

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Marion County

Honorable Thomas A. Russo, Circuit Court Judge

JOSHUA LEE PHILLIPS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000476

APPENDIX

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Sw - J. Love - Direct

1 that time?

2 A Yes, sir.

3 Q What can you tell us, if anything, any more about the
4 vehicle he was in or the inhabitants of that vehicle other
5 than him?

6 A After everything happened, after I guess the shooting
7 happened a guy leaned —

8 Q Don't tell me what anybody's told you. Just tell me
9 what you know, what you knew that evening, what you know.

10 A That's what I am. A guy leaned from the left passenger
11 side over to the right passenger window and was waving for
12 Joshua to come out the club.

13 Q You say the left passenger side, the right passenger
14 side, are you talking about the front or the back?

15 A The back.

16 Q The back?

17 A Yes, sir.

18 Q So there was one other person in the back?

19 A Yes, sir.

20 Q Could you tell if there were any other individuals in
21 the front?

22 A No, sir.

23 Q Was there anybody driving?

24 A I'm assuming so, yes, sir.

25 Q And did you tell that to law enforcement early on?

Sw - J. Love - Direct

1 A Yes, sir.

2 Q And how did you describe those individuals?

3 A Darker skinned guy. I don't know if he had a low hair
4 cut or not but I know it was a darker skinned guy.

5 Q And did you think they were males or females in the
6 car?

7 A Males.

8 Q All right. Do you know that?

9 A From the guy I saw it was a male, but not for certain.

10 Q Okay. Ms. Love, when y'all talked about the tattoos
11 about how long was that conversation?

12 A A little less than five minutes.

13 Q About five minute conversation?

14 A Yes, sir.

15 Q Okay. And when you talked with him what was your
16 demeanor and his demeanor? Were you kind of cutting up,
17 kind of flirting or very serious talk, or either of you
18 angry, or what was the nature of that conversation?

19 A Just acting kind of, you know, excited, happy, regular
20 club attitude I guess.

21 Q Okay. Club attitude?

22 A Yes, sir.

23 Q Okay, all right. Ms. Love, excuse me, beg the Court's
24 indulgence. I'm going to look through these photos in
25 evidence to see if there's anything else I can ask you

Sw - J. Love - Direct

1 that you can clarify for us. State's Exhibit 25, you know
2 whose truck that is?

3 A Tio's truck.

4 Q Tio's truck?

5 A Yes, sir.

6 Q I'm gonna show you State's Exhibit 28. Do you know
7 this gentleman? You recognize him?

8 A No, sir.

9 Q You don't?

10 A No, sir.

11 Q Okay. Are you sure it wasn't him you saw running out
12 the car?

13 A Positive.

14 Q Okay. State's Exhibit 36, what -- what's that room
15 referring to the Nichols life, or is that Nichols Night
16 Life?

17 A That is just the dance floor.

18 Q That's the dance floor? And what's this area right
19 over here with this little lamp?

20 A That's the DJ booth.

21 Q DJ booth?

22 A Yes, sir.

23 Q Okay. State's Exhibit 37, can you tell the jury what's
24 that? Can you see that?

25 A It's the pool table area. You see a little behind the

Sw - J. Love - Direct

1 bar and the bathroom.

2 Q Okay. Where is the bathroom at, which area?

3 A Over here past this chairs.

4 Q Kind of in the back right-hand corner of the building?

5 A Yes, sir.

6 Q And what's that right there, that black thing?

7 A Trash can.

8 Q Okay. Is that the one they emptied outside?

9 A Yes, sir.

10 Q And it had already been emptied outside that evening?

11 A Yes, sir.

12 Q Ms. Love, I'm sorry, I need to ask you to identify this

13 State's Exhibit 49. Can you identify that for me. Can

14 you tell us what area of the club that was?

15 A It's behind the bar.

16 Q Behind the bar. And do you know the person that was in

17 that picture, State's Exhibit 49?

18 A Yes, sir.

19 Q And who is that person?

20 A Angelique Bynum.

21 Q I'm sorry, Ms. Love. State's Exhibit 51, do you know

22 what that is?

23 A It's the back door.

24 Q And is that back door, is that back door normally open

25 or is it normally locked?

Sw - J. Love - Direct

- 1 A It's locked unless Tio is cooking.
- 2 Q Is Tio cooking while you were out in that car?
- 3 A No, sir.
- 4 Q So it's got, looks, like how many locks on that door?
- 5 A Just two.
- 6 Q Two?
- 7 A Yes, sir.
- 8 Q Chained and padlocked?
- 9 A Yes, sir.
- 10 Q So was other than this, is there any other entrance in
- 11 and out of that building other than the front door?
- 12 A No, sir.
- 13 Q And State's Exhibit 49, Ms. Love, and I show you -- I'm
- 14 not going to show you it to you again. There was a blue
- 15 bag depicted in that picture with Ms. Bynum. Do you know
- 16 what was in that blue bag?
- 17 A Yes, sir.
- 18 Q What was in that blue bag?
- 19 A A shotgun I believe.
- 20 Q And where was that bag kept at?
- 21 A Behind the bar.
- 22 Q Where at behind the bar?
- 23 A It's usually in the corner or on the shelve above.
- 24 Q Up on the shelf above?
- 25 A Yes, sir.

Sw - J. Love - Direct

1 Q Okay. I'm gonna show you State's Exhibit 59. You
2 recognize that?

3 A Yes, sir.

4 Q What is that?

5 A That's the shotgun.

6 Q That was kept in the bag?

7 A Yes, sir.

8 Q Was it always kept in that bag?

9 A Yes, sir.

10 Q What was the purpose for that shotgun being there?

11 A To protect people from doing exactly what happened that
12 night or any other things.

13 Q Do you know whether or not that shotgun was legal?

14 A No, sir, I have no idea.

15 Q Okay. It wasn't your shotgun, was it?

16 A No, sir.

17 Q Ms. Love, you have any type of criminal record?

18 A No, sir.

19 Q Okay. Ms. Love, is the man you saw get out of that
20 small SUV, run in to Nichols Night Life, are you
21 absolutely sure that's the same man that you talked to
22 that evening that had two tear drop tattoos and vitiligo
23 on his face?

24 A Yes, sir.

25 Q You absolutely positive?

Sw - J. Love - Direct

1 A Yes, sir.

2 Q And you're absolutely positive that when you pulled out
3 and you looked out your driver's side window and you
4 looked in behind that bar that that person behind that bar
5 fumbling around ---

6 MR. ANDERSON: Judge, I would object, asked and
7 answer. And I think that testimony has already been
8 covered.

9 THE COURT: I will overrule that particular
10 objection. Go ahead.

11 BY MR. CLEMENTS:

12 Q That the person you saw out your driver's side window
13 fumbling behind that bar was the same person that you
14 talked to earlier that evening?

15 A Yes, sir.

16 Q Absolutely sure?

17 A Yes, sir.

18 Q Are you absolutely positive that it is the same person
19 that you waited on in your mother's clothing store in
20 Loris and talked to there?

21 A Yes, sir.

22 Q And you're absolutely certain it's the same person that
23 you saw in the photo line-up, State's Exhibit 1, that you
24 identified for investigator Paul James?

25 A Yes, sir.

Sw - J. Love - Cross

1 Q You're absolutely certain?

2 A Yes, sir.

3 Q And are you absolutely certain that that person that
4 was fumbling behind that bar, that that person you talked
5 with that evening about his tear drop tattoos, that that
6 person that you saw run from the car into the club when it
7 was closed and they were cleaning up and the person you
8 talked to at that clothing store in Loris is the person
9 that's seated there in the plaid shirt, Joshua Phillips?

10 A Yes, sir.

11 Q You're absolutely certain?

12 A Yes, sir.

13 Q Please answer any questions Mr. Lawson or Mr. Anderson
14 may have.

15 **CROSS-EXAMINATION**

16 BY MR. ANDERSON:

17 Q Ms. Love, you said there was a sawed-off shotgun in
18 that blue bag?

19 A Yes, sir.

20 Q And that was for protection?

21 A Yes, sir.

22 Q Why would you need a sawed-off shotgun in a night club?

23 A Because it was a hole in the wall. I mean, it was a
24 small club with not much security.

25 Q Sometimes you ever feel threatened in the club?

Sw - J. Love - Cross

1 A Yes, sir.

2 Q Joshua Phillips never threatened you, did he?

3 A No, sir.

4 Q I think earlier you stated that at the bar while you
5 were talking to him y'all were kind of a club atmosphere
6 or bar atmosphere.

7 A Yes, sir.

8 Q I mean. Nothing unusual with his behavior at that
9 time, was there?

10 A No, sir.

11 Q You didn't see anything in his shirt pocket or under
12 his pants or anything like that, did you?

13 A No, sir.

14 Q Didn't see any guns on him?

15 A No, sir.

16 Q Now you talked to law enforcement at least three times
17 in this case; is that right?

18 A Yes, sir.

19 Q First time when you approached them I guess when you
20 left the club?

21 A Yes, sir.

22 Q Saw him in Nichols?

23 A Yes, sir.

24 Q Second time is when you came back and gave a statement
25 to someone in Marion, a Marion County deputy. You're not

Sw - J. Love - Cross

1 real sure who it was.

2 A Yes, sir.

3 Q And the third time is when you actually talked with the
4 Detective Larry Woods, or at least's who we think you
5 talked with.

6 A Yes, sir.

7 Q Now let back up for a second. Did you ever tell law
8 enforcement the names of the two girls that you jumped
9 off?

10 A No, sir.

11 Q Did you ever give law enforcement a description of
12 those two girls?

13 A No, sir.

14 Q Did you ever tell law enforcement, I went down the
15 street to such and such address at such and such house at
16 such and such time?

17 A I wrote it in my statement, but no, sir, as far as
18 speaking it.

19 Q Now let me ask you a question about the red truck. Do
20 you know why the truck was running?

21 A No, sir.

22 Q Do you know why the red truck was locked?

23 A No, sir.

24 Q Did Tio make a habit of keeping his truck locked and
25 running?

Sw - J. Love - Cross

1 A He kept it locked but not running.

2 Q Now earlier when Mr. Clements asked you about -- I'm
3 not sure if it was State's 22 but I will hand you State's
4 22 and ask you if that -- it's already in evidence but
5 I'll ask you if you recognize that.

6 A Yes, sir.

7 Q Is that the way it was when you left that night or the
8 early morning hours?

9 A Yes, sir.

10 Q Looking at State's 22 there is a white -- it appears to
11 be a white door; I'll ask you if that's what you think it
12 is, a white door and a black trash can?

13 A Yes, sir.

14 Q And beside that is a white chair?

15 A Yes, sir.

16 Q And then there's the entrance to the --

17 A Yes, sir.

18 Q --I guess, nightclub. And then the screen door
19 appears to be propped open by something that appears to be
20 white.

21 A A white trash can.

22 Q White trash can. Where did you park when you came
23 back?

24 A I backed up right here.

25 THE COURT: Keep your voice up.

Sw - J. Love - Cross

1 THE WITNESS: I backed up right here beside that
2 trash can beside that chair.

3 BY MR. ANDERSON:

4 Q So you -- and I'm not trying to put words in your
5 mouth. You're -- you backed up between this black trash
6 can and that white chair; is that?

7 A Yes, sir, closer to the chair, but yes, sir.

8 Q How far did you back up? I mean, did you back up to
9 the wall?

10 A No, sir. My left fender bumper should have been closer
11 to that blue wall, closer to this blue entrance here,
12 close to this blue wall here.

13 Q Okay. And you couldn't back up all the way because
14 then you would have hit the trash can and/or the chair; is
15 that right?

16 A Yes, sir.

17 Q Now where, if you recall, where did the SUV, where did
18 it pull up?

19 A It pulled up almost directly in front of me in the road
20 here.

21 Q All right. I'm gonna -- if you were right here. I
22 guess right there would be a better.

23 A Yes, sir.

24 Q The SUV was somewhere in this general vicinity?

25 A Yes, sir, in the road.

Sw - J. Love - Cross

1 Q All right.

2 MR. ANDERSON: Visual aids, Your Honor.

3 THE COURT: All right.

4 BY MR. ANDERSON:

5 Q And I realize that's bigger than your car was with the
6 car that you were driving, but is that accurate to where
7 you were backed up?

8 A Just about, yes, sir.

9 Q All right.

10 MR. ANDERSON: Madam Clerk, can I borrow your
11 scissors again?

12 BY MR. ANDERSON:

13 Q I'm gonna put an "A" on this one, and I'm gonna put a
14 "B" on this one and I would ask if you would please mark
15 that for me, A where you were and B where the SUV pulled
16 up.

17 A (Witness complies.)

18 Q A is you; B is the SUV?

19 A Yes, sir.

20 Q Now let's get a little bit bigger. This is already in
21 evidence, State's 10-A and State's 10-B. Now this one
22 does not have as much detail as this picture does; but if
23 you would, if you would step down for me please, ma'am.

24 THE COURT: Keep your voice up, Ms. Love.

25 THE WITNESS: Yes, sir.

Sw - J. Love - Cross

1 BY MR. ANDERSON:

2 Q And we'll do just do A and B again if that's all right
3 with you. A for your car and B for the SUV.

4 A (Witness complies.)

5 Q I'll have you return to your seat.

6 A (Witness complies.)

7 Q State's 30, when you were testifying earlier you talked
8 about State's 30. I'm gonna hand it to you. Again, is
9 that the chair we had previously talked about in the front
10 door of the night club?

11 A Yes, sir.

12 Q And of course that's got the white trash can holding
13 open the screen door?

14 A Yes, sir.

15 Q I think you indicated that you could not remember
16 whether or not the screen door was actually opened or
17 closed; is that right?

18 A Yes, sir.

19 Q How wide does that doorway appear to be?

20 A Not very wide.

21 Q Maybe two-and-a-half, three-feet?

22 A Yes, sir.

23 Q And the picture of the bar, how much of the bar can you
24 actually see through there?

25 A At best it's not a lot.

Sw - J. Love - Cross

- 1 Q Ma'am?
- 2 A Not a lot.
- 3 Q I mean, if you had to guess just using your best guess,
4 would you think maybe 4, 5-feet at the bar?
- 5 A Yes, sir.
- 6 Q And of course in State's 30 you were parked kind of
7 right here on the side?
- 8 A Yes, but you can see it better 'cause I was still on
9 this piece of wood right there.
- 10 Q Okay. So you were actually still on the piece of wood.
- 11 A Two of my tires were probably —
- 12 Q We need —
- 13 A —still there.
- 14 Q We need a little bit bigger. I'm gonna put the A on
15 this one. And if you would just maybe mark where your —
16 the bumper of your car would have been.
- 17 A Right about...
- 18 Q So you would probably, if your car is A you were
19 probably only maybe 6 or 7 feet away from being pass the
20 door, would that be accurate? I mean, if you were parked
21 here, if you had gone right here you couldn't have seen in
22 the night club, would you?
- 23 A I pulled up before that.
- 24 Q I understand that, but I mean, if once you pulled to
25 right here you can no longer see in the club, can you?

