOW. IT WAS ANOTHER GUY IN THERE, TOO, BUT I DON'T NOW HIS NAME.
Q WHEN DID THIS OCCUR?
A LAST WEDNESDAY.
Q DO YOU KNOW JAMES BYNUM'S BROTHER?
A NO.
Q YOU DON'T KNOW TOMMY LEE BYNUM?
A I HEARD OF HIM BUT I DON'T KNOW HIM PERSONALLY.

Q YOU ARE CURRENTLY IN JAIL WITH HIM RIGHT NOW, AREN'T YOU, IN THE SAME CELL?
A I STILL DON'T KNOW HIM. I KNOW OF HIM. JUST BY ME BEING IN JAIL WITH HIM THAT DON'T MEAN THAT I KNOW HIM.
Q DO YOU NOW HIM BY NAME, BY TOMMY LEE BYNUM?
A I HAVE HEARD HIS NAME.
Q AND YOU ARE CURRENTLY IN THE CELL WITH HIM?
A YEAH. BUT I DON'T KNOW HIM.
Q OKAY. HOW LONG HAVE YOU BEEN IN JAIL WITH HIM? IN THAT CELL?
A THREE WEEKS.
Q AND YOU DON'T KNOW HIM?
A I DON'T KNOW HIM.
Q OKAY. DO YOU KNOW RONALD TILLMAN?
A I SEEN HIM BEFORE.
Q YOU ARE FROM COLUMBIA, AREN'T YOU?
A YEAH.
Q HOW LONG HAVE YOU LIVED IN COLUMBIA?
A ALL MY LIFE.
Q OKAY.

MR. COLEMAN: NO FURTHER QUESTIONS.

MR. SWERLING: NO QUESTIONS.

THE COURT: YOU MAY STEP DOWN.

(WITNESS TO THE SIDE)

MR. SWERLING: I CALL MR. TILLMAN.

THOMAS E. TILLMAN, AFTER BEING DULY SWORN BY THE CLERK, TESTIFIES AS FOLLOWS:

DIRECT EXAMINATION BY

MR. SWERLING:

Q MR. TILLMAN, WHERE DO YOU RESIDE?

A

Q HOW LONG HAVE YOU LIVED IN COLUMBIA?

A SINCE 1976.

Q WHAT DID YOU DO PRIOR TO THAT?

A I WAS IN THE UNITED STATES NAVY. I AM RETIRED.

Q IS RONALD YOUR SON?

A YES, HE IS.

Q IS THAT YOUR WIFE SEATED BEHIND HIM?

A THAT'S MY WIFE.

Q DO YOU OWN AND OPERATE SEVERAL PARTY SHOPS IN THE COLUMBIA AREA?

A YES, I DO.

Q OKAY. IS ONE OF THEM LOCATED ON SHOP ROAD?

A YES.

Q OKAY. SPECIFICALLY ON DECEMBER 26TH, 1988, WOULD YOU TELL THE JURY WHAT YOUR ROUTINE IS USUALLY IF THE--WELL, LET ME ASK YOU THIS. DOES RONALD WORK AT THAT SHOP, DOES HE RUN THAT SHOP?

A RONALD WAS WORKING AT THE SHOP. HE WAS THE MANAGER.

Q OKAY. AND WHERE DO YOU GENERALLY WORK?

A I NORMALLY STAY OVER ON TWO NOTCH ROAD.
Q OKAY. AND WHAT IS YOUR ROUTINE IN CLOSING UP AND SHUTTING DOWN YOUR BUSINESSES?
A NORMALLY I HAVE FEMALE CASHIER AT THE TWO NOTCH AND CHESTNUT AND I STAY THERE UNTIL WE CLOSE SO SHE CAN LEAVE WITHOUT GETTING ROBBED. THEN I'LL LEAVE FROM TWO NOTCH AND THEN I'LL GO DOWN TO SHOP ROAD.
Q DO YOU RECALL THE EVENING OF DECEMBER 26TH, 1988?
A YES. MY ROUTINE IS I ALWAYS LEAVE RIGHT AFTER WE CLOSE CHESTNUT AND IT NORMALLY TAKE ABOUT FIFTEEN TO TWENTY MINUTES TO CLOSE UP.
Q DID YOU GO TO SHOP ROAD THAT EVENING?
A I GO TO SHOP ROAD EVERY NIGHT.
Q AND ON DECEMBER 26TH DID YOU GO?
A YES, I DID.
Q WAS RON THERE AT THE TIME YOU GOT THERE?
A NO, HE WASN'T.
Q APPROXIMATELY WHAT TIME DID YOU ARRIVE AT THE PARTY SHOP?
A SOMEWHERE BETWEEN ABOUT 7:30 AND--SOMEWHERE AROUND THAT NEIGHBORHOOD.
Q AND WHAT DID YOU WHEN YOU GOT THERE?
A WELL, NORMALLY WHAT I'LL DO I'LL CHECK THE PARTY SHOP OUT AND TALK WITH THE CASHIER AND ASK THEM IF EVERYTHING'S GOING OKAY. THEN I'LL GO IN THE OTHER SECTION OF THE STORE 'CAUSE I HAVE A SCREEN AND I WATCH HIS BACK.

Q NOW, DID RONALD COME BACK TO THE SHOP?
A RONALD CAME DOWN TO THE SHOP, HIM AND SOME YOUNG MAN. HE WALKED IN --
Q NOW, THAT YOUNG MAN, DO YOU KNOW WHO THAT YOUNG MAN IS?
A I KNOW WHO HE IS NOW BUT I DIDN'T KNOW HIM AT THE TIME.
Q WHO DO YOU KNOW THAT PERSON TO BE NOW?
A VITO.
Q OKAY. DO YOU KNOW DONALD SUTTON?
A YES, I DO.
Q WAS DONALD SUTTON OR DID YOU SEE DONALD SUTTON IN THE SHOP THAT NIGHT?
A I DIDN'T SEE DONALD THAT DAY.
Q APPROXIMATELY WHAT TIME DID RONALD AND VITO COME--OR THIS PERSON YOU NOW KNOW TO BE VITO COME BACK TO THE SHOP?
A WELL, THEY CAME IN--RONALD--I SAW TWO PEOPLE COME IN THE SHOP WHICH RONALD AND THIS YOUNG MAN CAME INTO THE SHOP. AND THEY STAYED OVER THERE A FEW MINUTES AND THEN HE CAME AROUND ON THE LIQUOR STORE SIDE.
Q DID YOU AND HE HAVE A CONVERSATION?
A WE TALKED A FEW MINUTES ABOUT BUSINESS AND THEN HE WALKED OUT THE SHOP AND WENT BACK ON THE PARTY SHOP SIDE AND THEN THEY LEFT.
Q I APOLOGIZE IF I ASKED YOU. DO YOU KNOW APPROXIMATELY WHAT TIME IT WAS?
A WELL, IT WAS BETWEEN--LET'S SEE. I DIDN'T HAVE NO

RECOLLECTION OF THE TIME BUT--

Q HOW LONG HAD YOU BEEN THERE BY THE TIME THEY CAME BACK, TO PUT IT ANOTHER WAY?

A I'D BEEN THERE MAYBE ABOUT TEN, FIFTEEN MINUTES.

Q AND HOW LONG DID THEY STAY?

A IT WASN'T VERY LONG. THEY DIDN'T STAY--HE DIDN'T STAY VERY LONG.

Q ALL RIGHT. LET ME ASK YOU THIS. CAN YOU IDENTIFY DEFENDANT'S EXHIBIT FOR IDENTIFICATION "C" AND "B'? CAN YOU IDENTIFY THESE?

A YES. THOSE ARE RONALD "B.K." WHITE AND BLACK JACKET AND SNEAKERS.

Q CAN YOU IDENTIFY THESE AS BEING THE ITEMS THAT HE WAS WEARING THAT NIGHT?

A HE WAS WEARING THE "B.K." JACKET AND THE WHITE PANTS.

Q AND WHERE HAVE THESE ITEMS BEEN SINCE RONALD WAS ARRESTED?

A BEEN IN THE HOUSE.

Q AND DID YOU BRING THEM TO COURT ON LAST WEEK? DID YOU AND YOUR WIFE BRING THEM TO COURT LAST WEEK?

A SHE BROUGHT THEM.

Q OKAY. TO YOUR KNOWLEDGE, HAVE THEY BEEN CLEANED OR ALTERED OR DOCTORED IN ANY WAY?

A NOT TO MY KNOWLEDGE.

MR. SWERLING: YOUR HONOR, WE WOULD AT THIS TIME OFFER THEM INTO EVIDENCE.

THE COURT: HAND THEM TO COUNSEL.

MR. COLEMAN: OBJECTION, YOUR HONOR. THE PROPER FOUNDATION HAS NOT BEEN LAID. HE SAID TO THE BEST OF HIS KNOWLEDGE THAT IT HAD NOT BEEN ALTERED OR CHANGED. WE NEED TO KNOW FOR SURE.

Q DID YOU HAVE THESE CLEANED?

A NO.

MR. COLEMAN: DO YOU KNOW IF ANYBODY ELSE HAS HAD THEM CLEANED?

A NO.

MR. COLEMAN: COULD SOMEBODY ELSE HAVE HAD THEM CLEANED?

THE COURT: JUST A MINUTE. JUST A MINUTE. COME HERE.

(COUNSEL APPROACH THE BENCH OUT OF THE PRESENCE OF THE COURT REPORTER)

Q MR. TILLMAN, WHERE HAVE THESE--

THE COURT: JUST A MINUTE. WHAT'S YOUR OBJECTION, MR. COLEMAN?

MR. COLEMAN: I WITHDRAW THE OBJECTION.

THE COURT: HAND THEM TO THE COURT REPORTER AND HAVE THEM MARKED AS EXHIBITS.

(SWEATSUIT IS RECEIVED INTO EVIDENCE AS DEFENDANT'S EXHIBIT #7 [FORMERLY "B"]. TENNIS SHOES ARE RECEIVED INTO EVIDENCE AS DEFENDANT'S EXHIBIT #8 [FORMERLY "C"])

THE COURT: NOW IN THE RECORD OF THIS CASE EXHIBIT WHICH WILL BE NOW DESIGNATED DEFENDANT'S EXHIBIT NUMBER 7 WHICH IS

DESCRIBED AS A JACKET, WHITE WITH BLACK LETTERING, HAS "B.K." ON THE BACK OF IT AND ALSO AN EXHIBIT DESIGNATED DEFENDANT'S EXHIBIT NUMBER 8, FORMERLY MARKED DEFENDANT'S I.D. "C," IS A PAIR OF SHOES, HIGHTOP TENNIS SHOES, WITH "B.K." WRITTEN ON THEM. THEY ARE BOTH NOW IN THE RECORD OF THIS CASE WITHOUT OBJECTION.

Q MR. TILLMAN, I THINK I ASKED YOU THIS AND I APOLOGIZE IF I DID. TO THE BEST OF YOUR KNOWLEDGE, WHERE HAVE THESE BEEN? HAVE THESE BEEN IN YOUR HOME SINCE RONALD WAS ARRESTED?

A THEY BEEN IN THE HOUSE EVER SINCE.

Q TO THE BEST OF YOUR KNOWLEDGE HAVE THEY BEEN ALTERED IN ANY WAY OR CLEANED?

A NO, THEY HAVEN'T.

MR. SWERLING: ANSWER ANY QUESTIONS THAT THE PROSECUTOR HAS, PLEASE.

THE COURT: CROSS EXAMINATION, PLEASE.

CROSS EXAMINATION BY

MR. MORTON:

Q MR. TILLMAN, YOU DON'T KNOW WHERE THOSE CLOTHES WERE BETWEEN DECEMBER 26TH AND THE DAY HE WAS ARRESTED THOUGH, DO YOU?

A THEY WERE IN THE HOUSE IN THE CLOSET.

Q DO YOU KNOW THAT HE PUT THEM IN THE CLOSET THAT NIGHT AFTER HE WAS ARRESTED?

A HE WAS ARRESTED IN THE MORNING TIME.

Q HOW DO YOU KNOW WHAT HE DID WITH THOSE CLOTHES BETWEEN THE

TIME OF DECEMBER 26TH WHEN "DUCK" SUTTON WAS MURDERED AND THE TIME HE PUT THOSE CLOTHES BACK IN THE HOUSE?

A HE CAME HOME. WHEN HE GOT UP THE NEXT MORNING THAT'S WHEN HE WAS ARRESTED.

Q OKAY. MR. TILLMAN, YOU SAY WHEN YOU GOT TO THE PARTY SHOP AROUND 7:30 RON WAS NO THERE, IS THAT RIGHT?

A NO, HE WASN'T.

Q BUT THEN HE AND VITO GOT THERE SHORTLY, IS THAT RIGHT?

A THAT'S RIGHT.

Q SO, IT WOULD BE IMPOSSIBLE FROM WHAT YOU ARE TELLING US FOR RON TO BE SOMEWHERE ELSE BETWEEN 7:30 AND 8:00, IS THAT RIGHT?

A I DON'T KNOW WHERE RONALD WAS AT.

Q YOU DON'T KNOW WHERE HE WAS?

A I WAS AT THE PARTY SHOP.

Q YOU DON'T KNOW WHERE RONALD WAS?

A NO, I DON'T.

MR. MORTON: THAT'S ALL I HAVE, YOUR HONOR.

MR. SWERLING: NO FURTHER QUESTIONS. THANK YOU, MR. TILLMAN.

THE COURT: YOU MAY STEP DOWN.

(WITNESS TO THE SIDE)

MR. SWERLING: YOUR HONOR, I CALL DIANE FRADY.

DIANE FRADY, AFTER BEING DULY SWORN BY THE CLERK, TESTIFIES AS FOLLOWS:

DIRECT EXAMINATION BY

MR. SWERLING:

Q MS. FRADY, YOU ARE EMPLOYED WITH THE RICHLAND COUNTY DETENTION CENTER?

A THAT'S CORRECT.

Q OKAY. AS A CORRECTIONAL OFFICER?

A YES, SIR.

Q AND ALSO ARE YOU CONSIDERED THE CUSTODIAN OF RECORDS?

A THAT'S CORRECT.

Q OKAY. ARE RECORDS KEPT THERE IN THE ORDINARY COURSE OF BUSINESS?

A YES, SIR.

Q AS TO CELL ASSIGNMENTS AND WHERE PEOPLE ARE ON A PARTICULAR DAYS?

A YES, SIR.

Q AND IS THAT SOMETHING THAT'S KEPT UP WITH ON A DAILY BASIS?

A YES, SIR. WE TRY TO.

Q TRY TO. AND ARE YOU THE CUSTODIAN OF THOSE RECORDS?

A YES, SIR. WELL, FOR THE PRESENT YEAR I AM. PAST YEARS GOES TO ANOTHER DEPARTMENT.

Q AT OUR REQUEST, DID YOU SEARCH YOUR RECORDS FOR 1989 CONCERNING A HAYES MALLOY AND GABBY WELLS?

A YES, SIR.

Q OKAY. AND DO YOU HAVE ANY RECORDS REGARDING THEIR CELL ASSIGNMENTS DURING 1989?

A YES, SIR.
Q DO YOUR RECORDS AT THE RICHLAND COUNTY DETENTION CENTER REFLECT THAT DURING 1989 THEY WERE HOUSED IN THE SAME CELL, GABBY WELLS AND HAYES MALLOY?
A THAT'S CORRECT.
Q OKAY. WOULD YOU TELL THE JURY ON WHAT DATES THEY WERE IN THE SAME CELL TOGETHER?
A OKAY. I DON'T HAVE AN APPROXIMATE NUMBER OF HOURS BUT --
Q THE DATE WILL BE SUFFICIENT.
A I'LL SAY BETWEEN THE AFTERNOON OF THE 3RD OF JANUARY, '89, UNTIL JANUARY THE 4TH, '89. I HAVE NO IDEA EXACTLY WHAT TIME.
A THEY WERE IN THE SAME--AT THAT TIME--LET ME ASK YOU THIS. AT THAT TIME, WERE THEY SEPARATED OR DID THEY HAVE DIFFERENT CELL ASSIGNMENTS AFTER THE 4TH?
A NO, SIR.
Q WELL, WHAT--HE WAS RELEASED FROM CUSTODY? MR. MALLOY WAS RELEASED FROM CUSTODY?
A THAT'S CORRECT.
Q ON WHAT DAY?
A ON THE 4TH.
Q OKAY. SO, YOUR RECORDS REFLECT THAT ON JANUARY 3RD AT SOME TIME THROUGH JANUARY 4TH WHEN HE WAS RELEASED HAYES MALLOY AND GABBY WELLS WERE IN THE SAME CELL?
A THAT'S CORRECT.

MR. SWERLING: ANSWER ANY QUESTIONS THE PROSECUTION HAS.

CROSS EXAMINATION BY

MR. MORTON:

Q MS. FRADY, DO YOU HAVE YOUR RECORDS ON RONALD TILLMAN'S LOCATION IN DECEMBER OF 1989?

A YES, SIR, I DO. I DIDN'T BRING MY COPIES WITH ME.

Q LET ME ASK YOU IF YOU CAN IDENTIFY THIS?

A YES, SIR. THIS IS THE PAPERWORK THAT I RESEARCHED LAST WEEK.

Q OKAY. WHERE DOES THAT INDICATE THAT RONALD TILLMAN WAS DECEMBER OF 1989?

MR. SWERLING: WHAT CELL LOCATION?

MR. MORTON: YES, SIR.

A IN CELL TWO LEFT SECURITY.

Q OKAY. AND WHERE DOES IT INDICATE THAT MR. KENNETH GARDNER WAS?

A HE WAS IN CELL TWO LEFT SECURITY.

MR. MORTON: THANK YOU. THAT'S ALL I HAVE, YOUR HONOR.

THE COURT: REDIRECT?

REDIRECT EXAMINATION BY

MR. SWERLING:

Q ARE YOU FAMILIAR WITH THOSE CELLS?

A BASICALLY, YES, SIR.

Q AND THE CELL THAT MR. TILLMAN WAS IN AND THE CELL THAT MR. GARDNER WAS IN, ISN'T THERE ANOTHER CELL IN BETWEEN?

A I'M NOT SURE, SIR.

Q HOW MANY CELLS ARE THERE?

A THERE IS LEFT SECURITY AND RIGHT SECURITY. NOW, THOSE ARE ACROSS THE HALL FROM EACH OTHER. I BELIEVE LEFT SECURITY HOUSES TWO OR THREE PEOPLE BUT I'VE NEVER WORKED THAT WING.

MR. SWERLING: THANK YOU.

MR. MORTON: NOTHING FURTHER, YOUR HONOR.

THE COURT: YOU MAY STEP DOWN.

(WITNESS TO THE SIDE)

MR. SWERLING: YOUR HONOR, THAT WOULD BE OUR CASE.

THE COURT: THE DEFENSE RESTS. ANY REPLY TESTIMONY?

MR. COLEMAN: YES, YOUR HONOR. THE STATE CALLS ANTHONY ROGERS TO THE STAND. (PAUSE)

THE COURT: I CAN'T LET YA'LL SIT OUT HERE FOR FIVE MINUTES. STEP BACK THERE.

(THE JURY LEAVES THE JURY BOX AT 10:18 A.M.)

THE COURT: LET THE RECORD REFLECT THE JURY IS OUTSIDE THE PRESENCE OF THE COURT.

MR. SWERLING: AS I UNDERSTAND IT, ANTHONY ROGERS--EXCUSE ME. IF I COULD TALK TO MR. TALBERT. (PAUSE) YOUR HONOR, I WOULD OBJECT TO THEM CALLING MR. ROGERS AT THIS TIME. THIS IS A WITNESS THEY COULD HAVE CALLED IN THEIR CASE IN CHIEF REGARDING WHAT MR. BYNUM SUPPOSEDLY SAID IN THE CELL.

THE COURT: THEY ARE ENTITLED TO REPLY TO ANY NEW MATTER

RAISED BY THE DEFENSE IN THEIR REPLY TESTIMONY. THE FACT THAT THEY MAY HAVE HELD IT, YOU CAN'T TELL THEM HOW TO TRY THEIR CASE. YOU MIGHT LIKE TO. JUST LIKE THEY CAN'T TELL YOU HOW TO TRY YOURS.

MR. SWERLING: I UNDERSTAND, YOUR HONOR. WHAT I'M SUBMITTING IS THAT THIS IS NOT DIRECT REPLY. THIS IS SOMETHING THEY COULD HAVE OFFERED IN THEIR CASE IN CHIEF.

THE COURT: IT'S GOT TO BE IN REPLY TO NEW MATTER, DOESN'T IT?

MR. SWERLING: YES, SIR.

THE COURT: ALL RIGHT. AS LONG AS IT FALLS WITHIN THAT CATEGORY, ONCE AGAIN, STRATEGICALLY THE STATE WOULD BE FOOLISH IN MANY OCCASIONS NOT TO HOLD SOMETHING OUT THERE THAT THEY COULD REPLY TO ONLY IF IT'S NEW MATTER. THEY EXPECT YOU TO BRING IT UP. IF YOU DON'T RAISE, THEY DON'T GET TO BRING IT IN BUT THAT DOESN'T MEAN THEY CAN'T USE IT.

MR. SWERLING: THEN, YOUR HONOR, I WOULD ASK IN LIGHT OF THEM CALLING HIM I WOULD ASK FOR THE OPPORTUNITY TO SURREPLY BECAUSE THIS WITNESS TOLD MY INVESTIGATOR SOMETHING DIFFERENT THAN HE'S GOING TO TESTIFY TO THIS MORNING.

THE COURT: HE IS LIMITED TO REPLY TO NEW MATTER. I DON'T NOW WHAT THE NEW MATTER--WHAT'S THE NEW MATTER?

MR. SWERLING: WHAT JAMES BYNUM SAID IN HIS CELL. FIRST OF ALL, I THINK THE STATE HAS TO ESTABLISH IT WAS AT THE SAME TIME--

THE COURT: YOU'RE TALKING ABOUT THIS GUY, THEY ARE GOING TO RESPOND TO WHAT ISIAH BENNETT HAS SAID?

MR. SWERLING: YES, SIR.

THE COURT: WELL, YOU SEE, YOU BRING THAT UP. YOU KNOW, THEY ARE ENTITLED TO IT. I DON'T KNOW HOW YOU GET SURREPLY, DO YOU? THERE'S NO SUCH THING.

MR. SWERLING: WELL, YOUR HONOR, I THINK IT'S IN YOUR DISCRETION IF THIS WITNESS OR WE ARE ALLOWED TO--IF HE HAS TOLD SOMEONE SOMETHING DIFFERENT.

THE COURT: LISTEN TO ME A MINUTE, MR. SWERLING. YOU KNOW, THE STATE PUTS UP THE CASE. YOU GET TO RESPOND TO WHATEVER THEY PUT UP IF YOU CHOOSE TO DO SO. YOU DON'T HAVE TO BUT YOU CAN CHOOSE TO DO SO. THEY CAN ONLY RESPOND TO WHAT YOU HAVE PUT UP NEW IN REPLY. THE REASON FOR THOSE RULES IS SO THAT SOMEWHERE DOWN IN THE NEAR FUTURE A CASE WILL END AND IT ISN'T WHO GETS THE LAST BLOW IN, IT'S WHO, YOU KNOW, THAT YOU ARE RESPONDING AND YOU HAVE AT LEAST ONE OPPORTUNITY TO RESPOND. THAT'S WHY WITH THE WITNESS THE RULE IS YOU PUT UP YOUR WITNESS, YOU EXAMINE YOUR WITNESS ON DIRECT, YOU GET TO CROSS. YOU GET TO CROSS HIM FULLY AS TO EVERYTHING HE SAID. NOW, IF IN THAT CROSS YOU BRING OUT NEW MATTER THEY GET TO COME BACK AND RESPOND TO THE NEW MATTER. IT'S SUPPOSED TO STOP THEN BECAUSE THE THING WILL NEVER END OTHERWISE AND THAT'S THE RULE. SAME RULES APPLY ABOUT PUTTING UP ALL YOUR TESTIMONY. IF YOU DON'T BRING IT OUT,

THEN THEY CAN'T REPLY TO IT. YOU SEE WHAT I MEAN? AND THAT IS THE RULE. I KNOW YOU UNDERSTAND THAT. I'M NOT TRYING TO GIVE ANY LECTURES HERE.

MR. SWERLING: I UNDERSTAND.

THE COURT: CLEARLY THAT'S THE REASON.

MR. SWERLING: WELL, YOUR HONOR, I BELIEVE I'VE SEEN SURREPLY WHEN SITUATIONS LIKE THIS HAVE COME UP WHERE THE REPLY WITNESS HAS GIVEN A PRIOR INCONSISTENT STATEMENT.

THE COURT: THERE IS A RECENT CASE THAT SAY THERE IS NO AUTHORITY FOR THAT.

MR. SWERLING: YOUR HONOR, THE OTHER THING IS THIS WITNESS, I'VE INTERVIEWED HIM AND HE APPARENTLY MADE SOME REFERENCE TO SOMETHING THAT BYNUM TOLD HIM HIS OPINION WAS ABOUT TILLMAN'S ROLE IN THIS THING. I WOULD MOVE THAT THAT NOT BE ALLOWED.

THE COURT: I DON'T KNOW WHAT HE'S GOING TO SAY BUT CLEARLY I REMIND EVERYBODY ONCE AGAIN A WITNESS IS NOT ENTITLED TO RENDER SUCH OPINIONS. I THINK AND I BELIEVE IS NOT PROPER. IT'S ONLY WHAT THEY SAW, WHAT THEY DID, WHAT THEY HEARD.

MR. COLEMAN: YOUR HONOR, GIVE US ONE SECOND. WE ARE DEBATING ON WHETHER OR NOT TO CALL HIM OURSELVES.

THE COURT: OKAY.

MR. SWERLING: I'D LIKE HIS RECORD.

(PAUSE)

THE COURT: YOU NEED TO GIVE MR. SWERLING THE RECORD IF THERE IS ANY CRIMES OF MORAL TURPITUDE. LOOK OVER IT AND SEE IF THERE'S ANY DISPUTE OR QUESTION ABOUT WHETHER ANY CRIMES LISTED ARE CRIMES OF MORAL TURPITUDE.

MR. COLEMAN: JUDGE, WE ARE GOING TO WITHDRAW CALLING THIS WITNESS.

THE COURT: ALL RIGHT, YOU MAY TAKE HIM BACK. ANY OTHERS YOU ARE GOING TO CALL, SOLICITOR?

MR. COLEMAN: YES, SIR. WE ARE CALLING MR. COPELAND. HE IS FROM THE JAIL. HE'S ON THE WAY UP.

MR. SWERLING: DOES HE HAVE A RECORD? WHO IS IT?

MR. COLEMAN: HE WORKS DOWN AT THE DETENTION CENTER.

MR. SWERLING: IF YOUR HONOR PLEASE, THIS WITNESS IS GOING TO APPARENTLY COME IN AND TESTIFY TO SOMETHING ABOUT THE LOCATION OF THE CELLBLOCKS. THIS IS NOT NEW MATTER. THIS IS NOT IN RESPONSE TO ANYTHING THAT WE'VE RAISED ON DEFENSE, ABOUT THE LOCATION OF KENNETH GARDNER AND RONALD TILLMAN. THAT'S NOT SOMETHING WE RAISED IN OUR DEFENSE. THAT WAS SOMETHING THE SOLICITOR RAISED ON CROSS EXAMINATION. I DON'T SEE WHAT NEW MATTER THAT IS OR THAT THAT IS PROPER REPLY. I NEVER WENT INTO IT IN OUR CASE WHAT LOCATION KENNETH GARDNER--WE NEVER DISPUTED THE FACT THAT GARDNER WAS NEXT TO MR. TILLMAN. THEY ARE TRYING TO BOLSTER THEIR OWN CASE NOW RATHER THAN REPLY TO MY CASE.

THE COURT: DO YA'LL HAVE ANY RESPONSE TO THAT?

MR. BILTON: JUDGE, I'D HAVE TO GET MR. COLEMAN TO RESPOND. I HAVE NOT TALKED TO THIS WITNESS AND MR. MORTON HASN'T. CREIGHTON IS THE ONLY ONE WHO HAS SPOKEN TO THIS WITNESS, IF I CAN FIND HIM.

(COUNSEL APPROACH THE BENCH OUT OF THE PRESENCE OF THE COURT REPORTER)

THE COURT: MR. COLEMAN, AS I UNDERSTAND YOU INTEND TO CALL THIS WITNESS FOR THE PURPOSE OF SHOWING WHAT CELLS ARE DOWN THERE IN--WHAT IS IT, "C" SECURITY LEFT, WHATEVER YOU CALL IT?

MR. COLEMAN: YES, SIR.

THE COURT: AND THAT'S BASED ON MR. SWERLING CALLING THE DETENTION CENTER LADY, DIANE FRADY? HE ON DIRECT ASKED HER WHETHER OR NOT HAYES MALLOY AND GABBY WELLS WERE HOUSED IN THE SAME CELL. THEN ON CROSS EXAMINATION YA'LL ASKED ABOUT--WHO WAS IT, BYNUM?

MR. SWERLING: GARDNER.

THE COURT: GARDNER. MR. GARDNER. YOU BROUGHT IT UP ON CROSS WHETHER OR NOT GARDNER, WHERE HE WAS HOUSED INSOFAR AS IN CONNECTION WITH THE DEFENDANT. AND MR. SWERLING ON REDIRECT ASKED HOW MANY CELLS WERE THERE AND WHETHER OR NOT THERE WAS A CELL IN BETWEEN AND SHE SAID SHE DIDN'T KNOW. IS THAT RIGHT?

MR. COLEMAN: YES, SIR.

THE COURT: SO, THE ISSUE IS WHETHER OR NOT YOU ARE

RESPONDING TO NEW MATTER. HE RAISES THAT THAT'S NOT NEW MATTER, HE DIDN'T RAISE IT, THAT YA'LL RAISED IT IF IT WAS ANY NEW MATTER WHICH THEY DON'T AGREE WITH ON YOUR CROSS EXAMINATION. ISN'T THAT WHAT THE ISSUE IS?

MR. COLEMAN: YES, SIR.

THE COURT: WHAT'S YOUR VIEW CONCERNING THAT?

MR. COLEMAN: I BEG YOUR PARDON?

THE COURT: WHAT'S YOUR VIEW CONCERNING THAT?

MR. COLEMAN: WELL, YOUR HONOR, WE HAD ASKED ON CROSS EXAMINATION OF MS. FRADY THE LOCATION OF GARDNER, WHERE HIS CELL WAS, AND WHERE THE DEFENDANT'S CELL WAS. SHE WASN'T SURE. THEN ON REDIRECT MR. SWERLING ASKED HER AGAIN ARE YOU AWARE THERE'S A CELL IN BETWEEN THE TWO CELLS WHERE GARDNER AND TILLMAN WERE. HE RAISED THAT ON REDIRECT AND HE DIDN'T KNOW THAT EITHER. WE ARE MERELY TRYING TO BRING OFFICER COPELAND HERE TO SHOW THE LOCATION OF THE DEFENDANT WITH MR. GARDNER AND THE LAYOUT OF THE SECURITY AREA.

THE COURT: MR. SWERLING?

MR. SWERLING: YOUR HONOR, I THINK THAT THE STATE CANNOT ON CROSS EXAMINATION CREATE ISSUES THAT THEY CAN BRING UP ON REPLY. I DID NOT ASK THE WITNESS AND SHE WAS NOT CALLED FOR THE PURPOSE OF ESTABLISHING WHERE TILLMAN AND GARDNER WERE. THEY BROUGHT THAT UP AND I THINK THEY ARE STUCK WITH THAT NOW.

THE COURT: WHAT ABOUT WHEN YOU COME BACK ON REDIRECT

AND ASK THAT QUESTION WAS THERE A CELL IN BETWEEN WHICH CAUSES THE CONFUSION AT THIS TIME, IF THERE IS ANY CONFUSION? THEY DIDN'T ASK THAT QUESTION. YOU ASKED IT.

MR. SWERLING: WELL, THEY ASKED THE WITNESS WHERE TILLMAN AND GARDNER WERE LOCATED AND I THINK I HAVE AN OBLIGATION TO EXAMINE HER AS TO WHETHER OR NOT THERE IS ANOTHER AREA BUT I THINK THEY ARE STUCK WITH THE ANSWER. I MEAN THEY CREATED THE ISSUE. ALL I DID WAS GO BACK ON REDIRECT AND ASK HER IF SHE KNEW, BUT THEY CREATED A NEW ISSUE THAT I DID NOT BRING UP IN MY DEFENSE. I MEAN THAT JUST OPENS THE DOOR FOR THE STATE TO DO THAT IN ALL KINDS OF CASES, JUST THROUGH CROSS EXAMINATION CREATE NEW ISSUES THAT THEY CAN REPLY TO. I DON'T THINK THAT'S THE PURPOSE OF REPLY TESTIMONY. I SUBMIT THAT IT'S NOT.

THE COURT: SO, YOUR ANSWER IS YOUR REDIRECT DID NOT BRING OUT NEW MATTER, YOU SIMPLY RESPONDED TO WHAT THEY BROUGHT OUT?

MR. SWERLING: YES, SIR. PLUS, IT'S A COLLATERAL ISSUE. THIS IS IMPEACHMENT. REPLY ISN'T IMPEACHMENT TESTIMONY AND IT IS A COLLATERAL ISSUE ANYWAY THAT THEY RAISED. THEY RAISED IT.

THE COURT: WELL, YOU CAUSED IT TO BE RAISED BY YOUR WITNESS SO, MR. SWERLING.

MR. SWERLING: YOUR HONOR, I CALLED HER TO ASK HER WHERE MALLOY AND WELLS WERE. THE STATE WENT IN TO EXPLORE SOME NEW

AREA AND THEY SHOULD BE PERMITTED TO KEEP EXPLORING NEW AREAS AND THEN EXPECT TO BE ABLE TO COME BACK WITH REPLY TESTIMONY.

THE COURT: YOU ARGUE THEY SHOULD HAVE PUT THAT UP IN THEIR CASE IN CHIEF IF IT WAS IMPORTANT?

MR. SWERLING: SURE, IF IT WAS IMPORTANT TO THEM, THEY COULD HAVE ESTABLISHED IT. THEY COULD HAVE CALLED IN SOMEONE FROM THE CORRECTIONAL FACILITY TO SAY THESE CELLS ARE TOGETHER. CERTAINLY THEY COULD HAVE DONE THAT IN THEIR CASE IN CHIEF. THAT WOULDN'T HAVE BEEN BOLSTERING, THAT WOULD HAVE JUST BEEN GOOD TRIAL TACTICS.

THE COURT: I AGREE.

MR. COLEMAN: YOUR HONOR, HE BROUGHT UP THE POINT THOUGH THAT THERE MAY BE A CELL IN BETWEEN WHERE GARDNER AND THE DEFENDANT, WHERE HE RESIDED. WE ARE MERELY OFFICER COPELAND UP TO SAY THERE IS NOT A CELL, THEY WERE NEXT TO EACH OTHER. HE BROUGHT UP THE POINT THAT THERE WAS A CELL IN BETWEEN THESE TWO CELLS. HE'S GOING TO SAY THERE IS NOT, THAT THEY WERE NEXT TO EACH OTHER.

THE COURT: BUT DIDN'T YA'LL IN YOUR CROSS EXAMINATION BRING THE ISSUE OF MR. GARDNER INTO IT? HE DIDN'T DO THAT, YA'LL DID THAT.

MR. COLEMAN: I REALIZE THAT, YOUR HONOR, BUT HE ADDRESSED IT AND HE ADDRESSED IT IN HIS REDIRECT.

THE COURT: WELL, DIDN'T HE HAVE TO READDRESS IT?

MR. COLEMAN: NO, SIR, I DON'T THINK HE DID AT ALL.

THE COURT: OKAY. I UNDERSTAND. IF THAT'S THE ISSUE YA'LL ARE GOING TO RAISE, I'M NOT GOING TO ALLOW IT. IT'S NOT PROPER REPLY. ANYTHING ELSE?

MR. COLEMAN: NO, YOUR HONOR.

THE COURT: ANYTHING ELSE?

MR. SWERLING: NO, SIR.

THE COURT: ALL RIGHT. I'M GOING TO BRING THE JURY IN AND LET THE STATE FORMALLY REST AND THE DEFENSE FORMALLY REST. IS THERE ANY REASON AFTER DOING THAT THAT YA'LL WILL NOT BE READY TO MAKE YOUR ARGUMENTS TO THE JURY AT ELEVEN O'CLOCK?

MR. SWERLING: IF WE COULD HAVE TWENTY-FIVE MINUTES, MAYBE TWENTY, TWENTY-FIVE MINUTES. THAT'S ALL I WOULD ASK.

THE COURT: HOW ARE YA'LL AS FAR AS YOUR ARGUMENTS? ARE YOU GOING TO--

MR. SWERLING: ONE ARGUMENT.

THE COURT: IS THE STATE WAIVE?

MR. MORTON: NO, SIR, THE STATE IS GOING TO OPEN JUST BRIEFLY ON THE LAW.

THE COURT: OKAY. AND THEN CLOSE. LET ME TELL YOU WHAT I PERCEIVE THAT WE SHOULD DO BECAUSE OF THE LENGTH OF THE TRIAL OF THE CASE AND THE ISSUES THE WAY THEY ARE AND THAT IS TO LET YOU ARGUE, SEND THE JURY, INSTRUCT THEM TO GO HOME AND PACK A BAG TO TAKE CARE OF THEM FOR AN EVENING STAY IF IT BECOMES NECESSARY AND HAVE LUNCH AND GET BACK HERE AT

THREE O'CLOCK AND AT THAT TIME CHARGE THE JURY AND GIVE IT TO THEM FOR DELIBERATIONS.

MR. MORTON: YOUR HONOR, MY ONLY CONCERN IS THAT I'M AFRAID THAT BY DOING THAT IT INDICATES TO THEM THAT THERE MAY BE SOME DOUBTS ON THIS CASE THAT MAY REQUIRE THEIR CONSIDERATION FOR QUITE SOME TIME. I WOULD RATHER THE COURT JUST GO AHEAD AND CHARGE THE JURY AT TWO O'CLOCK. IF THEY DELIBERATE INTO THE NIGHTTIME HOURS AND FEEL LIKE THEY CAN'T RESOLVE IT, THEN AT THAT TIME DO WHAT WE HAVE TO DO.

THE COURT: THAT'S BECAUSE YOU DON'T HAVE TO DO ANYTHING AFTER YOU DO THAT, MR. MORTON. LAW ENFORCEMENT HAS TO TAKE THESE PEOPLE HOME, THEY HAVE TO THEN MAKE SOME ARRANGEMENTS FOR THEIR FAMILY. SOME OF THESE PEOPLE MAY HAVE SMALL CHILDREN. THERE MAY BE SOME PROBLEMS WITH ALL THOSE THINGS. WE HAVE TWO ALTERNATES SITTING HERE RIGHT NOW IF THERE IS A PROBLEM WITH AN OVERNIGHT STAY THAT I CAN DEAL WITH. SEE, YOU ARE THROUGH WITH IT WHEN YOU SIT DOWN.

MR. MORTON: I UNDERSTAND.

THE COURT: EXCEPT WAITING ON THE JURY'S VERDICT. THE COURT OFFICIALS HAVE TO THEN MAINTAIN THE JURY, TAKE CARE OF THEM. THEY HAVE TO MAKE ARRANGEMENTS FOR THAT. THAT DOESN'T HAPPEN EASILY. BRING THE JURY IN.

(THE JURY RETURNS TO THE JURY BOX AT 10:42 A.M.)

THE COURT: AS I UNDERSTAND, THE STATE RESTS?

MR. MORTON: THE STATE HAS RESTED, YOUR HONOR.

THE COURT: MR. FOREMAN AND LADIES AND GENTLEMEN, THAT CONCLUDES THE TESTIMONY AND EVIDENCE IN THIS CASE AND THE NEXT THING TO OCCUR WILL BE FOR THE ATTORNEYS TO MAKE THEIR CLOSING ARGUMENTS OR SUMMATIONS TO YOU AND IN THIS CASE THE STATE WILL MAKE AN OPENING STATEMENT FIRST OR ARGUMENT, THEN FOLLOWED BY A CLOSING ARGUMENT MADE ON BEHALF OF THE DEFENDANT BY MR. SWERLING AND THEN A FINAL CLOSING ARGUMENT TO BE MADE ON BEHALF OF THE STATE BY ONE OF THE DEPUTY SOLICITORS. SO, THAT'S THE PROCEDURE IN THAT REGARD. I HAVE ASKED THEM AND THEY'VE TOLD ME THAT THEY ANTICIPATE APPROXIMATELY AN HOUR APIECE, A TOTAL OF TWO HOURS IN THEIR ARGUMENTS. I'M NOT GOING TO HOLD THEM TO THAT, OF COURSE, BUT THEY'VE ESTIMATED THAT'S HOW MUCH TIME. TO PLAN AS WE GO ALONG, WE HAVE TO MAKE PLANS, ONCE WE GIVE THE CASE TO YOU TO DELIBERATE WE HAVE TO ALL STAY TOGETHER UNTIL WE REACH A VERDICT IN THE CASE, OF COURSE. WHEN I SAY ALL OF US, THOSE OF YOU. WHAT I WOULD LIKE TO DO WOULD BE, SO THAT WE CAN PLAN AND BE PREPARED FOR EVERYTHING THAT OCCURS HOPEFULLY, WOULD BE TO LET THEM MAKE THEIR ARGUMENTS, STOP, SEND YOU HOME FOR LUNCH OR WHEREVER AND GIVE YOU A LITTLE EXTRA TIME AND I'M GOING TO ASK LIKE GIVING YOU FROM 1:00 TO 3:00 TO GIVE YOU ENOUGH TIME TO ALSO GO HOME AND PACK A BAG THAT WILL TAKE CARE OF YOU FOR AN OVERNIGHT STAY IF THAT BECAME NECESSARY. OF COURSE, ONCE YOU START YOUR DELIBERATIONS THAT IS UP TO YOU, THE JURY, AS TO THE LENGTH OF YOUR

DELIBERATIONS AND THE TIME. I HAVE NO CONTROL OVER THAT UNDER THE LAW AND SHOULDN'T NOT HAVE ANY. THAT'S TOTALLY WITHIN THE PROVINCE OF THE JURY. I JUST WANT TO BE PREPARED FOR IT INSTEAD OF HAVING TO DECIDE THAT AT 9:00 OR 10:00 TONIGHT IF IT BE NECESSARY. FOR EXAMPLE, AS A REASONABLE PERIOD OF TIME WE'D HAVE TO STOP AND HAVE TO GET YOU HOME AND THEN BACK TO THE MOTEL WHERE WE WOULD HOUSE YOU FOR TONIGHT. WHAT I'M SAYING IS IF YOU GO HOME AT LUNCH TIME AND PACK THE BAG AND IF IT'S NECESSARY, IF YOU NEED THE ADDITIONAL TIME FOR DELIBERATIONS, WE'LL GO INTO TOMORROW. WE WOULD STOP AT SOME REASONABLE TIME TONIGHT AND LET YOU GO TO THE MOTEL ROOM AND HAVE DINNER OR WHATEVER, GO TO BED, REST FOR THE EVENING AND START BACK IN THE MORNING.

NOW, WITH THAT, ARE THERE ANY OF YOU THAT BEING HOUSED OVERNIGHT WOULD CAUSE ANY PECULIAR TYPE OF INCONVENIENCE TO YOU THAT YOU COULD NOT RESOLVE OR TAKE CARE OF IN THAT TIME PERIOD FROM 1:00 TO 3:00? IF SO, I'D LIKE FOR YOU TO RAISE YOUR HAND. (NO RESPONSE) VERY GOOD. SO, ONCE AGAIN, OF COURSE, WHEN YOU REACH A VERDICT THE CASE IS ENDED AND WE'LL STOP BUT I HAVE TO EXTEND TO YOU AS MUCH TIME AS REASONABLY YOU NEED TO EVALUATE THE ISSUES IN THIS CASE AND, AS I SAID, I DON'T CONTROL THAT, YOU DO. SO, I'M JUST TRYING TO PLAN AND BE PREPARED FOR IF YOU NEED TIME. IF YOU DON'T, THAT'S UP TO YA'LL. WHAT I'M GOING TO DO IS I'M GOING TO GIVE THE ATTORNEYS ABOUT TWENTY MINUTES TO ORGANIZE THEIR THOUGHTS FOR

THEIR ARGUMENTS. I'M GOING TO LET YOU STEP BACK IN THE JURY ROOM. HOPEFULLY WE'LL COMPLETE THE ARGUMENTS BY 1:00. WHENEVER WE DO, I'LL GIVE YOU THAT PERIOD OF TIME AND LET YOU GO HOME AND PACK A BAG FOR AN OVERNIGHT STAY IF IT BECOMES NECESSARY THAT YOU'LL BE PREPARED FOR THAT SOMETIME THIS EVENING AND WILL NOT HAVE TO BE TAKEN HOME LATER ON. ALL RIGHT. OKAY. YES, SIR.

JUROR: IS IT PERMISSIBLE FOR US TO TAKE NOTES DURING THE SUMMATIONS?

THE COURT: I USUALLY ASK THE JURY NOT TO TAKE NOTES DURING THE TRIAL OF THE CASE BECAUSE THE TESTIMONY IS PRESENTED AND TAKEN DOWN BY THE COURT REPORTER. IF THERE IS ANY QUESTION ABOUT WHAT THE TESTIMONY WAS, THE COURT REPORTER HAS THAT FOR YOU. AS I TOLD YOU IN MY OPENING INSTRUCTIONS, WHAT THE ATTORNEYS SAY TO YOU IS NOT EVIDENCE. DOES THAT ANSWER IT FOR YOU?

JUROR: I UNDERSTAND.

THE COURT: DOES THAT ANSWER YOUR QUESTION?

JUROR: YES, SIR.

THE COURT: ALL RIGHT. YOU MAY STEP BACK AND BE COMFORTABLE. AS SOON AS THEY ARE READY TO GO, WE'LL GO.

(THE JURY LEAVES THE JURY BOX AT 10:48 A.M.)

THE COURT: ALL RIGHT. MR. SWERLING, YOU ASKED FOR AN INSTRUCTION CONCERNING IMPEACHMENT TESTIMONY. WE'VE HAD ABOUT RECORDS NOW. ARE YOU TALKING ABOUT PRIOR INCONSISTENT

STATEMENTS?

MR. SWERLING: PRIOR INCONSISTENT STATEMENTS.

THE COURT: WELL, I'VE GOT IT ON THE RECORD. NOW, DO YOU HAVE ONE--LET ME TELL YOU WHAT I'M GOING TO GIVE THEM ON RECORDS, AND THAT IS THAT YOU'VE HEARD EVIDENCE THAT A WITNESS OR WITNESSES MAY HAVE BEEN CONVICTED OF CRIMES. YOU MAY CONSIDER THIS EVIDENCE ALONG WITH ALL THE OTHER EVIDENCE IN THE RECORD OF THIS CASE AND DECIDE ON WHETHER OR NOT TO BELIEVE THIS WITNESS AND HOW MUCH WEIGHT TO GIVE TO THE TESTIMONY OF THAT WITNESS. IT GOES TO THEIR CREDIBILITY. NOW, YOU ASKED FOR ONE ABOUT PRIOR INCONSISTENT STATEMENT. I HAVE THEM ON DEFENDANTS WHO MAKE PRIOR INCONSISTENT STATEMENTS BUT NOT ON WITNESSES.

MR. SWERLING: YOUR HONOR, I WOULD SUBMIT IT PROBABLY WOULD BE THE SAME ONE. THAT'S THE ONE I'M FAMILIAR WITH FROM THE STANDARD CHARGE. IF NOT, I CAN GET YOUR ONE. I JUST MAY HAVE MISUNDERSTOOD. I THOUGHT YOU HAD ONE.

THE COURT: I HAVE THE DEFENDANTS. I'VE GIVEN IT BUT NEVER ON A WITNESS ON A PRIOR INCONSISTENT STATEMENT. OF COURSE, YOU CAN ARGUE THAT WHEN A WITNESS GIVE A DIFFERENT STORY WHICH STORY IS HE TELLING, YOU KNOW, WHICH ONE IS THE TRUTH.

MR. SWERLING: WILL YOUR HONOR GIVE THE SAME ONE ON THE DEFENDANTS PRIOR INCONSISTENT STATEMENT WITH RESPECT TO THE WITNESSES?

THE COURT: WELL, THE CHARGE WE HAVE GOES TO THE QUESTION ABOUT VOLUNTARINESS, NOT --

MR. SWERLING: WELL, THEN, YOUR HONOR, I'LL GET ONE.

THE COURT: YOU SHOW ME WHAT YOU'VE GOT. WHEN YOU INTRODUCE INTO THE RECORD THE INCONSISTENT STATEMENTS BY A DEFENDANT, THAT EVIDENCE IS ADMITTED FOR A LIMITED PURPOSE AND YOU MAY NOT CONSIDER THAT EVIDENCE FOR OTHER PURPOSE AND THAT IS FOR A LIMITED PURPOSE WHICH IT IS ADMITTED AND MAY BE CONSIDERED BY THE JURY IF YOU CONCLUDE THAT THE ALLEGED STATEMENT MADE BY THE DEFENDANT--OF COURSE, THESE ARE WITNESSES--WAS FREELY AND VOLUNTARY WITHOUT INDUCEMENT. YOU SEE WHAT I'M SAYING?

MR. SWERLING: YES, SIR.

THE COURT: IT WENT TO VOLUNTARINESS.

MR. SWERLING: I UNDERSTAND, JUDGE.

THE COURT: AND IT ALSO GOES ONLY FOR THE PURPOSE OF--IF YOU CONCLUDE IT WAS MADE VOLUNTARILY, THEN THE ONLY OTHER PURPOSE IS FOR EVALUATING THE CREDIBILITY, BELIEVABILITY OF THE TESTIMONY OFFERED BY THE DEFENDANT HIMSELF. IF YOU HAVE ONE DIFFERENTLY THAT APPLIES TO WITNESSES I'VE NEVER GIVEN ONE ON A WITNESS.

MR. SWERLING: I'LL GET ONE. I MISUNDERSTOOD.

THE COURT: LET ME SEE WHAT YOU'VE GOT AND I'LL TELL YOU WHETHER I'LL CHARGE IT OR NOT.

MR. SWERLING: ALL RIGHT.

THE COURT: YOU WANT A CHARGE ON ALIBI?

MR. SWERLING: YES, SIR.

THE COURT: OKAY. ALIBI, FAILURE OF THE DEFENDANT TO TESTIFY?

MR. SWERLING: YES, SIR. CIRCUMSTANTIAL EVIDENCE.

THE COURT: CIRCUMSTANTIAL EVIDENCE.

MR. SWERLING: EXPERTS.

THE COURT: EXPERTS.

MR. SWERLING: THAT WOULD BE IT.

THE COURT: WHAT ABOUT YOU, MR. COLEMAN AND MR. MORTON?

MR. MORTON: I DON'T HAVE ANY CHARGES, YOUR HONOR.

MR. SWERLING: YOUR HONOR, YOU ARE JUST GOING TO SUBMIT MURDER AND NOT GUILTY TO THE JURY?

THE COURT: I DON'T KNOW OF ANY OTHER VERDICTS IT COULD BE OTHER THAN GUILTY OR NOT GUILTY OF MURDER. NO LESSERS. THERE'S BEEN NO EVIDENCE TO SUPPORT ANYTHING ELSE.

MR. SWERLING: THAT WOULD BE OUR POSITION.

THE COURT: ANYTHING ELSE? ALL RIGHT. BE READY TO GO ABOUT 11:15, OKAY? THAT GIVES YOU ABOUT TWENTY MINUTES. THANK YOU.

(RECESS)

THE COURT: (AT CONCLUSION OF RECESS) IS THE STATE READY TO PROCEED?

MR. MORTON: YES, SIR, YOUR HONOR.

THE COURT: THE DEFENSE READY TO PROCEED?

MR. SWERLING: YES, SIR.

THE COURT: BRING THE JURY IN.

(THE JURY RETURNS TO THE JURY BOX AT 11:24 A.M.)

THE COURT: MR. FOREMAN, LADIES AND GENTLEMEN, I INVITE YOUR ATTENTION AND CONSIDERATION OF THE CLOSING ARGUMENTS THAT WILL BE MADE NOW ON BEHALF OF THE STATE AND BY THE DEFENDANT. MR. MORTON, ARE YOU GOING TO MAKE THE OPENING STATEMENT?

MR. MORTON: YES, SIR. THANK YOU, YOUR HONOR.

MR. MORTON MAKES OPENING ARGUMENT.

(DURING MR. MORTON'S OPENING ARGUMENT, THE FOLLOWING OBJECTION WAS MADE:

MR. MORTON: THE STATE DOES NOT CONTEND THAT WE HAVE BROUGHT CHOIR BOYS IN HERE TO TESTIFY ABOUT RONALD TILLMAN. YOU CANNOT GO THE FIRST BAPTIST CHURCH AND GET PEOPLE THAT HANG AROUND TILLMAN.

MR. SWERLING: OBJECTION, YOUR HONOR. THAT'S PUTTING HIS CHARACTER IN ISSUE.

THE COURT: ALL RIGHT. LET'S RESTRICT OUR ARGUMENTS TO THE FACTS IN THE CASE OR THE INFERENCES RAISED BY THEM.)

MR. MORTON CONCLUDES HIS OPENING ARGUMENT.

MR. SWERLING MAKES DEFENSE CLOSING ARGUMENT.

(DURING MR. SWERLING'S CLOSING ARGUMENT, THE FOLLOWING OBJECTIONS WERE MADE?

MR. SWERLING: NOW, ONE OF THE THINGS I'D LIKE YOU TO

ASK YOURSELF DURING YOUR DELIBERATIONS IN THIS CASE, I'D LIKE YOU TO GO BACK THERE WHEN YOU DO DELIBERATE, WHEN THE JUDGE FINALLY SENDS THIS CASE TO YOU AND TELLS YOU TO REACH A VERDICT, SOMETHING I'D LIKE TO BE ON EACH ONE OF YOUR MINDS DURING THE ENTIRE COURSE OF YOUR DELIBERATIONS IS WHY?

MR. MORTON: WAIT A MINUTE, JUDGE. I OBJECT TO THAT.

(MR. SWERLING AND MR. MORTON APPROACH THE BENCH OUT OF THE PRESENCE OF THE COURT REPORTER)

THE COURT: GO AHEAD.

MR. SWERLING: WHAT DID THE STATE DO WITH THAT CHARGE IN RETURN FOR HIS TESTIMONY? THEY BARGAINED IT AWAY. SOME INDIVIDUAL WHO WAS ROBBED OUT HERE IN RICHLAND COUNTY NOW IS GOING TO SEE MR. WELLS IN THE NOT TOO DISTANT FUTURE AGAIN AND NOT PAY ONE DAY FOR WHAT HE DID IN THAT ARMED ROBBERY.

MR. MORTON: I OBJECT TO THAT. IT'S A TOTALLY INCORRECT STATEMENT OF THE FACTS AND HE KNOWS IT.

MR. SWERLING: I DON'T THINK SO, YOUR HONOR.

THE COURT: MR. FOREMAN, LADIES AND GENTLEMEN, THE ATTORNEYS ARE ALLOWED TO ARGUE ANY REASONABLE INFERENCES PRESENTED BY ANY OF THE EVIDENCE OR TESTIMONY OFFERED IN THIS CASE. IT IS UP TO YOU, THE JURY, TO DETERMINE WHAT ARE THE FACTS IN THIS CASE. I REMIND YOU ONCE AGAIN WHAT THE ATTORNEYS SAY IN THEIR CLOSING ARGUMENTS IS NOT EVIDENCE AND IT MAY NOT BE CONSIDERED BY YOU AS EVIDENCE. THE ATTORNEYS

ARE REQUIRED TO ONLY ARGUE SUCH TESTIMONY AND EVIDENCE THAT HAS BEEN PRESENTED INTO THE RECORD OR ANY REASONABLE INFERENCE THAT MAY BE INFERRED FROM THAT TESTIMONY. YOU MAY PROCEED.

MR. SWERLING: (REFERRING TO JAMES BYNUM) THAT OATH HAS GOT TO MEAN SOMETHING. AND HE PUT HIS HAND ON THE BIBLE TWICE. TWICE HE SWORE TO TELL THE TRUTH, THE WHOLE TRUTH AND NOTHING BUT THE TRUTH. ONE OF THEM WAS A LIE. ONE OF THEM MAY NOT HAVE BEEN A LIE. WE STILL DON'T KNOW IF ANY OF IT WAS THE TRUTH.

THE COURT: MR. SWERLING, NOW THE TERM LIE IS AN IMPROPER ARGUMENT TO THE JURY. YOU ARE TO REFRAIN AND RESTRICT YOURSELF FROM MAKING SUCH AN ARGUMENT. IT IS UP TO THE JURY TO DETERMINE THE TRUTHFULNESS IN THIS CASE AND WHAT IS THE TRUTH.

MR. SWERLING: YES, SIR.)

MR. SWERLING CONCLUDES HIS CLOSING ARGUMENT.

MR. MORTON MAKES FINAL CLOSING ARGUMENT.

(DURING MR. MORTON'S CLOSING ARGUMENT, THE FOLLOWING OBJECTIONS WERE MADE:

MR. MORTON: LADIES AND GENTLEMEN, RON TILLMAN SAID HE WASN'T WITH VITO McKIE FROM 7:30 TO 8:30. HE SAYS HE WAS AT HOME. THEY'VE HAD A YEAR TO GET THEIR STORY STRAIGHT.

MR. SWERLING: OBJECTION YOUR HONOR. THERE'S NO

INFERENCE IN THE RECORD THAT THE TWO OF THEM HAVE EVER TALKED DURING THE LAST YEAR. NOT ONE INFERENCE.

THE COURT: AGAIN, MR. FOREMAN, I REMIND YOU THAT THE ATTORNEYS ARE PERMITTED TO ARGUE ANYTHING PRESENTED ON THE RECORD AND THE INFERENCE DERIVED THEREFROM, AND YOU, THE JURY, MUST DETERMINE WHAT ARE THE FACTS IN THIS CASE. REMEMBER THAT AT ALL TIMES. YOU MAY PROCEED, MR. MORTON.

MR. MORTON: ANOTHER LITTLE FACTOR THAT THE DEFENSE BROUGHT OUT THAT THEY CONVENIENTLY FORGOT TO TALK TO YOU ABOUT UP HERE. THEY CONVENIENTLY WHEN THEY ARE TELLING YOU ALL THE LIES THAT HAVE COME OUT OF HERE OVER THE LAST SEVEN DAYS, THEY CONVENIENTLY FORGET THE ONES THAT--HEY, WE BETTER NOT BRING THAT UP.

THE COURT: MR. MORTON, WATCH THE TERM. THE JURY DETERMINES THE TRUTHFULNESS. IT'S AN IMPROPER COMMENT TO USE THE TERM LIE ON A WITNESS. DO NOT USE IT AGAIN.

MR. MORTON: YES, SIR, I'LL TRY NOT.

MR. MORTON: HAYES MALLOY HAD NO REASON WHATSOEVER TO COME IN HERE AND TESTIFY TO YOU ABOUT RONALD TILLMAN. HAYES MALLOY COULD BE IN CANADA RIGHT NOW IF HE WANTED TO. NOTHING THAT WE COULD DO TO HAYES MALLOY WHATSOEVER IS GOING TO FORCE HIM TO COME TESTIFY. WE DIDN'T WAIT AND MAKE SURE HE TESTIFIED THE WAY WE WANTED HIM TO LIKE MR. SWERLING IS GOING

TO HAVE YOU BELIEVE, THAT THIS IS ALL SOME CONSPIRACY ON THE PART OF THE STATE THAT WE HAVE DRAGGED ALL THESE PEOPLE IN HERE AND REWARDED THEM WITH ALL THESE GREAT THINGS FOR THEM TO LIE IS WHAT HE'S SAYING. NOT ONLY HAVE WE REWARDED THEM AND HAVE WE DISMISSED ALL THESE CHARGES AGAINST HAYES MALLOY SO THAT HE COULD COME IN HERE AND LIE. THAT'S WHAT YOU HAVE TO BELIEVE. THAT'S WHAT MR. SWERLING WANTS YOU TO BELIEVE.

THE COURT: MR. MORTON.

MR. MORTON: I'M SORRY, YOUR HONOR.

THE COURT: USE THE TERM TRUTH OR UNTRUTH.

MR. MORTON: I'M SORRY.

MR. MORTON: GABBY WELLS HAS BEEN MOVED TO KERSHAW. WE MOVED HIM TO KERSHAW. WE SURE DID. WE MOVED HIM AWAY FROM MR. RON TILLMAN.

MR. SWERLING: OBJECTION, YOUR HONOR. THAT'S NOT EVEN IN THE RECORD OF THIS CASE. THAT'S NOT AN ADMISSIBLE COMMENT.

MR. MORTON: YOUR HONOR, HE TESTIFIED ABOUT THAT WE MOVED--HE SAID THAT WE MOVED GABBY WELLS TO KERSHAW FOR HIS COMFORT.

MR. SWERLING: I DIDN'T SAY ANYTHING ABOUT KERSHAW COUNTY.

THE COURT: YOU SAID THEY MOVED HIM FOR HIS COMFORT. GENTLEMEN, LET'S ARGUE ONCE AGAIN THE REASONABLE INFERENCES

IN THE CASE AND WHAT THE CHARGE IS BEING MADE.

MR. MORTON: GABBY WELLS CAME FORWARD LAST JANUARY OF 1989. AND THE SOLICITOR HANDLING THE CASE THEN AT THAT TIME DID NOT KNOW THERE WAS A KENNY GARDNER AND DID NOT KNOW THERE WAS A JAMES BYNUM. AND HE TOLD MR. GABBY WELLS THAT, GABBY--

MR. SWERLING: YOUR HONOR, THESE ARE FACTS OUTSIDE OF THE RECORD ABOUT WHAT THE SOLICITOR AT THAT TIME KNEW OR DID NOT KNOW. HE'S GOING INTO THE STATE OF MIND OF WHAT THE PROSECUTOR WAS BACK IN JANUARY OF '89? I SAY THAT'S NOT A PERMISSIBLE COMMENT.

THE COURT: I SUSTAIN THAT OBJECTION.

MR. MORTON: NOTHING REALLY IS GOING TO CORRECT THE INJUSTICE OF WHAT HAPPENED TO DONALD SUTTON DOWN THERE BY THAT CHURCH. NOTHING IS GOING TO BRING HIM BACK. NOTHING IS GOING TO BRING MRS. SUTTON'S--

MR. SWERLING: OBJECTION, YOUR HONOR. THAT'S NOT AN ADMISSIBLE COMMENT. HE'S APPEALING TO THE JURY'S PASSION. I WOULD OBJECT TO IT.

MR. MORTON: MRS. SUTTON IS SITTING HERE ON THE FRONT ROW.

MR. SWERLING: YOUR HONOR, OBJECTION.

MR. MORTON: I'M JUST INTRODUCING MRS. SUTTON.

MR. SWERLING: WELL, THAT'S FINE.)

MR. MORTON CONCLUDES HIS CLOSING ARGUMENT.

THE COURT: MR. FOREMAN, LADIES AND GENTLEMEN, NOW I WANT YOU TO HAVE YOUR LUNCH TIME PERIOD AND I ALSO WANT TO REMIND YOU THAT YOU ARE NOT ONCE AGAIN TO DISCUSS THIS CASE. YOU STILL DO NOT HAVE THE CASE TO DELIBERATE UPON. OF COURSE, NO ONE ELSE SHOULD TALK TO YOU ABOUT THIS CASE. I WANT YOU TO GO DO WHAT I TOLD YOU ABOUT HAVING YOUR LUNCH AND PACKING YOU A BAG WITH SUITABLE CLOTHING AND PERSONAL ITEMS TO TAKE CARE OF YOU FOR AT LEAST AN OVERNIGHT STAY IF IT BECOMES NECESSARY IN THE DELIBERATIONS. SO, I'LL SEE YOU BACK HERE AT 3:00. BRING WITH YOU THE BAGS. WHEN THEY COME BACK, MR. BAILIFFS, WE'LL HAVE ANOTHER ROOM WE WANT YOU TO PUT THEIR LUGGAGE INTO SO YOU MIGHT WANT TO PUT SOMETHING ON WHATEVER YOU BRING TO IDENTIFY IT SO THAT WE'LL PUT IT SO IT WON'T CRAMP THE JURY ROOM FOR YOU. OKAY? SEE YOU AFTER LUNCH. THREE O'CLOCK. OKAY?

(THE JURY LEAVES THE JURY BOX AT 1:05 P.M.)

THE COURT: ANYTHING ELSE, GENTLEMEN, BEFORE WE STOP FOR THE LUNCH TIME PERIOD? MR. SWERLING, YOU ASKED ON THE CHARGE THAT AFFECTS THE CREDIBILITY OF THE WITNESSES, I'M GOING TO ADD TO THE STANDARD CHARGE ABOUT THEIR BEING THE FINDERS OF THE FACTS. THIS LANGUAGE IN ESSENCE, IN ADDITION TO ALL THE OTHER THINGS ABOUT THEY CAN BELIEVE ANY PORTION OR PART OF A WITNESS'S TESTIMONY, THAT IN DECIDING WHAT TO BELIEVE YOU

MAY CONSIDER A NUMBER OF FACTORS INCLUDING THE FOLLOWING. OF COURSE, THAT INCLUDES SUCH THINGS AS THE WITNESS'S ABILITY TO HEAR AND KNOW THE THINGS HE TESTIFIED TO, THE QUALITY OF THE WITNESS'S MEMORY, THE MANNER OF TESTIFYING, WHETHER THE WITNESS HAD AN INTEREST IN THE OUTCOME OF THE CASE, ANY MOTIVE, BIAS OR PREJUDICE; WHETHER A WITNESS WAS CONTRADICTED BY ANYTHING THE WITNESS SAID OR WROTE BEFORE TRIAL OR BY OTHER EVIDENCE. I THINK THAT SUFFICIENTLY COVERS THE QUESTION ABOUT PRIOR INCONSISTENT STATEMENTS. ANYTHING ELSE? COURT WILL BE IN RECESS UNTIL THREE O'CLOCK.

(LUNCHEON RECESS)

(COURT RESUMES AT 3:04 P.M.)

MR. SWERLING: IF YOUR HONOR PLEASE, WE SUBMITTED UP TO YOUR HONOR TWO CHARGES ON PRIOR INCONSISTENT STATEMENTS. I JUST SUBMIT THOSE FOR THE COURT'S CONSIDERATION. IN ADDITION, YOUR HONOR, I'D LIKE TO GO AHEAD AND RENEW THE MOTIONS FOR DIRECTED VERDICT MADE AT THE CONCLUSION OF THE STATE'S CASE AND INCORPORATE MY ARGUMENTS NOW THAT I MADE AT THAT TIME IF THE COURT WILL PERMIT THAT.

THE COURT: CERTAINLY. FOR THE SAME REASONS THE COURT DENIED YOUR MOTION AT THE CONCLUSION OF THE STATE'S CASE, THE COURT DENIES YOUR MOTION AT THIS TIME FOR A DIRECTED VERDICT OF NOT GUILTY. DID YA'LL GET COPIES OF THESE?

MR. MORTON: YES, SIR.

THE COURT: ALL RIGHT.

MR. SWERLING: YOUR HONOR, PAGE TWO OF ONE OF THE CHARGES IS NOT APPLICABLE. I DON'T KNOW HOW THAT GOT ON THERE. APPARENTLY IT WAS IN THE COMPUTER.

THE COURT: YOU MEAN THE IMPEACHMENT PART? THE KNOWING PART?

MR. SWERLING: THE KNOWING PART, YES.

THE COURT: I WILL TAKE IT APART. AREN'T YOU ASKING FOR THE SAME THING?

MR. SWERLING: WELL, THAT ARE JUST SAID A DIFFERENT WAY.

THE COURT: YOU AREN'T ENTITLED TO TWO, ARE YOU?

MR. SWERLING: NO, SIR. I'LL LET YOUR HONOR CHOOSE ONE.

THE COURT: ALL RIGHT. WHAT'S YOUR POSITION, SOLICITOR?

MR. MORTON: YOUR HONOR, WE OBJECT TO EITHER ONE OF THEM. I ASSUME THAT THE COURT'S REGULAR CHARGE ON CREDIBILITY I THINK WILL SUFFICE. I THINK IT DRAWN UNNECESSARY ATTENTION TO IT.

THE COURT: IT'S THE COURT'S VIEW THAT THE INSTRUCTION CONCERNING CREDIBILITY OF WITNESSES WHICH I READ TO YOU COVERS THAT SUFFICIENTLY ON THE POINT. THE COURT IS REQUIRED TO CHARGE THE LAW OF THE CASE, NOT EVERY CHARGE REQUESTED UNLESS IT'S SOMETHING UNUSUAL. YOU WANT ME TO HAVE THESE MARKED?

MR. SWERLING: IF YOU WOULD.

(REQUESTS TO CHARGE ARE MARKED AS COURT'S EXHIBITS #5 AND 6)

THE COURT: ANYTHING ELSE?

MR. SWERLING: NOTHING, YOUR HONOR.

THE COURT: BRING THE JURY IN.

(THE JURY RETURNS TO THE JURY BOX AT 3:06 P.M.)

THE COURT: MR. FOREMAN, LADIES AND GENTLEMEN, PLEASE GIVE ME YOUR ATTENTION. YOU FOLLOWED VERY PATIENTLY AND YOU LISTENED VERY ATTENTATIVELY TO THE PRESENTATION OF THE EVIDENCE IN THIS CASE AND I WOULD LIKE TO THANK YOU FOR THAT AND ALSO FOR THE ABLE ARGUMENTS THAT HAVE BEEN MADE BY SOLICITOR MORTON ON BEHALF OF THE STATE AND MR. SWERLING ON BEHALF OF THE DEFENDANT. IT NOW BECOMES THE DUTY OF THIS TRIAL JUDGE UNDER THE CONSTITUTION OF THIS STATE TO CHARGE AND INSTRUCT YOU IN THE LAW APPLICABLE TO THIS CASE AND IT IS YOUR DUTY AS JURORS TO ACCEPT AND APPLY THE LAW AS I WILL NOW STATE IT TO YOU. AS JURORS THEN IT IS YOUR EXCLUSIVE DUTY TO DECIDE ALL OF THE ISSUES OF FACT IN THIS CASE AND FOR THAT PURPOSE TO DETERMINE THE EFFECT, THE VALUE, THE WEIGHT AND THE TRUTH OF THE EVIDENCE. NOW, BOTH THE STATE OF SOUTH CAROLINA AND THIS DEFENDANT HAVE A RIGHT TO EXPECT THAT YOU WILL CONSCIENTIOUSLY CONSIDER AND EVALUATE THE EVIDENCE AND APPLY THE LAW OF THE CASE THERETO TO THE END THAT BOTH THE STATE OF SOUTH CAROLINA AND THIS DEFENDANT WILL RECEIVE AND OBTAIN A FAIR AND IMPARTIAL TRIAL IN THIS CASE.

NOW, THROUGHOUT THESE INSTRUCTIONS WHEN I USE THE WORD DEFENDANT I WILL AT ALL TIMES BEING REFERRING TO RONALD S.

TILLMAN.

NOW, THE STATE OF SOUTH CAROLINA, BY THIS INDICTMENT IN THIS CASE CHARGES THE DEFENDANT, RONALD S. TILLMAN, WITH THE OFFENSE KNOWN IN THE LAW AS MURDER. AND THE INDICTMENT READS THAT HE DID IN RICHLAND COUNTY ON OR ABOUT THE 26TH DAY OF DECEMBER, 1988, FELONIOUSLY, WILFULLY AND WITH MALICE AFORE-THOUGHT KILL ONE DONALD I. SUTTON BY MEANS OF A PISTOL AND THAT THE SAID VICTIM DIED AS A PROXIMATE RESULT THEREOF. NOW, TO THIS CHARGE AND TO THIS INDICTMENT THE DEFENDANT HAS ENTERED A PLEA OF NOT GUILTY. THIS PLEA OF NOT GUILTY BY THE DEFENDANT PLACES THE BURDEN OF PROOF ON THE STATE OF SOUTH CAROLINA TO PROVE BY EVIDENCE THE GUILT OF THE DEFENDANT BEYOND A REASONABLE DOUBT BEFORE YOU, THE JURY, CAN FIND THE DEFENDANT GUILTY. NOW, THE DEFENDANT, RONALD TILLMAN IS PRESUMED IN LAW INNOCENT OF THE CHARGES CONTAINED IN THIS INDICTMENT. IT'S A CARDINAL AND A FUNDAMENTAL RULE OF THE LAW OF EVIDENCE THAT A DEFENDANT IRRESPECTIVE OF THE ENORMITY OF THE CHARGE AGAINST HIM WILL ALWAYS BE PRESUMED INNOCENT OF THE CRIME FOR WHICH HE IS INDICTED UNLESS AND UNTIL THE GUILT OF THE DEFENDANT HAS BEEN PROVED BY EVIDENCE THAT SATISFIES YOU, THIS JURY, OF HIS GUILT BEYOND A REASONABLE DOUBT. NOW, THE PRESUMPTION OF INNOCENCE IS NOT A MERE LEGAL THEORY, IT'S NOT JUST A LEGAL PHRASE. THE PRESUMPTION OF INNOCENCE IS A SUBSTANTIAL RIGHT TO WHICH EVERY ACCUSED PERSON IS ENTITLED. OUR SUPREME COURT HAS DECLARED THAT THE

PRESUMPTION OF INNOCENCE IS LIKE A ROBE OF RIGHTEOUSNESS PLACED ABOUT THE SHOULDERS OF THIS DEFENDANT AND IT REMAINS WITH HIM AND IT ASSIGNS HIM TO THAT CLASS, THE INNOCENT, UNTIL THAT PRESUMPTIVE ROBE OF RIGHTEOUSNESS HAS BEEN STRIPPED FROM HIS PERSON BY EVIDENCE SATISFYING YOU, THE JURY, OF THE GUILT OF THE DEFENDANT BEYOND A REASONABLE DOUBT. NOW, THE PRESUMPTION OF INNOCENCE ACCOMPANIES THE DEFENDANT FROM THE TIME OF HIS ARRAIGNMENT AND APPEARANCE IN THIS COURT AND CONTINUES WITH THE DEFENDANT THROUGHOUT EVERY STAGE OF THIS TRIAL AND IT CONTINUES WITH THE DEFENDANT AFTER YOU RETIRE TO THE JURY ROOM TO DELIBERATE YOUR VERDICT. THE PRESUMPTION OF INNOCENCE CONTINUES IN EXISTENCE TO THE BENEFIT OF THE DEFENDANT UNTIL YOU, THE JURY, REACH THE CONCLUSION THE STATE HAS PROVED THE GUILT OF THE DEFENDANT BEYOND A REASONABLE DOUBT. THEREFORE, THE STATE MUST PROVE THE DEFENDANT GUILTY BEYOND A REASONABLE DOUBT.

WHAT IS A REASONABLE DOUBT IN LAW? A REASONABLE DOUBT IS NOT A FANCIFUL, IMAGINARY, WHIMSICAL, SLIGHT OR WEAK DOUBT. A REASONABLE DOUBT IS A DOUBT WHICH MAKES AN HONEST, SINCERE, CONSCIENTIOUS JUROR IN SEARCH OF THE TRUTH IN THE CASE HESITATE. PROOF BEYOND A REASONABLE DOUBT MUST, THEREFORE, BE PROOF OF SUCH CONVINCING CHARACTER THAT A REASONABLE PERSON WOULD NOT HESITATE TO RELY AND ACT UPON IT IN THE MOST IMPORTANT OF HIS OR HER OWN AFFAIRS. A REASONABLE DOUBT MAY ARISE FROM EVIDENCE WHICH IS IN THE CASE

OR FROM THE LACK OR ABSENCE OF EVIDENCE IN THE CASE. THE JURY, AND YOURSELVES IN THIS CASE, MUST DETERMINE WHETHER OR NOT REASONABLE DOUBT EXISTS AS TO THE GUILT OF THIS DEFENDANT. NOW, I CHARGE YOU THAT THE DEFENDANT IS ENTITLED TO EVERY REASONABLE DOUBT ARISING IN THE WHOLE CASE OR ARISING IN ANY DEFENSES ASSERTED BY THE DEFENDANT. IF UPON ANY ISSUE OF FACT ESSENTIAL TO CONVICTION AND A VERDICT OF GUILTY YOU HAVE A REASONABLE DOUBT AS TO HOW THAT ISSUE SHOULD BE RESOLVED, IT WOULD BE YOUR DUTY TO RESOLVE THAT REASONABLE DOUBT IN FAVOR OF THE DEFENDANT. A DEFENDANT, LADIES AND GENTLEMEN, IS NOT REQUIRED TO PROVE HIS INNOCENCE BUT THE STATE OF SOUTH CAROLINA IS REQUIRED IN LAW TO PROVE EVERY ESSENTIAL ELEMENT OF THE OFFENSE CHARGED AGAINST THE DEFENDANT BY EVIDENCE WHICH SATISFIES YOU, THE JURY, OF THE GUILT OF THE DEFENDANT BEYOND A REASONABLE DOUBT BEFORE YOU CAN CONVICT THE DEFENDANT AND FIND HIM GUILTY. THEREFORE, IF UPON THE WHOLE CASE YOU HAVE A REASONABLE DOUBT AS TO THE GUILT OR INNOCENCE OF THE DEFENDANT, HE IS ENTITLED TO THAT REASONABLE DOUBT AND WOULD BE ENTITLED TO AN ACQUITTAL AND A VERDICT OF NOT GUILTY. LIKEWISE, IF YOU HAVE A REASONABLE DOUBT AS TO WHETHER OR NOT THE DEFENDANT HAS MADE OUT HIS DEFENSES, THEN HE WOULD BE ENTITLED TO THAT REASONABLE DOUBT AND WOULD BE ENTITLED TO AN ACQUITTAL AND A VERDICT OF NOT GUILTY. BUT ON THE OTHER HAND, IF UPON THE WHOLE CASE YOU FIND THAT THE STATE HAS PROVED BY EVIDENCE WHICH SATISFIES

YOU, THE JURY, OF THE GUILT OF THE DEFENDANT BEYOND A REASONABLE DOUBT, THEN IN SUCH CIRCUMSTANCES IT WOULD EQUALLY BE YOUR DUTY TO CONVICT THE DEFENDANT AND FIND HIM GUILTY.

I INSTRUCT YOU AS I HAVE PREVIOUSLY DONE SO IN THIS CASE THAT THE INDICTMENT WHICH YOU HAVE WILL YOU IN JUST A MOMENT IS NOT EVIDENCE AND IT CANNOT BE CONSIDERED BY YOU, THE JURY, AS EVIDENCE IN THIS CASE. THE INDICTMENT, WHICH AGAIN I HOLD IN MY HAND FOR YOU, IS SIMPLY THE FORMAL WRITTEN INSTRUMENT WHICH CONTAINS THE CHARGE OR CHARGES AGAINST THE DEFENDANT AND IT SERVES AS THE FORMAL DOCUMENT BY WHICH THIS CASE IS PROCESSED INTO THIS COURTROOM.

NOW, LADIES AND GENTLEMEN, DURING THIS TRIAL EACH OF US, YOU AND I BOTH, HAVE CERTAIN DUTIES TO PERFORM. AS THE TRIAL JUDGE, IT IS MY RESPONSIBILITY TO PRESIDE OVER THE TRIAL OF THIS CASE AND I ALSO HAVE THE DUTY TO RULE UPON OR PASS UPON THE ADMISSIBILITY OF THE EVIDENCE THAT WAS OFFERED DURING THE PROGRESS OF THIS TRIAL. AND YOU ARE TO CONSIDER ONLY THE COMPETENT EVIDENCE BEFORE YOU AND YOU ARE TO DISREGARD AND DISABUSE FROM YOUR MINDS ANY TESTIMONY THAT I HAVE ORDERED STRICKEN FROM THE RECORD OF THIS CASE DURING THE PROGRESS OF THE TRIAL AND YOU ARE TO CONSIDER ONLY THE TESTIMONY WHICH HAS BEEN PRESENTED FROM THIS WITNESS STAND, TOGETHER WITH ANY EXHIBITS WHICH I HAVE ADMITTED INTO THE RECORD OF THIS CASE, AND ANY STIPULATIONS OF COUNSEL THAT HAVE BEEN MADE AND PLACED INTO THE RECORD OF THIS CASE. NOW, I ALSO HAVE THE

ADDITIONAL DUTY TO CHARGE YOU THE APPLICABLE LAW IN THIS CASE. I AS THE PRESIDING JUDGE AM THE SOLE JUDGE OF THE LAW OF THIS CASE. AND IT IS YOUR DUTY TO ACCEPT THE LAW AS I NOW STATE IT TO YOU. IF YOU HAVE A PRECONCEIVED IDEA AS TO WHAT THE LAW IS OR WHAT THE LAW OUGHT TO BE IN THIS CASE AND IT SHOULD NOT AGREE WITH WHAT I TELL YOU THE LAW IS, YOU ARE OBLIGATED UNDER YOUR OATH TO ABANDON THIS PRECONCEPTION ON YOUR PART BECAUSE YOU ARE SWORN TO ACCEPT THE LAW PRECISELY AS I NOW STATE IT TO YOU.

NOW, AS I'VE STATED TO YOU IN EVERY CASE THAT'S TRIED IN THIS COURT BEFORE A JURY THE JURY, YOURSELVES, BECOME THE SOLE AND EXCLUSIVE JUDGES OF THE FACTS OF THE CASE. YOU ARE THE JUDGES OF THE FACTS IN THIS CASE. AS I TOLD YOU, I AM THE JUDGE OF THE LAW. THE CONSTITUTION OF THE STATE OF SOUTH CAROLINA HAS DECLARED THAT A TRIAL JUDGE, SUCH AS MYSELF, SHALL NOT INTIMATE, STATE, COMMENT UPON OR MAKE ANY STATEMENT TO A TRIAL JURY ABOUT THE FACTS IN A CASE. SINCE THEN YOU ARE THE SOLE JUDGES OF THE FACTS, YOU ARE NOT TO INFER FROM ANYTHING THAT I HAVE SAID DURING THE PROGRESS OF THIS TRIAL IN RULING UPON THE ADMISSIBILITY OF THE EVIDENCE OR OTHERWISE OR ANYTHING THAT I NOW SAY TO YOU DURING THE COURSE OF THIS CHARGE THAT I HAVE ANY OPINION ABOUT THE FACTS IN THIS CASE. THE LAW DOES NOT PERMIT ME TO HAVE AN OPINION ABOUT THE FACTS IN THE CASE. THAT IS A MATTER SOLELY FOR YOU, THE JURY, TO DETERMINE. AND AS JURORS THEN IT IS YOUR DUTY TO DETERMINE

AS I HAVE STATED IT TO YOU THE EFFECT, THE VALUE, THE WEIGHT AND THE TRUTH OF THE EVIDENCE PRESENTED DURING THE COURSE OF THIS TRIAL.

NOW, NECESSARILY THEN YOU MUST ASSESS THE CREDIBILITY OF THE WITNESSES WHO HAVE TESTIFIED IN THIS CASE. CREDIBILITY IS SIMPLY A LEGALISTIC TERM WHICH MEANS BELIEVABILITY. IT BECOMES YOUR DUTY THEN TO ANALYZE AND TO EVALUATE THE EVIDENCE AND TO DETERMINE THAT EVIDENCE WHICH CONVINCES YOU OF ITS TRUTH. I CHARGE YOU THEN IN DETERMINING THE QUESTION OF THE CREDIBILITY OR THE BELIEVABILITY OF THE WITNESSES, YOU MAY BELIEVE ONE WITNESS AS AGAINST SEVERAL WITNESSES OR SEVERAL WITNESSES AS AGAINST ONE WITNESS. YOU MAY BELIEVE A PART OF THE TESTIMONY OF A WITNESS AND REJECT THE REMAINING PART OF THE TESTIMONY OF THAT SAME WITNESS. YOU MAY BELIEVE THE TESTIMONY OF A WITNESS IN ITS ENTIRETY OR REJECT THE TESTIMONY OF A WITNESS IN ITS ENTIRETY. YOU MAY CONSIDER WHETHER ANY WITNESS HAS EXHIBITED ANY INTEREST, ANY BIAS OR AN PREJUDICE IN THIS CASE. YOU MAY CONSIDER THE DEMEANOR OF A WITNESS, THAT IS, THE APPEARANCE OF THE WITNESS FROM THE WITNESS STAND. YOU MAY CONSIDER THE QUALITY OF THE WITNESS'S MEMORY. YOU MAY ALSO CONSIDER WHETHER THE WITNESS WAS CONTRADICTED BY ANYTHING THE WITNESS SAID OR WROTE BEFORE TRIAL OR BY OTHER EVIDENCE. AND YOU MAY ALSO CONSIDER HOW REASONABLE WAS THE WITNESS'S TESTIMONY WHEN CONSIDERED IN THE LIGHT OF OTHER EVIDENCE WHICH YOU BELIEVE. NOW, YOU MAY ALSO

CONSIDER THE OPPORTUNITY FOR KNOWLEDGE CONCERNING THOSE THINGS I'VE TOLD YOU ABOUT WHICH A WITNESS HAS TESTIFIED. NOW, THESE CONSIDERATIONS, LADIES AND GENTLEMEN, YOU DO NOT EXERCISE ARBITRARILY, HOWEVER, IF IN YOUR GOOD JUDGMENT THERE IS SOUND REASON IN THE RECORD OF THIS CASE FOR SO DOING BECAUSE, LADIES AND GENTLEMEN, YOUR OBJECTIVE IS TO FIND THE TRUTH WHETHER IT COMES FROM A WITNESS OR WITNESSES FOR THE STATE OF SOUTH CAROLINA OR A WITNESS OR WITNESSES FOR THE DEFENDANT. AND IN SO DOING, IN EXERCISING YOUR MENTAL PROCESSES AND IN DETERMINING WHAT YOU CONSIDER TO BE TRUTH, THE LAW SIMPLY REQUIRES THAT YOU EXERCISE YOUR GOOD JUDGMENT,YOUR COMMON SENSE, YOUR SENSE OF LOGIC AND REASON AND YOUR EXPERIENCES IN LIFE. YOU THEN, OF COURSE, TAKE THESE ATTRIBUTES OF ABILITY AND APPLY IT TO THE EVIDENCE AND DETERMINE WHAT YOU CONSIDER THE TRUTHFUL EVIDENCE AND TO THESE TRUE STATE OF FACTS AS DETERMINED BY YOU, THE JURY, YOU THEN TAKE AND APPLY THE LAW AS I WILL NOW STATE IT TO YOU AND THUS ARRIVE AT A TRUE VERDICT IN THIS CASE.

LADIES AND GENTLEMEN, THE DEFENDANT IN THIS CASE IS CHARGED BY THIS INDICTMENT WITH THE OFFENSE OF MURDER. SECTION 16-3-10 OF THE CODE OF LAWS FOR THE STATE OF SOUTH CAROLINA STATES THAT MURDER IS THE KILLING OF ANY PERSON WITH MALICE AFORETHOUGHT EITHER EXPRESSED OR IMPLIED. NOW, AS I STATED TO YOU IN PARAPHRASING THAT STATEMENT THAT MURDER IS THE UNLAWFUL KILLING OF ANY PERSON WITH MALICE AFORETHOUGHT

EITHER EXPRESSED OR IMPLIED; THEREFORE, HENCE, IN ORDER TO CONVICT A PERSON OF MURDER THE STATE OF SOUTH CAROLINA MUST NOT ONLY PROVE THE KILLING OF THE DECEASED BY THE DEFENDANT, BUT THEY MUST ALSO PROVE THAT IT WAS DONE WITH MALICE AFORE-THOUGHT AND SUCH PROVE MUST BE BEYOND A REASONABLE DOUBT. MALICE AFORETHOUGHT IS AN ESSENTIAL ELEMENT IN THE CRIME OF MURDER. NOW, WHAT IS MALICE THEN? MALICE IS DEFINED IN THE LAW OF HOMICIDE AS A TERM OF ART, THAT IS, A TECHNICAL TERM, IMPORTING WICKEDNESS AND EXCLUDING JUST CAUSE OR LEGAL EXCUSE. IT IS SOMETHING WHICH SPRINGS FROM WICKEDNESS, FROM DEPRAVITY, FROM A DEPRAVED SPIRIT, FROM A HEART DEVOID OF SOCIAL DUTY AND FATALLY BENT ON MISCHIEF. THE WORDS EXPRESSED OR IMPLIED MALICE DO NOT MEAN DIFFERENT KINDS OF MALICE BUT MERELY THE MANNER IN WHICH THE ONLY KIND OF MALICE KNOWN TO THE LAW MAY BE SHOWN TO EXIST. THAT IS TO SAY EITHER BY DIRECT EVIDENCE OR BY INFERENCE. NOW, MALICE MAY BE EXPRESSED AS WHERE PREVIOUS THREATS OF VENGEANCE OR LYING IN WAIT OR OTHER CIRCUMSTANCES SHOW DIRECTLY THAT AN INTENT TO KILL WAS ENTERTAINED. MALICE MAY BE INFERRED WHERE THOUGH NO EXPRESSED INTENT TO KILL IS PROVED BY DIRECT EVIDENCE IT MAY BE INFERRED FROM THE FACTS AND CIRCUMSTANCES WHICH ARE PROVED. NOW, MALICE MAY BE INFERRED FROM THE WILFUL, DELIBERATE AND INTENTIONAL DOING OF AN UNLAWFUL ACT WITHOUT JUST CAUSE OR LEGAL EXCUSE. IN OTHER WORDS, IN ITS GENERAL SIGNIFICATION MALICE MEANS THE DOING OF A WRONGFUL ACT

INTENTIONALLY WITHOUT JUSTIFICATION OR LEGAL EXCUSE. BUT EVEN IF FACTS PROVED ARE SUFFICIENT TO RAISE AN INFERENCE OF MALICE, THIS INFERENCE WOULD BE SIMPLY AN EVIDENTIARY FACT TO BE TAKEN INTO CONSIDERATION BY YOU, THE JURY, ALONG WITH ALL THE OTHER EVIDENCE IN THE CASE AND YOU MAY GIVE IT SUCH WEIGHT AS YOU DETERMINE IT SHOULD RECEIVE AS TO WHETHER OR NOT MALICE HAS BEEN PROVED BEYOND A REASONABLE DOUBT. I ALSO INSTRUCT YOU THAT WHILE MALICE MAY BE INFERRED FROM THE USE OF A DEADLY WEAPON WHERE THE CIRCUMSTANCES RELATING TO THE HOMICIDE ARE BROUGHT OUT IN THE EVIDENCE THIS INFERENCE VANISHES AND THE BURDEN IS ON THE STATE TO PROVE MALICE BY EVIDENCE SATISFYING THE JURY BEYOND A REASONABLE DOUBT. AND ONCE AGAIN, LADIES AND GENTLEMEN, IT WILL BE OBSERVED THAT THERE MUST BE MALICE AFORETHOUGHT. AND WHILE THE LAW DOES NOT REQUIRE THAT MALICE SHALL EXIST FOR ANY PARTICULAR LENGTH OF TIME BEFORE THE COMMISSION OF THE ACT, IT MUST BE AFORETHOUGHT. THERE MUST BE A COMBINATION OF THE PREVIOUS EVIL INTENT AND THE ACT PRODUCING THE FATAL RESULT, BUT THE STATE SOUTH CAROLINA IS NOT REQUIRED TO PROVE A MOTIVE FOR A HOMICIDE.

I CHARGE YOU, LADIES AND GENTLEMEN, AND INSTRUCT YOU AND I EMPHASIZE TO YOU THAT THE FAILURE OF A DEFENDANT IN THE TRIAL OF A CRIMINAL CASE TO TESTIFY IN HIS OWN BEHALF IS NOT A FACTOR TO BE CONSIDERED BY YOU IN ANY WAY IN YOUR DELIBERATIONS AND IN YOUR CONSIDERATION ON THE QUESTION OF

THE GUILT OR INNOCENCE OF THE ACCUSED. IT MUST NOT BE CONSIDERED BY YOU IN ANY MANNER WHATSOEVER AGAINST THE DEFENDANT OR MITIGATE AGAINST HIM IN ANY RESPECT WHATSOEVER. A DEFENDANT HAS THE CONSTITUTIONAL RIGHT TO REMAIN SILENT AND THE ASSERTION OF SUCH CONSTITUTIONAL RIGHT CANNOT AND MUST NOT BE CONSIDERED BY YOU IN YOUR DELIBERATIONS. UNDER YOUR OATH THEN AS JURORS YOU ARE TO REACH NO INFERENCE AND DRAW NO CONCLUSION WHATSOEVER FROM THE FACT THAT THE DEFENDANT IN THIS CASE DID NOT HIMSELF TESTIFY. THE FAILURE OF THIS DEFENDANT TO TESTIFY SHOULD NOT EVEN BE DISCUSSED IN THE JURY ROOM. THE BURDEN OF PROOF AS I HAVE STATED TO YOU IS UPON THE STATE OF SOUTH CAROLINA. IT IS NOT INCUMBENT UPON THE ACCUSED TO PROVE HIS INNOCENCE. THE BURDEN OF PROOF REMAINS UPON THE STATE TO PROVE GUILT BEYOND A REASONABLE DOUBT AND THE FAILURE OF A DEFENDANT TO TESTIFY IS NOT A FACTOR TO BE CONSIDERED BY YOU IN DETERMINING THE GUILT OR INNOCENCE OF A DEFENDANT.

I CHARGE YOU, LADIES AND GENTLEMEN, NOW WITH RESPECT TO WHAT IS KNOWN AS THE DEFENSE OF ALIBI. AS I HAVE STATED TO YOU PREVIOUSLY, THE STATE MUST PROVE EVERY ELEMENT OF THE OFFENSE CHARGED IN THIS CASE, THAT IS, THE OFFENSE OF MURDER, AND MUST PROVE EVERY ELEMENT BEYOND A REASONABLE DOUBT. ONE OF THE ELEMENTS WHICH THE STATE IS REQUIRED TO PROVE IS THAT A DEFENDANT WAS THE PERSON WHO COMMITTED THE OFFENSE. THE DEFENDANT HAS PLED IN THIS CASE WHAT IS CALLED IN THE LAW THE

PLEA OF ALIBI. THAT MEANS THAT HE WAS NOT AT THE SCENE OF THE CRIME AT THE TIME IT WAS COMMITTED BUT THAT HE WAS ELSEWHERE AND THAT HE HAD NOTHING TO DO WITH IT. NOW, THERE IS NO BURDEN UPON THE ACCUSED TO PROVE THAT HE WAS NOT AT THE SCENE OF THE CRIME. THERE IS NO BURDEN UPON HIM TO PROVE HIS ALIBI. THE BURDEN IS UPON THE STATE OF SOUTH CAROLINA TO PROVE THAT HE WAS ACTUALLY PRESENT AT THE SCENE OF THE CRIME AND THAT HE ACTUALLY COMMITTED IT AND THAT HE WAS NOT ELSEWHERE. AND AS I HAVE INSTRUCTED YOU THE STATE MUST PROVE THAT ALLEGATION, AS ALL OTHER ALLEGATIONS ARE REQUIRED TO BE PROVED BY THE STATE, BY EVIDENCE SATISFYING THE JURY BEYOND A REASONABLE DOUBT.

NOW, LADIES AND GENTLEMEN, I ADMITTED INTO THE RECORD OF THIS CASE EVIDENCE OF AN ALLEGED PRIOR RECORD OF A WITNESS OR WITNESSES. THIS EVIDENCE WAS ADMITTED FOR A LIMITED PURPOSE AND THIS EVIDENCE WAS ADMITTED AND MAY BE CONSIDERED BY YOU, THE JURY, IF YOU CONCLUDE IT TRUE, ONLY FOR THE PURPOSE OF EVALUATING THE CREDIBILITY OR BELIEVABILITY OF THAT WITNESS. YOU MAY GIVE TO THIS EVIDENCE SUCH WEIGHT AND SUCH VALUE, IF ANY, TO WHICH YOU FIND IT IS ENTITLED ON THE SOLE ISSUE OF THE CREDIBILITY OR THE BELIEVABILITY OF THE TESTIMONY OFFERED BY THAT WITNESS HIMSELF.

MR. FOREMAN, LADIES AND GENTLEMEN, DURING THE TRIAL OF THIS MATTER WE'VE HAD WHAT IS KNOWN OR CALLED EXPERT TESTIMONY. I TELL YOU THAT ORDINARILY WITNESSES CANNOT

TESTIFY AS TO THEIR OPINION OF A MATTER. AN EXCEPTION TO THIS RULE IS WHERE A WITNESS QUALIFIES AS AN EXPERT AND IN SUCH AN EVENT THEN SUCH A WITNESS MAY GIVE AN OPINION. NOW, THESE ARE PERSONS WHO BY EDUCATION AND EXPERIENCE HAVE BECOME EXPERT IN SOME FIELD AND, THEREFORE, MAY STATE THEIR OPINIONS ON MATTERS IN THAT FIELD AND MAY ALSO STATE THEIR REASONS FOR THE OPINION. NOW, INSOFAR AS CONCERNS THE OPINION EVIDENCE, AND THAT IS TO SAY THE EFFECT OF ANY EXPERT WHICH IS A MATTER OF OPINION, THEY SHOULD BE JUDGED JUST LIKE ANY OTHER TESTIMONY. YOU MAY ACCEPT IT OR REJECT IT AND GIVE IT AS MUCH WEIGHT AS YOU THINK IT DESERVES CONSIDERING THE WITNESS'S EDUCATION AND EXPERIENCE, THE REASONS GIVEN FOR THE OPINION AND ALL THE OTHER EVIDENCE IN THE CASE.

MR. FOREMAN, LADIES AND GENTLEMEN, I'M FAIRLY CLOSE TO COMPLETION. A LITTLE WHILE LONGER. I'M NOT GOING TO INSTRUCT YOU AND DEFINE FOR YOU WHAT WE CALL IN LAW CIRCUMSTANTIAL EVIDENCE. THERE ARE TWO KINDS OF EVIDENCE, DIRECT EVIDENCE AND INDIRECT EVIDENCE OR CIRCUMSTANTIAL EVIDENCE. THE FACTS IN A CASE MAY BE PROVED BY DIRECT EVIDENCE OR BY CIRCUMSTANTIAL EVIDENCE OR BY A COMBINATION OF BOTH DIRECT EVIDENCE AND CIRCUMSTANTIAL EVIDENCE. NOW, DIRECT EVIDENCE OF A FACT MAY BE PROVED BY THE TESTIMONY OF A PERSON WHO PERCEIVES--I MEAN SAW THE EXISTENCE OF A FACT BY MEANS OF HIS OR HER SENSES. ONCE AGAIN, SUCH AS WHERE A PERSON SEES A CRIME COMMITTED AND COMES INTO COURT AND

TESTIFIES AS TO WHAT HE OR SHE SAW. CIRCUMSTANTIAL EVIDENCE MEANS THE PROOF OF SOME OTHER FACT OR FACTS WHICH EITHER TAKEN SINGLY OR COLLECTIVELY THE EXISTENCE OF A PARTICULAR FACT IN ISSUE MAY BE INFERRED AS A NECESSARY CONSEQUENCE. CRIME MAY BE PROVED BY CIRCUMSTANTIAL EVIDENCE AS WELL AS BY DIRECT EVIDENCE. CIRCUMSTANTIAL EVIDENCE IS GOOD PROVIDED IT MEETS THE TEST REQUIRED BY LAW. WHEN AND TO THE EXTENT THE STATE OF SOUTH CAROLINA RELIES ON CIRCUMSTANTIAL EVIDENCE, THE STATE MUST PROVE ALL THE CIRCUMSTANCES RELIED BY BEYOND A REASONABLE DOUBT. THE CIRCUMSTANCES MUST BE WHOLLY AND IN EVERY PARTICULAR CONSISTENT EACH WITH THE OTHER AND THE CIRCUMSTANCES MUST POINT CONCLUSIVELY, THAT IS, TO A MORAL CERTAINTY, TO THE GUILT OF THE ACCUSED TO THE EXCLUSION OF EVERY OTHER REASONABLE HYPOTHESIS. THAT IS, THE CIRCUMSTANCES MUST BE ABSOLUTELY INCONSISTENT WITH ANY OTHER REASONABLE HYPOTHESIS OTHER THAN THE GUILT OF THE ACCUSED. NOW, IN CONSIDERATION OF THE CIRCUMSTANTIAL EVIDENCE THE JURY MUST SEEK SOME OTHER REASONABLE EXPLANATION OTHER THAN THE GUILT OF THE ACCUSED AND IF SUCH REASONABLE EXPLANATION CAN BE FOUND THE JURY CANNOT CONVICT ON SUCH CIRCUMSTANTIAL EVIDENCE ALONE. THAT IS, IF THE JURY MAKES SUCH A DETERMINATION THEN YOU WOULD IN SUCH A CASE SET ASIDE SUCH CIRCUMSTANTIAL EVIDENCE AND DISREGARD IT AND ACQUIT THE DEFENDANT UNLESS THE STATE OF SOUTH CAROLINA HAS PROVED BY DIRECT EVIDENCE THE GUILT OF THE ACCUSED BEYOND A REASONABLE

DOUBT. NOW, I FURTHER CHARGE YOU THAT THE MERE FACT THAT THE CIRCUMSTANCES ARE STRONGLY SUSPICIOUS AND THE GUILT OF THE DEFENDANT IS PROBABLE IS NOT SUFFICIENT TO SUSTAIN A CONVICTION BECAUSE THE PROOF OFFERED BY THE STATE MUST EXCLUDE EVERY OTHER REASONABLE HYPOTHESIS EXCEPT THE GUILT OF THE ACCUSED AND SUCH PROOF MUST SATISFY THE JURY BEYOND A REASONABLE DOUBT WHEN THE STATE RELIES UPON CIRCUMSTANTIAL EVIDENCE ALONE. I INSTRUCT YOU THAT THE TWO PHRASES PROOF BEYOND A REASONABLE DOUBT AND PROOF TO A MORAL CERTAINTY ARE SYNONYMOUS AND THE LEGAL EQUIVALENT OF EACH OTHER. THESE PHRASES CONNOTE, HOWEVER, A DEGREE OF PROOF DISTINGUISHED FROM AN ABSOLUTE CERTAINTY.

NOW, LADIES AND GENTLEMEN, DURING THE COURSE OF THE TRIAL OF THE CASE I ADMITTED INTO THE RECORD OF THIS CASE A STATEMENT ALLEGED TO HAVE BEEN MADE BY THE DEFENDANT. BEFORE YOU MAY CONSIDER THE STATEMENT AS EVIDENCE FOR ANY PURPOSE YOU MUST DETERMINE FOUR QUESTIONS. DID THE DEFENDANT MAKE THE STATEMENT? WAS THE DEFENDANT WARNED OF HIS CONSTITUTIONAL RIGHTS? DID THE DEFENDANT KNOWINGLY AND INTELLIGENTLY WAIVE HIS CONSTITUTIONAL RIGHTS? WAS THE STATEMENT GIVEN VOLUNTARILY. NOW, THE FACT THAT I, THE COURT, HAS ADMITTED A STATEMENT INTO EVIDENCE SHOULD NOT BE CONSIDERED BY YOU, THE JURY, AS ANY EVIDENCE WHATSOEVER THAT THE DEFENDANT MADE SUCH A STATEMENT OR THAT THE CONSTITUTIONAL SAFEGUARDS WHICH ARE REQUIRED WERE IN FACT

PROVIDED AND WAIVED BY THE DEFENDANT OR THAT THE STATEMENT WAS VOLUNTARILY GIVEN BECAUSE THESE ARE ISSUES FOR YOU, THE JURY, TO DETERMINE, NOT THE COURT. THE STATE MUST PROVE BEYOND A REASONABLE DOUBT EACH OF THE FOUR ESSENTIALS OR THE FOUR REQUIREMENTS WHICH I HAVE JUST READ TO YOU BEFORE YOU MAY CONSIDER THE STATEMENT AS EVIDENCE FOR ANY PURPOSE WHATSOEVER. SO THAT YOU WILL UNDERSTAND THOSE FOUR, I'M GOING TO OUTLINE AND EXPLAIN THEM TO YOU. AS TO THE FIRST REQUIREMENT, DID THE DEFENDANT MAKE A STATEMENT, IF YOU CONCLUDE THAT THE DEFENDANT DID NOT MAKE THE STATEMENT YOU MUST THEN COMPLETELY AND TOTALLY DISREGARD THE STATEMENT. IF YOU CONCLUDE THE DEFENDANT DID NOT MAKE THE STATEMENT, YOU CANNOT AND YOU MUST NOT CONSIDER THE STATEMENT AS EVIDENCE IN ANY MANNER WHATSOEVER AND YOU SHOULD COMPLETELY DISREGARD THE STATEMENT IN ITS ENTIRETY AND EVERY PART OF IT. IF, HOWEVER, YOU FIND THAT THE DEFENDANT DID MAKE THE STATEMENT, YOU MUST THEN NEXT CONSIDER THE SECOND REQUIREMENT, WAS THE DEFENDANT WARNED OF HIS CONSTITUTIONAL RIGHT. NOW, LADIES AND GENTLEMEN, WHEN A DEFENDANT OR AN INDIVIDUAL IS TAKEN INTO CUSTODY OR OTHERWISE DEPRIVED OF HIS OR HER FREEDOM OF ACTION IN ANY SIGNIFICANT WAY BY POLICE OR LAW ENFORCEMENT OFFICER, THAT PERSON MUST BE WARNED OF HIS CONSTITUTIONAL RIGHTS PRIOR AND BEFORE ANY CUSTODIAL INTERROGATION OR CUSTODIAL QUESTIONING. WHAT ARE THESE RIGHTS? THEY ARE THAT HE HAS A RIGHT TO REMAIN SILENT, THAT ANY STATEMENT THAT HE

DOES MAKE CAN AND WILL BE USED AGAINST HIM IN A COURT OF LAW, THAT HE HAS A RIGHT TO SELECT A LAWYER OF HIS CHOICE BUT IF HE DOES NOT HAVE THE MONEY OR RESOURCES TO EMPLOY A LAWYER THAT THE COURT WILL APPOINT A LAWYER TO REPRESENT HIM WITHOUT COST OR EXPENSE TO HIM IF HE DESIRES, THAT HE HAS A RIGHT TO CONSULT A LAWYER BEFORE ANSWERING ANY QUESTIONS OR MAKING ANY STATEMENT, THAT HE HAS A RIGHT TO HAVE THAT LAWYER PRESENT WITH HIM AT ALL TIMES DURING ALL INTERVIEWS AND ALL INTERROGATIONS. NOW, IF YOU DETERMINE THAT THESE CONSTITUTIONAL WARNINGS WERE NOT GIVEN TO THE DEFENDANT PRIOR TO THE INTERROGATION AND THE TAKING OF THE STATEMENT OR THAT THE DEFENDANT WAS NOT AFFORDED THE OPPORTUNITY TO EXERCISE THESE RIGHTS, YOU MUST COMPLETELY DISREGARD THE STATEMENT AND YOU CANNOT CONSIDER THE STATEMENT AS EVIDENCE IN ANY MANNER WHATSOEVER. IF YOU FIND THAT THE DEFENDANT DID MAKE THE STATEMENT AND IF YOU CONCLUDE THAT THE CONSTITUTIONAL WARNINGS WERE IN FACT GIVEN THE DEFENDANT AND THAT THE DEFENDANT WAS AFFORDED AN OPPORTUNITY TO EXERCISE THESE CONSTITUTIONAL RIGHTS, THEN YOU MUST NEXT CONSIDER THE THIRD REQUIREMENT. THAT IS, DID THE DEFENDANT KNOWINGLY AND INTELLIGENTLY WAIVE THESE CONSTITUTIONAL RIGHTS WHICH I HAVE JUST READ TO YOU. NOW, BEFORE YOU CAN CONSIDER THE STATEMENT AS EVIDENCE IN THE CASE THE STATE MUST PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT AFTER BEING GIVEN THOSE CONSTITUTIONAL WARNINGS WHICH I READ TO YOU DID KNOWINGLY AND

INTELLIGENTLY WAIVE HIS CONSTITUTIONAL RIGHTS, WHICH MEANS TO GIVE UP, AND AGREED TO ANSWER QUESTIONS AND MAKE A STATEMENT. THEREFORE, IF YOU FIND THE DEFENDANT DID NOT KNOWINGLY AND INTELLIGENTLY WAIVE HIS CONSTITUTIONAL RIGHTS THEN ANY ANSWER GIVEN BY HIM OR ANY STATEMENT MADE BY HIM CANNOT BE USED AGAINST HIM AND YOU MUST AS JURORS COMPLETELY DISREGARD ALL THE TESTIMONY CONCERNING ANY SUCH ANSWERS OR ALLEGED STATEMENT. IF YOU FIND THAT THE DEFENDANT DID MAKE THE STATEMENT, HOWEVER, AND IF YOU CONCLUDE THAT THE CONSTITUTIONAL WARNINGS WERE IN FACT GIVEN TO THE DEFENDANT AND THAT THE DEFENDANT WAS AFFORDED AN OPPORTUNITY TO EXERCISE THESE CONSTITUTIONAL RIGHTS AND THEN THAT YOU FURTHER FIND THE DEFENDANT AFTER HAVING BEEN GIVEN THESE CONSTITUTIONAL WARNINGS DID KNOWINGLY AND INTELLIGENTLY WAIVE, WHICH MEANS GIVE UP, HIS CONSTITUTIONAL RIGHTS AND AGREED TO ANSWER QUESTIONS AND MAKE A STATEMENT YOU MUST THEN CONSIDER THE NEXT AND THE FOURTH REQUIREMENT. THAT IS, WAS THAT STATEMENT GIVEN VOLUNTARILY. YOU KNOW, THE WORD VOLUNTARILY MEANS THAT A STATEMENT WAS THE EXPRESSION OF THE DEFENDANT'S OWN FREE WILL AND WAS NOT INDUCED BY PRESSURE, BY FORCE, BY FEAR OR BY INFLUENCE OR THE HOPE OR PROMISE OF SOME BENEFIT OR REWARD OR THAT IT WAS EXTRACTED BY THREATS OR COERCION OR INTIMIDATION. A STATEMENT IS NOT VOLUNTARY AND IT MAY NOT BE USED AGAINST THE DEFENDANT UNLESS IT IS THE PRODUCT OF AN ESSENTIALLY FREE AND UNCONSTRAINED CHOICE BY

ITS MAKER. YOU KNOW, IF THE STATEMENT IS VOLUNTARY, IF THE DEFENDANT HAS WILLED TO MAKE A STATEMENT--THAT MEANS HE CHOSE TO DO SO--IT MAY BE USED AGAINST HIM. THE TRUE TEST TO BE APPLIED IS WHETHER SUCH STATEMENT IS FREELY, VOLUNTARILY AND UNDERSTANDINGLY MADE WITHOUT COMPULSION OR INDUCEMENT. NOW, IN DETERMINING WHETHER OR NOT THE ALLEGED STATEMENT OF THE DEFENDANT WAS VOLUNTARY, YOU AS JURORS MAY CONSIDER ALL THE FACTS AND CIRCUMSTANCE SURROUNDING THE TAKING OR THE MAKING OF THE STATEMENT CONCERNING AND RELATING TO THE VOLUNTARY OR INVOLUNTARY CHARACTER THEREOF, AND YOU MAY CONSIDER ALL OF THE EVIDENCE IN THIS CASE IN REACHING AN ULTIMATE CONCLUSION AS TO THE VOLUNTARY OR INVOLUNTARY CHARACTER OF ANY SUCH STATEMENT. THEREFORE, THE ULTIMATE QUESTION TO BE RESOLVED BY YOU, THE JURY, WITH RESPECT TO THE ALLEGED STATEMENT OF THE DEFENDANT IN ADDITION TO THE QUESTIONS OF WHETHER OR NOT THE DEFENDANT IN FACT MADE THE STATEMENT AND WHETHER OR NOT HIS CONSTITUTIONAL RIGHTS WERE OBSERVED AND KNOWINGLY AND INTELLIGENTLY WAIVED BY HIM IS THIS: WAS THE STATEMENT THE EXPRESSION OF THE DEFENDANT'S FREE WILL MADE WITHOUT COMPULSION OR INDUCEMENT BUT REPRESENTING AN ESSENTIALLY FREE AND UNCONSTRAINED CHOICE BY THE DEFENDANT OR WAS IT THE PRODUCT OF THE OVERBORNE WILL OF THE DEFENDANT. NOW, WITH REGARD TO THE ALLEGED STATEMENT OF THE DEFENDANT, I INSTRUCT YOU THAT THE STATE OF SOUTH CAROLINA MUST PROVE BY EVIDENCE EACH AND EVERY REQUIREMENT ABOUT WHICH I HAVE JUST INSTRUCTED

YOU AND SUCH PROOF MUST BEYOND A REASONABLE DOUBT BEFORE YOU MAY CONSIDER THE ALLEGED STATEMENT AS EVIDENCE IN THIS CASE. ABSENT ANY ONE OF THE REQUIREMENTS ABOUT WHICH I HAVE JUST INSTRUCTED YOU THE ALLEGED STATEMENT MUST BE DISREGARDED COMPLETELY AND YOU WILL ACCORD NO EVIDENTIAL WEIGHT WHATSOEVER TO IT OR ANY PART OF IT. ON THE OTHER HAND, IF YOU FIND BEYOND A REASONABLE DOUBT THAT THE DEFENDANT MADE THE STATEMENT, THAT THE DEFENDANT WAS GIVEN THE REQUIRED CONSTITUTIONAL WARNINGS BEFORE INTERROGATION, THAT THE DEFENDANT DID KNOWINGLY AND INTELLIGENTLY WAIVE THOSE CONSTITUTIONAL RIGHTS AND THEREAFTER GAVE A VOLUNTARY STATEMENT, THE STATEMENT MAY BE CONSIDERED BY YOU, THE JURY, TOGETHER WITH ALL THE OTHER EVIDENCE IN THE CASE AND GIVEN SUCH WEIGHT AND SUCH VALUE AND SUCH EFFECT AS TO THE WHOLE OR ANY PART THEREOF WHICH YOU, THE JURY, CONCLUDE THAT IT IS ENTITLED.

NOW, LADIES AND GENTLEMEN, YOU ARE NOT PARTISANS OR ADVOCATES FOR THE STATE OF SOUTH CAROLINA. YOU DO NOT SERVE AS JURORS TO REWARD FRIENDS OF PUNISH ENEMIES. OBVIOUSLY, IF THAT WERE THE SYSTEM IT WOULD BE A PERVERTED SYSTEM OF JUSTICE AND SHOULD BE INTOLERABLE TO ALL. YOU HAVE BEEN SELECTED BY BOTH THE STATE OF SOUTH CAROLINA AND THIS DEFENDANT AS FAIR AND IMPARTIAL JURORS. IT, THEREFORE, IS YOUR DUTY THEN BY YOUR JOINT DELIBERATIONS TO DETERMINE THE TRUTH IN THIS CASE GIVING TO THIS DEFENDANT THE BENEFIT OF

EVERY REASONABLE DOUBT ON EACH AND EVERY ISSUE. THEN TO THE FACTS WHICH YOU DETERMINE TO BE TRUE YOU THEN TAKE AND APPLY THE LAW WHICH I HAVE JUST GIVEN TO YOU AND THUS ARRIVE AT A VERDICT WHICH, OF COURSE, SPEAKS THE TRUTH OF THE CASE. THE WORD VERDICT HAS A LATIN DERIVATIVE WHICH MEANS A TRUE SAYING. WHEN YOU AS JURORS HAVE ACCOMPLISHED THESE RESPONSIBILITIES YOU WILL HAVE SATISFIED YOUR OATH AS JURORS AND YOU WILL HAVE DISCHARGED YOUR DUTY TO THIS COURT.

NOW, MR. FOREMAN, LADIES AND GENTLEMEN, WHATEVER YOUR VERDICT IS IN THIS CASE, WHATEVER VERDICT THAT YOU RENDER, IT MUST BE THE VERDICT OF EACH AND EVERY JUROR. THAT MEANS IT MUST BE YOUR UNANIMOUS VERDICT. ALL TWELVE OF YOU MUST AGREE ON THE VERDICT THAT YOU AUTHORIZE YOUR FOREMAN TO WRITE FOR THE JURY. NOW, MR. FOREMAN AND LADIES AND GENTLEMEN, WHEN I SEND THE JURY OUT THIS TIME I WANT THE ALTERNATES PLACED SEPARATELY. I WANT YOU TO TAKE THEM OUT BUT I DON'T WANT YOU TO PLACE THEM IN THE JURY ROOM. PUT THE TWELVE JURORS IN THE JURY ROOM, PUT THE TWO ALTERNATES IN ANOTHER ROOM. MR. FOREMAN, THERE ARE TWO POSSIBLE FORMS OF VERDICT IN THIS CASE. YOU WILL WRITE THAT VERDICT ON THE BACK OF THE INDICTMENT. ON THE BACK OF THE INDICTMENT IS THE PRINTED WORD "VERDICT." RIGHT DOWN HERE IN THIS CORNER. IT HAS THREE LINES, ACTUALLY FOUR LINES, AND AT THE BOTTOM IT HAS FOREMAN OF THE PETIT JURY. WHATEVER YOUR VERDICT IS YOU WILL WRITE IT THERE ON THAT SPACE AND YOU WOULD SIGN YOUR

NAME AS FOREMAN. KNOCK ON THE DOOR AN LET US KNOW THAT YOU'VE REACHED A VERDICT. YOU UNDERSTAND, MR. FOREMAN?

MR. FOREMAN: YES, SIR.

THE COURT: TWO POSSIBLE FORMS OF VERDICT ARE IF THE STATE OF SOUTH CAROLINA HAS FAILED TO PROVE THE GUILT OF THIS DEFENDANT BEYOND A REASONABLE DOUBT, YOUR VERDICT WILL BE THE TWO WORDS NOT GUILTY. YOU'D WRITE THOSE TWO WORDS, SIGN YOUR NAME AS FOREMAN, KNOCK ON THE DOOR. THE SECOND POSSIBLE FORM OF VERDICT IN THIS CASE IS GUILTY. IF THE STATE HAS PROVED THE GUILT OF THIS DEFENDANT BEYOND A REASONABLE DOUBT, YOUR VERDICT WOULD BE GUILTY AND YOU WOULD WRITE THAT ONE WORD, SIGN YOUR NAME AS FOREMAN, KNOCK ON THE DOOR AND LET US KNOW. NOW, MR. FOREMAN, I HAD TO LIST THE FORMS OF VERDICT IN SOME ORDER. PLEASE DO NOT ATTACH ANY SIGNIFICANCE TO THE ORDER I'VE LISTED THEM IN. IT JUST HAPPENED TO BE ORDER THAT I SELECTED. THE VERDICT IS FOR YOU, THE JURY, NOT THIS COURT. MR. BAILIFF, HAND THAT TO THE FOREMAN. MR. FOREMAN, I WANT YOU TO LOOK OVER THAT INDICTMENT AND MAKE SURE THAT YOU SEE AND UNDERSTAND WHERE I WANT YOU TO WRITE THE VERDICT. YOU SEE THAT, SIR?

MR. FOREMAN: YES, SIR.

THE COURT: NOW, WE WILL SEND TO YOU ALL OF THE EXHIBITS THAT WERE ADMITTED INTO THE RECORD OF THIS CASE. NOTE THAT. I SAID ADMITTED INTO THE RECORD. IF AN EXHIBIT OR SOMETHING WAS NOT ADMITTED INTO THE RECORD, YOU WILL NOT GET IT. ALL

EXHIBITS THAT WERE MARKED AND INTRODUCED INTO THE RECORD WILL BE SENT TO YOU IN THE JURY ROOM AND YOU MAY EXAMINE THEM AT THAT TIME. NOW, IF YOU WILL, I'M GOING TO HAVE STEP BACK INTO THE JURY ROOM BUT I DO NOT WANT YOU TO BEGIN YOUR DELIBERATIONS YET. I'M REQUIRED BY LAW TO ONCE AGAIN CONSULT WITH COUNSEL FOR THE STATE AND COUNSEL FOR THE DEFENSE AND I'M REQUIRED TO DO THIS OUTSIDE YOUR PRESENCE. IF IT IS NOT NECESSARY FOR ME TO HAVE YOU BROUGHT BACK OUT HERE, THE BAILIFFS WILL THEN BRING TO YOU ALL OF THE EXHIBITS. WHEN THEY BRING YOU THE EXHIBITS, YOU MAY START YOUR DELIBERATIONS. ALL RIGHT, SIR? OF COURSE, IF I NEED TO BRING YOU BACK IN HERE, I'LL BRING YOU BACK IN. ALL RIGHT. NOW, BE COMFORTABLE. THE BAILIFFS WILL BE THERE ON THE OUTSIDE OF THE DOOR FOR YOU. I PROBABLY WILL START ANOTHER CASE SO IF YOU HAPPEN TO KNOCK AND NEED ME FOR WHATEVER REASON OR TO REPORT AND I DON'T COME RIGHT DIRECTLY TO YOU, PLEASE UNDERSTAND THAT'S WHY. I'LL BE OUT HERE TRYING ANOTHER CASE, OKAY? IF YOU WILL THEN, STEP BACK IN THE JURY ROOM AND DON'T START YOUR DELIBERATIONS UNTIL THE EXHIBITS ARE HANDED TO YOU. MADAM ALTERNATE AND MR. ALTERNATE, YA'LL STAY WHEREVER THEY PUT YOU UNTIL I TELL YOU.

(THE JURY LEAVES THE JURY BOX AT 3:45 P.M.)

THE COURT: THE JURY AND THE ALTERNATES ARE NOW OUTSIDE THE PRESENCE OF THE COURT. ANY EXCEPTIONS OR ADDITIONAL REQUESTS TO CHARGE ON BEHALF OF THE STATE?

MR. MORTON: YOUR HONOR, THE ONLY THING I WOULD HAVE IS I WOULD ASK FOR A CLARIFICATION ON THE CHARGE OF DIRECT EVIDENCE. THE COURT CHARGED THE JURY DIRECT EVIDENCE IS WHAT ONE MIGHT OBSERVE, FOR INSTANCE, AT THE SCENE OF THE CRIME. I THINK THE JURY MAY BE CONFUSED ABOUT THAT. I WOULD LIKE THE COURT TO INSTRUCT THEM THAT DIRECT EVIDENCE IS NOT ONLY WHAT ONE MAY OBSERVE, BUT WHAT ONE MAY GAIN BY ANY OF THE SENSES, SUCH AS HEARING, TOUCHING. OTHER THAN THAT, YOUR HONOR, I HAVE NO EXCEPTION OR ADDITIONS.

THE COURT: WHAT SAY THE DEFENSE?

MR. SWERLING: IF YOUR HONOR PLEASE, WE HAVE NONE. I THINK THE CHARGE WAS A STANDARD CIRCUMSTANTIAL EVIDENCE CHARGE. I DON'T THINK IT NEEDS TO BE GONE BACK OVER.

THE COURT: I CHARGED THEM THAT DIRECT EVIDENCE OF A FACT MAY BE PROVED BY THE TESTIMONY OF A WITNESS WHO PERCEIVED THE EXISTENCE OF THE FACT BY MEANS OF HIS OR HER SENSES AS WHERE A PERSON SEES A CRIME COMMITTED AND COMES INTO COURT AND TESTIFIES AS TO WHAT HE OR SHE SAW. THAT WAS AN EXAMPLE. AND YOU ASKS THAT IT BE CLARIFIED IN WHAT WAY, MR. MORTON?

MR. MORTON: YES, SIR. I ASK THAT IT BE CLARIFIED IN THE SENSE THAT EXPLAIN TO THEM THAT--I THINK THE EXAMPLE DREW THEIR ATTENTION MORE TO WHAT ONE SAW OR OBSERVED AT THE SCENE OF A CRIME. I WOULD JUST LIKE A CLARIFICATION THAT DIRECT EVIDENCE CAN ALSO BE WHAT ONE TOUCHES OR ONE HEARS AS WELL

AS WHAT ONE SEES.

THE COURT: ANY USE OF THE SENSES?

MR. MORTON: YES, SIR.

THE COURT: IT'S HARMLESS. I'LL GIVE IT TO THEM JUST BY CLARIFICATION. BRING THE JURY BACK IN, ALL OF THEM.

(THE JURY RETURNS TO THE JURY BOX AT 3:47 P.M.)

THE COURT: MR. FOREMAN, LADIES AND GENTLEMEN, MY WAY OF CLARIFICATION, I WAS GIVING YOU AN INSTRUCTION ON WHAT IS KNOWN AS CIRCUMSTANTIAL EVIDENCE AND MY EXAMPLE--AND, OF COURSE, I TOLD YOU THAT DIRECT EVIDENCE, BEING ONE OF THE TWO TYPES. THE TWO TYPES, DIRECT EVIDENCE AND INDIRECT, INDIRECT BEING CIRCUMSTANTIAL, BUT I TOLD YOU THAT DIRECT EVIDENCE OF A FACT MAY BE PROVED BY THE TESTIMONY OF A PERSON WHO PERCEIVED THE EXISTENCE OF A FACT BY MEANS OF HIS OR HER SENSES AS WHERE A PERSON SEES A CRIME COMMITTED AND WOULD COME INTO COURT AND TESTIFY AS TO WHAT HE OR SHE SAW. I WANT TO MAKE SURE THAT YOU UNDERSTAND THAT IT IS DOES NOT LIMIT DIRECT EVIDENCE TO WHAT YOU SEE BUT THROUGH ANY OF YOUR SENSES, BEING TASTE, SMELL, TOUCH. DIRECT EVIDENCE CAN BE PROVEN BY ANY OF YOUR SENSES AS WELL. ALL RIGHT. YOU MAY NOW RETURN TO THE JURY ROOM AND AS SOON AS YOU GET THE EXHIBITS YOU MAY BEGIN YOUR DELIBERATIONS.

(THE JURY LEAVES THE JURY BOX AT 3:48 P.M.)

THE COURT: ALL RIGHT. ANYTHING ELSE FROM THE STATE OR THE DEFENSE?

MR. SWERLING: NOT BY THE DEFENSE, YOUR HONOR.

MR. MORTON: NO, SIR, YOUR HONOR.

THE COURT: ALL RIGHT.

(ALTERNATES ARE DISMISSED)

THE COURT: MADAM COURT REPORTER, LET THE RECORD REFLECT COUNSEL FOR THE STATE, COUNSEL FOR THE DEFENSE AND THE DEFENDANT ARE PRESENT. GENTLEMEN, THE FOREMAN HAS SENT A NOTE NEED COPY OF TRANSCRIPT OF TESTIMONY. I'M GOING TO BRING THE JURY IN ASK THEM--TELL THEM WE DON'T HAVE A TRANSCRIPT TO GIVE TO THEM AND EXPLAIN TO THEM IF THERE ARE ANY WITNESSES' TESTIMONY THAT THEY'D LIKE TO HEAR WE'LL BE HAPPY TO PLAY ANY PORTION OR PART OF IT THAT THEY'D LIKE TO HEAR AND THAT'S ALL WE CAN DO. ANY PROBLEMS WITH THAT BY COUNSEL FOR THE STATE?

MR. MORTON: NO, SIR, YOUR HONOR.

THE COURT: COUNSEL FOR THE DEFENSE?

MR. SWERLING: NO, YOUR HONOR.

THE COURT: BRING THE JURY IN.

(THE JURY RETURNS TO THE JURY BOX AT 5:17 P.M.)

THE COURT: ALL JURORS ARE NOW ACCOUNTED FOR, ALL JURORS IN THE CASE OF STATE VS. RONALD TILLMAN, COUNSEL FOR THE STATE, COUNSEL FOR THE DEFENSE AND DEFENDANT. MR. FOREMAN, I HAVE YOUR NOTE AND IT SAYS NEED COPY OF TRANSCRIPT OF TESTIMONY. WE DON'T HAVE A TRANSCRIPT OF TESTIMONY, MR.

FOREMAN. WE NEVER DO IN THE TRIAL OF A CASE. IF THERE IS A WITNESS'S TESTIMONY THAT YOU WOULD LIKE TO LISTEN TO, OR ALL OF THEM, YOU HAVE A RIGHT TO, BUT WHAT WE HAVE TO DO IS PLAY IT BACK FOR YOU AND WE HAVE TO DO IT OUT HERE IN THE COURTROOM. IT ALL HAS TO BE DONE HERE. YOU HAVE THE RIGHT TO LISTEN TO ANY PORTION OR ALL OF ANY WITNESS'S TESTIMONY OR ALL OF THE WITNESSES. IF THAT'S WHAT YOU ARE ASKING ME, THEN YOU NEED TO TELL ME THAT OR IF YOU JUST WANT TO LISTEN TO ONE SPECIFICALLY OR YOU JUST THOUGHT WE HAD A TRANSCRIPT OF TESTIMONY. WE DO NOT. WE HAVE THE TAPES AND WE HAVE TO PLAY THEM OUT HERE. ALL RIGHT?

MR. FOREMAN: I THINK BASICALLY WE THOUGHT YOU ALL HAD A TRANSCRIPT.

THE COURT: NO, SIR, WE DO NOT. YOU HAVE ALL OF THE WRITTEN EVIDENCE. THE TESTIMONY, OF COURSE, IS IN THE RECORD BY THE COURT REPORTER AND SHE HAS THAT PRESERVED THROUGH THE TAPES. WE CAN PLAY ANY PORTION OR PART OF THAT FOR YOU BUT I CANNOT GIVE YOU THE TAPES. IT WILL HAVE TO BE DONE RIGHT OUT HERE WITH EVERYBODY PRESENT.

MR. FOREMAN: OKAY. WE'LL GO BACK.

THE COURT: ALL RIGHT. THANK YOU. LET ME KNOW IF YOU NEED ANYTHING. WE'LL DO WHAT WE CAN.

(THE JURY LEAVES THE JURY BOX AT 5:20 P.M.)

THE COURT: ALL RIGHT. THIS JURY IS OUT OF THE PRESENCE OF THE COURT. I DON'T WANT COUNSEL FOR THE STATE OR COUNSEL

FOR THE DEFENSE OR THE DEFENDANT TO MOVE VERY FAR FROM THIS COURTROOM JUST IN CASE THEY COME BACK WANTING SOME TESTIMONY. SO, YA'LL MAY STEP BACK.

THE COURT: GENTLEMEN, THE JURY HAS BEEN OUT SINCE 4:00 AND I'M GOING TO MAKE INQUIRY WITH THEM ABOUT GETTING THEM SOME DINNER. WHAT I THINK I'M GOING TO DO IS IF THEY ARE READY WE'VE MADE ARRANGEMENTS TO SEND THEM ACROSS THE STREET WHERE THEY HAVE ROOM, THEY'LL BE SECURE, AND LET THEM HAVE DINNER AND AS SOON AS THEY'VE COMPLETED DINNER TO BRING THEM BACK AND PUT THEM INTO THE ROOM AND LET THEM CONTINUE DELIBERATIONS. BRING THE JURY IN, PLEASE.

(THE JURY RETURNS TO THE JURY BOX AT 6:37 P.M.)

THE COURT: LET THE RECORD REFLECT THAT ALL MEMBERS OF THE JURY ARE NOW BACK PRESENT, COUNSEL FOR THE STATE, COUNSEL FOR THE DEFENSE AND THE DEFENDANT. MR. FOREMAN, LADIES AND GENTLEMEN, YA'LL HAVE BEEN OUT THERE A LITTLE OVER TWO HOURS AND A HALF. I KNOW BIOLOGICALLY YOU ARE PROBABLY STARTING TO GET HUNGRY AND I HAVE TO START DEALING WITH THAT SITUATION AS FAR AS LOCATIONS AND THINGS. IF YOU ARE READY TO HAVE DINNER, WE ARE PREPARED TO TAKE CARE OF THAT FOR YOU. NORMALLY IT HELPS YA'LL TO GET OUT OF THAT ROOM FOR A WHILE SO WHAT WE PLAN TO DO IS TO HAVE THEM TAKE YOU OVER TO DINNER VERY CLOSE BY AND HAVE YOUR MEAL AND AS SOON AS YOU HAVE COMPLETED YOUR MEAL THEN RETURN AND PUT YOU BACK IN THE JURY

ROOM AND LET YOU CONTINUE DELIBERATING. DOES THAT SUIT EVERYBODY?

MR. FOREMAN: YES, SIR.

THE COURT: OKAY. I NEED THE BAILIFFS AND THE OFFICERS WHO ARE GOING TO BE GOING WITH THE JURY. ALL RIGHT, IF YOU WOULD COME RIGHT HERE IN FRONT OF ME, PLEASE. LADIES AND GENTLEMEN, YOU ARE GOING TO HEAR ME GIVE THE OFFICERS AND THE BAILIFFS WHO WILL BE TAKING YOU OVER AN OATH. THEY ARE DIRECTED TO TAKE YOU FOR THE PURPOSE OF HAVING YOUR MEAL. THEY CAN'T ALLOW ANYONE TO TALK TO YOU OR YOU TO TALK TO ANYONE ELSE, IN ADDITION TO WHICH, YOU ARE NOT TO DISCUSS THIS CASE WHILE YOU ARE OVER THERE HAVING YOUR MEAL. AFTER YOU HAVE FINISHED YOUR MEAL AND THEY BRING YOU BACK OVER HERE AND PUT YOU IN YOUR JURY ROOM YOU MAY CONTINUE YOUR DELIBERATIONS. NO DISCUSSION OF THIS CASE UNTIL YOU COME BACK TO THE JURY ROOM. NO ALCOHOLIC BEVERAGES EITHER. NONE. YOU ARE ENTITLED TO HAVE A REASONABLE MEAL. WE ARE TAKING YOU OVER TO HENNESSY'S. IT'S A NICE RESTAURANT AND YOU CAN ORDER OFF THE MENU. ALL RIGHT.

(OFFICERS AND BAILIFFS ARE SWORN TO ACCOMPANY THE JURY TO THEIR DINNER)

THE COURT: NOW, YOU'VE HEARD THE OATH GIVEN TO THEM. I'LL LET THEM TAKE YOU BACK INTO THE JURY ROOM IF YOU NEED TO STEP BACK OVER THERE AND WHATEVER. THEY ARE READY FOR YOU SO THEY'LL TAKE YOU OVER TO DINNER AND WHEN YOU'VE COMPLETED

THEY'LL BRING YOU BACK AND START YOUR DELIBERATIONS. MR. FOREMAN, I'M GOING TO ESTIMATE IT WILL TAKE YA'LL ABOUT AN HOUR OR SO. I'M GOING TO ALLOW EVERYBODY ELSE TO GET DINNER SO IF YOU HAPPEN TO GET BACK BEFORE THEN AND HAVE SOME MESSAGE OR ANYTHING BEAR IN MIND WE ARE GOING TO BE GETTING DINNER, TOO. SO, WE WON'T BE AVAILABLE TO YOU UNTIL ABOUT QUARTER TO 8:00.

(THE JURY LEAVES THE JURY BOX AT 6:42 P.M.)

THE COURT: YOU ARE FREE TO DO WHATEVER YOU'D LIKE UNTIL ABOUT QUARTER TO 8:00. YOU SHOULD BE BACK HERE BY ABOUT QUARTER TO 8:00. THAT SHOULD GIVE EVERYBODY TIME TO EAT. ALL RIGHT. ANYTHING BEFORE WE STOP?

MR. SWERLING: NO, SIR.

THE COURT: ALL RIGHT. THEY'VE MADE ARRANGEMENTS I UNDERSTAND FOR THE DEFENDANT'S MEAL, TOO. THEY ARE GOING TO ORDER SOMETHING OVER THERE SINCE THEY CAN'T TAKE HIM BACK. WE'LL BE IN RECESS.

(RECESS FOR EVENING MEAL)

(NOTE: JURY RETURNS FOR CONTINUED DELIBERATIONS AT 8:15 P.M.)

THE COURT: (AT CONCLUSION OF RECESS) BRING THE JURY IN. LET THE RECORD REFLECT THAT ALL COUNSEL FOR THE STATE, COUNSEL FOR THE DEFENSE AND THE DEFENDANT ARE PRESENT.

(THE JURY RETURNS TO THE JURY BOX AT 9:26 P.M.)

THE COURT: MR. FOREMAN, LADIES AND GENTLEMEN, I HAVE

RECEIVED YOUR NOTE AND LET ME SUGGEST THAT WE DO THIS. AND THAT IS--I KNOW YA'LL HAVE BEEN DELIBERATING AND IT'S BEEN SEVEN DAYS IN TRIAL AND I RESPECT THAT WE'VE ALL WORKED HARD AND ARE TIRED. IT'S NOW 9:30. THAT WHAT WE DO IS I GO AHEAD AND PUT YOU IN A MOTEL ROOM FOR THE EVENING AND YA'LL JUST DON'T TALK ABOUT THE CASE ANY MORE, GET IT OUT OF YOUR MIND, TRY TO RELAX AND I'LL BRING YOU BACK HERE IN THE MORNING AT 9:30 AND I'LL TALK TO YOU THEN. OKAY? NOW, EVERYBODY HAS PURSUANT TO MY INSTRUCTION BROUGHT PERSONAL ITEMS OF CLOTHING TO TAKE CARE OF YOU FOR THE EVENING AND IN THE MORNING, HAVEN'T YOU? OKAY. WE'LL JUST LOCK THE JURY ROOM AND LEAVE ALL THE EXHIBITS IN THERE. WE'VE ALREADY MADE ARRANGEMENTS TO PUT YOU IN A MOTEL ROOM. THEY'LL TAKE YOU TO BREAKFAST IN THE MORNING. THEY'LL GO AHEAD AND TAKE YOU ON OVER THERE FOR THE EVENING. I'M GOING TO HAVE THE OFFICERS WHO WILL BE IN CHARGE OF YOU AND THEY'LL BE THERE, TOO. I HAVE TO PLACE THEM UNDER OATH AND THERE WILL BE ONE BAILIFF WHICH I BELIEVE IS MRS. STEWART. SO THAT EACH OF YOU WILL KNOW, THE BAILIFF AND THE OFFICERS WILL RECEIVE THIS INSTRUCTION AND THAT IS THAT EACH OF YOU SWEAR THAT YOU WILL AT ALL TIMES KEEP THE JURORS SWORN IN THIS CASE IN YOUR CUSTODY AND THAT YOU WILL TAKE THEM TO THE MOTEL THAT WE'VE SELECTED AS DIRECTED BY THE COURT AND THAT YOU WILL PROVIDE FOR THEM SUITABLE LODGING AND MEALS, THAT YOU WILL NOT PERMIT ANY PERSON TO SPEAK TO THEM WITHOUT LEAVE OF THE COURT AND THAT YOU WILL NOT PERMIT THE

JURORS OR ANY OF THEM TO SPEAK TO ANY PERSON WITHOUT LEAVE OF THE COURT AND THAT YOU SHALL NOT SPEAK TO THEM YOURSELVES WITHOUT LEAVE OF THE COURT AND THAT YOU'LL RETURN THE JURORS TO THE JURY ROOM IN THIS COURTHOUSE ON OR BEFORE 9:30 A.M. AS DIRECTED BY THE COURT. THAT'S THE OATH THAT THE BAILIFF AND OFFICERS WILL GET. NOW, IN THAT REGARD YOU WILL NOT BE PERMITTED TO, I INSTRUCT YOU, TO RECEIVE TELEPHONE CALLS. I WILL AUTHORIZE THE BAILIFF TO LET YOU MAKE A CALL TO YOUR FAMILIES OR WHOEVER THAT YOU NEED TO IN THAT REGARD THIS EVENING WHEN YOU GET OVER THERE SO THAT THEY'LL KNOW AND HAVE A PLACE WHERE THEY CAN CALL IF THERE'S AN EMERGENCY OR ANYTHING LIKE THAT AS WELL AS TELL THEM YOU'LL BE BACK TOMORROW. OR FOR ANY BUSINESS PURPOSE REASON THAT YOU NEED TO GET A MESSAGE OUT. THAT WILL BE FINE. OF COURSE, YOU SHOULD BE COMFORTABLE IN THAT REGARD. I'LL ASK THAT YOU-- I HAVEN'T NOTICED ANY MEDIA COVERAGE BUT I DON'T KNOW BUT, PLEASE, ONCE AGAIN YOU ARE NOT TO OBSERVE ANY MEDIA COVERAGE WHETHER IT BE T.V., RADIO OR NEWSPAPER OR WHATEVER IF THERE BE ANY. THAT CONTINUES ON. ALL RIGHT? I'LL LET YA'LL GO AHEAD AND GO ON BACK IN THE JURY ROOM. AS SOON AS THE TWO BAILIFFS GET HERE I'M GOING TO PLACE THEM UNDER OATH WITH THE TWO OFFICERS AND THEY'LL TAKE YOU ON OVER, OKAY? I HOPE YOU HAVE A NICE EVENING. SEE YOU IN THE MORNING.

(THE JURY LEAVES THE JURY BOX AT 9:30 P.M.)

(NOTE: BAILIFFS AND OFFICERS ARE SWORN TO ACCOMPANY THE

JURY TO THEIR LODGING FOR THE EVENING)

THE COURT: NOW, I'VE TOLD THE JURORS THAT THEY MAY CALL THEIR HOMES IN ORDER TO TELL THEM WHERE THEY ARE SO THEY CAN LEAVE A MESSAGE BUT INSTRUCT THE MOTEL WHEN YOU TAKE THEM AROUND THERE THEY ARE NOT TO HAVE INCOMING TELEPHONE CALLS. PEOPLE CAN CALL IN AND LEAVE A NUMBER AND THEY ARE TO CALL YOUR ROOM AND YOU MAKE SURE THAT IT'S FAMILY OR A RELATIVE BEFORE YOU LET THEM RETURN THE CALL, OKAY? IT SHOULDN'T BE A WHOLE LOT OF THAT BECAUSE IT'S EVENINGTIME. ALL RIGHT. THANK YOU, GENTLEMEN. YOU MAY GO RIGHT OVER THERE, THE JURY IS READY TO GO. TAKE CARE OF THEM. COURT WILL BE IN RECESS UNTIL 9:30 ON THIS CASE. GENTLEMEN, FOR YA'LL'S INFORMATION THE FIRST THING WE'LL DO AT 9:30 IS TO BRING THEM BACK IN AND GIVE THEM THE MODIFIED ALLEN CHARGE AND THEN SEND THEM BACK TO DELIBERATE. VERY GOOD. SEE YA'LL IN THE MORNING.

(EVENING RECESS)

(COURT RESUMES JANUARY 23, 1990)

THE COURT: ALL RIGHT, MADAM COURT REPORTER, LET THE RECORD REFLECT THAT ALL COUNSEL ARE NOW PRESENT BEFORE THE COURT, COUNSEL FOR THE STATE, COUNSEL FOR THE DEFENSE AND THE DEFENDANT. YESTERDAY EVENING I RECEIVED THE MESSAGE FROM THE FOREMAN OF THE TRIAL JURY IN STATE VS. RONALD TILLMAN THAT THE JURY WAS AT THIS TIME HUNG. WITHOUT ANY DISCUSSION WITH THEM I SENT THEM TO THE MOTEL FOR THE EVENING AND, OF COURSE, REPORTED THAT TO COUNSEL FOR THE STATE AND COUNSEL FOR THE

DEFENDANT. AT THIS TIME THIS MORNING IT IS THE COURT'S INTENTION TO GIVE WHAT IS COMMONLY REFERRED TO AS THE ALLEN INSTRUCTION. ACTUALLY, IT'S NOT ALLEN, IT'S TUEY, T-U-E-Y (SPELLED). COMMONWEALTH VS. TUEY. A VERY OLD CASE, MASSACHUSETTS, 1850. IT'S ALSO CONTAINED IN SULLIVAN VS. UNITED STATES, 9TH CIRCUIT, 414 FED. 2d 714. WHAT IS THE POSITION OF THE STATE OR THE DEFENSE? ANYTHING FROM THE STATES?

MR. MORTON: NO, SIR, YOUR HONOR.

THE COURT: ANYTHING FROM THE DEFENSE?

MR. SWERLING: IF YOUR HONOR PLEASE, WE WOULD REQUEST THAT THE JURY BE ALLOWED TO RE-CONSIDER DELIBERATING, BEING INSTRUCTED TO DELIBERATE THIS MORNING.

THE COURT: MR. SWERLING, I'M CERTAIN YOU ARE FAMILIAR WITH WHAT IS KNOWN AS THE ALLEN CHARGE ACTUALLY. IT'S ALLEN VS. UNITED STATES, 164 U.S. 492. MY INTENT IS TO GIVE THEM THAT INSTRUCTION LIMITEDLY JUST TO ASK THEM IN ESSENCE TO CONTINUE TO TRY TO DELIBERATE IF THEY CAN UPON THE CASE. OF COURSE, WITHIN A REASONABLE PERIOD OF TIME IF THEY COME BACK AND SAY THEY CAN'T THEN--YOU KNOW, BOTH SIDES HAVE NOW EXHAUSTED EIGHT DAYS OF TRIAL IN THE CASE. AND THE EXPENSE TO THE DEFENSE IS AS GREAT AS THE EXPENSE TO THE STATE AND THE COUNTY FOR THE TRIAL OF THE CASE. AS LONG AS THAT DOESN'T OUTWEIGH THE RIGHTS TO A FAIR TRIAL BOTH TO THE STATE AND THE DEFENSE I'M GOING TO FOLLOW THAT PROCEDURE AND GIVE

THEM THE INSTRUCTION. BRING THE JURY IN, PLEASE.

(THE JURY RETURNS TO THE JURY BOX AT 9:35 A.M.)

THE COURT: GOOD MORNING, MR. FOREMAN AND LADIES AND GENTLEMEN. I HOPE YOU RESTED REASONABLY WELL THIS PAST EVENING. MR. FOREMAN, LADIES AND GENTLEMEN, IF YOU WILL GIVE ME YOUR ATTENTION. I HAVE INSTRUCTED YOU PREVIOUSLY THAT YOU, THE JURY, ARE THE SOLE JUDGES OF THE FACTS IN THIS CASE AND THIS COURT IS THE SOLE JUDGE OF THE LAW OF THE CASE. I ALSO FURTHER INSTRUCTED YOU THAT I AM NOT PERMITTED BY LAW TO GIVE YOU ANY INDICATION WHATSOEVER AS TO WHAT YOUR VERDICT SHOULD OR OUGHT TO BE IN A PARTICULAR CASE AND I DO NOT DO SO AT THIS TIME. IT IS THE DUTY OF THE COURT TO STATE THE LAW OF THE CASE TO YOU AND IT IS THE DUTY OF THE JURY TO RESOLVE THE FACTS IN THIS CASE. YOU KNOW, THE ONLY MODE PROVIDED BY OUR CONSTITUTION AND LAWS FOR DECIDING QUESTIONS OF FACT IN CRIMINAL CASES, AND THIS IS WHAT THIS IS, IS BY THE VERDICT OF A JURY. IN A LARGE PROPORTION OF CASES AND PERHAPS STRICTLY SPEAKING IN ALL CASES ABSOLUTE CERTAINTY CANNOT BE ATTAINED OR EXPECTED ALTHOUGH THE VERDICT TO WHICH A JUROR AGREES MUST, OF COURSE, BE HIS OR HER OWN CONVICTIONS AND NOT A MERE ACQUIESCENCE IN THE CONCLUSIONS OF THE OTHER JURORS OR YOUR FELLOW JURORS. YET, YOU KNOW, IN ORDER TO BRING TWELVE MINDS TO A UNANIMOUS RESULT YOU MUST EXAMINE THE QUESTIONS THAT ARE SUBMITTED TO YOU WITH CANDOR AND WITH A PROPER REGARD AND WITH DEFERENCE TO THE OPINIONS OF EACH

HAS FAILED TO PROVE THE GUILT OF THIS DEFENDANT BEYOND A REASONABLE DOUBT, THEN YOUR VERDICT SHOULD BE NOT GUILTY. IF THE STATE HAS PROVED THE GUILT OF THIS DEFENDANT BEYOND A REASONABLE DOUBT, THEN YOUR VERDICT SHOULD BE GUILTY. SO, WITH THAT INSTRUCTION I'M GOING TO ASK YOU TO RETIRE TO THE

JURY ROOM AND TO DELIBERATE FURTHER ON THE VERDICT IN THIS CASE AND SEE IF YOU CANNOT REACH A CONCLUSION IN THIS CASE. ONCE AGAIN, THANK YOU FOR YOUR PATIENCE WITH US IN CONSIDERATION OF THE ISSUES THAT HAVE BEEN PRESENTED TO YOU. I WANT YOU AT ALL TIMES TO BE COMFORTABLE IN THE JURY ROOM. IF FOR ANY REASON YOU BECOME UNCOMFORTABLE YOU JUST LET ME KNOW. THE BAILIFFS WILL BE OUT THERE TO ASSIST YOU IN ANY WAY THEY CAN AS FAR AS GETTING WHAT YOU NEED AND WE ARE GOING TO BE RIGHT HERE IN THIS COURTROOM CONTINUING ON THE TRIAL OF ANOTHER CASE. MR. FOREMAN, I NOW SEND YOU BACK TO THE JURY ROOM. IF YOU HAVE OTHER MESSAGES FOR ME, PLEASE JUST COMMUNICATE THEM TO ME. THANK YOU VERY MUCH.

(THE JURY LEAVES THE JURY BOX AT 9:41 A.M.)

THE COURT: ANYTHING FURTHER FROM THE STATE OR THE DEFENSE?

MR. MORTON: NO, SIR.

MR. SWERLING: IF YOUR HONOR PLEASE, JUST ONE POINT. WE WOULD TAKE EXCEPTION TO THE FIRST PART OF YOUR HONOR'S INSTRUCTIONS WHERE THE COURT SAID, AND I'M PARAPHRASING, IT WAS NOTHING THAT COULD EVER BE PROVED TO AN ABSOLUTE CERTAINTY. THAT SEEMS TO FROM THE BEGINNING LET THE JURY KNOW THAT THE BURDEN OF PROOF ON THE STATE IS LESS THAN A REASONABLE DOUBT STANDARD. IT SEEMS TO CONFLICT WITH THE, YOU KNOW, DEFINITION OF REASONABLE DOUBT AND THE FACT THAT THEY ARE SUPPOSED TO RESOLVE A REASONABLE DOUBT IN THE

DEFENDANT'S FAVOR. IT GIVES THEM THE IMPRESSION THAT THE COURT FROM THE BEGINNING WAS INDICATING TO THEM THAT THESE MATTERS CANNOT BE PROVED TO AN ABSOLUTE CERTAINTY AND THAT GIVES ME A LITTLE CONCERN.

THE COURT: DO YOU CONSIDER THAT PROOF BEYOND A REASONABLE DOUBT REQUIRES ABSOLUTE CERTAINTY?

MR. SWERLING: NO, SIR. WHAT I'M SAYING IS I THINK THE MANNER IN WHICH THE INSTRUCTION WAS GIVEN--

THE COURT: I UNDERSTAND WHAT YOU ARE SAYING. YOU ARE ON THE RECORD.

MR. SWERLING: THAT'S WHAT I WAS CONCERNED ABOUT. I THINK--

THE COURT: YOUR EXCEPTION IS DULY NOTED AND--

MR. SWERLING: THE JURY MIGHT CONSIDER THAT WAS THE COURT'S VIEW OF THE SITUATION.

THE COURT: I DON'T KNOW HOW THEY COULD REACH THAT CONCLUSION. I WENT BACK TO THEM TWICE AND TOLD THEM THAT THE STATE'S GOT TO PROVE THE DEFENDANT BEYOND A REASONABLE DOUBT AND IF THEY FAILED TO DO SO THEY SHOULD FIND HIM NOT GUILTY. I EMPHASIZED IT TWICE.

MR. SWERLING: YES, SIR.

THE COURT: ANYTHING ELSE? YA'LL MAY STEP BACK. LET ME HAVE MY OTHER JURY.

THE COURT: ALL RIGHT. MADAM COURT REPORTER, IN THE

CASE OF THE STATE VS. RONALD TILLMAN, INDICTED FOR MURDER, COUNSEL FOR THE STATE IS PRESENT, COUNSEL FOR THE DEFENSE AND DEFENDANT. I'VE BEEN INFORMED BY THE BAILIFFS THAT THE JURY HAS KNOCKED AND INDICATED THAT THEY'VE REACHED A VERDICT. IS THE STATE READY TO RECEIVE THE VERDICT?

MR. MORTON: YES, SIR, YOUR HONOR.

THE COURT: IS THE DEFENSE READY TO RECEIVE THE VERDICT?

MR. SWERLING: YES, SIR.

THE COURT: I PERMIT NO EXPRESSION OF HAPPINESS OR DISAPPOINTMENT BY ANYONE. THAT'S NOT A PROPER ATTITUDE AND I TELL YOU RIGHT NOW IF ANYBODY DOES IT I'M GOING TO HOLD YOU IN CONTEMPT OF COURT. ANYBODY. BRING THE JURY IN.

(THE JURY RETURNS TO THE JURY BOX AT 11:00 A.M.)

THE COURT: MR. FOREMAN, THE BAILIFFS INFORMED THE COURT THAT THE JURY HAS KNOCKED AND INDICATED THEY'VE REACHED A VERDICT IN THIS CASE. HAS THE JURY REACHED A VERDICT IN THIS CASE?

MR. FOREMAN: YES, SIR, YOUR HONOR.

THE COURT: AND HAVE YOU WRITTEN THAT VERDICT ON THE BACK OF THE INDICTMENT IN THE PLACE THAT I INSTRUCTED YOU TO DO SO?

MR. FOREMAN: YES, SIR.

THE COURT: AND SIGNED YOUR NAME AS FOREMAN FOR THE JURY?

MR. FOREMAN: YES, SIR.

THE COURT: MADAM CLERK, WOULD YOU RECEIVE THE VERDICT.

(CLERK OF COURT EXHIBITS THE VERDICT TO THE COURT)

THE COURT: YOU MAY PUBLISH THE VERDICT.

CLERK OF COURT: 8-GS40-0745, STATE OF SOUTH CAROLINA VS. RONALD S. TILLMAN, THE VERDICT IS GUILTY SIGNED BY SAMMY HICKS AS FOREMAN. MR. FOREMAN, IS THIS YOUR VERDICT AND THE VERDICT OF THIS JURY?

MR. FOREMAN: YES, IT IS.

CLERK OF COURT: THANK YOU.

THE COURT: MR. FOREMAN AND LADIES AND GENTLEMEN OF THE JURY, IF THIS BE YOUR VERDICT, EACH OF YOU INDIVIDUALLY, WOULD YOU PLEASE SIGNIFY BY THE RAISING OF YOUR RIGHT HAND? YOU MAY PLACE THEM DOWN. LET THE RECORD REFLECT THAT ALL TWELVE MEMBERS DID RAISE THEIR RIGHT HAND. ANYTHING FURTHER FROM THE STATE OR THE DEFENDANT BEFORE I DISCHARGE THE JURY?

MR. SWERLING: YOUR HONOR, JUST THE STANDARD POLLING.

THE COURT: WOULD YOU LIKE FOR THEM TO BE INDIVIDUALLY POLLED?

MR. SWERLING: YES, SIR.

THE COURT: MADAM CLERK, AT THIS TIME I DIRECT THAT YOU NOW POLL THE JURORS WITH THE FOLLOWING QUESTION: WAS THIS YOUR VERDICT AND IS IT NOW STILL YOUR VERDICT. CALL THEIR NAMES. AS SHE CALLS OUR NAME, PLEASE RESPOND TO THOSE QUESTIONS.

(WHEREUPON THE JURY IS POLLED AND ALL ASSENT)

THE COURT: THE JURY HAS BEEN POLLED. ALL RIGHT. IS THE DEFENDANT READY FOR SENTENCING?

MR. SWERLING: YES, SIR.

THE COURT: BRING THE DEFENDANT FORWARD. ALL RIGHT. MR. TILLMAN, I'M GOING TO EXTEND TO YOU AND YOUR ATTORNEY, MR. SWERLING, THE OPPORTUNITY TO MAKE ANY FURTHER STATEMENTS THAT YOU WOULD LIKE TO MAKE CONCERNING THIS CASE OR YOURSELF, WHATEVER YOU'D LIKE FOR THE COURT TO HEAR OR UNDERSTAND. BEFORE I DO THAT, I'LL APPRISE YOU NOW AS I WILL APPRISE YOU AT THE COMPLETION, THAT YOU HAVE A RIGHT TO APPEAL THIS DECISION. YOU HAVE TEN DAYS IN WHICH TO FILE YOUR NOTICE OF INTENT TO APPEAL. I'M CERTAIN YOUR ATTORNEY, MR. SWERLING, WHOM YOU HAVE CLEARLY AND WITHOUT QUESTION RECEIVED THE HIGHEST LEVEL OF LEGAL REPRESENTATION THAT THIS COURT'S OBSERVED IN SOME TIME. THE FACT WHETHER OR NOT YOU'VE HAD EXCELLENT REPRESENTATION IS NOT AN ISSUE IN THIS CASE. IN FACT, I'M SATISFIED THAT THE JURY WHEN THEY HEAR THE OTHER THINGS THAT WE ARE GOING TO HEAR RIGHT NOW ARE GOING TO BE SOMEWHAT SURPRISED. THE OTHER THINGS THAT THEY WERE NOT ALLOWED TO HEAR WHICH THIS COURT FELT WOULD DENY YOU THE RIGHT TO RECEIVE AND OBTAIN A FAIR TRIAL, SUCH AS YOUR PRIOR CONVICTIONS AND THE OTHER TESTIMONY AND EVIDENCE THAT THE PURPOSE AND REASON FOR THIS MURDER WAS TO EXECUTE A WITNESS WHO WOULD TESTIFY AGAINST YOU. ALL OF THOSE THINGS WERE KEPT FROM THEIR EARS. SO, IN THIS COURT'S VIEW YOU RECEIVED AND

OBTAINED AS PRISTINE A FAIR TRIAL AS THIS COURT FEELS A DEFENDANT COULD RECEIVE. BEFORE I HEAR FROM YOU AND YOUR COUNSEL, I'LL HAVE COUNSEL FOR THE STATE NOW PUBLISH INTO THE RECORD THE RECORD THAT YOU HAVE. OF COURSE, IT DOESN'T AFFECT SENTENCING. NORMALLY, IT WOULD BECAUSE THE LAW IS VERY CLEAR. THE SENTENCE THE COURT IS REQUIRED TO IMPOSE UPON YOU IS SET BY LAW AND I HAVE NO OTHER CHOICE. IF I DID HAVE ANY OPTIONS, AND THE ANSWER IS I HAVE NO OPTIONS IN THAT REGARD, BUT YOU HAVE AN EXTENSIVE RECORD. YOU ARE SITTING ON SENTENCING FROM THE FEDERAL COURTS RIGHT NOW FOR A CONVICTION FOR BANK ROBBERY, PROBABLY SOMEWHERE IN THE RANGE FROM WHAT I'VE READ AND THE INFORMATION I KNOW IS SOMEWHERE OF A LOW OF TEN OR FIFTEEN YEARS TO A HIGH OF PROBABLY THIRTY FOR THOSE OFFENSES. PUBLISH HIS RECORD.