Sw - J. Love - Cross

1 A No, sir.

2 Q Okay. Now if we had to use a big -- relate here in the
3 courtroom, this would be about the size of that door?

4 A Yes, sir.

5 Q And again, using the courtroom you're parked somewhere
6 about right here; is that right?

7 A Yes, sir.

8 Q And the driver's door, of course, would probably be
9 somewhere right in this area?

10 A The what?

11 Q The driver's door? Would that be about right?

12 A Little further back this way, but yeah.

13 Q Closer to you?

14 A Yes, sir, small car.

15 Q This is --

16 A Uh-huh.

17 Q --the wall. I mean, the driver's door can't be right
18 here.

19 A Which wall are you talking about? There's the entrance
20 wall.

21 Q This is the wall of the club. This is the door way
22 that we just talked about in State's Number 30.

23 A Okay.

24 Q So you're parked somewhere in the car. Driver's door
25 is probably right around here in this area; is that right?

Sw - J. Love - Cross

1 A No, sir, I'm -- you had me lost.

2 MR. ANDERSON: Your Honor, may I ask the witness
3 to step down?

4 THE COURT: Yes.

5 (Witness complies.)

6 BY MR. ANDERSON:

7 Q This is the entrance to the night club, right? This is
8 that door that leads in. And the car that you were
9 driving, the rental car, is backed up to this cinder block
10 wall. You would have backed up to that car, right?

11 A Okay.

12 THE COURT: Keep your voice up, Ms. Love.

13 BY MR. ANDERSON;

14 Q The driver's door on that car would have been somewhere
15 in this area; is that right?

16 A This is a outer part of the wall here, yes, sir.

17 Q Okay.

18 A This is not the very front. The entrance part right
19 here.

20 Q That's where you walk to the club and then a little bit
21 further there was another door; is that right?

22 A Yes, sir.

23 Q But this is the very entrance to the club?

24 A Yes, sir.

25 Q Okay. So you would have been right here in this

Sw - J. Love - Cross

1 general vicinity somewhere right here sitting in the
2 driver's seat. I'm not -- I mean, if you want to show me
3 that's, fine. I'm not trying to trick you here.

4 A The entrance of the door being right here, the very
5 entrance, and I mean, small part of the car would have
6 been from right here to about maybe about right here.

7 Q Okay.

8 A I was sitting here.

9 Q Okay. Now when you're sitting right here you can't see
10 the bar, can you?

11 A No, sir.

12 Q I mean, if you look in your rear view mirror you would
13 have seen would be the wall of the...

14 A Yes, sir.

15 Q So you would have had to actually gotten somewhere in
16 this vicinity to be able to see the bar; is that right?

17 A Yes, sir.

18 Q Okay. I'll let you be seated.

19 A (Witness complies.)

20 Q Now you indicated a vehicle pulled up?

21 A Yes, sir.

22 Q There was no one else in the parking lot?

23 A No, sir.

24 Q Okay. Now let me back up for a second. When you were
25 in the bar I guess taking money, serving drinks, things

Sw - J. Love - Cross

1 like that, you didn't tell anyone, we're closing around

2 5:05, 5:10, did you?

3 A No, sir.

4 Q Y'all normally didn't broadcast to patrons or people in
5 the bar when you were leaving, when you were closing,
6 things like that?

7 A No, sir.

8 Q Did y'all have any set hours of when you closed?

9 A No, sir.

10 Q A lot -- I'm just guessing now. As long as you had
11 business, paying customers, you would stay open?

12 A Yes, sir.

13 Q And when it kind of died down a little bit, all right,
14 time to clean up, etc., go on home?

15 A Yes, sir.

16 Q All right. Did y'all charge a cover fee or entrance
17 fee to get into the bar?

18 A Yes, sir.

19 Q How much was that typically?

20 A 3-dollars.

21 Q Now did y'all ever have DJ's playing there, things like
22 that?

23 A Yes, sir.

24 Q Did y'all have one there that night, early morning
25 hours?

Sw - J. Love - Cross

- 1 A At that time, no. He was already gone.
- 2 Q Now one thing I have a question about is, you said
- 3 there was a TV and either a DVD or VCR in the trunk of the
- 4 car?
- 5 A There was a TV in the trunk, yes, sir.
- 6 Q And you said y'all played movies?
- 7 A Yes, sir, on a small DVD player.
- 8 Q Did you tell me that sometime they play porn movies?
- 9 A Yes, sir.
- 10 Q Did y'all serve liquor or mixed drinks?
- 11 A No, sir, beer and wine.
- 12 Q Just beer and wine?
- 13 A Yes, sir.
- 14 Q Did y'all ever cook food there?
- 15 A Yes, sir.
- 16 Q Who did most of the cooking?
- 17 A Tio.
- 18 Q You said the club opened at approximately 10 a.m. -- or
- 19 excuse me, 10 p.m. that night?
- 20 A Yes, sir.
- 21 Q What time did you get up that day?
- 22 A I have a two year old so I'm up about 7 a.m.
- 23 Q Did you ever take a nap during the day?
- 24 A Most of the time, yes, sir.
- 25 Q What time, if you remember, did you take a nape that

Sw - J. Love - Cross

1 day?

2 A I can't remember.

3 Q If you would have taken one typically how long is that
4 nap?

5 A About an hour.

6 Q So you would have gotten up at approximately 7 a.m.
7 that morning, maybe taken an hour's nap sometime during
8 the day, and then work till five the next day?

9 A Yes, sir.

10 Q So you would have been up approximately 22 hours?

11 A Yes, sir.

12 Q When you were taking money at the bar, that 3-dollar
13 cover, where did y'all keep the money?

14 A I usually kept it in my pocket until the night was over
15 and then I would give it to Angelique Bynum.

16 Q And when y'all were paid or when someone was paying for
17 a drink where would the money be kept?

18 A Behind the bar and they, what seemed like a cash
19 register drawer.

20 Q A cashier's drawer?

21 A A cash register drawer. Not the cash register but the
22 drawer.

23 Q Cash register drawer?

24 A Yes, sir.

25 Q Getting back to the diagram for a moment, and I'm

Sw - J. Love - Cross

1 referring to State's 22 and 10-A and 10-B.

2 MR. ANDERSON: Your Honor, may I ask the witness
3 to step back down.

4 THE COURT: Yes, please keep your voice up now.

5 THE WITNESS: Yes, sir.

6 BY MR. ANDERSON:

7 Q You were parked right here?

8 THE COURT: The reference is to exhibit number?

9 MR. ANDERSON: 10-B, Your Honor.

10 BY MR. ANDERSON;

11 Q You were parked right here where A is marked?

12 A Yes, sir.

13 Q The car that pulled up is B?

14 A Yes, sir.

15 Q When you pulled out did you pull in front of that
16 vehicle or behind it?

17 A Behind it.

18 Q So you would have actually pulled ---

19 A Pulled in front of it this way.

20 Q You pulled in front of it?

21 A Yes, sir.

22 Q How wide is the parking lot?

23 A It's two car, fit two cars between the two.

24 Q Now was that car parked with the front going one way
25 and the back going one way or ---

Sw - J. Love - Cross

1 A Yes, sir.

2 Q Okay. So instead of being parked like yours it was
3 parked sideways?

4 A Yes, sir.

5 Q Now do you know if that was the driver's side or is
6 that the passenger side?

7 A Passenger side.

8 Q Passenger side. And you actually pulled in front of
9 it?

10 A Yes, sir.

11 Q So you — when you pulled out, if you know, or if you
12 want to guess, and we'll look at State's 22 'cause this
13 gives us a little more accurate picture of the actual
14 drive way. Were they parked in the road or were they
15 parked in the grass?

16 A In the road.

17 Q And you pulled in front of them?

18 A Yes, sir.

19 Q So do you think you were within 6 to 8-feet of that
20 car?

21 A I was pretty close do it.

22 Q At any point in time did you ever look over to see who
23 was in that car when you were pulling out?

24 A No, sir.

25 Q At any point in time did you look at that car to make

Sw - J. Love - Cross

1 sure you weren't getting ready to hit it?

2 A No, sir.

3 Q Okay. So you just pulled out? You can return to your
4 seat.

5 A (Witness complies.)

6 Q So you never looked at that car to make sure you
7 weren't going to hit it? Did you ever look to see if
8 there was anything in the front of you to make sure you
9 weren't going to hit that?

10 A Once I started taking off fully, yes, sir.

11 Q Part of the reason, I guess, and I'm not trying to tell
12 you what to say, but part of the reason I think you
13 indicated earlier you were alarmed. When you saw that
14 person waving you got alarmed?

15 A Yes, sir.

16 Q How fast do you think you pulled off?

17 A Being I pulled off pretty slow I looked inside the,
18 inside the club.

19 Q When you say pretty slow, if you had to, how many miles
20 an hour?

21 A About five, four or five miles an hour. Slow.

22 Q And this is the entrance way to the bar?

23 A Yes, sir.

24 Q And you can see the actual bar itself, part of the bar
25 when you drive past it?

Sw - J. Love - Cross

1 A Yes, sir.

2 Q So if you're driving past it, I mean, you got less than
3 a second to actually look in there. Would that be
4 accurate?

5 A I could actually see who was behind the bar, yes, sir,
6 so.

7 Q I understand that. You got less than a second; is that
8 accurate?

9 A Give or take. I mean, I could—

10 Q You didn't pull off like this, did you? I mean, you
11 were alarmed at that time according to your previous
12 testimony.

13 A Uh-huh.

14 Q I mean, so when you pulled off the doorway is only
15 3-feet. When you're looking directly in front of it you
16 can only see a small portion of the bar according to
17 State's 30 that we previously talked about. So when
18 you're pulling off you've only got less than a second to
19 look inside. Would that be accurate?

20 A I actually have a little more because of going
21 catty-corner I could still see inside so I had more than
22 one second.

23 Q But of course you were a little —

24 A Uh-huh.

25 Q —alarmed?

Sw - J. Love - Cross

1 A Yes, sir.

2 Q And you actually at some point in time diverted your
3 attention to look at the car, the jeep, 'cause you saw
4 somebody waving.

5 A (There was no response.)

6 MR. CLEMENTS: Is that a question, Your Honor,
7 or statement?

8 THE COURT: I didn't know.

9 MR. CLEMENTS: I would object if it's a
10 statement.

11 THE COURT: It's struck from the record because
12 there is no further response. Proceed.

13 BY MR. ANDERSON:

14 Q You did look at the other car?

15 A Yes, sir.

16 Q You did glance inside to see who was in that other car?

17 A I saw them when I was still parked waving.

18 Q And you saw at least two people in that car?

19 A I saw a shadow of a person in the front seat and a guy
20 leaned over in the back seat.

21 Q I'll repeat the question. So you saw —

22 A Yes, sir.

23 Q —at least two people in the car?

24 A Yes, sir.

25 Q Okay. Let's talk about your statements for a second.

Sw - J. Love - Cross

1 You gave at least two statements in this case.

2 A Yes, sir.

3 Q At any point in time did you ever contact Captain
4 Barker right here in the cream colored outfit with the
5 pink shirt and say, Ms. Barker, Captain Barker, I've got
6 some more information I want to give you?

7 A No, sir.

8 Q At any point in time did you ever call the Marion
9 County Sheriff's Office and go, you know, new stuff has
10 come to mind, I would like to fill you in on this case.

11 A No, sir.

12 Q When you gave that first statement you had actually
13 gone back to the scene?

14 A Yes, sir.

15 Q And this is after you had gone home?

16 A Yes, sir.

17 Q And this is after you had talked to your mom and dad or
18 your family?

19 A Yes, sir.

20 Q And this is after you had, I guess, calmed down a
21 little bit.

22 A Yes, sir.

23 Q And then you went back to the scene?

24 A Yes, sir.

25 Q Now was that your idea, was that your family's idea?

Sw - J. Love - Cross

- 1 A My mother's idea.
- 2 Q Did you agree with that?
- 3 A Yes, sir.
- 4 Q So you went back to the scene?
- 5 A Yes, sir.
- 6 Q And when you got to that scene there were multiple
- 7 police officers there?
- 8 A Yes, sir.
- 9 Q Multiple cars there?
- 10 A Yes, sir.
- 11 Q Guns, badges, everywhere?
- 12 A Yes, sir.
- 13 Q And you walked up to, according to the first statement,
- 14 it just says make it known to the Marion County Sheriff's
- 15 Office that you walked up to someone and said, hey, I'm
- 16 here, I'd like to give a statement.
- 17 A Yes, sir.
- 18 Q Or -- tell me what happened. You drove up and what
- 19 happened?
- 20 A I drove up and there were officers there and I wanted
- 21 to know what, if there was, you know, if it was a crime
- 22 scene as far as definitely. And one officer asked me who
- 23 I was. I told him who I was. He said, well, have I given
- 24 a statement. I said, no, sir, I'll give a statement.
- 25 Q Now when you got ready to talk to that officer he said,

Sw - J. Love - Cross

1 ma'am, I want you to just calm down.

2 A Yes, sir.

3 Q I want you to take several deep breaths. Did he say
4 that?

5 A Yes, sir.

6 Q I want you to write everything you know about this
7 case. Did he tell you that?

8 A In different words, but yes, sir.

9 Q I mean, he didn't tell you —

10 A Yeah.

11 Q —to just throw something down and whatever it is,
12 that's fine. He didn't say that, did he?

13 A No, sir.

14 Q He didn't say tell me a bunch of lies, did he?

15 A No, sir.

16 Q He didn't say just make up a story and sign your name
17 to it.

18 MR. CLEMENTS: Your Honor, I would object to
19 Hearsay of what somebody else said. I let it go for a
20 while but he is asking for hearsay.

21 THE COURT: You need to rephrase the query,
22 Counsel, in terms of the direct query to her.

23 BY MR. ANDERSON:

24 Q I think you gave the statement 7:05?

25 A Yes, sir.

Sw - J. Love - Cross

1 Q And in that statement did you ever give Joshua
2 Phillips' name?

3 A No, sir.

4 Q Did you ever mention a gun?

5 A No, sir.

6 Q Did you ever mention that he was hunched over?

7 A No, sir.

8 Q Did you ever say that I heard two or three shots?

9 A Yes, sir.

10 Q You did say that; didn't you?

11 A Yes, sir.

12 Q But you said I paid it no mind.

13 A Yes, sir.

14 Q So that statement you actually say I heard two or three
15 shots?

16 A Yes, sir.

17 Q But paid it no mind.

18 A Yes, sir.

19 Q Did not alarm you at that time?

20 A Not at that time, no.

21 Q Never said where you were parked?

22 A No, sir.

23 Q Never said where the jeep was parked or the SUV. Never
24 said you were nervous, did you?

25 A No, sir.

Sw - J. Love - Cross

1 Q Never said you were scared?

2 A No, sir.

3 Q You never said you, hey, when I left here I went and
4 stopped at a gas station, told the police something. You
5 didn't put that in that statement, did you?

6 A Yes, sir. I stopped at the gas station.

7 Q I'm sorry, you did, I left and stopped at a gas
8 station. Did you ever say you were hysterical?

9 A No, sir.

10 Q Did you ever say you felt threatened?

11 A No, sir.

12 Q Did you ever say that the jeep actually pulled up?

13 A I believe I did. No, sir.

14 Q No?

15 A No, sir.

16 Q Did you ever say how long you'd been at the club?

17 A No, sir.

18 Q Did the officers ever ask you if you'd been drinking?

19 A I believe one did, yes, sir.

20 Q Did you put that in your statement?

21 A No, sir.

22 Q Did you ever give a description of the person in the
23 back seat of the car?

24 A I don't believe so, no, sir.

25 Q That was at 7:05?

Sw - J. Love - Cross

1 A Yes, sir.

2 Q And then later you gave another statement; is that
3 right?

4 A Yes, sir.

5 Q Now do you know whether or not Detective Woods and
6 Captain Gray, did they have copy of your first statement
7 when they got you to write this second one?

8 A I'm not -- I'm not sure, no, sir.

9 Q Now after you gave that first -- well, actually after
10 you gave that second statement, but after you gave the
11 first handwritten statement what did you do after that?

12 A I kind of just -- I got -- they done -- they test me
13 for gun residue. And I got -- stood around and calmed
14 down, talked to my mom a little.

15 Q Did Detective Woods come talk to you?

16 A Yes, sir.

17 Q Did any other law enforcement officers talk to you?

18 A No, sir.

19 Q Now when Detective Woods came and talked to you did he
20 talk to you about the case for a few minutes?

21 A He first asked me how I was and calmed me down and then
22 --

23 Q Told you to relax?

24 A Uh-huh.

25 Q Did he ask you if you had already given one handwritten

Sw - J. Love - Cross

1 statement?

2 A Yes, sir.

3 Q Did he ask for a copy of that?

4 A I'm not sure.

5 Q Of your own knowledge do you know whether or not he
6 ever reviewed your first handwritten statement?

7 A I'm not sure, I'm sorry.

8 Q Did he ask you to write a second statement?

9 A Yes, sir.

10 Q And did you do that?

11 A Yes, sir.

12 Q And again, this is after he's asked you to calm down
13 relax, things like that ---

14 A Yes, sir.

15 Q ---is that true? Is that a copy of your second
16 statement?

17 A Yes, sir.

18 Q And that statement given roughly 30, 35 minutes later?

19 A Yes, sir.

20 Q And that statement is approximately half page long?

21 A Yes, sir.

22 Q And at the time this incident happened you were 19?

23 A Yes, sir.

24 Q Again, you start off talking about the two jumper,
25 girls with jumper cables?

Sw - J. Love - Cross

- 1 A Yes, sir.
- 2 Q You never mentioned their name in that, do you?
- 3 A No, sir.
- 4 Q Never talked about where they live?
- 5 A No, sir.
- 6 Q Did you ever indicate what kind of car they were
- 7 driving or?
- 8 A No, sir.
- 9 Q Now did you actually have to jump them off?
- 10 A No, sir.
- 11 Q Did they use your car or you just took them the cables?
- 12 A I just took -- I just with their cables took them to
- 13 another person's house.
- 14 Q Now when you backed up did you ever tell Detective
- 15 Woods where you were parked?
- 16 A Yes, sir, I believe so.
- 17 Q Did you ever say to some of the officers there, hey,
- 18 there was a light across the street, you need to get a
- 19 picture of that because that's how I was able to identify
- 20 some people?
- 21 A No, sir.
- 22 Q Did you ever tell them, hey, there's a spotlight right
- 23 behind the bar and you need to go in there and get a
- 24 picture of that because that's how I was able to identify
- 25 someone ---

Sw - J. Love - Cross

1 MR. CLEMENTS: Your Honor, I would object to
2 this. I don't think this witness would know how to tell
3 law enforcement to do their job.

4 THE COURT: Counsel, this is cross-examination
5 but there is some parameter to be imposed. I don't think
6 you can continue to just ask, did you ever tell. And I
7 think the query even on cross-examination must be related
8 to statements she made, things she did, things that are
9 relevant.

10 MR. ANDERSON: Your Honor, I don't know if she
11 did that or not; that's why I'm asking.

12 THE COURT: It's on the verge of being beyond
13 cross-examination but today I'll be liberal. Go ahead.

14 MR. ANDERSON: Were you a democrat, Your Honor?

15 THE COURT: No. Why make such an accusation
16 now?

17 MR. ANDERSON: Because I'm way over here, Your
18 Honor, and you're over there.

19 THE COURT: Deputy.

20 All right, go ahead.

21 BY MR. ANDERSON:

22 Q You indicated in your statement that you heard two or
23 three gunshots?

24 A Yes, sir.

25 Q But then you also indicated that it might have been

Sw - J. Love - Cross

- 1 something just falling.
- 2 A Yes, sir.
- 3 Q Have you ever heard gunshots before?
- 4 A No, sir.
- 5 Q Have you ever heard them on TV or movies or ---
- 6 A Yes, sir.
- 7 Q ---things like that?
- 8 A Yes, sir.
- 9 Q Do you know whether it was -- and I think Mr. Clements
- 10 asked you this. Was it two shots, three shots, four
- 11 shots?
- 12 A From what I remember it was two or three shots, yes,
- 13 sir.
- 14 Q Two or three, you're not sure. When you backed your
- 15 car up do you -- you were listening to the radio?
- 16 A Yes, sir.
- 17 Q You been up roughly 22 hours?
- 18 A Yes, sir.
- 19 Q You had the air condition running?
- 20 A Yes, sir.
- 21 Q Still in September. You leaned your seat back?
- 22 A Yes, sir.
- 23 Q Now did you lean it all the way back or just a little
- 24 bit?
- 25 A Just a little at an angle.

Sw - J. Love - Cross

1 Q Did you ever close your eyes?

2 A No, sir.

3 Q Were you ever playing with your cell phone or looking
4 at your cell phone?

5 A No, sir.

6 Q So you were just -- did you have your head all the way
7 back against the headrest?

8 A Yes, sir.

9 Q Now earlier you said you had gone in there get your
10 purse and that you only saw two people in there. You
11 didn't go in the bathroom, did you?

12 A No, sir.

13 Q Again, you didn't check any of the other rooms in the
14 night club, did you?

15 A No, sir.

16 Q You didn't ask either Ms. Bynum or Tio, are y'all the
17 only two in here?

18 A No, sir.

19 Q You never asked those questions?

20 A No, sir.

21 Q And you had actually left the club and gone to take the
22 jumper cables and then come back.

23 A Yes, sir.

24 Q How long were you gone?

25 A Ten minutes at the most.

Sw - J. Love - Cross

1 Q During that ten minutes you don't know who came and
2 went, do you?

3 A No, sir.

4 Q Now in your second statement you said you saw one of
5 the guys in the back seat; you saw him waving. I think
6 your exact words were, you saw one of the guys waving for
7 his friend to come on.

8 A Yes, sir.

9 Q Was that just a phrase? I mean, you don't know if that
10 was his friend or not, do you?

11 A They were in the car together. I didn't know his name
12 at the time so.

13 Q And you didn't give a description of that second person
14 in the back seat, did you?

15 A No, sir.

16 Q Did you tell law enforcement where the SUV was parked
17 in that second statement?

18 A I'm not quite sure, maybe.

19 Q Want to take a moment and check?

20 A No, sir.

21 Q Now getting back to the two or three gunshots, "I
22 thought it might have been something falling". Now that
23 didn't scare you at that time, did it?

24 A No, sir.

25 Q But then when you saw the person waving you became

Sw - J. Love - Cross

- 1 alarmed?
- 2 A Yes, sir.
- 3 Q Was he waving at you?
- 4 A No, sir.
- 5 Q So he was waving — you think he was waving at somebody
- 6 in the club?
- 7 A Yes, sir.
- 8 Q You know that for sure?
- 9 A In the — from the way it happened with me, from the
- 10 way he was waving, you know, that frantic-type way as
- 11 maybe it's he saw me. I'm not...
- 12 Q Did you put it was a frantic-type way in your
- 13 statement?
- 14 A No, sir.
- 15 Q Did you tell law enforcement it was a frantic-type
- 16 wave?
- 17 A No, sir.
- 18 Q Did you have a cell phone with you that night?
- 19 A No, sir.
- 20 Q When you saw that other person and to quote your words
- 21 to the frantically waving, is that when you got scared?
- 22 A Yes, sir.
- 23 Q That's when you started getting a little panicky?
- 24 A Yes, sir.
- 25 Q What was your first thought at that time?

Sw - J. Love - Cross

1 A They must have been gunshots. First thing I thought.

2 Q Did you ever think about getting away?

3 A Yes, sir.

4 Q Did you think about getting away as far as you could?

5 A Yes, sir.

6 Q One of the questions I have, and the fumbling, what do
7 you mean by fumbling? When you say someone was fumbling,
8 what do you mean by fumbling? Did they drop something?

9 A As far as was like this, looking like this. The
10 bar's --

11 Q So they were looking at something down?

12 A Yes, sir.

13 Q Okay.

14 MR. ANDERSON: Your Honor, could I have the
15 Court's indulgence for a moment.

16 THE COURT: Yes, sir.

17 BY MR. ANDERSON:

18 Q I'm sorry, Ms. Love, did you ever indicate to the
19 police that you knew him from your aunt's store or your
20 mom's store?

21 A No, sir.

22 Q Did you ever indicate to the police that you had waited
23 on him?

24 A No, sir.

25 Q Why didn't you drive the car back to the crime scene?

Sw - J. Love - Cross

1 A Because at that time there should have been police
2 officers out there and I felt a little more safe to go
3 back.

4 Q Why didn't you drive the ---

5 A The rental car?

6 Q ---rental car back?

7 A My mother told me to drive my own car.

8 Q I think you indicated you were part owner of the bar?

9 A Not officially, not at that time, no, sir.

10 Q But you certainly worked there that night?

11 A Yes, sir.

12 Q And you knew how much money had been brought in?

13 A Actually, no, sir.

14 Q You knew how much money you collected at the door?

15 A No, sir. During the night I would give her -- make
16 store runs and do things like that and me and her would
17 exchange money a lot. She would do the door sometimes.

18 Q You certainly knew where the money was kept?

19 A Yes, sir.

20 MR. ANDERSON: Court's indulgence a moment, Your
21 Honor.

22 THE COURT: All right.

23 BY MR. ANDERSON:

24 Q Was it a policy of the club to pat people down when
25 they came in?

Sw - J. Love -- Redirect

1 A Yes, sir.

2 Q Did you pat-down or search Mr. Phillips?

3 A Somebody else patted him down, yes, sir.

4 Q Didn't find anything on him?

5 A No, sir.

6 Q If they would have they would have, I guess, banned him
7 from the nightclub?

8 A Yes, sir.

9 Q You indicated when you got back, you went in there and
10 got your cell phone, I mean, excuse me, your pocketbook?

11 A My purse, yes, sir.

12 Q Thank you. That's all the questions I have.

13 THE COURT: Redirect.

14 **REDIRECT EXAMINATION**

15 BY MR. CLEMENTS:

16 Q Ms. Love, Mr. Anderson asked you about there being a TV
17 and DVD or VCR in that car. What actually was in the car
18 and the trunk and wasn't in the car?

19 A There was a TV in the trunk.

20 Q There was no DVD or VCR in the trunk?

21 A No, sir.

22 Q Okay, that was in the club?

23 A The DVD player was in the club.

24 Q The DVD player was in the club? No VCRs were there?

25 A No VCR, no, sir.

Sw - J. Love -- Redirect

1 Q Mr. Anderson was asking you about how you pulled out,
2 and I want to be sure this is clear. Was the door way,
3 was it about this width right here or close to that?

4 A Close to that, yes, sir.

5 Q Okay. And this was the entrance way. This wall came
6 out to right here. So your bumper was about right here?

7 A It was close to it, yes, sir.

8 Q Close to it? And was this -- what size car was this
9 Ford?

10 A Small car, it was compact.

11 Q Car was compact? So it was -- wasn't very long at all?

12 A No, sir.

13 Q If this was the bumper about right here tell me about
14 where you'd be seated. About where this court reporter
15 is?

16 A A little further, yes, sir.

17 Q Leaning back right here. So when you hit the gas to
18 pull out Mr. Anderson was asking you about your speed.
19 Did you pull out -- and I asked you from the front was
20 your car actually perpendicular or parallel to the wall of
21 the club or was it at an angle?

22 A It was an angle pulling out.

23 Q At an angle. So you pulled out at an angle and you
24 looked through here?

25 A Yes, sir.

Sw - J. Love -- Redirect

1 Q And that would have taken you, you were just getting
2 started, right?

3 A Yes, sir.

4 Q Just getting started?

5 A Yes, sir.

6 Q When did you speed up? You said you left fast. When
7 did you speed up, before or after you looked in the doors?

8 A After I looked in the door.

9 Q After you looked in the door you did what?

10 A I took off.

11 Q Now did you go -- and I was kind of confused about
12 this. Mr. Anderson was asking you about if you went front
13 of the car or behind the car. I don't want to ask front
14 or behind. What I want to ask is this, did you go around
15 the car where the car was in between you and the club, or
16 did you go between the club and the car?

17 A Between the club and the car.

18 Q Okay, all right. And you said it was parked along the
19 roadway, right?

20 A Yes, sir.

21 Q Do you know if the front of the car was pointing this
22 way or if the front end of the car was pointing this way?

23 A The front of the car was pointing that way.

24 Q This way?

25 A Yes, sir.

Sw - J. Love -- Redirect

1 Q Okay, all right. And Mr. Anderson was asking you about
2 the guy waving you said frantically. So he would have
3 leaned over out this window and done this?

4 A Yes, sir.

5 Q Was this before or after you heard the shots?

6 A After I heard the shots.

7 Q After you heard the shots?

8 A Yes, sir.

9 Q So tell me what is correct about this and what is
10 incorrect. You heard some popping sounds, didn't think
11 anything about it, then you see this guy doing this, and
12 then your brain kicks in and says, maybe that's gunshots.