MR. SWERLING: IF YOUR HONOR PLEASE, PRIOR TO DOING SO WILL THE COURT PERMIT THE RECORD TO REFLECT WE MOVE FOR A NEW TRIAL IN ALL GROUNDS STATED DURING THE COURSE OF THE TRIAL AND JUST REINCORPORATE HEREIN THOSE ARGUMENTS MADE ABOUT THE ADMISSIBILITY OF EVIDENCE, DIRECTED VERDICT AND ALL OTHER RULINGS THAT THE COURT MADE ADVERSELY TO THE DEFENDANT.

THE COURT: WELL, FRANKLY, COUNSEL, AS YOU KNOW, MOST OF THE RULINGS IN EFFECT WENT YOUR WAY. AS I SAID, HE HAS AS PRISTINE A FAIR TRIAL AS I THINK ANYONE CAN RECEIVE AND OBTAIN IN THIS CASE. IT WAS A VERY CONVOLUTED CASE. IT WAS VERY DIFFICULT FOR THE STATE TO PROSECUTE BECAUSE OF THE

OVERLAPPING CRIMES THAT WERE INVOLVED. HIS CRIMINAL WAS AWFUL BUT IN THIS TRIAL IT ALMOST MADE HIM LOOK LIKE--I STARTED TO SAY CHOIR BOY--BUT IT MADE HIM LOOK AWFULLY GOOD BECAUSE THE COURT HAD SOME VERY DIFFICULT DECISIONS TO MAKE AND SOMETIMES IT WAS VERY CLOSE AS TO WHETHER OR NOT THE STATE OF SOUTH CAROLINA WAS RECEIVING AND OBTAINING A FAIR TRIAL IN THE SEARCH TO SEE THAT THE DEFENDANT RECEIVED A FAIR TRIAL. VERY DIFFICULT. VERY DIFFICULT. AS I SAY, I DON'T KNOW OF ANYBODY--OF COURSE, THAT'S MY OBLIGATION AND IT WEIGHS HEAVILY AT TIMES TO SEE THAT PEOPLE RECEIVE AND OBTAIN A FAIR TRIAL ALONG WITH THE DECISION OF THE JURY. MR. SWERLING, YOU GAVE ABSOLUTELY EXCELLENT REPRESENTATION. IT WAS A QUESTION OF FACT FOR THE JURY AND THEY HAD TO DECIDE WHETHER OR NOT THEY WERE GOING TO BELIEVE THOSE WITNESSES, HAYES MALLOY AND A COUPLE OF THE OTHERS. BUT I WOULD HAVE PROBABLY BEEN IN THE SAME POSITION THEY WOULD HAVE BEEN IN, WHY NOT. WHY NOT? BUT YOU DID AS FINE A JOB AS I'VE EVER SEEN OF TRYING TO CONVINCE THEM WHY THEY SHOULDN'T AND IT WAS VERY CLOSE, VERY CLOSE IN YOUR REGARD. YOU ARE TO BE COMMENDED FOR IT IN THE REPRESENTATION THAT HE GOT. THOSE MOTIONS ARE DENIED. IT WAS A QUESTION OF FACT FOR THE JURY AND THEY COULD FIND BEYOND A REASONABLE DOUBT THAT HE COMMITTED THE CRIME AND THEY DID SO.

MR. BILTON: YOUR HONOR, ON BEHALF OF THE STATE I WOULD PERSONALLY LIKE TO THANK YOU ON BEHALF OF MR. MORTON AND MR.

COLEMAN FOR THE FAIR AND IMPARTIAL MANNER IN WHICH YOU TRIED THIS CASE. I KNOW IT WAS A VERY DIFFICULT CASE CONSIDERING THE CIRCUMSTANCES THAT WE WERE NOT ALLOWED TO GET IN. I THINK THAT AT THIS POINT I WOULD LIKE, SO THE JURY CAN UNDERSTAND SOME OF THE ASPECTS OF WHAT WAS GOING ON IN THIS CASE, I WOULD LIKE TO, FOR THEIR INFORMATION, LET THEM KNOW SOMETHING ABOUT THE REASON WHY AS MR. SWERLING IMPLIED IN HIS CLOSING ARGUMENTS. YOUR HONOR, IT'S THE STATE'S POSITION THAT IN EARLY SEPTEMBER OF 1988 MR. TILLMAN AND MR. SUTTON AND A GENTLEMAN BY THE NAME OF FRANK WRIGHT COMMITTED A SERIES OF ARMED ROBBERIES OF BURGER KINGS. AT THAT TIME, MR. SUTTON CAME CLEAN AND TOLD THE POLICE OF HIS INVOLVEMENT AND IMPLICATED MR. TILLMAN IN THOSE ROBBERIES. HE WAS PREPARED TO TESTIFY AGAINST MR. TILLMAN. THAT WAS THE MOTIVE BEHIND THIS KILLING. MR. TILLMAN SUBSEQUENTLY ROBBED A BANK ON BLUFF ROAD TO GET MONEY TO HIRE SOMEONE TO KILL MR. SUTTON. HE ROBBED THE BANK, HE GOT THE MONEY, HE WAS UNABLE TO HIRE SOMEONE AND HE COMMITTED THIS MURDER HIMSELF. YOUR HONOR, HE IS A CAREER CRIMINAL. GOING BACK TO 1977, HE WAS CONVICTED OF HOUSEBREAKING. IN 1977 CARRYING AN UNLAWFUL WEAPON. 1977 AGAIN HOUSEBREAKING AND GRAND LARCENY. 1982, HOUSEBREAKING AND PETTY LARCENY CONVICTION. GRAND LARCENY CONVICTION IN THAT YEAR. YOUR HONOR, HE WAS CONVICTED OF THE BANK ROBBERY IN 1989. HE IS AWAITING SENTENCE. HE WILL BE SENTENCED FEBRUARY 14TH FOR BANK ROBBERY AND POSSESSION OF

A SAWED OFF SHOTGUN. IT IS THE POSITION OF THE STATE THAT THIS GENTLEMAN IS A CAREER CRIMINAL AND WE WOULD ASK THAT YOU GIVE HIM THE MAXIMUM SENTENCE UNDER THE LAW. LIFE WITHOUT PAROLE.

THE COURT: ALL RIGHT. MR. SWERLING, THE STATE IS ASKING THE COURT TO EXTEND THE PENALTY BEYOND THE NORMAL LIFE ALLEGING A CAREER CRIMINAL SAYING THAT HIS RECORD CONSTITUTES THE LIFE WITHOUT PAROLE APPLICATION. WHAT'S YOUR VIEW?

MR. SWERLING: I THINK THEY HAVE TO PUT THE DEFENDANT ON NOTICE OF THAT BEFORE THE TRIAL WHICH THEY DID NOT DO.

THE COURT: I'LL RESERVE THAT ISSUE FOR THE TIME BEING. THAT'S WHAT I WOULD HAVE THOUGHT, TOO, BUT WE'LL LOOK AT IT.

MR. SWERLING: I THINK THE STATUTE MIGHT EVEN SAY THAT THEY HAVE TO BE APPRISED OF THAT.

MR. BILTON: YOUR HONOR, I WOULD THINK THAT UNDER THE OMNIBUS CRIME ACT THAT WITH HIS THREE PRIOR HOUSEBREAKINGS THAT HE WOULD FALL IN THAT CATEGORY.

THE COURT: WELL, THERE IS SOME--THE QUESTION IS HOW IS IT TREATED. IS IT AUTOMATIC? YOU SEE, THE SENTENCE FOR MURDER IS LIFE IMPRISONMENT WHICH MEANS THAT HIS EARLY PAROLE DATE WOULD BE TWENTY YEARS. TWENTY YEARS. IF IT WERE MURDER WITH AN AGGRAVATING CIRCUMSTANCE IT WOULD HAVE BEEN LIFE WITHOUT PAROLE FOR THIRTY. HAD IT BEEN A MURDER FOR HIRE AS IT ALMOST WAS IT COULD HAVE BEEN THE DEATH PENALTY APPLICATION. NOW, MY OBLIGATION UNDER THE VIOLATION IS A

LIFE SENTENCE WHICH IS PAROLE AT TWENTY. YOU NOW ASK ME TO HAVE HIM DETERMINED AND CLASSIFIED AS A CAREER CRIMINAL WHICH RAISES THE LIFE WITHOUT PAROLE SPECTRUM. I'M UNSURE, COUNSEL, BUT I'M GOING TO LOOK AT IT.

MR. SWERLING: YOUR HONOR, IF YOU WOULD ALLOW US TO SUBMIT SHORT BRIEFS OR MEMORANDUMS PRIOR TO YOUR RULING OR TAKE IT UNDER ADVISEMENT, I'D ASK THE OPPORTUNITY TO DO THAT PRIOR TO THE IMPOSITION OF SENTENCE.

THE COURT: WELL, THIS IS RIGHT IMPORTANT. IT AFFECTS THE LENGTH OF TIME PEOPLE SERVE. COUNSEL, I DON'T WANT TO HOLD ANYTHING IN ABEYANCE BUT I WANT TO GIVE YOU A FAIR OPPORTUNITY TO LOOK AT IT AND COUNSEL FOR THE STATE AS WELL AND THE COURT AS WELL. I'D LIKE TO RESOLVE IT BEFORE I LEAVE HERE THIS WEEK. I DON'T LIKE LEAVING THINGS LIKE THIS UNRESOLVED. THEY JUST TEND TO STAY UNRESOLVED AND I DON'T DO THAT. I'M GOING TO DECIDE IT AND I'M GOING TO DECIDE IT IN THE WAY THAT I BELIEVE IS RIGHT IN ACCORDANCE WITH THE LAW.

MR. SWERLING: YOUR HONOR, I THINK IF WE LOOK AT THE STATUTE--IT'S BEEN A LONG TIME SINCE I'VE LOOKED AT THAT STATUTE BUT I THINK THAT--

THE COURT: HOW ABOUT IN THE MORNING? DO YOU THINK THAT IN THE MORNING WOULD GIVE YOU ENOUGH TIME?

MR. SWERLING: YOUR HONOR, I HAVE NO PROBLEM WITH THAT UNLESS--I HAVE AN OBLIGATION IN ORANGEBURG.

THE COURT: HAVE THEY SENT FOR YOU?

MR. SWERLING: MAYBE YOUR HONOR COULD DISCUSS THAT WITH JUDGE SMITH.

THE COURT: ALL RIGHT.

MR. SWERLING: I'LL BE WHEREVER I'M CALLED.

THE COURT: YOU MEAN HE'S GOING TO START A CASE SOMETIME THIS AFTERNOON OR TOMORROW THAT YOU ARE INVOLVED IN?

MR. SWERLING: YES, SIR.

THE COURT: YOU DON'T KNOW HOW TO DO ANYTHING IN SHORT ORDER, MR. SWERLING.

MR. SWERLING: JUDGE, IT WASN'T ME. I WAS JUST TRYING TO KEEP THE STATE FROM GETTING IN EVIDENCE THAT THEY SHOULDN'T HAVE GOTTEN IN. MAYBE WE CAN CALL THE JUDGE AND RESOLVE THAT BUT IN THE MORNING WOULD BE FINE WITH ME.

THE COURT: HOW ABOUT YOU, SOLICITOR? YOU NEED TO LOOK AT WHETHER OR NOT YA'LL ARE REQUIRED TO PUT THEM ON NOTICE OR WHETHER IT'S AUTOMATIC BY VIRTUE OF HIS RECORD. IF IT'S AUTOMATIC BY VIRTUE OF HIS RECORD, THEN IT'S SIMPLY SENTENCING IMPOSITION. THEY MAY TAKE IT UP BY VIRTUE OF PAROLE. YOU KNOW, UNDER THE STATUTE. SOME OF THAT OCCURRED UNDER THE OMNIBUS CRIME CONTROL AND THERE'S NO INDICATION AS I RECALL AS TO THE APPLICATION FOR IT.

MR. BILTON: YOUR HONOR, MAY I INQUIRE ON BEHALF OF THE SUTTONS WHO HAVE BEEN HERE FOR SEVEN OR EIGHT DAYS NOW MR. SUTTON LIVES IN ORANGEBURG. DO YOU THINK SENTENCING WILL BE

THIS AFTERNOON?

THE COURT: WELL, THAT'S WHAT WE ARE JUST ASKING ABOUT. COUNSEL FOR THE DEFENSE HAS ASKED FOR AN OPPORTUNITY TO EXAMINE IT BEFORE I RENDER A DECISION ON WHETHER OR NOT IT WOULD BE THE CAREER CRIMINAL ACT APPLICATION AND I WOULD ASSUME YOU WOULD WANT TO LOOK AT THAT AS WELL.

MR. BILTON: YES, SIR.

THE COURT: IN ORDER TO ARGUE THAT SUFFICIENTLY. I SUGGESTED IN THE MORNING. YOU KNOW, WHETHER IT'S THIS AFTERNOON OR IN THE MORNING I THINK MR. SWERLING HAS A PROBLEM WITH JUDGE SMITH. HE'S ON CALL DOWN IN ORANGEBURG DOWN THERE, AREN'T YOU, MR. SWERLING? WHEN HAS HE TOLD YOU TO BE THERE?

MR. SWERLING: I'VE BEEN TRYING TO REACH JOE MIZELL.

THE COURT: WHY DON'T WE CALL HIM WHEN WE COMPLETE THIS PART OF IT AND FIND OUT WHEN YOU'VE GOT TO BE THERE. IF THEY DON'T NEED YOU UNTIL IN THE MORNING, MAYBE WE CAN RESOLVE THIS THIS AFTERNOON. IF NOT--THAT WILL GIVE YOU SUFFICIENT TIME. I WANT TO MAKE SURE YOU HAVE SUFFICIENT TIME TO LOOK AT IT AND THE STATE HAS SUFFICIENT TIME TO LOOK AT IT. ALL RIGHT. ANYTHING ELSE?

MR. SWERLING: YOUR HONOR, I DO NO NOT. THERE'S NOTHING THAT I WISH TO PRESENT TO THE COURT SINCE THE SENTENCE IS MANDATORY. SOMEBODY FROM THE FAMILY MAY WISH TO SAY SOMETHING AND MR. TILLMAN MIGHT WISH TO SAY SOMETHING BUT

THERE'S NOTHING I CAN SAY AT THIS POINT IN MITIGATION UNLESS THE COURT DECIDES THAT IT COULD IMPOSE A LIFE SENTENCE WITHOUT PAROLE. THEN I MIGHT LIKE TO ADDRESS THE COURT IF THAT WILL BE ALL RIGHT.

THE COURT: YES, SIR.

MR. SWERLING: BUT OTHERWISE I UNDERSTAND THE SENTENCE IS MANDATORY AND THERE'S NO SENSE IN REFUTING THE RECORD OF FACTS AT THIS POINT.

THE COURT: ALL RIGHT. MR. TILLMAN, DO YOU HAVE ANYTHING YOU'D LIKE TO SAY ON YOUR BEHALF?

DEFENDANT TILLMAN: YES, YOUR HONOR. I WOULD LIKE TO SAY I REALLY BELIEVE I RECEIVED A FAIR TRIAL FROM YOU AND I BELIEVE THE JURORS THEMSELVES HAVE, YOU KNOW, THEY PAID CLOSE ATTENTION TO THE EVIDENCE BUT IT'S NOT OVER BECAUSE I STILL, YOU KNOW, LIKE I SAID, THEY FOUND ME GUILTY AND I STILL SAY I'M NOT. OKAY. I DID NOT KILL DONALD AND I WILL PROVE IT IN THE LONG RUN. BUT I'D JUST LIKE TO SAY THANK YOU BECAUSE THERE'S A LOT OF THINGS THAT YOU COULD HAVE LET IN THAT YOU DIDN'T LET IN AND I THANK THE JURY FOR LOOKING AND SEARCHING THE EVIDENCE BECAUSE IN THE LONG RUN I WILL PROVE THE FACT THAT I DID NOT KILL DONALD AND THEN I'LL BE ABLE TO BE ALL RIGHT. SO, THANK YOU FOR, YOU KNOW, BEING FAIR BECAUSE, LIKE I SAY, I TOLD MY MOTHER AND FATHER THAT IF I DIDN'T GET ANYTHING OUT OF THIS TRIAL I WOULD HAVE RECEIVE A FAIR TRIAL. SO, THANK YOU FOR THAT.

THE COURT: YOU ARE ENTITLED TO THAT, MR. TILLMAN. EVERYONE IS ENTITLED TO THAT. I'M GLAD YOU FEEL THAT WAY. ANYONE ELSE? VERY GOOD. IF YA'LL WILL JUST STAND BACK AND, SOLICITOR AND MR. SWERLING, STEP IN MY CHAMBERS AND MAKE THOSE CALLS TO THE SOLICITOR DOWN ORANGEBURG AND SEE WHEN THEY NEED MR. SWERLING AND SET A SENTENCING. VERY GOOD.

(JURY IS DISMISSED)

(CASE RECESSED TEMPORARILY)

THE COURT: (AT CONCLUSION OF RECESS) MADAM COURT REPORTER, WE HAVE THE PARTIES BACK BEFORE THE COURT IN THE CASE OF STATE VS. RONALD TILLMAN. YOU HAVE THE INDICTMENT AND THE SENTENCING SHEET. THIS MORNING WHEN THE JURY RETURNED ITS VERDICT THE COURT ACCEPTED THE VERDICT AND AT THAT TIME ADVISED THE DEFENDANT OF HIS RIGHT TO APPEAL. THE STATE THEN MOVED THAT, AND I ASSUME MOVED PURSUANT TO SECTION 17-25-45 WHICH PROVIDES THAT LIFE SENTENCES FOR PERSONS CONVICTED THREE TIMES FOR CERTAIN CRIMES, UNDER SUBSECTION 2 SAYS THE DECISION TO INVOKE SENTENCING UNDER SUBSECTION 1 SHALL BE IN THE DISCRETION OF THE SOLICITOR. ALL RIGHT. I GAVE THE ATTORNEYS FOR THE STATE AND DEFENSE AN OPPORTUNITY TO LOOK AT THAT PARTICULAR SECTION. IN FACT, THERE WAS A RECENT CASE, JUSTICE FINNEY WROTE THE OPINION ON IT, BUT IT DIDN'T INVOLVE THE SAME FACTUAL SCENARIO OF THIS CASE. THAT INVOLVED AN ALLEGATION OF WHETHER OR NOT TWO CRIMES COMMITTED ON THE SAME DAY OR ONE AFTER THE OTHER WERE CONTINUOUS AND

WHERE THE TRIAL ATTORNEY MOVED THE COURT TO ISSUE AN ORDER FINDING THAT THEY WERE ONE CONTINUOUS OFFENSE AND THAT WAS APPEALED ON THAT ISSUE AND THE SUPREME COURT HELD THAT THE JUDGE WAS NOT REQUIRED TO DO SO, THAT THE PROBATION AND PAROLE BOARD OR PARDON AND PAROLE BOARD COULD MAKE SUCH A DETERMINATION AND AFFIRMED IT. THAT'S DIFFERENT THAN WHAT WE HAVE. THE QUESTION BEFORE THE COURT IS UNDER SECTION 17-25-45 WHICH READS FOR THE PURPOSE OF THIS SECTION ONLY A CONVICTION IS CONSIDERED A SECOND CONVICTION ONLY IF THE DATE OF THE COMMISSION OF THE DATE OF THE SECOND CRIME OCCURRED SUBSEQUENT TO THE IMPOSITION OF THE SENTENCE FOR THE FIRST OFFENSE. THAT'S NOT THE ISSUE HERE. HERE IS THE AREA. A CONVICTION IS CONSIDERED A THIRD CONVICTION ONLY IF THE DATE OF THE COMMISSION OF THE THIRD CRIME OCCURRED SUBSEQUENT, MEANING AFTERWARDS, THE IMPOSITION OF THE SENTENCE FOR THE SECOND OFFENSE. CONVICTIONS TOTALING MORE THAN THREE MUST BE DETERMINED IN A LIKE MANNER. NOW, AS I UNDERSTAND IT THE STATE HAS PUT IN THE RECORD THAT HE WAS CONVICTED OF ARMED ROBBERY IN 1978, IS THAT CORRECT? '76 OR '78?

MR. BILTON: YES, SIR.

THE COURT: AND THAT WAS IN THE STATE OF SOUTH CAROLINA. I BELIEVE HE GOT, WHAT, A Y.O.A. SENTENCE THEN?

MR. BILTON: HE GOT A Y.O.A. FOR THE ARMED ROBBERY IN 1978.

THE COURT: AND THEN THE OTHER ALLEGATION OF A VIOLENT

CRIME IS THE BANK ROBBERY IN THE FEDERAL COURT?

MR. BILTON: YES, YOUR HONOR.

THE COURT: ALL RIGHT.

MR. BILTON: WHICH HE WAS ALSO ARMED WITH A DEADLY WEAPON AND WAS CONVICTED OF.

THE COURT: IT FITS THE STATUTE FOR BANK ROBBERY, I MEAN COMING UNDER A VIOLENT CRIME. I DON'T THINK THAT'S THE ISSUE. I THINK THE ISSUE IS WHETHER--AS I UNDERSTAND IT, HE HAS NOT BEEN SENTENCED FOR THAT OFFENSE. THAT WAS THE TESTIMONY BEFORE THE COURT. HE'S BEEN CONVICTED BUT NOT SENTENCE.

MR. SWERLING: YOUR HONOR, HE WAS CONVICTED IN THE FIRST WEEK OF JUNE, 1989, AND SENTENCING IS PRESENTLY SCHEDULED BEFORE JUDGE BLATT FEBRUARY 14TH EVEN THOUGH THE DATE OF THE BANK ROBBERY WAS DECEMBER 12TH, 1988, WHICH PREDATED THE ALLEGATIONS IN THIS INDICTMENT. BUT HE HAS NOT YET BEEN SENTENCED ON THE FEDERAL CASE AND I THINK THAT'S BEEN STIPULATED TO BY THE STATE AND THE DEFENSE FOR THE PURPOSES OF THE RECORD.

MR. BILTON: IF WE MAY, THE STATE'S POSITION IS THAT WE DON'T BELIEVE THAT IT WAS THE INTENT OF THE LEGISLATURE TO REWARD PEOPLE THROUGH THIS STATUTE BECAUSE THE FEDERAL SYSTEM HAS A BIFURCATED SENTENCING PROCEDURE. MR. TILLMAN WAS CONVICTED OF AN ARMED ROBBERY IN 1978, HE HAS BEEN CONVICTED, ALL ISSUES ON APPEAL HAVE BEEN RESOLVED IN THIS MATTER AND

SIMPLY BECAUSE HE'S NOT GOING TO BE SENTENCED UNTIL FEBRUARY 14TH HE'S BEING REWARDED BY NOT BEING SUBJECTED TO THIS STATUTE. AND WE DON'T THINK IT WAS THE INTENT OF THE LEGISLATURE TO DO THAT. AND WE WOULD ASK FOR HIS HONOR TO RULE THAT THE BANK ROBBERY WHICH HE WAS ARMED WITH A DEADLY WEAPON, SAWED OFF SHOTGUN, WOULD BE A SECOND VIOLENT CRIME.

MR. SWERLING: IF YOUR HONOR PLEASE, JUST SO OUR POSITION IF CLEAR, WE SUBMIT THAT IT CANNOT BE A THIRD--THIS CASE CANNOT BE A THIRD OFFENSE UNLESS THIS CASE, THE ALLEGATIONS IN THIS CASE, OCCURRED SUBSEQUENT TO HIS CONVICTION AND SENTENCE ON THE SECOND CASE.

THE COURT: AFTERWARDS.

MR. SWERLING: AFTERWARDS. NOT ONLY THE COMMISSION OF IT, BUT THE SENTENCE. AND THEORETICALLY EVEN THOUGH THE BANK ROBBERY MAY HAVE OCCURRED PRIOR TO THE ALLEGATIONS IN THE INDICTMENT THE CLEAR READING OF THE STATUTE MANDATES THAT THE COMMISSION OF THE OFFENSE, IN ORDER FOR IT TO BE A THIRD OFFENSE, THE COMMISSION PLUS THE SENTENCE HAS TO OCCUR SUBSEQUENT TO THE SENTENCE FOR THE SECOND OFFENSE. HE'S GOING TO ONLY RECEIVE THE SENTENCE FOR THE SECOND OFFENSE TODAY. THAT WOULD BE OUR POSITION. JUST SO THE RECORD IS CLEAR, IT'S MY UNDERSTANDING THERE'S NO ISSUE BETWEEN THE STATE AND DEFENSE THAT HE HAS NOT BEEN SENTENCED ON THE FEDERAL CHARGE AND HE WILL NOT BE SENTENCED UNTIL FEBRUARY 14TH SO THE RECORD IS CLEAR ON APPEAL.

MR. MORTON: THAT'S CORRECT, YOUR HONOR. ALTERNATIVELY, YOUR HONOR, THE STATE'S POSITION IS THAT MR. TILLMAN HAS PRIOR CONVICTIONS IN 1976 FOR HOUSEBREAKING, 1977 FOR HOUSEBREAKING AND IN 1982 FOR HOUSEBREAKING. EVEN THOUGH THE CRIME BILL DOES NOT DEFINE HOUSEBREAKING AS A VIOLENT OFFENSE, IT'S THE POSITION OF THE STATE THAT THE BURGLARY STATUTE CONSUMED AND TOOK THE PLACE OF THE HOUSEBREAKING STATUTE AND IT WAS THE INTENT OF THE LEGISLATURE THAT HOUSEBREAKING ALSO BE CONSIDERED AS A VIOLENT CRIME AND FOR THAT REASON WE WOULD ASK THAT HE BE SENTENCED FOR A THIRD VIOLENT CONVICTION.

THE COURT: I THINK ALL OF THOSE ARE FAIRLY GOOD ARGUMENTS. PROBABLY THE BEST ARGUMENT, MR. MORTON, IS WHAT YOU JUST MADE. YOU KNOW, THE LAW OF CRIMINAL STATUTES IS THAT THEY ARE STRICTLY INTERPRETED. IN OTHER WORDS, I MUST INTERPRET THEM STRICTLY BY THE LETTER. I DON'T HAVE THE RIGHT TO SUPPLANT MY JUDGMENT OR VIEW OF WHAT I THOUGHT THEY INTENDED TO DO. THAT'S NOT WHAT CRIMINAL STATUTES DO. AND IN FACT, WHEN THEY AMEND THESE CRIMINAL STATUTES UNLESS THEY PUT SAVINGS CLAUSES THEM, SOMETIMES THEY JUST ELIMINATE THE CRIMES. UNFORTUNATELY THAT'S THE LAW OF THE LAND. THE OTHER THING IS IN INTERPRETING THAT, YOU KNOW, I HAVE TO SAY THE GENERAL ASSEMBLY DID NOT HAVE THE WISDOM OR THE KNOWLEDGE TO SAY THAT ANY CRIME THAT WOULD HAVE BEEN A CRIME AS A RESULT OF ANY CHANGE IN NOMENCLATURE FOR A CRIME BASED ON THE FACTS

WOULD BE CONSTITUTED BECAUSE THAT'S ALL THEY HAVE TO DO THERE. SO, MY PROBLEM IS THE LAW SAYS THAT I HAVE TO STRICTLY INTERPRET A PENAL STATUTE AT ALL TIMES. AND IT'S A PENAL STATUTE INSOFAR AS SENTENCING. IT ISN'T AS TO CRIME. NO QUESTION IT'S NOT AS TO CRIME. AND THE QUESTION IS WHETHER OR NOT IT WOULD ALSO GO TO SENTENCING AND I'D BE INCLINED TO AGREE THAT IT WOULD. I THINK YOU'VE GOT A GOOD ARGUMENT.

MR. MORTON: YOUR HONOR, WE HAVE COPIES OF HIS OLD HOUSEBREAKING CONVICTIONS AND WE WOULD LIKE AT THIS TIME TO MAKE THEM A PART OF THE RECORD.

THE COURT: ALL RIGHT. ANY OBJECTION?

MR. SWERLING: WELL, YOUR HONOR, I DON'T THINK THE INDICTMENTS THEMSELVES IS SUFFICIENT PROOF THAT--

THE COURT: WELL, THEY MAY NOT BE BUT WHY WOULDN'T HE BE ENTITLED TO PUT THEM IN THE RECORD FOR PRESERVING THE ISSUE. I THINK HE'S ENTITLED UNLESS YOU SAY THAT THAT'S NOT HIS RECORD OR THEY SHOULDN'T BE PUT IN. I THINK HE'S ENTITLED TO DO THAT.

MR. SWERLING: WELL, YOUR HONOR, I WOULD SUBMIT IF THE STATE IS TRYING TO PROVE THE HOUSEBREAKINGS AS SOME PRIOR CRIME IN ORDER FOR THE ENHANCEMENT STATUTE THEY'D HAVE TO DO THAT IN AN EVIDENTIARY HEARING.

THE COURT: WELL, HE CAN--CERTIFIED COPIES OF THE RECORDS OF THE CLERK OF COURT HAVE ALWAYS BEEN ADMISSIBLE IN

THIS STATE. AS I UNDERSTAND THAT'S CERTIFIED COPIES OF HIS INDICTMENTS. I'M GOING TO LET HIM PUT THOSE IN. I THINK THEY ARE ENTITLED TO PUT THOSE IN. NOW, THE COURT MAY RULE THAT'S INSUFFICIENT AND THIS IS HIS TIME. I THINK HE'S CLEARLY ENTITLED TO PRESENT THOSE ON THE ISSUE AND PRESERVE IT. AND THEY MAY BE RIGHT BUT, YOU KNOW, THE CASE LAW IN THE INTERPRETATION OF PENAL STATUTES ARE THAT THEY ARE STRICTLY INTERPRETED AND I'M GOING TO STRICTLY INTERPRET IT. I THINK YOUR CLIENT PROBABLY DESERVES THE OTHER BUT I'M GOING TO FOLLOW THE INTERPRETATION AS I UNDERSTAND THE LAW IN THAT IT'S STRICTLY INTERPRETED AND I'M GOING TO INTERPRET IT STRICTLY BECAUSE THIS CRIME WAS NOT COMMITTED AFTER HE WAS CONVICTED FOR A SECOND, IT OCCURRED BEFORE. HE'S NEVER BEEN SENTENCED FOR THE SECOND ONE AND THE STATUTE REQUIRES BOTH IN MY VIEW. BUT IT FAILS ON EITHER ONE IF YOU WANT TO TAKE AN ALTERNATIVE VIEW IN THAT REGARD. BUT I DO THINK THE STATE'S BEST ARGUMENT IS WHETHER OR NOT THE HOUSEBREAKINGS WOULD CONSTITUTE BURGLARY IN THE SECOND DEGREE AND, OF COURSE, UNDER THE REVISED BURGLARY STATUTE, YOU KNOW, THEY DEFINE A BUILDING AS ACTUALLY A RESIDENCE NOW.

MR. SWERLING: WELL, YOUR HONOR, MY POSITION ABOUT THE INDICTMENTS WOULD BE THAT THERE'S NO WAY THAT THE COURT CAN DISTINGUISH AT THIS TIME. THEY ARE NOT RELEVANT BECAUSE THEY DON'T DEFINE WHETHER OR NOT THE RESIDENCES OR THE--THEY DON'T DEFINE WHAT WAS BROKEN INTO AS BEING A BUILDING OR A

DWELLING. I DON'T--

THE COURT: WELL, I DON'T KNOW. HE'S LIMITED TO WHATEVER IT IS. MR. SWERLING, I APOLOGIZE FOR STEPPING ON YOU AGAIN.

MR. SWERLING: NO, THAT'S ALL RIGHT. I JUST DON'T THINK THEY ARE RELEVANT AT THIS TIME AND NO FOUNDATION HAS BEEN LAID TO OFFER THEM AS BEING HIS PRIOR VIOLENT CRIMES.

THE COURT: WHY WOULDN'T THEY?

MR. SWERLING: THEY ARE MERE ALLEGATIONS ABOUT THE FACT THAT A HOUSEBREAKING OCCURRED.

THE COURT: YOU KNOW, THE CASE THAT--AND I WAS TRYING TO REMEMBER WHICH ONE IT WAS--THAT DEALT WITH THE ISSUE YOU DEALT WITH IN THE TRIAL OF THIS CASE AND THEY SUBMITTED THE INDICTMENT AND IN THAT CASE THEY SAID THAT THE COURT DID NOT--THEY DID NOT PUT ONE IN AND THE INDICTMENT WOULD HAVE BEEN SUFFICIENT OR INDICATED THAT. I THOUGHT YOU OUGHT TO GET THE WARRANT. YOU HAD THE WARRANTS AND EVERYTHING TO PUT IN THE RECORD AND THEN WE TOOK SOME TESTIMONY ON THE ISSUE AND WHAT IT WAS WAS WHETHER OR NOT ASSAULT AND BATTERY OF A HIGH AND AGGRAVATED NATURE WAS A CRIME OF MORAL TURPITUDE AND UNDER THE FACTS CLEARLY IT WAS NOT. THE TESTIMONY THAT WE HAD WAS IT WAS NOT AN INTENT TO KILL, HE WAS NOT CUT AND IT SHOULD NOT HAVE BEEN A CRIME OF MORAL TURPITUDE BUT AT LEAST WE TOOK TESTIMONY AND EVIDENCE TO DETERMINE IT AND THE SUPREME COURT HAS GOT A GOOD RECORD THERE. I THINK THEY ARE ENTITLED AND

I'M GOING TO LET THEM PUT THEM IN. HAND THEM UP HERE AND LET ME SEE WHICH ONES YOU'VE GOT. I THINK THEY'VE GOT A PROBLEM AND I'VE INSTRUCTED THEM HOW THEY CAN PRESERVE THE RECORD. THEY ARE ALL CERTIFIED INDICTMENTS, AREN'T THEY? WAIT A MINUTE, THIS ISN'T GOING TO DO YOU ANY GOOD. THEY'VE HANDED ME A COPY OF 82-GS39-800, STATE VS. RONALD STAFFORD TILLMAN, INDICTMENT FOR HOUSEBREAKING AND LARCENY AND IT'S A CERTIFIED TRUE COPY FROM THE CLERK OF COURT IN PICKENS FOR HOUSEBREAKING AND LARCENY AND A CERTIFIED TRUE COPY OF 77-GS40-0187, STATE VS. RONALD TILLMAN, INDICTMENT FOR HOUSEBREAKING. THAT'S A PLEA OF GUILTY ON THAT ONE. IT DESCRIBES COUNT ONE AS BEING A BUSINESS HOUSE OF AURORA CENTER OF THE BLIND. UNDER THE FACTS OF THE CASE--OF COURSE, DON'T KNOW IF THAT'S GOING TO BE SUFFICIENT BY ITSELF. IT'S A BUSINESS BUT DID IT OCCUR IN THE NIGHTTIME. IT DOESN'T SAY.

MR. SWERLING: OF COURSE, THAT'S MY POSITION.

THE COURT: THAT'S NOT GOING TO HELP YOU. AND THE OTHER ONE SAYS A BUSINESS ESTABLISHMENT, TOO. BOTH OF THESE ARE BUSINESS ESTABLISHMENTS. IT HAS TO FALL WITHIN SOME CRITERIA OF THAT STATUTE BESIDES THAT.

MR. MORTON: YES, SIR, I UNDERSTAND.

THE COURT: BUT THAT'S ALL YOU'VE GOT. YOU ARE ENTITLED TO MARK THEM. I'M GOING TO HAVE THE COURT REPORTER MARK THEM AS STATE'S EXHIBIT WHATEVER NUMBER THEY ARE FOR THE PURPOSE

OF THIS HEARING.

(INDICTMENTS ARE RECEIVED INTO EVIDENCE AS STATE'S EXHIBIT #56)

THE COURT: ANYTHING ELSE, SOLICITOR?

MR. MORTON: NO, SIR, YOUR HONOR.

THE COURT: ANYTHING FROM THE DEFENSE?

MR. SWERLING: YOUR HONOR, WE WOULD JUST ASK FOR LEAVE TO SUPPLEMENT THE RECORD WITH THE ACTUAL INCIDENT REPORTS IN THE CASE TO ESTABLISH THAT THEY WERE IN FACT BUSINESSES.

THE COURT: ALL RIGHT.

MR. MORTON: YOUR HONOR, I THINK THE ISSUE IS WHETHER THEY WERE IN THE NIGHTTIME OR NOT.

MR. SWERLING: AND ALSO WHAT TIMES THEY WERE.

MR. MORTON: I DON'T HAVE ANY OBJECTION TO THAT.

THE COURT: IF YA'LL DON'T HAVE ANY OBJECTION, HOW CAN I HAVE ANY OBJECTION? BUT FOR THE PURPOSE OF RIGHT NOW I'M RENDERING MY DECISION BASED ON THE INDICTMENTS AND THEY CLEARLY DO NOT GIVE ME SUFFICIENT INFORMATION TO REACH THAT CONCLUSION AND I SO REACH.

MR. SWERLING: WELL, YOUR HONOR, THAT'S FINE. WE WOULD WITHDRAW IT. WE ARE NOT GOING TO SUPPLEMENT.

THE COURT: ANYTHING ELSE, MR. SWERLING OR MR. TILLMAN?

MR. SWERLING: YOUR HONOR, WE WOULD JUST ASK THE COURT TO CONSIDER THE HAVING MR. TILLMAN RECEIVE CREDIT FOR THE TIME HE'S BEEN INCARCERATED ON THE MURDER CHARGE SINCE

JANUARY 4TH, 1989, AND ALSO WOULD ASK THE COURT TO CONSIDER RUNNING THE STATE SENTENCE CONCURRENT WITH ANY FEDERAL SENTENCE THAT HE'S TO RECEIVE BY JUDGE BLATT ON FEBRUARY 14TH.

THE COURT: IS HE SERVING ANY SENTENCE RIGHT NOW?

MR. SWERLING: NO, SIR.

MR. MORTON: NO, SIR, HE'S AWAITING SENTENCE.

THE COURT: ANYTHING ELSE?

MR. SWERLING: NO, SIR.

MR. MORTON: YOUR HONOR, BEFORE YOU SENTENCE HIM I WOULD ASK LEAVE TO SUPPLEMENT THE RECORD WITH THE INCIDENT REPORT.

THE COURT: ANY OBJECTION?

MR. SWERLING: YES, SIR, I WOULD. THE SENTENCING HEARING IS NOW AND I THINK THE COURT HAS TO MAKE A DECISION. I THINK WE COULD BE CRITICIZED BY ALLOWING THE DECISION TO BE MADE WITHOUT THE FULL FACTS BEFORE THE COURT AND THAT'S ONE OF THE REASONS WHY I WITHDREW IT AND I THINK THE COURT OUGHT TO RENDER A DECISION BASED UPON WHAT IT HAS BEFORE IT.

MR. MORTON: WE JUST WANT TO PROTECT OUR RIGHT TO APPEAL, OF COURSE, THE SENTENCE, YOUR HONOR. WE JUST MAKE THAT REQUEST THAT WE BE ALLOWED TO SUPPLEMENT THE RECORD WITH THE INCIDENT REPORTS ON THOSE HOUSEBREAKING CONVICTIONS.

MR. SWERLING: YOUR HONOR, I'D SUBMIT WE'D HAVE THE RIGHT TO AN EVIDENTIARY HEARING IF THEY WANT TO DO THAT AND I JUST THINK THAT JUST PROTRACTS IT. CERTAINLY MR. TILLMAN

COULD REFUTE WHAT'S IN THE INCIDENT REPORTS ABOUT THE TIME OF DAY OR WHETHER IT WAS A BUILDING OR NOT EVEN THOUGH THERE HAS BEEN A PLEA. AS I UNDERSTOOD THE STATE'S POSITION LAST WEEK THE FACT THAT SOMEONE PLED GUILTY TO HITTING SOMEONE WITH A MACHETE WAS NOT AN ADMISSION THAT THEY COMMITTED A CRIME OF MORAL TURPITUDE. SO, HE COULD CONTEST IT. HE HAS A RIGHT TO CONTEST IT AND IF THEY WANT TO PUT IN EVIDENCE, SUPPLEMENTING HIS RECORD THEN HE WOULD HAVE A RIGHT TO CONTEST THAT.

THE COURT: THIS IS THE SENTENCING HEARING. THIS IS THE TIME THE COURT WILL CONSIDER ANY EVIDENCE OF AGGRAVATION ENHANCEMENT AND YOU DON'T HAVE IT, I'M NOT GOING TO CONSIDER IT. ARE YA'LL READY?

MR. SWERLING: YES, SIR.

THE COURT: ANYTHING ELSE?

MR. SWERLING: NO, SIR.

MR. MORTON: NO, SIR.

THE COURT: ANYTHING ELSE?

DEFENDANT TILLMAN: YES SIR. I WOULD LIKE TO SAY TO THE SUTTON FAMILY, LIKE I SAY, I WAS FOUND GUILTY, YES, BUT IT'S NOT YET OVER BECAUSE I DIDN'T KILL DONALD. AND WHEN IT ALL COMES OUT EVERYTHING WILL BE ALL RIGHT. AND I'M SORRY FOR WHAT YOU HAD TO GO THROUGH AND TO PUT YOUR FAMILY THROUGH IT AND TO PUT MY FAMILY THROUGH IT. I'M SORRY FOR TAKING YOU THROUGH THAT BUT IT'S NOT YET OVER WITH BECAUSE, YOU KNOW,

IT'S NOT FINISH AND I WISH IT COULD BE. I WISH THING COULD HAVE BEEN DIFFERENT BUT MY SYMPATHIES ARE WITH YOU AND, LIKE I SAY, I'M SORRY FOR WHAT HAS HAPPENED AND I WISH I COULD CHANGE THINGS BECAUSE NOBODY CARES. EVERYBODY IS HERE TO DO A JOB BUT I CARE. AS LONG AS I CARE THEY CAN DO WHAT THEY WANT TO TO ME BECAUSE THEY DON'T CARE.

THE COURT: ANYTHING ELSE, MR. SWERLING?

MR. SWERLING: NO, SIR.

THE COURT: AS REQUIRED BY THE STATUTES OF THIS STATE, MR. TILLMAN, YOU'VE BEEN FOUND GUILTY OF THE CRIME OF MURDER BY A JURY AND THE COURT HAS DENIED ALL POST TRIAL MOTIONS. AS A RESULT I'VE EXTENDED TO YOU THE OPPORTUNITY TO SUBMIT ANY FURTHER EVIDENCE. THE STATE HAS MOVED FOR ENHANCEMENT OF SENTENCING AND I'VE DENIED IT BASED UPON THE REASONS I'VE STATED ON THE RECORD. THEREFORE, IT IS THE SENTENCE OF THIS COURT THAT YOU BE COMMITTED TO THE STATE DEPARTMENT OF CORRECTIONS, RICHLAND COUNTY DETENTION CENTER, FOR A TERM OF LIFE IMPRISONMENT. NO CREDIT IS TO BE GIVEN FOR TIME SERVED OR AWAITING TRIAL. ONCE AGAIN, I APPRISE YOU OF YOUR RIGHT TO APPEAL. YOU MUST DO SO BY FILING YOUR NOTICE OF INTENT TO APPEAL WITH THIS COURT AND WITH THE SUPREME COURT WITHIN TEN DAYS. DO YOU UNDERSTAND THAT, SIR?

DEFENDANT TILLMAN: YES, SIR.

THE COURT: GOOD LUCK TO YOU, SIR.

STATE OF SOUTH CAROLINA)

) C E R T I F I C A T E

COUNTY OF RICHLAND)

I, THE UNDERSIGNED NANCY S. AHRENS, OFFICIAL COURT REPORTER FOR THE 5TH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD IN THE CAPTIONED CAUSE IN THE COURT OF GENERAL SESSIONS FOR RICHLAND COUNTY, SOUTH CAROLINA, BEGINNING ON JANUARY 15, 1990.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL NOR INTEREST TO ANY PARTY HERETO.

Nancy S. Ahrens

NANCY S. ARHENS, CVR

COURT REPORTER

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY

THE HONORABLE DON S. RUSHING, JUDGE

THE STATE,

RESPONDENT,

vs.

RONALD S. TILLMAN,

APPELLANT.

BRIEF OF APPELLANT

JACK B. SWERLING
JENNIFER KNEECE SHEALY

1720 MAIN ST., SUITE 301
COLUMBIA, S.C. 29201

ATTORNEYS FOR APPELLANT

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QUESTIONS PRESENTED

1. Did the Trial Judge err in overruling Appellant's objections to certain questions, testimony, and evidence presented by the State concerning tire treads?
2. Did the Trial Judge err in overruling Appellant's objections to the testimony of Gabby Wells concerning criminal misconduct allegedly referred to in statement allegedly made by Appellant?
3. Did the Trial Judge err in refusing to allow Appellant to impeach the credibility of Gabby Wells by the use of a conviction of assault and battery with a machete?
4. Did the Trial Judge err in giving the jury an "Allen charge" despite objection by Appellant that such charge was untimely and erroneous.

(Exceptions 1-7, 15-16 have been abandoned and are not argued herein.)

STATEMENT OF CASE

The Appellant was indicted by the Richland County Grand Jury for murder. The Appellant was tried before the Honorable Don S. Rushing and a jury on January 15-23, 1990. The Appellant was found guilty of murder and sentenced to life imprisonment. Timely notice of intent to appeal was served and filed.

ARGUMENT

Introduction and Summary

A. The Evidence at Trial

The lengthy trial herein involved evidence which presented two conflicting views of the events on the night of the homicide. The State offered evidence in support of its position that Appellant had shot the victim, Donald Sutton, on December 26, 1989, between 8:30 and 9:00 p.m. Appellant offered alibi evidence in support of his position that he was elsewhere at the time of the killing.

The chief witness for the State was Hayes Malloy. Malloy testified that Appellant had asked Malloy earlier in December if Malloy "knows anybody that would kill Donald Sutton." (Tr. p. 16, lines 18). Malloy also testified that Appellant had offered Malloy "$5,000.00 to kill Donald Sutton." (Tr. p. 17, line 5). Malloy's testimony concerning the night of the killing can be summarized as follows:

> At about 8:30 p.m. Malloy got in a car driven by Appellant. Appellant showed Malloy a gun, saying it had been recently delivered to Appellant by Vito McKie. A car, driven by Sutton, pulled up behind them and flashed its lights. Appellant then asked Malloy if he would "take care" of Sutton, but Malloy refused despite Appellant's raising the price to $10,000. Appellant then drove to the parking lot of the Brown Chapel Church. Sutton pulled in afterward. Appellant and Sutton got out of the cars. The two met and Appellant talked to Sutton. While he was talking, Appellant pulled out the gun and shot Sutton. Malloy got out of the car before Appellant got back in. While Malloy was

checking for Sutton's pulse, Appellant drove off. Malloy left on foot.

(See Tr. p. 23, line 7 through p. 34, line 24).

Malloy's testimony was subject to a number of challenges and shortcomings, particularly concerning his credibility. For example, sometime after the shooting, Malloy contacted the police. However, he did not give them the story summarized above. Instead, he lied and said only that he knew where a body was. Malloy took the police to the scene of the shooting but denied having seen the shooting. (See Tr. p. 37, line 1 through p. 40, line 24). Malloy did not tell the police the account that he testified to at trial until after Malloy had been charged with having committed the murder himself. (Tr. p. 41, line 23 through p. 42, line 7).

B. Summary of Appellant's Position

Appellant contends that the verdict herein resulted from three types of errors. First, the Trial Court erred in permitting certain questions, testimony, and evidence offered by the state. In particular, the Trial Court erred in: (1) permitting evidence concerning tire tracks at the scene of the killing; and (2) permitting Gabby Wells, a witness for the State, to testify concerning misconduct by Appellant, which misconduct was referred to in a statement allegedly made by defendant. Second, the Trial Judge erred in refusing to allow Appellant to impeach a witness for the State. Third, the Trial Judge erred in using an "Allen

charge" at the point in jury deliberations he did because it was such an early point in deliberations that it had an improperly coercive effect on the minority-position jurors. Appellant also contends that, given the conflicting positions presented at trial, these errors, either singly or in combination, were so prejudicial that Appellant's conviction should be reversed.

I. First Argument -- Improper Admission of Tire Tread Evidence Offered by the State

The Trial Judge erred in overruling Appellant's objections to questions, testimony, and evidence presented by the State concerning the tire treads on Appellant's Car and tire tracks at the scene of the killing.

(Exceptions 10-14)

The State offered evidence which it argued showed that Appellant's car had been at the scene of the killing. In particular, the State offered: (1) evidence concerning the tires on Appellant's automobile; (2) evidence concerning the tire tracks at the scene; and (3) testimony of Bruce Hall, who gave an "expert" opinion to the effect that the tires on Appellant's car were "vector tires", that the tire tracks at the scene were made by "vector tires," and that "vector tires" were rare in his store. Each of these types of evidence is considered separately below.

A. Evidence concerning Appellant's Automobile

In late December, 1989, Appellant was arrested by agents of the Federal Bureau of Investigation (F.B.I.) for a bank robbery. At the time of this arrest, Appellant consented to a search by the F.B.I. of his house and car concerning the bank robbery. (Tr. p. 362, line 16, through p. 363, line 14). Later that day, the car

was impounded by the F.B.I. and placed in a basement parking area. (Tr. p. 392, lines 6-7; p. 399, lines 8-12)

"[A] short time thereafter, a few days or more, the Richland County Sheriff's Department...made contact with the F.B.I. and requested to come over and see the vehicle." (Tr. p. 399, lines 13-17). Subsequently, agents of the Richland County Sheriff's Department went to the F.B.I. parking area to investigate the car. As a part of this investigation, they were given the car keys by the F.B.I., unlocked the car, turned the wheel so that photographs could be made, and started the car and drove it a short distance in order to get a tire impression. (Tr. p. 399, lines 17 through 400, line 11). No warrant was sought to undertake this investigation, and the Sheriff's Department had not sought Appellant's consent. (Tr. p. 361, lines 1-4; p. 367, line 25 through p. 388, line 8; p. 390, lines 21-25; p. 391, lines 12-20).

At trial Appellant objected to the introduction of the evidence secured by this investigation. (See Tr. p. 337, lines 4-20). The basis of this objection was that the original impoundment of the vehicle was wrongful and that under these circumstances the entry into and driving of the car constituted a search and that a warrant was required for such a search since there were no exigent circumstances justifying a warrantless search. (See, e.g., Tr. p. 367, lines 6-13; p. 371, lines 7-12; p. 377 lines 6-12, 19-20).

The State did not disagree with the position that there were no exigent circumstances involved at any relevant point in time.

Moreover, the State did not present evidence of probable cause. Instead, the State argued that Appellant's consent to the F.B.I. search justified the subsequent search by the Sheriff's Department. (See, e.g., Tr. p. 380, lines 12-21).

The Trial Judge overruled Appellant's objection. The basis of this ruling was:

> The only thing that occurred was a very harmless cranking of the vehicle and moving it in order to obtain inked impressions and to photograph it, all of which I find to be reasonable and do not be intrusive and really no expectation of privacy but if there was it was waived by his consent to search.

(Tr. p. 401 lines 1-6). Appellant contends that this ruling was erroneous because the impoundment by the F.B.I. and the search by the Sheriff's department were unreasonable and beyond the scope of consent.

1. **The Impoundment by the F.B.I. and the Investigation by the Sheriff's Department Were Beyond the Scope of Appellant's Consent to the Search of his Car**

a. **Appellant's Consent to Search Was Limited**

Appellant testified that he had consented to a search of his car and that the consent was limited. Appellant had not yet been charged with the murder involved herein and had consented only to a search of his automobile in relation to his arrest by the F.B.I. for bank robbery. (Tr. p. 389, lines 1-19). Appellant also testified that he had given the federal government permission to search the vehicle, not to seize or impound it. (Tr. p. 390, lines

6-8; p. 392, line 1 through p. 393, line 14). The seizure and removal of the car occurred after Appellant had been arrested and taken to F.B.I. headquarters. (Tr.p. 392, lines 4-6).

b. Seizure and Impoundment were Beyond the Scope of Consent

The sole evidence to challenge Appellant's testimony concerning the limited scope of his consent was a consent-to-search form that he signed at the time of his arrest by the F.B.I. (See Tr. p. 393 line 17 through p. 394, line 18). One sentence in this form is:

> These agents are authorized by me to take from my premises any letters, papers, materials or other property which they may desire.

No evidence was offered by the State concerning the F.B.I. agents' interpretation of the phrase "letters, papers, materials or other property" or concerning whether this phrase had been discussed with Appellant at the time he signed the form. Thus, the sole basis for finding that seizure and impoundment were within the scope of Appellant's consent was this language contained in the form.

Given Appellant's testimony that he did not consent to the seizure and impoundment of the vehicle, this language standing alone cannot provide a sufficient basis for finding that he consented to the seizure and impoundment. The language of the consent form referred to the taking of "letters, papers, materials or other property." The automobile, however, could not be

regarded as falling within the phrase "other property" for four interrelated reasons.

First, Appellant testified that such an interpretation was not his intent. This testimony was not contradicted by evidence that the agents who arrested Appellant had a different view of the form or that the language had been discussed. Thus, the form itself cannot provide a basis for disregarding Appellant's view that the consent was limited unless the language of the consent form was clearly contrary to Appellant's view.

Second, the consent form is a written agreement, and the doctrine of ejusdem generis generally applies to the interpretation of such written documents.

> In contract, as in statutory, construction, the rule is usually applicable that where no intention to the contrary appears, general words used after specific terms are to be confined to thins "ejusdem generis"--of the same kind or class--as the things previously specified. In other words, where general words follow the enumeration of particular kinds or classes of persons or things, the general words will, unless a contrary intent is manifested, be construed as applicable only be persons or things of the same general nature or class as those specifically enumerated.

17 AM. JUR. 2d Contracts § 270 at 678 (footnotes omitted). When this principle of construction is applied to the language involved, the term "other property" must be interpreted as referring to things like letters, papers, and materials. Thus, the term "other property" did not include Appellant's automobile.

Third, the consent form authorized a "search of my premises located at Columbia, South Carolina, and my brief case and my vehicle, a 1988 Buick Riviera." (Tr. p. 394,

lines 10-12 (emphasis added)). Thus, the language authorizing the F.B.I. "to take from my premises any letters, materials, or other property" was limited to the search of the premises. There was no language in the consent form which indicates a consent to the seizure of any items from Appellant's briefcase or Appellant's automobile. Nor was there any language explicitly indicating consent to seize the briefcase or the automobile.

Fourth, even if the term "other property" were not necessarily limited by the principle of ejusdem generis or by the other terms of the agreement, the term is nonetheless ambiguous. The general rule for interpreting ambiguous terms in a written agreement is that any ambiguity should be construed against the drafter. See, e.g., Williams v. Teran, Inc. 266 S.C. 55, 221 S.E.2d 526 (1976); Mid-Continent Refrigerator Co. v. Way, 263 S.C. 101, 208 S.E.2d 31 (1974); Moody v. McLellan, 295 S.C. 157, 367 S.E.2d 449 (Ct. App. 1988). Since the uncontroverted testimony of Appellant was that he viewed his consent as limited to the search of the vehicle, not its seizure and impoundment, his reasonable interpretation of the ambiguous phrase must prevail as against the interpretation adopted by the Trial Court.

Thus, the consent-to-search form did not by itself authorize the seizure of Appellant's automobile by the F.B.I. Therefore, since no other ground was offered to justify the seizure, the seizure was wrongful. Moreover, any evidence secured as a result of this wrongful seizure must be suppressed.

Such suppression was required in United States v. Leary, 846 F.2d 592 (10th Cir. 1988), in which the government asserted that a defendant's consent to search included a consent to seize. The Court of Appeals rejected this argument, noting that Kleinberg, the defendant, had not consented to allow "the government to rummage through company files and carry out any documents that the agents found interesting. ...Kleinberg invited government agents to inspect and copy records, not seize them." 846 F.2d at 599. The Court of Appeals in Leary also rejected the government's other reasons in support of the seizure and therefore suppressed the evidence involved.

c. Search Subsequent to Seizure was Beyond the Scope of Consent

Even if the consent form were interpreted to include a consent to seizure of the vehicle, this consent was limited to a particular temporal context. The form indicated first that a search was authorized. After this authorization, the form then indicated that a seizure of "letters, papers, materials, or other property" was authorized. Thus, the consent form authorized seizure but only following or contemporaneously with the search. It did not authorize the Government to take all of Appellant's "property" to F.B.I. headquarters so that the F.B.I. could rummage through the "property" at its leisure over an indefinite period of time.

It is generally accepted that a consent to search is limited in time. For example, in State v. Brochu, 237 A.2d 418 (Me. 1967) the defendant had consented to a search of his home. A second search conducted the next day was not explicitly consented to, but the government argued that the consent was continuing until explicitly revoked. This argument was rejected by the Maine Supreme Court. Consequently, it held that there was no consent to the second search. A similar approach has been adopted in other states. See, e.g., People v. Shelton, 110 Ill. App. 3d 625, 66 Ill. Dec. 367, 442 N.E.2d 928 (1982); State v. Douglas, 123 Wis. 2d 13, 365 N.W.2d 580 (1985).

d. Search Concerning the Murder Charge was Beyond the Scope of Consent

Even if Appellant had consented to the seizure of the vehicle, this consent was limited to search and seizure concerning the crime for which he was arrested by the F.B.I. It was not a consent to a general search after seizure concerning any possible crimes which the F.B.I., or persons acting with the permission of the F.B.I., might want to investigate.

It is well established that the scope of consent is limited to the subject matter involved when the consent is given. For example, in United States v. Dichiarinte, 445 F.2d 126 (7th Cir. 1971) evidence was suppressed because the search went beyond the scope of the crime involved in the consent. The court noted:

> A consent search is reasonable only if kept within the bounds of the actual consent. Honig v. United States, 208 F.2d 916, 919 (8th

> Cir. 1953). In the case before us the defendant's consent set the parameters of the agents' conduct at that which would reasonably be necessary to determine whether he had narcotics in his home. But the agents went beyond what was necessary to determine whether defendant had hidden narcotics among his personal papers; they read through those papers to determine whether they gave any hint that defendant was engaged in criminal activity. This was a greater intrusion into defendant's privacy than he had authorized and the fourth amendment requires that any evidence resulting from this invasion be suppressed.

445 F.2d at 129-30 (footnotes omitted).

In United States v. Leary, supra, a search and seizure that resulted from going beyond the scope of consent was suppressed. The Court noted that:

> "[w]hen the basis for a search or seizure is consent, the government must conform to the limitations placed upon the right granted to search, seize or retain the papers or effects." Mason v. Pulliam, 557 F.2d 426, 429 (5th Cir. 1977); see also United States v. Gay, 774 F.2d 368, 377 (10th Cir. 1985) ("The scope of a consent search is limited by the breadth of the actual consent itself."); United States v. Milian-Rodriguez, 759 F.2d 1558, 1563 (11th Cir.) ("the government may not use consent to a search which was initially described as narrow as license to conduct a general search"), cert. denied, 474 U.S. 845, 106 S.Ct. 135, 88 L.Ed.2d 112 (1985). Even if Kleinberg's policy can be characterized as an ongoing consent to government searches, the government exceeded the scope of that consent.... Kleinberg's invitation extended only to those documents related to regulated export activities. The government searched and seized records dealing with Leary's personal and financial affairs and business activities unrelated to exports.

846 F.2d at 599.

At the time Appellant signed the consent form he had been arrested for robbery but not for murder. Moreover, his testimony that his consent was limited to the robbery was uncontradicted. Thus, the scope of his consent was limited to the bank robbery. Neither the F.B.I. nor the Richland County Sheriff's Department was entitled to go beyond that scope and generally search for evidence of other crimes by entering and driving the car.

Thus, the Trial Court erred in taking the position "once... law enforcement has it [the automobile]... they are not restricted from passing [it] along to other law enforcement agencies." (Tr. p. 382, lines 19-21). This position is contrary to the limited scope of the consent herein and to the authority holding that a search or seizure based on consent is limited to the scope of that consent.

2. <u>The Investigation of Appellant's Car was an Unreasonable Search and Seizure</u>

If the investigation of the vehicle by the Sheriff's Department was not consented to by Appellant, then that investigation must be justified on some other basis. The Trial Court concluded that such a basis existed because the intrusion was so minimal.

However, the Trial Court's reasoning did not adequately take account of the effect of lack of consent. At the time Appellant's car was seized, it was in his yard. (Tr. p. 391, lines 21-25). Thus, if he did not consent to the seizure of the vehicle or to the subsequent investigation by the Sheriff's Department, then his

expectations concerning the car must be measured in terms of that location at the time of the seizure. Thus, Appellant was entitled to the expectation of privacy of a person where his car is parked in his yard.

When a person's car is parked in his yard, he is entitled to expect that his car will not be searched or seized without a warrant or without a reason for dispensing with the warrant requirement. In Coolidge v. New Hampshire, 403 U.S. 443 (1971) the Supreme Court recognized this expectation and held that the seizure and the subsequent search of an automobile parked in the defendant's driveway could not be justified unless exigent circumstances justified proceeding without a warrant.

In Cardwell v. Lewis, 417 U.S. 583 (1974) the court held that investigation of the exterior of a car on public property does not involve expectations of privacy. However, in Cardwell there was no entry into the car like that involved herein; nor was there a seizure in the form of driving like that involved herein. Moreover, the Cardwell opinion stresses that the car involved was on public property, not on private property like the car in Coolidge v. New Hampshire.

B. Evidence Concerning Tire Tracks at the Scene of the Killing

The State offered photographs of tire tracks found in the vicinity of the crime. The purpose of this evidence to provide a foundation for an "expert" on tires to testify concerning these

photographs and the photographs and impressions of the tires on Appellant's automobile.

Appellant objected to the introduction of evidence concerning tire tracks at the scene on the ground that there was no proper showing that these tracks were connected to the killing. The Trial Judge overruled this objection because the witness involved had testified that "the tire tracks appeared to stop in view of the body." (Tr. p. 407, line 17 through p. 408, line 5).

Appellant contends that this ruling was erroneous because the selection of the tire tracks that were photographed was unduly speculative. There were "innumerable" tire tracks in the parking area. (Tr. p. 432, lines 1-4). As a result, the officer who made photographs had to speculate first, that the tire tracks he chose to photograph, among all the tire tracks in a parking area, appeared to be the tracks of the car involved in the shooting and second, that they were the tracks involved. Allowing such a speculative basis for evidence is particularly improper where the State had available a person like Hayes Malloy, who claimed to be an eyewitness. There was no need whatsoever to speculate because it would have been easy to ask Malloy which tracks were made by the car in which he and Appellant allegedly rode.

Moreover, asking Malloy to identify the tracks would serve to confirm (or disconfirm) his account of the events involved. Given the fact that Malloy had substantially changed his story after he had been charged with the murder, the police had good reason to seek corroboration. Yet they did not ask Malloy to identify where

the car was parked even though asking Malloy could have corroborated his story while also avoiding the need to speculate.

The following testimony indicates this lack of corroboration and the unnecessarily speculative nature of the tire track evidence:

Q Did anybody show you where Mr. Malloy--well, let me ask you. Did Mr. Malloy show you where the car was that he said was the car that they drove up in?

A No, nobody showed me where the car was.

Q So, nobody ever showed you where the car was?

A That's correct. Nobody ever showed me.

Q What you did is you went out there and two out two prints. You took a photograph of two tire prints because they were tire prints that were in view of the body?

A They stopped in view of the body. They did not continue on.

Q Okay. But nobody told you that's where the car was parked. Is that correct?

A That's correct.

Q And in looking at this photograph, would you tell the jury, are there literally innumerable tire marks and tire patterns in that sand?

A Yes, there are. Many are over one another.

Q Many of them are over one another. Some are not over one another, is that correct?

A That's correct.

Q All right. Did you photograph any of those? Any of the others?

A No.

Q Did you do any comparisons on any of these others?

A No, we did not.

Q So, you basically randomly took some impressions in the sand even though we had all of these in state's Exhibit Number 24 because they were stopped near the body? Is that correct?

A That's correct. Because they appeared to stop in view of the body.

Q All right. Now, you don't know if that's where the vehicle was according to your testimony? Is that correct?

A Nobody told me that's where the vehicle was that night.

(Tr. p. 431, line 13 through p. 432, line 20).

The admission or exclusion of evidence is a matter of discretion for the trial judge. However, it is error to admit evidence unless the connection of the evidence to a point at issue "is reasonable, and not latent and conjectural." Clark v. Patapsco Guano Co., 144 N.C. 64, 56 S.E. 858, 862 (1907). Evidence based on speculation is not admissible. See City of Spartanburg v. Laprinakos, 267 S.C. 589, 594-596, 230 S.E.2d 443 (1976).

The tire track evidence herein does not satisfy this legal test. The testimony was admittedly speculative and conjectural. The witness candidly admitted that he simply picked the tires that "appeared" to be close to the body and did not ask anyone about the tracks. Such speculation may be reasonable in some situations

because the use of circumstantial evidence i) often necessary and often involves the need for relying on appearances. However, there was no such need herein. The State had a person who claimed to be the eyewitness and who could identify the specific tracks involved. Yet this witness was not questioned even though such questioning could have eliminated the need to speculate while also providing a check on the validity of the witness' account.

C. "Expert" Testimony Concerning the Tires Tracks at the Scene and Appellant's Tires.

1. Qualifications as an Expert.

The State offered Bruce Hall as an "expert" on "Goodyear tire treads." (Tr. p. 443, lines 10-14). The basis of this alleged expertise was that Mr. Hall had worked for a Goodyear store in Columbia for six years. He testified that he had acquired knowledge of tread patterns as a part of providing service to his customers over the years. (Tr. p. 438, line 1 through p. 443, line 9). The State argued that Mr. Hall had sufficient "expertise" to render an "expert" opinion concerning the brand and type of tires involved by looking at photographs of the tire treads on Appellant's tires and photographs of the tire tracks in the parking area of the murder scene.

Appellant challenged these qualifications on two grounds. First, though Mr. Hall had considerable experience with Goodyear tires, this experience was limited in several important respects. His experience with tires was limited to observation of tires, not

of photographs and tire impressions. His experience was also limited to Goodyear tires. While selling and installing Goodyear tires at his store, he may have serviced cars with some other brands of tires. However, such random, ad hoc experience would not qualify him as an expert concerning all other tires.

Second, Mr. Hall's training was also limited in its nature. His training was entirely "on the job" training, and there was no way to determine whether he had the expertise he claimed. He had no degree or formal education in the area. Moreover, his area of expertise did not involve the type of subject matter where lay persons could evaluate his abilities. Thus, Mr. Hall was, in effect, "bootstrapping" himself into the position of having himself qualified as an "expert": The existence of his expertise was based solely on his own "expert" assessment of his skills. (See Tr. p. 443, line 19 through p. 448, line 24; p. 452, line 8 through p. 467, line 5).

The Trial Judge overruled these objections and held that Mr. Hall was qualified because of his experience and because of his own assessment of his abilities:

> He says that he can ride down the road and tell the difference between a tire simply by looking at the tread, he doesn't need to see the name on it. And not just Goodyear tires, he said every other type of tire.

The qualifications of an expert is a matter for the discretion of the trial judge. However, there are limits on this discretion. For example, State v. Priester, -- S.C. --, 391 S.E.2d 227 (1990) held that the Trial Judge erred in allowing a

person with expertise in assessing the content of alcohol in blood to testify concerning the behavioral effect of that content. Such a witness "'lacked the qualification necessary to permit her to testify as an expert on the effect of a given blood alcohol content....'" 391 S.E.2d at 228, quoting from Groth v. DeGrandchamp, 71 Mich. App. 439, 248 N.W.2d 576 (1976).

Similar error occurred at the trial herein because Mr. Hall's experience was extremely limited. The State offered Mr. Hall as a person who installed Goodyear tires and who was, therefore, an expert on "Goodyear tire treads." (Tr. p. 443, lines 10-14). Yet Mr. Hall's testimony went beyond this scope. He testified that no other brand of tire made the tire tracks like the photographs he was shown. Moreover, Mr. Hall's experience was limited to the observation of tires on cars brought into his store. He was not experienced in identifying photographs of tire tracks, particulary where the tread marks were in soft sand.

2. The "Expert Opinion"

Despite objection, Mr. Hall was allowed to testify that, based on his examination of photographs and impressions of the tire on Appellant's car and on his examination of the photographs of the tire tracks in the sand, both involved Goodyear "vector tires." (Tr. p. 499 line 18 through p. 494, line 24; p. 498, line 17 through p. 503, line 2).

He was also allowed to testify despite objection that "around 2 percent of the tires just sold out of my location were Goodyear

vectors." (Tr. p. 509, lines 7-11; see p. 509, lines 22-24). Mr. Hall had no idea what the sales figures for vector tires were for other stores. Nor did he know anything about the overall number of vector tires in the United States or in Columbia, South Carolina. (Tr. p. 509, line 5 through p. 510, line 5).

The Trial Judge overruled the objections and admitted the testimony. The basis of this ruling was as follows:

> The Court finds there is a probative value .... The testimony by Mr. Malloy was that the Defendant drove him out there in that vehicle which is in essence corroboration of what Hayes Malloy says and also would defeat any evidence of an alibi of this defendant. The state has a right and is required to prove that he was present at the scene of the crime. There's direct testimony that the defendant was in that vehicle driving that car and there are tire prints which are shown in the sand which are the same type of tire print as the vehicle. It goes to support that testimony. That's a reasonable inference. No witness at this point has testified that that is the tire print which matched that tire. No question about it but they have said that that tire print was a vector tire. He drove a vector car out there. So, those two connected together are sufficient for the court to rule out any speculative nature in the case and it is probative on the issue, if believed. Always if believed.

(Tr. p. 513, line 15 through p. 514, line 7). This ruling was erroneous for several reasons.

First, as indicated in "1" above, the opinion was beyond the competence of Mr. Hall because he had been offered and qualified as an expert on "Goodyear tire treads." (See Tr. p. 443, line 13-14). His "expertise" with other tires was limited to his random, ad hoc experience with tires brought into his store. Thus, he

went beyond his expertise and was speculating when he said that only a Goodyear brand tire made tracks like those at the scene.

Second, the underlying evidence was extremely speculative and improperly prejudicial. Where experts offer opinions based on speculation, a jury verdict based on such a speculative opinion must be reversed. For example, in City of Spartanburg v. Laprinakos, 267 S.C. 589, 230 S.E.2d 443 (1976) an "expert 'in the field of real estate'" testified concerning property value in a condemnation case. 267 S.C. at 593-94. It was held error to have allowed this testimony because the witness not compare similar properties, because he used speculative information gained from landowners in the area, and because he was not sufficiently familiar with the relevent facts.

Similar shortcomings are reflected in the facts involved herein. There were numerous different tire tracks at the scene of the killing, yet only one set had been photographed and this set had been selected on the basis of appearance and speculation without consulting Hayes Malloy, the "eyewitness" to the shooting. (See argument above at pages 17-20). Moreover, the Trial Judge's reasoning is questionable because, as pointed out above, the tire track evidence did not corroborate Malloy's account. Such corroboration is absent because the police officer who photographed the tire tracks at the scene did not ask Malloy where the car had parked. (See argument above at pages 17-20). The evidence was also speculative in that there was no competent

testimony concerning how common vector tires were at that time. Thus, the jury had no way to assess the evidence involved.

Third, the evidence was not only speculative but also unduly and improperly prejudicial. The undue prejudice was particularly harmful because Mr. Hall was allowed to testify that 2 percent of his sales involved vector tires. This evidence was clearly irrelevant and misleading concerning the question of how common "vector" tires are. Nevertheless, it suggested to the jury that such tires are rare even though such an "opinion" was pure speculation since Mr. Hall did not know anything about the number of "vector" tires in Columbia generally.

D. Improper Prejudice from the Tire Tread Evidence

The evidence concerning the treads was extremely prejudicial. The trial involved a clash between the story of Hayes Malloy and the alibi witnesses of Appellant. As a result, the tire tread evidence was extremely prejudicial because, as the Trial Judge noted, the jury could use this evidence as "corroboration of what Hayes Malloy says" and to "defeat any evidence of an alibi." (Tr. p. 513, lines 16-21).

Yet this use of the evidence was unduly and improperly prejudicial given the speculation involved. In particular, to use it to corroborate Hayes Malloy's story is both illogical and very prejudicial since the photographs of tire tracks at the scene were not based on his identification of the location where they had driven and parked. No such corroboration of his story had been sought. (See argument above at pages 17-20).

II. Second Argument -- Improper Admission of Testimony by Gabby Wells Concerning Alleged Misconduct by Appellant.

The Trial Court erred in overruling Appellant's Objections to testimony by Gabby Wells concerning criminal misconduct allegedly referred to in a statement allegedly made by Appellant.
(Exception Number 8)

The State called Gabby Wells to testify to the effect that Wells had heard Appellant ask Malloy to tell the authorities that Malloy had committed the murder. The State also wanted Wells to testify that he had heard Appellant say to Malloy that "the Feds have me by the balls." (The federal charge involved the bank robbery discussed above in Part A of the First Argument). Appellant objected to the second portion of the testimony on the basis of State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) because that portion indicated that he was facing prosecution by the federal government and thus involved the improper admission of other wrongdoing. (See, Tr. p. 307, line 8 through p. 309, line 16).

This objection was overruled, and the Trial Judge ruled that Wells could testify concerning the statement about "the feds." (See Tr. p. 307, lines 8-12). The basis of this ruling was not that Lyle was inapplicable or that one of exceptions to Lyle existed. Instead, the Trial Judge, addressing only the problems of hearsay and relevance, ruled as follows:

> Lyle goes to prove another crime in order to show motive, intent, common scheme and

> plan. That isn't the purpose for which it was offered. It's not a Lyle issue. It's an admission against his penal interest in this case. That's what it's admitted for. And the fact that he admits that the feds have him by the balls they are not trying to prove another crime to show that he committed this crime but simply to show his state of mind at the time the declaration was made and it was made against his penal interest. That statement. It clearly has probative value. And if there is any prejudicial effect by it it's clearly outweighed by the probative value in the case. I'm going to allow it.

(Tr. p. 308, lines 10-22).

This ruling was erroneous because the statement indicating that the federal government was likely to convict Appellant of a crime involves the type of misconduct that should be barred under State v. Lyle. The reason for the Lyle rule is that evidence of such misconduct can cause the jury to believe that a defendant is a "bad person" and, therefore, more likely to be guilty of the crimes at issue. See 125 S.C. at 415-417. Just such a result was likely herein given the dispute about the facts and the importance of determining whether the account of Hayes Malloy was sufficiently credible to overcome the alibi evidence presented by Appellant.

The possible commission of a federal crime was irrelevant to the admissibility of the rest of the statement. The request that Malloy say that he committed the murder could only have been admissible under the following theory: Appellant was seeking Malloy's assistance to avoid conviction of the murder because Appellant knew that he was guilty and thus likely to be convicted.

If this were not the motivation for the request, then the request would be irrelevant and inadmissible. The existence of the federal charge and its likelihood of success were not relevant, and it was error to admit any reference to either.

Moreover, evidence of other misconduct should be excluded where the prejudice therefore far outweighs the probative value, if any, of the misconduct evidence. State v. Coleman, -- S.C. --, 389 S.E.2nd 659 (1990). Therefore, even if the reference to another crime were relevant, its relevance was limited and outweighed by its improper prejudicial impact. Its sole relevance concerned the collateral issue of whether Appellant had requested Malloy to say that Malloy had committed the murder. Moreover, even as to this collateral issue the statement had only limited probative weight concerning motivation since the desire to avoid a murder conviction obviously provided a motive to make the request of Malloy. The federal crime added virtually nothing to this motive. Thus, the reference to the federal crime should have been excluded because it was unduly prejudicial.

The prejudicial effect is also indicated by the role the statement could have played in the jury verdict. The jury herein considered itself possibly deadlocked at one point. (See Part IV below). Thus, the view that Appellant was a "bad man" could have had a role in the verdict. Such a prejudicial role is particularly likely herein because credibility and character were crucial given the diametrically opposed positions presented at the trial.

III. Third Argument -- Improper Exclusion of Impeachment Evidence Concerning Gabby Wells

The Trial Judge erred in refusing to allow Appellant to impeach the credibility of Gabby Wells by the use of a conviction of assault and battery with a machete.

(Exception Number 9)

A. The Crime Involved in the Impeachment Attempt and the Ruling by the Trial Judge

Gabby Wells, a witness for the State, testified that he had heard Appellant ask Hayes Malloy if Malloy would "take the murder charge for Donald Sutton 'cause the Feds got him by the balls." (Tr. p. 310, lines 19-21).

Appellant attempted to impeach Wells' credibility by asking about a conviction of assault and battery of a high and aggravated nature that occurred in 1988. The charge involved an assault and battery that had occurred on July 16, 1988. (Tr. p. 329, lines 2-6; p. 652). The indictment for assault and battery of a high and aggravated nature charged that Wells had stricken the victim "repeatedly with a machete." (Tr. p. 646). Wells pled guilty to the charge of assault and battery of a high and aggravated nature. (Tr. p. 655).

The Trial Judge ruled that evidence of this conviction was not admissible. This ruling was based on the position of the Trial Judge that the indictment did not control the determination of whether a crime of moral turpitude was involved. Instead, the

Trial Judge ruled that that "determination depends upon the facts and circumstances of each particular case" and that since these facts may vary from the indictment, a hearing was necessary to determine the underlying facts involved. (Tr. p. 335, lines 4-10). Based on the testimony of Gabby Wells at this "hearing," the Trial Judge ruled that the facts did not indicate a crime of moral turpitude.

B. The Exclusion was Erroneous

Appellant contends that this ruling was erroneous for two reasons. First, the Trial Court adopted the wrong test when it took the view that it was necessary to conduct a mini-hearing in order to make a factual determination concerning the facts underlying a conviction. Second, even if such a hearing was necessary and appropriate, the facts of this case indicate that a crime of moral turpitude was involved.

It is well established that a serious, harmful assault and battery involves a crime of moral turpitude. See, e.g., Jamison v. Howard, 275 S.C. 344, 271 S.E.2d 116 (1980) (assault and battery with intent to kill). State v. Bailey, 275 S. C. 444, 272 S.E. 2d 439 (1980) held that the determination of whether assault and battery of high and aggravated nature involves moral turpitude depends upon the circumstances. Bailey clearly indicated that the indictment would provide the basis for this determination and that a hearing on the facts underlying the conviction was not appropriate.

> Proof of the nature of a prior conviction must necessarily be confined to the inherent nature of the crime as defined by law and particularized by the indictment. More thorough proof of the underlying circumstances would possibly require an extensive hearing on collateral matters and therefore be adverse to the uniform and efficient administration of law.

275 S.C. at 446. Thus, under Bailey the Trial Court should have based its determination solely on the indictment.

Even if a mini-hearing were the proper approach, the facts herein show that a crime of moral turpitude was involved in the assault and battery at issue. Mr. Wells himself testified as follows concerning the facts of the assault:

Q ... Mr. Wells, you pled guilty to that indictment, did you not?

A That's true.

Q Okay. And did you have a machete in your hand?

A That's true.

Q Okay. Did you hit somebody with it?

A I hit him with the fat part, not the blade part.

Q Okay. And did you rob the person?

A He say I robbed him but I didn't rob him.

Q Okay. How many times did you hit him with the fat part of the blade?

A It was about four or five times. Most of the time I kick him in his face.

Q So, in addition to hitting him with the machete blade or machete handle you kicked him in the face?

A I didn't say I hit him with no handle.

Q You just said you did.

A I say I hit him with the fat part which I didn't hit him with the blade. The fat part of the machete about that long and about that thick (indicating). But I did not hit him with the blade.

Q You were hitting the person with the blade--

A But it was the fat part turned sideways what I'm saying. Turned sideways.

Q You did that about four times?

A Yes. I pulled his hands down and beat him with the butt.

Q Okay. And how many times did you kick him in the face?

A No tellin'. I couldn't say.

Q Ten, twenty?

A I say I couldn't say. It might have been two or three.

(Tr. p. 335, line 14 through p. 336, line 18).

A crime of moral turpitude is involved where the criminal conduct is "an act of baseness, vileness, or depravity in the social duties which a man owes to his fellow man or society in general, contrary to the accepted and customary rule of right and duty between man and man." State v. Yates, 280 S.C. 29, 37, 310 S.E.2d 805, 810 (1982); accord, e.g., State v. Ball, 292 S.C. 71, 73, 354 S.E.2d 906 (1987); State v. Morris, 289 S.C. 294, 296, 345 S.E. 2d 477 (1986); State v. Horton, 271 S.C. 413, 248 S.E.2d 263 (1978). "In determining whether a crime is one of moral tur-

pitude, the Court focuses primarily on the duty to society and fellow men which is breached by the commission of the crime." State v. Ball, 292 S.C. 71, 74, 354 S.E.2d 906, 908 (1987); accord, e.g., State v. Major, -- S.C. --, 391 S.E.2d 235 (1990).

Where physical attacks are involved such "baseness, vileness and depravity" is evidenced by the deliberate willingness to harm another human being. However, when legally recognized provocation has motivated the attack, no such deliberate disregard of rights is involved. Thus, voluntary manslaughter does not involve a crime of moral turpitude. State v. McFarlane, 279 S.C. 327, 306 S.E.2d 611 (1983) (manslaughter); Taylor v. State, 258 S.C. 369, 188 S.E.2d 850 (1972) (manslaughter); see State v. Bailey, 275 S.C. 444, 272 S.E.2d 439 (1980) (whether assault and battery of high and aggravated nature involves moral turpitude depends upon circumstances); Liberty Mutual Insurance Co. v. Gould, 266 S.C. 521, 224 S.E.2d 715 (1976) (involuntary manslaughter).

The attack involved in Well's conviction certainly shows a depraved disregard of the rights of a fellow man. The indictment charged that he repeatedly hit the victim with a machete. By his own admission, Wells used a large, sharp knife when he attacked the victim. He admitted that he struck the victim with the flat edge with enough force to knock him down. After knocking the victim down, he continued to hit him with the weapon and to kick him in the face. Such deliberate, unprovoked violence against a fellow human shows the kind of disregard of rights, duties, and

the well-being of others that requires a conclusion that moral turpitude was involved.

These facts are similar to those in State v. Scott, 269 S.C. 438, 237 S.E.2d 886 (1977). The defendant in Scott "deliberately committed an unprovoked assault with a deadly weapon upon the unsuspecting victim, a young woman, while she was peacefully walking to her car from the hospital where she had been visiting a friend." 269 S.C. at 450. The Court ruled that an assault and battery with intent to kill was involved in such a case. The criminal conduct involved in Scott was a crime of moral turpitude because an assault and battery with intent to kill involves moral turpitude. See Jamison v. Howard, supra. Given the similarity between the facts in Scott and the facts in Wells' attack, it is clear that Wells' conviction for the attack involved a crime of moral turpitude.

C. The Exclusion was Prejudicial

The exclusion of this conviction was prejudicial. The jury was aware that Wells had been convicted of other crimes. However, with only one exception, these convictions were not as recent as the assault and battery at issue. Thus, the conviction for an assault in July of 1988 added an important dimension to Well's record because it indicated a consistent, continuing, recent disregard for the law and for the rights of others.

Moreover, this recent example of violent conduct supported Appellant's position that Wells had a specific motive to lie. Appellant contended that Wells had a grudge against the Tillman

family and that this grudge could effect his credibility. The basis of this grudge was that Wells had been barred from the Tillman family's "Party Shop" in 1989 because of a violent assault in the "Party Shop." However, Wells denied that he had a grudge. He also implicitly denied that he had a motive for a grudge because he asserted that the "bar" from the shop was not really effective. He supported this assertion by implicitely denying that there was any need or reason for a "bar" because he denied that he had had a fight or that he was really threatening anyone. (See Tr. p. 321, line 8 through p. 322, line 7). Thus, Appellant suffered additional prejudice from the exclusion of the evidence of this conviction because the evidence of the criminal assault would have bolstered Appellant's contentions concerning Wells' aggressive nature at the time involved and thus would have supported Appellant's assertions concerning Wells' bias caused by the necessary and effective "bar" from the "Party Shop."

Since the trial herein involved diametrically opposed views of the facts involved, credibility was crucial. Wells' testimony had the effect of strengthening Malloy's credibility and weakening the credibility of Appellant's alibi defense. Consequently, it was crucial to have Wells' credibility tested as thoroughly as possible. It was, therefore, prejudicial error to exclude the conviction of assault and battery of high and aggravated nature. This prejudice is particularly apparent given the fact that the jury at one point felt that it could be deadlocked. (See Part IV below).

IV. Fourth Argument--Improper Use of "Allen Charge"

The Trial Judge erred in giving the jury an "Allen charge" despite objection by Appellant that such charge was untimely and erroneous.

(Exception Number 17)

The jury began its deliberations shortly before 4:00 p.m. on January 22. Within an hour the jury was recalled briefly to discuss their request for a transcript. At about 6:30 p.m. the jury was called back in and recessed for dinner. At 8:15 p.m. the jury resumed its deliberations and continued for about an hour before recessing for the night. (See Tr. p. 617, lines 23 through p. 625, line 17).

The next morning the Trial Judge indicated that prior to the recess for the night he had been given a note stating that the jury was deadlocked. (Tr. p. 625, lines 18-24). The Trial Judge indicated that he was going to given an "Allen charge" urging them to reach a verdict. Appellant requested that the jury only be instructed to deliberate further this morning. (Tr. p. 626, lines 11-13). However, this request was denied, and the jury was given an "Allen charge." (Tr. p.626 line 14 through p. 629, line 12). In about an hour the jury reached its verdict of guilty. (See p. 629, line 13; p. 631, lines 3-13)

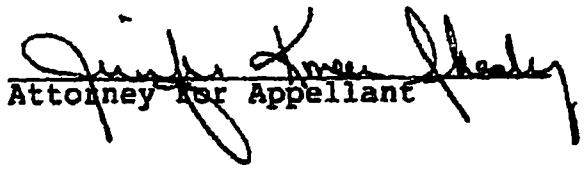
Appellant contends that use of the "Allen charge" was erroneous under the circumstances because it had an unnecessarily coercive impact on the jury's decision process. The "Allen

charge" has a long history of approval, but its potential for coercion is also well recognized. See, e.g., State v. Elmore, 279 S.C. 417, 424, 308 S.E.2d 781 (1983); United States v. Rogers, 289 F.2d 433 (4th Cir. 1961). This coercive effect was likely in the present case because of two circumstances. First, the charge was used so quickly that the jury was implicitly told that extensive debate and discussion were not important. Second, the previously deadlocked jury reached a decision quickly after the giving of the "Allen charge." This speed suggests that the majority view simply prevailed. See United States v. Rogers, supra at 437. In light of the coercive effect likely under these circumstances, it was erroneous and prejudicial to give the "Allen charge" as was done herein.

CONCLUSION--RELIEF REQUESTED

For the reasons given in the preceding arguments, Appellant requests this Court to reverse his conviction and to grant him a new trial.

Respectfully submitted,



Attorney for Appellant

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal From Richland County

The Honorable Don S. Rushing, Judge

THE STATE,

Respondent,

v.

RONALD S. TILLMAN,

Appellant.

BRIEF OF RESPONDENT

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QUESTIONS INVOLVED

I.

Did the trial court err in allowing State's witness Clarence Gabby Wells to testify about a statement made by Appellant to Hayes Malloy?

II.

Did the trial court err in refusing to allow Appellant to impeach State's witness Clarence Gabby Wells with his prior conviction for assault and battery of a high and aggravated nature?

III.

Did the trial court err in allowing the State to present evidence of tire tracks found near the victim's body?

IV.

Did the trial court err in allowing the State to introduce photographs of the tread of the tires on the car driven and rented by Appellant?

V.

Did the trial court err in qualifying State's witness Bruce Hall as an expert in the area of tire treads and patterns? Did the court err in allowing Bruce Hall to testify as to his opinion concerning the tire tracks found near the victim's body and the tires on the car driven and rented by Appellant?

VI.

Did the trial court err in giving the jury a supplemental charge?

STATEMENT OF THE STATE'S CASE[1]

Several times during the month of November 1988, Appellant told Clarence Gabby Wells he was going to kill Donald "Duck" Sutton. He repeated these comments in December 1988. (Tr. p. 286, lines 6-19).

Also during the month of December 1988, Appellant asked Hayes Malloy if he knew anybody who would kill Donald; Hayes replied negatively. Appellant then offered him Five Thousand and No/100 Dollars ($5,000.00) to kill Donald. Although he planned to go straight to the police with this information, Hayes told Appellant that he accepted the offer. (Tr. p. 16, line 14 - p. 17, line 25; p. 45, lines 15-18; p. 209, line 10 - p. 210, line 6). On December 21, 1988, Hayes met with Federal Bureau of Investigation (hereinafter referred to as FBI) Agents Randy Mondor and Jim Davis and told them of Appellant's offer. (Tr. p. 18, line 1 - p. 19, line 6; p. 74, lines 5-14). He thereafter continued to go to Appellant's party shop between that date and December 26th and talk to him. (Tr. p. 19, lines 7-16).

While standing with some other men across the street from Appellant's shop on December 26, 1981, Hayes was approached by Appellant who told him that Donald was coming down to the shop and that he had to get rid of him. Believing that Appellant wanted Donald killed that night, Hayes unsuccessfully tried to

---

[1] This recitation of the evidence introduced during the State's presentation of its case does not include any of Bruce Hall's evidence relating to the tire tracks found near the victim's body or the tires on Appellant's car.

reach an FBI Agent. (Tr. p. 19, line 17 - p. 21, line 1; p. 45, line 8 - p. 46, line 19; p. 47, lines 14-18; p. 48, lines 5-7; p. 74, line 15 - p. 78, line 17; p. 211, line 22 - p. 213, line 15). He, however, stayed where he was for the remainder of the afternoon, drinking and talking with his friends. Appellant, who apparently divided his time that afternoon between his shop and Hayes's group across the street, left between 6:00 and 7:00 p.m. to run some errands. He informed Hayes that he would return shortly. (Tr. p. 21, lines 2-18; p. 47, lines 3-8).

While Appellant was gone, Donald arrived at the shop. In an attempt to get him to leave before Appellant returned, Hayes told him that Appellant had gone to the "Fountain Bleu." Donald left and at 8:30 p.m., approximately thirty (30) minutes later, Appellant returned with Vito McKie. (Tr. p. 21, line 19 - p. 23, line 10; p. 43, lines 4-9; p. 47, line 9 - p. 48, line 2; p. 217, lines 12-21). After talking with Appellant, Hayes got in the car with him to go somewhere. In the car, Appellant pulled out a small caliber, black, pearl-handled pistol and showed it to Hayes; he told him that Vito had given it to him. (Tr. p. 23, line 11 - p. 24, line 15; p. 29, lines 1-7; p. 48, lines 8-12; p. 217, line 20 - p. 218, line 11).

As they drove down Shop Road, Donald pulled up behind them and flashed his high beam headlights. Apparently after signaling to Donald to follow them, Appellant asked Hayes if he was going to take care of Donald for him; Hayes replied

negatively. Appellant then offered to give him Ten Thousand and No/100 Dollars ($10,000.00); Hayes's reply was still negative. (Tr. p. 24, line 16 - p. 26, line 2; p. 29, lines 15-24; p. 45, lines 15-21; p. 48, lines 13-23; p. 186, lines 4-7; p. 209, line 21 - p. 210, line 1; p. 218, lines 12-25).

Appellant drove behind a church where he parked his car. He then got out and approached Donald who had pulled up behind them. (Tr. p. 26, lines 3-22; p. 29, line 24 - p. 31, line 20; p. 48, line 24 - p. 49, line 8; p. 219, lines 1-7). Putting his arm around Donald, Appellant walked with him toward a corner of the building. As he talked, Appellant pulled the pistol from his pocket and shot Donald in the head. Donald fell to the ground and Appellant, bending over him, shot him again. (Tr. p. 31, line 20 - p. 34, line 1; p. 49, line 9 - p. 57, line 13; p. 173, line 16 - p. 174, line 4; p. 191, line 12 - p. 192, line 23; p. 219, lines 7-14). As Appellant ran back to his car, Hayes jumped out and went over to Donald. Appellant drove off leaving Hayes with Donald, who was dead. Hayes, who feared for his life, wandered around before eventually calling the police. (Tr. p. 34, line 2 - p. 38, line 6; p. 57, line 11 - p. 60, line 24; p. 174, line 4 - p. 175, line 15; p. 179, line 22 - p. 183, line 11; p. 219, lines 14-16).

When the police responded to his call, Hayes -- afraid of the consequences of his presence at a murder scene -- simply reported that he knew where a body was located. He was taken to the Sheriff's Department and, after submitting to various

tests and giving a statement, was allowed to go home. (Tr. p. 38, line 7 - p. 40, line 24; p. 79, line 4 - p. 82, line 22; p. 93, line 18 - p. 94, line 25; p. 97, lines 17-21; p. 198, lines 6-15; p. 199, lines 10-15; p. 220, lines 6-12; p. 582, line 16 - p. 587, line 23). The following morning, the members of the Sheriff's Department processed the murder scene -- which included examining and photographing tire tracks -- and then went to Appellant's party shop. There, they looked at the tires on Appellant's car; they were discovered to be Goodyear Vector tires. (Tr. p. 587, line 24 - p. 589, line 2).

The next day, December 27th, Hayes saw Appellant at his party shop. Referring to the murder, Appellant asked Hayes "how [he liked] that shit." Without responding, Hayes walked out of the shop. (Tr. p. 42, lines 8-20).

Within the next few days, Hayes was arrested and located in the same prison facility as Appellant. Through the door of his prison cell, Appellant told Hayes that he wanted him to "take the murder charge for Donald Sutton 'cause the Feds [had] him by the balls." (Tr. p. 309, line 20 - p. 310, line 21).

Several times during December 1988 and January 1989, Appellant told Kenneth L. Gardner, who was also in the same prison facility as Appellant, that he killed Donald. Appellant also boasted that the police were not going to be able to prove he did it. (Tr. p. 537, line 20 - p. 541, line 22; p. 543, line 14 - p. 544, line 14; p. 547, lines 10-16; p. 549,

line 5 - p. 550, line 1).

On January 3, 1989, Hayes finally told the police that he actually witnessed Appellant's murder of Donald Sutton. (Tr. p. 41, line 23 - p. 42, line 5; p. 140, lines 14-21; p. 143, lines 16-19). On the following day, Appellant gave a statement to the police in which he denied any involvement in the shooting and placed himself somewhere other than the murder scene at the time of the murder. (Tr. p. 239, line 4 - p. 244, line 13; p. 249, lines 8-15; p. 253, line 21 - p. 254, line 16).

Appellant was subsequently indicted for, tried for, and convicted of the murder of Donald Sutton. This appeal follows. (Tr. p. 1).

I.

The trial court properly allowed the State to present evidence of a statement made by Appellant. (Appellant's Argument II; Exception 8).

During the presentation of the State's case, it presented the testimony of Clarence Gabby Wells. (Tr. p. 283, line 10 - p. 349, line 1). Gabby, an acquaintance of Appellant, testified that Appellant told him several times in November 1988 that he was going to kill Donald "Duck" Sutton. In December 1988, Appellant made similar statements to Gabby. (Tr. p. 283, lines 14-24; p. 286, lines 6-19). Gabby then testified that one (1) night while he was in the same prison facility as Appellant at the end of December 1988, Appellant asked him, through their cell doors, if Hayes Malloy was in the facility. Gabby replied that he was not there yet. When Hayes did arrive, Appellant again asked if he were there; at that time, Gabby replied that he was. (Tr. p. 286, line 20 - p. 288, line 11). Gabby's testimony concerning a statement made by Appellant was then interrupted by defense counsel who made an objection and requested an in camera hearing. (Tr. p. 288, line 11 - p. 289, line 9). During the course of the in camera hearing, Gabby testified that Appellant told Hayes that he wanted him to take the murder charge for Donald Sutton "because the Feds had him by the balls." (Tr. p. 289, lines 11-20). Defense counsel objected to this testimony on the ground that it raised the inference that Appellant was involved in other crimes and, therefore, the prejudicial effect

outweighed any probative value that the evidence might have. Defense counsel also argued that the statement was not relevant to the issue of Appellant's guilt or innocence and improperly placed Appellant's character at issue. The State opposed the objection and the trial court, finding that the statement was a statement against Appellant's own interest and not a crime, overruled the objection. (Tr. p. 289, line 21 - p. 292, line 17; p. 307, line 8 - p. 309, line 10).

The jury returned to the courtroom and the State continued its direct examination of Gabby Wells. At that time, the following occurred.

> Q Mr. Well (sic), you remember being in the Richland County Detention Center sometime around Christmas of 1988 I believe you have testified to?
>
> A Yes, sir.
>
> Q Do you remember exactly when around that time you had been arrested?
>
> A I got arrested December 24th.
>
> Q December 24th?
>
> A 1988.
>
> Q 1988. On December 24th you were in the Richland County Detention Center?
>
> A Yes, sir.
>
> Q And have you been out of jail since then?
>
> A No, sir.
>
> Q I believe you testified that [Appellant] was in a cell block across the hall from you?
>
> A Yes, sir.

> Q And that Hayes Malloy was in the cell block with you?
>
> A Yes, sir.
>
> Q And that you heard -- at [Appellant's] request you got Hayes Malloy to the door for him, is that right?
>
> A That's correct.
>
> Q And tell this jury what you heard [Appellant] ask Hayes Malloy?
>
> A After I got Hayes Malloy to the little door, I heard [Appellant] told Hayes Malloy that he want him to take the murder charge for Donald Sutton 'cause the Feds got him by the balls."

(Tr. p. 309, line 20 - p. 310, line 21).[2] The State then concluded its direct examination of Gabby Wells.

On appeal, Appellant argues that the trial court erred in allowing the testimony of Gabby Wells concerning his statement to Hayes Malloy about assuming responsibility for the murder of Donald Sutton because such improperly introduced evidence of other crimes committed by Appellant.

Respondent strongly disagrees with Appellant's assertion of error. Inasmuch as the challenged evidence was relevant and competent, the trial court exercised sound discretion in admitting it.

The conduct of a trial, including the admission and rejection of evidence, is left largely to the sound discretion

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[2] Immediately after this testimony, Gabby inferably began to testify as to a statement made by Hayes Malloy. There was a general objection by defense counsel which was apparently sustained by the trial court as being non-responsive. (Tr. p. 310, lines 22-25).

of the trial court whose exercise as such will not be disturbed by this Court on appeal unless it has been shown that there has been an abuse of discretion, a commission of legal error in its exercise, and that the rights of the complaining party have been thereby prejudiced. State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981); State v. Groome, 274 S.C. 189, 262 S.E.2d 31 (1980); State v. Tyner, 273 S.C. 646, 258 S.E.2d 559 (1979); State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941). Evidence is admissible if it is relevant and competent. The test for relevancy is whether the evidence tends to establish or make more or less probable some matter in issue and to bear directly or indirectly thereon. The evidence need not be sufficient in itself to establish the whole or any definite portion of a party's contention. State v. Finley, 300 S.C. 196, 387 S.E.2d 88 (1989); Associates Management, Inc. v. E.D. Sauls Construction Company, 279 S.C. 219, 305 S.E.2d 236 (1983); State v. Hoffman, 257 S.C. 461, 186 S.E.2d 421 (1972); Gause v. Livingston, 251 S.C. 8, 159 S.E.2d 604 (1968).

Despite Appellant's assertions to the contrary, the challenged evidence did not concern the commission of other crimes by Appellant.[3] It was simply evidence of a statement made by Appellant which, contrary to his interests, reflected his guilt of Donald Sutton's murder.[4] Therefore, it was

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[3] Therefore, the analysis required by State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), and its progeny was not required to determine the admissibility of the evidence.

[4] Inasmuch as the statement was not a direct acknowledge-

clearly relevant and properly admitted in the trial court's exercise of sound discretion.[5] See State v. Plyler, 275 S.C. 291, 270 S.E.2d 126 (1980) (statements of declarations made by one accused of crime are admissible against him); State v. Shorter, 85 S.C. 170, 67 S.E. 131 (1910) (general rule is that admissions of party in interest are received as evidence of fact admitted).

This Exception is without merit.[6]

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ment of guilt, it was not a "confession." Instead, it was an "admission" -- i.e., a statement of pertinent facts which, in connection with proof of other facts, tends to prove guilt. See Ex Parte Cobb, 448 F. Supp. 886 (D.S.C. 1977), aff'd, 568 F.2d 774 (4th Cir. 1978).

[5] For this reason, the evidence would have been admissible even had it reflected upon Appellant's character or his commission of other criminal acts. See e.g. State v. Green, 261 S.C. 266, 200 S.E.2d 74 (1973) (evidence tending to establish an element of a charged offense is not to be excluded merely because it also reflects upon the defendant's guilt of another crime); State v. Thompson, 276 S.C. 616, 281 S.E.2d 216 (1981) (evidence tending to establish an element of a charged offense is not to be excluded merely because it also reflects upon the defendant's character).

[6] Moreover, even assuming arguendo this Court should find that the trial court erred in admitting the challenged evidence, the error could not have affected the jury's determination of Appellant's guilt. The Transcript of Record clearly establishes that, even without the challenged evidence, the State presented sufficient evidence to establish Appellant's guilt beyond a reasonable doubt. See Statement of the State's Case herein. Therefore, in light of the overwhelming evidence of Appellant's guilt, any error would be harmless beyond a reasonable doubt. See United States v. Hastings, 461 U.S. 499 (1985); Chapman v. California, 386 U.S. 18 (1967); State v. Ferguson, ___ S.C. ___, 395 S.E.2d 182 (1990); State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989); State v. Darby, 297 S.C. 459, 377 S.E.2d 340 (1989); State v. Key, 256 S.C. 90, 180 S.E.2d 888 (1971).

II.

The trial court exercised sound discretion in refusing to allow Appellant to impeach State's witness Clarence Gabby Wells with his prior conviction of assault and battery of a high and aggravated nature. (Appellant's Argument III, Exception 9).

As previously stated, the State presented the testimony of Clarence Gabby Wells during the presentation of its case. After having him testify as to his acquaintance with Appellant, the State questioned him as to his current term of imprisonment as well as several of his prior criminal convictions.[7] (Tr. p. 283, line 10 - p. 284, line 17). In response to questioning by the State, Gabby also testified that he was testifying for the State pursuant to an agreement which would result in the armed robbery charge against him being reduced to simple robbery, a request by the State that he receive a concurrent five (5) year term of imprisonment upon such charge, and a request by the State that pending shoplifting charges against Gabby in Dorchester and Lexington Counties be dismissed. (Tr. p. 284, line 21 - p. 285, line 22). Gabby then proceeded to give testimony incriminating Appellant in the murder of Donald Sutton. (Tr. p. 285, line 23 - p. 288, line 12; p. 309, line 20 - p. 310, line 21).

Upon cross-examination, defense counsel extensively

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[7] Upon direct examination, Gabby admitted that he had been convicted of shoplifting in 1988, shoplifting in 1985, petty larceny in 1984, and petty larceny in 1983. He also stated that he was currently incarcerated on a robbery charge. (Tr. p. 284, lines 3-17).

questioned Gabby about the "deal" he got from the State in return for his testimony against Appellant; the possible sentences Gabby could have received upon his armed robbery charge were discussed as was the fact that Gabby's sentencing upon the robbery charge had been postponed until after he gave his testimony at Appellant's trial. (Tr. p. 311, line 6 - p. 314, line 22; p. 316, line 3 - p. 317, line 11). Defense counsel then questioned Gabby as to the probationary term he was supposed to be serving at the time; Gabby testified that he was on probation from a 1988 conviction of assault and battery of a high and aggravated nature (hereinafter referred to as ABHAN) and he was supposed to go back to court concerning the revocation of his probation. (Tr. p. 317, line 12 - p. 318, line 13). At that time, the following occurred.

> Q So, when you were arrested in December of 1988 for armed robbery, you were on probation for assault and battery of a high and aggravated nature having hit someone with a machete, isn't that true?
>
> [ASSISTANT SOLICITOR]: Your Honor, I object to that.
>
> THE COURT: Just a minute.
>
> [ASSISTANT SOLICITOR]: He can't go into that.
>
> THE COURT: Why are you trying to go into that?
>
> [DEFENSE COUNSEL]: Crime of moral turpitude, Your Honor.
>
> THE COURT: You're entitled to go into the crime --
>
> [DEFENSE COUNSEL]: I'm not going into the facts.

> THE COURT: Why aren't you? Assault and battery with intent to kill.
>
> [DEFENSE COUNSEL]: Well, I wasn't asking him about the facts.
>
> THE COURT: Well, you were, too. Restricted to assault and battery with intent to kill on that whether or not he was convicted of it.

(Tr. p. 318, line 14 - p. 319, line 6).

Defense counsel continued his cross-examination of Gabby by questioning him further concerning the agreement he entered into with the State for his testimony. (Tr. p. 319, line 7 - p. 320, line 25). After questioning Gabby concerning past conflicts with Appellant, defense counsel then questioned him about his criminal record. (Tr. p. 321, line 8 - p. 324, line 20). Gabby admitted that he had been convicted of petty larceny in February 1983, assault with a deadly weapon in 1987, and petty larceny in February 1984. (Tr. p. 325, lines 4-14). However, when questioned about his 1984 conviction of assault and battery, the State objected. The objection was sustained and the jury was instructed to disregard the question because it was improper. (Tr. p. 325, line 15 - p. 326, line 4). When defense counsel then questioned Gabby about a 1985 conviction for resisting arrest, the State objected and the jury was removed from the courtroom. (Tr. p. 326, lines 5-12).

At that time, the trial court stated for the record that the defense had attempted to question Gabby concerning a conviction of ABHAN. The court noted that the State's objection to the question was sustained because there had been no

inquiry into the charge for the purpose of determining whether or not, under state law, it was an ABHAN involving moral turpitude. (Tr. p. 326, line 13 - p. 327, line 5). Upon examination by defense counsel, Gabby admitted that he had pled guilty to a charge of ABHAN in 1988 based upon an indictment alleging that he struck Eugene McKnight repeatedly with a machete. (Tr. p. 327, line 7 - p. 328, line 14). Defense counsel then argued that under State v. Bailey, 275 S.C. 444, 272 S.E.2d 439 (1980), Appellant's 1988 conviction of ABHAN constituted a crime of moral turpitude. (Tr. p. 328, lines 15-24; p. 329, line 16 - p. 331, line 1). The court, noting that Appellant had pled guilty after waiving presentment of the ABHAN indictment to the Grand Jury, ruled there was not a sufficient showing to establish that the ABHAN involved moral turpitude. (Tr. p. 328, line 25 - p. 335, line 10). Although he argued the law did not allow for the trial court to go beyond the face of the indictment, defense counsel proceeded to question Gabby concerning his ABHAN conviction. At that time, Gabby testified that he hit the victim with a machete, but not that portion of the machete with the blade; while Gabby also admitted kicking the victim, he denied robbing him. (Tr. p. 334, line 12 - p. 337, line 12). The trial court then again rejected defense counsel's argument and expressly found that the facts of the prior ABHAN conviction did not establish that it was a crime of moral turpitude. (Tr. p. 337, lines 13-25).

When the jury returned to the courtroom, defense counsel

continued his cross-examination of Gabby. At that time, he questioned him about, inter alia, his 1985 conviction of resisting arrest, his 1976 conviction of selling heroin, and his December 24, 1988 arrest for armed robbery. (Tr. p. 338, line 13 - p. 339, line 10). He also questioned him concerning his decision to cooperate with the police. (Tr. p. 339, line 11 - p. 346, line 7).

Upon re-direct examination by the State, Gabby testified as to the facts leading up to the current armed robbery charge against him. (Tr. p. 346, line 3 - p. 347, line 4).

On appeal, Appellant argues the trial court erred in refusing to allow him to impeach Gabby Wells with his 1988 conviction of ABHAN. He contends that the trial court's ruling was erroneous because the ABHAN conviction involved moral turpitude.

Respondent strongly disagrees with Appellant's assertion of error. The trial court exercised sound discretion in making its ruling.

The conduct of a trial, including the admission and rejection of evidence, is left largely to the sound discretion of the trial court whose exercise as such will not be disturbed by this Court on appeal unless it has been shown that there has been an abuse of discretion, a commission of legal error in its exercise, and that the rights of the complaining party have been thereby prejudiced. State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981); State v. Groome, 274 S.C. 189, 262 S.E.2d 31 (1980); State v. Tyner, 273 S.C. 646, 258 S.E.2d

559 (1979); State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941). Upon taking the stand, a witness's credibility may be impeached through cross-examination about convictions of crimes of moral turpitude. State v. Major, ___ S.C. ___, 391 S.E.2d 235 (1990); State v. Hale, 284 S.C. 348, 326 S.E.2d 418 (Ct. App.) cert. denied, 286 S.C. 127, 332 S.E.2d 533 (1985). Moral turpitude has been defined by this Court as an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowman or to society in general, contrary to the accepted and customary right and duty between man and man. State v. Major, supra; State v. Labarge, 275 S.C. 225, 268 S.E.2d 278 (1980).

> In determining whether a crime is one involving moral turpitude, the Court focuses primarily on the duty to society and fellowman which is breached by the commission of the crime.

State v. Ball, 292 S.C. 71, 354 S.E.2d 906, 908 (1987). See also State v. Major, supra.

In previously addressing the issue of whether the offense of ABHAN is a crime of moral turpitude, this Court has held as follows.

> The crime of assault and battery of a high and aggravated nature does not, however, invariably constitue (sic) a crime of moral turpitude, since that determination depends on the facts of each particular case.
>
> Proof of the nature of a prior conviction must necessarily be confined to the inherent nature of the crime as defined by law and particularized by the indictment. More thorough proof of the underlying circumstances would possibly require an extensive hearing on collater-

> al matters and therefore be adverse to the uniform and efficient administration of law.

State v. Bailey, 275 S.C. 444, 272 S.E.2d 439, 440 (1980).[8] Here, Appellant has simply argued, at both trial and on appeal, that the ABHAN conviction should be considered to involve moral turpitude because it involved the use of a machete and kicking by Gabby -- i.e., it was an aggravated assault and battery. The Record reveals the total absence of any rational basis for distinguishing the ABHAN in question from any other instance of ABHAN. Therefore, the trial court's decision that the ABHAN conviction did not involve moral turpitude -- based upon the arrest warrant, the indictment, Gabby's testimony concerning the facts underlying the conviction, and the fact that Gabby pled guilty to ABHAN as part of a plea agreement which included a waiver of presentment of the indictment to the grand jury[9] -- was clearly supported by the Record. There was no error.

This Exception is without merit.[10]

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[8] Despite this Court's declaration that such was not necessary, the trial court held a hearing in this case to obtain the facts behind Appellant's ABHAN conviction.

[9] The trial court's use of and reliance upon the information other than the indictment was not error as contended by Appellant. While this Court has held that the reality of the judicial system would not allow for extensive hearings on the facts underlying individual ABHAN convictions, it never held that the holding of such a hearing would be error. State v. Bailey, supra.

[10] Moreover, even if the trial court erred in excluding the evidence of Gabby's ABHAN conviction, any error would be harmless beyond a reasonable doubt. The Record reveals not only that Gabby's otherwise extensive criminal record was fully exposed to the jury, but that defense counsel thoroughly

III.

The trial court exercised sound discretion in allowing the State to introduce photographs of tire tracks found near the body of Donald Sutton. (Appellant's Argument I; Exception 11).

During the course of the presentation of the State's case, John C. Christy, an Officer with the Richland County Sheriff's Department at the time of the murder was called as a witness. He testified that, on December 26, 1988, he was summoned to the murder scene for the purpose of processing evidence. (Tr. p. 351, lines 1-21). His testimony then continued as follows.

> Approximately fifty some feet from the body on a dirt trail which led down to a cemetery behind the educational building off the church grounds we found a set of tire tracks that were unusual. They were unusual in that they appeared to stop in view of the body. We photographed these tire tracks.
>
> Q Were there other tire tracks in the area?
>
> A Yes, there were numerous tire tracks in the area with it being a church and

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examined him about any difficulties with Appellant. Therefore, the exclusion of the impeachment evidence could not have prejudiced Appellant because it was merely cumulative in substance to that presented to the jury. State v. Patterson, 290 S.C. 523, 384 S.E.2d 699 (1989), vacated other grounds, ___ U.S. ___, 110 S.Ct. 709 (1990); State v. Amburgy, 206 S.C. 426, 34 S.E.2d 779 (1945); State v. Mason, 215 S.C. 457, 56 S.E.2d 90 (1949). The granting of a new trial based upon its exclusion would not be warranted. State v. Thompson, 276 S.C. 616, 281 S.E.2d 216 (1981) (conviction will not be set aside for non-prejudicial error in the admission of evidence); State v. Knight, 258 S.C. 452, 189 S.E.2d 1 (1972) (same); State v. Green, 255 S.C. 548, 180 S.E.2d 179 (1971) (error without prejudice is not basis for new trial).

the previous day being Sunday. They did not appear as fresh in condition --

[DEFENSE COUNSEL]: Objection, Your Honor, as to any conclusions. He has not been qualified as any kind of a witness concerning tires.

[ASSISTANT SOLICITOR]: Your Honor, he can testify of his own knowledge if the tracks appeared fresh or not.

THE COURT: No, that's reaching a conclusion. He can describe what he saw but whether or not they were fresh or not is a conclusion on his part without having been qualified as an expert in that particular field. He can describe what it was.

[ASSISTANT SOLICITOR]: Yes, sir.

Q How did those tracks appear to you?

A They appeared fresh.

[DEFENSE COUNSEL]: Objection, Your Honor. I again move that it be stricken.

THE COURT: I sustain the objection. The jury is instructed to disregard the response to the question.

Q How did they compare to the other tracks?

A They stopped in view of the body.

Q Okay. Were the markings of these tracks -- how did the markings of those tracks appear compared to the other tracks?

A I don't understand your question.

Q Okay.

THE COURT: Describe what you saw in other words. If there were two sets of tracks there and one's different than the other, what was the difference? Did they have water in them, did they have dirt filling in on them, were the crust of the tire marks pushed down? Describe. Don't

reach a conclusion. The jury has the right to reach the ultimate conclusion, not you.

A Yes, sir. Would you repeat the question?

Q How did they appear compared to the other tracks in the area?

A They appeared to stop in view of the body.

Q Okay. What did you do with those prints?

A They were photographed.

Q Okay. How many photographs did you take?

A We took numerous photographs of the tracks.

THE COURT: Have him identify them, the ones he took on that date, if they accurately represent the condition on that date. We'll mark them for identification and then show them to counsel.

Q Do these photographs accurately depict the way those tire tracks were that night?

A Yes, that night and the morning after also.

(Tr. p. 352, line 10 - p. 354, line 5; p. 354, lines 16-22).

Shortly thereafter, Officer Christy's testimony was interrupted and an in camera hearing was held during which the admissibility of the evidence concerning the tire tracks found at the murder scene was debated. (Tr. p. 357, line 4 - p. 403, line 20). At the conclusion of the hearing, the trial court ruled that, inter alia, the evidence concerning the tire tracks found at the scene of the murder were not then admissible for any reason other than to show that they simply exist-

ed. The court noted, however, that the evidence could be admissible for other purposes if the appropriate foundation were established by the State. (Tr. p. 401, line 9 - p. 402, line 14).

The jury then returned to the courtroom and the State's direct examination of Agent Christy continued during which he testified as follows.

> Q Okay. Going back out to the crime scene, did you measure the tracks out there?
>
> A Yes, we did.
>
> Q When I say tracks, explain to the jury what you did.
>
> A We took measurements of the length of the track that we found at the scene of the tracks. And we also --
>
> THE COURT: What kind of tracks? Tell me what you are talking about.
>
> A The tire tracks at the scene. These were the tracks that were on the road that led down towards the cemetery and the tire tracks appeared to stop in view of the body. We also measured the --
>
> [DEFENSE COUNSEL]: Your Honor, I'd have to object to any testimony concerning any measurements. Those tire tracks have not been connected up to anything in this case. They are not relevant.
>
> THE COURT: He's testified where he found the body and the tire tracks had some all the way up to the body.
>
> [DEFENSE COUNSEL]: To a view of the body.
>
> THE COURT: Yes. Appeared to end right there are the body. I find that causally connected sufficient to be testified to. You may go ahead.

Q Go ahead.

A We also measured the distance between the two tracks.

Q And what was the distance between the tracks?

A I don't recall exactly.

[DEFENSE COUNSEL]: I object.

THE COURT: I sustain the objection.

Q Do you know the width of those tracks?

A We prepared a diagram with the measurements of the distance of the tracks. Unfortunately, it has been misplaced from the file and I cannot recall the measurement.

(Tr. p. 407, line 9 - p. 408, line 15).

Thereafter, during defense counsel's cross-examination of Agent Christy, he was questioned in detail concerning his experience and training in the area of tire track examination and comparison. And, after being offered as an expert in tire impressions by defense counsel and being so qualified, he testified as to the reason he processed the scene as he did. (Tr. p. 414, line 18 - p. 432, line 20). He also testified as follows.

Q That is a -- by the way, when you got out there that night, was Hayes Malloy there?

A When I arrived he was not.

Q Did anybody show you where Mr. Malloy -- well, let me ask you. Did Mr. Malloy show you where the car was that he said was the car that they drove up in?

A No, nobody showed me where the car was.

Q So, nobody ever showed you where the car was?

A That's correct. Nobody ever showed me.

Q What you did is you went out there and two out two prints. You took a photograph of two tire prints because they were tire prints that were in view of the body?

A They stopped in view of the body. They did not continue on.

Q Okay. But nobody told you that's where the car was parked. Is that correct?

A That's correct.

Q And in looking at this photograph, would you tell the jury, are there literally innumerable tire marks and tire patterns in that sand?

A Yes, there are. Many are over one another.

Q Many of them are over one another. Some are not over one another, is that correct?

A That's correct.

Q All right. Did you photograph any of those? Any of the others?

A No.

Q Did you do any comparisons on any of these others?

A No, we did not.

Q So, you basically randomly took some impressions in the sand even though we had all of these in State's Exhibit Number 24 because they were stopped near the body? Is that correct?

A That's correct. Because they appeared to stop in view of the body.

> Q All right. Now, you don't know if that's where the vehicle was according to your testimony? Is that correct?
>
> A Nobody told me that's where the vehicle was that night.

(Tr. p. 431, line 10 - p. 432, line 20).

At the conclusion of Officer Christy's testimony, the jury was removed from the courtroom and defense counsel repeated his objections to the photographs of the tire tracks found near the victim's body. (Tr. p. 510, line 21 - p. 513, line 14; p. 514, lines 8-12). The trial court overruled the objections as follows.

> The court finds there is a probative value, [defense counsel]. The testimony by Mr. Malloy was that [Appellant] drove him out there in that vehicle which is in essence corroboration of what Hayes Malloy says and also would defeat any evidence of an alibi of this [Appellant]. The State has a right and is required to prove that he was present at the scene of the crime. There's direct testimony that [Appellant] was in that vehicle driving that car and there are tire prints which are shown in the sand which are the same type of tire print as the vehicle. It goes to support that testimony. That's a reasonable inference. No witness at this point has testified that that is the tire print which matched that tire. No question about it but they have said that that tire print was a Vector tire. He drove a Vector car out there. So, those two connected together are suffcient for the court to rule out any speculative nature in the case and it is probative on the issue, if believed, always if believed.

(Tr. p. 513, line 15 - p. 514, line 7).

On appeal, Appellant has excepted to the trial court's ruling allowing photographs of the tire tracks found at the

murder scene to be admitted into evidence on the grounds that such evidence was irrelevant and unduly speculative and prejudicial. (Tr. p. 658).

Respondent strongly disagrees with Appellant's assertion of error. Inasmuch as the evidence concerning the tire tracks found at the murder scene was relevant, the trial court exercised sound discretion in admitting it.

The determination of the admissibility of photographs into evidence is a matter left to the sound discretion of the trial court. State v. Livingston, 282 S.C. 1, 317 S.E.2d 129 (1984); State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984); State v. Goolsby, 275 S.C. 110, 268 S.E.2d 31 (1980); State v. Bellue, 260 S.C. 39, 194 S.E.2d 193 (1973). However,

> [i]f such photographs are calculated to arouse the sympathy or prejudice of the jury or if they are entirely irrelevant or not necessary to substantiate facts, they should be excluded.

State v. Stallings, 253 S.C. 451, 171 S.E.2d 588, 591 (1969). See also State v. Thorne, 239 S.C. 164, 121 S.E.2d 623, cert. denied, 368 U.S. 979 (1961); State v. Edwards, 194 S.C. 410, 10 S.E.2d 587 (1940); State v. Waitus, 224 S.C. 12, 77 S.E.2d 256 (1953).

A review of the challenged photographs of the tire tracks found near the victim's body and the testimony concerning the tracks establishes not only that the tracks were those closest to the body, but also that they did not have other tracks superimposed thereon. This evidence clearly provided a reasonable basis for inferring that they were caused by the

murderer. There was, consequently, a sufficient connection between the tracks and the murder to render evidence concerning such relevant and admissible. State v. Quillien, 263 S.C. 87, 207 S.E.2d 814 (1974); State v. Parker, 255 S.C. 359, 179 S.E.2d 31 (1971); State v. Jordan, 258 S.C. 340, 188 S.E.2d 780 (1972). Moreover, since the photographs of the tracks clearly were not intended to arouse the passion or prejudice of the jury, the trial court exercised sound discretion in admitting them.[11] State v. Livingston, supra; State v. Stroman, supra; State v. Goolsby, supra; State v. Bellue, supra; State v. Stallings, supra; State v. Thorne, supra; State v. Edwards, supra; State v. Waitus, supra.

Moreover, even assuming arguendo this Court should find that the trial court erred in admitting the challenged evidence, the error could not have affected the jury's determination of Appellant's guilt. The Transcript of Record clearly establishes that, even without the challenged evidence, the State presented sufficient evidence to establish Appellant's guilt beyond a reasonable doubt. See Statement of the State's Case herein. Therefore, in light of the overwhelming evidence of Appellant's guilt, any error would be harmless beyond a reasonable doubt. See United States v. Hastings, 461 U.S. 499 (1985); Chapman v. California, 386 U.S. 18 (1967); State v. Ferguson, ___ S.C. ___, 395 S.E.2d 182 (1990); State v.

[11] Respondent notes that the photographs corroborated the testimony given by Officer Christy. Therefore, under State v. Stroman, supra, they were also admissible as corroborative evidence.

Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989); State v. Darby, 297 S.C. 459, 377 S.E.2d 340 (1989); State v. Key, 256 S.C. 90, 180 S.E.2d 888 (1971).

This Exception is without merit.[12]

[12] Although Appellant's Exception concerns only the propriety of the trial court's ruling allowing the introduction of photographs of the tire tracks, he has used it to also attack, in his brief, the propriety of the admission of the testimony about the tracks. His failure to raise that issue by exception renders it unavailable for appellate review. State v. Beachum, 288 S.C. 325, 342 S.E.2d 597 (1986); State v. Carson, 274 S.C. 316, 262 S.E.2d 918 (1980); State v. Mitchell, 261 SC. 452, 200 S.E.2d 448 (1973). However, Respondent would note that, as established hereinabove, the evidence concerning the existence of the tire tracks was relevant and properly admitted in the trial court's exercise of sound discretion.

IV.

The trial court exercised sound discretion in admitting evidence of the tread of the tires on Appellant's car. (Appellant's Argument I; Exception 10).

While the State was conducting its direct examination of Officer John C. Christy, the jury was removed from the courtroom and an in camera hearing was conducted. (Tr. p. 356, line 10 - p. 357, line 5). The hearing was held for the purpose of determining the admissibility of photographs taken of the Appellant's car. Defense counsel argued that the photographs were taken when the car was unlawfully in the custody of the federal government and that, therefore, the Fourth Amendment would render the resulting photographs inadmissible. (Tr. p. 356, lines 4-20). A stipulation was entered at that time to the effect that the photographs in question were of the tires on Appellant's car which was photographed by an officer of the Richland County Sheriff's Department while the car was in the custody of the federal government pursuant to some federal charge. (Tr. p. 357, line 21 - p. 358, line 24). The court then requested argument on whether the taking of the photographs was an illegal search and seizure. (Tr. p. 358, line 24 - p. 359, line 3). At that time, it was established through the argument of the Assistant Solicitor and the testimony of Officer Christy that the car was in the custody of the federal government pursuant to a consent to search form executed by Appellant, but that the Richland County Sheriff's Department was unaware of the con-

sent to search at the time the photographs were taken on December 28, 1988.[13] (Tr. p. 359, line 15 - p. 360, line 25). It was also established that the Richland County Sheriff's Department had neither a warrant to search or seize the car nor the consent of Appellant to take any photographs or measurements of the tires. (Tr. p. 361, lines 1-13). Officer Christy also testified that in addition to the photographs and measurements, the police obtained some tire track marks from the tires on Appellant's car by entering the car and driving it over ink carbons. (Tr. p. 361, lines 14-22).

After Officer Christy's in camera testimony concluded, defense counsel stipulated that Appellant consented to a search of his vehicle and his home by the Federal Bureau of Investigation (hereinafter referred to as FBI) in regard to a bank robbery charge. (Tr. p. 361, line 23 - p. 363, line 14; p. 364, lines 6-7; p. 365, lines 5-6). The State then argued that not only was there no violation of Appellant's Fourth Amendment rights, but also that Appellant did not have standing to challenge the Department's activities in regard to the tires on the car because the car did not belong to him. In response to that argument, defense counsel stipulated that while Appellant did not own the car, he had rented it, and paid for its use, through January 10, 1989. He then again argued that while Appellant gave specific consent to search to the FBI relating to the bank robbery charge, the State had no

[13] Which was prior to the date of Appellant's arrest for the murder of Donald Sutton. (Tr. p. 360, lines 17-25).

authority or probable cause to authorize its search or seizure. (Tr. p. 364, line 8 - p. 368, line 13). The trial court then concluded that consent was not an issue in the case; the only question to be resolved was whether or not the photographing and measuring of the tires constituted a seizure under the Fourth Amendment. All counsel entered into another stipulation to the effect that if FBI Agent Randy Mondor were called to testify, he would testify that he told the Richland County Sheriff's Department that it could come and look at Appellant's car and, upon the arrival of the officers, he opened the door to the garage of the FBI building where the car was located and gave them the key to Appellant's car. (Tr. p. 398, lines 6-12).

During the course of the in camera hearing, Appellant took the stand and testified concerning the FBI's search and seizure of his car. He stated that he consented to the search the car and the house, but did not give them permission to tow or take away his car. (Tr. p. 388, line 16 - p. 393, line 19). At the conclusion of his testimony, the consent to search form executed by Appellant for the FBI was marked for identification as State's Exhibit N. (Tr. p. 393, line 21 - p. 394, line 3). It read, in pertinent part, as follows:

> I, [Appellant], having been informed of my constitutional rights not to have a search made of the premises hereinafter mentioned without a search warrant and of my right to refuse to consent to such a search, hereby authorize James H. Davis, Michael Marchant, and R.D. Johnson, Special Agents of the Federal Bureau of Investigation, United States Department of Justice, to conduct a complete search of

> my premises located at
> Columbia, South Carolina, and my brief case and my vehicle, a 1988 Buick Rivera. These agents are authorized by me to take from my premises any letters, papers, materials or other property which they may desire. This written permission is being given by me to the abovenamed special agents voluntarily and without threats or promises of any kind.

(emphasis added). (Tr. p. 394, lines 3-17).

At the conclusion of the hearing, the trial court ruled as follows.

> All right, the question before the court is whether or not the officer, in this case Mr. Christy who took the photographs, whether or not there was any invasion in violation of the defendant's protections afforded to him under the 4th and 14th Amendments, unreasonable searches and seizures of his person or his property. It appears to the court that the defendant gave a consent to search to the federal government as a result of an investigation on or about December the 28th of that year, 1988, investigating a bank robbery case. And he gave a consent which is in the record of this case executed authorizing the F.B.I. to in essence take possession of the vehicle and to search that vehicle. The F.B.I. did take possession of the vehicle and placed it in essence under impoundment is the only reasonable inference at the F.B.I. building here in Columbia in, as I understand it, a downstairs basement. Thereafter a time that I'm unfamiliar with as to his testimony but apparently it was a short time thereafter, a few days or more, the Richland County Sheriff's Department, and particularly Officer Christy who is now with S.L.E.D. made contact with the F.B.I. and requested to come over and see the vehicle. They did go over, they were taken down to the basement, the keys to the vehicle were turned over to the Richland County Sheriff's Department officers who then examined the exterior of the vehicle by photographing the vehicle, photographing

the tires of the vehicle and as depicted in the photographs measured, did measurements on it. In addition to which they opened the vehicle and at least turned the wheel in order to photograph the wheel such that it could depict what they wanted it to depict. In addition to which and it has not been presented at this time but the court's aware of it by statements by counsel to the court there also were impressions made, inked impressions of that tire, done by having the tire -- no one has testified that the tire was moved. I assume that it was. Is that correct, Mr. Christy?

MR. CHRISTY: Yes, sir, Your Honor.

THE COURT: The car was cranked up and moved for the purpose of doing that.

[DEFENSE COUNSEL]: Yes, sir, that's correct. The car had to be moved.

THE COURT: Yes. I assumed that even though there is not testimony. Everybody will stipulate that. So, the question then is whether or not those acts were violations of the defendant's constitutional rights and protections afforded to him under the 4th Amendment and the 14th Amendment, unreasonable searches and seizures. It's the court's finding that they were not a violation of his 4th Amendment and 14th Amendment. The property was impounded, it was in the custody of the F.B.I. pursuant to a consent authorization. The vehicle was the subject of a federal bank robbery and the vehicle was under seizure by consent. It was thereafter allowed to be examined without any in-depth search. There was no scope -- it wasn't even like an inventory search. There was no tearing or removing from anything of the vehicle. Photographs were made. The only thing that occurred was a very harmless cranking of the vehicle and moving it in order to obtain inked impressions and to photograph it, all of which I find to be reasonable and do not be intrusive and really no expectation of privacy but if there was it was waived by his consent to search.

(Tr. p. 398, line 21 - p. 401, line 6).

Thereafter, in the presence of the jury, the State introduced evidence concerning the measurements of the tires on Appellant's car and the photographs taken of the tire treads. (Tr. p. 408, line 16 - p. 410, line 17).

On appeal, Appellant argues that the trial court erred in admitting the evidence of the measurements and photographs of the tires on his car because such were obtained in violation of his constitutional rights.

Respondent strongly disagrees with Appellant's assertion of error. Inasmuch as the challenged evidence was lawfully obtained and relevant, it was properly admitted in the sound exercise of the trial court's discretion.

It is well settled that the Fourth Amendment does not protect that which a person knowingly exposes to the public. Cardwell v. Lewis, 417 U.S. 583 (1974); Katz v. United States, 389 U.S. 347 (1967). See also Rawlings v. Kentucky, 448 U.S. 98 (1980) (legitimate expectation of privacy necessary to trigger Fourth Amendment protections); United States v. Salvucci, 448 U.S. 83 (1980) (same); Rakas v. Illinois, 439 U.S. 128 (1978), reh. denied, 439 U.S. 1122 (1979) (same). This being true, the examination by law enforcement personnel of the exterior of a vehicle on a street or in a lot or at some other location where it is readily subject to observation by members of the public does not constitute a search. Nor does the taking of photographs of such vehicles constitute a search. See, e.g., Cardwell v. Lewis, supra (examination of

tire and taking of paint scrapings from exterior of car found in and taken from public parking lot by police not search); United States v. Hensel, 699 F.2d 18 (1st Cir.), cert. denied, 461 U.S. 958 (1983) (viewing of license plate on car parked in driveway located 100-200 yards from road and squarely between that road and beach used by public not search); United States v. White, 766 F.2d 1328 (9th Cir. 1985) (to identify a vehicle, police may scrape off paint sample and make cast of tire tread and neither action constitutes search); Dorris v. State, 656 P.2d 578 (Alas. App. 1982) (examination of tires not search); Deshazier v. State, 155 Ga. App. 526, 271 S.E.2d 664 (1980) (photographing and taking paint scrapings from car not infringe upon any expectation of privacy); People v. Petersen, 110 Ill. App. 3d 647, 66 Ill. Dec. 380, 442 N.E.2d 941 (1982) (no legitimate expectation of privacy in car parked on owner's property which was visible from neighboring lands; police examination lawful even though from back of duplex where car owner lived); Fisher v. State, 259 Ind. 633, 291 N.E.2d 76 (1973) (photographs of vehicle in open view in vacant lot adjoining defendant's home not search even though police entered onto lot to take photographs); Commonwealth v. Mangini, 478 Pa. 147, 386 A.2d 482 (1978) (examination of tread and groove patterns on tires of car parked in public school parking lot not search); Hudson v. State, 588 S.W.2d 348 (Tex. Crim. App. 1979) (photographs of exterior of car parked on street not search); State v. Wettstein, 28 Utah 2d 295, 501 P.2d 1084 (1972) (no expectation of privacy in car

parked in parking lot of apartment building in which car owner not reside; photographs of car's exterior taken by police from alley admissible); 1 W. LaFave, Search and Seizure § 2.5 (b) (1987).

Likewise, the examination by law enforcement personnel of the exterior of a vehicle located on private property does not constitute a search if they have made a lawful entry upon the property. Nor does the taking of photographs of such vehicles constitute a search. See, e.g., United States v. Gunn, 428 F.2d 1057 (5th Cir. 1970) (observations of police, who were at defendant's work site to investigate crime she believed involved in, of serial numbers on tires of vehicle, from both side and underside of car, either not search or, if search, lawful); United States v. Kitowski, 729 F.2d 1418 (11th Cir. 1984) (opening of car door by police, for purpose of observing vehicle identification number, at service station of station owner's request no search); Dumbsky v. State, 508 N.E.2d 1274 (Ind. 1987) (neither photographs of exterior of truck parked in driveway by police properly on premises to execute arrest warrant nor placement of gas cap found at scene of crime on truck and photographs thereof constitute search); State v. Doile, 244 Kan. 493, 769 P.2d 666 (1989)[14] (observation of car parked in parking lot of private club by police responding to call at club not search); State v. Wilbourn, 364 So.2d 995 (La. 1978), cert. denied, 444 U.S. 825 (1979) (police investi-

[14] This opinion has, insofar as it relied upon inadvertance being an element of a plain view search, been abrogated by Horton v. California, ___ U.S. ___, 110 S. Ct. 2301 (1990).

gatory entry into unenclosed carport which was located such that anyone at side-door of house could see front of car parked therein lawful and, therefore, observation of blood and hair on front of car lawful); People v. Brooks, 405 Mich. 225, 274 N.W.2d 430 (1979) (viewing of vehicle identification number on car frame by crawling under car not search); Commonwealth v. Grabowski, 306 Pa. Super. 483, 452 A.2d 827 (1982) (same); 1 W. LaFave, Search and Seizure § 2.5 (b) and (c) (1987).

From the authorities cited above, it is inescapable that Appellant did not have an expectation of privacy in the tires on his car and, therefore, no Fourth Amendment protection in regard to them. If there is any question to be resolved by this Court in regard to the examination of the tires on Appellant's car,[15] it can only be whether the Richland County Sheriff's Department were lawfully where they could observe the car. As demonstrated below, the answer can only be that they were.

It is well settled that searches and seizures made without the authorization of a duly executed warrant are per se unreasonable unless an exception to the warrant requirement is applicable. U.S. Const. amend. IV; S.C. Const. art. I, § 10; Coolidge v. New Hampshire, 403 U.S. 443, reh. denied, 404 U.S. 874 (1971); Katz v. United States, supra; State v. Peters, 271 S.C. 498, 248 S.E.2d 475 (1978). The exception involved in

[15] And Respondent does not concede that any further inquiry or analysis is necessary.

the present case is consent to search.[16] See Schneckloth v. Bustamonte, 412 U.S. 218 (1973). "Whether a consent to search was voluntary or the product of duress or coercion, express or implied, is a question of fact to be determined from the 'totality of the circumstances'." State v. Wallace, 269 S.C. 547, 238 S.E.2d 675, 676 (1977). See also Schneckloth v. Bustamonte, supra. The "totality of the circumstances" test is to be applied regardless of whether the consent was given in a custodial or non-custodial situation and places the burden of establishing the voluntariness of the consent upon the State. State v. Wallace, supra.

The uncontested evidence presented during the suppression established that Appellant voluntarily consented to "a complete search of [his] premises ..., and [his] brief case and [his] vehicle, a 1988 Buick Rivera." And, despite Appellant's protestations to the contrary, the plain meaning of the consent form executed by him also establishes that he consented to the FBI's seizure of his car and its removal from his property.[17] Therefore, the FBI had lawful possession of

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[16] If a valid consent is obtained, there is no additional requirement of probable cause for the search. McIntosh v. State, 296 Ark. 167, 753 A.W.2d 273 (1988), cert. denied, ___ U.S. ___, 109 S. Ct. 1339 (1989); 3 W. LaFave, Search and Seizure § 8.1, n. 5.1 (Supp. 1990). See also Commonwealth v. Mangini, supra

[17] The executed consent to search form clearly authorized the Agents to "take from [Appellant's] premises any letters, papers, materials or other property which they may [have desired]." (emphasis added). (Tr. p. 394, lines 12-14). The term "property" is a very general term clearly encompassing the briefcase, car and any other moveable item at Appellant's home.

Appellant's car at all times pertinent to this issue.

Inasmuch as the possession of Appellant's car by the FBI was lawful, that agency's exposure of it to the Richland County Sheriff's Department[18] rendered the Department's viewing of the car lawful. See In the Matter of Bazen, 275 S.C. 436, 272 S.E.2d 178 (1980) (Bazen had no expectation of privacy in open garage entered by police investigating disturbance when appearances at time police arrived indicated garage source of disturbance). Therefore, the subsequent examination, photographing and measuring of the car's tires constituted neither a search nor a violation of any of Appellant's constitutional rights.[19] See United States v. Gunn, supra; United States v. Kitowski, supra; Dumbsky v. State, supra; State v. Doile, supra; State v. Wilbourn, supra; People v. Brooks, supra; Commonwealth v. Grabowski, supra; 1 W. LaFave, Search and Seizure § 2.5 (b) and (c) (1987).

This Exception is without merit.

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[18] Which was within the scope of their authority under the general consent given by Appellant. See Commonwealth v. Mangini, supra.

[19] This is true despite the fact that members of the Department entered the car to drive over carbon papers and turn the steering wheel for no search of the interior of the car was made by the officers. See United States v. Kitowski, supra; United States v. DeBardeleben, 740 F.2d 440 (6th Cir.), cert. denied, 469 U.S. 1028 (1984); People v. Brewer, 112 Mich. App. 670, 317 N.W.2d 218 (1981). See also Cardwell v. Lewis, supra.

V.

The trial court exercised sound discretion in qualifying State's witness Bruce Hall as an expert and allowing him to give his testimony. (Appellant's Argument I; Exceptions 12, 13 and 14).

During the presentation of the State's case, Bruce Hall, was called as a witness. He testified that while attending the University of South Carolina he was hired by Goodyear Tire and Rubber Company in a management training position; after participating in that training program for two (2) years, he became a store manager. As of the date of Appellant's trial, he had been employed with Goodyear for six (6) years during which he had personally sold between seventy-two hundred (7200) and eighty-four hundred (8400) tires. During that same time period the store in which he worked had sold approximately forty-two thousand (42,000) automobile tires. (Tr. p. 438, line 2 - p. 439, line 18). Mr. Hall testified that in November of 1983, he attended a three (3) week school on product selling skills in Akron, Ohio; during that course, he was taught how tires are manufactured, problems arising from neglect, and how to diagnose problems with tires. He was also taught how to recognize the different types of tread patterns of the tires manufactured by Goodyear. Since 1983, Mr. Hall testified that he had received further training in the operations of a company store and Goodyear tires; in addition to three (3) two (2) day long courses, he attended a six (6) week course in March 1985. (Tr. p. 439, line 19 - p. 442, line 25;

p. 443, lines 5-9; p. 444, line 1 - p. 445, line 20). Mr. Hall admitted that he had never attended any type of law enforcement training nor extensive training in tires other than Goodyear. (Tr. p. 445, line 21 - p. 446, line 2; p. 447, lines 16-25). Mr. Hall concluded his testimony by stating that he could identify different makes of tires from their tread marks. (Tr. p. 448, line 1 - p. 456, line 4).

At the conclusion of the hearing concerning Mr. Hall's qualifications to testify as an expert concerning tire treads and comparisons, defense counsel vehemently opposed his qualification on the ground that his training and education were extremely limited and concerned only Goodyear tires. The trial court, finding that the subject of Mr. Hall's proposed testimony was not within the common knowledge of the lay public, found that Mr. Hall had sufficient job training and experience to be qualified as an expert in distinguishing the patterns of tires produced in the United States. (Tr. p. 457, line 1 - p. 472, line 3). The trial court then stated that the State would have to lay a proper foundation before Mr. Hall could render an opinion as to any tire patterns. (Tr. p. 472, lines 3-10).

Thereafter, the jury was returned to the courtroom and the State called Mr. Hall to the stand. (Tr. p. 472, line 10 - p. 473, line 4). After again questioning him as to his education, training and experience with tires and their patterns, he was qualified as an expert in the area of tire treads and patterns. (Tr. p. 473, line 5 - p. 488, line 3).

He thereafter identified the tire treads found near the victim's as coming from a Goodyear Vector tire. He also identified two (2) tires on Appellant's car as being Goodyear Vector tires. (Tr. p. 488, line 6 - p. 510, line 20).

On appeal, Appellant argues that the trial court erred in qualifying Mr. Hall as an expert because he lacked the training and education to be so qualified. He also argues that the trial court erred in allowing Mr. Hall to give testimony concerning the identification of the tire which made the tread marks found near the victim's body.

Respondent strongly disagrees with Appellant's assertion of error. The trial court exercised sound discretion in qualifying Bruce Hall as an expert and in allowing his testimony.

It is well settled that the qualifications of a witness as an expert is a matter within the sound discretion of the trial court whose rulings thereon will not be disturbed on appeal unless it clearly appears that there has been an abuse of discretion. State v. Myers, ___ S.C. ___, 391 S.E. 2d 551 (1990); State v. Childs, 299 S.C. 471, 385 S.E.2d 839 (1989); State v. Caldwell, 283 S.C. 350, 322 S.E.2d 662 (1984); State v. Cunningham, 275 S.C. 189, 268 S.E.2d 289 (1980); State v. Moorer, 241 S.C. 487, 129 S.E.2d 330, cert. denied, 379 U.S. 860 (1963). While a witness need not have a professional degree to be qualified as a witness, State v. Ham, 256 S.C. 1, 180 S.E.2d 628 (1971), rev'd on other grounds, 409 U.S. 524 (1972), the trial court's exercise of discretion in this area

is channeled by certain guidelines.

> To be competent as an expert, a witness must have acquired by reason of study or experience or both such knowledge and skill in a business, profession, or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony. Hopkins v. Comer, 240 N.C. 143, 81 S.E.2d 368 (1954); Sandford v. Howard, 161 Ga. App. 495, 288 S.E.2d 739 (1982). The test is a relative one, depending on the particular witness's reference to the subject; an expert is not limited to any class of persons acting professionally. Memorial Hospital of Alamance Count, Inc. v. Brown, 50 N.C. App. 526, 274 S.E.2d 277 (1981); cf., State v. Merriman, 34 S.C. 16, 12 S.E. 619 (1891) (not necessary for witness with medical training and experience to be regularly licensed to practice medicine to qualify as expert); Hill v. Carolina Power & Light Co., 204 S.C. 83, 28 S.E.2d 545 (1943) (physician not incompetent to testify as an expert merely because he is not a specialist in the particular branch of his profession involved); Daniels v. Bernard, 270 S.C. 51, 240 S.E.2d 518 (1978) (chiropractor competent to testify as medical expert to extent of his knowledge and experience); Avret v. McCormick, 246 Ga. 401, 271 S.E.2d 832 (1980) (nurse competent to testify in medical malpractice action again physician as to standard of care in keeping sterile a needle used to draw blood); Sandford v. Howard, supra (orthopaedist competent to testify against podiatrist where orthopaedic and podiatric methods of treatment are same and witness has knowledge of procedure used by podiatrist).

Botehlo v. Bycura, 282 S.C. 578, 320 S.E.2d 59, 64 (S.C. App. 1984). See also State v. Myers, supra; Campbell v. Paschal, 290 S.C. 1, 347 S.E.2d 892 (Ct. App. 1986).

The Transcript of Record establishes that Mr. Hall had extensive experience with tires -- not only selling them but

also examining them for manufacturer, wear and defects. His testimony established that he had received training in the area of tire manufacturing and wear analysis, but not in the forensic context. This testimony clearly supported the trial court's exercise of discretion inasmuch as Mr. Hall's limited training went to the weight of his testimony rather than its admissibility. See State v. Myers, supra. Therefore, there was no error in the qualification of Bruce Hall as an expert in the area of tire treads and patterns.

Insofar as Appellant has argued that the trial court erred in allowing Mr. Hall to give his opinion that the tire tracks found near the victim's body were consistent with the tracks made by a Goodyear Vector tire and that at least two (2) of the tires on Appellant's car were Goodyear Vector tires because of the lack of a proper foundation, his argument is without merit. In addition to testifying in great detail concerning his experience with and exposure to Goodyear tires and their characteristics, he testified that his opinion was based upon his examination of the photographs of the tracks found near the victim's body and of the tires on Appellant's car. A foundation for his testimony concerning the tires and tracks was clearly established.[20] See State v. Childs, supra (foundation was established for witness's testimony where he

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[20] Despite Appellant's representation to the contrary, the problems attendant to the testimony of the witness in City of Spartanburg v. Laprinkakos, 267 S.C. 589, 230 S.E.2d 443 (1976) -- who was not qualified as an expert -- are not present in this case. As demonstrated hereinabove, Mr. Hall's testimony was clearly not speculative but based upon a sufficient foundation.

testified as to basis of testimony and fact that previously qualified as expert); State v. Bellamy, 296 S.C. 478, 374 S.E.2d 180 (1984) (witness qualified to give opinion as to how fingerprint made where gave testimony as to experience and education concerning such); State v. Edens, 272 S.C. 130, 250 S.E.2d 116 (1978) (no abuse of discretion to allow expert witness to testify based upon his expertise); State v. Browder, 183 S.C. 447, 191 S.E. 302 (1937) (testimony of expert witness competent where testified as to facts upon which opinion based). The trial court exercised sound discretion in allowing Mr. Hall to testify as he did. Id.

These Exceptions are without merit.[21]

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[21] Moreover, even assuming arguendo this Court should find that the trial court erred in qualifying Mr. Hall as an expert and in admitting his testimony, the error could not have affected the jury's determination of Appellant's guilt. His testimony concerning the identification of the tires on Appellant's car as Goodyear Vector tires was cumulative to the subsequent testimony of Officer Mark Austin which was admitted without objection. (Tr. p. 588, line 13 - p. 589, line 2). It was, consequently, non-prejudicial. State v. Johnson, 298 S.C. 496, 381 S.E.2d 732 (1989); State v. VanDillard, 298 S.C. 171, 379 S.E.2d 115 (1989).

Moreover, the Transcript of Record clearly establishes that, even without the challenged evidence, the State presented sufficient evidence to establish Appellant's guilt beyond a reasonable doubt. See Statement of the State's Case herein. Therefore, in light of the overwhelming evidence of Appellant's guilt, any error in the admission of the challenged evidence would be harmless beyond a reasonable doubt. See United States v. Hastings, 461 U.S. 499 (1985); Chapman v. California, 386 U.S. 18 (1967); State v. Ferguson, ___ S.C. ___, 395 S.E.2d 182 (1990); State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989); State v. Darby, 297 S.C. 459, 377 S.E.2d 340 (1989); State v. Key, 256 S.C. 90, 180 S.E.2d 888 (1971).

VI.

The supplemental charge given by the trial court was a proper charge under Allen v. United States, 164 U.S. 492 (1896), and, as such, resulted in no error. (Appellant's Argument IV; Exception 17).

The jury in this case began their final deliberations at 3:48 p.m. on January 22, 1989. They returned to the courtroom at 5:17 p.m. so that the trial court could respond to a question concerning testimony; they resumed their deliberations at 5:20 p.m. At 6:37 p.m., the jury recessed for the evening meal; they returned to court at 8:15 p.m. and resumed their deliberations. (Tr. p. 617, line 23 - p. 622, line 20). After the jury sent a note to the trial court, they returned to the courtroom at 9:26 p.m. At that time, the trial court made the following comments to the jury panel.

> ... I have received your note and let me suggest that we do this. And that is -- I know ya'll have been deliberating and it's been seven days in trial and I respect that we've all worked hard and are tired. It's now 9:30. That what we do is I go ahead and put you in a motel room for the evening and ya'll just don't talk about the case any more, get it out of your mind, try to relax and I'll bring you back here in the morning at 9:30 and I'll talk to you then. Okay?

(T. p. 622, line 25 - p. 623, line 8). The jury was released at 9:30 p.m. Thereafter, the court informed counsel that the first thing it would do in the morning would be to give the jury a "modified" Allen charge and send them back to deliberate. (Tr. p. 624, line 24 - p. 625, line 15). No objection was stated at that time by counsel for either the State or the

defense.

On the following morning, the following colloquy occurred.

> THE COURT: All right, Madam Court Reporter, let the record reflect that all counsel are now present before the court, counsel for the State, counsel for the defense, and the defendant. Yesterday evening I received the message from the foreman of the trial jury in State v. Ronald Tillman that the jury was at this time hung. Without any discussion with them I sent them to the motel for the evening and, of course, reported that to counsel for the State and counsel for the defendant. At this time this morning, it is the court's intention to give what is commonly referred to as the Allen instruction. Actually, it's not Allen, it's Tuey, then T-u-e-y (spelled). Commonwealth vs. Tuey. A very old case, Massachusetts, 1850. It's also contained in Sullivan vs. United States, 9th Circuit, 414 Fed. 2d 714 (sic). What is the position of the State or the defense? Anything from the State's (sic)?
>
> [ASSISTANT SOLICITOR]: No, sir, Your Honor.
>
> THE COURT: Anything from the defense?
>
> [DEFENSE COUNSEL]: If Your Honor please, we would request that the jury be allowed to re-consider deliberating, being instructed to deliberate this morning.
>
> THE COURT: [DEFENSE COUNSEL], I'm certain you are familiar with what is known as the Allen charge actually. It's Allen vs. United States, 164 U.S. 492. My intent is to give them that instruction limitedly (sic) just to ask them in essence to continue to try to deliberate if they can upon the case. Of course, within a reasonable period of time if they come back and say they can't then -- you know, both sides have now exhausted eight days of trial in the case. And the expense to the defense is as great as the expense to the State and the County for

> the trial of the case. As long as that doesn't outweigh the rights to a fair trial both to the State and the defense, I'm going to follow that procedure and give them the instruction.

(Tr. p. 625, line 18 - p. 627, line 1).

The jury returned to the courtroom at 9:35 a.m. and was instructed as follows.

> Mr. Foreman, Ladies and Gentlemen, if you will give me your attention. I have instructed you previously that you, the jury are the sole judges of the facts in this case and this court is the sole judge of the law of the case. I also further instructed you that I am not permitted by law to give you any indication whatsoever as to what your verdict should or ought to be in a particular case and I do not do so at this time. It is the duty of the court to state the laws of the case to you and it is the duty of the jury to resolve the facts in this case. You know, the only mode provided by our constitution and laws for deciding questions of fact in criminal cases, and this is what this is, is by the verdict of a jury. In a large proportion of cases and perhaps strictly speaking in all cases absolute certainty cannot be attained or expected although the verdict to which a juror agrees must, of course, be his or her own convictions and not a mere acquiescence in the conclusions of the other jurors or your fellow jurors. Yet, you know, in order to bring twelve minds to a unanimous result you must examine the questions that are submitted to you with candor and with a proper regard and with deference to the opinions of each other. You should consider that the case must at some time be decided, that you are selected in the same manner, from the same course which any future jury must be selected. And there is no reason to suppose that the case will ever be submitted to twelve individuals more intelligent, more impartial or more competent to decide this issue or that more or clearer evidence will be produced on the one side or the other. With this view it is your

> duty to decide the case if you can conscientiously do so. In order to make a decision more practical the law imposes the burden of proof on one party or the other in all cases. And in the present case as I have previously instructed you the burden of proof is upon the State of South Carolina to establish every part of it beyond a reasonable doubt. And if in any part of it you are left in doubt the defendant is entitled to the benefit of the doubt and must be acquitted. But if in conferring together you ought to pay proper respect to each other's opinions and listen with a disposition to be convinced to each other's arguments.
>
> Now, as I have previously instructed you, if the State has failed to prove the guilt of this defendant beyond a reasonable doubt, then your verdict should be not guilty. If the State has proved the guilt of this defendant beyond a reasonable doubt, then your verdict should be guilty. So, with that instruction I'm going to ask you to retire to the jury room and to deliberate further on the verdict in this case and see if you cannot reach a conclusion in this case. Once again, thank you for your patience with us in consideration of the issues that have been presented to you.

(Tr. p. 627, line 5 - p. 629, line 3). At the conclusion of the charge, the jury resumed their deliberations; it was then 9:41 a.m. (Tr. p. 629, line 13).

Once the jury had been removed from the courtroom, defense counsel objected to the supplemental charge because of an alleged misstatement of the burden of proof. The objection was noted. (Tr. p. 629, line 13 - p. 630, line 23).

At 11:00 o'clock, a.m. that same day, the jury reached their verdict finding Appellant guilty as charged. (Tr. p. ii; p. 631, line 13 - p. 632, line 9).

On appeal, Appellant argues that the trial court erred in

giving a supplemental charge under Allen v. United States, 164 U.S. 492 (1896), after only a short period of deliberation. He argues that this had a coercive effect upon the jury as demonstrated by the short period of time between the charge and the rendering of the verdict.

Respondent strongly disagrees with Appellant's assertion of error. The supplemental charge given by the trial court in the present case was a proper charge under Allen v. United States, supra, and, as such, resulted in no error.

The trial court, in discharging its duty to the public and litigants, has the duty to urge the jury to reach a verdict provided that no coercion takes place. Allen v. United States, supra; State v. Lynn, 277 S.C. 222, 284 S.E.2d 786 (1981); State v. Jones, 86 S.C. 17, 67 S.E. 160 (1910). The permissibility of an Allen charge "to jurors to re-examine their views in the light of those of their fellows is dependent upon the moderating reminder to their own individual responsibility and the necessity that any verdict be that of each of the jurors and not just that of a majority." United States v. Rogers, 289 F.2d 433, 437 (4th Cir. 1961).

The Allen charge in question emphasized that the verdict was to be that of each individual juror, "his or her own convictions and not a mere acquiescence in the conclusions of the jurors." (Tr. p. 1113, lines 20-22). Under State v. Marsh, 260 Or. 416, 490 P.2d 491, cert. denied, 406 U.S. 974 (1971), this charge is a "balanced charge" in that the supplemental instruction emphasized that each individual juror was

not to give up his or her conscientious convictions in attempting to render a verdict. Considering the instruction as a whole, the supplemental charge given was a proper Allen charge and did not deprive Appellant of his right to a fair trial. See Lowenfield v. Phelps, 484 U.S. 231 (1988).

The primary concern of Appellant centers around the time the Allen charge was given, i.e., three (3) hours and fifty-seven (57) minutes after the jury began its deliberations. He asserts that the charge was premature and therefore coercive. While this Court has not addressed this specific issue, other courts have held that there is no fixed period of time which must necessarily elapse before an Allen charge may be properly given. See United States v. Sawyers, 902 F.2d 1217 (6th Cir. 1990) (supplemental charge given after jury deliberation of slightly over three [3] hours); Barnes v. State, 261 Ark. 360, 548 S.W.2d 141 (1977) (supplemental charge given after jury deliberation of one (1) hour and fifty (50) minutes); Hawkens v. State, 260 Ga. 138, 390 S.E.2d 836 (199) (supplemental charge given after jury deliberation of less than three [3] hours); Cole v. State, 766 P.2d 358 (Okla. 1988) (supplemental charge given after jury deliberation of one [1] hour and forty-five [45] minutes). In looking at the attendant circumstances, the length of the trial, the relatively simple issues, and the length of the jury's initial deliberations, the charge in this case was not prematurely given. See Barnes v. State, supra.

Furthermore, the time between the giving of the Allen

charge and the jury's rendering of a verdict one (1) hour and twenty-five (25) minutes does not indicate that the jury was coerced or pressured by the trial court. The time period between the charge and the rendering of a verdict is not to be considered in determining whether the Allen charge in question is proper. U.S. v. Ball, 547 F.Supp. 929 (D.C. Tenn. 1981); see also U.S. v. Hynes, 424 F.2d 754 (2nd Cir.) cert. denied, 399 U.S. 933 (1978) [jury returned with verdict with five (5) minutes after supplemental instruction given]. The time period is a factor to be considered only if the charge is first determined to be improper. U.S. v. Ball, supra. Under the prevailing Federal and State law, the trial court's supplemental charge was a proper Allen charge; therefore, the time period is not a factor to be considered.

No error resulted from the giving of the Allen charge in the case at bar. Therefore, this Exception is without merit.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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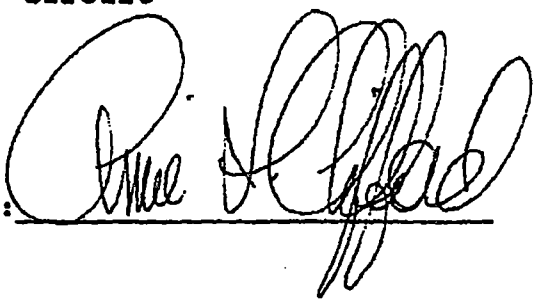
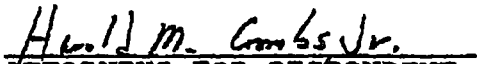
BY: 


ATTORNEYS FOR RESPONDENT

November 16, 1990.

ALC

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, ... Respondent,

v.

Ronald S. Tillman, ... Appellant.

Appeal from Richland County
Don S. Rushing, Judge

Opinion No. 1666
Heard March 18, 1991 - Filed May 28, 1991

AFFIRMED

Jack B. Swerling and Jennifer Kneece Shealy, both of Columbia, for appellant.

Attorney General T. Travis Medlock, Assistant Attorneys General Harold M. Coombs, Jr., and Amie L. Clifford; and Solicitor Richard A. Harpootlian, all of Columbia, for respondent.

SHAW, J.: Appellant, Ronald S. Tillman, was convicted of murder and sentenced to life imprisonment. We affirm.

The State offered three key witnesses implicating the appellant in the murder of one Donald Sutton. The most damaging evidence came from Hayes Malloy who testified he saw the appellant shoot Donald Sutton. He stated that in December of 1988, appellant offered him $5,000 to kill Sutton. He reported this solicitation to the F.B.I. on December 21, 1988. On December 26, 1988, following a conversation with the appellant, Malloy concluded appellant was likely to have Sutton killed that night. Sometime after 8:30 p.m., Malloy got in a car with appellant at which point appellant pulled out a pistol and showed it to Malloy. As they drove off, Sutton pulled up behind them flashing his high beam headlights and appellant signalled Sutton to follow them. Appellant then offered Malloy $10,000 to "take care" of Sutton but Malloy refused.

The two cars turned in behind a church and stopped. Appellant and Sutton got out of their cars and met each other. Appellant pulled out his gun and shot Sutton. Sutton fell to the ground and appellant then shot him again. As appellant headed back to the car, Malloy jumped out and went to check on Sutton. Appellant then drove his car away, leaving Malloy at the scene.