13 A Yes, sir.

14 Q Is that correct?

15 A Yes, sir.

16 Q And so you then -- tell me what's correct about this or
17 incorrect. You pull up, look in for Angie.

18 A Yes, sir.

19 Q Don't see Angie.

20 A No, sir.

21 Q You see Josh Phillips.

22 A Yes, sir.

23 Q Behind the bar he's getting something. What was behind
24 there he could have got?

25 A Money.

Sw - J. Love -- Redirect

1 Q Money?

2 MR. ANDERSON: Your Honor, object to leading.

3 THE COURT: Yes, you are leading, Counsel.

4 MR. CLEMENTS: All right.

5 BY MR. CLEMENTS:

6 Q Well, what was behind there that he could have got?

7 A It was just money kept behind the bar.

8 Q Money, okay. And then what did you do from this point
9 forward?

10 A At this time I took off.

11 Q You took off?

12 A Yes, sir.

13 Q Okay. Mr. Anderson asked you why you would need a
14 sawed-off shotgun. What was the reason for having a
15 shotgun in that kind of place?

16 A Protection.

17 Q Protection?

18 A Yes, sir.

19 Q Was it usually in that bag or not in that bag?

20 A It was always in that bag.

21 Q Always in that bag.

22 A Yes, sir.

23 Q That all the questions I have.

24 THE COURT: Recross.

25 **RE CROSS - EXAMINATION**

Sw - J. Love - Recross

1 BY MR. ANDERSON:

2 Q I'm gonna hand you State's 22 again, and you've got A
3 and B marked. A is your car; B is the SUV. Is that
4 approximately where the SUV was?

5 A It was in this thing here. In —

6 THE COURT: Keep your voice up.

7 THE WITNESS: They were in the street.

8 BY MR. ANDERSON:

9 Q Right. Is that approximately where they were in
10 relation to the night club?

11 A As far as distance, yes, sir.

12 Q Is that approximately where they were as far as in
13 relation to the club? I mean, were they — was it —
14 where were they as far as being in front of the night
15 club?

16 A They were almost directly in front of the door.

17 Q Okay. So I mean, should we move the —

18 A It's kind of hard to do it with this.

19 Q —B over?

20 A It's hard to do it with this thing right here. They're
21 almost about where I had it 'cause the door is right here.
22 It's like — in here somewhere as far as I can see.

23 MR. CLEMENTS: Your Honor, may we approach a
24 minute.

25 THE COURT: Yes.

Sw - J. Love - Recross

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

3 THE COURT: Let the record show we've had
4 colloquy at the Bench and we proceed from this point.

5 BY MR. ANDERSON:

6 Q The jeep was almost directly in front of the door?

7 A Yes, sir.

8 Q And I think that you indicated earlier that you were
9 worried about being followed?

10 A Yes, sir.

11 Q You were worried about them recognizing you or
12 recognizing your car?

13 A Yes, sir.

14 MR. CLEMENTS: Your Honor, at this point I have
15 to object I think this is out of scope of recross. I
16 think his recross would be limited to what I talked about
17 on redirect. I don't believe I talked about that on
18 redirect.

19 THE COURT: On yesterday I indicated my belief
20 in regard to the absolute necessity to use liberality in
21 regard to this rule of recross, redirect, and recross.

22 MR. CLEMENTS: I withdraw my objection, Your
23 Honor.

24 THE COURT: All right. Proceed.

25 BY MR. ANDERSON:

Sw - J. Love - Recross

1 Q But you pulled directly in front of them when you were
2 leaving?

3 A Between the car and the club, yes, sir.

4 Q And that point in time you were alarmed because you
5 thought those were gunshots?

6 A Yes, sir.

7 Q When you drove by them they would have gotten a very
8 clear look of you?

9 A Looks like it, yes, sir.

10 Q Did you see Mr. Phillips get out of the car?

11 A No, sir.

12 Q Let me ask you a question. When someone runs from a,
13 let's say 15, 20-feet, how long would it take them to
14 cover that amount of ground? How long did it take that
15 person that got out of the jeep to get inside of that
16 night club?

17 A Not long.

18 Q A second, two seconds?

19 A I think, yes, sir.

20 Q That's all the questions I have, Judge.

21 THE COURT: Anything further?

22 MR. CLEMENTS: No, Your Honor.

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

24 And jurors, we'll take a short recess here now, 15
25 minute recess.

Sw - J. Love - Recross

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

2 THE COURT: Bring the jury out.

3 (WHEREUPON, the jury was returned to the courtroom at
4 approximately 10:56 a.m., and the following proceedings
5 commenced in open court.)

6 THE COURT: All right, we're ready to proceed.

7 MR. CLEMENTS: Thank you, Your Honor. Our next
8 witness will be Amy Stephens from SLED.

9 THE COURT: All right.

10 CLERK OF COURT: Ms. Stephens, if you will come
11 around and let me swear you in please, ma'am.

12 WHEREUPON,

13 AMY STEPHENS,

14 having been duly sworn by the Clerk of Court, testified as
15 follows:

16 THE COURT: All right, you may proceed.

17 MR. CLEMENTS: Thank you, Your Honor.

18 DIRECT EXAMINATION

19 BY MR. CLEMENTS:

20 Q Can you please state your name.

21 A Amy Stephens.

22 Q Ms. Stephens. Would you tell the jury where you work
23 and in what capacity.

24 A I'm a forensic technician at the South Carolina Law
25 Enforcement Division in the evidence control department.

Sw - J. Love - Recross

1 Q And can you please explain to this jury what a forensic
2 technician does in the evidence control department?

3 A Our responsibilities are to log in the evidence that is
4 brought in by the agencies in the state of South Carolina.
5 We assign it a lab number. We package it appropriately
6 and we store it in our evidence room.

7 Q Until what time?

8 A Until analyst comes to pick it up for analysis or until
9 we return it to the agency.

10 Q And just for the benefit of the jury do you have
11 different departments of analysis?

12 A We do.

13 Q Can you tell this jury some of those departments are?

14 A We have the DNA department, the trace department,
15 question document, firearms, latent prints.

16 Q Okay, all right. And do you have your records with you
17 of what items you received in this case, this death
18 investigation that occurred January -- I mean, excuse me,
19 September 29th, 2007?

20 A I do.

21 Q Okay. And you -- do you know about items 1 through 20,
22 SLED items 1 through 20, can you tell when you received
23 those into SLED?

24 A According to our chain of custody they were submitted
25 by Edward Porter with the South Carolina Law Enforcement

Sw - J. Love - Recross

1 Division.

2 Q And what was Edward Porter?

3 A He was a forensic scientist for our crime scene
4 investigation unit also with the latent prints department.

5 Q And items 21 through 43, did you receive those items at
6 SLED?

7 A I did.

8 Q Could you please tell this jury what items 21 and 22
9 were.

10 A SLED item Number 21 was a white shirt from Joshua
11 Phillips. And what was the other item number, I'm sorry.

12 Q 22.

13 A And SLED item Number 22 was bluejean pants from Joshua
14 Phillips?

15 Q Can you please tell this jury what items 23, 24, 25,
16 26, 27, 28, 29, and 30 came from?

17 A Item Number 23 was Timberland boots from Maltonin
18 Clark. Item 24 was bluejeans from Maltonin Clark. Item
19 25 was blue boxer shorts from Maltonin Clark. Item 26 was
20 a tan shirt from Maltonin Clark. Item Number 27 was
21 camouflage pants from Angelique Bynum. Item number 28 was
22 a sleeveless tank top from Angelique Bynum. Item 29 was
23 tan panties from Angelique Bynum, and item Number 30 was a
24 tan bra from Angelique Bynum.

25 Q And can you please tell this jury what items 31 through

Sw - J. Love - Recross

1 35 were and where they came from?

2 A Item 31 was a finger nail clippings from Maltonin Larry
3 Clark. Item Number 32 was known head hairs from Maltonin
4 Larry Clark. Item 33 was a bullet from neck of Maltonin
5 Clark. Item 34 was jacket fragments from Maltonin Clark,
6 and item 35 was a blood standard from Maltonin Larry
7 Clark.

8 Q And do you know what analysis was requested on those
9 items?

10 A SLED item numbers 21 through 30 there was a evidence
11 processing request on those. Items 31 and 32 there was a
12 DNA analysis. Items 33 and 4 there was a firearms
13 analysis. And item 35 there was a DNA analysis.

14 Q All right. Can you please tell this jury what items
15 36, 37, 38 and 39 and 40 were, and 41?

16 A Item 36 is a finger fail clippings from Angelique
17 Dianne Bynum. Item 37 is known head hairs from Angelique
18 Dianne Bynum. Item 38 is a blood standard from Angelique
19 Dianne Bynum. Item 39 is a fragment from Angelique Dianne
20 Bynum. And item Number 40 is a projectile from Angelique
21 Dianne Bynum.

22 Q How about item 41?

23 A Fragment from skull from Angelique Dianne Bynum.

24 Q All right. Would items 23 through 41 be items that
25 would have come to SLED from the autopsy?

Sw - J. Love - Recross

1 A I assume so. We don't collect that evidence. They
2 bring it in to us so.

3 Q So you received those from the Marion Sheriff's
4 Department?

5 A Yes, I did.

6 Q Can you please tell us about items 42 and 43 and what
7 those were, where you received them from, and when you
8 received them?

9 A Yes. Item 42 is a handgun, a 45-cal Armando, serial
10 number 30579. Item 43 was a spent .45 caliber round and I
11 received those from Detective Paul James of the Marion
12 County Sheriff's Department.

13 Q Okay. I'm going show to show what's been marked for
14 State's Exhibit I.D. Number 9. Can you identify what that
15 is.

16 A Yes. We recognize it by the lab number, L0714207, item
17 Number 43, which was the described as the spent 45 caliber
18 round.

19 Q Did you receive it from Paul James?

20 A I did.

21 Q With the .45 caliber pistol?

22 A Yes.

23 MR. CLEMENTS: Your Honor, we enter this into
24 evidence at this time.

25 THE COURT: Any objection now?

Sw - J. Love - Recross

1 MR. LAWSON: No, Your Honor.

2 THE COURT: It's in evidence without objection,
3 Ms. Court Reporter.

4 (WHEREUPON, State Exhibit No. 9 was admitted into
5 evidence.)

6 BY MR. CLEMENTS:

7 Q The items 42, 43, do you know what analysis was
8 requested on those items?

9 A According to the receipt was the firearms request and a
10 latent prints request.

11 Q Okay.

12 MR. CLEMENTS: Beg the Court's indulgence.

13 THE COURT: All right.

14 MR. CLEMENTS: Ms. Stephens, please answer any
15 questions Mr. Lawson or Mr. Anderson may have.

16 MR. ANDERSON: Court's indulgence for a moment,
17 Your Honor.

18 MR. LAWSON: Bear with me one moment, Your
19 Honor.

20 THE COURT: Okay.

21 **CROSS-EXAMINATION**

22 BY MR. LAWSON:

23 Q Ms. Stephens, as I understand it you are basically an
24 -- the custodian of the evidence?

25 A Yes, sir.

Sw - L. Thompson - Direct

1 Q You did none of the testing on this?

2 A No, sir.

3 Q And you -- your sole function is to make sure it comes
4 in and goes out where it's supposed to go?

5 A Yes, sir.

6 Q That's all the questions I have.

7 THE COURT: Redirect.

8 MR. CLEMENTS: Your Honor, we'd ask Ms. Stephens
9 be released from her subpoena.

10 THE COURT: Suitable?

11 MR. LAWSON: Without objection.

12 THE COURT: Thank you, have a nice day.

13 THE WITNESS: Thank you.

14 MR. CLEMENTS: Your Honor, our next witness will
15 be Lindsey Thompson from SLED.

16 THE COURT: All right.

17 THE CLERK OF COURT: If you will come around and
18 let me swear you in please, ma'am.

19 WHEREUPON,

20 **LINDSEY THOMPSON,**

21 having been duly sworn by the Clerk of Court, testified as
22 follows:

23 **DIRECT EXAMINATION**

24 **BY MR. CLEMENTS:**

25 Q Can you please state your name for the record.

Sw - L. Thompson - Direct

1 A My name is Lindsey Thompson.

2 Q Ms. Thompson, where do you work?

3 A I work for the South Carolina Law Enforcement Division
4 commonly referred to as SLED.

5 Q And what's your occupation at SLED?

6 A I'm a DNA analyst.

7 Q Can you please tell the jury what a DNA analyst is.

8 A I -- as a DNA analyst I examine items of evidence that
9 are submitted from agencies across the state. I look at
10 those items and examine them to decide whether or not to
11 move on with DNA analysis. DNA analysis is generating a
12 profile from evidence samples generating a separate
13 profile from standards, comparing the two, and then if I
14 need to I'll testify in court.

15 Q Can you please tell this jury what your training,
16 experience, is in this particular field?

17 A Sure. I have a bachelors of science degree in forensic
18 science and biology with a minor in chemistry from
19 Virginia Commonwealth University. I also have a Masters
20 in biology with a concentration the forensic DNA also
21 Virginia Commonwealth University. In addition to that I
22 have specific course work that's required for forensic
23 analysts, forensic DNA analysts, which is molecular
24 biology, genetics, biochemistry, and statistics. I've
25 also completed a week long training session with the

Sw - L. Thompson - Direct

1 company that makes most all of the instrumentation
2 chemistries we use in our lab. I've also completed the
3 training course at SLED with under the supervision of a
4 court qualified analyst, and then we also complete
5 continuing education every year.

6 Q About how much continuing education do you complete
7 each year?

8 A We attend a conference on everything that's happening
9 in forensic DNA from that year.

10 Q And how long have you been employed at SLED in this
11 capacity?

12 A Three years in October.

13 Q Have you ever been qualified to testify as an expert in
14 DNA analysis in state or federal court?

15 A Yes, I have.

16 Q Approximately how many times?

17 A About four times.

18 Q About four times? Okay.

19 MR. CLEMENTS: Your Honor, at this time we would
20 offer Agent Thompson as an expert in the field of DNA
21 analysis.

22 THE COURT: What says Defense?

23 MR. LAWSON: No objection.

24 THE COURT: She's qualified. You may proceed.

25 MR. CLEMENTS: Thank you.

Sw - L. Thompson - Direct

1 BY MR. CLEMENTS:

2 Q Did you have the opportunity to analyze any pieces of
3 evidence in the case that result, that is a result of a
4 shooting two individuals September 29th, 2007 in Nichols,
5 South Carolina?

6 A Yes, I did.

7 Q Can you please tell this jury what you did, what items
8 you received, and what you did with those items?

9 A May I refer to my report?

10 THE COURT: Yes.

11 BY MR. CLEMENTS:

12 Q You certainly may.

13 A The items I received were three cuttings from a
14 T-shirt, two cuttings from bluejeans, fingernail clippings
15 from Maltonin Larry Clark, known head hairs from Maltonin
16 Clark, blood stan---

17 Q Let's stop right there. First let's deal with the
18 cuttings from the T-shirt and bluejeans.

19 A Yes, sir.

20 Q Do you know what SLED items those cuttings came from?

21 A They were from items 21 was T-shirt and item 22 were
22 the bluejeans.

23 Q Okay, all right. What was the result of your analysis
24 on those cuttings from the T-shirt and bluejeans? Tell us
25 about what you do and what your analysis will be, if

Sw - L. Thompson - Direct

1 anything?

2 A I tested the cuttings for blood. We do a presumptive
3 test for blood and blood was indicated on those items so I
4 went ahead and did DNA analysis. And my results for DNA
5 analysis on those items for items 22 -- 21.2, 21.3 and
6 22.2, those are my item numbers, which are two cuttings
7 from the shirt and a cutting from the bluejeans. It says
8 that the DNA profile developed from these items and the
9 partial DNA profile from item 22.3, which is another
10 cutting from the jeans are from an unidentified female
11 individual.

12 Q Okay. So you didn't have any standards or anything
13 that you could match those to?

14 A Correct. The standards that I had were not ones that
15 would match this female profile.

16 Q Is that a usual or unusual occurrence in your normal
17 work?

18 A Finding unidentified females for DNA --

19 Q Or is it by --

20 A --on somebody?

21 Q --source?

22 A That's common, very common.

23 Q Very common? Okay.

24 A Yes.

25 Q All right. Now if you would move on to items 31.1.

Sw - L. Thompson - Direct

1 A 31.1 and 31.2 are both fingernail clippings from
2 Maltonin Clark, left hand, right hand, separate items.
3 And then 32 is the known head hairs from Maltonin and 35
4 is blood standard from Maltonin Clark.

5 Q Okay. Can you tell us what analysis you did on those
6 items and what was the result.

7 A Yes. On the fingernail clippings I did test for blood
8 as well, and I did get blood indicated. No analysis was
9 performed on the known head hairs. And the blood standard
10 did perform DNA analysis and get a -- generate a standard
11 profile. My results for the fingernail clippings, no DNA
12 profile foreign to Maltonin Clark is developed from items
13 31.1 and 31.2.

14 Q So all the profiles matched him?

15 A Right. His own profile is under his own fingernails.

16 Q And is that common or uncommon?

17 A Extremely common.

18 Q Extremely common. Now you said that you received head
19 hair, but you didn't analyze that. Can you tell the jury
20 why you didn't analyze that.

21 A Correct. Known head hairs are going to be another type
22 of standard in a case, and I was submitted blood standard
23 which is what we would generate DNA profile from so the
24 known head hairs did not need to be analyzed as a second
25 standard in this case. We already had one standard that

Sw - L. Thompson - Direct

1 worked we got a profile from.

2 Q Since you had the blood you didn't needed hair?

3 A Correct.

4 Q Okay, thank you. Can you please tell us about items
5 36.1, 36.2, 37 and 38?

6 A Yes. 36.1 and 36.2 were both fingernail clippings from
7 Angelique Bynum's right and left hands. And then known
8 head hairs, item number 37, were known head hairs from
9 Angelique Bynum. And then 38 was the blood standard from
10 Angelique Bynum.

11 Q Can you tell this jury what analysis you performed or
12 what your results were?

13 A Yes. For the fingernail clippings 36.1 I developed a
14 partial DNA profile that was insufficient to allow for
15 interpretation.

16 Q Can you tell the jury what that means?

17 A Yes, that means that the -- there wasn't really enough
18 DNA to get enough information to generate a full profile.
19 We got a few little points that don't give us enough
20 information to match to somebody. So in that instance we
21 would say it's insufficient for reliable interpretation.
22 We don't want to give somebody the wrong impression since
23 it's not enough information.

24 Q Okay, all right. Keep going please?

25 A Okay. 36.2 is a mixture of two, at least two

Sw - L. Thompson - Direct

1 individuals, the DNA profile of the major contributor to
2 this mixture is consistent with Angelique Bynum. The DNA
3 profile of the minor contributor to this mixture is from
4 unidentified individual and is not suitable for entry
5 into.

6 Q Okay. Can you tell us what it's not suitable for entry
7 into and what that is?

8 A The combined DNA index system. It's a ---

9 Q What's that commonly referred to as?

10 A CODIS.

11 Q CODIS? Can you explain to this jury what is this is?

12 A CODIS is a system where profiles, probative profiles,
13 DNA profiles from evidence, can be entered into the system
14 as well as profiles from convicted offenders and sometimes
15 you can get a hit on a convicted offender to an
16 individual, or to a case to individual item of evidence in
17 a case. Or you can get one item from of evidence from one
18 case matching to an item of evidence from another case.
19 There's also a section in the system where people can
20 enter a missing persons profile so that if an unidentified
21 body is discovered they can enter that in and see if that
22 matches any of the missing persons a well.

23 Q So you have my DNA on file and you check something and
24 you don't know whose DNA it is but it happened to be mine
25 you can enter it into this system and get a match?

Sw - L. Thompson - Direct

1 A If your profile is already entered into CODIS ---

2 Q Yeah.

3 A ---and item of evidence that came in that was eligible
4 for CODIS and I entered it in, then yes, it would. It
5 would come back to me as being matched.

6 Q But your testimony was it was not sufficient suitable
7 to enter into CODIS?

8 A Correct.

9 Q All right. Thank you. Please continue.

10 A And then the 37 was the known head hairs which were
11 there was no analysis performed on those as well, and then
12 the blood standard which was used as a comparison.

13 Q Okay. And but you did not -- you attempted to find but
14 there was nothing there to match with anything other than
15 the victims themselves; is that correct?

16 A And the partial minor profile that was not eligible for
17 CODIS.

18 Q All right. Please tell us about item 42.1 and 42.2.

19 Where did those come from and what did you do with those?

20 A 42.1 is the swab from handle and 42.2 was a swab from a
21 trigger.

22 Q Okay. And what was item 42 again?

23 A Handgun .45 caliber Armando, Armando.

24 Q I'm gonna hand you State's Exhibit 7-B and you
25 recognize this marker?

Sw - L. Thompson - Direct

1 A Yes, sir.

2 Q Is that I-42?

3 A Item number 42 and then the bottom numbers would be
4 the SLED case number, yes.

5 Q All right. Were those swabs from State's Exhibit 7-B,
6 42.1 and 42.2?

7 A From item number 42, yes. 42.1 and 42.2 are swabs from
8 item 42.

9 Q Can you please tell this jury what analysis you
10 performed and what your analysis revealed, if anything?

11 A There is no test for touch DNA so we just go ahead and
12 run DNA analysis on that. And in this case insufficient
13 human DNA was obtained from 42.1 and 42.2 for that final
14 stage of analysis that we do.

15 Q So you attempted to find something but didn't find
16 anything?

17 A There wasn't enough DNA there to be able to develop a
18 profile.

19 Q Now Agent Thompson, is this a common or uncommon
20 occurrence for that to happen?

21 A Very common for touch DNA.

22 Q Okay. Can you please tell us about items 58.1 through
23 58.6. Tell us what those are and what you did with them.

24 A 58.1 through 58.6 were just submitted to me as swabs
25 and they had a number on them so I got number 5, 6, 7, 8,

Sw - L. Thompson - Direct

1 9, and 10. From those items I just ahead and ran DNA
2 analysis on those for touch DNA. And 58.1 there was a
3 partial DNA profile developed from item 58.1. It's a
4 mixture of least two individuals. Maltonin Clark and
5 Angelique Bynum are excluded as possible contributors to
6 this mixture. The DNA profile of item, developed from
7 item 58.2, is a mixture of at least two individuals. The
8 DNA profile of the major contributor to this mixture is
9 from an unidentified female individual. The partial DNA
10 profile of minor contributor to this mixture is from an
11 unidentified individual. Maltonin Clark and Angelique
12 Bynum are excluded as possible contributors to this
13 mixture. Partial DNA profile developed from item 58.3 is
14 a mixture of at least two individuals. The partial DNA
15 profile of major contributor to this mixture is from an
16 unidentified female individual and the partial DNA profile
17 of the minor contributor in the mixture is from an
18 unidentified individual. Maltonin Clark and Angelique
19 Bynum are excluded as possible contributors to this
20 mixture. And no DNA profile was developed from items 58.5
21 and 58.6.

22 Q What does that mean? There was not anything there?

23 A Right. From — at a certain point in DNA analysis we
24 check to see how much DNA we have, and if it's above a
25 certain level we try to get a DNA profile. And in this

Sw - L. Thompson - Direct

1 case we tried and nothing at all came up, not even enough
2 to have a partial or anything at all but there's no
3 information when we went ahead and did analysis. And then
4 also the partial DNA profile developed from 58.4 is
5 insufficient for reliable interpretation. Again, one or
6 two points may have come up and not enough to actually do
7 DNA analysis on.

8 Q So is that a common or uncommon occurrence in what you
9 do every day?

10 A It's common to get mixtures on touch DNA from things
11 that several people touched, doorknobs, handles.

12 Q What about rental cars?

13 A Yes, very much so. It would be surprising to only get
14 two people in rental car. And also to get no DNA somebody
15 hasn't touched it, we can't tell whether or not somebody
16 left DNA behind till we go ahead and run the sample.

17 Q So is it fair to say you tested everything you could
18 test that was submitted?

19 A Yes.

20 Q Would it be fair to say that you found nothing of
21 evidentiary value?

22 A I would assume so, nothing that matched either of the
23 standards.

24 Q Okay. And is that ma common or uncommon occurrence?

25 A It's common.

Sw - L. Thompson - Cross

1 Q It's common? Okay. Agent Thompson, thank you. Please
2 answer any questions Mr. Lawson or Mr. Anderson may have.

3 MR. LAWSON: May it please the Court.

4 THE COURT: Yes, sir.

5 **CROSS-EXAMINATION**

6 BY MR. LAWSON:

7 Q Agent Thompson, of course you would call it of
8 evidentiary value if you had found something positive to
9 identify the supposed suspects that's listed on your sheet
10 as Joshua Phillips, then it would have evidentiary value;
11 would it not?

12 A I wasn't submitted his standard so I wouldn't know if
13 it would match him or not.

14 Q The truth of the matter is you don't determine
15 evidentiary value; you just do your test?

16 A Right. I only meant if it matched the victims or not
17 because those are whose standards I was given.

18 Q All right. And you had cuttings from blue jeans and a
19 T-shirt that were the property of Joshua Phillips; is that
20 correct?

21 A I'm unaware as to whose those items of clothing were.
22 I did receive cuttings from a T-shirt and bluejeans.

23 Q Item 21 and 22 —

24 A Yes.

25 Q —were cuttings from T-shirt and bluejeans?

Sw - L. Thompson - Cross

1 A Yes.

2 Q And you found blood on both of those, the T-shirt and
3 the bluejeans; did you not?

4 A Yes, I did.

5 Q But none of that blood was consistent with Ms. Bynum or
6 Mr. Clark; is that correct?

7 A Correct.

8 Q And you had their known samples to test it in?

9 A Correct.

10 Q Is that correct?

11 A Yes.

12 Q You had already run a profile on them and then in this
13 developing you develop also a profile on this unknown
14 substance as well; is that correct?

15 A Right. At separate time I do the evidence and then I
16 do the standards and then I compare the generated
17 profiles.

18 Q And you compare the profile of the known sample with
19 the unknown that are developed, and in this case it did
20 not match either of the victims?

21 A The blood on the T-shirt and jeans did not match either
22 of the victims, correct.

23 Q And that would be item 21 and 22, correct?

24 A Correct.

25 Q And then you got .1 and .2, .3, .2 I guess that's ---

Sw - L. Thompson - Cross

1 A Right.

2 Q ---different cuttings?

3 A Yes.

4 Q It's different numbers, right?

5 A Yes, yes.

6 Q Now as I understand it, if you don't have a known
7 sample to compare to that is basically what you use CODIS
8 for; is that correct?

9 A No. We can't enter certain things into CODIS. If
10 there's any indication that it might be a victim's profile
11 we can't enter into CODIS. If there's certain mixtures we
12 can't enter into CODIS. It's very specific what we can
13 enter.

14 Q Well, when you say that it was not suitable for entry
15 would that be it was not suitable because you didn't
16 develop an appropriate DNA profile, or would that be that
17 it was inappropriate for some other procedural reason?

18 A No. For mixtures, when there's two individuals and you
19 have a major and a minor and then you have the minor
20 profile, that minor profile in this case did not have
21 enough information to be entered into CODIS. We do
22 require a minimum amount of information before it can be
23 entered and this minor profile didn't have enough
24 information.

25 Q And as I understand it, on all the -- all the things

Sw - L. Thompson - Cross

1 that you did that were unknown, were you looking, I'm
2 talking outside the known head hair, the known blood
3 samples and the known fingernail clippings, you would
4 expect those to come back to the individual that gave them
5 as at least one contributor; would you not? If my head
6 hair you would figure my DNA would come back.

7 A Correct.

8 Q And under my fingernails you would assume my DNA would
9 be at least one of the mixture?

10 A Correct.

11 Q But on any of the unknown things that you tested none
12 of them matched either one of the victims; is that
13 correct?

14 A Correct.

15 Q And as I understand it, you did not have anything to do
16 with the obtaining of any of this evidence?

17 A Correct.

18 Q You -- it's brought to you in your lab and you then do
19 your test; --

20 A Yes, sir.

21 Q --is that correct?

22 A Yes, sir.

23 Q And actually, the cutting, you don't even do the
24 cuttings on the -- that's done by trace evidence; is that
25 correct or?

Sw - L. Thompson - Cross

1 A No, sir. For larger items of evidence that don't fit
2 in our work area we do have an evidence processing section
3 that's within DNA. It's part of our section and they
4 specifically work with larger items of evidence and give
5 us the smaller pieces so that we can work with them in our
6 work area in the lab.

7 Q So that whereas the bluejeans or T-shirt you would be
8 given actually a little clipping of —

9 A Correct.

10 Q —something cut out, —

11 A Yes.

12 Q —a little piece of it to work with. And the swabs
13 that are listed as 58.1, 58.2, 58.3, 4, 5, and 6, do you
14 know the origin of those swabs, simply that they were
15 swabs?

16 A Just that they were swabs. I was submitted five or —
17 and that's all I have that they said item Number 5, 6, 7,
18 8, 9 and 10.

19 Q Now item 42, 42.1 and 42.2 are swabs, is that correct,
20 from a handgun?

21 A Yes.

22 Q And did you — would you do those swabs or would those
23 swabs be done prior to arriving at your — at your place?

24 A No. They were done prior to coming to me. I just
25 receive the swabs and process the gun.

Sw - L. Thompson - Cross

1 Q Would you even see the gun when the gun comes with you
2 or just ---

3 A No.

4 Q ---just the swabs?

5 A It depends on specific case. I have had some come into
6 the lab but this one the swabs were submitted to me.

7 Q The swabs came in?

8 A Yes.

9 Q In dealing with swabs from a handgun, if you were
10 trying to develop what law enforcement, I guess, would be
11 looking for is DNA, hopefully DNA from someone who fired
12 the gun either through some DNA on top of a gun or some
13 DNA on the trigger or on the handle, I think in this case
14 it was the handle and the trigger that was swabbed.