The State also introduced the testimony of Clarence Gabby Wells and Kenneth L. Gardner. Wells testified that, before Sutton was killed, appellant told him on two occasions he intended to kill Sutton. He further stated that after appellant's arrest, he heard appellant tell Malloy he wanted him to take the murder charge for him. Witness Gardner testified appellant told him he

killed Sutton at a church.

Appellant raises several issues on appeal. We first address his exceptions relating to the tire tread evidence.

I

At trial, the State introduced evidence that tire tracks found near Sutton's body were those of Goodyear Vector tires and that appellant's automobile had that brand. Appellant challenges several rulings of the trial judge relating to the tire tread evidence.

A.

First and foremost, appellant contends the trial judge erred in admitting evidence of photographs and ink impressions of the tires on his car arguing this evidence resulted from an illegal search and seizure. The record reflects in connection with an unrelated federal bank robbery charge, appellant had given the F.B.I. a consent to search. The consent stated as follows:

> I, Ronald Stafford Tillman ... hereby authorize James H. Davis, Michael Marchant and R.D. Johnson, special agents of the Federal Bureau of Investigation ... to conduct a complete search of my premises located at ... and my briefcase and my vehicle, a 1988 Buick Riviera. These agents are authorized by me to take from my premises any letters, papers, materials or other property which they may desire.

Thereafter, the F.B.I. agents took possession of the vehicle, impounding it, and later made it available to the Richland County Sheriff's Department. The Sheriff's Department then made ink impressions and photographs of the tire treads by means of cranking the automobile and moving it.

Over objection, the trial judge allowed the photographs and ink impressions into evidence concluding the written consent authorized the impoundment and ruling there were no violations in appellant's Fourth and Fourteenth Amendment rights and that the harmless cranking of the vehicle and moving of it was reasonable, not intrusive, and not within appellant's expectation of privacy. We agree.

Appellant contends a consent search is only legal if it is kept within the scope of consent and, because the search went beyond the scope of consent, the evidence was not admissible. There is no question appellant consented for the F.B.I. to search his automobile. Although appellant denied consenting to the seizure of his automobile, the clear language of the consent form signed by him allowed for seizure of the car. Thus, the question becomes whether appellant's Fourth Amendment rights were violated when the Sheriff's Department obtained the evidence in the manner they did.

Appellant's argument that the scope of consent was exceeded is misplaced. First, we note there is no indication in the record of what, if any, limits applied to the consent given by appellant. There is no indication the scope of consent would have been exceeded had the F.B.I., in the same manner, obtained the same evidence. And though consent may very well be limited by the type of activity for which consent has been granted, the question here is not whether the Sheriff's Department had appellant's consent to search the vehicle in connection with a murder charge, but whether appellant had a legitimate expectation of privacy while the car was in the custody of the F.B.I. such that it would prevent the Sheriff's Department from lawfully obtaining the photographs and ink impressions. See Rawlings v. Kentucky, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980) (a legitimate expectation of privacy is necessary to trigger Fourth Amendment protections); United States v. White, 766 F.2d 1328 (9th Cir. 1985) (the Fourth Amendment prohibits only unreasonable searches and the presence of a privacy expectation is essential in determining the extent of intrusion under the Fourth Amendment).

The U.S. Supreme Court case of Cardwell v. Lewis, 417 U.S. 583, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974) involved the issue of the admissibility of evidence obtained from an automobile based on the defendant's Fourth and Fourteenth Amendment rights. In that case, the defendant appeared at the office of the investigating authority for questioning in regard to a murder. The defendant drove his automobile, leaving it at a public commercial parking lot. When defendant was arrested later that afternoon, his car was towed to a police impoundment lot where a warrantless examination was made revealing a tire that matched a cast tire impression made at the crime scene. Paint scrapings were also obtained from the defendant's car.

The court found the issue before them was whether examination of an automobile's exterior upon probable cause invades a right to privacy which the interposition of a warrant requirement is meant to protect. The court noted that the primary object of the Fourth Amendment is the protection of privacy rather than property rights. It went on to point out that, generally, less stringent requirements have been applied to vehicles than to homes or offices, and that the search of an automobile is far less intrusive on the rights protected by the Fourth Amendment than the search of one's person or of a building. It found one has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as a repository of personal effects. What a person knowingly exposes to the public is not a subject of Fourth Amendment protection and, insofar as Fourth Amendment protection extends to a motor vehicle, it is the right to privacy that is the touchstone of inquiry. The Court concluded as follows:

> In the present case, nothing from the interior of the car and no personal effects, which the Fourth Amendment traditionally has been deemed to protect, were searched or seized and introduced in evidence. With the "search" limited to the examination of the tire on the wheel and the taking of paint scrapings from the exterior of the vehicle left in the public lot, we fail to comprehend what expectation of privacy was infringed.
> (417 U.S. at 591).

* * *

> Under circumstances such as these, where probable cause exists, a warrantless examination of the exterior of a car is not unreasonable under the Fourth and Fourteenth Amendments.
> (417 U.S. at 592).

The circumstances of the case at hand are very similar to those of the Cardwell case.[1] It is difficult to see how the appellant in this case has any greater expectation of privacy where both automobiles were impounded by legal authorities at the time the evidence was obtained. Whereas the automobile was impounded without specific consent in Cardwell, appellant had consented to the seizure of his automobile by the F.B.I. Certainly, the appellant here has no greater expectation of privacy under these facts.[2] We therefore find no error in the admission of this evidence by the trial judge. Further, in light of the overwhelming evidence of appellant's guilt contained in the record, we find any error in the admission of this evidence would have been harmless. See State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989).

B.

Appellant next argues the trial judge erred in admitting evidence of tire tracks found near the scene of the crime. Testimony and photographs of tire tracks found at the scene came into evidence. Although there were numerous tire tracks in the area, the investigators took photographs of specific tracks because they appeared to stop in view of Sutton's body. Appellant objected to the introduction of this evidence on the ground there was no proper showing these tracks were connected to the murder. The trial judge overruled the objection finding the testimony the tracks appeared to stop in view of the body was sufficient to connect the tracks to the murder. On appeal, appellant argues the selection of these tracks was too speculative. We disagree.

---

[1] We note the issue of whether the Sheriff's Department had probable cause to examine the automobile was not raised by the appellant at trial nor on appeal.

[2] There is no indication of how the evidence of the tire tread of defendant's car was obtained in Cardwell. Nevertheless, we find the minimal intrusion used to obtain the evidence in the case at hand has no impact on the outcome of this case in light of the allowance of paint scrapings in Cardwell and other cases. See Deshazier v. State, 155 Ga. App. 526, 271 S.E.2d 664 (1980). See also United States v. White, supra, citing Cardwell v. Lewis, supra, (to identify a vehicle, officers may scrutinize its exterior to the extent of scraping off a paint sample and making a cast of the tire tread and neither action will constitute a search).

Evidence is admissible if it logically or reasonably tends to prove or disprove a crime charged or any fact material to the issue. State v. Hoffman, 257 S.C. 461, 186 S.E.2d 421 (1972). We find the testimony that these particular tracks stopped in view of the body more than sufficient to logically tie such evidence to the crime. The fact that there may have been numerous other tracks at the scene goes to the weight of the evidence, not its admissibility. The determination of the admissibility of evidence is largely within the discretion of the trial judge. State v. Livingston, 282 S.C. 1, 317 S.E.2d 129 (1984). We find no abuse of his discretion.

C.

Appellant also contends the trial judge erred in relation to several aspects of an expert witness' opinion. He first argues the witness was improperly qualified as an expert. We disagree.

Bruce Hall is the manager of a Goodyear tire store and has been employed with Goodyear for six years. He has attended classes on recognizing tread patterns of Goodyear tires and stated he could identify different makes of tires because of his training and the experience of seeing virtually every kind of tire in his store. Over objection, the trial judge qualified him as an expert in distinguishing tire patterns.

During direct examination, Hall identified the tire tracks found at the scene as coming from Goodyear Vector tires and also identified tires on appellant's car as being Goodyear Vectors. He further testified that only around two percent of the tires sold in the store he managed were Vectors.

The decision to qualify an expert is in the sound discretion of the trial judge. State v. Caldwell, 283 S.C. 350, 322 S.E.2d 662 (1984). We find the record here supports the trial judge's qualification of Hall as an expert in distinguishing tire patterns.

Appellant also argues the admission of this evidence was erroneous because it was speculative in nature. We disagree. As previously noted, we find the testimony that the tire tracks stopped in view of the body was sufficiently connected to the crime such that admission of this evidence was proper.

Finally, appellant appears to argue the testimony of the expert witness that "around two percent of the tires just sold out of my location were Goodyear Vectors" was improperly admitted over objection. We first note this testimony initially came in without objection. Further, when the appellant later objected, the trial judge sustained his objection. We therefore find no error.

II

During the trial, the State offered the testimony of one Clarence Gabby Wells. During direct examination, Wells testified he heard appellant tell Malloy to take the murder charge for him because "the Feds got him by the balls". Over objection, the trial judge allowed the statement into evidence.

Appellant contends State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) prohibited this evidence because it indicated he was guilty of another crime. We disagree. It is clear this evidence was offered, not to show that appellant had committed another crime, but to show his state of mind at the time he made a statement against his interest. See State v. Plyer, 275 S.C. 291, 270 S.E.2d 126 (1980) (as a general rule, statements of declarations made by one accused of a crime are admissible against him). Evidence logically relevant to establish a material element of the offense charged is not to be excluded merely because it incidentally reveals the accused's guilt of another crime. State v. Green, 261 S.C. 366, 200 S.E.2d 74 (1973). Here, the testimony did not even necessarily reveal appellant's guilt of another crime. We find any reference to a federal crime was so vague that its probative value outweighed any possible prejudice.

III

Appellant next contends the trial judge erred in improperly excluding impeachment evidence concerning State witness Wells. The record shows that, on cross-examination, appellant attempted to impeach Wells by asking whether he had pleaded guilty to an indictment charging him with an assault and battery of a high and aggravated nature which occurred in 1988. After hearing the details of the crime, the trial judge found it was not a crime of moral turpitude and therefore would not allow this evidence.

Because Wells was thoroughly impeached by admission of numerous previous convictions and his acknowledgment he was testifying under an agreement to receive favorable treatment on some outstanding charges, we find the error, if any, in denying admission of evidence on this particular crime was harmless.

IV

Finally, appellant contends the trial judge erred in giving an Allen charge. We disagree. The record reflects that around 9:30 p.m., after close to four hours of deliberations, the jury sent a note to the trial judge indicating it was hung. The trial judge informed the jury they would start back up at 9:30 the following morning. He excused the jury and then informed counsel he intended to give the jury an Allen charge first thing in the morning.

The next morning, the trial judge again informed counsel of his intention to give the jury an Allen charge which he proceeded to do despite appellant's objections. Approximately one hour and fifteen minutes later, the jury came back with a guilty verdict.

Appellant contends the trial judge erred in giving the charge because it had an "unnecessarily coercive impact on the jury's decision process." Appellant does not argue any specific error in the content of the charge. Rather, he contends it was coercive because it was given too soon and because the speed with which the jury returned its verdict suggests "the majority view simply prevailed." We disagree.

A trial judge is but discharging his duty to the public and the litigants when he urges the jury to reach a verdict, provided no coercion takes place. State v. Lynn, 277 S.C. 222, 284 S.E.2d 786 (1981). A reading of the charge given by the trial judge reveals no indication he tried to coerce a verdict. We further find appellant's argument as to the timing of the charge meritless given that the jury had deliberated for almost four hours. See Hawkins v. State, 260 Ga. 182, 390 S.E.2d 836 (1990). Further, the trial judge, in giving the Allen charge, specifically instructed the jury that the verdict must be each juror's "own convictions and not a mere acquiescence in the conclusions of the other jurors ...." We therefore find no error in the giving of this charge.

AFFIRMED.

GARDNER and BELL, JJ., concur.

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY

THE HONORABLE DON S. RUSHING, JUDGE

THE STATE OF SOUTH CAROLINA,

Respondent

vs.

RONALD TILLMAN,

Appellant.

OPINION NO. 1666
PETITION FOR REHEARING

Appellant herein petitions this Court for a rehearing on the ground that the Opinion containing the judgment on the issues herein (No. 1666, filed May 28, 1991) overlooked or misapprehended a number of important points.

In particular, the following points were overlooked or misapprehended:

1. Part I A of the opinion misapprehends the proper approach to the interpretation of the scope of a "consent to search" and the record concerning Appellant's understanding of the scope of consent.

2. Part I A of the opinion misapprehends and misapplies the applicable doctrine concerning the permissible scope of examination of a locked, parked automobile.

3. Part I B of the opinion misapprehends and misapplies the applicable doctrine concerning the inadmissibility of speculative evidence.

4. Part I C of the opinion misapprehends the applicable doctrine concerning the qualifications of an expert witness and the factual basis required for an expert opinion.

5. Part II of the opinion misapprehends the rules of evidence concerning the admissibility of evidence of unrelated wrongdoing. Of particular importance is that the opinion does not indicate how "state of mind" or "declarations" are relevant insofar as the statement involved is concerned.

6. Part III of the opinion misapprehends the admissibility of the impeachment evidence and/or the prejudicial effect of the exclusion of the evidence.

7. Part IV of the opinion misapprehends the circumstances under which an Allen charge is proper.

In support of this Petition, Appellant relies upon the authorities and arguments set forth in the Brief of Appellant.

Respectfully submitted,

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Richland County

The Honorable Don S. Rushing, Judge

THE STATE OF SOUTH CAROLINA,

Respondent,

vs.

RONALD TILLMAN,

Appellant.

PROOF OF SERVICE

I, Jennifer Kneece Shealy, attorney for the above Appellant, certify that I have served the within Petition for Rehearing on Respondent by having the same hand-delivered by courier to the attorneys of record, T. Travis Medlock, Attorney General, Harold M. Coombs, Jr., Assistant Attorney General, and Amie L. Clifford, Assistant Attorney General, Post Office Box 11549, Columbia, South Carolina 29211.

I further certify that all parties required to be served have been served.

This 12th day of June, 1991.

JACK B. SWERLING
JENNIFER KNEECE SHEALY

By: _____
1720 Main Street, Suite 301
Columbia, South Carolina 29201

ATTORNEYS FOR APPELLANT

THE SOUTH CAROLINA COURT OF APPEALS

The State, ... Respondent,

v.

Ronald S. Tillman, ... Appellant.

ORDER DENYING PETITION
FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no ground for a rehearing. It is therefore ordered that the petition for rehearing be denied.

J.

J.

J.

Columbia, South Carolina

June 20, 1991

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal From Richland County

The Honorable Don S. Rushing, Judge

Opinion No. 1666

THE STATE,

Respondent,

vs.

RONALD S. TILLMAN,

Appellant.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that a Petition for Rehearing was filed and was finally ruled on by the Court of Appeals on June 20, 1991.

QUESTIONS PRESENTED

1. Were the seizure and impoundment of petitioner's automobile beyond the scope of his consent?
2. Were the seizure and search of petitioner's automobile subsequent to the impoundment beyond the scope of petitioner's consent and unreasonable?
3. Did the Trial Judge err in admitting photographs alleged to be of tire tracks from Petitioner's automobile at the scene of the crime?
4. Did the Trial Judge err in admitting expert testimony concerning tire tracks and concerning the tires from Petitioner's automobile?
5. Did the Trial Judge err in overruling Petitioner's objections to testimony by Gabby Wells concerning criminal misconduct by Petitioner?
6. Did the Trial Judge err in refusing to allow Petitioner to impeach the credibility by Gabby Wells by the use of a conviction of assault and battery with a machete?
7. Did the Trial Judge err in giving the jury an "Allen charge" despite objection by Petitioner that such charge was untimely and erroneous?

STATEMENT OF CASE

I. Procedural History

Petitioner was indicted by the Richland County Grand Jury for murder. Petitioner was tried before the Honorable Don S. Rushing and a jury on January 15-23, 1990. The Petitioner was found guilty of murder and sentenced to life imprisonment. Timely notice of intent to appeal was served and filed.

The Court of Appeals affirmed the conviction and sentence. State v. Tillman, Op. No. 1666 (S.C. Ct. App. filed May 28, 1991). (Davis Adv. Sh. No. 14 at 15). Petitioner petitioned for rehearing, and this petition was denied on June 20, 1991.

II. The Evidence at Trial

The lengthy trial herein involved evidence which presented two conflicting views of the events on the night of the homicide. The State offered evidence in support of its position that Appellant had shot the victim, Donald Sutton, on December 26, 1989, between 8:30 and 9:00 p.m. Petitioner offered alibi evidence in support of his position that he was elsewhere at the time of the killing.

A. Testimony of Hayes Malloy

The chief witness for the State was Hayes Malloy. Malloy testified that Petitioner had asked Malloy earlier in December if Malloy "knows anybody that would kill Donald Sutton." (Tr. p. 16, lines 18). Malloy also testified that Petitioner had offered Malloy "$5,000.00 to kill Donald Sutton." (Tr. p. 17, line 5).

Malloy's testimony concerning the night of the killing can be summarized as follows:

> At about 8:30 p.m. Malloy got in a car driven by Petitioner. Petitioner showed Malloy a gun, saying it had been recently delivered to Petitioner by Vito McKie. A car, driven by Sutton, pulled up behind them and flashed its lights. Petitioner then asked Malloy if he would "take care" of Sutton, but Malloy refused despite Petitioner's raising the price to $10,000. Petitioner then drove to the parking lot of the Brown Chapel Church. Sutton pulled in afterward. Petitioner and Sutton got out of the cars. The two met and Petitioner talked to Sutton. While he was talking, Petitioner pulled out the gun and shot Sutton. Malloy got out of the car before Petitioner got back in. While Malloy was checking for Sutton's pulse, Petitioner drove off. Malloy left on foot.

(See Tr. p. 23, line 7 through p. 34, line 24).

Malloy's testimony was subject to a number of challenges and shortcomings, particularly concerning his credibility. For example, sometime after the shooting, Malloy contacted the police. However, at that time he did not give them the story summarized above. Instead, he lied and said only that he knew where a body was. Malloy took the police to the scene of the shooting but denied having seen the shooting. (See Tr. p. 37, line 1 through p. 40, line 24). Later, Malloy himself was charged with having committed the murder. At this time Malloy changed his story and told the police the account that he testified to at trial. (Tr. p. 41, line 23 through p. 42, line 7).

B. Evidence Concerning Petitioner's Automobile

The State offered evidence which it argued showed that Petitioner's automobile had been at the scene of the killing. In

particular, the State offered: (1) evidence concerning the tires on Petitioner's automobile, which evidence was secured by moving Petitioner's automobile, which had been seized by the F.B.I.; (2) evidence concerning tire tracks at the scene of the homicide; and (3) testimony of Bruce Hall, who gave an "expert" opinion to the effect that the tires on Petitioner's car were "vector tires," that the tire tracks at the scene were made by "vector tires," and that "vector tires" were rare in his store.

1. The Seizure of Petitioner's Automobile by the F.B.I.

In late December, 1989, Petitioner was arrested by agents of the Federal Bureau of Investigation (F.B.I.) for a bank robbery. At the time of this arrest, Petitioner consented to a search by the F.B.I. of his house and car concerning the bank robbery. (Tr. p. 362, line 16, through p. 363, line 14). Later that day, the car was impounded by the F.B.I. and placed in a basement parking area. (Tr. p. 392, lines 6-7; p. 399, lines 8-12)

Petitioner testified that he had consented to a search of his car and that the consent was limited. Petitioner had not yet been charged with the murder involved herein and had consented only to a search of his automobile in relation to his arrest by the F.B.I. for bank robbery. (Tr. p. 389, lines 1-19). Petitioner also testified that he had given the federal government permission to search the vehicle, not to seize or impound it. (Tr. p. 390, lines 6-8; p. 392, line 1 through p. 393, line 14). The seizure and removal of the car by the F.B.I. occurred after Petitioner had been arrested and taken to F.B.I. headquarters. (Tr.p. 392, lines 4-6.

The sole evidence to challenge Petitioner's testimony concerning the limited scope of his consent was a consent-to-search form that he signed at the time of his arrest by the F.B.I. (See Tr. p. 393 line 17 through p. 394, line 18). The relevant portions of this form provide:

> I, Ronald Stafford Tillman... hereby authorize James H. Davis, Michael Marchant and R. D. Johnson, special agents of the Federal Bureau of Investigation ... to conduct a complete search of my premises located at ... and my briefcase and my vehicle a 1988 Buick Riviera. These agents are authorized by me to take from my premises any letters, papers, materials or other property which they may desire.

No evidence was offered by the State concerning the F.B.I. agents' interpretation of the phrase "letters, papers, materials or other property" or concerning whether this phrase had been discussed with Petitioner at the time he signed the form. Thus, other than the form itself, there was no evidence to support the finding that seizure and impoundment were within the scope of Petitioner's consent.

2. The Search and Seizure of Petitioner's Automobile by the Sheriff's Department

A short time after the seizure and impoundment of the automobile, "the Richland County Sheriff's Department...made contact with the F.B.I. and requested to come over and see the vehicle." (Tr. p. 399, lines 13-17). Subsequently, agents of the Richland County Sheriff's Department went to the F.B.I. parking area to investigate the car. As a part of this investigation, they were given the car keys by the F.B.I., unlocked the car, turned the

wheel so that photographs could be made, and started the car and drove it a short distance in order to get a tire impression. (Tr. p. 399, lines 17 through 400, line 11). No warrant was sought to undertake this investigation, and the Sheriff's Department had not sought Petitioner's consent. (Tr. p. 361, lines 1-4; p. 367, line 25 through p. 388, line 8; p. 390, lines 21-25; p. 391, lines 12-20).

At trial, Petitioner objected to the introduction of the evidence secured by this investigation. (See Tr. p. 337, lines 4-20). The basis of this objection was that the original impoundment of the vehicle was wrongful and that under these circumstances the entry into and driving of the car constituted a search and that a warrant was required for such a search since there were no exigent circumstances justifying a warrantless search. (See, e.g., Tr. p. 367, lines 6-13; p. 371, lines 7-12; p. 377 lines 6-12, 19-20).

The State did not disagree with the position that there were no exigent circumstances involved at any relevant point in time. Moreover, the State did not present evidence of probable cause. Instead, the State argued that Petitioner's signing of the form consent to the F.B.I. search justified the subsequent search by the Sheriff's Department. (See, e.g., Tr. p. 380, lines 12-21).

The Trial Judge overruled Petitioner's objection. The basis of this ruling was:

> The only thing that occurred was a very harmless cranking of the vehicle and moving it in order to obtain inked impressions and to photograph it, all of which I find to be reasonable and do not be intrusive and really

> no expectation of privacy but if there was it was waived by his consent to search.

(Tr. p. 401 lines 1-6).

3. Evidence Allegedly Relating to Petitioner's Tire Tracks at the Scene of the Homicide

The State offered photographs of tire tracks found in the vicinity of the crime. The purpose of this evidence was to provide a foundation for an "expert" on tires to testify concerning these photographs and concerning the photographs and impressions of the tires on Petitioner's automobile.

Petitioner objected to the introduction of evidence concerning tire tracks at the scene on the ground that there were numerous different tire tracks in the area and there was no proper showing that the tracks at issue were connected to the killing. The Trial Judge overruled this objection on the ground that the witness laying the foundation for the photographs had testified that "the tire tracks appeared to stop in view of the body." (Tr. p. 407, line 17 through p. 408, line 5).

The witness' testimony was that no attempt had been made to get Malloy, the State's alleged eyewitness, to identity which tracks were those of the car. The testimony concerning the selection of the tire tracks was as follows:

> Q Did anybody show you where Mr. Malloy--well, let me ask you. Did Mr. Malloy show you where the car was that he said was the car that they drove up in?
>
> A No, nobody showed me where the car was.

Q So, nobody ever showed you where the car was?

A That's correct. Nobody ever showed me.

Q What you did is you went out there and ... took a photograph of two tire prints because they were tire prints that were in view of the body?

A They stopped in view of the body. They did not continue on.

Q Okay. But nobody told you that's where the car was parked. Is that correct?

A That's correct.

Q And in looking at this photograph, would you tell the jury, are there literally innumerable tire marks and tire patterns in that sand?

A Yes, there are. Many are over one another.

Q Many of them are over one another. Some are not over one another, is that correct?

A That's correct.

Q All right. Did you photograph any of those? Any of the others?

A No.

Q Did you do any comparisons on any of these others?

A No, we did not.

Q So, you basically randomly took some impressions in the sand even though we had all of these in state's Exhibit Number 24 because they were stopped near the body? Is that correct?

A That's correct. Because they appeared to stop in view of the body.

Q All right. Now, you don't know if that's where the vehicle was according to your testimony? Is that correct?

A Nobody told me that's where the vehicle was that night.

(Tr. p. 431, line 13 through p. 432, line 20).

4. Expert Testimony Concerning the Tire Tracks at the Scene and Petitioner's Tires.

The State offered Bruce Hall as an "expert" on "Goodyear tire treads." (Tr. p. 443, lines 10-14). The basis of this alleged expertise was that Mr. Hall had worked for a Goodyear store in Columbia for six years. He testified that he had acquired knowledge of tread patterns as a part of providing service to his customers over the years. (Tr. p. 438, line 1 through p. 443, line 9). The State argued that Mr. Hall had sufficient "expertise" to render an "expert" opinion concerning the brand and type of tires involved by looking at photographs of the tire treads on Petitioner's tires and photographs of the tire tracks in the parking area of the murder scene.

Petitioner challenged these qualifications on two grounds. First, though Mr. Hall had considerable experience with Goodyear tires, this experience was limited in several important respects. His experience with tires was limited to observation of tires, not of photographs and tire impressions. His experience was also limited to Goodyear tires. While selling and installing Goodyear tires at his store, he may have serviced cars with some other brands of tires. However, such random, ad hoc experience would not qualify him as an expert concerning all other tires.

Second, Mr. Hall's training was also limited in its nature. His training was entirely "on the job" training, and there was no way to determine whether he had the expertise he claimed. He had no degree or formal education in the area. Moreover, his area of expertise did not involve the type of subject matter where lay persons could evaluate his abilities. Thus, Mr. Hall was, in effect, "bootstrapping" himself into the position of qualifying himself as an "expert": The existence of his expertise was based solely on the assumption that he was able to provide his own "expert" assessment of his skills. (See Tr. p. 443, line 19 through p. 448, line 24; p. 452, line 8 through p. 467, line 5).

The Trial Judge overruled these objections and held that Mr. Hall was qualified because of his experience and because of his own assessment of his abilities:

> He says that he can ride down the road and tell the difference between a tire simply by looking at the tread, he doesn't need to see the name on it. And not just Goodyear tires, he said every other type of tire.

Despite objection, Mr. Hall was allowed to testify that, based on his examination of photographs and impressions of the tire on Petitioner's car and on his examination of the photographs of the tire tracks in the sand, both involved Goodyear "vector tires." (Tr. p. 499 line 18 through p. 494, line 24; p. 498, line 17 through p. 503, line 2).

He was also allowed to testify despite objection that "around 2 percent of the tires just sold out of my location were Goodyear vectors." (Tr. p. 509, lines 7-11; see p. 509, lines 22-24). Mr.

Hall had no idea what the sales figures for vector tires were for other stores. Nor did he know anything about the overall number of vector tires in the United States or in Columbia, South Carolina. (Tr. p. 509, line 5 through p. 510, line 5).

The Trial Judge overruled the objections and admitted the testimony. The basis of this ruling was as follows:

> The Court finds there is a probative value.... The testimony by Mr. Malloy was that the Defendant drove him out there in that vehicle which is in essence corroboration of what Hayes Malloy says and also would defeat any evidence of an alibi of this defendant. The state has a right and is required to prove that he was present at the scene of the crime. There's direct testimony that the defendant was in that vehicle driving that car and there are tire prints which are shown in the sand which are the same type of tire print as the vehicle. It goes to support that testimony. That's a reasonable inference. No witness at this point has testified that is the tire print which matched that tire. No question about it but they have said that tire print was a vector tire. He drove a vector car out there. So, those two connected together are sufficient for the court to rule out any speculative nature in the case and it is probative on the issue, if believed. Always if believed.

(Tr. p. 513, line 15 through p. 514, line 7).

C. Testimony of Gabby Wells

1. Testimony Concerning Prior Misconduct by Petitioner

The State called Gabby Wells to testify to the effect that Wells had heard Petitioner ask Malloy to tell the authorities that Malloy had committed the murder. The State also wanted Wells to testify that he had heard Petitioner say to Malloy that "the Feds

have me by the balls." (The federal charge involved the bank robbery discussed above in Part B-1). Petitioner objected to the second portion of the testimony on the basis of State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) because that portion indicated that he was facing prosecution by the federal government and thus involved the improper admission of other wrongdoing. (See, Tr. p. 307, line 8 through p. 309, line 16).

This objection was overruled, and the Trial Judge ruled that Wells could testify concerning the statement about "the feds." (See Tr. p. 307, lines 8-12). The basis of this ruling was not that Lyle was inapplicable or that one of exceptions to Lyle existed. Instead, the Trial Judge, addressing only the problems of hearsay and relevance, ruled as follows:

> Lyle goes to prove another crime in order to show motive, intent, common scheme and plan. That isn't the purpose for which it was offered. It's not a Lyle issue. It's an admission against his penal interest in this case. That's what it's admitted for. And the fact that he admits that the feds have him by the balls they are not trying to prove another crime to show that he committed this crime but simply to show his state of mind at the time the declaration was made and it was made against his penal interest. That statement. It clearly has probative value. And if there is any prejudicial effect by it it's clearly outweighed by the probative value in the case. I'm going to allow it.

(Tr. p. 308, lines 10-22).

2. Attempt to Impeach Gabby Wells

Petitioner attempted to impeach Wells' credibility by asking about a conviction of assault and battery of a high and aggravated nature that occurred in 1988. The charge involved an assault and

battery that had occurred on July 16, 1988. (Tr. p. 329, lines 2-6; p. 652). The indictment for assault and battery of a high and aggravated nature charged that Wells had stricken the victim "repeatedly with a machete." (Tr. p. 646). Wells had pled guilty to the charge of assault and battery of a high and aggravated nature. (Tr. p. 655).

The Trial Judge ruled that evidence of this conviction was not admissible. This ruling was based on the position of the Trial Judge that the indictment did not control the determination of whether a crime of moral turpitude was involved. Instead, the Trial Judge ruled that "determination depends upon the facts and circumstances of each particular case" and that since these facts may vary from the indictment, a hearing was necessary to determine the underlying facts involved. (Tr. p. 335, lines 4-10).

At that "minihearing," Mr. Wells testified as follows concerning the facts of the assault:

Q ... Mr. Wells, you pled guilty to that indictment, did you not?

A That's true.

Q Okay. And did you have a machete in your hand?

A That's true.

Q Okay. Did you hit somebody with it?

A I hit him with the fat part, not the blade part.

Q Okay. And did you rob the person?

A He say I robbed him but I didn't rob him.

Q Okay. How many times did you hit him with the fat part of the blade?

A It was about four or five times. Most of the time I kick him in his face.

Q So, in addition to hitting him with the machete blade or machete handle you kicked him in the face?

A I didn't say I hit him with no handle.

Q You just said you did.

A I say I hit him with the fat part which I didn't hit him with the blade. The fat part of the machete about that long and about that thick (indicating). But I did not hit him with the blade.

Q You were hitting the person with the blade--

A But it was the fat part turned sideways what I'm saying. Turned sideways.

Q You did that about four times?

A Yes. I pulled his hands down and beat him with the butt.

Q Okay. And how many times did you kick him in the face?

A No tellin'. I couldn't say.

Q Ten, twenty?

A I say I couldn't say. It might have been two or three.

(Tr. p. 335, line 14 through p. 336, line 18). Based on the testimony of Gabby Wells at this "hearing," the Trial Judge ruled that the facts did not indicate a crime of moral turpitude.

III. Summary of Petitioner's Position on Appeal

Petitioner contended on Appeal that the verdict herein resulted from three types of errors. First, the Trial Court erred in permitting certain questions, testimony, and evidence offered by the State. In particular, the Trial Court erred in: (1) permitting evidence concerning tire tracks at the scene of the killing; and (2) permitting Gabby Wells, a witness for the State, to testify concerning misconduct by Petitioner, which misconduct was referred to in a statement allegedly made by defendant. Second, the Trial Judge erred in refusing to allow Petitioner to impeach Gabby Wells. Third, the Trial Judge erred in using an "Allen charge" at such an early point in jury deliberations because it had an improperly coercive effect on the minority-position jurors. Petitioner also contended that, given the conflicting factual scenarios presented at trial by Petitioner and by the State, these errors, either singly or in combination, were so prejudicial that Petitioner's conviction should be reversed.

ARGUMENT

I. THE SEIZURE AND IMPOUNDMENT OF PETITIONER'S AUTOMOBILE WERE BEYOND THE SCOPE OF HIS CONSENT TO SEARCH HIS PREMISES.

The interpretation of the consent to search from herein raises novel issues of law in South Carolina. In particular, it involves substantial issues concerning the considerations that are relevant to interpreting such a government-drafted waiver of constitutional rights. For example, will such broadly phrased forms be construed strictly against the drafter in the same way that a form consumer contract would be?

The Court of Appeals did not address these issues. Instead, it simply concluded that, although Petitioner "denied consenting to the seizure of his automobile, the clear language of the consent form signed by him allowed for seizure of the car." State v. Tillman, supra, at 16. However, these issues should have been addressed because there is no such "clear language" in the form waiver. The consent form authorized the taking of "letters, papers, materials or other property," and there are several reasons for concluding that the automobile does not clearly fall within the phrase "other property."

First, the consent form is a written agreement, and the doctrine of ejusdem generis generally applies to the interpretation of such written documents.

> In contract, as in statutory, construction, the rule is usually applicable that where no intention to the contrary appears, general words used after specific terms are to be confined to things "ejusdem generis"--of

> the same kind or class--as the things previously specified. In other words, where general words follow the enumeration of particular kinds or classes of persons or things, the general words will, unless a contrary intent is manifested, be construed as applicable only be persons or things of the same general nature or class as those specifically enumerated.

17 AM. JUR. 2d Contracts § 270 at 678 (footnotes omitted). When this principle of construction is applied to the language involved, the term "other property" must be interpreted as referring to things like letters, papers, and materials. Thus, the term "other property" did not include Petitioner's automobile.

Second, the search portion of the consent form authorized a search of three distinct areas: "[1] my premises located at Columbia, South Carolina, and [2]my brief case and [3] my vehicle, a 1988 Buick Riviera." (Tr. p. 394, lines 10-12 (emphasis and bracketed numbers added)). In contrast, the seizure portion of the form authorized the F.B.I. to seize items from only one of three areas since it authorized the F.B.I. "to take from my premises any letters, materials, or other property." Thus, the authorization to seize was limited to items discovered in the search of the premises. There is no language in the consent form which indicates a consent to the seizure of any items from the other two areas that could be searched, that is, from Petitioner's briefcase or Petitioner's automobile. Nor was there any language explicitly indicating consent to seize the briefcase itself or the automobile itself.

Third, even if the term "other property" were not necessarily limited by the principle of ejusdem generis or by the other terms

of the agreement, the term is nonetheless ambiguous. The general rule for interpreting ambiguous terms in a written agreement is that any ambiguity should be construed against the drafter. See, e.g., Williams v. Teran, Inc. 266 S.C. 55, 221 S.E.2d 526 (1976); Mid-Continent Refrigerator Co. v. Way, 263 S.C. 101, 208 S.E.2d 31 (1974); Moody v. McLellan, 295 S.C. 157, 367 S.E.2d 449 (Ct. App. 1988). Since the uncontroverted testimony of Petitioner was that he viewed his consent as limited to the search of the vehicle, not its seizure and impoundment, his reasonable interpretation of the ambiguous phrase must prevail as against the interpretation adopted by the Trial Court.

Petitioner testified that it was not his intent to authorize a seizure and impoundment of his automobile. This testimony was not contradicted by evidence that the agents who arrested Petitioner had a different view of the form or that the language had been discussed. The form, by itself, cannot provide a basis for disregarding Petitioner's view that the consent was limited because the language of the consent form did not clearly and unambiguously contradict Petitioner's view.

Thus, the consent-to-search form did not by itself authorize the seizure of Petitioner's automobile by the F.B.I. Since no other ground was offered to justify the seizure, the seizure was wrongful. Moreover, any evidence secured as a result of this wrongful seizure must be suppressed.

Such suppression was required in United States v. Leary, 846 F.2d 592 (10th Cir. 1988), in which the government asserted that a

defendant's consent to search included a consent to seize. The Court of Appeals rejected this argument, noting that Kleinberg, the defendant, had not consented to allow "the government to rummage through company files and carry out any documents that the agents found interesting. ...Kleinberg invited government agents to inspect and copy records, not seize them." 846 F.2d at 599. The Court of Appeals in Leary also rejected the government's other reasons in support of the seizure and therefore suppressed the evidence involved.

II. THE SEARCH AND SEIZURE OF PETITIONER'S AUTOMOBILE SUBSEQUENT TO IMPOUNDMENT WERE BEYOND THE SCOPE OF HIS CONSENT AND UNREASONABLE

This case raises important and novel issues concerning the legal principles relevant to determining the scope of a consent to search and to determining whether a search was so intrusive that infringed on constitutional rights. The Trial Court held that the investigation of Petitioner's automobile by the Sheriff's Department was valid because he had consented to the F.B.I. search and seizure and because the intrusion involved was so minimal. The Court of Appeals did not address the consent issue. Instead, it focused on the nature of the intrusion and held that the search of Petitioner's car was proper because, having consented to its seizure by the F.B.I.,[1] Petitioner had no legitimate expectation that the automobile would not be searched by others in the way it was.[2]

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[1]The Court of Appeals did not address the question of whether the investigation of the automobile by the Sheriff's Department was proper if the seizure and impoundment by the F.B.I. had not been consented to by Petitioner. However, this issue would have to be resolved in Petitioner's favor. See Coolidge v. New Hampshire, 403 U.S. 443 (1971).

[2]The Court of Appeals also took the position that the issue of probable cause had not been raised by Petitioner. State v. Tillman, supra, at 17, n.1. However, the State never claimed probable cause as the basis of the search; instead, the State relied on consent. Moreover, even if probable cause had existed, a warrant would have been required unless there were exigent circumstances. The undisputed lack of such circumstances and the resulting need for a warrant were explicitly stressed by Petitioner at trial and on appeal.

> [T]hough consent may very well be limited by the type of activity for which consent has been granted, the question here is not whether the Sheriff's Department had appellant's consent to search the vehicle in connection with a murder charge, but whether appellant had a legitimate expectation of privacy while the car was in the custody of the F.B.I. such that it would prevent the Sheriff's Department from lawfully obtaining the photographs and ink impressions.

State v. Tillman, supra, at 17. The Court of Appeals held that the search did not violate any legitimate expectation of privacy that petitioner may have had. Id.

The failure of the Court of Appeals to consider the issue of scope of consent was erroneous because Petitioner's legitimate expectations concerning the automobile were determined in part by the scope of any consent to search and seize the vehicle. Therefore, it was necessary to consider the question of scope of consent. For example, the consent form might have explicitly stated: "Search only by F.B.I. and only for evidence of a bank robbery; no other searches or intrusion whatsoever allowed." In such a case, Petitioner would legitimately expect that the F.B.I. would not give the keys to the automobile to persons not in the F.B.I. so that these other persons could unlock it and drive it.

Yet the consent to search was implicitly limited in such a manner. More specifically even if Petitioner had consented to seizure of the vehicle by the F.B.I., the scope of this consent was limited in two ways. First, this consent, like any consent to search, was limited to a particular temporal context.[3] Second,

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[3]It is generally accepted that a consent to search is limited in time. See, e.g., People v. Shelton, 110 Ill. App. 3d 625, 66 Ill. Dec. 367, 442 N.E.2d 928 (1982); State v. Brochu, 237 A.2d 418

the consent was given within the context of a particular criminal investigation and was limited to that context.[4] Thus, Petitioner legitimately expected that any intrusions would be limited in terms of time and nature of crime.

The Court of Appeals also erred in concluding that the intrusion was unimportant. This position was based in large part on Cardwell v. Lewis, 417 U.S. 583 (1974), which held that investigation of the exterior of a car on public property does not involve expectations of privacy. However, in Cardwell there was no entry into the car like that involved herein; nor was there a seizure (in the form of driving) like that involved herein. Instead, Cardwell (and the other cases relied upon by the Court of Appeals) involved an examination of the exterior of the car. The opinion in Cardwell explicitly notes that intrusion and search into the interior of the car is not permitted. See 417 U.S. at 591-592, particularly note 8 at page 592. Even if Petitioner did not have an expectation of privacy concerning the exterior of his car, he had a legitimate expectation that the car would not be unlocked and "seized" (by driving it) unless he had consented, unless a warrant

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(Me. 1967); State v. Douglas, 123 Wis. 2d 13, 365 N.W.2d 580 (1985).

[4]The scope of a consent to search is limited to the subject matter involved when the consent is given. See, e.g., United States v. Leary, 846 F.2d 599 (10th Cir. 1988); United States v. Gray, 774 F.2d 368, 377 (10th Cir. 1985); United States v. Dichiarinte, 445 F.2d 126, 129-130 (7th Cir. 1971); United States v. Milian-Rodriguez, 759 F.2d 1558, 1563 (11th Cir.); Mason v. Pulliam, 557 F.2d 426, 429 (5th Cir. 1977).

had been issued, or unless the State demonstrates that exigent circumstances existed.

The Court of Appeals also took the view that any error concerning the automobile evidence was harmless. State v. Tillman, supra, at 18. However, this view is not supported by the record. The State's eyewitness had been charged with the murder himself and had admitted lying to the police about the events involved. Petitioner presented an alibi defense. Under these circumstances, evidence which allegedly placed Petitioner's car a the scene of the homicide was highly prejudicial and was not harmless. The Trial Judge certainly felt that the automobile evidence was crucial to the State's case. (See Tr. p. 513, lines 16-21).

III. THE TRIAL JUDGE ERRED IN ADMITTING PHOTOGRAPHS ALLEGED TO BE OF TIRE TRACKS FROM PETITIONERS AUTOMOBILE AT THE SCENE OF THE HOMICIDE.

The selection of the tire tracks at the scene to photograph required extreme speculation because there were "innumerable" tire tracks in the parking area. (Tr. p. 432, lines 1-4). More specifically, the officer who made the photographs had to speculate first, that the tire tracks he chose to photograph, among all the tire tracks in a parking area, "appeared to stop in view of the body" and second, that the tracks which appeared to stop at that point had been made by the car involved in the shooting. (See Part II-B-3 of the Statement of the Case).

Allowing such a speculative basis for evidence was unnecessary because the State had available a person like Hayes Malloy, who claimed to be an eyewitness. It would have been easy to ask Malloy which tracks were made by the car in which he and Petitioner allegedly rode.

Moreover, asking Malloy to identify the tracks would serve to confirm (or disconfirm) Malloy's account of the events involved. Given the fact that Malloy had substantially changed his story after he had been charged with the murder, the police had good reason to seek corroboration. Yet they did not ask Malloy to identify where the car was parked even though asking Malloy could have corroborated his story while also avoiding the need to speculate concerning the tracks.

Despite this extensive and unnecessary speculation, the Court of Appeals held that there was no error in admitting evidence concerning tire tracks at the scene of the homicide.

> We find the testimony that these particular tracks stopped in view of the body more than sufficient to logically tie such evidence to the crime. The fact that thee may have been numerous other tracks at the scene goes to the weight of the evidence, not its admissibility. The determination of the admissibility of evidence is largely within the discretion of the trial judge. ...We find no abuse of his discretion.

State v. Tillman, supra, at 19.

However, the admission of tire track evidence was unduly speculative. The admission or exclusion of evidence is a matter of discretion for the trial judge. Nevertheless, it is error to admit evidence unless the connection of the evidence to a point at issue "is reasonable, and not latent and conjectural." Clark v. Patapsco Guano Co., 144 N.C. 64, 56 S.E. 858, 862 (1907). Evidence based on speculation is not admissible. See City of Spartanburg v. Laprinakos, 267 S.C. 589, 594-596, 230 S.E.2d 443 (1976).

The tire track evidence herein does not satisfy this legal test. The testimony was admittedly speculative and conjectural. The witness candidly admitted that he simply picked the tires that "appeared" to be close to the body and did not ask anyone about the tracks. Such speculation may be reasonable in some situations because the use of circumstantial evidence is often necessary and often involves the need for relying on appearances. However, there was no such need herein. The State had a person who claimed to be the eyewitness and who could identify the specific tracks involved. Yet this witness was not questioned even though such questioning

could have eliminated the need to speculate while also providing a check on the validity of the witness' account. In these circumstances, it was error to admit the evidence based on speculation and appearance.

IV. THE TRIAL JUDGE ERRED IN ADMITTING EXPERT TESTIMONY CONCERNING THE TIRE TRACKS AND CONCERNING THE TIRES FROM PETITIONER'S AUTOMOBILE.

The Court of Appeals held that the Trial Judge did not err in holding that Bruce Hall was an expert and in allowing Mr. Hall to offer his expert opinion concerning the photographs of the tire tracks which "appeared" to be closest to the site of the shooting. State v. Tillman, supra, at 19. These holdings are contrary to law. Moreover, they were based in part on the premise that the qualifications of an expert can be based solely on the testimony of that alleged expert concerning the reliability of his own expertise. Determining the validity of this premise is an important and novel issue that should be addressed through the grant of a writ of certiorari.

The qualifications of an expert is a matter for the discretion of the trial judge. However, there are limits on this discretion. For example, State v. Priester, -- S.C. --, 391 S.E.2d 227 (1990) held that the Trial Judge erred in allowing a person with expertise in assessing the content of alcohol in blood to testify concerning the behavioral effect of that content. Such a witness "'lacked the qualification necessary to permit her to testify as an expert on the effect of a given blood alcohol content....'" 391 S.E.2d at 228, quoting from Groth v. DeGrandchamp, 71 Mich. App. 439, 248 N.W.2d 576 (1976). Similar error occurred at the trial herein for several reasons.

First, Mr. Hall's experience was extremely limited. The State offered Mr. Hall as a person who installed Goodyear tires and who was, therefore, an expert on "Goodyear tire treads." (Tr. p. 443, lines 10-14). Yet Mr. Hall's testimony went beyond this scope. He testified that no other brand of tire made the tire tracks like the photographs he was shown. Moreover, Mr. Hall's experience was limited to the observation of tires on cars brought into his store. His "expertise" with other tires was limited to this random, ad hoc experience with tires brought into his store. Thus, he went beyond his expertise and was speculating when he said that only a Goodyear brand tire made tracks like those at the scene. Moreover, he was not experienced in identifying photographs of tire tracks, particularly where the tread marks had been made in soft sand. These limitations were used as a basis for challenging Mr. Hall's qualifications as an expert. However, the Trial Judge rejected these objections simply because Mr. Hall said he was qualified despite the limitations. As a result, Mr. Hall was, in effect, allowed to give an "expert opinion" that he was able to give an expert opinion about all tires and about tire photographs.

Second, the evidence underlying his opinion was extremely speculative and improperly prejudicial. Where experts offer opinions based on speculation, a jury verdict based on such a speculative opinion must be reversed. For example, in City of Spartanburg v. Laprinakos, 267 S.C. 589, 230 S.E.2d 443 (1976) an "expert 'in the field of real estate'" testified concerning property value in a condemnation case. 267 S.C. at 593-94. It was

held error to have allowed this testimony because the witness not compare similar properties, because he used speculative information gained from landowners in the area, and because he was not sufficiently familiar with the relevant facts.

Similar shortcomings are reflected in the facts involved herein. There were numerous different tire tracks at the scene of the killing, yet only one set had been photographed and this set had been selected on the basis of appearance and speculation without consulting Hayes Malloy, the "eyewitness" to the shooting. (See Part V of this Argument). The evidence was also speculative in that there was no competent testimony concerning how common vector tires were at that time. Thus, the jury had no way to assess the evidence involved.

Third, the evidence was not only speculative but also unduly and improperly prejudicial. The undue prejudice was particularly harmful because Mr. Hall was allowed to testify that 2 percent of his sales involved vector tires. This evidence was clearly irrelevant and misleading concerning the question of how common "vector" tires are. Nevertheless, it suggested to the jury that such tires are rare even though such an "opinion" was pure speculation since Mr. Hall did not know anything about the number of "vector" tires in Columbia generally.

The evidence concerning the treads was extremely prejudicial. The trial involved a clash between the story of Hayes Malloy and the alibi witnesses of Petitioner. As a result, the tire tread evidence was extremely prejudicial because, as the Trial Judge

noted, the jury could use this evidence as "corroboration of what Hayes Malloy says" and to "defeat any evidence of an alibi." (Tr. p. 513, lines 16-21).

Yet this use of the evidence was unduly and improperly prejudicial given the speculation involved. In particular, to use it to corroborate Hayes Malloy's story is both illogical and very prejudicial since the photographs of tire tracks at the scene were not based on his identification of the location where they had driven and parked. No such corroboration of his story had been sought.

V. THE TRIAL COURT ERRED IN OVERRULING PETITIONER'S OBJECTIONS TO TESTIMONY BY GABBY WELLS CONCERNING CRIMINAL MISCONDUCT BY PETITIONER

As indicated above in Part C-1 of the Statement of the Case, the State called Gabby Wells to testify to the effect that Wells had heard Petitioner ask Malloy to take the rap and tell the authorities that Malloy had committed the murder. The State also wanted Wells to testify that he had heard Appellant say to Malloy that "the Feds have me by the balls." (The federal charge involved the bank robbery discussed above in Part B-1 of the State of the Case.) Petitioner objected to the second portion of the testimony on the basis of State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) on the ground that this portion indicated that he was facing prosecution by the federal government and thus involved the improper admission of other criminal wrongdoing.

The Trial Court[5] and the Court of Appeals took the position that Lyle was irrelevant. The Court of Appeals concluded:

> It is clear this evidence was offered, not to show that appellant had committed another crime, but to show his state of mind at the time he made a statement against his interest. See State v. Plyer, 275 S.C. 291, 270 S.E.2d 126 (1980) (as a general rule, statement of declarations made by one accused of a crime are admissible against him).

State v. Tillman, supra, at 20.

This reasoning of the Court of Appeals has two shortcomings which are so substantially in conflict with prior decisions of the

[5] See supra part C-1 of the Statement of the Case.

Supreme Court that they should be addressed through the grant of a writ of certiorari.[6]

First, the reasoning rests on a confusion of the requirements of Lyle, which addresses relevance and improper prejudice, and the requirements of the rules concerning hearsay. Lyle provides a list of the reasons why evidence of other crimes would be relevant and, therefore, admissible in a trial. State of mind is clearly admissible under Lyle, but only where it relates to an element of a crime, like intent to steal. "State of mind at the time of an admission against interest" is not relevant to the crime and thus does not satisfy the relevance test of Lyle. There are recognized hearsay exceptions for "state of mind,"[7] for "admission of party opponent,[8] and for "declarations against interest." [9] However, these exceptions relate to hearsay, not to the relevance requirements of Lyle. Relevance requirements are independent of the rules concerning hearsay. There is no authority for treating hearsay

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[6]The reasoning is also subject to the technical objection that any statement by Petitioner concerning Malloy's taking rap for the crime was admissible, if at all, as an "admission of a party," not as a "declaration against interest." See W. Reiser, A Comparison of the Federal Rules of Evidence Law 60, 74-75 (4th ed. 1990). However, this point concerning terminology is technical and was not raised at trial. Consequently, it will not be pursued in this Petition. Instead, the terminological problem will be ignored and the phrase "admission against interest" will be used rather than the technically correct phrase "admission of party opponent."

[7]Id. at 66.

[8]Id. at 60.

[9]Id. at 74-75.

exceptions as exceptions to the relevance requirements of Lyle in the way done by the Court of Appeals and the Trial Court.

Second, even if there were such an exception to Lyle, it would not be applicable in the circumstances of this case. The statement that the "Feds have me by the balls" does not indicate a present mental condition of any sort. It does not contain any information concerning the declarant's intent, plan, or feelings at the time of the statement.[10]

The Court of Appeals also held that the prejudicial impact of the statement was outweighed by its probative value. State v. Tillman, supra, at 20. However, the statement did not have any probative value. The part of the statement requesting that Malloy say that Malloy committed the murder could only have been admissible under the following theory: Petitioner was seeking Malloy's assistance to avoid conviction of the murder because Petitioner knew that he was guilty and thus likely to be convicted. If this were not the motivation for the request, then the request to Malloy would be irrelevant and inadmissible.[11] The existence of the federal charge and its likelihood of success were not relevant to this motivation, and it was error to admit any reference to the federal charge. The desire to avoid a murder conviction obviously provided a motive to make the request of Malloy. The federal crime added nothing to this motive because it

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[10] See Id. at 68.

[11] See id. at 14.

did not make it more or less likely that Petitioner would prefer to have Malloy "take the rap" for the murder.

Moreover, even if there were some probative value, Lyle sets forth the standards for admitting evidence of other wrongdoing and Lyle does not authorize an ad hoc approach to balancing relevance against prejudice. The reference to the federal crime should have been excluded under Lyle because it was improper and unduly prejudicial as a matter of law. The statement indicating that the federal government was likely to convict Petitioner of a crime involves the type of misconduct that should be barred under State v. Lyle. The reason for the Lyle rule is that evidence of such misconduct can cause the jury to believe that a defendant is a "bad person" and, therefore, more likely to be guilty of the crimes at issue. See 125 S.C. at 415-417. Yet the new "exception" to Lyle utilized by the Court of Appeals will allow such results in later cases.

Just such a result was likely herein given the dispute about the facts and the importance of determining whether the account of Hayes Malloy was sufficiently credible to overcome the alibi evidence presented by Petitioner. The prejudicial effect is also indicated by the role the statement could have played in the jury verdict. The jury herein considered itself possibly deadlocked at one point. (See Part VI below). Thus, the view that Petitioner was a "bad man" could have had a role in the verdict. Such a prejudicial role is particularly likely herein because credibility and character were crucial given the diametrically opposed positions presented at the trial.

VI. THE TRIAL JUDGE ERRED IN REFUSING TO ALLOW PETITIONER TO IMPEACH THE CREDIBILITY OF GABBY WELLS BY THE USE OF A CONVICTION OF ASSAULT AND BATTERY WITH A MACHETE.

The Court of Appeals did not address the issue of whether the Trial Judge erred in refusing to allow Petitioner to impeach Gabby Wells by the use of his conviction for assault. Instead, the Court of Appeals found that any error was harmless "[b]ecause Wells was thoroughly impeached by admission of numerous previous convictions and his acknowledgment he was testifying under an agreement to receive favorable treatment on some outstanding charges." State v. Tillman, supra, at 20.

The refusal to allow impeachment by evidence of this conviction was prejudicial. The jury was aware that Wells had been convicted of other crimes. However, with only one exception, these convictions were not as recent as the assault and battery at issue. Thus, the conviction for an assault in July of 1988 added an important dimension to Well's record because it indicated a consistent, continuing, recent disregard for the law and for the rights of others.

Moreover, this recent example of violent conduct supported Petitioner's position that Wells had a specific motive to lie. Petitioner contended that Wells had a grudge against the Tillman family and that this grudge could effect his credibility. The basis of this grudge was that Wells had been barred from the Tillman family's "Party Shop" in 1989 because of a violent assault in the "Party Shop." However, Wells denied that he had a grudge.

He also implicitly denied that he had a motive for a grudge because he asserted that the "bar" from the shop was not really effective. He supported this assertion by implicitly denying that there was any need or reason for a "bar" because he denied that he had a fight or that he was really threatening anyone. (See Tr. p. 321, line 8 through p. 322, line 7). Thus, Petitioner suffered additional prejudice from the exclusion of the evidence of this conviction because the evidence of the criminal assault would have bolstered Petitioner's contentions concerning Wells' aggressive nature at the time involved. Thus, the conviction would have supported Petitioner's assertions concerning Wells' bias because the evidence would have supported Petitioner's contention that there was a need to effectively "bar" Wells from the "Party Shop."

Since the trial herein involved diametrically opposed views of the facts involved, credibility was crucial. Wells' testimony had the effect of strengthening Malloy's credibility and weakening the credibility of Petitioner's alibi defense. Consequently, it was crucial to have Wells' credibility tested as thoroughly as possible. It was, therefore, prejudicial error to exclude the conviction of assault and battery of high and aggravated nature. This prejudice is particularly apparent given the fact that the jury at one point felt that it could be deadlocked. (See Part IV below).

The refusal to allow impeachment was not only prejudicial but also erroneous. The Trial Court adopted the wrong test when it took the view that it was necessary to conduct a mini-hearing in order to make a factual determination concerning the facts

underlying a conviction. It is well established that a serious, harmful assault and battery involves a crime of moral turpitude.[12] State v. Bailey, 275 S. C. 444, 272 S.E. 2d 439 (1980) held that the determination of whether assault and battery of high and aggravated nature involves moral turpitude depends upon the circumstances and that the indictment would provide the basis for this determination, not a hearing on the facts underlying the conviction.[13] Thus, under Bailey the Trial Court should have based its determination solely on the indictment.

Even if a mini-hearing were the proper approach, the facts herein show that a crime of moral turpitude was involved in the assault and battery at issue. A crime of moral turpitude is involved where the criminal conduct is "an act of baseness, vileness, or depravity in the social duties which a man owes to his fellow man or society in general, contrary to the accepted and customary rule of right and duty between man and man."[14]

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[12] See, e.g., Jamison v. Howard, 275 S.C. 344, 271 S.E.2d 116 (1980) (assault and battery with intent to kill).

[13] Proof of the nature of a prior conviction must necessarily be confined to the inherent nature of the crime as defined by law and particularized by the indictment. More thorough proof of the underlying circumstances would possibly require an extensive hearing on collateral matters and therefore be adverse to the uniform and efficient administration of law.

[14] State v. Yates, 280 S.C. 29, 37, 310 S.E.2d 805, 810 (1982) [subsequent history on unrelated issue omitted]; accord, e.g., State v. Ball, 292 S.C. 71, 73, 354 S.E.2d 906 (1987); State v. Morris, 289 S.C. 294, 296, 345 S.E. 2d 477 (1986); State v. Horton, 271 S.C. 413, 248 S.E.2d 263 (1978). "In determining whether a crime is one of moral turpitude, the Court focuses primarily on the duty to society and fellow men which is breached by the commission of the crime." State v. Ball, 292 S.C. 71, 74, 354 S.E.2d 906, 908 (1987); accord, e.g., State v. Major, -- S.C. --, 391 S.E.2d 235 (1990).

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

On Petition for Writ of Certiorari

Appeal From Richland County

The Honorable Don S. Rushing, Circuit Court Judge

THE STATE,

Respondent-Respondent,

v.

RONALD S. TILLMAN,

Appellant-Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT.

QUESTIONS PRESENTED

I.

Did the South Carolina Court of Appeals err in holding the trial court properly allowed the State to introduce photographs and other evidence of the tread of the tires on the car driven and rented by Appellant-Petitioner? (Appellant-Petitioner's Questions 1, 2 and 4)

II.

Did the South Carolina Court of Appeals err in holding that the trial court properly allowed the State to present evidence of tire tracks found near the victim's body? (Appellant-Petitioner's Question 3)

III.

Did the South Carolina Court of Appeals err in holding that the trial court properly allowed State's witness Clarence Gabby Wells to testify about a statement made by Appellant-Petitioner to Hayes Malloy? (Appellant-Petitioner's Question 5)

IV.

Did the South Carolina Court of Appeals properly hold that the trial court properly refused to allow Appellant-Petitioner to impeach State's witness Clarence Gabby Wells with his prior conviction for assault and battery of a high and aggravated nature? (Appellant-Petitioner's Question 6)

V.

Did the South Carolina Court of Appeals err in holding that the trial court properly qualified State's witness Bruce Hall as an expert in the area of tire treads and patterns? Did the South

Carolina Court of Appeals err in holding that the trial court properly allowed Bruce Hall to testify as to his opinion concerning the tire tracks found near the victim's body and the tires on the car driven and rented by Appellant-Petitioner? (Appellant-Petitioner's Question 4)

VI.

Did the South Carolina Court of Appeals err in holding that the trial court did not abuse its discretion in giving the jury a supplemental charge? (Appellant-Petitioner's Question 7)

STATEMENT OF THE CASE[1]

Several times during the month of November 1988, Appellant-Petitioner told Clarence Gabby Wells he was going to kill Donald "Duck" Sutton. He repeated these comments in December 1988. (Tr. p. 286, lines 6-19).

Also during the month of December 1988, Appellant-Petitioner asked Hayes Malloy if he knew anybody who would kill Donald; Hayes replied negatively. Appellant-Petitioner then offered him Five Thousand and No/100 Dollars ($5,000.00) to kill Donald. Although he planned to go straight to the police with this information, Hayes told Appellant-Petitioner that he accepted the offer. (Tr. p. 16, line 14 - p. 17, line 25; p. 45, lines 15-18; p. 209, line 10 - p. 210, line 6). On December 21, 1988, Hayes met with Federal Bureau of Investigation (hereinafter referred to as FBI) Agents Randy Mondor and Jim Davis and told them of Appellant-Petitioner's offer. (Tr. p. 18, line 1 - p. 19, line 6; p. 74, lines 5-14). He thereafter continued to go to Appellant-Petitioner's party shop between that date and December 26th and talk to him. (Tr. p. 19, lines 7-16).

While standing with some other men across the street from Appellant-Petitioner's shop on December 26, 1981, Hayes was approached by Appellant-Petitioner who told him that Donald was coming down to the shop and that he had to get rid of him. Believing that Appellant-Petitioner wanted Donald killed that night,

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[1] This recitation of the evidence introduced during the State's presentation of its case does not include any of Bruce Hall's evidence relating to the tire tracks found near the victim's body or the tires on Appellant-Petitioner's car.

Hayes unsuccessfully tried to reach an FBI Agent. (Tr. p. 19, line 17 - p. 21, line 1; p. 45, line 8 - p. 46, line 19; p. 47, lines 14-18; p. 48, lines 5-7; p. 74, line 15 - p. 78, line 17; p. 211, line 22 - p. 213, line 15). He, however, stayed where he was for the remainder of the afternoon, drinking and talking with his friends. Appellant-Petitioner, who apparently divided his time that afternoon between his shop and Hayes's group across the street, left between 6:00 and 7:00 p.m. to run some errands. He informed Hayes that he would return shortly. (Tr. p. 21, lines 2-18; p. 47, lines 3-8).

While Appellant-Petitioner was gone, Donald arrived at the shop. In an attempt to get him to leave before Appellant-Petitioner returned, Hayes told him that Appellant-Petitioner had gone to the "Fountain Bleu." Donald left and at 8:30 p.m., approximately thirty (30) minutes later, Appellant-Petitioner returned with Vito McKie. (Tr. p. 21, line 19 - p. 23, line 10; p. 43, lines 4-9; p. 47, line 9 - p. 48, line 2; p. 217, lines 12-21). After talking with Appellant-Petitioner, Hayes got in the car with him to go somewhere. In the car, Appellant-Petitioner pulled out a small caliber, black, pearl-handled pistol and showed it to Hayes; he told him that Vito had given it to him. (Tr. p. 23, line 11 - p. 24, line 15; p. 29, lines 1-7; p. 48, lines 8-12; p. 217, line 20 - p. 218, line 11).

As they drove down Shop Road, Donald pulled up behind them and flashed his high beam headlights. Apparently after signaling to Donald to follow them, Appellant-Petitioner asked Hayes if he was going to take care of Donald for him; Hayes replied negatively.

Appellant-Petitioner then offered to give him Ten Thousand and No/100 Dollars ($10,000.00); Hayes's reply was still negative. (Tr. p. 24, line 16 - p. 26, line 2; p. 29, lines 15-24; p. 45, lines 15-21; p. 48, lines 13-23; p. 186, lines 4-7; p. 209, line 21 - p. 210, line 1; p. 218, lines 12-25).

Appellant-Petitioner drove behind a church where he parked his car. He then got out and approached Donald who had pulled up behind them. (Tr. p. 26, lines 3-22; p. 29, line 24 - p. 31, line 20; p. 48, line 24 - p. 49, line 8; p. 219, lines 1-7). Putting his arm around Donald, Appellant-Petitioner walked with him toward a corner of the building. As he talked, Appellant-Petitioner pulled the pistol from his pocket and shot Donald in the head. Donald fell to the ground and Appellant-Petitioner, bending over him, shot him again. (Tr. p. 31, line 20 - p. 34, line 1; p. 49, line 9 - p. 57, line 13; p. 173, line 16 - p. 174, line 4; p. 191, line 12 - p. 192, line 23; p. 219, lines 7-14). As Appellant-Petitioner ran back to his car, Hayes jumped out and went over to Donald. Appellant-Petitioner drove off leaving Hayes with Donald, who was dead. Hayes, who feared for his life, wandered around before eventually calling the police. (Tr. p. 34, line 2 - p. 38, line 6; p. 57, line 11 - p. 60, line 24; p. 174, line 4 - p. 175, line 15; p. 179, line 22 - p. 183, line 11; p. 219, lines 14-16).

When the police responded to his call, Hayes -- afraid of the consequences of his presence at a murder scene -- simply reported that he knew where a body was located. He was taken to the Sheriff's Department and, after submitting to various tests and giving a statement, was allowed to go home. (Tr. p. 38, line 7 - p. 40,

line 24; p. 79, line 4 - p. 82, line 22; p. 93, line 18 - p. 94, line 25; p. 97, lines 17-21; p. 198, lines 6-15; p. 199, lines 10-15; p. 220, lines 6-12; p. 582, line 16 - p. 587, line 23). The following morning, the members of the Sheriff's Department processed the murder scene -- which included examining and photographing tire tracks -- and then went to Appellant-Petitioner's party shop. There, they looked at the tires on Appellant-Petitioner's car; they were discovered to be Goodyear Vector tires. (Tr. p. 587, line 24 - p. 589, line 2).

The next day, December 27th, Hayes saw Appellant-Petitioner at his party shop. Referring to the murder, Appellant-Petitioner asked Hayes "how [he liked] that shit." Without responding, Hayes walked out of the shop. (Tr. p. 42, lines 8-20).

Within the next few days, Hayes was arrested and located in the same prison facility as Appellant-Petitioner. Through the door of his prison cell, Appellant-Petitioner told Hayes that he wanted him to "take the murder charge for Donald Sutton 'cause the Feds [had] him by the balls." (Tr. p. 309, line 20 - p. 310, line 21).

Several times during December 1988 and January 1989, Appellant-Petitioner told Kenneth L. Gardner, who was also in the same prison facility as Appellant-Petitioner, that he killed Donald. Appellant-Petitioner also boasted that the police were not going to be able to prove he did it. (Tr. p. 537, line 20 - p. 541, line 22; p. 543, line 14 - p. 544, line 14; p. 547, lines 10-16; p. 549, line 5 - p. 550, line 1).

On January 3, 1989, Hayes finally told the police that he actually witnessed Appellant-Petitioner's murder of Donald Sutton.

(Tr. p. 41, line 23 - p. 42, line 5; p. 140, lines 14-21; p. 143, lines 16-19). On the following day, Appellant-Petitioner gave a statement to the police in which he denied any involvement in the shooting and placed himself somewhere other than the murder scene at the time of the murder. (Tr. p. 239, line 4 - p. 244, line 13; p. 249, lines 8-15; p. 253, line 21 - p. 254, line 16).

Appellant-Petitioner was subsequently indicted for, tried for, and convicted of the murder of Donald Sutton. (Tr. p. 1). His appeal was transferred by this Court to the South Carolina Court of Appeals; that Court issued an opinion affirming Appellant-Petitioner's conviction of murder. See State v. Tillman, Op. No. 1666 (S.C.S. Ct. May 28, 1991). Appellant-Petitioner thereafter petitioned that Court for rehearing; that Petition was denied and this Petition follows.

FACTS FOR RESPONDENT-RESPONDENT'S ARGUMENT I
(EVIDENCE OF TIRES OF APPELLANT-PETITIONER'S CAR)

While the State was conducting its direct examination of Officer John C. Christy, the jury was removed from the courtroom and an in camera hearing was conducted. (Tr. p. 356, line 10 - p. 357, line 5). The hearing was held for the purpose of determining the admissibility of photographs taken of the Appellant-Petitioner's car. Defense counsel argued that the photographs were taken when the car was unlawfully in the custody of the federal government and that, therefore, the Fourth Amendment would render the resulting photographs inadmissible. (Tr. p. 356, lines 4-20). A stipulation was entered at that time to the effect that the photographs in question were of the tires on Appellant-Petitioner's car which was photographed by an officer of the Richland County

Sheriff's Department while the car was in the custody of the federal government pursuant to some federal charge. (Tr. p. 357, line 21 - p. 358, line 24). The court then requested argument on whether the taking of the photographs was an illegal search and seizure. (Tr. p. 358, line 24 - p. 359, line 3). At that time, it was established through the argument of the Assistant Solicitor and the testimony of Officer Christy that the car was in the custody of the federal government pursuant to a consent to search form executed by Appellant-Petitioner, but that the Richland County Sheriff's Department was unaware of the consent to search at the time the photographs were taken on December 28, 1988.[2] (Tr. p. 359, line 15 - p. 360, line 25). It was also established that the Richland County Sheriff's Department had neither a warrant to search or seize the car nor the consent of Appellant-Petitioner to take any photographs or measurements of the tires. (Tr. p. 361, lines 1-13). Officer Christy also testified that in addition to the photographs and measurements, the police obtained some tire track marks from the tires on Appellant-Petitioner's car by entering the car and driving it over ink carbons. (Tr. p. 361, lines 14-22).

After Officer Christy's in camera testimony concluded, defense counsel stipulated that Appellant-Petitioner consented to a search of his vehicle and his home by the Federal Bureau of Investigation (hereinafter referred to as FBI) in regard to a bank robbery charge. (Tr. p. 361, line 23 - p. 363, line 14; p. 364, lines 6-7; p. 365, lines 5-6). The State then argued that not only was there

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[2] Which was prior to the date of Appellant-Petitioner's arrest for the murder of Donald Sutton. (Tr. p. 360, lines 17-25).

no violation of Appellant-Petitioner's Fourth Amendment rights, but also that Appellant-Petitioner did not have standing to challenge the Department's activities in regard to the tires on the car because the car did not belong to him. In response to that argument, defense counsel stipulated that while Appellant-Petitioner did not own the car, he had rented it, and paid for its use, through January 10, 1989. He then again argued that while Appellant-Petitioner gave specific consent to search to the FBI relating to the bank robbery charge, the State had no authority or probable cause to authorize its search or seizure. (Tr. p. 364, line 8 - p. 368, line 13). The trial court then concluded that consent was not an issue in the case; the only question to be resolved was whether or not the photographing and measuring of the tires constituted a seizure under the Fourth Amendment. All counsel entered into another stipulation to the effect that if FBI Agent Randy Mondor were called to testify, he would testify that he told the Richland County Sheriff's Department that it could come and look at Appellant-Petitioner's car and, upon the arrival of the officers, he opened the door to the garage of the FBI building where the car was located and gave them the key to Appellant-Petitioner's car. (Tr. p. 398, lines 6-12).

During the course of the in camera hearing, Appellant-Petitioner took the stand and testified concerning the FBI's search and seizure of his car. He stated that he consented to the search the car and the house, but did not give them permission to tow or take away his car. (Tr. p. 388, line 16 - p. 393, line 19). At the conclusion of his testimony, the consent to search form executed by

Appellant-Petitioner for the FBI was marked for identification as State's Exhibit N. (Tr. p. 393, line 21 - p. 394, line 3). It read, in pertinent part, as follows:

> I, [Appellant-Petitioner], having been informed of my constitutional rights not to have a search made of the premises hereinafter mentioned without a search warrant and of my right to refuse to consent to such a search, hereby authorize James H. Davis, Michael Marchant, and R.D. Johnson, Special Agents of the Federal Bureau of Investigation, United States Department of Justice, to conduct a complete search of my premises located at Columbia, South Carolina, and my brief case and my vehicle, a 1988 Buick Rivera. <u>These agents are authorized by me to take from my premises any letters, papers, materials or other property which they may desire</u>. This written permission is being given by me to the abovenamed special agents voluntarily and without threats or promises of any kind.

(emphasis added). (Tr. p. 394, lines 3-17).

At the conclusion of the hearing, the trial court ruled as follows.

> All right, the question before the court is whether or not the officer, in this case Mr. Christy who took the photographs, whether or not there was any invasion in violation of the defendant's protections afforded to him under the 4th and 14th Amendments, unreasonable searches and seizures of his person or his property. It appears to the court that the defendant gave a consent to search to the federal government as a result of an investigation on or about December the 28th of that year, 1988, investigating a bank robbery case. And he gave a consent which is in the record of this case executed authorizing the F.B.I. to in essence take possession of the vehicle and to search that vehicle. The F.B.I. did take possession of the vehicle and placed it in essence under impoundment is the only reasonable inference at the F.B.I. building here in Columbia in, as I understand it, a downstairs basement. Thereafter a time that I'm unfamiliar with as to his testimony but appar-

ently it was a short time thereafter, a few days or more, the Richland County Sheriff's Department, and particularly Officer Christy who is now with S.L.E.D. made contact with the F.B.I. and requested to come over and see the vehicle. They did go over, they were taken down to the basement, the keys to the vehicle were turned over to the Richland County Sheriff's Department officers who then examined the exterior of the vehicle by photographing the vehicle, photographing the tires of the vehicle and as depicted in the photographs measured, did measurements on it. In addition to which they opened the vehicle and at least turned the wheel in order to photograph the wheel such that it could depict what they wanted it to depict. In addition to which and it has not been presented at this time but the court's aware of it by statements by counsel to the court there also were impressions made, inked impressions of that tire, done by having the tire -- no one has testified that the tire was moved. I assume that it was. Is that correct, Mr. Christy?

MR. CHRISTY: Yes, sir, Your Honor.

THE COURT: The car was cranked up and moved for the purpose of doing that.

[DEFENSE COUNSEL]: Yes, sir, that's correct. The car had to be moved.

THE COURT: Yes. I assumed that even though there is not testimony. Everybody will stipulate that. So, the question then is whether or not those acts were violations of the defendant's constitutional rights and protections afforded to him under the 4th Amendment and the 14th Amendment, unreasonable searches and seizures. It's the court's finding that they were not a violation of his 4th Amendment and 14th Amendment. The property was impounded, it was in the custody of the F.B.I. pursuant to a consent authorization. The vehicle was the subject of a federal bank robbery and the vehicle was under seizure by consent. It was thereafter allowed to be examined without any in-depth search. There was no scope -- it wasn't even like an inventory search. There was no tearing or removing from anything of the vehicle. Photographs were made. The only thing that occurred was a very harmless cranking of the vehicle and moving it in order to

> obtain inked impressions and to photograph it, all of which I find to be reasonable and do not be intrusive and really no expectation of privacy but if there was it was waived by his consent to search.

(Tr. p. 398, line 21 - p. 401, line 6).

Thereafter, in the presence of the jury, the State introduced evidence concerning the measurements of the tires on Appellant-Petitioner's car and the photographs taken of the tire treads. (Tr. p. 408, line 16 - p. 410, line 17).

FACTS FOR RESPONDENT-RESPONDENT'S ARGUMENT II (EVIDENCE OF TIRE TRACKS NEAR VICTIM'S BODY)

During the course of the presentation of the State's case, John C. Christy, an Officer with the Richland County Sheriff's Department at the time of the murder was called as a witness. He testified that, on December 26, 1988, he was summoned to the murder scene for the purpose of processing evidence. (Tr. p. 351, lines 1-21). His testimony then continued as follows.

> Approximately fifty some feet from the body on a dirt trail which led down to a cemetery behind the educational building off the church grounds we found a set of tire tracks that were unusual. They were unusual in that they appeared to stop in view of the body. We photographed these tire tracks.
>
> Q Were there other tire tracks in the area?
>
> A Yes, there were numerous tire tracks in the area with it being a church and the previous day being Sunday. They did not appear as fresh in condition --
>
> [DEFENSE COUNSEL]: Objection, Your Honor, as to any conclusions. He has not been qualified as any kind of a witness concerning tires.
>
> [ASSISTANT SOLICITOR]: Your Honor, he can testify of his own knowledge if the tracks appeared fresh or not.

THE COURT: No, that's reaching a conclusion. He can describe what he saw but whether or not they were fresh or not is a conclusion on his part without having been qualified as an expert in that particular field. He can describe what it was.

[ASSISTANT SOLICITOR]: Yes, sir.

Q How did those tracks appear to you?

A They appeared fresh.

[DEFENSE COUNSEL]: Objection, Your Honor. I again move that it be stricken.

THE COURT: I sustain the objection. The jury is instructed to disregard the response to the question.

Q How did they compare to the other tracks?

A They stopped in view of the body.

Q Okay. Were the markings of these tracks -- how did the markings of those tracks appear compared to the other tracks?

A I don't understand your question.

Q Okay.

THE COURT: Describe what you saw in other words. If there were two sets of tracks there and one's different than the other, what was the difference? Did they have water in them, did they have dirt filling in on them, were the crust of the tire marks pushed down? Describe. Don't reach a conclusion. The jury has the right to reach the ultimate conclusion, not you.

A Yes, sir. Would you repeat the question?

Q How did they appear compared to the other tracks in the area?

A They appeared to stop in view of the body.

Q Okay. What did you do with those prints?

A They were photographed.

Q Okay. How many photographs did you take?

A We took numerous photographs of the tracks.

THE COURT: Have him identify them, the ones he took on that date, if they accurately represent the condition on that date. We'll mark them for identification and then show them to counsel.

Q Do these photographs accurately depict the way those tire tracks were that night?

A Yes, that night and the morning after also.

(Tr. p. 352, line 10 - p. 354, line 5; p. 354, lines 16-22).

Shortly thereafter, Officer Christy's testimony was interrupted and an in camera hearing was held during which the admissibility of the evidence concerning the tire tracks found at the murder scene was debated. (Tr. p. 357, line 4 - p. 403, line 20). At the conclusion of the hearing, the trial court ruled that, inter alia, the evidence concerning the tire tracks found at the scene of the murder were not then admissible for any reason other than to show that they simply existed. The court noted, however, that the evidence could be admissible for other purposes if the appropriate foundation were established by the State. (Tr. p. 401, line 9 - p. 402, line 14).

The jury then returned to the courtroom and the State's direct examination of Agent Christy continued during which he testified as follows.

Q Okay. Going back out to the crime scene, did you measure the tracks out there?

A Yes, we did.

Q When I say tracks, explain to the jury what you did.

A We took measurements of the length of the track that we found at the scene of the tracks. And we also --

THE COURT: What kind of tracks? Tell me what you are talking about.

A The tire tracks at the scene. These were the tracks that were on the road that led down towards the cemetery and the tire tracks appeared to stop in view of the body. We also measured the --

[DEFENSE COUNSEL]: Your Honor, I'd have to object to any testimony concerning any measurements. Those tire tracks have not been connected up to anything in this case. They are not relevant.

THE COURT: He's testified where he found the body and the tire tracks had some all the way up to the body.

[DEFENSE COUNSEL]: To a view of the body.

THE COURT: Yes. Appeared to end right there are the body. I find that causally connected sufficient to be testified to. You may go ahead.

Q Go ahead.

A We also measured the distance between the two tracks.

Q And what was the distance between the tracks?

A I don't recall exactly.

[DEFENSE COUNSEL]: I object.

THE COURT: I sustain the objection.

Q Do you know the width of those tracks?

A We prepared a diagram with the measurements of the distance of the tracks. Unfortunately, it has been misplaced from the file and I cannot recall the measurement.

(Tr. p. 407, line 9 - p. 408, line 15).