15 A Yeah, those two items were what were submitted to me, a
16 swab from the handle and a swab from the trigger, so I
17 would assume they were looking for touch DNA for somebody
18 who had handled those areas of the gun.

19 Q In your experience in collecting DNA samples or what
20 you were going to test for samples, if someone handles the
21 gun and pulls the trigger or does something to that
22 effect, can that have an adverse consequence on your
23 ability to find DNA from someone previously that has fired
24 or handled the gun?

25 A Touch DNA is very tricky. Sometimes you leave cells

Sw - L. Thompson - Redirect

1 behind; sometimes you don't. DNA, whoever touches an item
2 most recently doesn't erase the DNA from before; it adds
3 to it. That's when we get mixtures. So if -- if the
4 first person did leave cells behind and the second person
5 didn't, then we may only get the first person. Second
6 person left cell behind, the first person didn't, then we
7 may only get the second person. Or we could get a mixture
8 of both or we could get neither of them on it.

9 Q I guess my question is, can it be fragile in a sense
10 that it would be destroyed by further handling of the
11 item?

12 A I don't know for sure. I would think that from what
13 I've seen with touch DNA is it just adds to it. Unless
14 somebody is cleaning with bleach or something like that
15 DNA doesn't -- it's removed.

16 Q You are extremely careful with what you use and what
17 you test; are you not?

18 A Yes.

19 Q That's all I have.

20 THE COURT: Redirect.

21 **REDIRECT EXAMINATION**

22 BY MR. CLEMENTS:

23 Q If someone handled the gun with gloves on would that
24 add to or detract the touch DNA?

25 A It could. It could wipe some of the DNA off. I -- we

Sw - L. Thompson - Redirect

1 haven't done testing to know if it does or not so I don't
2 honestly know for sure. I know that whoever handled it
3 with a gun would not leave any DNA ---

4 Q Because they had on gloves?

5 A Because they had on gloves.

6 Q Would a gun being out in the weather or a item being
7 out in the weather or thrown in a swamp, would that have
8 any impact on touch DNA or the ability to retrieve touch
9 DNA?

10 A Yes. Actually, the elements have a lot to do with not
11 being able to get DNA from, not just touch but any type of
12 DNA. The sun and water both degrade DNA and make it to
13 where you may or may not get a profile, and if you do it
14 might be a very partial profile, one that you wouldn't be
15 able to interpret.

16 Q Thank you.

17 THE COURT: Recross.

18 MR. LAWSON: Nothing, Your Honor.

19 THE COURT: All right.

20 MR. CLEMENTS: Your Honor, we ask that Agent
21 Thompson be released from her subpoena.

22 MR. LAWSON: Without objection.

23 THE COURT: She's excused. Thank you. Have a
24 nice day.

25 MR. CLEMENTS: Our next witness will be Agent

Sw - I. Simmons - Direct

1 Ila Simmons.

2 THE COURT: Bring her in.

3 CLERK OF COURT: Ms. Simmons. If you'll come
4 and let me swear you in please, ma'am.

5 WHEREUPON,

6 ILA SIMMONS,

7 having been duly sworn by the Clerk of Court, testified as
8 follows:

9 THE COURT: Proceed.

10 MR. CLEMENTS: Thank you, Your Honor.

11 DIRECT EXAMINATION

12 BY MR. CLEMENTS:

13 Q Would you please state your name for the record.

14 A My name is Ila Simmons.

15 Q And that's spelled I-L-A?

16 A Yes, sir.

17 Q And can you please tell this jury where you work and in
18 what capacity?

19 A I work at the South Carolina Law Enforcement Division
20 in the forensics laboratory in their trace evidence
21 department.

22 Q How long have you worked for SLED?

23 A Almost ten years.

24 Q Ten years almost?

25 A Yes, sir.

Sw - I. Simmons - Direct

1 Q And has that whole time period been in trace evidence?

2 A Yes, sir.

3 Q Okay. If you'd please explain to this jury what trace
4 evidence is.

5 A Trace evidence encompasses several areas of forensics.
6 We analyze gunshot residue, perform fiber, paint
7 comparisons as well as arson and explosive residues.

8 Q And what does it take to be a SLED analyst and trace
9 evidence? What kind of training, what kind of experience
10 what kind of education?

11 A I have a bachelors of science degree in chemistry and
12 when I completed that I went to work for SLED. The first
13 three years that I was employed there I worked with a
14 court certified SLED qualified trace evidence examiner who
15 taught me how to collect and analyze trace evidence.

16 Q Do you have any continuing education or further
17 education beyond your bachelors degree?

18 A Yes, sir. Each year we have -- we go and attend
19 different courses. I'm a member of the FBI's Gunshot
20 Residue Symposium where the FBI invites analysts of
21 gunshot residue from around the world to come to Quantico
22 to discuss and set standards and practices that all
23 gunshot residue analysts will abide by.

24 Q Have you ever been qualified to testify as an expert
25 witness in state or federal court?

Sw - I. Simmons - Direct

1 A Yes, sir, I have in both.

2 Q Approximately how many times?

3 A Approximately two hundred times.

4 MR. CLEMENTS: Your Honor, we would offer Agent
5 Simmons as an expert in trace evidence generally and
6 specifically for gunshot residue.

7 THE COURT: What says Defense?

8 MR. LAWSON: Without objection.

9 THE COURT: She's qualified. Proceed.

10 BY MR. CLEMENTS:

11 Q Agent Simmons, did you have opportunity to do any
12 analysis in regards to an event that occurred
13 September 29th, 2007 here in Marion County where Angelique
14 Dianne Bynum and Maltonin Clark were murdered?

15 A Yes, I have.

16 Q Can you please tell this jury exactly what you did?

17 A I received four gunshot residue analysis kits. Gunshot
18 residue is a mixture of microscopic chemicals that come
19 out of a gun when it's fired. It comes out in a cone
20 shaped cloud and some of it wraps back around and can get
21 on the hands of the person shooting the gun. It can get
22 on anything that is in the proximity to this weapon when
23 it was fired if they're in the cloud of the gunshot
24 residue. A GSR kit is collected to see if someone was in
25 vicinity of a gun when it was fired, if they were firing a

Sw - I. Simmons - Direct

1 gun or handling a gun. And in this case I received four
2 such kits to analyze.

3 Q Now tell us a little bit more about how gunshot residue
4 is created.

5 A When you have a cartridge that goes in a weapon it has
6 a primer on one end. It has gun powder in the middle and
7 then has projectile on the other end. When the firing pin
8 falls and strikes the primer it has some shock sensitive
9 chemicals in it, creates a small spark, the spark goes
10 through, ignites the gun powder, the gun powder starts to
11 burn, builds up pressure. And in the chamber of a gun
12 everything is held so tight the only area -- the only
13 thing that can come out of the gun is projectile. That
14 pushes the bullet out of the weapon and eventually would
15 strike a target.

16 Q Okay. And what follows the bullet out of the muzzle of
17 the gun?

18 A Gunshot residue falls out, a mixture of the primer and
19 the gun powder as well as smoke and any soot that may be
20 in the gun.

21 Q Okay. Are you familiar -- are you familiar with the
22 term muzzle flash?

23 A Yes, sir.

24 Q What is a muzzle flash?

25 A Muzzle flash is the exhaust and the gas and the heat

Sw - I. Simmons - Direct

1 coming out of the gun and the small spark that also is --
2 comes out of the muzzle end of the gun.

3 Q If you shoot a gun in the dark what are you going to
4 see --

5 A Yes.

6 Q --come out end of the barrel?

7 A Yes, you will see that. It looks like flame or fire
8 coming out of the gun.

9 Q Is this the gases that are burning?

10 A Yes, sir, it is.

11 Q Okay. And what are some of the metals or particle
12 types that are in that cloud that comes out behind that
13 muzzle?

14 A Primarily it consists of lead, barium and antimony is
15 what gunshot residue consists of.

16 Q And when you test for presence of gun shot residue what
17 exactly do you do?

18 A We have the kits that are collected. They're double
19 sided sticky tape. It's dabbed over the areas of the
20 hands of the metal that's being tested. Then swabs are
21 collected. We analyze the swabs to see how much of each
22 one of those metals is present, how much lead, how much
23 barium, and how much antimony. Over the course of time we
24 have shot different guns, used different types of
25 ammunition, and in a laboratory setting taken these

Sw - I. Simmons - Direct

1 gunshot residue kits from our own kits so we have
2 determined a certain threshold level that someone will
3 have on their hands when firing a weapon.

4 MR. CLEMENTS: Beg the Court's indulgence one
5 moment.

6 THE COURT: All right.

7 BY MR. CLEMENTS:

8 Q So if I — if I had this weapon —

9 A Yes, sir.

10 Q —and I shot it, the bullets going to come out the
11 muzzle of the gun; is that correct?

12 A Yes, sir.

13 Q And behind the bullet will come out what?

14 A Will come out the gunshot residue, a mixture of powder
15 and metals and also you can have the flash that you were
16 discussing.

17 Q When it comes out what happens to the materials as it
18 comes out the barrel?

19 A It comes out in a cone shape cloud and as it hits the
20 resistance of the air in the room, just the atmosphere,
21 some of it wraps back around the hands of the person
22 shooting the gun but primarily most of it comes out and
23 follows the bullet down there.

24 Q So it's kind of like a mushroom cloud sort of?

25 A Yes.

Sw - I. Simmons - Direct

1 Q Okay. So you would test someone's hands to see they
2 shot a gun or if they handled a gun?

3 A Yes, sir.

4 Q Or if a gun was fired in close proximity to them?

5 A Yes, sir.

6 Q Okay. Does any of -- does gas, any of these material,
7 can it possibly escape somewhere other than the barrel?

8 A Yes, sir. In a semiautomatic like you have here you
9 see you have a hole here; this is an ejector port. The
10 gunshot residue can also come out of there and a small
11 amount can come out around the trigger, but most of the
12 gunshot residue is gonna come out of the muzzle of the gun
13 and go forward with the projectile.

14 Q Okay. And you testified they have a kit sticky pad so
15 that collect off the hands?

16 A Yes, sir.

17 Q Is that correct?

18 A Yes, sir.

19 Q And then they take the swabs from the sticky pad and
20 they put them in a container?

21 A Yes, sir.

22 Q For you to test?

23 A Yes, sir.

24 Q Okay. And how many gunshot residue kits did you
25 receive in this case?

Sw - I. Simmons - Direct

1 A Four.

2 Q Can you tell this jury what four individuals did you
3 receive gunshot residue kits from?

4 A I can. It was an Angelique Bynum, Larry Clark
5 Maltonin, Jacqueline Love, and Rakeem Lamar Gaffney.

6 Q Okay. And do you have any knowledge about who those
7 four individuals are?

8 A Yes, sir, just from the incident report that was
9 submitted. That Angelique Bynum and Larry Maltonin were
10 the deceased victims in the case. And that Jacqueline
11 Love was someone who just happened to be in the vicinity
12 of the incident when it occurred. And I'm not exactly
13 sure about Rakeem Gaffney.

14 Q Okay.

15 A It's just mentioned.

16 Q All right. Can you tell us, tell this jury, how
17 fragile or how durable is gunshot residue?

18 A Gunshot residue is very fragile. It's like getting
19 flour on your hands when you're cooking. If you wipe your
20 hands on your pants or if you wash your hands or if you
21 begin to sweat, all of those things can remove gunshot
22 residue from your hands.

23 Q What is, I guess the window of opportunity, if there is
24 such a thing for testing for gunshot residue?

25 A On a living person gunshot residue will not remain

Sw - I. Simmons - Direct

1 longer than six hours after a shooting so, and it begins
2 to fall away immediately. So after six hours no gunshot
3 residue will be found from the shooting. If someone was
4 to shoot a gun at noon, by 6:00 that afternoon, even if
5 they didn't wash their hands or didn't clean their hands
6 in any way, by 6:00 that afternoon their gunshot residue
7 would be gone.

8 Q Okay. And do normally do you collect or advocate
9 collecting gunshot residue kits from people outside of six
10 hours?

11 A No. If someone shoots a gun and the GSR kit is not
12 collected within six hours we do not analyze it.

13 Q Okay. What size are these particles?

14 A They're very small, microscopic.

15 Q Microscopic.

16 A Yes. You can probably fit a hundred of them across the
17 head of a pin.

18 Q Is there anything special or anything unique about
19 having lead, barium, and antimony and aren't those the
20 three ingredients you talk about?

21 A Yes.

22 Q Is there something special or unique about the
23 combination of those three? Are they found in combination
24 commonly in the world?

25 A No, sir, they are not. When you have lead, barium, and

Sw - I. Simmons - Direct

1 antimony together in certain ratios that is consistent
2 with gunshot residue and not found in other sources.

3 Q So wouldn't be other sources?

4 A No, not if they were all combined together.

5 Q Okay. How about you talked about living people as
6 opposed to deceased people. Is there a difference?

7 A Yes. On the hands of someone who is deceased they're
8 no longer moving. They're not making contact with
9 objects. They're not sweating and their skin is not
10 absorbing materials so gunshot residue will stay on their
11 hands indefinitely. It would be like an inanimate object.
12 Until it was removed from the outside source it would
13 remain on the hands.

14 Q Okay. Can you tell us what you did with the gunshot
15 residue kit from Angelique Bynum and what your results
16 were.

17 A Yes, sir. When the kits came in we received a sample
18 from the right palm, which is this area, the back of the
19 right hand, a separate sample from the back of the right
20 hand, a sample from the left palm and a sample from the
21 back of the left hand. We analyzed them to determine how
22 much of the three metals is present on those samples. And
23 in this case we found that the quantities of metals that
24 were found on the right palm were consistent with gunshot
25 residue. The quantities of metals found on the back of

Sw - I. Simmons - Direct

1 the right hand were consistent with gunshot residue. On
2 the left palm gunshot residue was also found, and on the
3 back of the left hand the metals found were consistent
4 with gunshot residue.

5 Q Okay. Let me ask you this, Agent Simmons. You said
6 that bullet comes out the middle of the gun and most of
7 the gunshot residue cloud follow the bullet?

8 A Yes, sir.

9 Q But it ---

10 A About 95 percent.

11 Q But it kind of pillars out like a mushroom cloud?

12 A Yes.

13 Q Is distance a factor for finding gunshot residue on a
14 victim?

15 A Yes, sir.

16 Q Okay. So if you're close up, if the victim is close to
17 the person that shot them, what be your expectation?

18 A I would expect to find a large amount of gunshot
19 residue or these three metals that we're looking for on
20 the hands of someone. In fact, it would be much higher if
21 I were standing in front of a weapon and the weapon goes
22 off than if I'm shooting the weapon in the case. If I'm
23 shooting weapon I'm behind the weapon; most of the gunshot
24 residue is going this way. So if you're standing in front
25 of a weapon you would have higher levels than someone

Sw - I. Simmons - Direct

1 shooting the gun.