Thereafter, during defense counsel's cross-examination of

Agent Christy, he was questioned in detail concerning his experience and training in the area of tire track examination and comparison. And, after being offered as an expert in tire impressions by defense counsel and being so qualified, he testified as to the reason he processed the scene as he did. (Tr. p. 414, line 18 - p. 432, line 20). He also testified as follows.

> Q That is a -- by the way, when you got out there that night, was Hayes Malloy there?
>
> A When I arrived he was not.
>
> Q Did anybody show you where Mr. Malloy -- well, let me ask you. Did Mr. Malloy show you where the car was that he said was the car that they drove up in?
>
> A No, nobody showed me where the car was.
>
> Q So, nobody ever showed you where the car was?
>
> A That's correct. Nobody ever showed me.
>
> Q What you did is you went out there and two out two prints. You took a photograph of two tire prints because they were tire prints that were in view of the body?
>
> A They stopped in view of the body. They did not continue on.
>
> Q Okay. But nobody told you that's where the car was parked. Is that correct?
>
> A That's correct.
>
> Q And in looking at this photograph, would you tell the jury, are there literally innumerable tire marks and tire patterns in that sand?
>
> A Yes, there are. Many are over one another.
>
> Q Many of them are over one another. Some are not over one another, is that correct?
>
> A That's correct.

> Q All right. Did you photograph any of those? Any of the others?
>
> A No.
>
> Q Did you do any comparisons on any of these others?
>
> A No, we did not.
>
> Q So, you basically randomly took some impressions in the sand even though we had all of these in State's Exhibit Number 24 because they were stopped near the body? Is that correct?
>
> A That's correct. Because they appeared to stop in view of the body.
>
> Q All right. Now, you don't know if that's where the vehicle was according to your testimony? Is that correct?
>
> A Nobody told me that's where the vehicle was that night.

(Tr. p. 431, line 10 - p. 432, line 20).

At the conclusion of Officer Christy's testimony, the jury was removed from the courtroom and defense counsel repeated his objections to the photographs of the tire tracks found near the victim's body. (Tr. p. 510, line 21 - p. 513, line 14; p. 514, lines 8-12). The trial court overruled the objections as follows.

> The court finds there is a probative value, [defense counsel]. The testimony by Mr. Malloy was that [Appellant] drove him out there in that vehicle which is in essence corroboration of what Hayes Malloy says and also would defeat any evidence of an alibi of this [Appellant]. The State has a right and is required to prove that he was present at the scene of the crime. There's direct testimony that [Appellant] was in that vehicle driving that car and there are tire prints which are shown in the sand which are the same type of tire print as the vehicle. It goes to support that testimony. That's a reasonable inference. No witness at this point has testified that is the tire print which matched that

> tire. No question about it but they have said that tire print was a Vector tire. He drove a Vector car out there. So, those two connected together are sufficient for the court to rule out any speculative nature in the case and it is probative on the issue, if believed, always if believed.

(Tr. p. 513, line 15 - p. 514, line 7).

FACTS FOR RESPONDENT-RESPONDENT'S ARGUMENT III (WELLS' TESTIMONY OF STATEMENT MADE BY APPELLANT-PETITIONER)

During the presentation of the State's case, it presented the testimony of Clarence Gabby Wells. (Tr. p. 283, line 10 -p. 349, line 1). Gabby, an acquaintance of Appellant-Petitioner, testified that Appellant-Petitioner told him several times in November 1988 that he was going to kill Donald "Duck" Sutton. In December 1988, Appellant-Petitioner made similar statements to Gabby. (Tr. p. 283, lines 14-24; p. 286, lines 6-19). Gabby then testified that one (1) night while he was in the same prison facility as Appellant-Petitioner at the end of December 1988, Appellant-Petitioner asked him, through their cell doors, if Hayes Malloy was in the facility. Gabby replied that he was not there yet. When Hayes did arrive, Appellant-Petitioner again asked if he were there; at that time, Gabby replied that he was. (Tr. p. 286, line 20 - p. 288, line 11). Gabby's testimony concerning a statement made by Appellant-Petitioner was then interrupted by defense counsel who made an objection and requested an in camera hearing. (Tr. p. 288, line 11 - p. 289, line 9). During the course of the in camera hearing, Gabby testified that Appellant-Petitioner told Hayes that he wanted him to take the murder charge for Donald Sutton "because the Feds had him by the balls." (Tr. p. 289, lines 11-20). Defense counsel objected to this testimony on the ground that it

raised the inference that Appellant-Petitioner was involved in other crimes and, therefore, the prejudicial effect outweighed any probative value that the evidence might have. Defense counsel also argued that the statement was not relevant to the issue of Appellant-Petitioner's guilt or innocence and improperly placed Appellant-Petitioner's character at issue. The State opposed the objection and the trial court, finding that the statement was a statement against Appellant-Petitioner's own interest and not a crime, overruled the objection. (Tr. p. 289, line 21 - p. 292, line 17; p. 307, line 8 - p. 309, line 10).

The jury returned to the courtroom and the State continued its direct examination of Gabby Wells. At that time, the following occurred.

> Q Mr. Well (sic), you remember being in the Richland County Detention Center sometime around Christmas of 1988 I believe you have testified to?
>
> A Yes, sir.
>
> Q Do you remember exactly when around that time you had been arrested?
>
> A I got arrested December 24th.
>
> Q December 24th?
>
> A 1988.
>
> Q 1988. On December 24th you were in the Richland County Detention Center?
>
> A Yes, sir.
>
> Q And have you been out of jail since then?
>
> A No, sir.
>
> Q I believe you testified that [Appellant-Petitioner] was in a cell block across the hall from you?

A Yes, sir.

Q And that Hayes Malloy was in the cell block with you?

A Yes, sir.

Q And that you heard -- at [Appellant-Petitioner's] request you got Hayes Malloy to the door for him, is that right?

A That's correct.

Q And tell this jury what you heard [Appellant-Petitioner] ask Hayes Malloy?

A After I got Hayes Malloy to the little door, I heard [Appellant-Petitioner] told Hayes Malloy that he want him to take the murder charge for Donald Sutton 'cause the Feds got him by the balls."

(Tr. p. 309, line 20 - p. 310, line 21).[3] The State then concluded its direct examination of Gabby Wells.

FACTS FOR RESPONDENT-RESPONDENT'S ARGUMENT IV (WELLS' CONVICTION OF ASSAULT AND BATTERY OF A HIGH AND AGGRAVATED NATURE)

As previously stated, the State presented the testimony of Clarence Gabby Wells during the presentation of its case. After having him testify as to his acquaintance with Appellant-Petitioner, the State questioned him as to his current term of imprisonment as well as several of his prior criminal convictions.[4] (Tr. p. 283, line 10 - p. 284, line 17). In response to questioning by the

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[3] Immediately after this testimony, Gabby inferably began to testify as to a statement made by Hayes Malloy. There was a general objection by defense counsel which was apparently sustained by the trial court as being non-responsive. (Tr. p. 310, lines 22-25).

[4] Upon direct examination, Gabby admitted that he had been convicted of shoplifting in 1988, shoplifting in 1985, petty larceny in 1984, and petty larceny in 1983. He also stated that he was currently incarcerated on a robbery charge. (Tr. p. 284, lines 3-17).

State, Gabby also testified that he was testifying for the State pursuant to an agreement which would result in the armed robbery charge against him being reduced to simple robbery, a request by the State that he receive a concurrent five (5) year term of imprisonment upon such charge, and a request by the State that pending shoplifting charges against Gabby in Dorchester and Lexington Counties be dismissed. (Tr. p. 284, line 21 - p. 285, line 22). Gabby then proceeded to give testimony incriminating Appellant-Petitioner in the murder of Donald Sutton. (Tr. p. 285, line 23 - p. 288, line 12; p. 309, line 20 - p. 310, line 21).

Upon cross-examination, defense counsel extensively questioned Gabby about the "deal" he got from the State in return for his testimony against Appellant-Petitioner; the possible sentences Gabby could have received upon his armed robbery charge were discussed as was the fact that Gabby's sentencing upon the robbery charge had been postponed until after he gave his testimony at Appellant-Petitioner's trial. (Tr. p. 311, line 6 - p. 314, line 22; p. 316, line 3 - p. 317, line 11). Defense counsel then questioned Gabby as to the probationary term he was supposed to be serving at the time; Gabby testified that he was on probation from a 1988 conviction of assault and battery of a high and aggravated nature (hereinafter referred to as ABHAN) and he was supposed to go back to court concerning the revocation of his probation. (Tr. p. 317, line 12 - p. 318, line 13). At that time, the following occurred.

> Q So, when you were arrested in December of 1988 for armed robbery, you were on probation for assault and battery of a high and aggravated nature having hit someone with a

machete, isn't that true?

[ASSISTANT SOLICITOR]: Your Honor, I object to that.

THE COURT: Just a minute.

[ASSISTANT SOLICITOR]: He can't go into that.

THE COURT: Why are you trying to go into that?

[DEFENSE COUNSEL]: Crime of moral turpitude, Your Honor.

THE COURT: You're entitled to go into the crime --

[DEFENSE COUNSEL]: I'm not going into the facts.

THE COURT: Why aren't you? Assault and battery with intent to kill.

[DEFENSE COUNSEL]: Well, I wasn't asking him about the facts.

THE COURT: Well, you were, too. Restricted to assault and battery with intent to kill on that whether or not he was convicted of it.

(Tr. p. 318, line 14 - p. 319, line 6).

Defense counsel continued his cross-examination of Gabby by questioning him further concerning the agreement he entered into with the State for his testimony. (Tr. p. 319, line 7 - p. 320, line 25). After questioning Gabby concerning past conflicts with Appellant-Petitioner, defense counsel then questioned him about his criminal record. (Tr. p. 321, line 8 - p. 324, line 20). Gabby admitted that he had been convicted of petty larceny in February 1983, assault with a deadly weapon in 1987, and petty larceny in February 1984. (Tr. p. 325, lines 4-14). However, when questioned about his 1984 conviction of assault and battery, the State objected. The objection was sustained and the jury was instructed to

disregard the question because it was improper. (Tr. p. 325, line 15 - p. 326, line 4). When defense counsel then questioned Gabby about a 1985 conviction for resisting arrest, the State objected and the jury was removed from the courtroom. (Tr. p. 326, lines 5-12).

At that time, the trial court stated for the record that the defense had attempted to question Gabby concerning a conviction of ABHAN. The court noted that the State's objection to the question was sustained because there had been no inquiry into the charge for the purpose of determining whether or not, under state law, it was an ABHAN involving moral turpitude. (Tr. p. 326, line 13 - p. 327, line 5). Upon examination by defense counsel, Gabby admitted that he had pled guilty to a charge of ABHAN in 1988 based upon an indictment alleging that he struck Eugene McKnight repeatedly with a machete. (Tr. p. 327, line 7 - p. 328, line 14). Defense counsel then argued that under State v. Bailey, 275 S.C. 444, 272 S.E.2d 439 (1980), Gabby's 1988 conviction of ABHAN constituted a crime of moral turpitude. (Tr. p. 328, lines 15-24; p. 329, line 16 - p. 331, line 1). The court, noting that Gabby had pled guilty after waiving presentment of the ABHAN indictment to the Grand Jury, ruled there was not a sufficient showing to establish that the ABHAN involved moral turpitude. (Tr. p. 328, line 25 - p. 335, line 10). Although he argued the law did not allow for the trial court to go beyond the face of the indictment, defense counsel proceeded to question Gabby concerning his ABHAN conviction. At that time, Gabby testified that he hit the victim with a machete, but not that portion of the machete with the blade; while Gabby

also admitted kicking the victim, he denied robbing him. (Tr. p. 334, line 12 - p. 337, line 12). The trial court then again rejected defense counsel's argument and expressly found that the facts of the prior ABHAN conviction did not establish that it was a crime of moral turpitude. (Tr. p. 337, lines 13-25).

When the jury returned to the courtroom, defense counsel continued his cross-examination of Gabby. At that time, he questioned him about, inter alia, his 1985 conviction of resisting arrest, his 1976 conviction of selling heroin, and his December 24, 1988 arrest for armed robbery. (Tr. p. 338, line 13 - p. 339, line 10). He also questioned him concerning his decision to cooperate with the police. (Tr. p. 339, line 11 - p. 346, line 7).

Upon re-direct examination by the State, Gabby testified as to the facts leading up to the current armed robbery charge against him. (Tr. p. 346, line 3 - p. 347, line 4).

FACTS FOR RESPONDENT-RESPONDENT'S ARGUMENT V
(EXPERT TESTIMONY CONCERNING TIRE TRACKS AND TREADS)

During the presentation of the State's case, Bruce Hall, was called as a witness. He testified that while attending the University of South Carolina he was hired by Goodyear Tire and Rubber Company in a management training position; after participating in that training program for two (2) years, he became a store manager. As of the date of Appellant-Petitioner's trial, he had been employed with Goodyear for six (6) years during which he had personally sold between seventy-two hundred (7200) and eighty-four hundred (8400) tires. During that same time period the store in which he worked had sold approximately forty-two thousand (42,000) automobile tires. (Tr. p. 438, line 2 - p. 439, line 18). Mr. Hall

testified that in November of 1983, he attended a three (3) week school on product selling skills in Akron, Ohio; during that course, he was taught how tires are manufactured, problems arising from neglect, and how to diagnose problems with tires. He was also taught how to recognize the different types of tread patterns of the tires manufactured by Goodyear. Since 1983, Mr. Hall testified that he had received further training in the operations of a company store and Goodyear tires; in addition to three (3) two (2) day long courses, he attended a six (6) week course in March 1985. (Tr. p. 439, line 19 - p. 442, line 25; p. 443, lines 5-9; p. 444, line 1 - p. 445, line 20). Mr. Hall admitted that he had never attended any type of law enforcement training nor extensive training in tires other than Goodyear. (Tr. p. 445, line 21 - p. 446, line 2; p. 447, lines 16-25). Mr. Hall concluded his testimony by stating that he could identify different makes of tires from their tread marks. (Tr. p. 448, line 1 - p. 456, line 4).

At the conclusion of the hearing concerning Mr. Hall's qualifications to testify as an expert concerning tire treads and comparisons, defense counsel vehemently opposed his qualification on the ground that his training and education were extremely limited and concerned only Goodyear tires. The trial court, finding that the subject of Mr. Hall's proposed testimony was not within the common knowledge of the lay public, found that Mr. Hall had sufficient job training and experience to be qualified as an expert in distinguishing the patterns of tires produced in the United States. (Tr. p. 457, line 1 - p. 472, line 3). The trial court then stated that the State would have to lay a proper foundation before Mr.

Hall could render an opinion as to any tire patterns. (Tr. p. 472, lines 3-10).

Thereafter, the jury was returned to the courtroom and the State called Mr. Hall to the stand. (Tr. p. 472, line 10 - p. 473, line 4). After again questioning him as to his education, training and experience with tires and their patterns, he was qualified as an expert in the area of tire treads and patterns. (Tr. p. 473, line 5 - p. 488, line 3). He thereafter identified the tire treads found near the victim's as coming from a Goodyear Vector tire. He also identified two (2) tires on Appellant-Petitioner's car as being Goodyear Vector tires. (Tr. p. 488, line 6 - p. 510, line 20).

FACTS FOR RESPONDENTS-RESPONDENT'S ARGUMENT VI (SUPPLEMENTAL/ALLEN CHARGE)

The jury in this case began their final deliberations at 3:48 p.m. on January 22, 1989. They returned to the courtroom at 5:17 p.m. so that the trial court could respond to a question concerning testimony; they resumed their deliberations at 5:20 p.m. At 6:37 p.m., the jury recessed for the evening meal; they returned to court at 8:15 p.m. and resumed their deliberations. (Tr. p. 617, line 23 - p. 622, line 20). After the jury sent a note to the trial court, they returned to the courtroom at 9:26 p.m. At that time, the trial court made the following comments to the jury panel.

> ... I have received your note and let me suggest that we do this. And that is -- I know ya'll have been deliberating and it's been seven days in trial and I respect that we've all worked hard and are tired. It's now 9:30. That what we do is I go ahead and put you in a motel room for the evening and ya'll just

> don't talk about the case any more, get it out of your mind, try to relax and I'll bring you back here in the morning at 9:30 and I'll talk to you then. Okay?

(T. p. 622, line 25 - p. 623, line 8). The jury was released at 9:30 p.m. Thereafter, the court informed counsel that the first thing it would do in the morning would be to give the jury a "modified" Allen charge and send them back to deliberate. (Tr. p. 624, line 24 - p. 625, line 15). No objection was stated at that time by counsel for either the State or the defense.

On the following morning, the following colloquy occurred.

> THE COURT: All right, Madam Court Reporter, let the record reflect that all counsel are now present before the court, counsel for the State, counsel for the defense, and the defendant. Yesterday evening I received the message from the foreman of the trial jury in State v. Ronald Tillman that the jury was at this time hung. Without any discussion with them I sent them to the motel for the evening and, of course, reported that to counsel for the State and counsel for the defendant. At this time this morning, it is the court's intention to give what is commonly referred to as the Allen instruction. Actually, it's not Allen, it's Tuey, then T-u-e-y (spelled). Commonwealth vs. Tuey. A very old case, Massachusetts, 1850. It's also contained in Sullivan vs. United States, 9th Circuit, 414 Fed. 2d 714 (sic). What is the position of the State or the defense? Anything from the State's (sic)?
>
> [ASSISTANT SOLICITOR]: No, sir, Your Honor.
>
> THE COURT: Anything from the defense?
>
> [DEFENSE COUNSEL]: If Your Honor please, we would request that the jury be allowed to reconsider deliberating, being instructed to deliberate this morning.
>
> THE COURT: [Defense counsel], I'm certain you are familiar with what is known as the Allen charge actually. It's Allen vs. United States, 164 U.S. 492. My intent is to give

> them that instruction limitedly (sic) just to ask them in essence to continue to try to deliberate if they can upon the case. Of course, within a reasonable period of time if they come back and say they can't then -- you know, both sides have now exhausted eight days of trial in the case. And the expense to the defense is as great as the expense to the State and the County for the trial of the case. As long as that doesn't outweigh the rights to a fair trial both to the State and the defense, I'm going to follow that procedure and give them the instruction.

(Tr. p. 625, line 18 - p. 627, line 1).

The jury returned to the courtroom at 9:35 a.m. and was instructed as follows.

> Mr. Foreman, Ladies and Gentlemen, if you will give me your attention. I have instructed you previously that you, the jury are the sole judges of the facts in this case and this court is the sole judge of the law of the case. I also further instructed you that I am not permitted by law to give you any indication whatsoever as to what your verdict should or ought to be in a particular case and I do not do so at this time. It is the duty of the court to state the laws of the case to you and it is the duty of the jury to resolve the facts in this case. You know, the only mode provided by our constitution and laws for deciding questions of fact in criminal cases, and this is what this is, is by the verdict of a jury. In a large proportion of cases and perhaps strictly speaking in all cases absolute certainty cannot be attained or expected although the verdict to which a juror agrees must, of course, be his or her own convictions and not a mere acquiescence in the conclusions of the other jurors or your fellow jurors. Yet, you know, in order to bring twelve minds to a unanimous result you must examine the questions that are submitted to you with candor and with a proper regard and with deference to the opinions of each other. You should consider that the case must at some time be decided, that you are selected in the same manner, from the same course which any future jury must be selected. And there is no reason to suppose that the case will ever be submitted to twelve individuals more intelli-

> gent, more impartial or more competent to decide this issue or that more or clearer evidence will be produced on the one side or the other. With this view it is your duty to decide the case if you can conscientiously do so. In order to make a decision more practical the law imposes the burden of proof on one party or the other in all cases. And in the present case as I have previously instructed you the burden of proof is upon the State of South Carolina to establish every part of it beyond a reasonable doubt. And if in any part of it you are left in doubt the defendant is entitled to the benefit of the doubt and must be acquitted. But if in conferring together you ought to pay proper respect to each other's opinions and listen with a disposition to be convinced to each other's arguments.
>
> Now, as I have previously instructed you, if the State has failed to prove the guilt of this defendant beyond a reasonable doubt, then your verdict should be not guilty. If the State has proved the guilt of this defendant beyond a reasonable doubt, then your verdict should be guilty. So, with that instruction I'm going to ask you to retire to the jury room and to deliberate further on the verdict in this case and see if you cannot reach a conclusion in this case. Once again, thank you for your patience with us in consideration of the issues that have been presented to you.

(Tr. p. 627, line 5 - p. 629, line 3). At the conclusion of the charge, the jury resumed their deliberations; it was then 9:41 a.m. (Tr. p. 629, line 13).

Once the jury had been removed from the courtroom, defense counsel objected to the supplemental charge because of an alleged misstatement of the burden of proof. The objection was noted. (Tr. p. 629, line 13 - p. 630, line 23).

At 11:00 o'clock, a.m. that same day, the jury reached their verdict finding Appellant-Petitioner guilty as charged. (Tr. p. ii; p. 631, line 13 - p. 632, line 9).

ARGUMENT

I.

The South Carolina Court of Appeals properly held that the trial court properly allowed the State to introduce photographs and other evidence of the tread of the tires on the car driven and rented by Appellant-Petitioner. (Appellant-Petitioner's Questions 1, 2, 3 and 4).

On appeal, Appellant-Petitioner challenged the admission of evidence concerning the tires on his car on the ground that it was obtained as the result of an illegal search and seizure. The South Carolina Court of Appeals, finding the evidence to have been lawfully obtained by law enforcement personnel, rejected the challenge. State v. Tillman, ___ S.C. ___, 405 S.E.2d 607, 609-611 (Ct. App. 1991).

As established hereinafter, the South Carolina Court of Appeals properly held that the trial court properly allowed the State to introduce photographs and other evidence of the tread of the tires on the car driven and rented by Appellant-Petitioner.

Searches and seizures made without the authorization of a duly executed warrant are per se unreasonable unless an exception to the warrant requirement is applicable. U.S. Const. amend. IV; S.C. Const. art. I, § 10; Coolidge v. New Hampshire, 403 U.S. 443, reh. denied, 404 U.S. 874 (1971); Katz v. United States, supra; State v. Peters, 271 S.C. 498, 248 S.E.2d 475 (1978). The exception involved in the present case is consent to search.[5] See Schneckloth

[5] If a valid consent is obtained, there is no additional requirement of probable cause for the search. McIntosh v. State, 296 Ark. 167, 753 S.W.2d 273 (1988), cert. denied, ___ U.S. ___, 109 S.

v. Bustamonte, 412 U.S. 218 (1973). The uncontested evidence presented during the suppression established that Appellant-Petitioner voluntarily consented[6] to "a complete search of [his] premises ..., and [his] brief case and [his] vehicle, a 1988 Buick Rivera." And, despite Appellant-Petitioner's protestations to the contrary, the plain meaning of the consent form executed by him also establishes that he consented to the FBI's seizure of his car and its removal from his property.[7] Therefore, the FBI had lawful possession of Appellant-Petitioner's car at all pertinent times.

Inasmuch as the possession of Appellant-Petitioner's car by the FBI was lawful, that agency's exposure of it to the Richland County Sheriff's Department[8] rendered the Department's viewing of the car lawful. See In the Matter of Bazen, 275 S.C. 436, 272 S.E.2d 178 (1980) (Bazen had no expectation of privacy in open garage entered by police investigating disturbance when appearances at time police arrived indicated garage source of disturbance). For the Fourth Amendment does not protect that which a person know-

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Ct. 1339 (1989); 3 W. LaFave, Search and Seizure § 8.1, n. 5.1 (Supp. 1990). See also Commonwealth v. Mangini, 478 Pa. 147, 386 A.2d 482 (1978).

[6] Here, the voluntariness of the consent has not been challenged by Appellant-Petitioner; he has only challenged the consent in terms of its scope.

[7] The executed consent to search form clearly authorized the Agents to "take from [Appellant-Petitioner's] premises any letters, papers, materials or other property which they may [have desired]." (emphasis added). (Tr. p. 394, lines 12-14). The term "property" is a very general term clearly encompassing the briefcase, car and any other moveable item at Appellant-Petitioner's home.

[8] Which was within the scope of their authority under the general consent given by Appellant. See Commonwealth v. Mangini, 478 Pa. 147, 386 A.2d 482 (1978).

ingly exposes to the public.[9] Cardwell v. Lewis, 417 U.S. 583

[9] This being true, the examination by law enforcement personnel of the exterior of a vehicle on a street or in a lot or at some other location where it is readily subject to observation by members of the public does not constitute a search. Nor does the taking of photographs of such vehicles constitute a search. See, e.g., Cardwell v. Lewis, supra (examination of tire and taking of paint scrapings from exterior of car found in and taken from public parking lot by police not search); United States v. Hensel, 699 F.2d 18 (1st Cir.), cert. denied, 461 U.S. 958 (1983) (viewing of license plate on car parked in driveway located 100-200 yards from road and squarely between that road and beach used by public not search); United States v. White, 766 F.2d 1328 (9th Cir. 1985) (to identify a vehicle, police may scrape off paint sample and make cast of tire tread and neither action constitutes search); Dorris v. State, 656 P.2d 578 (Alas. App. 1982) (examination of tires not search); Deshazier v. State, 155 Ga. App. 526, 271 S.E.2d 664 (1980) (photographing and taking paint scrapings from car not infringe upon any expectation of privacy); People v. Petersen, 110 Ill. App. 3d 647, 66 Ill. Dec. 380, 442 N.E.2d 941 (1982) (no legitimate expectation of privacy in car parked on owner's property which was visible from neighboring lands; police examination lawful even though from back of duplex where car owner lived); Fisher v. State, 259 Ind. 633, 291 N.E.2d 76 (1973) (photographs of vehicle in open view in vacant lot adjoining defendant's home not search even though police entered onto lot to take photographs); Commonwealth v. Mangini, 478 Pa. 147, 386 A.2d 482 (1978) (examination of tread and groove patterns on tires of car parked in public school parking lot not search); Hudson v. State, 588 S.W.2d 348 (Tex. Crim. App. 1979) (photographs of exterior of car parked on street not search); State v. Wettstein, 28 Utah 2d 295, 501 P.2d 1084 (1972) (no expectation of privacy in car parked in parking lot of apartment building in which car owner not reside; photographs of car's exterior taken by police from alley admissible); 1 W. LaFave, Search and Seizure § 2.5 (b) (1987). Likewise, the examination by law enforcement personnel of the exterior of a vehicle located on private property does not constitute a search if they have made a lawful entry upon the property. Nor does the taking of photographs of such vehicles constitute a search. See, e.g., United States v. Gunn, 428 F.2d 1057 (5th Cir. 1970) (observations of police, who were at defendant's work site to investigate crime she believed involved in, of serial numbers on tires of vehicle, from both side and underside of car, either not search or, if search, lawful); United States v. Kitowski, 729 F.2d 1418 (11th Cir. 1984) (opening of car door by police, for purpose of observing vehicle identification number, at service station of station owner's request no search); Dumbsky v. State, 508 N.E.2d 1274 (Ind. 1987) (neither photographs of exterior of truck parked in driveway by police properly on premises to execute arrest warrant nor placement of gas cap found at scene of crime on truck and photographs thereof constitute search); State v. Doile, 244 Kan. 493, 769 P.2d 666 (1989) (observation of car parked in parking lot of private

(1974); Katz v. United States, 389 U.S. 347 (1967). See also Rawlings v. Kentucky, 448 U.S. 98 (1980) (legitimate expectation of privacy necessary to trigger Fourth Amendment protections); United States v. Salvucci, 448 U.S. 83 (1980) (same); Rakas v. Illinois, 439 U.S. 128 (1978), reh. denied, 439 U.S. 1122 (1979) (same). Therefore, in light of the presence of Appellant-Petitioner's car on government property pursuant to lawful impoundment, it can only be concluded that Appellant-Petitioner did not have an expectation of privacy in the tires on his car and, consequently, no Fourth Amendment protection in regard to them. The subsequent examination, photographing and measuring of the car's tires consequently constituted neither a search nor a violation of any of Appellant-Petitioner's constitutional rights.[10]

Appellant-Petitioner's arguments are without merit.

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club by police responding to call at club not search); State v. Wilbourn, 364 So.2d 995 (La. 1978), cert. denied, 444 U.S. 825 (1979) (police investigatory entry into unenclosed carport which was located such that anyone at side-door of house could see front of car parked therein lawful and, therefore, observation of blood and hair on front of car lawful); People v. Brooks, 405 Mich. 225, 274 N.W.2d 430 (1979) (viewing of vehicle identification number on car frame by crawling under car not search); Commonwealth v. Grabowski, 306 Pa. Super. 483, 452 A.2d 827 (1982) (same); 1 W. LaFave, Search and Seizure § 2.5 (b) and (c) (1987).

[10] See United States v. Gunn, supra; United States v. Kitowski, supra; Dumbsky v. State, supra; State v. Doile, supra; State v. Wilbourn, supra; People v. Brooks, supra; Commonwealth v. Grabowski, supra; 1 W. LaFave, Search and Seizure § 2.5 (b) and (c) (1987). This is true despite the fact that members of the Department entered the car to drive over carbon papers and turn the steering wheel for no search of the interior of the car was made by the officers. See United States v. Kitowski, supra; United States v. DeBardeleben, 740 F.2d 440 (6th Cir.), cert. denied, 469 U.S. 1028 (1984); People v. Brewer, 112 Mich. App. 670, 317 N.W.2d 218 (1981). See also Cardwell v. Lewis, supra.

II.

The South Carolina Court of Appeals properly held that the trial court properly allowed the State to present evidence of tire tracks found near the victim's body. (Appellant-Petitioner's Question 3)

On appeal, the South Carolina Court of Appeals held that, inasmuch as evidence concerning tire tracks -- testimony and photographs -- found at the murder scene was relevant, the trial court exercised sound discretion in admitting it. State v. Tillman, ___ S.C. ___, 405 S.E.2d 607, 611 (Ct. App. 1991). For the reasons set forth below, Respondent-Respondent maintains that the Court of Appeals' holding was proper.

The admission of evidence, including photographs, is left to the sound discretion of the trial court whose ruling on such will not be disturbed on appeal in the absence of an abuse of discretion, a commission of legal error in its exercise, and prejudice to the rights of the complaining party. State v. Livingston, 282 S.C. 1, 317 S.E.2d 129 (1984); State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984); State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981); State v. Groome, 274 S.C. 189, 262 S.E.2d 31 (1980); State v. Bellue, 260 S.C. 39, 194 S.E.2d 193 (1973). Evidence is admissible if it is relevant and competent. The test for relevancy is whether the evidence tends to establish or make more or less probable some matter in issue and to bear directly or indirectly thereon. The evidence need not be sufficient in itself to establish the whole or any definite portion of a party's contention. State v. Finley, 300 S.C. 196, 387 S.E.2d 88 (1989); Associates Management,

Inc. v. E.D. Sauls Construction Company, 279 S.C. 219, 305 S.E.2d 236 (1983); State v. Hoffman, 257 S.C. 461, 186 S.E.2d 421 (1972); Gause v. Livingston, 251 S.C. 8, 159 S.E.2d 604 (1968). However, even if relevant, photographs calculated to arouse the sympathy or prejudice of the jury should be excluded. State v. Stallings, 253 S.C. 451, 171 S.E.2d 588 (1969); State v. Thorne, 239 S.C. 164, 121 S.E.2d 623, cert. denied, 368 U.S. 979 (1961); State v. Edwards, 194 S.C. 410, 10 S.E.2d 587 (1940); State v. Waitus, 224 S.C. 12, 77 S.E.2d 256 (1953).

A review of the challenged photographs of the tire tracks found near the victim's body and the testimony concerning the tracks establishes not only that the tracks were those closest to the body, but also that they did not have other tracks superimposed thereon. This evidence clearly provided a reasonable basis for inferring that they were caused by the murderer. There was, consequently, a sufficient connection between the tracks and the murder to render evidence concerning such relevant and admissible.[11] State v. Quillien, 263 S.C. 87, 207 S.E.2d 814 (1974); State v. Parker, 255 S.C. 359, 179 S.E.2d 31 (1971); State v. Jordan, 258 S.C. 340, 188 S.E.2d 780 (1972). Moreover, since the photographs of the tracks clearly were not intended to arouse the passion or prejudice of the jury, the trial court exercised sound discretion in admitting them.[12] State v. Livingston, supra; State v. Stroman,

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[11] The existence of other tracks at the scene and the absence of any direct evidence connecting the tracks in question to the murder went to the weight to be given the evidence and not its admissibility. State v. Quillien, 263 S.C. 87, 207 S.E.2d 814 (1974).

[12] Respondent-Respondent notes that the photographs corroborat-

supra; State v. Goolsby, supra; State v. Bellue, supra; State v. Stallings, supra; State v. Thorne, supra; State v. Edwards, supra; State v. Waitus, supra. Therefore, there was no error in the Court of Appeals' holding.

Moreover, even assuming arguendo this Court should find that there was error in the admission of the challenged evidence, the error could not have affected the jury's determination of Appellant-Petitioner's guilt. The Transcript of Record clearly establishes that, even without the challenged evidence, the State presented sufficient evidence to establish Appellant-Petitioner's guilt beyond a reasonable doubt. See Statement of the State's Case herein. Therefore, in light of the overwhelming evidence of Appellant-Petitioner's guilt, any error would be harmless beyond a reasonable doubt. See United States v. Hastings, 461 U.S. 499 (1985); Chapman v. California, 386 U.S. 18 (1967); State v. Ferguson, ___ S.C. ___, 395 S.E.2d 182 (1990); State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989); State v. Darby, 297 S.C. 459, 377 S.E.2d 340 (1989); State v. Key, 256 S.C. 90, 180 S.E.2d 888 (1971).

Appellant-Petitioner's argument is without merit.[13]

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ed the testimony given by Officer Christy. Therefore, under State v. Stroman, supra, they were also admissible as corroborative evidence.

[13] While the Court of Appeals also upheld the admission of testimony concerning the tire tracks at the scene, the propriety of such had not been properly presented on appeal. The relevant Exception raised by Appellant-Petitioner on appeal concerned only the propriety of the trial court's ruling allowing the introduction of photographs of the tire tracks; Appellant-Petitioner nonetheless used it to also attack, in his brief, the propriety of the admission of the testimony about the tracks. As Respondent-Respondent noted for the Court of Appeals, his failure to raise that issue by exception rendered it unavailable for appellate review. State v. Beachum, 288 S.C. 325, 342 S.E.2d 597 (1986); State v. Carson, 274

III.

The South Carolina Court of Appeals properly held that the trial court properly allowed State's witness Clarence Gabby Wells to testify about a statement made by Appellant-Petitioner to Hayes Malloy. (Appellant-Petitioner's Question 5)

On appeal, Appellant-Petitioner challenged the admission of a statement made by him -- i.e., "the Feds got him by the balls" -- while trying to get someone else to assume the responsibility for the murder of Donald Sutton on the ground that it constituted inadmissible evidence of his guilt of other crimes. The South Carolina Court of Appeals rejected this argument as follows.

> Appellant contends State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) prohibited this evidence because it indicated he was guilty of another crime. We disagree. it is clear this evidence was offered, not to show that appellant had committed another crime, but to show his state of mind at the time he made a statement against his interest. Evidence logically relevant to establish a material element of the offense charged is not to be excluded merely because it incidentally reveals the accused's guilt of another crime. Here, the testimony did not even necessarily reveal appellant's guilt of another crime. We find any reference to a federal crime was so vague that its probative value outweighed any possible prejudice.

(citations omitted). State v. Tillman, ___ S.C. ____, 405 S.E.2d 607, 612 (Ct. App. 1991).

The admission of evidence is left largely to the sound discre-

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S.C. 316, 262 S.E.2d 918 (1980); State v. Mitchell, 261 SC. 452, 200 S.E.2d 448 (1973). However, Respondent-Respondent would note for this Court -- as it did for the Court of Appeals -- that, as established hereinabove, the evidence concerning the existence of the tire tracks at the scene was relevant and properly admitted in the trial court's exercise of sound discretion.

tion of the trial court whose exercise as such will not be disturbed by this Court on appeal unless it has been shown that there has been an abuse of discretion, a commission of legal error in its exercise, and that the rights of the complaining party have been thereby prejudiced. State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981); State v. Groome, 274 S.C. 189, 262 S.E.2d 31 (1980). Evidence is admissible if it is relevant and competent. The test for relevancy is whether the evidence tends to establish or make more or less probable some matter in issue and to bear directly or indirectly thereon. The evidence need not be sufficient in itself to establish the whole or any definite portion of a party's contention. State v. Finley, 300 S.C. 196, 387 S.E.2d 88 (1989); Associates Management, Inc. v. E.D. Sauls Construction Company, 279 S.C. 219, 305 S.E.2d 236 (1983); State v. Hoffman, 257 S.C. 461, 186 S.E.2d 421 (1972); Gause v. Livingston, 251 S.C. 8, 159 S.E.2d 604 (1968).

Despite Appellant-Petitioner's assertions to the contrary, the challenged evidence did not concern the commission of other crimes by Appellant.[14] It was simply evidence of a statement made by Appellant-Petitioner which, contrary to his interests, reflected his guilt of Donald Sutton's murder.[15] Therefore, it was clearly

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[14] Therefore, the analysis required by State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), and its progeny was not required to determine the admissibility of the evidence.

[15] Inasmuch as the statement was not a direct acknowledgement of guilt, it was not a "confession." Instead, it was an "admission" -- i.e., a statement of pertinent facts which, in connection with proof of other facts, tends to prove guilt. See Ex Parte Cobb, 448 F. Supp. 886 (D.S.C. 1977), aff'd, 568 F.2d 774 (4th Cir. 1978).

relevant[16] and properly admitted in the trial court's exercise of sound discretion. See State v. Plyler, 275 S.C. 291, 270 S.E.2d 126 (1980) (statements of declarations made by one accused of crime are admissible against him); State v. Shorter, 85 S.C. 170, 67 S.E. 131 (1910) (general rule is that admissions of party in interest are received as evidence of fact admitted).

Appellant-Petitioner's argument is without merit.[17]

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[16] As the Court of Appeals noted, since it was relevant, the evidence would have been admissible even had it reflected upon Appellant-Petitioner's character or his commission of other criminal acts. See e.g. State v. Green, 261 S.C. 266, 200 S.E.2d 74 (1973) (evidence tending to establish an element of a charged offense is not to be excluded merely because it also reflects upon the defendant's guilt of another crime); State v. Thompson, 276 S.C. 616, 281 S.E.2d 216 (1981) (evidence tending to establish an element of a charged offense is not to be excluded merely because it also reflects upon the defendant's character).

[17] Moreover, even assuming arguendo this Court should find error in the admission of the challenged evidence, the error could not have affected the jury's determination of Appellant-Petitioner's guilt. The Transcript of Record clearly establishes that, even without the challenged evidence, the State presented sufficient evidence to establish Appellant-Petitioner's guilt beyond a reasonable doubt. See Statement of the State's Case herein. Therefore, in light of the overwhelming evidence of Appellant-Petitioner's guilt, any error would be harmless beyond a reasonable doubt. See United States v. Hastings, 461 U.S. 499 (1985); Chapman v. California, 386 U.S. 18 (1967); State v. Ferguson, ___ S.C. ___, 395 S.E.2d 182 (1990); State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989); State v. Darby, 297 S.C. 459, 377 S.E.2d 340 (1989); State v. Key, 256 S.C. 90, 180 S.E.2d 888 (1971).

IV.

The South Carolina Court of Appeals properly held that the trial court properly refused to allow Appellant-Petitioner to impeach State's witness Clarence Gabby Wells with his prior conviction for assault and battery of a high and aggravated nature. (Appellant-Petitioner's Question 6).

On appeal, the South Carolina Court of Appeals found any error in the trial court refusal to allow Appellant-Petitioner to impeach Gabby Wells with his 1988 conviction of ABHAN was harmless beyond a reasonable doubt inasmuch as Gabby was thoroughly impeached by numerous other convictions and his acknowledgement that he was testifying for the State in return for favorable treatment on some outstanding charges against him. State v. Tillman, ___ S.C. ___, 405 S.E.2d 607, 612 (Ct. App. 1991).

There was no error in the Court of Appeals holding. The Record reveals not only that Gabby's otherwise extensive criminal record was fully exposed to the jury, but that defense counsel thoroughly examined him about any difficulties with Appellant-Petitioner and his reasons for testifying. Therefore, the exclusion of the impeachment evidence in question could not have prejudiced Appellant-Petitioner because it was merely cumulative in substance to that presented to the jury. State v. Patterson, 290 S.C. 523, 384 S.E.2d 699 (1989), vacated other grounds, ___ U.S. ___, 110 S.Ct. 709 (1990); State v. Amburgy, 206 S.C. 426, 34 S.E.2d 779 (1945); State v. Mason, 215 S.C. 457, 56 S.E.2d 90 (1949). The granting of a new trial based upon its exclusion would not be warranted. State v. Thompson, 276 S.C. 616, 281 S.E.2d 216

(1981) (conviction will not be set aside for non-prejudicial error in the admission of evidence); State v. Knight, 258 S.C. 452, 189 S.E.2d 1 (1972) (same); State v. Green, 255 S.C. 548, 180 S.E.2d 179 (1971) (error without prejudice is not basis for new trial).

Moreover, Respondent-Respondent would note that there was no error in the trial court's ruling which prohibited Gabby's impeachment with the ABHAN conviction. Upon taking the stand, a witness's credibility may be impeached through cross-examination about convictions of crimes of moral turpitude. State v. Major, ___ S.C. ___, 391 S.E.2d 235 (1990); State v. Hale, 284 S.C. 348, 326 S.E.2d 418 (Ct. App.) cert. denied, 286 S.C. 127, 332 S.E.2d 533 (1985). Moral turpitude has been defined by this Court as an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowman or to society in general, contrary to the accepted and customary right and duty between man and man. State v. Major, supra; State v. Ball, 292 S.C. 71, 354 S.E.2d 906 (1987); State v. Labarge, 275 S.C. 225, 268 S.E.2d 278 (1980). In previously addressing the issue of whether the offense of ABHAN is a crime of moral turpitude, this Court has held that, since the crime of ABHAN does not invariably constitute a crime of moral turpitude, such a determination depends on the facts of each particular case. State v. Bailey, 275 S.C. 444, 272 S.E.2d 439 (1980). Here, Appellant-Petitioner has simply argued, at both trial and on appeal, that Gabby's ABHAN conviction should be considered to involve moral turpitude because it involved the use of a machete and kicking by Gabby -- i.e., it was an aggravated assault and battery. The Record reveals the total absence of any

rational basis for distinguishing the ABHAN in question from any other instance of ABHAN. Therefore, the trial court's decision that the ABHAN conviction did not involve moral turpitude -- based upon the arrest warrant, the indictment, Gabby's testimony concerning the facts underlying the conviction, and the fact that Gabby pled guilty to ABHAN as part of a plea agreement which included a waiver of presentment of the indictment to the grand jury -- was clearly supported by the Record. There was no error.

Respondent-Respondent would further note that the trial court's use of and reliance upon the information other than the indictment was not error as contended by Appellant. While this Court has held that the reality of the judicial system would not allow for extensive hearings on the facts underlying individual ABHAN convictions, it never held that the holding of such a hearing would be error. State v. Bailey, supra.

Appellant-Petitioner's Argument is without merit.

V.

The South Carolina Court of Appeals properly upheld the trial court's qualification of State's witness Bruce Hall as an expert in the area of tire treads and patterns and its ruling which allowed Bruce Hall to testify as to his opinion concerning the tire tracks found near the victim's body and the tires on the car driven and rented by Appellant-Petitioner. (Appellant-Petitioner's Question 4).

On appeal, the South Carolina Court of Appeals rejected Appellant-Petitioner's allegations of error in the trial court's qualification of State's witness Bruce Hall as an expert in the area of tire treads and patterns and its ruling which allowed Bruce Hall to testify as to his opinion concerning the tire tracks found near the victim's body and the tires on the car driven and rented by Appellant-Petitioner. Its ruling was, in pertinent part, as follows.

> The decision to qualify an expert is in the sound discretion of the trial judge. We find the record here supports the trial judge's qualification of Hall as an expert in distinguishing tire patterns.
>
> Appellant also argues the admission of this evidence was erroneous because it was speculative in nature. We disagree. As previously noted, we find the testimony that the tire tracks stopped in view of the body was sufficiently connected to the crime such that admission of this evidence was proper.
>
> Finally, appellant appears to argue the testimony of the expert witness that "around two percent of the tires just sold out of my location were Goodyear Vectors" was improperly admitted over objection. We first note this testimony initially came in without objection. Further, when the appellant later objected, the trial judge sustained his objection. We therefore find no error.

(citations omitted). State v. Tillman, ___ S.C. ___, 405 S.E.2d 607 (Ct. App. 1991).

The Court of Appeals properly held that the trial court exercised sound discretion in qualifying Bruce Hall as an expert and in allowing him to testify about the identification of the tire which made the tread marks found near the victim's body.

It is well settled that the qualifications of a witness as an expert is a matter within the sound discretion of the trial court whose rulings thereon will not be disturbed on appeal unless it clearly appears that there has been an abuse of discretion. State v. Myers, ___ S.C. ___, 391 S.E. 2d 551 (1990); State v. Childs, 299 S.C. 471, 385 S.E.2d 839 (1989); State v. Caldwell, 283 S.C. 350, 322 S.E.2d 662 (1984); State v. Cunningham, 275 S.C. 189, 268 S.E.2d 289 (1980); State v. Moorer, 241 S.C. 487, 129 S.E.2d 330, cert. denied, 379 U.S. 860 (1963). While a witness need not have a professional degree to be qualified as a witness, State v. Ham, 256 S.C. 1, 180 S.E.2d 628 (1971), rev'd on other grounds, 409 U.S. 524 (1972), the trial court's exercise of discretion in this area is channeled by certain guidelines.

> To be competent as an expert, a witness must have acquired by reason of study or experience or both such knowledge and skill in a business, profession, or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony. The test is a relative one, depending on the particular witness's reference to the subject; an expert is not limited to any class of persons acting professionally.

(citations omitted). Botehlo v. Bycura, 282 S.C. 578, 320 S.E.2d 59, 64 (S.C. App. 1984). See also State v. Myers, supra; Campbell v. Paschal, 290 S.C. 1, 347 S.E.2d 892 (Ct. App. 1986).

The Transcript of Record establishes that Mr. Hall had extensive experience with tires -- not only selling them but also examining them for manufacturer, wear and defects. His testimony established that he had received training in the area of tire manufacturing and wear analysis, but not in the forensic context. This testimony clearly supported the trial court's exercise of discretion inasmuch as Mr. Hall's limited training went to the weight of his testimony rather than its admissibility. See State v. Myers, supra. Therefore, there was no error in the qualification of Bruce Hall as an expert in the area of tire treads and patterns.

Insofar as Appellant-Petitioner has argued that the trial court erred in allowing Mr. Hall to give his opinion that the tire tracks found near the victim's body were consistent with the tracks made by a Goodyear Vector tire and that at least two (2) of the tires on Appellant-Petitioner's car were Goodyear Vector tires because of the lack of a proper foundation, his argument is without merit. In addition to testifying in great detail concerning his experience with and exposure to Goodyear tires and their characteristics, he testified that his opinion was based upon his examination of the photographs of the tracks found near the victim's body and of the tires on Appellant-Petitioner's car. A foundation for his testimony concerning the tires and tracks was clearly established.[18] See State v. Childs, supra (foundation was established

[18] Despite Appellant-Petitioner's representation to the contrary, the problems attendant to the testimony of the witness in City of Spartanburg v. Laprinkakos, 267 S.C. 589, 230 S.E.2d 443 (1976) -- who was not qualified as an expert -- are not present in this case. As demonstrated hereinabove, Mr. Hall's testimony was

for witness's testimony where he testified as to basis of testimony and fact that previously qualified as expert); State v. Bellamy, 296 S.C. 478, 374 S.E.2d 180 (1984) (witness qualified to give opinion as to how fingerprint made where gave testimony as to experience and education concerning such); State v. Edens, 272 S.C. 130, 250 S.E.2d 116 (1978) (no abuse of discretion to allow expert witness to testify based upon his expertise); State v. Browder, 183 S.C. 447, 191 S.E. 302 (1937) (testimony of expert witness competent where testified as to facts upon which opinion based). The trial court exercised sound discretion in allowing Mr. Hall to testify as he did. Id.

Appellant-Petitioner's argument is without merit.[19]

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clearly not speculative but based upon a sufficient foundation.

[19] Moreover, even assuming arguendo this Court should find that there was error in the qualification of Mr. Hall as an expert and the admission of his testimony, the error could not have affected the jury's determination of Appellant-Petitioner's guilt. Mr. Hall's testimony concerning the identification of the tires on Appellant-Petitioner's car as Goodyear Vector tires was cumulative to the subsequent testimony of Officer Mark Austin which was admitted without objection. (Tr. p. 588, line 13 - p. 589, line 2). It was, consequently, non-prejudicial. State v. Johnson, 298 S.C. 496, 381 S.E.2d 732 (1989); State v. VanDillard, 298 S.C. 171, 379 S.E.2d 115 (1989).

Moreover, the Transcript of Record clearly establishes that, even without the testimony of Mr. Hall, the State presented sufficient evidence to establish Appellant-Petitioner's guilt beyond a reasonable doubt. See Statement of the State's Case herein. Therefore, in light of the overwhelming evidence of Appellant-Petitioner's guilt, any error in the admission of the challenged evidence would be harmless beyond a reasonable doubt. See United States v. Hastings, 461 U.S. 499 (1985); Chapman v. California, 386 U.S. 18 (1967); State v. Ferguson, ___ S.C. ___, 395 S.E.2d 182 (1990); State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989); State v. Darby, 297 S.C. 459, 377 S.E.2d 340 (1989); State v. Key, 256 S.C. 90, 180 S.E.2d 888 (1971).

VI.

The South Carolina Court of Appeals did not err in holding that the trial court did not abuse its discretion in giving the jury a supplemental charge. (Appellant-Petitioner's Question 7).

The South Carolina Court of Appeals also rejected Appellant-Petitioner's challenge to the supplemental charge given by the trial court.

> A trial judge is but discharging his duty to the public and the litigants when he urges the jury to reach a verdict, provided no coercion takes place. A reading of the charge given by the trial judge reveals no indication he tried to coerce a verdict. We further find appellant's argument as to the timing of the charge meritless given that the jury had deliberated for almost four hours. Further, the trial judge, in giving the Allen charge, specifically instructed the jury that the verdict must be each juror's "own convictions and not a mere acquiescence in the conclusions of the other jurors ...." We therefore find no error in the giving of the charge.

(citations omitted). State v. Tillman, ___ S.C. ___, 405 S.E.2d 607, 612-613 (Ct. App. 1991). As established hereinafter, the Court of Appeals properly held that the supplemental charge given by the trial court was a proper charge under Allen v. United States, 164 U.S. 492 (1896), and, as such, resulted in no error.

The trial court, in discharging its duty to the public and litigants, has the duty to urge the jury to reach a verdict provided that no coercion takes place. Allen v. United States, supra; State v. Lynn, 277 S.C. 222, 284 S.E.2d 786 (1981); State v. Jones, 86 S.C. 17, 67 S.E. 160 (1910). The permissibility of an Allen charge "to jurors to re-examine their views in the light of those of their fellows is dependent upon the moderating reminder to their

own individual responsibility and the necessity that any verdict be that of each of the jurors and not just that of a majority." United States v. Rogers, 289 F.2d 433, 437 (4th Cir. 1961).

The Allen charge in question emphasized that the verdict was to be that of each individual juror, "his or her own convictions and not a mere acquiescence in the conclusions of the jurors." (Tr. p. 1113, lines 20-22). Under State v. Marsh, 260 Or. 416, 490 P.2d 491, cert. denied, 406 U.S. 974 (1971), this charge is a "balanced charge" in that the supplemental instruction emphasized that each individual juror was not to give up his or her conscientious convictions in attempting to render a verdict. Considering the instruction as a whole, the supplemental charge given was a proper Allen charge and did not deprive Appellant-Petitioner of his right to a fair trial. See Lowenfield v. Phelps, 484 U.S. 231 (1988).

The primary concern of Appellant-Petitioner centers around the time the Allen charge was given, i.e., three (3) hours and fifty-seven (57) minutes after the jury began its deliberations. He asserts that the charge was premature and therefore coercive. While this Court has not addressed this specific issue, other courts have held that there is no fixed period of time which must necessarily elapse before an Allen charge may be properly given. See United States v. Sawyers, 902 F.2d 1217 (6th Cir. 1990) (supplemental charge given after jury deliberation of slightly over three [3] hours); Barnes v. State, 261 Ark. 360, 548 S.W.2d 141 (1977) (supplemental charge given after jury deliberation of one (1) hour and fifty (50) minutes); Hawkens v. State, 260 Ga. 138,

390 S.E.2d 836 (1990) (supplemental charge given after jury deliberation of less than three [3] hours); Cole v. State, 766 P.2d 358 (Okla. 1988) (supplemental charge given after jury deliberation of one [1] hour and forty-five [45] minutes). In looking at the attendant circumstances, the length of the trial, the relatively simple issues, and the length of the jury's initial deliberations, the charge in this case was not prematurely given. See Barnes v. State, supra.

No error resulted from the giving of the Allen charge in the case at bar.[20] Therefore, the Court of Appeals ruled properly and Appellant-Petitioner's argument is without merit.

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[20] Respondent-Respondent notes that the time between the giving of the Allen charge and the jury's rendering of a verdict -- one (1) hour and twenty-five (25) minutes -- does not indicate that the jury was coerced or pressured by the trial court's supplemental charge. The time period between the charge and the rendering of a verdict is not to be considered in determining whether the Allen charge in question is proper unless the charge is first determined to be improper. U.S. v. Ball, 547 F.Supp. 929 (D.C. Tenn. 1981); see also U.S. v. Hynes, 424 F.2d 754 (2nd Cir.) cert. denied, 399 U.S. 933 (1978) [jury returned with verdict with five (5) minutes after supplemental instruction given]. As established hereinabove, the trial court's supplemental charge was a proper Allen charge under the prevailing Federal and State law; therefore, the time period is not a factor to be considered.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

T. TRAVIS MEDLOCK
Attorney General

HAROLD M. COOMBS, JR.
Assistant Attorney General

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Columbia, SC 29211
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Solicitor, Fifth Judicial Circuit

Post Office Box 7485
Columbia, SC 29202
(803)

BY: _____
ATTORNEYS FOR RESPONDENT

August 23, 1991.

ALC

CERTIFICATE OF SERVICE
THE UNDERSIGNED CERTIFIES THAT A
Return to Petition for Writ of Certiorari
PROPERLY
23rd
August 1991
Respondent
23rd
August 91
(L.S.)
4/1/93

The Supreme Court of South Carolina

CLYDE N. DAVIS, JR.
CLERK
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX [illegible]
COLUMBIA, S.C. [illegible]
PHONE NO. [illegible]

September 5, 1991

Jack B. Swerling, Esquire
Jennifer Kneece Shealy, Esquire
1720 Main Street, Suite 301
Columbia, S. C. 29201

Re: The State v. Ronald S. Tillman

Dear Ms. Shealy and Mr. Swerling:

The Court has issued the following Order on your Petition for Writ of Certiorari in the above entitled matter:

"Petition for Writ of
Certiorari denied.

s/George T. Gregory, Jr. C.J.
For the Court

September 5, 1991."

By copy of this letter we are asking counsel of record what disposition they would have us make of the extra copy of the record in this action. If we have not heard from them to the contrary, we will destroy the record on September 16, 1991.

Very truly yours,

Brenda F. Shealy
DEPUTY CLERK

BFS/dmh

cc: The Honorable Amie L. Clifford
The Honorable Reba D. Mims
The Honorable Barbara Scott
West Publishing Company

95CP 402449

STATE OF SOUTH CAROLINA

County of RICHLAND

In the Court of Common Pleas

RONALD TILLMAN # 85375-071

Full name and prison number (if any) of Applicant.

vs.

STATE OF SOUTH CAROLINA

Name of Respondent.

APPLICATION FOR POST-CONVICTION RELIEF

95 JUL 17 AM 10:05

FILED

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 it clear to which question any such continued answer refers.

Since every application must be sworn to 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 applicant was convicted.

1. Place of detention USP ATLANTA, Box PMB , ATLANTA, GA 30315

2. Name and location of Court which imposed sentence 5TH JUDICIAL CIRCUIT RICHLAND COUNTY JUDICIAL CENTER, COLUMBIA, SOUTH CAROLINA

3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
   (a) 89-GS40-0745
   (b)
   (c)

4. The date upon which sentence was imposed and the terms of the sentence:
   (a) January 15, 1990, Life
   (b)
   (c)

1346

5. Check whether a finding of guilty is made

(a) after a plea of guilty _____

(b) after a plea of not guilty x

(c) after a plea of nolo contendere _____

6. Did you appeal from the judgment of conviction or the imposition of sentence?

yes

7. If you answered "yes" to (6), list

(a) the name of each Court to which you appealed:

i. THE SUPREME COURT FOR THE STATE OF SOUTH CAROLINA

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. Affirmed the Conviction

ii. _____

iii. _____

(c) the date of each such result:

i. _____

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. _____

ii. _____

iii. _____

8. If you answered "no" to (6), state your reasons for not so appealing:

(a) _____

(b) _____

(c) _____

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Ineffective Assistance of Counsel

(b) Brady Violations

(c) Judge Abuse his Discretion and denied the defendant a fair trial

10. State concisely and in the same order the facts which support each of the grounds set out in (9):

(a) Trial counsel failed to interview or subpoena crucial witnesses

(b) Prosecutor withheld exculpatory evidence that was favor to the defense.

(c) Trial judge gave the Allen charge-it was deemed coercive.

11. Prior to this application have you filed with respect to this conviction

(a) any petition in a State Court under South Carolina Law? no

(b) any petitions in State or Federal Courts for habeas corpus or post-convictions relief? no

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7)? no

(d) any other petitions, motions or applications in this or any other Court?
no

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. _____

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. _____

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
no

1348

14. If you answered "yes" to (13), identify:

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

15. If any ground set forth in (9) 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) The petitioner is incarcerate in federal custody and at the

(b) present time could not obtained the information that he needed

(c) to present to this court

16. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? 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

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? no

17. If you answered "yes" to one or more parts of (16), list:

(a) the name and address of each attorney who represented you

i. Jack B. Swerling 1720 Main St.,Suite 301, Columbia South Carolina 29201

ii. _____

iii. _____

(b) the proceedings at which each such attorney represented you:

i. _____

ii. _____

iii. _____

18. State clearly the relief you seek in filing this application.

The conviction and sentence vacate and set aside for a new trial

19. Are you now under sentence from any other court that you have not challenged?

yes

STATE OF SOUTH CAROLINA
County of Richland

VERIFICATION

I, Ronald S. Tillman #85375-071, 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.

Mr. Ronald S. Tillman

SWORN to and subscribed before me this 10

day of July, 1995

_____ (L.S.)
Notary Public
Notary Public, Fulton County Georgia
My Commission Expires Sept. 25, 1998

My Commission Expires: _____

APPLICATION TO PROCEED WITHOUT PREPAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF

I, Ronald S. Tillman #85375-071, 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 therefor.

Mr Ronald S Tillman
Applicant

SWORN or affirmed to and subscribed before me this

10 day of July, 1995

_____
Notary Public
Notary Public, Fulton County, Georgia
My Commission Expires Sept. 25, 1998

My Commission Expires _____.

1350

Ronald S, Tillman
F.R.N. 85375-071
Box PMB
Atlanta, GA 30315

in propria persona

95 JUL 17 AM 10:05
C.C.C. & G.S.

THE STATE OF SOUTH CAROLINA
FIFTH JUDICIAL CIRCUIT

RONALD S, TILLMAN, Petitioner/Defendant, v. STATE OF SOUTH CAROLINA, Respondent.	Case No. 89-GS40-0745

SEPARATE MEMORANDUM
MOTION

COME NOW the petitioner, Ronald S, Tillman filing pro se and in propria persona. The petitioner requests the court to grant him leave to proceed in forma pauperis. This is a separate memorandum motion, in support of the application for the post-conviction relief, to vacate, set aside, or correct the verdict and sentence. The main focus on this motion is ineffective assistance of counsel, brady violations and the court abuse his discretion.

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STATEMENT OF THE CASE

On or about the 26th of December, 1988, the body of one Donald Ivory Sutton was discovery off Barnes Street in Richland County, South Carolina.

On or about February 9, 1989, a grand jury of Richland County handed down a one count indictment against Ronald S, Tillman for the murder of one Donald Ivory Sutton.

At the time of the warrant for the petitioner arrest, the petitioner was in federal custody for bank robbery.

On or about February 17, 1989, a preliminary hearing was held in the circuit court for Columbia, South Carolina. The petitioner was represented by attorney Jack B, Swerling, the Judge that presided over the case of the preliminary hearing was the Honorable Michael Davis.

On or about January 15, 1990,....the petitioner proceeded to trial. On or about January 23, 1990, the jury returned a verdict of guilt to the one count indictment against the petitioner for murder. Later that day the Honorable Judge Don S, Rushing sentence the petitioner to life imprisonment. Petitioner Ronald S, Tillman, filed a timely notice of appeal.

STATEMENT OF THE FACTS

On or about December 26, 1988, body of one Donald Sutton was discovery behind a church off of Barnes Street by the Richland County Sheriff's department, at or about approximately 11:30 p.m. The investigators for the Richland County Sheriff's department stated that they received a call from the City Police Department informing them that they received a phone call from a Hayes Malloy stating that he saw a body behind a church off of Barnes Street. After further investigating the murder, Investigator Austin question Malloy about the discovery of the body of Donald Sutton. Malloy first statement to Officer Austin was that he just happen to come across the body lying behind the church. Austin further stated that he asked Malloy if he knew how the body got there, Malloy stated that he had no knowledge of how the body got there. Austin stated that he did not believe Malloy, and asked if he [Malloy] had anything to do with the killing of Donald Sutton, Malloy said he did not. Further, into the investigation Officer Austin requested a polygraph.....test be giving to Malloy. The polygraph test was giving by Officer.....John Burnette. Officer Burnette asked Malloy if he had any knowledge of Sutton's death or did you shoot Sutton, Malloy said no. The polygraph test concluded that Malloy

lied and in fact had something to do with the death of one Donald Sutton. The fact do not states how many polygraph test was giving to Malloy, but that Malloy was in fact charged with the death of Donald Sutton. However, later Malloy change his story and implicated Ronald Tillman as the person who shot and kill one Donald Sutton.

While in the custody of the federal government, Tillman was transfer back to the state custody by way of a writ.

On or about January 4, 1989, Tillman was question by Officer Edward and Austin about the death of Donald Sutton. Tillman stated that he did not kill, nor did he go with anyone to kill Donald Sutton. Officer Edward and Austin question Tillman to his whereabout...on December 26, 1988, at the time of Sutton death. illman informed Officer Edward and Austin where he was and who he was with at the time of Sutton death.

On or about February 9, 1989, Tillman was charged with Malloy as being the person of killing Sutton. Later the charge was drop against Malloy for his testimony against Tillman.

ISSUE I. ARGUMENT

INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner concluded that trial counsel denied him effective assistance of counsel; for failure to investigate, interview or subpoena crucial witnesses that would have had a mitigating factor on the outcome of the petitioner trial, failure to subpoena or interview these witnesses, prejudice the petitioner defense, due to the ineffectiveness of trial counsel performance. Strickland v. Washington, 466 US. 668,104 S.Ct. 2052,80 L.Ed.2d 674 (1984).

In Strickland, the Supreme Court set out two-prong test for evaluating an ineffective assistance of counsel claim. The first prong requires the reviewing court to examine the performance of counsel. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' uaranteed the defendant by the Sixth Amendment. Id at 678,104 S. Ct. at 2064. The second prong requires a showing that the deficient performance prejudiced the defense. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

The petitioner concluded that if trial counsel had subpoena these witnesses the out-come of the trial would have been different.

Petitioner concluded that trial counsel denied him effective assistance of counsel for 6 reasons. 1) That counsel for the defense failed to interview or subpoena one of the most crucial witness to the petitioner defense, which was the state forensic expert investigator Lt. Sulton. Had trial counsel subpoena or interview this witness, Lt. Sulton would have testified that the tire impression that was produced at the scene or near the body of Donald Sutton did not come from the petitioner car.

Moreover, one of the petitioner witness informed the petitioner that she over heard Lt. Sulton informed the prosecutor of these facts. Therefore, the state drop investigator Sulton from their witnesses list. However, the petitioner informed trial counsel of these allegation, in which trial counsel informed the etitioner that he would call Lt. Sulton to the stand, but during duration of trial, counsel for the defense failed to call Lt. Sulton to testify. Furthermore, had Lt. Sulton been called to testify, he would have refuted the testimony of the state so call expert witness Mr. Hall, who and was at the time of trial was employed by Goodyear Tire and Rubber Company. Mr. Hall stated that state exhibit number 28,31,30,and 29 are Vector Tires and that they are made by Goodyear and that state exhibit 49

was a Buick Riviera that was equiped with Goodyear Vector. [Tr. 500,01,02,03,04]. However, had Lt. Sulton been called to testify, he would have refuted the testimony of Mr. Hall the state so appointed expert witness. Lt. Sulton would have testified that state exhibit number 28,31,30 and 29 was not the imprint of the petitioner car. Therefore, the testimony of Lt. Sulton would have contradict the state theory that the tire impression that was near the body of Donald Sutton was from the petitioner car. Moreover, the testimony of Lt. Sulton would have shown that the tire impression was not from the petitioner car, but it was from another car. However, if the jury had been aware of this information the outcome of the petitioner trial would have rendered a different result. Therefore, the deficient of the rial counsel performance rendered the petitioner effective assistance of counsel that is guaranteed to the petitioner by the Sixth Amendment. Stickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 80 L.Ed. 2d 674 (1984) also see Montgomery v. Petersen, 846 F. 2d 407 (7th. cir. 1987). In Montgomery the defense counsel failed to investigate or subpoena the most crucial and promising witness, Montgomery attorney had no reason to believe that he would not be any valuable in securing Montgomery release, therefore, the defense counsel had no cause to automatically reject the petitioner

witnesses. Moreover, Lt. Sulton had no apparent reason for bias. There was no strategy involved in the defense of the petitioner counsel, only negligence. See, Washington v. Murray, 4 F.3d 1285 (4th. cir. 1993) also see, U.S v. Myers, 892 F.2d 642 (7th. cir. 1990).

2) Trial counsel failed to subpoena three other crucial witnesses, who had testified at the petitioner federal trial. Had these three witnesses, Curtis Gear, Alphonso Shell and Frank Wright had been subpoena, they would have refuted the testimony of Clarence Gabby Well, who stated that in November and December of 1988, while at the Party Shop Tillman stated to him [Gabby Well] that he was going to kill Donald Sutton. Well also stated that while he was in jail for robbery, Tillman was brought in and was placed in a cell directly in front of his, later, Malloy was brought in and placed in his [Well] cell. Well stated that he over-heard Tillman tell Malloy that he wanted Malloy to take the murder case, cause the federal people have him by the ball. Well also stated that on or about 3rd of January 1989, Tillman offer him $500.00 to testify for him. [Tr. 286, 289, 290, 292]. However, had trial counsel subpoena the petitioner three crucial witnesses, Curtis Gear, Alphonso Shell and Frank Wright they would have testified that Clarence Gabby Well stated to them that he did not want to go prison and

hat he would do anything from going, even if it mean lying on Tillman. These three witnesses also was willing to testify that Well informed them that he did not like Tillman, because on one occassion Tillman and him [Well] got into a fight and on another occassion Tillman stop Gabby Well from shooting Rubin Eubanks by taken the gun from him [Well], [Tr. 321, 322]. Had the petitioner witnesses been called, their testimony would have been that Well stated to them that he did not like the petitioner because Tillman and Tillman's father had barred him [Well] away from their place of business and Gabby Well did not like that, [Tr. 322, 323]. Had the petitioner's father been subpoena to testify, he would have testified that he and his son Tillman had barred Well away from their place of business, [Tr. 323].

Therefore, the petitioner conclude that trial counsel denied him effective assistance of counsel by failure to subpoena his most and promising witnesses, Curtis Gear, Alphonso Shell, Frank Wright and the petitioner's father. Griffin v. Warden, 970 F.2d 1355 (4th. cir. 1992), also see, Workman v. Tate, 957 F. 2d 1339 (6th. cir 1992), and Strickland v. Washington, 466 U.S. 668 (1984). Further, in Workman, the Court of Appeals for the Sixth Circuit concluded that trial counsel denied Workman effective assistance of counsel for failure

subpoena two of Workman promising witnesses, one of Workman witness was his fiance, the other was a close friend, but had these two witnesses been called to testify, they would have refuted the testimony of the state witnesses, who stated that they identify themselves as police officer, before arresting Workman. However, had trial counsel called Workman witnesses to testify, their testimony would have been, that the arresting officer did not identify themselves before arresting Workman. Therefore, the Court of Appeals for the Sixth Circuit reversed the conviction due to ineffective assistance of counsel.

3) Petitioner also conclude that trial counsel was ineffective for failure to subpoena crucial and promising witnesses who would have refuted the testimony of the state most and promising witness, Hayes Malloy. Had trial counsel interview or subpoena Frank Wright, Wright would had testified that on numerous occasion Donald Sutton informed him that Hayes Malloy and him [Sutton] had robbed Thomas & Howard Wholesale and that the owner could have identify Hayes Malloy as the robber. Had Wright been called to testify, he also would have testified that Hayes Malloy believe that Donald Sutton was going to testify against him on the Thomas & Howard Wholesale robbery and on a few other robbery that Hayes Malloy and Donald Sutton was responsible for and that

ayes Malloy also indicated to him that he was not going to jail because of Donald Sutton, even if it mean killing Sutton.

Had trial counsel subpoena Heywood William, William would have informed the trial court that on numerous occasion Donald Sutton informed him that Hayes Malloy and him [Sutton] had done a few robbery together. William also would have testified that Malloy felt that Sutton was going to testify against him, because Donald Sutton did not want to go to jail. William also would have testify that Hayes Malloy indicated to him that he was going to kill Donald Sutton. William also would have testified if been called to that Malloy stated that he would have to get Tillman out of the way first, because he knew Tillman and Sutton was close friend and that he knew if he killed Sutton, Tillman would avenge Sutton death. Therefore, Malloy informed the FBI that the petitioner had robbed the SCN Bank on Bluff Road just to get Tillman off the street. William also would have testified that Malloy was going to kill Tillman, but never did get a chance at it, due to Tillman alway having friend around him. Therefore, Malloy took his chance by alleging to the FBI that Tillman was the one who robbed the SCN Bank on Bluff Road. Therefore, trial counsel denied the petitioner effective assistance of counsel; for failure to subpoena Heywood William and Frank Wright. Furtherfore,

.ial counsel had no reason to believe that the testimony of Frank Wright and Heywood William would not be any valuable in securing Tillman release. Therefore, the defense counsel had no cause to automatically reject the petitioner witnesses. The Court of Appeals for the Eighth Circuit concluded in Lawrence v. Armon - trout, 900 F.2d 127 (8th. cir. 1990), appeal after remand 961 F.2d 113 (8th. cir. 1992)(failure to interview alibi witnesses was deficient performance under first Strickland factor); Harris v. Reed, 894 F.2d 871 (7th. cir. 1990)(failure to call witnesses to contradict eye-witness identification of defendant was ineffective assistance); Grooms v. Solem, 923 F.2d 88 (8th. cir. 1991)("it is unreasonable not to make some effort to contact [alibi witnesses] to ascertain whether their testimony would aid the defense").

At and during the petitioner trial, defense counsel asked Malloy if he had a gun the night of Donald Sutton death, Malloy answer was no. Had trial counsel subpoena John Corbitt and Cleveland Malloy, they would have refuted the testimony of Malloy.

John Corbitt would have testified that on the night of Donald Sutton death. Malloy borrow a gun from him and he believe that the gun Malloy borrow is the same hand gun that kill Sutton, [Tr. 13]. Had Malloy brother Cleveland Malloy been call

testify, he would have stated that he did see his brother with a small hand gun on the night of Sutton death. Cleveland Malloy also would have testified that the hand gun he saw his brother with was the hand gun of John Corbitt. The petitioner conclude that the second prong test of Strickland was met when the petitioner "demonstrate affirmatively that, but for trial counsel's unprofessional errors, the result would have been different." The courts conclude that Strickland is not so demanding. If a petitioner establishes a reasonable probability that the result would have been different, prejudice is established. Moreover, a "reasonable probability" is simply "a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694, 104 S.Ct. at 2068.

At and during trial, counsel for the defense asked Malloy, **did you know Donald Sutton, Malloy answer was no [Tr. 15].** Had trial counsel subpoena Frank Wright and Heywood William that would have refuted the testimony of Malloy. Moreover, had William and Wright been call to testify they would have testified that Sutton informed them that he knew Malloy and that him and Malloy robbed Thomas & Howard Wholesale together. Had John Corbitt been called to testify he also would have stated that Malloy knew Donald Sutton. Therefore, trial counsel performance prejudice the defense

4) Petitioner conclude that had trial counsel subpoena the owner of Thomas & Howard Wholesale, the owner would have testify that Malloy was one of the individual who robbed him. Moreover, the testimony of the owner of Thomas & Howard Wholesale would have corroborative the testimony of Heywood William and Frank Wright, who would have testified if had been subpoena that Malloy did know Donald Sutton and that Malloy and Sutton robbed Thomas & Howard Wholesale. **[See pg 9,10,11 of the petitioner brief].**

Trial counsel failure to call two other crucial witnesses Arthur Robert and Rubin Eubanks. Had these two witnesses been call to testify, their testimony would have been that Malloy did know Donald Sutton and that Sutton and Malloy was the two individual who had robbed Thomas & Howard Wholesale. Furthermore, had Arthur Robert and Rubin Eubanks been call to testify, they would have testified that Malloy informed them after Donald Sutton made bond that he felt that Sutton had his fiance to call the police and report the Thomas & Howard Wholesale robbery. Arthur Robert and Rubin Eubanks also would have testified that Malloy did kill Donald Sutton with John Corbitt gun.

Further, had Rubin Eubanks been subpoena, he would have testified that the reason Malloy tried to kill him in front of

llman place of business was that Malloy felt that Eubanks had something to do with Sutton decision to turn state evidence against Malloy in the Thomas & Howard Wholesale robbery. Therefore, trial counsel denied the petitioner effective assistance of counsel that is afforded to him by the Sixth Amendment. Moreover, trial counsel decision not to subpoena Rubin Eubanks and Arthur Robert was not a decision of strategy but a decision of negligence.

Therefore, trial counsel denied the petitioner effective assistance of counsel, for failure to interview or call alibi witnesses that would have contradict the state witness against the petitioner. Therefore, trial counsel denied the petitioner effective assistance of counsel. Grooms v. Solem, 923 F.2d 88,90 (8th. cir. 1991), Ballou v. Booker, 777 F.2d 910 (4th. cir. 1985), and Jackson v. Cox, 435 2d 1089 (4th. cir. 1970).

Trial counsel failed to subpoena Malloy's mother, had Malloy's mother been call to testify, she would have testified that her son was the person who shot and kill Donald Sutton. Therefore, petitioner was denied effective assistance of counsel, due to trial counsel failure to subpoena Malloy's mother. Griffin v. Warden MD. CORR. ADJUSTMENT CENTER, 970 F.2d 1355 (4th. cir. 1992).

Trial counsel failed to interview or subpoena the petitioner's mother. Had the petitioner's mother been subpoena to testify she would have testified that she did call the police and informed them that Malloy was the person who robbed the Thomas & Howard Wholesale. Moreover, the petitioner's mother testimony would have corroborative the testimony of Arthur Robert and Rubin Eubanks who would have testify that Malloy thought that Sutton's fiance was the one who made the call to the police department, but in fact, it was the petitioner's mother. **[See pg 13 of the brief].**

Petitioner requested trial counsel, to subpoena Lavette Jefferson. Had trial counsel subpoena Ms. Jefferson, she would have testify that on the eve of Donald Sutton death, she made two call to the petitioner between the hour of 7:00 and 8:30 oclock.

Had trial counsel subpoena the phone records of Ms. Jefferson it would have showed that Ms. Jefferson did in fact call the petitioner between the hour of 7:00 and 8:30 oclock.

Had trial counsel subpoena the phone record of the Party Shop it would have showed that Vito McKie did in fact call Ms. Bridgette from the Party Shop between the hour of 8:30 and 9:00 oclock. Had these records been subpoena, these records would

have corroborative the testimony Vito McKie that the petitioner and him [Vito McKie] was together throughout night of December 26, 1988, at the time of Donald Sutton death. Moreover, had these records been subpoena, these records would have contradict the testimony of the state witness Malloy, who stated that the petitioner was the person who kill Sutton. Therefore, trial counsel had no reason, why, he did not subpoena these phone records. [Tr. 598,599]. Moreover, trial counsel performance denied the petitioner effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984).

Vito McKie also stated that him and the petitioner stop at two gas station before ending the night at a club call the Bleau. Further, Vito McKie stated that him and the petitioner ran into a few people that saw them at the gas station and the club Bleau. However, trial counsel failed to locate or interview promising witnesses that would have placed the petitioner at these places with Vito McKie at the time of Donald Sutton death. Trial counsel had no reason to believe that these witnesses would not be any valuable in securing the petitioner release. Therefore, trial counsel denied the petitioner effective assistance of counsel. Montgomery v. Petersen, 846 F.2d 407 (7th.cir). [Tr. 601, 602, 603, 604].

See also Tosh v. Lockhart, 879 F.2d 412 (8th. cir. 1989), and (quoting U.S v. Dawson, 857 F.2d 923 (3rd. cir. 1988). Further, in Tosh the Court of Appeals for the Eighth Circuit concluded that trial counsel was ineffectiveness for failure to locate promising witnesses that would have had a mitigating factor on the outcome of the defendant trial.

Trial counsel failed to subpoena the phone records of the FBI on the night of December 26, 1988, to determined whether Malloy in fact call the FBI office. Had these records been subpoena, these record would have refuted the testimony of Malloy when he stated that he call the officer of the FBI. Had these records been subpoena, it would have showed that Malloy in fact did not call the office of the FBI as he stated, [Tr. 74,75,76].

Malloy also stated that since he could not reach Agent Lisa Misicka by way of phone, therefore, he tried on numerous occasion to reach her by way of her beeper, [Tr. 77]. Had trial counsel subpoena Agent Lisa Misicka beeper records; it would have refuted the testimony of Malloy, that he tried to beep Agent Lisa Misicka on numerous occasion by way of her beeper to informed her that the petitioner was going to kill Donald Sutton. Therefore, trial counsel denied the petitioner effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984).

Malloy stated that he road with the petitioner to Barnes street, where he witness the petitioner shoot and kill Donald Sutton. Malloy also stated that he walk over to the body of Sutton to see if he was dead. Malloy stated after checking to see if Sutton was dead, he proceeded to walk toward his mother house....., he noticed that she wasn't there. Further, Malloy stated that he proceeded to his sister-in-law house and asked her for a ride home. [Tr. 35, 36].

Had trial counsel subpoena Malloy's sister-in-law, she would have testified that on the night of Donald Sutton death, she did not give her brother-in-law a ride home. Malloy's sister-in law also would have testified that she did not see Malloy the night of Sutton death. Therefore, trial Counsel violated the Compulsory Process Clause, which guaranteed a defendant the right to present witnesses, a right to secure attendance and testimony of witnesses whose testimony is both favorable and material to the defense. U.S v. Valenzuela-Bernal, 458 U.S. 858 (1982); Washington v. Texas, 388 U.S. 14 (1967). Therefore, trial counsel's performance was ineffectiveness, for failure to subpoena Malloy's sister-in-law.