2 Q Would you have any type of qualification or
3 quantification on the amount that was on Angelique Bynum?

4 A Yes, sir, I do.

5 Q And what would that be?

6 A If I can -- may I consult my notes real quick?

7 Q Certainly.

8 A On Angelique Bynum we found amounts where when shooting
9 a weapon we expect our threshold level is about 170 counts
10 of lead. And on the right palm of Angelique Bynum we
11 found 4,000 or above 4,000. And on the back of her right
12 hand we found over 14,000 counts of lead. On the left
13 palm it was on -- it was 114 counts and on the back of the
14 left hand it was 649.

15 Q So based on those numbers what conclusion can you draw
16 as to how close she was to the muzzle of that weapon when
17 she was shot?

18 A I can say that she was -- it's most consistent that she
19 was in front of the gun when it went off. If it were a
20 handgun probably within 5-feet of the weapon when it went
21 off.

22 Q So at least as close as we are?

23 A Yes, sir.

24 Q Okay, all right. Can you tell me about the GSR kit,
25 your analysis and your results on Larry Maltonin Clark?

Sw - I. Simmons - Direct

1 A Yes, sir. On his right palm the lead quantities are
2 above 300. On the back of his right hand they're above
3 200. On the left palm 180, and on the back of his left
4 hand we --I did not find consistent enough to say that
5 gunshot residue was present on the back of his hand.

6 Q So there was -- it was positive for gunshot residue?

7 A Yes, sir, on the right palm it was. And on the back of
8 the right hand it could be associated with gunshot
9 residue. The levels were slightly lower.

10 Q So but it was not as close as it was with Angelique
11 Bynum?

12 A That's correct, yes, sir.

13 Q Okay. Can you tell me what analysis you did and what
14 your results were on the gunshot residue test from
15 Ms. Jacqueline Love?

16 A I process the kit the exact same way I processed all
17 the other kits looking for the quantities of three metals
18 that are present in gunshot residue. And on Jacqueline
19 Love the quantity of metals I found did not indicate the
20 presence of gunshot residue on any areas of the hand.

21 Q So none?

22 A No, sir.

23 Q Do you have anything that indicates when the gunshot
24 residue kits were actually administered to the
25 individuals?

Sw - I. Simmons - Direct

1 A Yes, sir. I have a gunshot residue information form
2 that is filled out with every gunshot residue kit, and
3 it's also sent in to us with the kits.

4 Q Okay. Can you tell me what time the gunshot residue
5 kit was done on Angelique Bynum.

6 A It appears that it was 10:50 a.m. on September 29th of
7 2007.

8 Q And are you aware of the purported time that this
9 shooting occurred?

10 A It is also on the sheet.

11 Q Okay.

12 A So it was at five a.m.

13 Q So it was within the six hour window?

14 A Yes, sir, but since the person was deceased it did not
15 have to be within six hours.

16 Q All right. Do you have what time the gunshot residue
17 kit was performed on Larry Maltonin Clark?

18 A Yes, sir. It was at approximately 10:25 on the 27th of
19 September.

20 Q Okay. Do you have the time that the gunshot residue
21 kit was administered to Jacqueline Love?

22 A Yes, sir. 8:30 a.m.

23 Q Okay. And that's well within the six hour window?

24 A Yes, sir, it is.

25 Q Okay. Can you tell me about the gunshot residue kit

Sw - I. Simmons - Cross

1 on Rakeem Lamar Gaffney?

2 A Yes, sir. Also on the hands of Rakeem Gaffney no
3 gunshot residue was detected. The quantities of metals we
4 found did not meet our threshold level so it was no
5 gunshot residue was found.

6 Q Do you have the time when that gunshot residue kit was
7 administered to Mr. Gaffney?

8 A Yes, sir, that was at 9:20 a.m. on September 29th.

9 Q And is that within your six hour window?

10 A Yes, sir, it is.

11 Q Okay. Thank you, Ms. Simmons. Would you please answer
12 any questions Mr. Lawson or Mr. Anderson may have.

13 MR. LAWSON: May it please the Court.

14 THE COURT: Yes, sir.

15 **CROSS-EXAMINATION**

16 BY MR. LAWSON:

17 Q Agent, is it Agent Simmons, is that —

18 A Yes, sir, that's —

19 Q Your designation is agent?

20 A Yes, sir.

21 Q So you're actually a forensic scientist. I think I'd
22 rather be called a scientist or something than agent
23 especially at SLED. Now with gunpowder residue was GSR,
24 as indicated in direct this is a fragile form of evidence;
25 is that correct?

Sw - I. Simmons - Cross

1 A Yes, sir, it is.

2 Q So, and the six hour window is a window that is just,
3 it's basically, it -- through years of experience
4 determine that it takes if it's six hours then the chances
5 of there being any left after that is very slim on someone
6 who is mobile and moving.

7 A Yes, sir, that's correct.

8 Q Now and I think you said that on inanimate objects or
9 someone who is deceased that rule wouldn't apply?

10 A Yes, sir.

11 Q And I would assume part of that is because you can
12 remove it by washing your hands, by simple movement, can
13 remove it shaking hands with someone, brushing people,
14 whatever can knock it off and it can disappear very
15 easily?

16 A Yes, sir, that's correct.

17 Q But if you have an inanimate object or someone who is
18 deceased you assume that they aren't moving?

19 A Yes, sir.

20 Q However, that's not necessarily always accurate, is it?
21 If you got someone that's taken to an autopsy the bodies
22 can be moved around. If EMS comes and does testing that
23 can also affect the gunpowder residue?

24 A Yes, sir, if it's removed by an outside source, yes,
25 sir. That is possible.

Sw - I. Simmons - Cross

1 Q So it doesn't always have to be internal, you moving
2 yourself. It can -- the movement can be from an outside
3 source as well?

4 A Yes, sir.

5 Q So there are many ways to lose that evidence?

6 A Yes, sir.

7 Q But as I understand it, the -- it doesn't just attract
8 to your hands or your face or your skin?

9 A No, sir, it doesn't.

10 Q It will attach to clothes as well?

11 A Yes, sir, it can get on the clothing.

12 Q And on the clothes, if you take them off and lay them
13 down it would appear that there could be gunpowder,
14 gunshot residue there, until they're washed or moved or
15 shaken out. Those are the kind of things that would
16 remove it from the clothes.

17 A Yes, sir, that's correct.

18 Q But it would be worth testing if you had clothes that
19 an alleged shooter had on and you knew that they had not
20 been overly moved?

21 A Right. If they had not been washed you could associate
22 those with a specific shooting incident, yes.

23 Q You could test them for gunpowder residue?

24 A Yes, you can.

25 Q Now, and as far as telling, you can't really tell the

Sw - I. Simmons - Cross

1 distance that the gunshot was based on the amount of
2 gunpowder, gunshot residue that's on the person, is that
3 —

4 A We can just give estimation with a handgun, yes, sir.

5 Q The higher the amount obviously you would think the
6 closer it is but within a certain range. If you're
7 extremely close like a contact wound the gunpowder residue
8 may actually go in the wound as opposed to being on the
9 hand?

10 A Yes, that is a possibility.

11 Q So that — a gunshot where it's right there is not
12 necessarily giving you exactly what you would look for?

13 A Right. In a contact shot is where the muzzle of the
14 weapon is placed directly into the skin and fired. And if
15 someone's hands were out like this the gunshot residue
16 would go into the skin, would not get on the hands of the
17 person.

18 Q So, but now with the weapon in this case, the one that
19 you looked at, the 4r, that you looked at during —

20 A Yes, sir.

21 Q —direct examination, the hole at the bottom, is that
22 what you were talking about where gunpowder residue,
23 gunshot residue?

24 A I was. The ejector port where the slide slides back
25 the shell comes out.

Sw - I. Simmons - Cross

1 Q Okay, that part, not —

2 A Yes, sir. No, not out of the receiver.

3 Q Because usually on the bottom there's a clip?

4 A Right, yes, sir.

5 Q And that would prevent it from too much from coming out
6 there.

7 A Well, right.

8 Q I guess a little bit could come out?

9 A A small amount may come out of there.

10 Q Okay. And would you expect to find more residue in
11 relation to this kind of weapon or a revolver?

12 A Generally revolvers expel more gunshot residue because
13 they're not as tight. When you shoot a semiautomatic it
14 has to pull the round in and shoot the cartridge case out
15 so a lot of the gases have to be contained within the
16 weapon to shoot the cartridge case out. In a revolver the
17 cylinder spins and cartridge stays inside the cylinder so
18 it doesn't have to have as tight of a seal on the weapon.

19 Q Okay. And so with a revolver you would expect to have
20 more on the shooter I would assume than —

21 A Yes, sir. You can get more —

22 Q ---an automatic?

23 A ---on the shooter with the...

24 Q And likewise, as far as what we're talking about with
25 distance, the fact that the male victim had lower levels

Sw - I. Simmons - Cross

1 on his hand could be a result of what took place after the
2 shot was fired as opposed to the distance?

3 A Yes, sir. If the hands were cleaned in some way or
4 something that is a possibility.

5 Q Okay. And as I understand it you didn't have anything
6 to do with collecting these tests?

7 A No, sir, I did not.

8 Q They were just submitted to you for testing?

9 A Yes, sir.

10 Q Okay. And did you receive in this case any other test,
11 gunpowder residue test, gunshot residue, to perform tests
12 on?

13 A No, sir, just the four that I mentioned.

14 Q Just these four?

15 A Yes, sir.

16 Q Any other items of evidence that you were requested to
17 test?

18 A No, sir, just these four GSR kits.

19 Q No further questions.

20 THE COURT: Redirect.

21 MR. CLEMENTS: Your Honor, we don't have any
22 further questions. We'd ask that Agent Simmons be
23 released from her subpoena and may we approach the Bench,
24 Your Honor.

25 THE COURT: She's excused. Have a nice day.

Sw - I. Simmons - Cross

1 MR. LAWSON: Without objection.

2 THE COURT: All right.

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

5 THE COURT: All right, jurors, it's proper at
6 this stage to take the lunch recess so as to keep the
7 procedure in place. So please remember my instructions to
8 you not to discuss the case among yourselves and not to
9 let anyone discuss it with you under any circumstances.
10 And I need to put this on the record just so the reviewing
11 body will understand in terms of the television
12 presentation, did any of you, did any of you see any
13 television presentation last evening? Anyone?

14 (There was no response.)

15 THE COURT: Thank you so much. Have a nice
16 lunch. No one leaving now but the jury.

17 (WHEREUPON, the jury was removed from the
18 courtroom at 12:00 p.m., and the following proceedings
19 commenced in open court.)

20 THE COURT: Anything the State needs to put on
21 the record?

22 MR. CLEMENTS: Your Honor, just simply
23 housekeeping. We anticipate that we have at most five.
24 maybe four witnesses left.

25 THE COURT: Okay, all right. So Defense is on

Sw - C. Smith - Direct

1 notice in that regard. Have a nice lunch. 1:15.

2 (WHEREUPON, a lunch break was taken.)

3 (WHEREUPON, State Exhibits Nos. 88, 89 were marked for
4 identification only.)

5 THE COURT: Bring the jury out.

6 (WHEREUPON, the jury was returned to the courtroom at
7 approximately 1:15 p.m., and the following proceedings
8 commenced in open court.)

9 THE COURT: All the juror's okay? Everybody all
10 right?

11 All right, Mr. Solicitor.

12 MR. CLEMENTS: Thank you, Your Honor. Your
13 Honor, the first witness we call for the afternoon session
14 will be Conswella Smith.

15 THE COURT: Okay.

16 CLERK OF COURT: Ms. Smith, if you will come
17 around and let me swear where you in please, ma'am.

18 WHEREUPON,

19 **CONSWELLA SMITH,**

20 having been duly sworn by the Clerk of Court, testified as
21 follows:

22 CLERK OF COURT: You may have a seat up in the
23 witness stand.

24 **DIRECT EXAMINATION**

25 **BY MR. CLEMENTS:**

Sw - C. Smith - Direct

1 Q Ms. Smith, can you please state your full name for the
2 record and please spell your first name for the court
3 reporter.

4 A Conswella Smith.

5 THE COURT: You got to talk up louder.

6 THE WITNESS: Conswella Smith,

7 C-O-N-S-W-E-L-L-A.

8 BY MR. CLEMENTS:

9 Q Ms. Smith, where do you live?

10 A In Conway, South Carolina.

11 THE COURT: A little louder, little louder.

12 THE WITNESS: Conway, South Carolina.

13 THE COURT: Everybody's got to hear you,
14 especially these folk over here, please.

15 THE WITNESS: Conway, South Carolina.

16 BY MR. CLEMENTS:

17 Q Ms. Smith, I'm gonna stand over here and then if I can
18 hear you I feel sure that these people hear you, okay.

19 A Uh-huh.

20 Q If you don't understand my question if you'll ask me to
21 repeat it. And when you answer if you can give a verbal
22 answer like instead of nod your head or shake your head
23 say yes or no, okay?