ISSUE II. RIGHT TO TESTIFY

5) Petitioner concluded that on numerous occasion he requested to testify in his own defense, but during the duration of trial, trial counsel rejected the petitioner wishes. Trial counsel had no reason to reject the petitioner wish to testify, when the testimony of the petitioner would have refuted the testimony of the state most promising witness Malloy. Had the petitioner been allowed to testify, the petitioner would have testified that on the night of Donald Sutton death, he and Vito McKie was together from 8:30 oclock to 2:00 a.m the next morning. The petitioner also would have testified that he did not kill and nor did he have any wishes to kill Donald Sutton.

Petitioner conclude that had trial counsel not rejected his wishes to testify, the petitioner would have testified that Malloy did kill Donald Sutton and tried to kill him.

Further, the petitioner would have informed the court that Malloy did know Sutton and that Malloy and Sutton did robbed Thomas & Howard Wholesale. **[See pg 9,10,11 of the petitioner brief].**

Petitioner also conclude that had he been allowed to testify he would have corroborative the testimony of Arthur Robert and Rubin Eubanks had they been call to testify that Malloy thought

hat Sutton had his fiance to informed the police that Malloy was responsible for the robbery of Thomas & Howard Wholesale, but in -fact it was the petitioner's mother who informed the police that Malloy was responsible for the robbery. [See pg 13,15 of the pettitioner brief]. See U.S v. Teague, 908 F.2d 752 (11th. cir. 1990), in Teague, the defendant wanted to testify in his own defense, but dissuaded from doing so by his attorney. Following his conviction, the defendant moved for a new trial contending that it was improper for his attorney to refuse to put him on the stand. The Eleventh Circuit agrees: The defendant in a criminal case has a right to take the witness stand and to testify in his defense and this right cannot be waived by his attorney.

Where an inherently personal right to fundamental importance involved, the defendant's personal consent is required.

The right to be represented by counsel, the right to tried by a jury, and the right to appeal, are all rights which may be waived, but they must be waived by the defendant personally and the right to testify falls in that category.

Defendant right to testify: Logically included in right to present witnesses in his favor is defendant's right to testify

imself if he should decide it is in his interest to do so. Rock v. Arkansas, 483 U.S. 44 (1987)(per se exclusion of defendant's hypnotically enhanced testimony violated Confrontation Clause). Although defendant must know of his right to testify to waive it, trial court need not advise defendant of right and secure waiver on record. U.S v. McMeans, 927 F.2d 162 (4th. cir. 1991). Statute requiring that defendant testify first if he desires to testify impermissibly burdens privilege against self-incrimination and right to due process. Brooks v. Tennessee, 406 U.S. 605 (1972). But right to testify is not unconstitutionally chilled by judge's consideration of false testimony in fixing sentence. United States v. Grayson, 438 U.S. 41 (1978).

ISSUE III. **BRADY VIOLATION**

6) Petitioner conclude that the government held exculpatory evidence that was favorable to the accused, this however, violated the petitioner due process where there is reasonable probability that result of the proceeding would have been different, had evidence been disclosed to the defense. U.S v. Bagley, 473 U.S. 667 (1985). Petitioner conclude that the prosecutor intentionally with held the forensic expert, Lt. Sulton report that the tire impression that was found at the scene and near the body of Sutton

as not from the petitioner car. Had the jury been aware of this fact, this fact would have created reasonable probability that the outcome of the trial would have been different, where no physical evidence linked the defendant to the crime.

Reasonable probability that disclosure of evidence would have changed result requires probability sufficient to undermine confidence in outcome. Bagley, 473 U.S. at 682; see Jean v. Rice, 945 F.2d 82 (4th. cir. 1991).

Petitioner also conclude that the prosecutor did not disclosure all plea agreement of their witnesses. When reliability of witness may be determinative of guilt or innocence, nondisclosure of evidence that affects credibility is denial of due process. United States v. Giglio , 405 U.S. 150 (1972). In U.S v. Powell, 886 F.2d 81 (4th. cir. 1989)(although government has a duty to make good faith effort to discover and disclose alleged Brady material failure to abide by requirement will not require reversal where defendant unable to show information sought was material).

ISSUE IV. **DID THE TRIAL COURT ERRED IN GIVEN THE ALLEN CHARGES INSTRUCTION**

The petitioner argue.....that the supplemental instruction, given by the trial court to the jury after the jury returned from their hotel rooms the next morning, was improper. given.

Instruction Given: Good morning, Mr. Foreman and Ladies and Gentlemen. I hope you rested reasonably well this past evening. Mr. Foreman, Ladies and Gentlemen, if you will give me your attention. I have instructed you previously that you, the jury are sole judges of facts in this case and this court is the sole judge of the law of this case. I also further instructed you that I am not permitted by law to give you any indication whatsoever as to what your verdict should or ought to be in a particular case and I do not do so at this time. It is the duty of the court to state the law of the case to you and it is the duty of the jury to resolve the facts in this case. You know, the only mode provided by our constitution and laws for deciding questions of fact in criminal cases, and this is what this is, is by the verdict of a jury. In a large proportion of cases and perhaps strictly speaking in all cases absolute certainty cannot be attained or expected although the verdict to which a juror agrees must, of course, be his or her own convictions and not a mere acquiescence in the conclusions of the other to bring twelve minds to a unanimous result you must examine the questions that are submitted to you with candor and with a proper regard and with deference to the opinions of each other. You should consider that the case must at some time be decided, that you are selected in the same manner, from the same course which any future jury must be selected. And there is no reason to suppose that the case will ever be submitted to twelve individuals more intelligent

more impartial or more competent to decide this issue or that more or clearer evidence will be produced on the one side or the other. With this view it is your duty to decide the case if you can conscientiously do so. In order to make a decision more practical the law imposes the burden of proof on one party or the other in all cases. And in the present case as I have previously instructed you the burden of proof is upon the State of South Carolina to establish every part of it beyond a reasonable doubt. And if in any part of it you are left in doubt the defendant is entitled to the benefit of the doubt and must be acquitted. But if in conferring together you ought to proper respect to each other's opinions and listen with a disposition to be convinced to each other's arguments.

Now, as I have previously instructed you, if the state has failed to prove the guilt of this defendant beyond a reasonable doubt, then your verdict should be not guilty. If the state has proved the guilt of this defendant beyond a reasonable doubt, then your verdict should be guilty. So, with that instruction I'm going to ask you to retire to the jury room to deliberate on the verdict in this case and see if you cannot reach a conclusion in this case. [Tr. 1113,1114,1115].

:he petitioner conclude that after six hours of deliberation and an over sleep, went beyond the permissible limits and represented "an unwarranted intrusion by the court upon the province of the jury." While the Supreme Court in Allen v. U.S, 164 U.S. 492, 17 S. Ct. 154, 41 L. Ed. 528 (1896) established the right of a federal trial judge to give additional instructions to a jury, after that jury had deliberated for a reasonable time, in an effort to assist the jury in reaching a unanimous verdict, the practice, and particularly the phrasing of the Allen instructions have been the subject of considerable criticism since. It would unnecessarily add to this opinion to review these criticisms. Sufficeth that these criticisms have prompted a number of courts to reject entirely the "Allen charge" as improperly coercive and to have ıfluenced the drafters of the ABA Standards from Criminal Justice to recommend categorically that "the Allen charge....should not be used." It is true that the courts have never found the use of "the Allen charge" itself, when confined strictly to the language of Allen, and not enlarged or expanded upon to be reversible per se, but in U.S v. Rogers, 289 F.2d 433 (4th. cir. 1961), the Court of Appeals for the Fourth Circuit cautioned that the instructions in Allen "approach[ed] [in U.S v. Sawyers, 423 F.2d 1335 (4th. cir.1970) is one of the leading case in the Fourth Circuit Court of Appeals at this point] this circuit would like the Allen type

charge given here better if it did not mirror so exactly the language of the original Allen charge," and this circuit strongly recommend[ed] use of a modern version of Allen that include[d] that part of recommendation of the Judicial Conference italicized in footnote 7," which was "better balanced and fairer." In U.S v. Davis, 481 F.2d 425 (4th. cir. 1973). Moreover, here in State v. Tillman, the trial judge was aware of the jury been hung that evening, and informed the prosecutor and the defense of its finding. However, the trial judge informed the state and defense that he would bring the jury back in the next morning and give them the Modified Allen Charge and then send them back to deliberate. [Tr. 1111]. The next morning the court addressed the state and defense to see if they had any objection. There was no objection from the state, but however, the defense did object and asked the court to re-consider allowing the jury to continue deliberating, over the objection of the defense, the court gave the the modified Allen charge. [Tr. 1112]. One hour and nineteen minute later the jury returned a verdict of guilt to the petitioner. See, United States v. Mitchell, 720 F.2d 370 (4th. cir. 1983) also see United States v. Smith, 353 F.2d 166 (4th. cir. 1965).

ISSUE V. INEFFECTIVE ASSISTANCE OF COUNSEL DUE TO A CONFLICT OF INTEREST

Petitioner Tillman conclude that his trial counsel performance created a conflict of interest, violating his Sixth Amendment right to be free of....a conflict of interest.

Furthermore, trial counsel misconduct was so serious that counsel was not functioning as the counsel that is guaranteed by the Sixth Amendment. Strickland v. Washington, 466 US 668 (1984).

Trial counsel deliberately knowingly and intentionally concealed his representation of the state most and promising witness Malloy. Trial counsel held this knowledge from the petitioner.

Petitioner conclude that after further investigating he learn hat trial counsel had represented the witness Malloy in the assault and shooting in the petitioner place of business. At trial Mr. Jack Swerling asked Malloy if he was barred from the petitioner's place of business, Malloy answer was no. However, trial counsel knew what the stipulation was, since he was the attorney who represented Malloy. Moreover, trial counsel failed informed the court that Malloy lied about the agreement that him and the State of South Carolina entered into. Further, trial counsel failed to informed the court that he was the attorney

ıo represented Malloy in obtaining that agreement from the state prosecutor office. [Tr. 261].

A defendant has a right to effective assistance of counsel includes the right to representation free from a conflict of interest. Mitchell v. Maggio, 679 F.2d 77 (5th. cir. 1982).

In U.S v. McLain, 823 F.2d 1457 (11th. cir. 1987), the defendant's counsel was under investigation by the same United States attorney's office prosecuting the defendant. Finding an actual conflict of interest, the Eleventh Circuit concluded that counsel was under an ethical obligation to inform his client of the investigation and the possibility that it would affect his judgment.

Therefore, like the case at hand, the petitioner conclude that ꜱ trial counsel Jack Swerling have an ethical obligation to informed the petitioner that he represented state witness Malloy in the proceeding of the shooting in the petitioner place of business. Holloway v. Arkansas, 435 U.S. 475 (1978).

Petitioner conclude that the performance of trial counsel was adversely affected, for two reason.

1) That trial counsel failed to informed the court that he represented Malloy in a situation whereas the petitioner

rought charges against Malloy for shooting inside his place of business and that trial counsel failed to bring his representation of Malloy to the trial judge.

2) That trial counsel failed to subpoena the petitioner most and promising witnesses who would had refuted the testimony of Malloy. Trial counsel also failed to question Malloy about the Stipulation of the shooting of the petitioner's place of business that he received for Malloy, while being Malloy attorney. Trial counsel also failed to question Malloy about failing of the polygraph test and that trial counsel failed to subpoena Polygraph Examiner John Burnette. Officer John Burnette been subpoena he could have informed the court, as to how many polygraph test did he administer to Malloy and had trial counsel subpoena officer John Burnette he could testified, if Malloy failed each and everyone of them. Therefore, if trial counsel had informed the court on his representation of Malloy (i.e) this would have gave the court inopportuneness to question the attorney for the defense and also question the petitioner about an probability of a conflict of interest.

Petitioner argues that the actual conflict was trial counsel Jack Swerling's simultaneous representation of him in his criminal

.rial and representing Malloy in his criminal case that the petitioner brought-forth against Malloy for shooting in his place of business. Petitioner contends that trial counsel necessarily faced divided loyalties when he cross-examined his client Malloy at the petitioner's trial, especially as the matters were so closely related. At the petitioner's trial, trial counsel argued that the petitioner did not kill Donald Sutton on December 26, 1988. However, trial counsel failed to be aggressive in questioning Malloy about whether he was the individual who actual kill Donald Sutton are was he really trying to kill the petitioner when he shot inside the petitioner's place of business.

However, trial counsel failed to be aggressive in his questioning of Malloy and trail counsel also failed to asked Malloy bout incidence that led up to the shooting that took place at the petitioner's place of business.

Petitioner argues that this structural conflict tempered of Swerling's representation during the criminal proceedings and at trial never raised the issue either with the petitioner or the state court that he had represented Malloy in a situation against the petitioner. McConico v. State Of Ala, 919 F.2d 1543 (5th.cir.1990).

Had trial counsel had any doubt about the possibility of

onflict, he could have raised it with his client or the trial court, but he did not. By placing himself between two adverse parties and actively representing both, "counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties." Strickland 104 S.Ct. at 2067.

ISSUE VI. **TRIAL JUDGE ABUSED ITS DISCRETION**

Petitioner conclude that the trial judge abused his discretion when he allowed the prosecutor to introduce one of their witness Mr. Hall as in expert in forensic. Mr. Hall had testified that he was a manager for Goodyear Tire and Rubber Company and that he have no experience in forensic and that he have never testify in any criminal trial at being in expert in forensic.

However, the trial court accepted Mr. Hall as an expert and allowed him to testify in matter that he had no experience in. [Tr. 500-504]. Therefore, trial court abused its discretion and this court should view this issue as plain error.

CONCLUSION

The petitioner concluded for the forth-going reason set forth herein and above, petitioner respectfully requests that this court reverse the conviction entered in the case of State v. Tillman, and remand the case back to the Fifth Judicial Circuit for the State of South Carolina to vacate the conviction or in the alternate remand for a new trial.

Respectfully Submitted

Mr. Ronald S. Tillman

Ronald S, Tillman

CERTIFICATE OF SERVICE

I, Ronald S, Tillman hereby certify that I have on this 10 day of June 1995. Foreward a true and correct copy of the foregoing brief by placing same in the United States Mail with the proper postage affixed thereto, the Fifth Judicial Circuit Courthouse, P. O. Box 644, Columbia, South Carolina 29202.

Respectfully Submitted

Ronald S. Tillman

Ronald S, Tillman
F.R.N. 85375-071
Box PMB
Atlanta, GA 30315

Ronald S, Tillman
F.R.N. 85375-071
Box PMB

in propria persona

95 JUL 17 AM 10:06
BARBARA A. SCOTT
C.C.C. & C.S.

THE STATE OF SOUTH CAROLINA
FIFTH JUDICIAL CIRCUIT

RONALD S, TILLMAN,	)	
	)	
Petitioner/Defendant,	)	
	)	Case No. 89-GS40-0745
v.	)	
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Plaintiff/Respondent.	)	
	)	

AFFIDAVIT IN SUPPORT

Ronald S, Tillman states under penalty of perjury:

1) That I am the petitioner in the above-entitled case. I made this affidavit in support of my motion for post-conviction relief.

2) That the petitioner states that he did not kill, one Donald I, Sutton, nor did he have anything to do with the death of Donald I, Sutton.

3) That the petitioner states that he asked for a polygraph test to be administer to him, to prove his innocence, but his request was denied.

4) Petitioner conclude that had Honorable Judge Rushing been aware of Malloy failing the polygraph test that was administer by Officer John Burnette, maybe the Honorable Judge Rushing might have investigated into the matter at hand to determine how mant polygraph test that was administer to Malloy and to determine if he failed each one that was administer to him.

5) Petitioner conclude that the death of two innocence victim Clarence McKay and Caroline Swinson could have been avoided if the prosecutor had not held exculpatory evidence from the trial court and the defense. Had this evidence not been held from the trial court and the defense, it would had shown that Malloy did shoot and kill Donald I, Sutton. This evidence would also have shown that Ronald S, Tillman did not kill one Donald I, Sutton.

6) Petitioner conclude that the prosecutor allowed another convicted felon Clarence Well to walk free in his aid to convict an innocence man Ronald S, Tillman. However, socie[ty] was not put on notice when these two convicted felon was release back into social environment. Moreover, Ms. Beth West became another victim of Clarence Well, as she was assaulted

'icious and robbed by Clarence Well. However, the court heard Clarence Well state to the court that he was there to testify truthfully against Ronald Tillman and that he was not going to commit any other crime. However, Ms. Beth West found-out the hard way, when she was vicious beating by Clarence Well.

How often would societ[y] have to suffer from the mistake of the solicitor's office, just to convict an innocent...man, with the aid of vicious criminal like Hayes Malloy and Clarence Well.

Justice Harlan the Supreme Court Judge....stated in U.S v. in re Winship. Justice Harlan noted that the standard is "bottomed on fundamental value determination of our socie[ty] that it far worse to convict an innocent man than to let a guilty man go free." Id at 372.

Petitioner conclude that had his trial attorney subpoena his most and promising witnesses they would have enlighten the court that Hayes Malloy did shoot and kill Donald Sutton. They also would have enlighten the court that Ronald Tillman did not shoot Donald Sutton.

10) Had trial counsel subpoena Malloy's mother and brother that would have enlighten the court that Malloy kill Sutton.

11) Had trial counsel question Donald Sutton's mother she would have enlighten the court that Malloy kill her son, and not Ronald S, Tillman.

12). Petitioner conclude that had this evidence been submitted to the court, Malloy would not have been release back into societ[y] along with Clarence Well to prey upon other victims for there life.

13) However, the solicitor's office play a [Russian Roulette] game the victims that suffer from the hand of the state two promising witnesses, Hayes Malloy and Clarence Well.

14) Petitioner Ronald Tillman stated that he also.....is a innocent victim that was caught - up in the web of the solicitor game of [Russian Roulette] by allowing Hayes Malloy to walk free from a murder crime that he truly conmitted, with the aid of another convicted felon Clarence Well. How long must I, alone with socie[ty] have to suffer for the mistake of the Solicitor's office.

WHEREFORE, the petitioner pray that this honorable court will reversed the conviction of the petitioner or in the alternative, remanded the case back to Fifth Judicial Circuit Court for the State of South Carolina for an evidentary hearing.

DECLARATION

I, Ronald S, Tillman declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge. Signed this 10 day of June 1995.

CERTIFICATE OF SERVICE

I, Ronald S, Tillman hereby certify that a true and correct copy of the foregoing pleading have been foreward by United States Mail, this 10 day of June 1995, to the Fifth Judicial Circuit Courthouse, Columbia, South Carolina 29201

Respectfully Submitted

Mr. Ronald S Tillman

Ronald S, Tillman
F.R.N. 85375-071
Box PMB
Atlanta, GA 30315

1392

ARREST WARRANT

E- 387192

STATE OF SOUTH CAROLINA

☐ County/ ☐ Municipality of [illegible]

THE STATE

against

[illegible] BARRY ENGLISH

Address: _____

Name: _____ SSN: [illegible]

Race: [illegible] Height: [illegible] Weight: _____

State: _____ DL #: _____

[illegible]: [illegible] Agency ORI #: [illegible]

Executing Agency: [illegible]

Executing Officer: [illegible]

Offense: [illegible]

Offense Code: [illegible]

Code/Ordinance Sec. [illegible]

This warrant is CERTIFIED FOR SERVICE in the County/☐ Municipality of _____. The accused to be arrested and brought before me to be [illegible] with according to law.

_____ (L.S.)

Signature of Judge

RETURN

A copy of this arrest warrant was delivered to defendant WELLS, CLARENCE 12-26-94

[illegible]

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

STATE OF SOUTH CAROLINA)
☐ County/ ☐ Municipality of)
RICHLAND)

AFFIDAVIT

Form Approved by S.C. Attorney General July 26, 1990 SCCA 518

Personally appeared before me the affiant [illegible] who being duly sworn deposes and says that defendant WELLS, CLARENCE [illegible] did within this county and state on 12/22/94 violate the criminal laws of the State of South Carolina (or ordinance of ☐ County/☐ Municipality of _____) in the following particulars:

DESCRIPTION OF OFFENSE: ARMED ROBBERY 16-11-[illegible]

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

THAT ON OR ABOUT DECEMBER 26, 1994 IN THE [illegible] OF RICHLAND COUNTY ONE CLARENCE WELLS DID COMMIT THE CRIME OF ARMED ROBBERY IN THAT AFTER ASSAULTING THE VICTIM BATH WEST ABOUT THE BODY DID TAKE FROM HER A POCKET BOOK THAT CONTAINED VARIOUS CREDIT CARDS AND TEN DOLLARS CASH. SUBJECT WAS [illegible] WITH SEVERAL OF THE VICTIMS CREDIT CARDS ON HIS PERSON. OFFENSE TOOL PLACE AT 1501 BLUFF RD (GAZ. PAH). SUBJECT HAS BEEN IDENTIFIED IN A LINE UP AFFIANT AND OTHER ARE WITNESS TO THOSE CAME.

Sworn to and subscribed before me on 12/26/94)

_____ (L.S.)

Signature of Issuing Judge

Signature of Affiant

Affiant's Address [illegible]

Affiant's Telephone [illegible]

RECEIVED
DEC 29 1994
CLERK OF COURT
CRIMINAL RECORDS

STATE OF SOUTH CAROLINA)
☐ County/ ☐ Municipality of)
RICHLAND)

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that on 12/22/94 defendant WELLS, CLARENCE [illegible] did violate the criminal laws of the State of South Carolina (or ordinance of ☐ County/☐ Municipality of _____) as set forth below:

DESCRIPTION OF OFFENSE: ARMED ROBBERY 16-11-[illegible]

Now, therefore, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable.

_____ (L.S.)

Signature of Issuing Judge

Judge Code: [illegible]

Judge's Address _____

Judge's Telephone _____

Issuing Court: ☐ Magistrate ☐ Municipal ☐ Circuit

ARREST WARRANT

E-142672 9415542

STATE OF SOUTH CAROLINA

[ ] County/ [X] Municipality of COLUMBIA

THE STATE

against

HAYES MALLOY
1439 BONNER
LUMBIA SC 29204

SSN:

e: B Height: 6 00 Weight: 210

D'L#:

01/11/65 Agency ORI#: SC0400100

ing Agency: CITY OF COLUMBIA

ing Officer: SOL: GASSER/RICE

MURDER

Offense Code: HOM

dinance Sec: 16-3-10

arrant is CERTIFIED FOR SERVICE in the nty/ [X] Municipality of OLUMBIA. The accused be arrested and brought before me to be according to law.

(L.S.)

Signature of Judge

RETURN

of this arrest warrant was delivered to

5-14-94

Hayes Malloy

nature of Constable/Law Enforcement Officer

WARRANT TO:

STATE OF SOUTH CAROLINA)
[ ] County/ [X] Municipality of)
COLUMBIA)

AFFIDAVIT

Form Approved by S.C. Attorney General July 26, 1990 SCCA 518

Personally appeared before me the affiant S O RICE who being duly sworn deposes and says that defendant HAYES MALLOY did within this county and state on 05/14/94 violate the criminal laws of the State of South Carolina (or ordinance of [ ] County/ [X] Municipality of COLUMBIA) in the following particulars:

DESCRIPTION OF OFFENSE: MURDER 16-3-10

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

DEFENDANT DID WHILE AT 2511 CHESTNUT ST, IN THE CITY LIMITS OF COLUMBIA, SC, SHOOT THE VICTIM, CLARENCE MCKAY, ONCE IN THE RIGHT RIB AREA. THE VICTIM DIED AS A RESULT OF HIS WOUND. DEFENDANT WAS IDENTIFIED IN A PHOTO-LINE UP.

Sworn to and subscribed before me on 05/14/94)

M. G. Tearley (L.S.)

Signature of Issuing Judge

Ministerial Recorder

S O Rice

Signature of Affiant

Affiant's Address CPD

Affiant's Telephone

RECEIVED JUL 18 1994 CLERK OF COURT CRIMINAL RECORDS

STATE OF SOUTH CAROLINA)
[ ] County/ [X] Municipality of)
COLUMBIA)

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that on 05/14/94 defendant HAYES MALLOY did violate the criminal laws of the State of South Carolina (or ordinance of [ ] County/ [X] Municipality of COLUMBIA) as set forth below:

DESCRIPTION OF OFFENSE: MURDER 16-3-10

Now, therefore, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable.

M. G. Tearley (L.S.)

Judge Code 403003

Ministerial Recorder

Judge's Address CITY OF COLUMBIA, SC MUNICIPAL COURT, P.O. BOX 644 29202

Judge's Telephone

Issuing Court: [ ] Magistrate [X] Municipal [ ] Cir

1393

ARREST WARRANT

E-142688

STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of

COLUMBIA

THE STATE

against

HAYES MALLOY

dress: 1439 BONNER

COLUMBIA SC 29204

ne: _____ SSN: _____

: Race: B Height: 6 00 Weight: 210

State: _____ DL#: _____

B: 01/11/65 Agency ORI#: SC0400100

ecuting Agency: CITY OF COLUMBIA

ecuting Officer: SGT.; GASSER/RICE

ense: MURDER

Offense Code: HOM

te/Ordinance Sec. 16-3-10

s warrant is CERTIFIED FOR SERVICE in the ☐ County/ ☒ Municipality of COLUMBIA. The accused to be arrested and brought before me to be lt with according to law.

_____ (L.S.)

Signature of Judge

RETURN

:opy of this arrest warrant was delivered to

ndant L Hayes Malloy

05-14-94

V.J. Mikeska

Signature of Constable/Law Enforcement Officer

URN WARRANT TO:

STATE OF SOUTH CAROLINA

☐ County/ ☐ Municipality of

COLUMBIA

AFFIDAVIT

Form Approved by S.C. Attorney General July 26, 1990 SCCA 518

Personally appeared before me the affiant S O RICE who being duly sworn deposes and says that defendant HAYES MALLOY did within this county and state on 05/14/94 violate the criminal laws of the State of South Carolina (or ordinance of ☐ County/ ☒ Municipality of COLUMBIA) in the following particulars:

DESCRIPTION OF OFFENSE: MURDER 16-3-10

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

DEFENDANT DID WHILE AT 2511 CHESTNUT ST, IN THE CITY LIMITS OF COLUMBIA, SC, SHOOT THE VICTIM, CAROLINE SWINSON, ONCE IN THE CHEST AREA. THE VICTIM DIED AS A RESULT OF HER WOUND. DEFENDANT WAS IDENTIFIED IN A PHOTO-LINE UP BY WITNESSES.

RECEIVED

MAY 18 1994

CLERK OF COURT

CRIMINAL RECORDS

Sworn to and subscribed before me on 05/15/94

M. G. Insley (L.S.)

Ministerial Recorder

S. O. Rice

Signature of Affiant

Affiant's Address CPD

Affiant's Telephone

RECEIVED

MAY 19 1994

CLERK OF COURT

CRIMINAL RECORDS

STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of

COLUMBIA

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF RICHLAND COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that on 05/14/94 defendant HAYES MALLOY did violate the criminal laws of the State of South Carolina (or ordinance of ☐ County/ ☒ Municipality of COLUMBIA) as set forth below:

DESCRIPTION OF OFFENSE: MURDER 16-3-10

Now, therefore, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable.

M. G. Insley (L.S.)

Signature of Issuing Judge

Ministerial Recorder

Judge Code: 4

Judge's Address CITY OF COLUMBIA, SC

MUNICIPAL COURT, P.O. BOX 644 29202

Judge's Telephone

Issuing Court: ☐ Magistrate ☐ Municipal ☐ Circuit

ORIGINAL

DOCKET NO. 91GS403357

The State of South Carolina,

County of Richland

#58

COURT OF GENERAL SESSIONS

June TERM 1991

THE STATE

vs.

Clarence Wells

MB 3/30/51

249-90-0896

Indictment for Larceny -Grand

16-1-10

WITNESSES

ARREST WARRANT NO. D 090836

ACTION OF GRAND JURY

Foreman of Grand Jury

VERDICT

Foreman of Petit Jury *Date:*

The prisoner Clarence Wells is not in the but and [illegible] is charged [illegible] Attest [illegible] C.C.P. & G.S. Date 6/26/91

X Clarence Wells

St McDow
Dep Mayor
Rep Joseph

0191 2368

1395

FORM 19 (12/87)

STATE OF SOUTH CAROLINA)
)
COUNTY OF Richland)

INDICTMENT FOR LARCENY -Grand

At a Court of General Sessions, convened on _____,

the Grand Jurors of _____ County present upon their oath:

COUNT ONE — GRAND LARCENY

That Clarence Wells

did in Richland County on or about June 8, 1991,

feloniously take and carry away the personal goods of Carolina Coalson,

of the value of more than Two Hundred Dollars, described as follows:

did take $1,455 in cash and sixteen checks

with intent to deprive the owner permanently of such property.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Richard A. Harpootlian
SOLICITOR

SENTENCE

U Larceny

STATE OF SOUTH CAROLINA

CASE NO. 91-GS-3357

Richland COUNTY

The defendant Clarence Wells is committed to the State Department of Corrections/County for a term of 5 ~~months~~/years, and/or to pay a fine of $_____; provided upon the service of _____ months/years and/or payment of $_____, plus pay/waive costs and assessments as applicable*, ~~the balance suspended with probation for~~ _____ months/years.

Restitution $ was removed For physical injury $_____

Yes/No property damage $_____

to be paid _____

_____

to clerk for _____.**

Other conditions Δ has testified in murder trial against Ron Tillman, should NOT be placed in maximum security institution; commitment of parole revocation

Date 6/26/91

Carl A
Presiding Judge

*Costs and Assessments

Non-waivable $_____

Not waived $_____

Total $_____

Barbara O Scott
Clerk of Court

**Pay to Victim's Compensation Fund if subrogated.

SCCA Form 217 (3/86)

1398

DOCKET NO. 93-GS-40-0363

The State of South Carolina,

County of RICHLAND

COURT OF GENERAL SESSIONS

#74 AUGUST 1993 TERM

THE STATE

vs.

CLARENCE WELLS

MB 3/30/93

249 90 2836

WITNESSES

L. Thornton/SCDC

ARREST WARRANT NO. D567407

ACTION OF GRAND JURY

Foreman of Grand Jury

VERDICT

Foreman of Petit Jury Date:

Indictment for Escape

S.C. CODE SEC. 24-13-410
F FELONY

The prisoner Clarence Wells is put to the bar and arraigned and upon his arraignment pleads guilty to the charge of Indictment being submitted to the Grand Jury and consents to plead without the within indictment waives [illegible] and a true bill [illegible] thereon, and specifically the said plea. [illegible] submitted to a Grand Jury before he enters [illegible]

Witness: [illegible] C.C.C.P.C.G.

Date 8/30/93

ST: Rashley
Def: MB Mills

0004 1058

FORM 26 (12/87)

STATE OF SOUTH CAROLINA)
) INDICTMENT FOR ESCAPE
COUNTY OF RICHLAND)

At a Court of General Sessions, convened on _____,

the Grand Jurors of _____ County present upon their oath:

COUNT ONE — ESCAPE

That CLARENCE WELLS

did in Richland County on or about December 22, 1992,

unlawfully escape or attempt to escape from lawful confinement or custody, to wit: _____

Campbell Work Center.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

_____
SOLICITOR

1400

ARREST WARRANT

D-567407

STATE OF SOUTH CAROLINA

☐ County/ ☐ Municipality of

THE STATE

against

CLARENCE WELLS

Address: SCDC Campbell Wk Release Ctr. Colu, S.C.

Phone: SSN 249-90-0836

Sex M Race B Height 5'11" Weight 190

DL State DL#

DOB 3-30-51 Agency ORI#

Prosecuting Agency SC Dept of Corrections

Prosecuting Officer

Offense

Offense Code

Code/Ordinance Sec

This warrant is CERTIFIED FOR SERVICE in the ☐ County/ ☐ Municipality of

The accused is to be arrested and brought before me to be dealt with according to law

(L.S.)

Signature of Judge

Date

RETURN

A copy of this arrest warrant was delivered to defendant CLARENCE WELLS on 4 Jan 93

Mary Bragg

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

STATE OF SOUTH CAROLINA

☐ County/ ☐ Municipality of

AFFIDAVIT

Form Approved by S.C. Attorney General July 25, 1990 SCCA 318

Personally appeared before me the affiant L. Thornton / SC Dept of Corr who being duly sworn deposes and says that defendant Clarence Wells did within this county and state on 12-22-92 violate the criminal laws of the State of South Carolina (or ordinance of ☐ County/ ☐ Municipality of) in the following particulars:

DESCRIPTION OF OFFENSE: Escape

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts

That on 12-22-92 about 4 pm one Clarence Wells SCDC #155723 Did Escape the lawful Custody of Campbell work Center in Richland County. The defendent ~~was~~ is serving a 5 year sentence ABHAN + Strong Arm Robbery and Grand Larceny. Defendant left from a work site at the Salvation Army thus leaving Custody

Sworn to and subscribed before me on 12-23-92

Louis A. Thornton

Signature of Affiant

Affiant's Address 4530 BROAD RIVER RD. COLUMBIA SC 29210

Affiant's Telephone 737-85-60

Mel Maurer (L.S.)

Signature of Issuing Judge

RECEIVED

JAN 8 1993

CLERK OF COURT CRIMINAL RECORDS

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of Richland

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that on 12-22-92 defendant Clarence Wells did violate the criminal laws of the State of South Carolina (or ordinance of ☐ County/ ☐ Municipality of) as set forth below:

DESCRIPTION OF OFFENSE: Escape

Now, therefore, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable

Mel Maurer (L.S.)

Signature of Issuing Judge

Judge Code 463

Judge's Address 1223 St Andrews Rd Columbia SC 29210

Judge's Telephone 772-6464

Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

ORIGINAL

0004 0060

2900 4000

SENTENCE Escape

STATE OF SOUTH CAROLINA

CASE NO. 93GS-363

Richland COUNTY

The defendant Clarence Wells is committed to the State Penitentiary Department of Corrections/County for a term of 6 months/years and/or to pay a fine of $_____; provided upon the service of _____ months/years and/or payment of $_____, plus pay/waive costs and assessments as applicable*, the balance suspended with probation for _____ months/years.

Restitution

Yes/No

to be paid _____

_____

to clerk for _____.**

For physical injury $_____

property damage $_____

Other conditions _____

_____

_____

Date 8-30-93

Presiding Judge

*Costs and Assessments

Non-waivable $_____

Not waived $_____

Total $_____

Barbara A Scott
Clerk of Court

**Pay to Victim's Compensation Fund if subrogated.

SCCA Form 217 (3/86)

1402

ACTION OF GRAND JURY

TRUE BILL

Willie Johnson
Foreman of Grand Jury

VERDICT

Foreman of Petit Jury Date:

MB
DOB: 1-11-65
SSN: 097-56-5412

Indictment for Driving Under Suspension SECOND OFFENSE
SC CODE SECTION 56-1-460
Misdemeanor

S. Jones
D. Prose
R. Clinton

... put to the bar ... arraigment pleads ...
ATTEST:
Barbara A. S.
Clerk of Court
11-15-93

FORM 12 (12/87)

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

INDICTMENT FOR DRIVING UNDER SUSPENSION SECOND OFFENSE

At a Court of General Sessions, convened on SEPTEMBER 22, 1993, the Grand Jurors of RICHLAND County present upon their oath:

COUNT ONE — DRIVING UNDER SUSPENSION

That HAYES MALLOY did in RICHLAND County on or about JUNE 26, 1993, drive a motor vehicle on a public highway of this State when his license to drive was suspended, such not being the first such offense within a period of five years including and immediately preceding the foregoing date.

PRIOR: 03-22-92

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

SOLICITOR

DUS and

SENTENCE

STATE OF SOUTH CAROLINA

Richland COUNTY

CASE NO. 93-GS-16943

The defendant Hayes Malloy is committed to the State Department of Corrections/County for a term of 60 DAYS months/years and/~~or~~ to pay a fine of $ 500.00 ; provided upon the ~~service of~~ _____ ~~months/years and/or~~ payment of $ 300.00 , plus pay/waive costs and assessments as applicable*, the balance suspended with probation for 6 months/~~years~~.

Restitution

Yes/No

to be paid _____

_____

to clerk for _____.**

For physical injury $_____

property damage $_____

Other conditions _____

_____

_____

Date Nov 15 93

J. Ernest Kinard
Presiding Judge

*Costs and Assessments

Non-waivable $_____

Not waived $_____

Total $_____

Barbara A Scott
Clerk of Court

**Pay to Victim's Compensation Fund if subrogated.

SCCA Form 217 (3/86)

B-128 1626

WITNESSES

#06

ARREST WARRANT NO. B786600

ACTION OF GRAND JURY

TRUE BILL

Harry J. Knight Jr.

FOREMAN OF GRAND JURY

VERDICT

FOREMAN OF PETIT JURY DATE:

DOCKET NO. 89GS400738

THE STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

COURT OF GENERAL SESSIONS

FEBRUARY TERM 1989

THE STATE

vs.

HAYES MALLOY

INDICTMENT FOR
ASSAULT AND BATTERY
WITH INTENT TO KILL
~~XANDXCARRYING~~
~~CONCEALED WEAPON~~

S. C. Code C/L 17-25-20

(013)

DR

Nolle Prosse
[signature] C. Ackerman
6-19-89

0065 0783

FORM 8 (9/86)

STATE OF SOUTH CAROLINA)
) INDICTMENT FOR ASSAULT AND BATTERY WITH INTENT TO KILL
COUNTY OF RICHLAND)

At a Court of General Sessions, convened on February 9, 1989, the Grand Jurors of Richland County present upon their oath:

COUNT - ASSAULT AND BATTERY WITH INTENT TO KILL

That HAYES MALLOY did in Richland County on or about December 28, 1988, with malice aforethought commit an assault and battery upon one Corinthian A. Hampton with intent to kill the said victim.

COUNT TWO - CARRYING CONCEALED WEAPON

That _____ did in _____ County on or about _____, carry concealed about his person a deadly weapon, to wit: _____.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

James C. Allen
SOLICITOR

STATE OF SOUTH CAROLINA)
) ASSIGNMENT
COUNTY OF RICHLAND)

I hereby assign unto Furr & Delgado the sum of Seven Hundred Fifty and no/100 ($750.00) Dollars from the Appearance Recognizance Bond posted by Lessie Malloy with the Richland County Clerk of Court on behalf of Hayes Malloy for defending him on the criminal charges pending against him in Richland County, South Carolina on Arrest Warrant C249258, Receipt 23873 dated January 4, 1989.

Lessie Malloy

SWORN TO before me this
24th day of April, 1989.

Anita M. Floyd (L.S.)
Notary Public for South Carolina
My Commission expires: 3-23-94

I hereby authorize and require the Richland County Clerk of Court to disburse Seven Hundred Fifty and no/100 ($750.00) Dollars of the above Bond to Furr & Delgado for representation of Hayes Malloy.

Lessie Malloy

SWORN TO before me this
24th day of April, 1989.

Anita M. Floyd (L.S.)
Notary Public for South Carolina
My Commission expires: 3/23/94

THE STATE, COLUMBIA, S.C. MIDLANDS

Man gets life term in '

Defense says drugs made Malloy insane

By LISA GREENE
Staff Writer

Getting high on crack cocaine made Hayes Malloy crazy — so crazy he killed two people, his lawyer said Friday.

But a judge didn't buy the argument, and Malloy was sentenced to life in prison after a Richland County jury convicted him.

Malloy's lawyer, John Delgado, had asked Judge Joseph Wilson to let jurors consider finding Malloy not guilty by reason of insanity. Delgado said that a "crack-induced psychosis" had led Malloy to shoot Clarence McKay and Caroline Swinson in May 1994.

But Wilson said no, to the relief of 5th Circuit Assistant Solicitor Knox McMahon, who prosecuted the case with Assistant Solicitor Jack Riordan.

"It's unfortunate that people in our society commit homicide under the influence of crack, but it doesn't excuse the conduct," McMahon said.

Jurors considered only whether Malloy was guilty of murder. The prosecution's case included a confession by Malloy and a witness to one of the killings. It took jurors about 30 minutes to convict Malloy.

Before Wilson sentenced Malloy to life imprisonment, Delgado told Wilson that Malloy would never have taken a life if he had been sober. Delgado said he had known Malloy for years, having represented him and his family on traffic charges and other matters.

"I said, 'Oh no, not Hayes,' " Delgado said as he recalled learning of the shootings. "It was so out of character from what I knew.... It's unbelievable what happened."

Before being sentenced, Malloy begged his victims' families for forgiveness.

"Saying I'm sorry is never enough," he said. "I can only pray and ask God to touch your hearts to see that I'm truly sorry and that he heals your wounds."

Delgado said he plans to appeal whether crack-induced psychosis can cause insanity. Being legally insane means a person can't tell the difference between right and wrong.

"This case is an example for our community of how drugs can destroy lives," he said.

McMahon pointed out that the S.C. Supreme Court has allowed for defendants to argue that substance abuse has made them insane. But in that case, the defendant had permanent brain damage after prolonged drug abuse.

McMahon said Malloy's drug use didn't meet that standard. He said Delgado's argument would extend to almost anyone who committed a crime while drunk or high. "You'd have people saying, 'I want to do something wrong; let me go smoke some crack,' " he said.

/ STATE SATURDAY, JUNE 24, 1995 • B3

)4 Richland killings

Ronald S. Tillman
Reg. No. 85375-071
Post Office Box 1000
Lewisburg, PA 17837

October 12, 1990

Mr. Jack B. Swerling, Esq.
1720 Main Street, Suite 301
Columbia, South Carolina 29201

Re: Your Failure to Properly Maintain Communication with me regarding my Appeal

Dear Mr. Swerling:

I write at this time to inform you as to my sincere disapproval of the manner in which you have chose to totally ignore my many attempts to contact you. Moreover, you have also completely ignored my family's several requests to please return their calls.

In addition, I have, on several occasions, attempted to solicit answers to certain questions involving my trial and appeal, only to have my posed questions go unanswered or be informed that my call will not be accepted.

To be quite frank sir, the above described conduct on your part is in direct conflict with the standards set forth in the Cannon Code of Professional Responsibility; and, as my attorney, I expect you to demonstrate an acceptable degree of concern for my wishes.

Also, would you please advise me if the government has, as of yet, submitted their brief on appeal? Mr. Swerling, I have recently discovered some very pertinent information regarding this case as well as the State case that I need to discuss with you. Information of such a nature, if true, would completely exonerate me of the death of Donald Sutton. Now can you understand my need to converse with you?

Hopefully this period of indifference on your part regarding my case was a minor oversight, and I will not have to take any further corrective action. On the other hand, if you so choose to continue to completely ignore my correspondence, I will have be left with no other alternative.

With kind regards, I remain

Very truly yours,

Ronald S. Tillman

cc:

1410

Ronald Tillman
Reg. No. 83273-071
Post Office Box 1000
Lewisburg, PA 17837

August 16, 1990

Mr. John Edward
Richland County Sheriff's Dept.
1400 Huger Street
Columbia, S.C. 29201

Re: In the Matter of
TILLMAN, Ronald
Case # C296208

Dear Mr. Edward:

I write at this time in sincere hopes of obtaining your assistance in rectifying the terrible injustice that has befallen me.

Mr. Edward, I am sure you are familiar, and/or recall the Donald I. Sutton murder case. Although I was charged and convicted of committing this crime, the truth is, I did not kill Donald Sutton. I don't know if HAYES MALLOY actually killed Donald or not, because I was not there, but I do know that if you had someone that could befriend Hayes and drink alittle beer with him, he will tell the truth about what happened to Donald and who did kill him.

In short, if you was to give Hayes enough rope, he would surely hang himself. I know that Hayes has bragged to someone about what happened, especially since he feels that its over and I have been given the blame. Mr. Edward, I would like you to attempt to reopen the Donald Sutton murder case and bring the real killer to justice. If I could talk with you, I believe I can facilitate your investigation, therefore, is there any way that perhaps you could arrign a vist or accept a collect phone call ?

Mr. Edward, I am not an angel, nor do I claim to be, I have made a few mistakes in my life and I have always accepted responsibility for my actions, however, the killing of Donald Sutton is not mine to accept. Donald Sutton was my friend, I will die and go to hell before I let Hayes Malloy get away with Killing Donald.

Please advise me as to your decision as to whether or not you are going to look into what I have requested.

Sincerely yours,

Mr. Ronald S. Tillman

RONALD TILLMAN

cc:

June 3, 1994

Mr. Dick Harpootlian
Solicitor
Fifth Judicial Circuit
State of South Carolina
1701 Main Street
Columbia, S.C. 29201

Dear Mr. Harpootlian:

Please accept this open letter as being written in the interest of justice and to demonstrate the amount of community concern regarding the May 14, 1994 tragic shooting deaths of two Columbia residents by one Hayes Malloy. An individual in which local law enforcement personnel is quite familiar with; which raises the question as to why this violent-prone man has been allowed to remain at liberty for so long?

I, along with several others in 1989 advised your office as to Mr. Malloy's propensity for violence. In fact, Hayes Malloy was responsible for the death of my best friend, Donald I. Sutton on December 26, 1988. Yet, because of his smooth ability to fabricate and trade information for favorable treatment, he was allowed to accuse me of his crime and get away scot-free with the actual murder.

Moreover, this is not the only incident in which Malloy was able to elude justice. A brief perusal of this man's actual arrest record will reflect that on December 28, 1988, Malloy once again exhibited his propensity for violence by shooting yet another person at a club during a dispute. On another occasion, (late 1987 or early 1988), Malloy shot through a commercial business located on Sharp Road, Columbia, S.C., using a high-power rifle, endangering the lives of several people present. Yet, once again, for reasons unknown, your office refused to prosecute.

Thus, as a direct result of the inaction previously taken against this smooth talking, coldblooded killer, not only is an innocent man in prison for a crime that Malloy committed, but two more people have lost their lives at his hand.

In the interest of justice, I, along with my family and the family of Donald I. Sutton, as well as the community in which I live, respectfully ask that my case (#C296208) be reopened and the truth thereof revealed, and in doing so, bring to an end the violent killing spree of Hayes Malloy once and for all.

Mr. Harpootlian, I am willing, as well as several others to assist your office in reaching the truth of Donald I. Sutton's murder, which the final results will clearly show that it was indeed Hayes Malloy that actually killed Donald and not I. My family has spoken with several people in the community that is now willing to come forward and tell the truth concerning the death of Donald. People who, all before was afraid of coming forward in fear of Malloy.

Moreover, the Sutton family firmly believes that I did not have anything to do with the death of their son, and justice will never be served as long as Hayes Malloy avoids prosecution for killing Donald. In fact, during my trial, the Honorable Judge Russian clearly let it be known in no uncertain terms that he did not believe the story of Hayes Malloy.

In closing, if your office is interested in having justice prevail, and the people of Columbia knowing that they have a Solicitor that is fair and pursues the very concepts of justice, I am willing to come forward and share with your office the knowledge I have in regards to Hayes Malloy and hopefully, at the same time clear myself of this unjust conviction.

Please contact me in the event that you are interested in having the truth finally surface.

With kind regards, I am

Very truly yours,

Mr. Ronald S. Tillman

Ronald S. Tillman
Reg. No. 85375-071
P.O. Box P.M.B.
USP Atlanta,
Atlanta, GA 30315

cc: State Newspaper
Hon. Judge ~~Russian~~ Rushing
Sutton Family
Tillman Family

June 3, 1994

Mr. Clif LeBlanc
Staff Writer
The State Newspaper
1401 Shorp Road
Columbia, SC 29201

Re: Article of May 17, 1994
"Man's Mistake Leads To Death Of 2 People"
Page B-1

Dear Mr. LeBlanc:

My name is Ronald Tillman, and I have been trying to contact you since your story appeared. My reasons in contacting you are two-fold. First, and foremost, I would like to openly extend my condolence to the families of the two victims of Hayes Malloy's propensity for violence. Secondly, I sincerely hope that you are interested in knowing the true story regarding Malloy and his continued spree of violence with impunity because of his working relationship as a paid informant for both State and Federal authorities.

Mr. Malloy has an extensive record of violence and weapon related incidents. Yet, for reasons stated above, has never been held accountable for his conduct. Thus, as a direct result of law enforcement inaction, two more people have needlessly lost their lives.

I can say, without fear of contradiction that Hayes Malloy is a ruthless individual that has absolutely no respect for human life.

Indeed, during my trial, I attempted, via letters, to inform the proper authorities as to Malloy's viciousness, yet no one would listen. (See copies of letters attached herewith).

If you are interested in a real story, including dates, times, places, etc., I would be willing to agree to an interview with you. The people of Columbia has an absolute right to know that these lives could have been spared had Hayes Malloy been rightfully charged and convicted of the 1988 death of Donald I. Sutton, my neighbor and best friend; and also a victim of Malloy's ruthlessness.

If you would like to speak with me, please indicate this in advance and I will make the necessary arrangements.

I shall be looking forward to receiving your prompt response.

With kind regards, I am

Sincerely yours,

Ronald S. Tillman

Ronald S. Tillman
Reg. No. 85375-071
P.O. Box P.M.B.
USP Atlanta
Atlanta, GA 30315

cc: Tillman Family
Sutton Family

Man's mistake leads to deaths of two people

By CLIF LeBLANC
Staff Writer

The gunman in Saturday's shooting aths of two people fired because he ought someone in the house on Columbia's est Street had stolen his wallet during a g crack smoking.

That turned out to be a tragic mistake. The unman found his wallet at his home after ing a .30-06 rifle and running from police, uthorities said Monday. Clarence McKay, l, and Caroline Swinson, 39, died a few urs later at Richland Memorial Hospital.

Police blame the gunman's memory lapse on the cocaine.

McKay, owner of the house at 2511 Chestnut St., had vision problems, a speech impediment and was mildly retarded, 5th Circuit Solicitor Dick Harpootlian said Monday after a bond hearing. The landlord, who rented a room to a relative of one of the people at the house that night, came out of his room only to check on the commotion.

Circuit Judge Henry McKellar denied bond to Hayes Malloy, 29, of 1439 Bonner Ave., who's charged in the deaths.

Police said Malloy bought $125 of crack nearby for a party that began about 10 p.m. Friday at the house. Malloy, another man and three women began doing drugs.

"It looks like his intention was to give a little cocaine for a little sex, but it didn't turn out like that," said Capt. Charlie Clark, chief of detectives at the Columbia Police Department.

"The women told me to slow down (on the cocaine), but I couldn't resist," according to a statement Malloy gave to police that was read in court Monday afternoon.

Authorities theorized Saturday that the shooting was provoked by an argument over paying for drugs. In court Monday, however, the motive centered on Malloy's belief that his wallet had been stolen.

After partying into the early morning Saturday, the men left the house. Malloy told police he went home, took his wife to work and then went to get something to eat.

That's when he learned his wallet was missing.

The prosecution alleges Malloy blamed someone in the house and returned there, angry, to reclaim his wallet. The women told him they knew nothing about his wallet so he went outside and got the high-powered rifle from his vehicle.

PLEASE SEE **SHOOTING** PAGE **B5**

SHOOTING

FROM PAGE B1

The women saw him armed and coming toward the house so the two locked themselves in a bathroom, Clark said. The gunman kicked in the bathroom door.

That's when McKay emerged from his room to find out about the commotion and was shot.

Both victims were shot in the chest.

The other woman in the bathroom was forced at gunpoint to the porch after telling the gunman the wallet was there. She had planned to break free once outside, Clark said. About that time, police arrived and the gunman ran away.

Swinson was pronounced dead at 8:40 a.m. and McKay at 9:12 a.m.

Malloy had been a witness for the prosecution in a 1989 murder case and a 1988 armed robbery.

lloy was accused of murder in ...e shooting death of Donald "Duck" Sutton in a church ...ma... testimony helped convict Ronald Tillman.

The twisted plot had Tillman killing Sutton because Sutton had signed a statement implicating Tillman in a string of armed robberies, the solicitor's office said at the time.

Malloy also testified against Tillman in a federal bank robbery trial. Tillman and Tommy Lee Bynum were convicted.

Malloy's only drug offense occurred in February, when he was charged with having a small amount of marijuana in his possession, Harpootlian said.

1415

1416

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS 95-CP-40-2449
Ronald Tillman, 85375-071 Applicant, v. State of South Carolina, Respondent.	)	RETURN AND MOTION TO DISMISS

The Respondent, making its Return and Motion to Dismiss to the application for post-conviction relief filed July 17, 1995, would respectfully show this Court:

I.

The Applicant is presently confined in Atlanta, Georgia. The Applicant was indicted at the February, 1989, term of the Court of General Sessions for Richland County for murder (Indictment No. 89-GS-40-0745). He was represented by Jack B. Swerling, Esquire, and Jennifer Kneece Shealy, Esquire. On January 23, 1990, the Applicant proceeded to trial by jury at the conclusion of which Applicant was found guilty as charged. He was sentenced by the Honorable Don S. Rushing to life imprisonment.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Tillman, 304 S.C. 512, 405 S.E.2d 607 (1991). Petitions for Rehearing and Certiorari were denied on June 20, 1991, and September 5, 1991, respectively.

Attached herewith and incorporated herein by reference are the records of the Richland County Clerk of Court regarding the subject conviction.

II.

The Respondent submits that this application for post-conviction relief should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10, et. seq. S.C. Code Ann. § 17-27-45(a) reads as follows:

> An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgement of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

The Applicant was convicted of the offense(s) he challenges in this application on January 23, 1990. The Court of Appeal's decision affirming the conviction was filed on May 28, 1991, and the remittitur was sent down on September 9, 1991. This application was filed on July 17, 1995, well after the statutory filing period had expired.

The South Carolina Supreme Court has held that a motion for summary judgement may properly be used to raise the defense of statute of limitations. McConnell v. Consolidated School District of Aiken, ___ S.C. ___, 455 S.E.2d 638 (1994). Therefore, the Respondent requests that this Court summarily dismiss the application for post-conviction relief for failure to file within the time mandated by statute.

The Respondent therefore moves for summary dismissal pursuant to Section 17-27-20, Code of Laws of South Carolina (1976), on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing.

WHEREFORE, having made its Return, the Respondent requests that the Application for Post-Conviction Relief be summarily dismissed.

CHARLES MOLONY CONDON
Attorney General

JOHN W. McINTOSH
Deputy Attorney General

TERESA NESBITT COSBY
Assistant Deputy Attorney General

RUBY BRICE McCLAIN
Senior Assistant Attorney General

By: Ruby Brice McClain
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Columbia, South Carolina

October 6, 1995

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS
Ronald Tillman, 85375-071, Applicant, v. State of South Carolina, Respondent.	95-CP-40-2449 REPLY TO RESPONDENT'S RETURN AND MOTION TO DISMISS

The Applicant filed his Application for Post-Conviction Relief on July 17, 1995. The Respondent made its Return and Motion to Dismiss on October 6, 1995. Counsel for the Applicant received service on October 10, 1996. The Applicant now urges this Court to deny the Respondent's Motion to Dismiss his Application for Post-Conviction Relief. In support of that position he would show unto this Court the following.

I.

The Applicant is presently confined in Atlanta, Georgia. He was indicted by the Richland County Court of General Sessions for murder in February, 1989. In the trial court he was represented by Jack B. Swerling, Esquire, and Jennifer Kneece Shealy, Esquire. On January 23, 1990, he proceeded to trial by jury before the Honorable Don S. Rushing, Presiding Circuit Judge. At the conclusion of this proceeding he was found guilty as charged and was sentenced by the trial court to life imprisonment.

The Applicant filed a timely Notice of Intent to Appeal his conviction and sentence. The South Carolina Court of Appeals affirmed the Applicant's conviction and sentence. State v.

Tillman, 304 S.C. 512, 405 S.E.2d 607 (1991). The Applicant's subsequent Petition for Rehearing was denied by the Court of Appeals on June 20, 1991. His Petition for Writ of Certiorari was denied by the Supreme Court of South Carolina on September 5, 1991.

II.

The Uniform Post-Conviction Procedure Act, S.C. Code Ann. §17-27-10, et. seq., contained no statutory time limits for seeking collateral review until July 1, 1995. The Respondent relies on a January, 1995 Amendment to this Act which for the first time, imposed a one-year statute of limitations for seeking collateral review following a judgment of conviction or one year after the Return of a Remittitur to the lower court following an appeal. This Amendment, S.C. Code Ann. §17-27-45, became effective July 1, 1995. This new Code section does not expressly state that it is to be retroactively applied. The Respondent urges this Court to interpret the language found in this Amendment to the Applicant's case. In the words of the Respondent's Return, "This Application was filed on July 31, 1995, well after the statutory filing period had expired." (Return, p. 2, paragraph 2). Section 17-27-45 became law without the Governor's signature on January 12, 1995.

III.

Generally, a statute is presumed prospective only and not retroactive ***unless there is clear legislative intent to the contrary.*** Fidelity and Casualty Ins. Co. of New York v. Nationwide Ins. Co., et al., 278 S. C. 332, 295 S. E. 2d 783 (1982). While the Supreme Court has never specifically passed on the retroactivity of

§17-27-45 (A), they have consistently held *the law is fixed when a cause of action accrues*, and no change of the statutes of limitation may be wrought by any later legislation fixing a different period. United States Rubber Co. v. McManus, 211 S. C. 342 , 45 S. E. 2d 335 (1947); Glover v. Floyd, 76 S. C. 292 , 57 S. E. 25 (1907). The Supreme Court "has consistently approved retroactive application of statutes *which provide procedural or remedial benefits as opposed to statutes affecting vested or substantial rights*." Goff v. Morgan Mills,279 S.C. 382, 308 S.E.2d 778 (1983). The Applicant would submit that in Post-Conviction Relief cases the cause of action, the right to file an application for collateral review, accrues either when the judgment is entered or when a direct appeal from the judgment is decided. Thus, the new statute of limitations contained in *S.C. Code Ann. §17-27-45 (A)* may not be applied to cases where the judgment was final prior to the effective date of this legislation; July 1, 1995.

IV.

In recent years our Supreme Court has issued several opinions highlighting the dual goals of protection of the due process rights of the defendant and judicial economy in the area of collateral review. While the Court has expressed a desire to see an end to needless repetitive litigation, the Court has likewise expressed a determination to safeguard the right of every criminal defendant to one full and fair bite at the apple. Gambell v. State, 298 S.C. 176, 379 S.E.2d 118 (1989). See, Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991); Austin v. State,305 S.C. 453, 409 S.E.2d 395

(1991); King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992).

In Gambell, Supra, Justice Toal noted that the Rules of Court governing Applications for Post-Conviction Relief, "While barring subsequent petitions on grounds available to or waived by an applicant in a prior action or petition, contemplate an adjudication on the merits of the original petition, *one bite at the apple*, as it were. These rules will not be construed to operate as a trap for the unwary." The Applicant would respectfully submit that the statutory construction urged by the Respondent in this case is an attempt to create such a "trap for the unwary." While the merit of the legislative goal to streamline and regulate collateral review is apparent, this forward step must not be taken at the expense of the due process rights of those who had the misfortune of seeking collateral review during a period of transition. Based on all the foregoing reasons and authorities, the Applicant now urges the Court to deny the Respondent's Motion to Dismiss.

Respectfully submitted,

TARA DAWN SHURLING
Attorney and Counselor at Law

3610 Landmark Drive, Suite F
Columbia, S.C. 29204
(803) 738-8622
(803) 738-1600 (Fax)

ATTORNEY FOR APPLICANT.

This 19th day of October, 1995.

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

95-CP-40-2449

RONALD TILLMAN #85375-071,

APPLICANT,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Reply to Respondent's Return and Motion to Dismiss in the above matter has been served on opposing counsel by mailing one (1) copy in an envelope properly addressed with postage prepaid this 19th day of October, 1995.

Ruby Brice McClain
Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, S. C. 29211

TARA DAWN SHURLING
Attorney and Counselor at Law

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Columbia, South Carolina 29204
(803) 738-8622
(803) 738-1600 (Fax)

ATTORNEY FOR APPLICANT.

SWORN TO BEFORE me this 19th day of October, 1995.

(L.S.)

NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: 10/21/98.

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS
Ronald Tillman, 85375-071, Applicant, v. State of South Carolina, Respondent.	)	95-CP-40-2449 SUPPLEMENTAL REPLY TO RESPONDENT'S RETURN AND MOTION TO DISMISS

FILED
95 NOV 27 PM 2:55
BARBARA A. SCOTT
C.C. & G.S.

The Applicant filed his Application for Post-Conviction Relief on July 17, 1995. The Respondent made its Return and Motion to Dismiss on October 6, 1995. Counsel for the Applicant received service on October 10, 1996. On October 19, 1995, the Applicant filed a Reply to the State's Motion to Dismiss.

In addition to the arguments and authorities set forth in the Applicant's Reply to the State's Return and Motion to Dismiss, the Applicant would ask this Court to consider the following.

1. The Act which added Section 17-27-45 to the Uniform Post-Conviction Relief Procedure Act[1], Acts\4323AC.94[2], contains a Savings Clause. This Clause, found at Section 19 of the Act, specifically states,

> All proceedings pending and all rights and liabilities existing, acquired, or incurred at the time this act takes effect ***are saved. The provisions of the act apply prospectively to crimes and offenses committed after the effective date of this act.*** The provisions of this act apply prospectively to all sentences pronounced on or after the effective date of this act, except where a penalty greater than

---

[1] S.C. Code Ann. §17-27-10 (1985 Cum. Sup.).

[2] A copy of which is attached as **ATTACHMENT A.**

> the one in effect on the date of the offense as committed would be required. Notwithstanding the provisions of the section, Section 16-1-60 applies retroactively and prospectively.

The Applicant would submit that this language from the Joint Acts and Resolutions of this act, clearly evidences the intent of the legislature to have the new one year statute of limitations imposed on Post-Conviction Relief Applications by Section 17-27-45 be applied prospectively to cases where the crimes occurred after the enactment of this legislation.

WHEREFORE, the Applicant asks that the Respondent's Motion to Dismiss be denied.

Respectfully submitted,

TARA DAWN SHURLING
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(803) 738-1600 (Fax)

ATTORNEY FOR APPLICANT.

This 27th day of November, 1995.

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

95-CP-40-2449

RONALD TILLMAN #85375-071,

APPLICANT,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Supplemental Reply to Respondent's Return and Motion to Dismiss in the above matter has been served on opposing counsel by mailing one (1) copy in an envelope properly addressed with postage prepaid this 27th day of November, 1995.

Ruby Brice McClain
Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
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Tara D. Shurling

TARA DAWN SHURLING
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(803) 738-1600 (Fax)

ATTORNEY FOR APPLICANT.

SWORN TO BEFORE me this 27th day of November, 1995.

Susan M. Poe (L.S.)

NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: 10/21/98.

witness). If any corporate surety fails to pay a forfeiture on a bond ordered by the Court, upon proper notice to that surety and opportunity for it to be heard as to why it has failed to pay a forfeiture decreed, the Court may order the Clerk to strike its name from the list of approved corporate sureties eligible to execute bonds to be performed in the District of South Carolina, and to notify the Secretary of Treasury of such action.

RULE 24.03 DISCLOSURE OF INTEREST

In every corporate surety bond proffered for filing in a criminal case in the District of South Carolina, the Court requires the Attorney-in-Fact who executes the bond on behalf of the corporate surety to disclosure under oath the identity of the premium payor, and for any bond (or combination of bonds) which exceed(s) fifty thousand dollars ($50,000.00) in amount for any one defendant (or material witness), whether the surety is a corporate surety or an individual, the Attorney-in-Fact or individual surety must disclose the details of any collateral pledged to the surety to induce it (or him or her) to issue the bond, and the details of any agreement to indemnify the surety should it (or he or she) be ordered to pay any forfeiture of the bond.

RULE 24.04 USE OF REAL PROPERTY AS SECURITY

Whenever an individual presents himself or herself as a surety to be justified on the basis of real property he or she owns, such individual must demonstrate by satisfactory evidence that the unencumbered equity that he or she has in such property is sufficient in amount to secure his or her undertaking on the bond, and such individual must agree to place a lien on the real property if he or she seeks to justify on a bond of more than twenty-five thousand dollars ($25,000.00). The Court may require independent appraisal evidence of value in the discretion of the judicial officer before whom the surety seeks to justify. In no event will an individual who seeks to justify exclusively on the basis of equity in real property be approved as a surety for an amount in excess of seventy-five percent (75%) of his or her equity.

RULE 24.05 USE OF PERSONAL PROPERTY AS SECURITY

The Court will not accept a pledge of personal property other than as provided in Local Rule 24.01 above.

RULE 24.06 PROHIBITED SURETIES

Bail bondsmen who are authorized to write bonds in the courts of South Carolina are not by such authorization eligible to serve as sureties in this Court, and no such bondsman (or local corporation) will be approved as a surety unless he (or she or it) meets the standards required of any other corporate or individual surety as specified by federal statutes, Rule 46 of the Fed.R.Crim.P., and these Rules. Members of the Bar and their spouses, officers and employees of this Court and officers and employees of the United States Marshal's Service are prohibited from acting as a surety unless the Court, by a special order that is filed as a public record, creates an exception based on the financial need of a particular defendant or material witness.

[Amended effective July 12, 1995.]

RULE 25.00 TIME OF ISSUANCE OF SUBPOENAS IN CRIMINAL CASES

Subpoenas for witnesses in criminal cases shall be delivered to the Marshal or other person qualified by Fed.R.Crim.P. 17(d) to make service at least seven (7) days prior to the Monday of the week in which the case is set for trial unless otherwise ordered by the Court. The failure of the Marshal or other qualified person to serve a subpoena not delivered within the time period shall not constitute sufficient cause for a continuance.

[Amended effective July 12, 1995.]

RULE 26.00 SURRENDER OF CUSTODY OF PRETRIAL DETAINEES HELD FOR TRIAL TO OTHER WANTING JURISDICTIONS

RULE 26.01 REQUESTS FOR FEDERAL CUSTODY

If custody of a defendant awaiting trial in this District is requested by another United States Court, the Marshal shall not surrender custody of such defendant unless the United States District Judge to whom the defendant's case has been assigned for trial or other disposition so orders after considering all relevant factors and giving such notice to interested parties as he deems appropriate.

RULE 26.02 REQUESTS FOR STATE CUSTODY

If custody of a defendant awaiting trial in this District is requested by any state authority, the

Attachment A

FILE COPY
PLEASE DO NOT REMOVE

House: Wilkins, et al.
Attorney: Cushman
House No.: 4323
Secretary: Kubala
Date: June 2, 1994
ID No.: (1367) 4323AC.94
THE STATE OF SOUTH CAROLINA

At A General Assembly Begun to be Holden at Columbia, on the Second Tuesday in January, in the Year of Our Lord One Thousand Nine Hundred Ninety-Four, and Thence Continued by Divers Adjournments to the _____ of _____

In the Year of Our Lord One Thousand Nine Hundred Ninety-Four

AN ACT

TO AMEND SECTION 16-1-20, AS AMENDED, RELATING TO CLASSES OF FELONIES AND MISDEMEANORS, SO AS TO PROVIDE THAT THE MINIMUM TERM OF IMPRISONMENT DOES NOT APPLY TO MISDEMEANORS LISTED IN SECTION 16-1-100 AND TO FURTHER PROVIDE THAT THIS PROVISION DOES NOT APPLY WHEN THE OFFENSE PROHIBITS SUSPENSION OF ANY PART OF THE SENTENCE; TO AMEND SECTION 16-1-57, RELATING TO THE CLASSIFICATION OF REPEAT OFFENDERS FOR CERTAIN PROPERTY CRIMES, SO AS TO PROVIDE THAT THIRD OR SUBSEQUENT OFFENSES ARE CLASS E FELONIES; TO AMEND SECTION 16-1-60, AS AMENDED, RELATING TO VIOLENT CRIMES, SO AS TO ADD THE OFFENSE OF TRAFFICKING IN CRACK COCAINE, AND THE OFFENSE OF ENGAGING A CHILD FOR A SEXUAL PERFORMANCE, AND TO INCLUDE ACCESSORY AND ATTEMPT TO COMMIT ANY VIOLENT CRIME AS A VIOLENT CRIME AND TO REPEAL THE PROVISION REQUIRING THE CRIME TO BE DEFINED AS A VIOLENT CRIME AT THE TIME IT WAS COMMITTED; TO AMEND SECTION 16-11-330, AS AMENDED, RELATING TO ARMED ROBBERY, SO AS TO REQUIRE A MANDATORY MINIMUM TERM OF IMPRISONMENT OF NOT LESS THAN TEN YEARS, NO PART OF WHICH MAY BE SUSPENDED OR PROBATION GRANTED; TO AMEND SECTION 16-13-10, AS AMENDED, RELATING TO FORGERY, SECTION 16-13-210, AS AMENDED, RELATING TO EMBEZZLEMENT, SECTION 16-13-385,

JUVENILE'S RECORD, SO AS TO PROVIDE ACCESS TO THESE RECORDS FOR LAW ENFORCEMENT; TO AMEND SECTION 20-7-780, RELATING TO RECORDS, FINGERPRINTING, AND PHOTOGRAPHS OF JUVENILES, SO AS TO FURTHER PROVIDE UNDER WHAT CIRCUMSTANCES RECORDS ARE OPEN TO THE PUBLIC, THE IDENTITY OR PICTURE OF A CHILD MAY BE PUBLISHED BY THE MEDIA, FINGERPRINTS MAY BE TAKEN, AND RECORDS MAY BE TRANSFERRED TO OTHER LAW ENFORCEMENT AGENCIES; TO AMEND SECTION 20-7-3300, AS AMENDED, RELATING TO JUVENILE'S RECORDS, SO AS TO PROVIDE CERTAIN CIRCUMSTANCES UNDER WHICH A JUVENILE'S RECORD IS PROVIDED TO A SCHOOL; TO AMEND SECTION 23-3-120, AS AMENDED, RELATING TO CRIMINAL INFORMATION REPORTED TO SLED, SO AS TO REQUIRE REPORTING ON JUVENILES; TO AMEND SECTION 24-19-10, RELATING TO THE YOUTHFUL OFFENDER ACT SO AS TO REVISE THE DEFINITION OF 'YOUTHFUL OFFENDER'; TO AMEND 20-7-600, AS AMENDED, RELATING TO PREADJUDICATORY DETENTION OF JUVENILES, SO AS TO FURTHER PROVIDE FOR THE PROCEDURES FOR DETENTION; TO AMEND SECTION 20-7-2115, AS AMENDED, RELATING TO THE JUVENILE PAROLE BOARD, SO AS TO AUTHORIZE THE BOARD RATHER THAN THE DEPARTMENT OF SOCIAL SERVICES TO EMPLOY A DIRECTOR; TO ADD SECTION 24-3-93 SO AS PROHIBIT PRISONERS FROM WEARING JEWELRY AND TO PROVIDE EXCEPTIONS; TO ADD SECTION 16-1-120 SO AS TO PROVIDE FOR INCREASED SENTENCING OF OFFENDERS FOR SUBSEQUENT OFFENSES; TO ADD SECTION 24-3-81 AND TO ADD SECTION 24-3-951 SO AS TO PROHIBIT PRISONERS FROM HAVING CONJUGAL VISITS AND FROM POSSESSING UNITED STATES CURRENCY AND TO PROVIDE EXCEPTIONS; TO AMEND SECTION 24-21-10 SO AS TO PROVIDE PROCEDURES FOR FILLING VACANCIES ON THE BOARD OF PROBATION, PAROLE, AND PARDON SERVICES; TO AMEND TITLE 2, CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING CHAPTER 48 SO AS TO ENACT THE COMMUNITY CORRECTIONS INCENTIVE ACT TO ENABLE COURTS TO SENTENCE NONVIOLENT OFFENDERS TO LESS COSTLY COMMUNITY CORRECTIONAL FACILITIES FOR HOUSING BOTH STATE AND LOCAL INMATES IN ALTERNATIVE SENTENCING PROGRAMS; BY ADDING SECTION 17-27-45 SO AS TO PROVIDE THAT AN APPLICATION FOR RELIEF FILED PURSUANT TO THE UNIFORM POST CONVICTION PROCEDURE ACT MUST BE FILED WITHIN ONE YEAR AFTER THE ENTRY OF A JUDGMENT OR

PROGRAM MUST BE PAID TO THE DEPARTMENT OF CORRECTIONS FOR DISBURSEMENT TO THE PRISONER; TO AMEND SECTION 24-3-330, AS AMENDED, RELATING TO THE PURCHASE OF PRODUCTS PRODUCED BY CONVICT LABOR BY THE STATE OR POLITICAL SUBDIVISIONS, SO AS TO REQUIRE THE MATERIALS MANAGEMENT OFFICE OF THE DIVISION OF GENERAL SERVICES TO MONITOR THE COOPERATION OF STATE OFFICES, DEPARTMENTS, INSTITUTIONS, AND AGENCIES IN THE PROCUREMENT OF GOODS, PRODUCTS, AND SERVICES FROM THE DIVISION OF PRISON INDUSTRIES OF THE DEPARTMENT OF CORRECTIONS; TO AMEND SECTION 24-3-360, AS AMENDED, RELATING TO THE ANNUAL PREPARATION OF CATALOGUES DESCRIBING ARTICLES PRODUCED BY CONVICT LABOR, SO AS TO ALLOW A STATE OFFICE, DEPARTMENT, INSTITUTION, OR AGENCY OR A POLITICAL SUBDIVISION OF THIS STATE TO CONTACT AND REQUEST THE DEPARTMENT OF CORRECTIONS TO MANUFACTURE OR PRODUCE ARTICLES OR PRODUCTS SIMILAR, BUT NOT IDENTICAL TO, ARTICLES OR PRODUCTS LISTED IN THE CATALOGUE; TO AMEND SECTION 24-13-1530, AS AMENDED, RELATING TO CORRECTIONAL PROGRAMS FOR WHICH HOME DETENTION MAY BE SUBSTITUTED, SO AS TO AUTHORIZE LOCAL GOVERNMENTS TO ESTABLISH BY ORDINANCE THE SAME ALTERNATIVE TO INCARCERATIONS FOR PERSONS WHO ARE AWAITING TRIAL AND FOR OFFENDERS WHOSE SENTENCES DO NOT PLACE THEM IN CUSTODY OF THE DEPARTMENT OF CORRECTIONS; TO AMEND SECTION 24-13-1560, AS AMENDED, RELATING TO THE USE OF ELECTRONIC MONITORING DEVICES, SO AS TO PROVIDE THAT THE DEVICE MUST BE USED IN ACCORDANCE WITH THE DEPARTMENT'S INSTRUCTIONS; TO AMEND SECTION 40-5-310, RELATING TO THE PRACTICE OF LAW, SO AS TO INCREASE THE PENALTIES FOR THE UNLAWFUL PRACTICE OF LAW; TO AMEND SECTION 41-27-260, RELATING TO EXEMPTIONS FROM THE SOUTH CAROLINA EMPLOYMENT SECURITY LAW, SO AS TO EXEMPT CERTAIN SERVICES PERFORMED BY PRISONERS; TO REPEAL SECTION 24-3-35, RELATING TO THE USE OF COUNTY PRISONERS FOR LITTER REMOVAL WORK, AND SECTIONS 24-7-10, 24-7-20, 24-7-30, 24-7-40, 24-7-50, 24-7-90, AND 24-7-100 ALL RELATING TO COUNTY CHAINGANGS; TO REQUIRE THE DEPARTMENT OF CORRECTIONS TO SUBMIT TO THE GENERAL ASSEMBLY, NO LATER THAN THE FIRST DAY OF THE 1995 LEGISLATIVE SESSION, A REPORT CONTAINING CERTAIN INFORMATION REGARDING PRISON INDUSTRIES AND

CONFINEMENT FACILITIES; AND TO AMEND SECTION 20-7-2205, AS AMENDED, RELATING TO STATUS OFFENDERS, SO AS TO INCLUDE A CHILD WHO IS IN CONTEMPT OF COURT.

Be it enacted by the General Assembly of the State of South Carolina:

Part I
"Criminal Justice Reform"

Minimum terms of imprisonment

SECTION 1. Section 16-1-20(B) of the 1976 Code, as last amended by Act 184 of 1993, is further amended to read:

"(B) For all offenders sentenced on or after July 1, 1993, the minimum term of imprisonment required by law does not apply to the offenses listed in Sections 16-1-90 and 16-1-100 unless the offense refers to a mandatory minimum sentence or the offense prohibits suspension of any part of the sentence. Offenses listed in Section 16-1-10(C) and (D) are exempt and minimum terms of imprisonment are applicable. No sentence of imprisonment precludes the timely execution of a death sentence."

Classification of certain property crimes

SECTION 2. Section 16-1-57 of the 1976 Code, as added by Act 184 of 1993, is amended to read:

"Section 16-1-57. A person convicted of an offense for which the term of imprisonment is contingent upon the value of the property involved must, upon conviction for a third or subsequent offense, be punished as prescribed for a Class E felony."

Violent crimes defined

SECTION 3. Section 16-1-60 of the 1976 Code, as last amended by Act 184 of 1993, is further amended to read:

"Section 16-1-60. For purposes of definition under South Carolina law a violent crime includes the offenses of murder (Section 16-3-10); criminal sexual conduct in the first and second degree (Sections 16-3-652 and 16-3-653); criminal sexual conduct with minors, first and second degree (Section 16-3-655); assault with intent to commit criminal sexual conduct, first and second degree (Section 16-3-656); assault and battery with intent

(2) utter or publish as true any false, forged, or counterfeited writing or instrument of writing;

(3) falsely make, forge, counterfeit, alter, change, deface, or erase; or cause or procure to be falsely made, forged, counterfeited, altered, changed, defaced, or erased any record or plat of land; or

(4) willingly act or assist in any of the premises, with an intention to defraud any person.

(B) A person who violates the provisions of this section is guilty of a:

(1) felony and, upon conviction, must be fined in the discretion of the court or imprisoned not more than ten years, or both, if the amount of the forgery is five thousand dollars or more;

(2) felony and, upon conviction, must be fined in the discretion of the court or imprisoned not more than five years, or both, if the amount of the forgery is less than five thousand dollars.

If the forgery does not involve a dollar amount, the person is guilty of a misdemeanor and, upon conviction, must be fined in the discretion of the court or imprisoned not more than three years, or both."

Misdemeanor classification deleted

SECTION 6. Section 16-13-210 of the 1976 Code, as last amended by Act 184 of 1993, is further amended to read:

"Section 16-13-210. It is unlawful for an officer or other person charged with the safekeeping, transfer, and disbursement of public funds to embezzle these funds. A person who violates the provisions of this section is guilty of a:

(1) felony and, upon conviction, must be fined in the discretion of the court to be proportioned to the amount of the embezzlement and imprisoned not more than ten years if the amount of the embezzled funds is five thousand dollars or more;

(2) felony and, upon conviction, must be fined in the discretion of the court to be proportioned to the amount of embezzlement and imprisoned not more than five years if the amount of the embezzled funds is less than five thousand dollars.

The person convicted of a felony is disqualified from holding any office of honor or emolument in this State; but the General Assembly, by a two-thirds vote, may remove this disability upon payment in full of the principal and interest of the sum embezzled."

Fine increased

(3) grand larceny and, upon conviction, must be fined in the discretion of the court or imprisoned not more than ten years, or both, if the original dollar amount of the video or cassette tape lease or rental agreement is five thousand dollars or more."

Offense revised and classified as felony

SECTION 9. Section 16-14-20 of the 1976 Code is amended to read:

"Section 16-14-20. A person is guilty of financial transaction card theft when he:

(1) takes, obtains, or withholds a financial transaction card from the person, possession, custody, or control of another without the cardholder's consent and with the intent to use it; or who, with knowledge that it has been so taken, obtained, or withheld, receives the financial transaction card with intent to use it, sell it, or transfer it to a person other than the issuer or the cardholder;

(2) receives a financial transaction card that he knows to have been lost, mislaid, or delivered under a mistake as to the identity or address of the cardholder, and who retains possession with intent to use it, sell it, or transfer it to a person other than the issuer or the cardholder;

(3) is not the issuer, and sells a financial transaction card or buys a financial transaction card from a person other than the issuer;

(4) is not the issuer, and during any twelve-month period, receives financial transaction cards issued in the names of two or more persons which he has reason to know were taken or retained under circumstances which constitute a violation of item (3) of this section and Section 16-14-60(a)(3).

A person who commits financial transaction card theft is guilty of a felony and, upon conviction, must be sentenced as provided in Section 16-14-100(b)."

Financial transaction card forgery classified as felony

SECTION 10. Section 16-14-40(e) of the 1976 Code, as added by Act 184 of 1993, is amended to read:

"(e) A person who violates the provisions of this section is guilty of a felony and, upon conviction, must be fined not less than three thousand dollars nor more than five thousand dollars or imprisoned not more than five years, or both."

Offense classified as felony

was false, fictitious, forged, altered, or counterfeit or that the above deposited item was not his lawful or legal property.

A person who violates the provisions of this subsection except subsection (a)(2)d. is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both, if the value of all money, goods, services, and other things of value furnished in violation of this section or if the difference between the value actually furnished and the value represented to the issuer to have been furnished in violation of this section, does not exceed five hundred dollars in any six-month period. If the value exceeds five hundred dollars in a six-month period, a person is guilty of a felony and, upon conviction, must be fined not less than three thousand dollars or more than five thousand dollars or imprisoned not more than five years, or both.

A person who violates the provisions of subsection (a)(2)d. is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.

(b) A person who is authorized by an issuer to furnish money, goods, services, or anything else of value upon presentation of a financial transaction card by the cardholder, or any agent or employee of such person is guilty of a financial transaction card fraud when, with intent to defraud the issuer or the cardholder, he:

(1) furnishes money, goods, services, or anything else of value upon presentation of a financial transaction card obtained or retained in violation of Section 16-14-20, or a financial transaction card which he knows is forged, expired, or revoked;

(2) fails to furnish money, goods, services, or anything else of value which he represents in writing to the issuer that he has furnished.

A person who violates the provisions of this subsection is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both, if the value of all money, goods, services, and other things of value furnished in violation of this section or if the difference between the value actually furnished and the value represented to the issuer to have been furnished in violation of this section, does not exceed five hundred dollars in any six-month period. If the value exceeds five hundred dollars in a six-month period, a person is guilty of a felony and, upon conviction, must be fined not less than three thousand dollars nor more than five thousand dollars or imprisoned not more than five years, or both.

(c) A person is guilty of financial transaction card fraud when, upon application for a financial transaction card to an issuer, he knowingly makes or causes to be made a false statement or report relative to his name, occupation, financial condition, assets, or liabilities; or wilfully and substantially overvalues any assets, or wilfully omits or substantially

Offense classified as felony

SECTION 12. Section 16-14-70 of the 1976 Code, as last amended by Act 184 of 1993, is further amended to read:

"Section 16-14-70. (A) A person is guilty of criminal possession of financial transaction card forgery devices when:

(1) he is a person other than the cardholder and possesses two or more incomplete financial transaction cards, with intent to complete them without the consent of the issuer;

(2) he possesses, with knowledge of its character, machinery, plates, or any other contrivance designed to reproduce instruments purporting to be financial transaction cards of an issuer who has not consented to the preparation of such financial transaction cards.

(B) A financial transaction card is incomplete if part of the matter other than the signature of the cardholder, which an issuer requires to appear on the financial transaction card before it can be used by a cardholder, has not yet been stamped, embossed, imprinted, encoded, or written upon it.

A person who violates the provisions of this section is guilty of a felony and, upon conviction, must be fined not less than three thousand dollars nor more than five thousand dollars or imprisoned not more than five years, or both."

Dissemination of obscenity penalties increased

SECTION 13. Section 16-15-305(H) of the 1976 Code, as added by Act 168 of 1987, is amended to read:

"(H) A person who violates this section is guilty of a felony and, upon conviction, must be imprisoned not more than five years or fined not more than ten thousand dollars, or both."

Conditions for early parole for offender victims of spousal abuse

SECTION 14. Chapter 25, Title 16 of the 1976 Code is amended by adding:

"Section 16-25-90. Notwithstanding any provisions of Chapter 21 of Title 24, and notwithstanding any other provisions of law, an inmate shall be eligible for parole after serving one-fourth of his prison term when the inmate at the time he pled guilty to, nolo contendere to, or was convicted of an offense against his spouse presented credible evidence of a history of

SECTION 17. The last three paragraphs of Section 44-53-370(e) of the 1976 Code, as last amended by Act 184 of 1993, are further amended to read:

"A person convicted and sentenced under this subsection to a mandatory term of imprisonment of twenty-five years, a mandatory minimum term of imprisonment of twenty-five years, or a mandatory minimum term of imprisonment of not less than twenty-five years nor more than thirty years is not eligible for parole, extended work release, as provided in Section 24-13-610, or supervised furlough, as provided in Section 24-13-710. Notwithstanding Section 44-53-420, a person convicted of conspiracy pursuant to this subsection must be sentenced as provided in this section with a full sentence or punishment and not one-half of the sentence or punishment prescribed for the offense.

The weight of any controlled substance in this subsection includes the substance in pure form or any compound or mixture of the substance.

The offense of possession with intent to distribute described in Section 44-53-370(a) is a lesser included offense to the offenses of trafficking based upon possession described in this subsection."

Parole work release or furloughs prohibited with mandatory minimum term

SECTION 18. Section 44-53-375(D) of the 1976 Code, as last amended by Act 184 of 1993, is further amended to read:

"(D) Except for a first offense, as provided in subsection (A) of this section, sentences for violation of the provisions of this section may not be suspended and probation may not be granted. A person convicted and sentenced under this subsection to a mandatory term of imprisonment of twenty-five years, a mandatory minimum term of imprisonment of twenty-five years, or a mandatory minimum term of imprisonment of not less than twenty-five years nor more than thirty years is not eligible for parole, extended work release, as provided in Section 24-13-610, or supervised furlough, as provided in Section 24-13-710."

Savings clause

SECTION 19. All proceedings pending and all rights and liabilities existing, acquired, or incurred at the time this act takes effect are saved. The provisions of this act apply prospectively to crimes and offenses committed after the effective date of this act. The provisions of this act apply prospectively to all sentences pronounced on or after the effective

(1) there is substantial likelihood that justice will be served if the offender is placed in an intervention program;

(2) it is determined that the needs of the offender and the State can better be met outside the traditional criminal justice process;

(3) it is apparent that the offender poses no threat to the community;

(4) it appears that the offender is unlikely to be involved in further criminal activity;

(5) the offender, in those cases where it is required, is likely to respond quickly to rehabilitative treatment;

(6) the offender has no significant history of prior delinquency or criminal activity;

(7) the offender has not previously been accepted in a pretrial intervention program."

Definition revised for certain crimes

SECTION 23. Section 20-7-390 of the 1976 Code is amended to read:

"Section 20-7-390. When used in this article, unless the context otherwise requires, 'child' means a person less than seventeen years of age, where the child is dealt with as a juvenile delinquent. 'Child' does not mean a person sixteen years of age or older who is charged with a Class A, B, C, or D felony as defined in Section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen years or more. However, a person sixteen years of age who is charged with a Class A, B, C, or D felony as defined in Section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen years or more may be remanded to the family court for disposition of the charge at the discretion of the solicitor. Where the child is dealt with as a dependent or neglected child, the term 'child' shall mean a person under eighteen years of age."

Transfer of juvenile jurisdiction

SECTION 24. Section 20-7-430 of the 1976 Code, as last amended by Act 579 of 1990, is further amended to read:

"Section 20-7-430. Jurisdiction over a case involving a child shall be transferred or retained as follows:

(1) If, during the pendency of a criminal or quasi-criminal charge against a child in a circuit court of this State, it is ascertained that the child was under the age of seventeen years at the time of committing the alleged offense, it is the duty of the circuit court immediately to transfer the case,

within the purview of this article. The judge of the family court is authorized to determine this request. If the request is denied, the petitioner may appeal within five days to the circuit court. Upon the hearing of the appeal, the judge of the circuit court is vested with the discretion of exercising and asserting the jurisdiction of the court of general sessions or of relinquishing jurisdiction to the family court. If the circuit judge elects to exercise the jurisdiction of the general sessions court for trial of the case, he shall issue an order to that effect, and then the family court has no further jurisdiction in the matter.

(7) Once the family court relinquishes its jurisdiction over the child and the child is bound over to be treated as an adult, the provisions of Section 20-7-780 dealing with the confidentiality of identity and fingerprints will not be applicable.

(8) When jurisdiction is relinquished by the family court in favor of another court, the court shall have full authority and power to grant bail, hold a preliminary hearing and any other powers as now provided by law for magistrates in such cases.

(9) If a child fourteen years of age or older is charged with a violation of Section 16-23-430(1), Section 16-23-20, assault and battery of a high and aggravated nature, or Section 44-53-445, the court may after full investigation and hearing, if it considers it contrary to the best interest of the child or the public to retain jurisdiction, acting as committing magistrate, bind over the child for proper criminal proceedings to a court which would have trial jurisdiction of the offenses if committed by an adult."

Juvenile records also to be maintained by SLED; release of records

SECTION 25. Section 20-7-770 of the 1976 Code, as last amended by Act 181 of 1993, is further amended to read:

"Section 20-7-770. Notwithstanding the right of a person to petition the family court pursuant to Section 20-7-780 for the release of a person's record of juvenile adjudications, upon the request of the Attorney General, a circuit solicitor, or a law enforcement officer which is made pursuant to a current criminal investigation or prosecution, the South Carolina Law Enforcement Division or the Department of Juvenile Justice, or both if requested, shall provide the requesting party with a copy of the juvenile criminal record of a person adjudicated as a juvenile for the commission of a crime. This information shall not be disseminated except as authorized in Section 20-7-780. The juvenile record of a person must be maintained by the South Carolina Law Enforcement Division and the Department of Juvenile Justice for the same period as for offenses committed by an adult."

of accused or convicted persons or criminal offenders, or the collection, storage, and dissemination of criminal history record information.

The Department of Juvenile Justice may fingerprint and photograph a juvenile upon commitment to a juvenile correctional institution. Fingerprints and photographs taken by the Department of Juvenile Justice remain confidential and must not be transmitted to the State Law Enforcement Division, the Federal Bureau of Investigation, or another agency or person, except for the purpose of aiding the department in apprehending an escapee from the department, assisting the Missing Persons Information Center in the location or identification of a missing or runaway child, or except as otherwise provided in this section."

Juvenile records provided to schools

SECTION 27. Section 20-7-3300 of the 1976 Code, as last amended by Act 181, is further amended to read:

"Section 20-7-3300. Records and information of the department pertaining to juveniles shall be confidential as provided in Section 20-7-780; provided, however, that where necessary and appropriate to ensure the provision and coordination of services and assistance to a juvenile under the custody or supervision of the department, the director must establish policies by which the department may transmit such information and records to another department or agency of state or local government, a school district, or a private institution or facility licensed by the State as a child-serving organization, where such is required for admission or enrollment of the juvenile into a program of services, treatment, training, or education. Records and information provided to a public or private school by the Department of Juvenile Justice must include in the case of an individual who has been adjudicated for having committed a violent crime as defined in Section 16-1-60, for a crime in which a weapon was used, or for distribution or trafficking in unlawful drugs as defined in Article 3, Chapter 53 of Title 44, a copy of and, if requested, information pertaining to that person's juvenile criminal record. The person's juvenile criminal record must be provided by the Department of Juvenile Justice to the principal of the school which the juvenile is eligible to attend immediately upon the person's release from the Department of Juvenile Justice. The person's juvenile criminal record must be provided by the Department of Juvenile Justice to the principal of any school to which the person is seeking enrollment, upon the principal's request. Each school district is responsible for developing a policy for schools to follow within the district which ensures that the confidential nature of these records and of the other information received is maintained. This policy

responding, the authorized representative of the department shall review the facts in the officer's report or petition and any other relevant facts and advise the officer if, in his opinion, there is a need for detention of the child. The officer's written report must be furnished to the authorized representatives of the department and must state:

(1) the facts of the offense;

(2) the reason why the child was not released to the parent. Unless the child is to be detained, the child must be released by the officer to the custody of his parents or other responsible adult upon their written promise to bring the child to the court at a stated time or at a time the court may direct. However, if the offense for which the child was taken into custody is a violent crime as defined in Section 16-1-60 the child may be released only by the officer who took the child into custody. If the officer does not consent to the release of the child, the parents or other responsible adult may apply to any judge of the family court within the circuit for an ex parte order of release of the child. The officer's written report must be furnished to the family court judge. The family court judge may establish conditions for such release."

Juvenile detention procedures and ex parte orders for release

SECTION 31. Section 20-7-600(F) of the 1976 Code, as last amended by Act 181 of 1993, is further amended to read:

"(F) When the officer who took the child into custody determines that placement of a juvenile outside the home is necessary, the authorized representative of the Department of Juvenile Justice shall make a diligent effort to place the child in an approved home, program, or facility, other than a secure juvenile detention facility, when these alternatives are appropriate and available. A child is eligible for detention in a secure juvenile detention facility only if the child:

(1) is charged with a violent crime as defined in Section 16-1-60;

(2) is charged with a crime which, if committed by an adult, would be a felony other than a violent crime, and the child:

(a) is already detained or on probation or conditional release in connection with another delinquency proceeding;

(b) has a demonstrable recent record of wilful failures to appear at court proceedings;

(c) has a demonstrable recent record of violent conduct resulting in physical injury to others; or

(d) has a demonstrable recent record of adjudications for other felonies; and:

court shall order the detention of the juvenile in that facility. Periodic reviews of the detention order must be conducted in accordance with the rules of practice in a family court. However, a juvenile must not be detained in secure confinement in excess of ninety days. If the child does not qualify for detention or otherwise require continued detention under the terms of subsection (F), the child must be released to a parent, guardian, or other responsible person."

Juvenile Parole Board to employ a director

SECTION 33. Section 20-7-2115 of the 1976 Code, as last amended by Act 181 of 1993, is further amended to read:

"Section 20-7-2115. The department is charged with the responsibility of making aftercare investigations to determine suitable placement for children considered for conditional release from the correctional schools. The department shall also have the responsibility of supervising the aftercare program, making revocation investigations, and submitting findings to the parole board.

The director and such staff as he shall designate in the performance of their duties of investigation, counseling and supervision, and revocation investigations, are considered official representatives of the parole board.

The director and his staff are subject to the regulations for parole and parole revocation promulgated by the parole board and shall meet with the parole board at its meetings when requested. Community-based counselors, or their supervisors, with assigned clients committed to institutions of the department shall periodically visit the institutions in order to counsel their clients and accomplish the duties as outlined in this subarticle.

Recognizing the need to maintain autonomy and to provide a check and balance system, the parole board shall employ a director of parole and other staff necessary to carry out the duties of parole examinations, victim liaison, and revocation hearings. The director serves at the will and pleasure of the parole board. All staff are employees of the parole board and are directly responsible to the parole board both administratively and operationally. Funds allocated for the functions designated in this section must be incorporated as a line item within the department's budget and are subject to administrative control by the parole board.

The department shall continue to provide the budgetary, fiscal, personnel, and training information resources and other support considered necessary by the parole board to perform its mandated functions."

Prisoners prohibited from wearing jewelry; exception

(3) No portion of the additional term provided for herein may be suspended and no such additional term may be reduced by any early release program, work credit, or similar program but must be served in full."

Conjugal visits prohibited; exception

SECTION 36. Chapter 3 of Title 24 of the 1976 Code is amended by adding:

"Section 24-3-81. No prisoner within the state prison system shall be permitted to have conjugal visits, as defined by the department, except pursuant to written guidelines and procedures promulgated by the department."

Contraband includes U. S. currency; credit system required

SECTION 37. Chapter 3 of Title 24 of the 1976 Code is amended by adding:

"Section 24-3-951. Effective July 1, 1995, notwithstanding Section 24-3-956 and any other provision of law, United States currency or money, as it relates to use within the state prison system, is declared contraband and shall be not be utilized as a medium of exchange for barter or financial transaction between prisoners or prison officials and prisoners within the state prison system, except prisoners on work release or in other community based programs. Inmates must not possess United States currency. All financial disbursements to prisoners or mediums of exchange between prisoners and between the prison system and prisoners shall be transacted with a system of credits.

Procedures for filling board vacancy

SECTION 38. Section 24-21-10 of the 1976 Code, as last amended by Act 181 of 1993, is further amended to read:

"Section 24-21-10. (A) The Department of Probation, Parole and Pardon Services, hereafter referred to as the 'department', is governed by the Director of Probation, Parole and Pardon Services, hereafter referred to as the 'director'. The director must be appointed by the Governor with the advice and consent of the Senate.

(B) The Board of Probation, Parole and Pardon Services is composed of seven members. The terms of office of the members are for six years.

and the future availability of capital improvement bonds for more prison construction is uncertain.

(B) To ensure that adequate space is available in state corrections facilities for violent and habitual offenders, a need exists for additional community correctional facilities to enable courts to sentence nonviolent offenders to these less costly community correctional facilities which enable the offenders to make restitution payments and otherwise compensate the community for their crimes and which require participation in programs emphasizing substance abuse, education, and mental health counseling.

(C) The need exists for South Carolina to create a plan from which the State can establish a partnership with local governments to meet the corrections and incarceration needs of local governments and the State by offering less costly facilities for housing state and local inmates in alternative sentencing programs.

Section 2-48-20. (A) The Department of Corrections and a county, a municipality, another local governmental entity, or a multi-jurisdictional entity may enter into contracts for the incarceration of state, county, or municipal jail inmates and all services necessary, appropriate, or incidental to the housing and care of the inmates.

(B) The Department of Corrections, with the approval of the governing body of the local or multi-jurisdictional entity provided in subsection (A), may construct community correctional facilities for alternative sentencing programs within a municipality, county, or multi-jurisdictional region if the General Assembly appropriates the necessary funds.

Section 2-48-30. Before construction of a community correctional facility pursuant to Section 2-48-20, tracts of land suitable for the construction of community corrections facilities must be provided by the county, municipality, or other local governmental or multi-jurisdictional entity involved. The title of the lands provided must be conveyed to the State of South Carolina. Upon the acquisition of the land in the name of the State, the State Budget and Control Board has the authority to convey the land to the Department of Corrections for the erection and construction of the facilities. The original construction costs and necessary equipment costs for the facilities must be paid by the State. These facilities must be constructed to the extent possible by utilizing inmate labor as determined appropriate by the Director of the Department of Corrections. Legal title to the facilities must be transferred to the State of South Carolina, as set forth in this chapter, and the facilities are the property of the Department of Corrections.

(a) allow the governing body of the municipality, county, other local governmental entity, or multi-jurisdictional entity to rescind the contract by notification of its intention to rescind the contract at the beginning of the fiscal year. The recision is effective beginning the following fiscal year;

(b) provide that upon recision, the operation and management of the facilities constructed pursuant to this chapter and the care of the state inmates located at that facility revert to the Department of Corrections;

(c) provide that all inmates under the jurisdiction of the municipality, county, other local governmental entity, or multi-jurisdictional entity who are incarcerated at that facility must be returned to the custody of their respective governmental entities.

Section 2-48-70. This chapter does not preempt application of applicable zoning laws or regulations.

Section 2-48-80. Legal custody of state inmates assigned to a community correctional facility is in accordance with Section 24-3-30."

Filing procedures for post conviction relief application

SECTION 40. The 1976 Code is amended by adding:

"Section 17-27-45. (A) An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

(B) When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.

(C) If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence."

Pretrial classification system

funds, employees, and prisoners, and other resources and liabilities as appropriate.

(B) Every sentenced person committed to a local regional correctional facility constructed or operated pursuant to this section unless disqualified by sickness or otherwise, must be kept at some useful employment suited to his age and capacity and which may tend to promote the best interest of the citizens of this State."

Prison labor in private industry

SECTION 43. The 1976 Code is amended by adding:

"Section 24-3-430. (A) The Director of the Department of Corrections may establish a program involving the use of inmate labor in private industry for the manufacturing and processing of goods, wares, or merchandise or the provision of services or another business or commercial enterprise considered by the director to enhance the general welfare of South Carolina.

(B) The director may enter into contracts necessary to implement this program. The contractual agreements may include rental or lease agreements for state buildings or portions of them on the grounds of an institution or a facility of the Department of Corrections and provide for reasonable access to and egress from the building to establish and operate a facility.

(C) An inmate may participate in the program established pursuant to this section only on a voluntary basis and only after he has been informed of the conditions of his employment.

(D) No inmate participating in the program may earn less than the prevailing wage for work of similar nature in the private sector.

(E) Inmate participation in the program may not result in the displacement of employed workers in the State of South Carolina and may not impair existing contracts for services.

(F) Nothing contained in this section restores, in whole or in part, the civil rights of an inmate. No inmate compensated for participation in the program is considered an employee of the State.

(G) No inmate who participates in a project designated by the Director of the Bureau of Justice Assistance pursuant to Public Law 90-351 is eligible for unemployment compensation upon termination from the program.

item does not apply to medical costs incurred as a result of injuries sustained by an inmate or other medically necessary treatment for which that inmate is determined not to be responsible.

(C) All sums collected for medical treatment must be reimbursed to the inmate if the inmate is acquitted or otherwise exonerated of all charges for which the inmate was being held.

(D) The detention facility may initiate an action for collection of recovery of medical costs incurred pursuant to this section against an inmate upon his release or his estate if the inmate was executed or died while in the custody of the detention facility."

Center for alcohol and drug rehabilitation for offenders

SECTION 45. Chapter 13, Title 24 of the 1976 Code is amended by adding:

"Article 19

The Center for Alcohol and Drug Rehabilitation

Section 24-13-1910. There is established one or more centers for alcohol and drug rehabilitation under the jurisdiction of the Department of Corrections to treat and rehabilitate alcohol and drug offenders. The Department of Alcohol and Other Drug Abuse Services has primary responsibility for the addictions treatment of the offenders, and the Department of Corrections has primary responsibility for the maintenance and security of the offenders. The Department of Corrections may construct one or more centers upon the necessary appropriation of funds by the General Assembly. The centers established or constructed as authorized by this section shall provide at least seven hundred fifty beds. The centers established under this section must be fully operational by January 1, 1997.

Section 24-13-1920. The Department of Alcohol and Other Drug Abuse Services shall establish a program to provide alcohol and drug abuse intervention, prevention, and treatment services for offenders sentenced to a center for alcohol and drug rehabilitation established pursuant to Section 24-13-1910. The Department of Alcohol and Other Drug Abuse Services shall provide staff and support necessary to administer the program. Funds for this program must be appropriated annually by the General Assembly.

(ii) a range of fixed sentences for offenders for whom imprisonment is proper, based on each appropriate combination of reasonable offense and offender characteristics;

(iii) a determination whether multiple sentences to terms of imprisonment must be ordered to run concurrently or consecutively.

(b) In establishing the advisory sentencing guidelines, the commission shall take into consideration current sentence and release practices and correctional resources including, but not limited to, the capacities of local and state correctional facilities;

(2) recommend appropriate advisory sentencing guidelines for the general sessions courts for all offenses for which a term of imprisonment of one year or less is allowed;

(3) recommend appropriate advisory guidelines for offenders for whom traditional imprisonment is not considered proper. Advisory guidelines promulgated by the commission for offenders for whom traditional imprisonment is not considered proper must make specific reference to noninstitutional sanctions;

(4) develop and recommend policies for preventing prison and jail overcrowding;

(5) examine the impact of statutory provisions and current administrative policies on prison and jail overcrowding;

(6) before January sixteenth of each year, prepare and submit to the Governor, the General Assembly, and the Chief Justice of the Supreme Court a comprehensive state criminal justice ten-year, five-year, and one-year plan for preventing prison and jail overcrowding. This plan must include, but is not limited to, the number of persons currently involved in pretrial and postsentencing options predominantly provided through community-based agencies which minimize the number of persons requiring incarceration consistent with protection of public safety, including mediation, restitution, supervisory release, and community service plans and the impact on prison populations, local communities, and court caseloads. The commission shall take into account state plans in the related areas of mental health and drug and alcohol abuse in the development of the plan;

(7) research and gather relevant statistical data and other information concerning the impact of efforts to prevent prison and jail overcrowding and make the information available to criminal justice agencies and members of the General Assembly;

(8) serve as a clearing house and information center for the collection, preparation, analysis, and dissemination of information on state and local sentencing practices and conduct ongoing research regarding sentencing guidelines, use of imprisonment and alternatives to imprisonment, plea

make, from time to time, recommendations to the General Assembly regarding changes in the classification system."

Purchase of prison industry goods exempt from Procurement Code

SECTION 51. Section 11-35-710 of the 1976 Code, as last amended by Section 94, Act 181 of 1993, is further amended to read:

"Section 11-35-710. The board, upon the recommendation of the Division of General Services, may exempt governmental bodies from purchasing certain items through the respective chief procurement officer's area of responsibility. The board may exempt specific supplies or services from the purchasing procedures required in this section and for just cause by unanimous written decision limit or may withdraw exemptions provided for in this section. The following exemptions are granted in this chapter:

(1) the construction, maintenance, and repair of bridges, highways and roads; vehicle and road equipment maintenance and repair; and other emergency type parts or equipment utilized by the Department of Transportation;

(2) the purchase of raw materials and supplies by the South Carolina Department of Corrections, Division of Prison Industries;

(3) South Carolina State Ports Authority;

(4) Division of Public Railways of the Department of Commerce;

(5) South Carolina Public Service Authority;

(6) expenditure of funds at state institutions of higher learning derived wholly from athletic or other student contests, from the activities of student organizations and from the operation of canteens and bookstores, except as the funds are used for the procurement of construction, architect-engineer, construction-management, and land surveying services;

(7) livestock, feed, and veterinary supplies;

(8) articles for commercial sale by all governmental bodies;

(9) fresh fruits, vegetables, meats, fish, milk, and eggs;

(10) South Carolina Arts Commission and South Carolina Museum Commission for the purchase of one-of-a-kind items such as paintings, antiques, sculpture, and similar objects. Before a governmental body procures the objects, the head of the purchasing agency shall prepare a written determination specifying the need for the objects and the benefits to the State. The South Carolina Arts Commission shall review the determination and forward a recommendation to the board for approval;

(11) published books, periodicals, and technical pamphlets;

(12) South Carolina Research Authority;

(13) the purchase of goods, products, and services by state offices, departments, institutions, agencies, boards, and commissions or the political

suitable for confinement. A county or municipality, through mutual agreement or contract, may arrange with another county or municipality or a local regional correctional facility for the detention of its prisoners. The Department of Corrections must be notified by the county officials concerned not less than six months before the closing of a county prison facility which would result in the transfer of the prisoners of the county facility to facilities of the department.

Each county administrator, or the equivalent, having charge of county prison facilities, upon the department's designating the county facilities as the place of confinement of a prisoner, may use the prisoner assigned to them for the purpose of working the roads of the county or other public work. A prisoner so assigned to the county must be under the custody and control of the administrator or the equivalent during the period to be specified by the director at the time of the prisoner's assignment, but the assignment must be terminated at any time the director determines that the place of confinement is unsuitable or inappropriate, or that the prisoner is employed on other than public works. If, upon termination of the assignment, the prisoner is not returned, habeas corpus lies."

Prison industry wages to be paid to department for disbursement

SECTION 54. Section 24-3-40 of the 1976 Code, as last amended by Section 393, Act 181 of 1993, is further amended to read:

"Section 24-3-40. Unless otherwise provided by law, the employer of a prisoner authorized to work at paid employment in the community under Sections 24-3-20 to 24-3-50 or in a prison industry program provided under Article 3 of this chapter shall pay the prisoner's wages directly to the Department of Corrections. The Director of the Department of Corrections shall withhold five percent of the gross wages and promptly place these funds on deposit with the State Treasurer for credit to a special account to support victim assistance programs established pursuant to the 'Victims of Crime Act of 1984, Public Law 98-473, Title II, Chapter XIV, Section 1404'. The director may withhold from the wages costs incident to the prisoner's confinement as the Department of Corrections considers appropriate and reasonable. These withholdings must be deposited to the maintenance account of the Department of Corrections. The balance of the wages, in the discretion of the director and in proportions determined by the director, may be disbursed to the prisoner, the prisoner's dependents, and the victim of the crime or deposited to the credit of the prisoner."

Monitoring of state agency cooperation in purchasing prison industry goods

manufacture or produce articles or products similar, but not identical, to articles or products listed in the catalogue."

Local governments may use home detention

SECTION 57. Section 24-13-1530 of the 1976 Code, as added by Act 594 of 1990, is amended to read:

"Section 24-13-1530. (A) Notwithstanding another provision of law which requires mandatory incarceration, electronic and nonelectronic home detention programs may be used as an alternative to incarceration for low risk, nonviolent adult and juvenile offenders as selected by the court if there is a home detention program available in the jurisdiction. Applications by offenders for home detention may be made to the court as an alternative to the following correctional programs:

(1) pretrial or preadjudicatory detention;
(2) probation (intensive supervision);
(3) community corrections (diversion);
(4) parole (early release);
(5) work release;
(6) institutional furlough;
(7) jail diversion; or
(8) shock incarceration.

(B) Local governments also may establish by ordinance the same alternative to incarceration for persons who are awaiting trial and for offenders whose sentences do not place them in the custody of the Department of Corrections. Counties and municipalities may develop home detention programs according to the Minimum Standards for Local Detention Facilities in South Carolina which are established pursuant to Section 24-9-20 and enforced pursuant to Section 24-9-30."

Use of electronic monitoring devices

SECTION 58. Section 24-13-1560 of the 1976 Code, as added by Act 594 of 1990, is amended to read:

"Section 24-13-1560. The participant shall use an approved electronic monitoring device if instructed by the department at all times to verify his compliance with the conditions of his detention and shall maintain a monitoring device in his home or on his person."

To increase the penalties for the unlawful practice of law

SECTION 61. Sections 24-3-35, 24-7-10, 24-7-20, 24-7-30, 24-7-40, 24-7-50, 24-7-90, and 24-7-100 of the 1976 Code are repealed.

PART III

Prison Industries Report

Prison industry agriculture and litter program report

SECTION 62. No later than the first day of the 1995 Legislative Session, the Department of Corrections shall submit to the General Assembly a detailed and comprehensive report on:

(1) the current status of the prison industries and agricultural programs and the litter control program and recommendations necessary to expand the litter control program;

(2) the potential market that exists for prison industries products or services;

(3) the participation by offices, departments, institutions, or agencies supported in whole or in part by this State or its political subdivisions in purchasing goods and services currently provided by prison industries and recommendations for increasing the purchasing;

(4) a listing of known products, goods, or services currently manufactured or produced by offices, departments, institutions, or agencies supported in whole or in part by this State or its political subdivisions which could be evaluated for adoption into the prison industries program;

(5) a plan to establish, transfer, and close certain prison industries operations to adjust to actual or potential market demand for particular products or services and maximize opportunities for gainful work for inmates;

(6) a plan to promote, plan, and when considered advisable, assist in the location of privately owned and operated industrial enterprises which would utilize inmate labor on the grounds of adult correctional institutions;

(7) the need, if any, for the creation of an advisory board to establish and promote prison industries and services programs.

PART IV

School Safety and Juvenile Justice Reform

Long-term plan for services to juvenile offenders

in the State to educate the students on the consequences of committing delinquent and criminal acts.

Juvenile offenders - family assessment and service plan

SECTION 64. The 1976 Code is amended by adding:

"Section 20-7-753. (A) In a juvenile delinquency proceeding before the family court, the court may designate a state agency as the lead agency to provide a family assessment to the court. The assessment shall include, but is not limited to, the strengths and weaknesses of the family, problems interfering with the functioning of the family and with the best interests of the child, and recommendations for a comprehensive service plan to strengthen the family and assist in resolving these issues.

(B) The lead agency shall provide the family assessment to the court in a timely manner and the court shall conduct a hearing to review the proposed plan and adopt a plan as part of its order that will best meet the needs and best interest of the child. In arriving at a comprehensive plan, the court shall consider:

(1) additional testing or evaluation that may be needed;

(2) economic services including, but not limited to, employment services, job training, food stamps, and aid to families with dependent children;

(3) counseling services including, but not limited to, marital counseling, parenting skills, and alcohol and drug abuse counseling;

(4) and any other programs or services appropriate to the child's and family's needs.

(C) The lead agency is responsible for monitoring compliance with the court ordered plan and shall report to the court at such times as the court requires."

Family court jurisdiction includes family's failure to cooperate in plan

SECTION 65. Section 20-7-420 of the 1976 Code is amended by adding an appropriately numbered item to read:

"( ) to require the parent of a child brought before the court for adjudication of a delinquency matter and agencies providing services to the family to cooperate and participate in a plan adopted by the court to meet the needs and best interests of the child and to hold a parent or agency in contempt for failing to cooperate and participate in the plan adopted by the court. In imposing its contempt powers the Family Court must take into consideration mitigating circumstances including the parent's or legal

exclusively to school and district safety functions. It is the intent of the General Assembly that the safety coordinator have a strong background in law enforcement, safety matters, or coordination of relevant services.

(C) If a county consists of more than one school district, any or all school districts within the county may apply jointly for funds for a safety coordinator. Each participating school district must provide a portion of the local matching funds based upon the relationship the district's student membership bears to the total student membership of all participating districts within the county. Nonparticipating school districts in multi-district counties may begin participation in the program by contributing to the local match in the same manner as those school districts originally participating in the program.

(D) When more than one school district in a multi-district county is provided funds under this section, the safety coordinator must be an employee of the school district with the largest student membership during the immediately preceding school year, unless the participating school districts have a memorandum of agreement providing otherwise; however, the safety coordinator must provide services to all participating school districts.

(E) For purposes of this section, 'student membership' means the cumulative one hundred thirty-five day average daily membership during the immediately preceding school year.

(F) The State Board of Education, through the State Department of Education, shall develop and implement regulations establishing the safety coordinator grant program."

Public middle schools and high schools to be equipped with metal detector

SECTION 68. The 1976 Code is amended by adding:

"Section 59-66-30. (A) Using funds appropriated by the General Assembly, each public middle, junior high, and high school in the State must be equipped with one hand-held metal detector.

(B) In consultation and cooperation with the Office of the Attorney General and the State Law Enforcement Division, the State Department of Education shall provide training in the use of hand-held metal detectors to school officials who shall use the equipment.

(C) The State Board of Education, through the State Department of Education, shall promulgate regulations to implement this section."

Schools to be notified of certain juveniles taken into custody

detention of juveniles from their particular county who are charged with committing a criminal offense for which pretrial detention is both authorized and appropriate. No later than September 1, 1993, the department shall report to the Budget and Control Board on the strategy of each county to comply with Sections 20-7-600 and 20-7-605. The department must include with its report a plan for the construction and the operation of those facilities which are projected to be necessary for the preadjudicatory detention of juveniles in this State. No later than September first of each subsequent year, the department shall report to the board on the status of all preadjudicatory juvenile detention facilities known to be operational or planned, regardless of ownership or management. The board then will coordinate with all responsible and affected agencies and entities to ensure that adequate funding is identified to prevent the detention or incarceration of juveniles in adult jails anywhere within the State of South Carolina. Upon completion of each facility and upon the determination by the Jail and Prison Inspection Division of the Department of Corrections that each facility is staffed in accordance with relevant standards and can be operated in accordance with these standards, the division shall determine and announce the rated capacity of each facility. A facility operated by the Department of Juvenile Justice for the preadjudicatory detention of juveniles must be maintained and continued in operation for that purpose until approved for conversion or closure by the Budget and Control Board. However, a county which decides to maintain its own approved facilities or which has entered into a regional intergovernmental agreement, which has provided secure facilities for preadjudicatory juveniles, and which meets the standards set forth above, may continue to operate these facilities. County and regionally operated facilities are subject to inspection by the Jail and Prison Inspection Division of the Department of Corrections for compliance with the standards set forth above and those created pursuant to Section 24-9-20. The division has the same enforcement authority over county and regionally operated secure juvenile detention facilities as that which is provided in Section 24-9-30. A juvenile ordered detained in a facility must be screened within twenty-four hours by a social worker or, if considered appropriate, by a psychologist, in order to determine whether the juvenile is emotionally disturbed, mentally ill, or otherwise in need of services. The services must be provided immediately. In Department of Juvenile Justice operated facilities, the department shall determine an amount of per diem for each child detained in a center, which must be paid by the governing body of the law enforcement agency having original jurisdiction where the offense occurred. The per diem paid by the governing body of the law enforcement agency having original jurisdiction where the offense occurred must be based on the average operating cost among all preadjudicatory state facilities. The Department of Juvenile

of Counties and adopted by the Department of Corrections, and appropriate fire and health codes and regulations. The division, the inspecting fire marshal, and the food service inspector of the Department of Health and Environmental Control shall each prepare a written report on the conditions of the inspected facility. Copies of the reports shall be filed with the governing body of the political subdivision having jurisdiction of the facility inspected, the governing body of each political subdivision involved in a multi-jurisdictional facility, the State Fire Marshal with respect to the fire safety inspection, the Department of Health and Environmental Control with respect to the food service inspection, and the county legislative delegation in which such facility is located. All reports shall be filed through the Director of the Department of Corrections."

Inspection of local confinement facility

SECTION 73. Section 24-9-30 of the 1976 Code, as last amended by Section 435, Act 181 of 1993, is further amended to read:

"Section 24-9-30. (a) If an inspection under this chapter discloses that a local confinement facility does not meet the minimum standards established by the South Carolina Association of Counties and adopted by the Department of Corrections, and the appropriate fire and health codes and regulations, the Director of the South Carolina Department of Corrections shall notify the governing body of the political subdivision responsible for the local confinement facility. A copy of the written reports of the inspections required by this chapter shall also be sent to the resident or presiding judge of the judicial circuit in which the facility is located. The governing body shall promptly meet to consider the inspection reports, and the inspection personnel shall appear, if requested, to advise and consult concerning appropriate corrective action. The governing body shall initiate appropriate corrective action within ninety days or may voluntarily close the local confinement facility or objectionable portion thereof.

(b) If the governing body fails to initiate corrective action within ninety days after receipt of the reports of the inspections, or fails to correct the disclosed conditions, the Director of the South Carolina Department of Corrections may order that the local confinement facility, or objectionable portion thereof, be closed at such time as the order may designate. However, if the director determines that the public interest is served by permitting the facility to remain open, he may stipulate actions to avoid or delay closing the facility. The governing body and the resident or presiding judge of the judicial circuit shall be notified by registered mail of the director's order closing a local confinement facility.

Status offenses include contempt of court

SECTION 75. Section 20-7-2205, as last amended by Acts 131 and 181 of 1993, of the 1976 Code is further amended to read:

"Section 20-7-2205. A child who is guilty of a violation of law or other misconduct which would not be a criminal offense if committed by an adult, including a child who has been found in contempt of court for violation of a court order related to the violation or misconduct or a child who violates the conditions of probation for an offense, must not be committed to the custody of a correctional institution operated by the Department of Juvenile Justice or to secure evaluation centers operated by the department."

PART V

Effective Dates

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)

95-CP-40-2449

Ronald Tillman, 85375-071,
Applicant,

vs.

State of South Carolina,
Respondent.

SUPPLEMENTAL RETURN AND MOTION TO DISMISS WITHOUT PREJUDICE

FILED
96 SEP -5 AM 10:00
BARBARA A. SCOTT
C.C.P. & G.S.

The Respondent, making its Supplemental Return to the Application for Post-Conviction Relief dated July 17,1995, would respectfully show this Court:

I.

The Respondent hereby incorporates by reference its complete Return dated October 6, 1995.

II.

In his Application, the Applicant alleges the following additional ground for relief:

1. Ineffective assistance of counsel.
2. Brady violation.
3. Judge abuse his discretion and denied the defendant a fair trial.

III.

The Respondent submits that the Application should be dismissed without prejudice. It appears that the Applicant is not in the State of South Carolina nor subject to this State's jurisdiction at this time. Furthermore, the Respondent submits that this State has neither the right, duty or

authority to force the State of Georgia to release the Applicant for purposes of a Post-Conviction Relief hearing in this State. State v. Knowles, _____ S.C. _____, 270 S.E.2d 133 (1980); Coshman v. Nash, 473 U.S. 716, 105 S.Ct. 3401 (1985).

IV.

The Respondent therefore moves for summary dismissal pursuant to § 17-27-20, S.C. Code Ann., (1976) on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing.

Each and every allegation contained within the Application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

WHEREFORE, having made its Return and Motion to Dismiss, the Respondent requests that this matter be summarily denied and dismissed.

Respectfully submitted,

CHARLES MOLONY CONDON
Attorney General

JOHN W. MCINTOSH
Deputy Attorney General

TERESA A. KNOX
Assistant Deputy Attorney General

BY: _____
(ATTORNEYS FOR RESPONDENT)
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3649

September 3, 1996

COPY

STATE OF SOUTH CAROLINA)) COUNTY OF RICHLAND)	IN THE COURT OF COMMON PLEAS 95-CP-40-2449
Ronald Tillman, 85375-071, Applicant, vs. State of South Carolina, Respondent.	REPLY TO SUPPLEMENTAL RETURN AND MOTION TO DISMISS WITHOUT PREJUDICE

The Respondent made its Supplemental Return to this Application for Post-Conviction Relief on September 3, 1996. In this Supplemental Return the Respondent incorporated by reference its complete Return dated October 6, 1995. The Application for Post-Conviction Relief in this matter was dated July 17, 1995.

The Respondent correctly notes that the Applicant is not in the State of South Carolina and is not currently subject to this State's jurisdiction. For that reason, the Respondent has requested that this Application for collateral review pursuant to S.C. Code §17-27-10 et seq. (1985 Cum. Supp.) be dismissed without prejudice. The Respondent has submitted for this court's review a Proposed Order of Dismissal without Prejudice. The Applicant now asks that this Court either deny the Respondent's Motion to Dismiss or, in the alternative, that the Motion be granted with certain specific additional findings by this Court designed to ensure that the Applicant's right to a full and fair collateral review is not prejudiced by this action. In support of this position he would show unto this Court the following:

I.

As previously noted, the Application for Post-Conviction Relief in this case was filed on July 17, 1995. The judgments and sentences attacked in that Application were entered prior to July 1, 1995. On July 1, 1995, a new Statute of Limitations for applying for collateral review through Post-Conviction Relief went into effect pursuant to S.C. Code Ann. §17-27-45 (1995 Cum. Supp.). In Peloquin v. State Op. No. 24410 S.C. Sup. Ct. filed April 15, 1996) (Davis Adv. Sh. No. 9 at 11). the South Carolina Supreme Court held that all individuals with convictions and sentences arising prior to the effective date of this legislation, July 1, 1995, would have one (1) full year from the effective date of the legislation to file an Application for Post-Conviction Relief.

The Applicant is currently in the custody of the Federal Bureau of Prisons and is housed at the Federal Penitentiary in Atlanta, Georgia. The Respondent has asserted that the State has ***"neither the right, duty, or authority to force the State of Georgia to release the Applicant for purposes of a Post-Conviction Relief hearing in this state."*** (Supplemental Return and Motion to Dismiss, Section III). In actuality, the Applicant is in the custody of the federal government, not the sister state of Georgia. Rule 26.02, Local Rules for the United States District Court, District of South Carolina, provides a specific procedure which is to be followed by the State in requesting temporary custody of a

federal detainee."[1] Under the provisions of this rule the State does have the ability to request temporary custody of a federal detainee for the purpose federal sentence of disposing of state charges or for collateral review. The determination as to whether such a state request should be granted rests in the discretion of the appropriate United States District Court Judge. The Applicant has it upon information and belief that such requests are routinely made and granted. The Applicant would further note that a request by a state for temporary custody over a federal detainee in fact requires, ***"a specific writ signed by the judge of a court of competent jurisdiction."*** In the case of a state Post-Conviction Relief action, an Order signed by a circuit court judge for the Court of Common Pleas would be required as a prerequisite to an order signed by a United States District Court Judge releasing the federal detainee for transport to temporary state custody. (Rule 26.02, §§A).

Counsel for the Applicant is advised that the Applicant is currently serving a federal sentence. If the State's Motion to Dismiss the Applicant's request for collateral review without prejudice is granted, on the grounds set forth by the Respondent, by the time the Applicant is released from federal custody he will be procedurally barred from filing a second Application for Post-Conviction Relief. In actuality, the one year permitted under Peloquin, supra has already expired. Therefore, the Respondent's

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[1] A copy of this rule is attached for the Court's convenience.

request for a dismissal without prejudice would be meaningless unless accompanied by specific rulings by this Court holding that the Applicant's right to seek collateral review pursuant to S.C. Code Ann. §17-27-10 et seq. would not be tolled by the Post-Conviction Relief statute of limitations and its interpretation pursuant to Peloquin, supra.

The Applicant would also note that his Application for Post-Conviction Relief has now been pending for nearly fourteen months. To date, his case has not been scheduled for an evidentiary hearing on its merits. The current docket for Post-Conviction Relief hearings in Richland County[2] schedules for review numerous cases with common pleas docket numbers preceding and post-dating that issued in this case. If the Respondent's Motion to Dismiss without Prejudice is granted, even with the procedural safeguards requested by the Applicant above, the Applicant would be prejudiced if he is required to file a subsequent Application for Post-Conviction Relief and begin anew the lengthy wait for an evidentiary hearing in Richland County.

If an Order to Dismiss in this case is truly to be issued "***without prejudice***" it would be necessary that such an order first exempt the Applicant from Application for §17-27-45 and Peloquin, supra. In addition, in order to protect the Respondent from unfair and unnecessary delay, such an order could require that the Applicant re-file for Post-Conviction Relief within sixty (60) days of his release from federal custody. Secondarily, it would be

[2] Received by counsel for the Applicant in connection with unrelated cases on September 5, 1996.

necessary for the Order of Dismissal to provide that the Respondent is to comply with the requirements of Rule 71.1 and Rule 12 (a) SCRCP in filing its Return in a timely manner. Such an order should further direct that the Applicant's case would be scheduled for an evidentiary hearing at the first term of Post-Conviction Relief hearings scheduled for Richland County following the filing of the State's Return. Such a ruling would be necessary to ensure that the Applicant would not be prejudiced by being required to begin anew the lengthy process of waiting for the opportunity to be heard in the court of common pleas.

As discussed above, the Respondent does have the authority to request temporary custody of the Applicant for the purpose of disposing of his pending Post-Conviction Relief Application. The Applicant would therefore asks that the State's Return and Motion to Dismiss be denied and that the State be required to seek temporary custody of the Applicant in order to facilitate the completion of his pending collateral review without unnecessary interruption and delay. If access to the Applicant is denied by the United States District Court, then the Respondent could renew its Motion to Dismiss without Prejudice. At such time the Applicant would of course renew his request for the safeguards discussed herein to ensure that any ***Order of Dismissal*** without Prejudice would in fact safeguard the Applicant's rights not to be prejudiced by the resulting delay. If in the judgment of this Court it is best to dismiss the Applicant's current Post-Conviction Relief case without prejudice he would respectfully ask that the

order to be issued by this Court make the necessary rulings discussed herein to ensure minimal prejudice to the Applicant. In that regard the Applicant would note that it is impossible for court-appointed counsel to accurately measure at this point in time the degree to which her client's ability to meet his burden of proof in a collateral proceeding might be harmed by the delay requested by the Respondent.

WHEREFORE, the Applicant asks that the Respondent's Motion to Dismiss be denied or, in the alternative, that the Order of Dismissal issued by this Court make appropriate rulings to protect the Applicant's right to collateral review upon return to the custody of the State of South Carolina.

Respectfully submitted,

TARA DAWN SHURLING
Attorney and Counselor at Law
3610 Landmark Dr., Suite F
Columbia, S. C. 29204
(803) 738-8622
(803) 738-1600 (FAX)

ATTORNEY FOR APPLICANT.

This 13th day of September, 1996

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)

95-CP-40-2449

Ronald Tillman, 85375-071,
Applicant,
vs.
State of South Carolina,
Respondent.

ORDER OF DISMISSAL
WITHOUT PREJUDICE

FILED
97 SEP 26 AM 11:28
BARBARA A. SCOTT
C.C.C.P. & G.S.

This matter comes before this Court by way of an Application for Post-Conviction Relief dated July 17, 1995. The Respondent made its Supplemental Return and Motion to Dismiss Without Prejudice on September 3, 1996.

In his Application, the Applicant alleges the following additional ground for relief:

1. Ineffective assistance of counsel.
2. Brady violation.
3. Judge abuse his discretion and denied the defendant a fair trial.

This Court finds that the Application should be dismissed without prejudice. It appears that the Applicant is not in the State of South Carolina nor subject to this State's jurisdiction at this time. The records before this Court reflect that the Applicant is currently incarcerated in Atlanta, Georgia. Furthermore, this Court finds that this State has neither the right, duty or authority to force the State of Georgia to release the Applicant for purposes of a

Post-Conviction Relief hearing in this State. State v. Knowles, _____ S.C. _____, 270 S.E.2d 133 (1980); Coshman v. Nash, 473 U.S. 716, 105 S.Ct. 3401 (1985).

AND, IT IS THEREFORE ORDERED that the Application is dismissed without prejudice this 24 day of March, 1997.

L. CASEY MANNING
Chief Administrative Judge
Fifth Judicial Circuit

Columbia, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS
Ronald Tillman, 85375-071, Applicant, v. State of South Carolina, Respondent.	95-CP-40-2449 MOTION TO ALTER OR AMEND PURSUANT TO 59 (E) SCRCP

NOW COMES the Applicant in the above-captioned Post-Conviction Relief matter acting by and through his undersigned counsel asking that the Order of this court dated March 24, 1997 dismissing without prejudice the Application for Post-Conviction Relief docketed at 95-CP-40-2449, be altered or amended. In support of this request, the Applicant would show unto this court the following:

Following the State's Supplemental Return and Motion to Dismiss dated September 3, 1996, the Applicant, acting through his court-appointed counsel, filed a Reply dated on November 12, 1996. The Order of this Court dismissing the Applicant's Post-Conviction Relief case makes no reference to this reply. The Applicant asserts therein both legal and equitable arguments for being permitted to go forward with this collateral action.

The Order of Dismissal signed by this Court on March 24, 1997 purports to dismiss the Applicant's Post-Conviction Relief Application without prejudice. The Order fails, however, to address the impact of SC Code Ann. § 17-27-45 (1995 Cum. Supp.) on any subsequent Application for Post-Conviction Relief which might be filed by the Applicant. The Applicant's current Application for Post-Conviction Relief was timely filed under the guidelines set forth by the Supreme Court in ***Peliquin v. State***, ___ S.C. _____, 469 S.E.2d 606 (1996). Any subsequent application for relief filed by the Applicant would fall outside the time restrictions set forth in both § 17-27-45 and the Supreme Court's decision in ***Peliquin, supra***. Wherefore the Applicant would submit that the Order of Dismissal entered in this matter, as currently framed ,

would act to deprive the Applicant to his right to ever obtain a collateral review of his convictions and sentences through the Uniformed Post-Conviction Relief Procedure Act. See SC Code Ann. § 17-27-10, *et seq.*, (1985 Cum. Supp.).

WHEREFORE, the Applicant herein prays that the Order of this Court dismissing his Application for Post-Conviction Relief be withdrawn and that his case be returned to the list of cases awaiting hearing in the Richland County Court of Common Pleas. In the alternative, the Applicant seeks an Amended Order of Dismissal whereby it is expressly held that the Applicant's time limits for filing a renewed Application for Post-Conviction Relief would be set from the date of his release from federal custody.

Respectfully submitted,

By: Tara D. Shurling

TARA DAWN SHURLING
Attorney and Counselor at Law

3610 Landmark Drive, Suite F
Columbia, South Carolina 29204
(803) 738-8622
ATTORNEY FOR APPLICANT

This 4th day of April, 1997.

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

95-CP-40-2449

Ronald Tillman, 85375-071, APPLICANT,

v.

STATE OF SOUTH CAROLINA, RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of our Motion to Alter or Amend Pursuant to 59 (e) SCRCP in the above matter has been served on opposing counsel, Teresa A. Knox, Assistant Deputy Attorney General, by mailing one (1) copy in an envelope properly addressed with postage prepaid this 4th day of April, 1997.

Tara D. Shurling

TARA DAWN SHURLING
Attorney and Counselor at Law
3610 Landmark Drive
Suite F
Columbia, South Carolina 29204
(803) 738-8622

ATTORNEY FOR APPLICANT.

SWORN TO BEFORE me this 4th day of April, 1997.

Bee Lynn Coombs (L.S.)
NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: 4/4/2000

1470

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Ronald Tillman, 85375-071,)
Applicant,)
)
v.)
)
State of South Carolina,)
Respondent.)

95-CP-40-2449

MOTION FOR RULING ON
59 (e) MOTION

NOW COMES the Applicant in the above-captioned action, acting by and through his undersigned counsel, asking for this Court's ruling on his previously filed Motion Pursuant to Rule 59(e) SCRCivP. In support of this Motion, he would show unto this Court the following:

1. This matter came before the Court by way of an Application for Post-Conviction Relief dated July 17, 1995. The State filed its Return on October 6, 1995. This pleading was followed by a Supplemental Return to this Application for Post-Conviction Relief filed by the State on September 3, 1996, wherein the Respondent sought an Order of Dismissal without Prejudice in this case. An Order of Dismissal was filed in this matter on March 26, 1997. The Applicant filed a timely Motion to Alter or Amend Pursuant to Rule 59(e) SCRCivP on April 7, 1997.
2. No further action has been taken on this file since the Applicant's Rule 59(e) Motion filed on April 7, 1997. The Applicant remains in Federal custody and maintains his desire to pursue a collateral review of his South Carolina conviction and sentence. The Applicant maintains that the presence of this judgment and sentence on his record is adversely affecting the time he is required to serve in Federal custody.

WHEREFORE, the Applicant respectfully seeks a ruling from this Court on his Motion to Alter or Amend that has been pending before this Court for thirteen (13) months. The Applicant intends no disrespect by requesting an immediate ruling on this pending Motion. It is his intent rather to obtain a ruling in this matter so that he might pursue further legal recourses available to him based upon whatever ruling this Court might see fit to issue.

Respectfully submitted,

By: _____
TARA DAWN SHURLING
Attorney and Counselor at Law
3614 Landmark Drive, Suite D
Columbia, South Carolina 29204
(803) 738-8622

ATTORNEY FOR APPLICANT

This 17th day of March, 1998.

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

95-CP-40-2449

Ronald Tillman, 85375-071, APPLICANT,

v.

STATE OF SOUTH CAROLINA, RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of our Motion for Ruling on 59(e) Motion in the above matter has been served on opposing counsel, Teresa A. Knox, Assistant Deputy Attorney General, by mailing one (1) copy in an envelope properly addressed with postage prepaid this 13th day of May, 1998.

TARA DAWN SHURLING
Attorney and Counselor at Law
3614 Landmark Drive, Suite D
Columbia, South Carolina 29204
(803) 738-8622

ATTORNEY FOR APPLICANT.

SWORN TO BEFORE me this 13th day of May, 1998.

(L.S.)
NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: March 5, 2008

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS
Ronald Tillman, 85375-071, Applicant, vs. State of South Carolina, Respondent.	)	95-CP-40-2449 ORDER

This matter comes before the Court by way of Applicant's Motion to Alter or Amend filed on April 7, 1997.

This Court is not persuaded to alter or amend the judgment, based upon careful reconsideration of all of the evidence in the case, and upon full consideration of Applicant's motion and supporting memorandum. This Court further finds that oral argument would not aid in the reconsideration of the original judgment.

IT IS THEREFORE ORDERED:

That the Applicant's motion is denied and dismissed.

AND, IT IS SO ORDERED this 13 day of July, 1998.

L. CASEY MANNING
Presiding Judge
Fifth Judicial Circuit

Columbia, South Carolina

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)

95-CP-40-2449

Ronald Tillman, 85375-071,)
Applicant,)
vs) AFFIDAVIT OF SERVICE BY MAIL
State of South Carolina,)
Respondent.)

PERSONALLY APPEARED before me JEAN CLIFTON, who being first duly sworn, states:

1. That I am an employee of the Respondent in the above-captioned action.

2. That regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. That I have this day served a copy of the Order of Judge Manning dated July 13, 1998 in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

Tara D. Shurling, Esquire
3614 Landmark Drive, Suite D
Columbia, SC 29204

DATED this 17th day of August, 1998.

Jean Clifton
JEAN CLIFTON

SWORN TO before me this
17th day of August, 1998.

[signature] (L.S.)
Notary Public for South Carolina
My Commission Expires: 6-2-2007

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
L. Casey Manning, Circuit Court Judge

RONALD TILLMAN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

MELODY J. BROWN
Assistant Appellate Defender
South Carolina Office of Appellate Defense
1122 Lady Street, Suite 940
Columbia, S. C. 29201

ATTORNEY FOR PETITIONER.

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QUESTION PRESENTED

Did the circuit court judge err in dismissing petitioner's application for lack of personal jurisdiction?

STATEMENT OF FACTS

Petitioner, Ronald Tillman, was indicted for murder by a Richland County grand jury. A jury trial was held before the Honorable Don S. Rushing on January 23, 1990. The jury found petitioner guilty as charged, and the judge sentenced him to life imprisonment.

Petitioner filed a post conviction relief application on July 17, 1995, alleging ineffective assistance of counsel. The state moved to dismiss the application based on lack of personal jurisdiction on September 3, 1996. App. p. 81. The judge granted the state's motion and dismissed the application without prejudice. App. pp. 92, 93. This petition follows.

ARGUMENT

The circuit court judge erred in dismissing petitioner's application for lack of personal jurisdiction.

In the context of this review, a judge's decision will only be upheld if there is evidence to support the decision. Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997), McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995), Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). The petitioner in this case filed a proper application with the Richland County Clerk of Court. South Carolina Code of Laws Ann. § 17-27-40. Petitioner alleged a violation of his constitutional rights which "raised a question of fact which could only be determined in the lower court by an evidentiary hearing." Rogers v. State, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973), Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983). At the time of the application, petitioner was incarcerated in the federal penitentiary in Atlanta, Georgia.[1] The state moved to dismiss the application for lack of personal jurisdiction. The judge erroneously granted the motion. App. pp. 92, 93.

By application to the court, petitioner waived any personal jurisdiction defects and submitted himself to the jurisdiction of the court voluntarily. This differs from a defendant where proper service precedes personal jurisdiction. See generally Rule 3 and 4, SCRCP, Brown v. Evatt, 322 S.C. 189, 470 S.E.2d 848 (1996). Moreover, the judge relied on the finding that the state could not petition for release of petitioner to come into this state to pursue a collateral proceeding to confirm that personal jurisdiction was lacking. App. p. 92. Appearance is not required by the

[1] Petitioner is presently in the Lewisburg Federal Penitentiary, Lewisburg, Pennsylvania.

complaining party to gain jurisdiction because the complaining party is submitting to jurisdiction voluntarily. Thus, personal appearance is not required to pursue the action in the instant case. If appearance would be required, the rules of procedure provide a mechanism to accomplish representation.

South Carolina Rules of Civil Procedure, Rule 17(c), states, in part : "A person imprisoned outside this State shall appear by guardian ad litem in an action by or against him...." The rule does not require that a guardian be appointed to bring the suit, but allows a GAL to take the place of the "incompetent" at the time of appearance if appearance is required.

It was error to dismiss the action based on the inability of petitioner to appear at a hearing. The petitioner consented to jurisdiction, and could waive his right to be present at the hearing if duly represented by counsel. See generally Gossett v. Gilliam, 317 S.C. 82, 452 S.E.2d 6 (Ct. App. 1995). If testimony should be needed, in absence of specific directions to the contrary, it appears that either party could petition for a GAL to be appointed. See generally Rule 17(d)(6), SCRCP. Additionally, to alleviate the need for in-court appearances, sworn statements could be taken by telephone dispositions, written questions, or other arrangements "on such terms as the court prescribes." Rule 30, SCRCP, Rule 31, SCRCP. Such depositions may be used in court proceedings for the benefit of both petitioner and the state. Rule 32, SCRCP.

Rule 17(d)(7) mandates that the court shall make "orders as may be necessary to protect the interest" of a party imprisoned out of state. Rule 17(d)(7), SCRCP. With provisions readily available in the rules, Rule 17(d)(7) urges the judge make any order necessary to protect the out of state petitioner. The rule acknowledges the occasional difficulty in litigating from state to state but

nonetheless expresses our policy to allow access to the judicial system even to the out of state incarcerated individual.

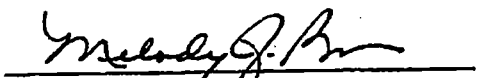
The order in the instant case does allow that petitioner could re-file his application upon completion of his current federal sentence. According to his federal records, petitioner will not be released to SCDC until December 2010. Not only would this delay in post conviction relief proceedings result in evaporation of evidence and dimming of the memories of witnesses, but would also result in partial mootness in relief if the action should be successful. The South Carolina conviction petitioner seeks to challenge was used to enhance the federal sentence he is presently serving. An eventual reversal of the conviction should invalidate the federal enhancement, but this relief would be, in a practical sense, meaningless if the time was already served.

Dismissal in light of these provisions amounts to a violation of due process, offending both the U.S. and state constitutions. The judge did not have any evidence before him to substantiate dismissal based on lack of personal jurisdiction. Thus the judge erred in dismissing petitioner's application.

CONCLUSION

Based on the foregoing argument, petitioner's writ of certiorari should be granted in order to allow full briefing on this issue.

Respectfully submitted,



MELODY J. BROWN
Assistant Appellate Defender

ATTORNEY FOR PETITIONER.

This 18th day of January, 1999.

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
L. Casey Manning, Circuit Court Judge

RONALD TILLMAN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Writ of Certiorari, as well as a copy of the Appendix, in the above referenced case has been served upon opposing counsel, Teresa A. Knox, Esquire, of the attorney general's office, this 18th day of January, 1999.

MELODY J. BROWN
Assistant Appellate Defender

ATTORNEY FOR PETITIONER.

SUBSCRIBED AND SWORN TO before me
this 18th day of January, 1999.

(L.S.)
Notary Public for South Carolina

My Commission Expires: April 6, 2002

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Ronald Tillman, ...Petitioner,

v.

State of South Carolina, ...Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

CHARLES M. CONDON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

TERESA A. KNOX
Assistant Deputy Attorney General

Post Office Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

Did the lower court properly dismiss, without prejudice, Petitioner's application for post-conviction relief?

STATEMENT OF THE CASE

Petitioner is currently incarcerated outside the State of South Carolina due to federal charges. Petitioner filed an application for post-conviction relief dated July 17, 1995. In his application, Petitioner alleged the following additional grounds for relief:

1. Ineffective assistance of counsel.
2. Brady violation.
3. Judge abuse his discretion and denied the defendant a fair trial.

Respondent made its supplemental return and motion to dismiss without prejudice on September 3, 1996. Respondent moved to dismiss the application because Petition is not incarcerated in the State of South Carolina.

On March 24, 1997, the Honorable L. Casey Manning, issued a written order denying and dismissing the application without prejudice. This appeal follows.

ARGUMENT

The lower court properly summarily dismissed, without prejudice, Petitioner's application for post-conviction relief.

Petitioner contends the PCR court erred in dismissing his application on the grounds that he is incarcerated outside the State of South Carolina on federal charges. Respondent submits that the application was properly dismissed.

Respondent submits that the State does not have the duty or authority to ensure appellant's presence at a PCR hearing. Respondent submits that the appropriate remedy is to dismiss the application without prejudice, allowing Petitioner to apply for post-conviction relief when he returns to South Carolina. See Clayton v. State, 278 S.C. 655, 301 S.E.2d 133 (S.C. Ct. App. 1983).

In his petition, Petitioner contends that his South Carolina conviction is being used to enhance his federal sentence. However, in his PCR application, Petitioner states that he was already in federal custody for bank

robbery at the time of his arrest for the South Carolina charges.

Respondent submits that the State should not be responsible for ensuring the appearance of Petitioner nor obtaining his testimony for a collateral hearing in this State. Respondent further submits that it has no authority to gain access to Petitioner while he is under federal custody and control. Respondent has no objection to Petitioner proceeding in a post-conviction matter once he returns to South Carolina, whenever that may be.

Therefore, Respondent submits that certiorari should be denied.

CONCLUSION

For the foregoing reasons, the State submits that the Petition should be denied and dismissed. If this Court sees fit to grant this petition for writ of certiorari, the Respondent would request permission under the rules to fully brief the issues contained herein.

Respectfully submitted,

CHARLES M. CONDON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

TERESA A. KNOX
Assistant Deputy Attorney General

BY: _____
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-3737

April 5, 1999

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY
HONORABLE L. CASEY MANNING, JUDGE

Ronald Tillman,

Petitioner,

v.

State of South Carolina,

Respondent.

AFFIDAVIT OF SERVICE

PERSONALLY APPEARED before me Teresa A. Knox, Assistant Attorney General, who being duly sworn, deposes and says:

(1) That she is one of the attorneys for Respondent herein.

(2) That there exists regular communication by mail throughout the State of South Carolina and that this is a proper circumstance for service by mail.

(3) That she served copies of the foregoing RETURN TO PETITION FOR WRIT OF CERTIORARI on opposing counsel by depositing same in the U.S. Mail, postage prepaid, addressed as follows:

MELODY J, BROWN ESQ.
OFFICE OF APPELLATE DEFENSE
1122 LADY STREET, SUITE 940
COLUMBIA, SC 29201

TERESA A. KNOX

SWORN TO before me this
5th day of April, 1999.

Notary Public for South Carolina
My Commission Expires: June 2, 2007

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
L. Casey Manning, Circuit Court Judge

RONALD TILLMAN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

MOTION TO SUPPLEMENT APPENDIX

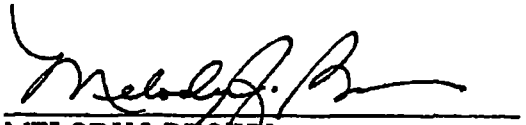
The petitioner, by and through his undersigned attorney, moves the court for permission to supplement the appendix filed January 19, 1999, in support of his petition for certiorari.

Petitioner was denied the right to challenge his state conviction because he is presently serving a federal sentence in a distant federal institution. As part of the argument presented, petitioner explains in his petition that the state conviction he attempts to challenge under post conviction relief affected the federal sentence he is now serving. Petition, page 6. In the return filed April 5, 1999, the state forwards that petitioner was in federal custody at the time of his trial for the state charge. Return, page 5-6. For clarity, petitioner seeks to supplement the appendix with the attached federal sentencing hearing transcript demonstrating that the federal sentencing did not

occur until after petitioner's state conviction. Exhibit A. The conviction was referenced several times during the actual sentencing proceedings. Exhibit A, page 4, lines 11-21; p. 9, lines 15-18; p. 11, lines 9-16.

Petition seeks to submit the appendix for the convenience of the court and for the sake of clarity and completeness. Petitioner submits the transcript directly affects the claims of petitioner on certiorari and more completely presents his case to the court. Petitioner also submits that the transcript is verified by an authorized court reporter and bears the normal indicia of reliability of correctness in recording of the proceedings. Finally, petitioner submits that the information more fully illustrates his sentence and is, in form and function, much like the inmate records customarily submitted without objection.

THEREFORE, petitioner requests the court allow him to supplement the appendix with the attached transcript.



MELODY J. BROWN
Assistant Appellate Defender

ATTORNEY FOR PETITIONER.

May 5, 1999.

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
L. Casey Manning, Circuit Court Judge

RONALD TILLMAN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Motion to Supplement Appendix in the above referenced case has been served upon opposing counsel, Teresa A. Knox, Esquire, of the attorney general's office, this 5th day of May, 1999.

MELODY J. BROWN
Assistant Appellate Defender

ATTORNEY FOR PETITIONER.

SUBSCRIBED AND SWORN TO before me
this 5th day of May, 1999.

(L.S.)
Notary Public for South Carolina
My Commission Expires: 11/25/07

880 3802

AWB

EXHIBIT " A "

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

UNITED STATES OF AMERICA	)	
	)	
V.	)	CR NO. 89-06
	)	
RONALD S. TILLMAN,	)	COLUMBIA, SOUTH CAROLINA
	)	WEDNESDAY, FEBRUARY 14, 1990
DEFENDANT.	)	9:47 A.M. - 11:04 A.M.
	)	

- - -

GUIDELINES SENTENCING HELD BEFORE
THE HONORABLE SOL BLATT, JR., FEDERAL JUDGE

- - -

APPEARANCES:

FOR THE GOVERNMENT: OFFICE OF THE UNITED STATES ATTORNEY
1100 LAUREL STREET
COLUMBIA, SOUTH CAROLINA 29201
BY: ALFRED W. BETHEA, AUSA

FOR THE DEFENDANT: SWERLING & MCCULLOCH
SUITE 301, 1720 MAIN STREET
COLUMBIA, SOUTH CAROLINA 29201
BY: JACK B. SWERLING, ESQUIRE
PAUL L. REEVES, ESQUIRE
JENNIFER SHEALY, ATTORNEY AT LAW

COURT REPORTER: KATIE HANWELL BAILEY, R.P.R.

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY, TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION.

THE COURT: THANK YOU. GOOD MORNING, PLEASE BE SEATED. ALL RIGHT, MR. UNITED STATES ATTORNEY.

MR. BETHEA: THANK YOU, YOUR HONOR. IF IT PLEASE THE COURT, THE GOVERNMENT CALLS UNITED STATES OF AMERICA VERSUS TOMMY LEE BYNUM AND RONALD TILLMAN. THIS IS CRIMINAL NUMBER 89-06, AND THIS HEARING IS FOR PURPOSES OF SENTENCING IN THIS CASE.

THE COURT: ALL RIGHT, SIR. I'M READY TO TAKE THE TILLMAN CASE FIRST. MR. SWERLING, WILL YOU AND THE DEFENDANT COME FORWARD, PLEASE?

MR. SWERLING: GOOD MORNING.

THE COURT: GOOD MORNING, MR. SWERLING.

MR. SWERLING: GOOD MORNING, YOUR HONOR.

THE COURT: MR. SWERLING, HAVE YOU BEEN OVER THE PRE-SENTENCE REPORT?

MR. SWERLING: YES, THIS IS PAUL REEVES, YOUR HONOR, FROM MY FIRM, AND HE HAS ALSO GONE OVER THE PRE-SENTENCE REPORT WITH MR. TILLMAN.

THE COURT: WELL, I STUDIED IT IN DETAIL, AND HAVE BEEN OVER THE OBJECTIONS RAISED BY THE GOVERNMENT, AND THE OBJECTIONS RAISED BY THE DEFENDANT. HAVE BOTH OF YOU SEEN THIS -- I'M JUST NOT SURE IF YOU GET THIS. YOU GET THE ADDENDUM WHICH INCLUDES THE OBJECTIONS?

MR. REEVES: YES, SIR.

MR. BETHEA: YES, SIR.

THE COURT: YOU'VE GOT THEM TOO, MR. UNITED STATES ATTORNEY?

MR. BETHEA: YES, SIR, I CERTAINLY---

THE COURT: SO IF YOU WOULD COME FORWARD TOO, MR. UNITED STATES ATTORNEY, PLEASE.

THE COURT: AS I -- WHAT I LIKE TO DO IS GO DOWN ANY OBJECTIONS BY THE GOVERNMENT AND OBJECTIONS BY THE DEFENDANT.

MR. BETHEA: YES, SIR.

THE COURT: AND RULE ON THEM. NOW, YOUR FIRST OBJECTION IS THAT THE GUIDELINE -- WELL, THE STATUTORY MAXIMUM FOR COUNT ONE IS 25 YEARS, AND COUNT TWO IS A FIVE-YEAR MANDATORY CONSECUTIVE SENTENCE?

MR. BETHEA: THAT'S CORRECT.

THE COURT: THE GUIDELINE RANGE FOR COUNT ONE IS 77 AND 96 MONTHS. THERE IS, OF COURSE, A FIVE-YEAR OR 60-MONTHS MANDATORY ON TWO. AND I ASSUME THAT YOU AGREE THAT THOSE -- OR DO YOU AGREE THAT THOSE FIGURES ARE CORRECT?

MR. BETHEA: YES, SIR, I DO.

THE COURT: AND THE GOVERNMENT FEELS, AS FAR AS I UNDERSTAND, AS FAR AS THE GOVERNMENT IS CONCERNED, THAT THIS CASE IS AGGRAVATED, AND JUST BECAUSE OF THE CIRCUMSTANCES, JUSTIFIES AN UPWARD DEPARTURE FROM THE 25-YEAR MAXIMUM PLUS FIVE YEARS MANDATORY?

MR. BETHEA: THAT'S CORRECT.

THE COURT: AND OF COURSE, THE PRE-SENTENCE REPORT DOESN'T ARGUE FOR AN UPWARD DEPARTURE. OF COURSE, THE RECOMMENDATION IS SOMETHING THAT ONLY I SEE.

MR. BETHEA: YES, SIR.

THE COURT: AND YOU HAVEN'T SEEN THE RECOMMENDATION---

MR. BETHEA: NO, SIR.

THE COURT: ---EITHER ONE OF YOU?

MR. SWERLING: NO, SIR.

MR. REEVES: NO, SIR.

THE COURT: NOW, YOU STATE THAT THE -- INSOFAR AS THE GOVERNMENT IS, FINDS THAT HIS CRIMINAL HISTORY GREATLY UNDERRATES HIS PAST CRIMINAL CONDUCT. BOTH PAST CRIMINAL HISTORY, AND YOU REFERRED -- YOU REFERRED TO HIS PARTICIPATION IN THREE BURGER KING ROBBERIES AND A MURDER OF A GOVERNMENT WITNESS. NOW. . .

MR. BETHEA: YOUR HONOR, AS TO THAT, AS YOU ARE AWARE, SINCE THIS WAS WRITTEN, MR. TILLMAN WAS FOUND GUILTY OF THAT MURDER, SO I THINK---

THE COURT: YES, SIR.

MR. BETHEA: ---THAT TAKES CARE OF ITSELF.

THE COURT: BUT I DON'T THINK THAT, REGARDLESS OF -- I KNOW IT WOULD BE YOUR POSITION THAT THE REASON HE WAS ACQUITTED OF ONE GOVERNMENT BURGER KING ROBBERY THAT HE WAS TRIED ABOUT, WAS BECAUSE THE MAIN GOVERNMENT -- THE

GOVERNMENT WITNESS WHO HE WAS CONVICTED OF KILLING WAS KILLED. I ASSUME THAT'S YOUR POSITION?

MR. BETHEA: YES, SIR, IT IS.

THE COURT: BUT HE'S -- INSOFAR AS THAT PARTICULAR THING IS CONCERNED, BURGER KING ROBBERIES, HE'S ONLY BEEN TRIED FOR ONE, MR. -- HE'S ONLY BEEN TRIED FOR ONE BURGER KING ROBBERY?

MR. SWERLING: YES, SIR. THAT'S CORRECT. AND HE WAS ACQUITTED OF THAT ONE. THE ONE FROM DILLON COUNTY, YOUR HONOR, WAS NOLLE PROSSED.

THE COURT: UH-HUH. BUT YOU USE THE FIGURE THREE, AND I WAS FAMILIAR WITH DILLON AND ONE HE WAS ACQUITTED, WHICH WAS HERE, I BELIEVE.

MR. BETHEA: THERE WAS ONE IN LEXINGTON ALSO, YOUR HONOR.

THE COURT: WHAT'S HAPPENED TO THAT?

MR. SWERLING: HE WAS NEVER -- HE WAS NOT CHARGED WITH THE LEXINGTON CASE.

MR. BETHEA: DONALD SUTTON WAS THE PRIMARY WITNESS IN---

THE COURT: I SAY, NO CHARGE WAS EVER MADE ABOUT IT?

MR. BETHEA: HE WAS NOT BROUGHT TO TRIAL ON THAT.

MR. SWERLING: NO, YOUR HONOR. THERE WAS NO CHARGE BROUGHT AGAINST MR. TILLMAN.

THE COURT: WELL, I THINK THE GOVERNMENT -- I AGREE THAT THE -- AT THE TIME THIS WAS WRITTEN, OF COURSE, THE MURDER CASE HAD NOT BEEN TRIED.

MR. SWERLING: THAT'S CORRECT.

THE COURT: SO I THINK THAT THE PROBATION OFFICER AT THE TIME WAS CORRECT. NOW THE MURDER CASE HAS BEEN TRIED, I THINK THE COURT IS ENTITLED TO TAKE THAT INTO CONSIDERATION. INSOFAR AS THE BURGER KING ROBBERY, I AGREE WITH THE PROBATION OFFICER THAT THAT SHOULD NOT BE CONSIDERED, AND I DON'T INTEND TO CONSIDER IT. SO I WANT THE RECORD TO SHOW THAT.

YOU ALSO MENTION SEVERAL POLICY STATEMENT IN THE GUIDELINES THAT SUPPORT UPWARD DEPARTURE. I'M TALKING -- INSOFAR AS UPWARD DEPARTURE, I'M JUST GOING TO DISCUSS THE THREE THE PROBATION OFFICER SETS FORTH. . .

MR. BETHEA: YES, SIR.

THE COURT: ---WHICH ARE MENTIONED. WELL, ANY--- I AGREE WITH THE PROBATION OFFICER, WHERE THE COMMISSION OF THIS OFFENSE, ALTHOUGH IT COULD HAVE RESULTED IN DEATH, IT DIDN'T RESULT IN DEATH. I DON'T BELIEVE THAT WARRANTS AN ABILITY -- THERE ARE FACTORS THAT I'M GOING TO DISCUSS, BUT I DON'T THINK THAT WARRANTS AN UPWARD DEPARTURE.

MR. BETHEA: YES, SIR.

THE COURT: WHILE I'M SURE THAT THAT TELLER, THAT LITTLE GIRL -- AND I REMEMBER VIVIDLY HER TESTIMONY, AND

THAT TOOK A LOT -- THAT TOOK A LOT OF WILL POWER, TOOK A LOT OF INTESTINAL FORTITUDE FOR HER TO DO WHAT SHE DID.

AND I'VE READ THE PROBATION REPORT ABOUT THE INTERVIEW. I THINK THAT HE INTERVIEWED HER, AND I'M SURE SHE IS CONCERNED, BUT. . . I'M GOING TO TAKE THAT INTO CONSIDERATION, BUT I DON'T THINK THAT SHE'S HAD EXTREME PSYCHOLOGICAL, IN WHAT I WOULD TERM EXTREME. SHE'S NOT CONFINED IN ANY -- OR CONFINED TO A HOSPITAL, OR SHE'S HAD SOME COUNSELING, I THINK, AND SHE'S WORKING, AND I DOUBT THAT HER LIFE IS EXACTLY BACK TO NORMAL.

BUT OF COURSE, I THINK EXTREME, IF YOU HAVEN'T BEEN DOWN THAT ROAD, YOU DON'T REALLY UNDERSTAND WHAT EXTREME IS. I MEAN, SOMETHING THAT TO ME OR YOU, LOOKING AT IT IN THE ABSTRACT, MAY NOT SEEM EXTREME, BUT IT MIGHT SEEM EXTREME IF IT WERE ME.

MR. BETHEA: YES, SIR.

THE COURT: BUT I -- I JUST -- SHE'S HAD PSYCHOLOGICAL INJURY. NOW, I TAKE THAT INTO CONSIDERATION. I DON'T THINK, LOOKING AT IT AS I LOOK AT IT, THAT IT'S EXTREME, ALTHOUGH I'M SURE IT'S DIFFICULT.

MR. BETHEA: YES, SIR. YOUR HONOR, WELL, SHE -- WE ASKED HER IF SHE WANTED TO BE HERE TODAY, AND SHE SAID THAT SHE DIDN'T THINK SHE COULD HANDLE BEING HERE. HOWEVER, THERE ARE QUITE A FEW PEOPLE FROM THE BANK HERE TODAY.