24 A Okay.

25 Q And I'll ask you to speak to this jury, all right.

Sw - C. Smith - Direct

1 Speak up loud, clear voice.

2 Q Ms. Smith, how old are you?

3 A I'm 34.

4 Q And do you know Joshua Phillips?

5 A No, sir.

6 Q Do you know someone named Scrappy?

7 A Yes, sir.

8 Q Okay. Do you know a Jason Phillips?

9 A Yes, sir.

10 Q I'll going to ask you to speak up a little louder.

11 A Yes, sir.

12 Q Do you know Reginald Evans?

13 A Yes, sir.

14 Q The person you know as Scrappy, do you see him in the
15 courtroom here today?

16 A Yes.

17 Q Can you please point him out and describe what he has
18 on.

19 A He right there with the brown shirt on (indicating.)

20 THE COURT: You got to speak up.

21 THE WITNESS: He's right there with the brown
22 shirt on.

23 BY MR. CLEMENTS:

24 Q All right. Let the record reflect the witness has
25 identified the defendant.

Sw - C. Smith - Direct

1 THE COURT: It will.

2 BY MR. CLEMENTS:

3 Q Ms. Smith, do you remember back in September 29th, 2007
4 and September 28th, 2007?

5 A Yes, sir.

6 Q Can you please tell this jury who you were with that
7 night of September 28th, 2007 and what you were doing.

8 A I was at — with Reginald Evans and me, little Scrappy
9 and Joshua Phillips.

10 THE COURT: Can you folk all hear? Everybody
11 hear?

12 BY MR. CLEMENTS:

13 Q All right, you were with Reggie and who else?

14 A Reginald, Jason and Josh.

15 Q Regional, Jason and Josh?

16 A Yes, sir.

17 THE COURT: Please speak up a little louder now,
18 please.

19 THE WITNESS: Yes, sir.

20 BY MR. CLEMENTS:

21 Q I'll give you a little bit of water to drink. If
22 you're a little nervous sometimes if you can drink some
23 water you can speak a little louder. Ms. Smith, you were
24 with Reginald —

25 A Yes, sir.

Sw - C. Smith - Direct

- 1 Q --Jason and Josh, who's Little Scrappy?
- 2 A Yes, sir.
- 3 Q Okay. Where did y'all start out that night? What were
- 4 y'all doing, where did you go first?
- 5 A To King George Club.
- 6 Q Where is King George Club?
- 7 A I think it's called Green Sea area. Green See area.
- 8 Q Green sea area, okay. And who was driving?
- 9 A I was.
- 10 Q What were you driving?
- 11 A A Jeep Cherokee.
- 12 Q Okay. Who did that Jeep Cherokee belong to?
- 13 A A lady from Conway named Ms. Ruth.
- 14 Q Ms. Ruth. And did she just let y'all drive that jeep
- 15 or how did you come to drive the jeep?
- 16 A They had rented the jeep.
- 17 Q They had rented the jeep. When you say "they," who are
- 18 you talking about?
- 19 A Reginald.
- 20 Q Reginald? Okay. And y'all went to the King George
- 21 Club. Who was with you before you got to King George
- 22 Club?
- 23 A It was me, Reggie, Josh, Jason, and like two other
- 24 people at my house.
- 25 Q Okay. And when you got to the King George Club what

Sw - C. Smith - Direct

1 did you do?

2 A Well, Josh went in and I went in, but Reginald and them
3 didn't come in. They didn't go in the club.

4 Q Okay.

5 A And we drunk a couple of drinks.

6 Q Y'all drank some drinks. What kind of drinks?

7 A Beer and liquor.

8 Q Okay. And about how long did you stay at King George
9 Club, if you remember?

10 A I think, say, about 30 minutes, 35 minutes, not too
11 long.

12 Q Okay. And you know what time of night it was?

13 A I think it was like 12 or 11:00.

14 Q 11 or 12:00?

15 A Yes, sir.

16 Q At night? Okay. When you left the King George Club
17 how did you leave?

18 A In the truck. Well, I was driving the truck and some
19 dudes in a jeep and another kind of car followed us to the
20 Nichols Club.

21 Q Okay. And did everybody that was riding with you in
22 the jeep still ride with you in the jeep then?

23 A Yes, sir.

24 Q Okay. Josh, Jason, everyone else?

25 A Yes, sir.

Sw - C. Smith - Direct

1 Q Okay. And when you left King George Club where did you
2 go?

3 A To Nichols Club.

4 Q Nichols Club. Was that Nichols Night Life?

5 A I'm not sure of the name of it.

6 Q Okay. I'm gonna show you what's been marked as State's
7 Exhibit 22.

8 MR. CLEMENTS: May I approach, Your Honor.

9 THE COURT: Yes.

10 BY MR. CLEMENTS:

11 Q You recognize State's Exhibit 22?

12 A Yes, sir.

13 Q What is that?

14 A That's the club.

15 Q That's the club y'all went to?

16 A Yes, sir.

17 Q Okay. Do you know about what time it was when you got
18 to the Nichols Club?

19 A I'm not sure, but I know it was like 12, 12:30. It
20 wasn't that late.

21 Q Okay. What did you do when you got there?

22 A Got drunk. We got drunk.

23 Q Got drunk? Okay. Were there a lot of people there or
24 a few people there?

25 A It was a lot of people there.

Sw - C. Smith - Direct

1 Q Lot of people?

2 A Yes, sir.

3 Q Was any music playing, have a DJ, a band, what?

4 A They had a DJ and but I didn't go down there. I stayed
5 at front.

6 Q You stayed at the bar? Okay. And who stayed at the
7 bar there with you?

8 A None of them. Nobody.

9 Q Nobody. Everybody just kind of did their own thing
10 after they got there?

11 A Yes, sir.

12 Q Okay. You remember about what time it was when y'all
13 decided to leave? Do you remember about how long y'all
14 stayed there?

15 A I know it was like 5 or 6:00 in the morning. It was
16 getting morning.

17 Q Getting towards morning time?

18 A Yes, sir.

19 Q All right. When you left the club who was riding with
20 you then?

21 A When I left?

22 Q When you got ready to leave the club.

23 A When I got ready to leave it was all of us, me, Reggie
24 Jason, and Josh.

25 Q Okay. What did y'all do?

Sw - C. Smith - Direct

- 1 A Okay. We was getting ready to leave the club, but Josh
2 said he had to go back and use the restroom.
- 3 Q Okay. And did he go get out the car and go back in?
- 4 A Yes, sir.
- 5 Q Do you remember who was sitting where?
- 6 A In the truck?
- 7 Q Yes.
- 8 A Yes, sir.
- 9 Q Can you tell me where were you seated?
- 10 A I was in the driver's seat and Jason -- no, was it
11 Josh? I think josh was behind me and Jason was on the
12 other side and Reggie was in the front seat.
- 13 Q Reggie was in the front seat? What kind of condition
14 was Reggie in?
- 15 A He was drunk. He was throwing up.
- 16 Q He was throwing up drunk?
- 17 A Passed out.
- 18 Q Passed out? Okay. I don't mean to keep repeating what
19 you're saying. I want to be sure that we hear. You're so
20 soft spoken?
- 21 A Yes, sir.
- 22 Q So Reggie was in the front seat but he was throwing up,
23 drunk, passed out?
- 24 A Yes, sir.
- 25 Q Okay. And Josh and Jason were in the back seat?

Sw - C. Smith - Direct

1 A Yes, sir.

2 Q Okay. Josh said he had to go to the bathroom. Did he
3 get out the car?

4 MR. ANDERSON: Object to the leading.

5 THE COURT: Well, Ma'am, you have got to speak
6 up now. Please, everybody must hear you. Please now you
7 got to speak up.

8 Mr. Solicitor, you have been leading but the witness
9 has not been talking up, and frankly I can barely hear.
10 You've got to. We can't go forward until you speak up now,
11 please, please.

12 THE WITNESS: Yes, sir.

13 MR. CLEMENTS: Thank you, Your Honor.

14 BY MR. CLEMENTS:

15 Q What did Josh do?

16 A He went in the club.

17 Q Okay. Do you know what direction your car was at or
18 where he was parked at?

19 A I'm not sure.

20 Q Okay. What do you remember, if anything, about helping
21 a Henry Junior?

22 A We gave him a jump. We gave him a jump. His car
23 was -- wouldn't crank up so we went over there, pulled the
24 truck up there, gave him a jump.

25 Q Okay. And then what did you do after you gave him the

Sw - C. Smith - Direct

1 jump? Did you stay parked there?

2 A No, sir.

3 Q All right. Where did you pull up to in relation to the
4 club when Josh went out to go to the bathroom?

5 A When Josh went out to go the bathroom I went to like —
6 okay, we was parked that way. But I went to turn around.
7 I went to turn around and I came back up like facing going
8 to Marion/Mullins area, yeah.

9 Q Facing going —

10 A To Mullins.

11 Q Okay. So if this was the front, this was the front of
12 the club where you walk in, right here, was your car
13 facing this way or this way?

14 A This way.

15 Q All right. Towards Nichols?

16 A No, Nichols is down the other way. We was —

17 Q So you were facing the opposite way from Nichols?

18 A Yes, sir.

19 Q Okay, all right. After Josh went in the club what, if
20 anything, did you ever hear after that, if you heard
21 anything at all?

22 A Well, when I came out the club he was like, drive, yo,
23 I just merked two niggers.

24 THE COURT: He said what?

25 THE WITNESS: He said, drive, I just merked two

Sw - C. Smith - Direct

1 niggers.

2 BY MR. CLEMENTS:

3 Q I'm, sorry, can you say that -- I hate to make you
4 speak so loud. Can you say that slow and real loud. Tell
5 the jury?

6 A He said, drive, he just merked two niggers.

7 Q Murdered?

8 THE COURT: Drive, I just murdered two.

9 THE WITNESS: No, sir, he said drive, I must
10 merked, I just had merked two niggers.

11 MR. CLEMENTS: Merked I think.

12 BY MR. CLEMENTS:

13 Q Is that correct, merked?

14 A Yes, sir.

15 Q Do you know what merked means?

16 A No, sir, no, sir.

17 Q Okay. What -- what, if anything, do you remember Josh
18 saying that night before y'all left to go home?

19 A I don't know 'cause when we got in the car he was,
20 like, drive, so when I was driving we went to Mullins.

21 Q Okay. And when you went to Mullins what did you do?

22 A The car had run out of gas. Once the car gave out of
23 gas he told Jason to go with him to get some gas.

24 Q Okay. What did you do?

25 A Me and Reggie, we went -- well, we stayed at the truck.

Sw - C. Smith - Direct

1 We left the truck and went through the cut at housing
2 authority apartments. We went through the cut and went to
3 Jerome house.

4 Q Okay. And what did you do after that?

5 A We paid him 30-dollars to give us a ride. We came back
6 to look for the truck but it was gone, and we gave him a
7 ride -- we paid him to give us a ride to my house.

8 Q Okay. And where was that at?

9 A In Conway.

10 Q Conway. Did you get to your house?

11 A Yes, sir.

12 Q Was anybody at your house when you there?

13 A Josh and Jason.

14 Q Josh and Jason were there?

15 A Yes, sir.

16 Q What, if anything, did you hear Josh say to you?

17 A He didn't say nothing right then. But when we -- when
18 all us went in the house to lay down he just kept saying
19 something about burning a trailer down, something about
20 burning a trailer down if we say his name or something
21 like that.

22 Q Burning a trailer down if you said his name?

23 A Yes, sir.

24 Q Did you know what he was referring to saying his name
25 about?

Sw - C. Smith - Direct

1 A Well, I asked Reggie. He told me not to worry about
2 it, to go lay down.

3 Q Okay, all right. Later on after that a couple of days
4 later what happened?

5 A When -- that morning where I didn't get up I left --
6 let me see. When I left home I was out at Shady Miles
7 Apartments so when the detectives came out there.

8 Q Okay, detectives came out there. What did the
9 detectives want?

10 A They wanted to know was he riding in the car with me.

11 Q And what did you do when they wanted to talk to you?

12 A Well, I told them at first that I didn't know what they
13 was talking about.

14 Q Okay. Why did you do that?

15 A Because I was -- I didn't really remember everything at
16 that time until the next morning.

17 Q Okay.

18 A The next day when I --

19 Q What condition were you in when you first got talked to
20 by the police?

21 A I was -- I was wasted.

22 Q You were kind of wasted? Okay. Did you cooperate with
23 them at first or not?

24 A No, sir.

25 Q You didn't? What happened later?

Sw - C. Smith - Direct

1 A The detective dude, he gave me his phone number, had
2 gave me his phone number and he came back and he just kept
3 calling and he just told me to tell him the truth and it
4 will be all right. So they came back and they made us
5 come to the -- they made us come to the Sheriff's Office
6 up here.

7 Q When you say "us," who are you talking about?

8 A Me, Jason and Reggie.

9 Q Okay. And they made you come to the Sheriff's Office?

10 A No, they -- well, yes. Yes, sir.

11 Q Okay. What happened when you got to the Sheriff's
12 Office?

13 A We had to tell them the truth. I just told them the
14 truth.

15 Q Did you give a statement to anyone?

16 A To Ms. Judy Barker.

17 Q Ms. Judy Barker? You see Ms. Judy Barker in the
18 courtroom?

19 A Yes, sir.

20 Q Did you write out a statement?

21 A No, sir.

22 Q How did you give a statement to him?

23 A She wrote down what I said.

24 Q Okay. Did you give more than one statement?

25 A No, sir.

Sw - C. Smith - Direct

1 Q Okay.

2 MR. CLEMENTS: Let me -- may I approach the
3 witness, Your Honor.

4 THE COURT: Yeah.

5 BY MR. CLEMENTS:

6 Q Let me show you this see if this refreshes your
7 recollection.

8 A Yeah, I started writing this at the apartment, what you
9 call it there, but I couldn't write so he asked would the
10 lady, would it be okay if Ms. Judy Barker write it.

11 Q Okay. So you stopped that one?

12 A Yes, sir.

13 Q Okay. And did they give you Miranda rights?

14 A Not sure.

15 Q You do you know what Miranda rights are?

16 A No.

17 Q It's when they ask you, you have the right to remain
18 silent.

19 A Yes, sir.

20 Q They gave you all those?

21 A Yes, sir.

22 Q Okay. And did you agree to talk to them then?

23 A Yes, sir.

24 Q Okay. And you talked to Ms. Barker?

25 A Yes, sir.

Sw - C. Smith - Direct

1 Q To the best of your ability at that time did you tell
2 Ms. Barker most everything you knew?

3 A Yes, sir.

4 Q Did you write it down for her?

5 A No, sir, she wrote it for me.

6 Q She wrote it?

7 A Yes, sir.

8 Q Did you sign it?

9 A Yes, sir.

10 MR. CLEMENTS: May I approach, Your Honor?

11 THE COURT: Yes, sir.

12 BY MR. CLEMENTS:

13 Q Do you recognize this?

14 A Yes, sir.

15 Q Okay. Is that your signature on those pages?

16 A Yes, sir.

17 Q Can you tell us what you meant -- first let me ask you
18 this, what familiarity do you have with a shotgun?

19 A I'm not that good at it, but I can -- I know one if I
20 see one.

21 Q Okay. Anybody in your family got one?

22 A My granddaddy had a shotgun.

23 Q He hunts?

24 A Yes, sir.

25 Q Okay. You ever seen him with it, shoot it, operate it?

Sw - C. Smith - Direct

1 A Yes.

2 Q Okay. Can you tell us what you meant when you told
3 Captain Barker, I heard him in the back racking a shotgun,
4 what you meant by that?

5 A I heard the noise when he pulled the -- you got -- it's
6 like when you take the thing out and it make noise.

7 Q The shotgun makes noise?

8 A Yes, sir.

9 Q When you load it?

10 A (Shakes head.)

11 Q Listen very carefully Ms. Smith (indicates).

12 A Yeah, like that. I heard noises.

13 Q That noise?

14 A Yes, sir.

15 Q Noise like that?

16 A Yes, sir.

17 Q That evening at the Nichols Life or early that morning
18 at Nichols Night Life what would you say was your
19 condition?

20 A I was wasted.

21 Q You were wasted? What would you say was Jason
22 Phillips' condition?

23 A He was wasted.

24 Q What about Reginald Evans' condition?

25 A Yeah, he was real tore up.

Sw - C. Smith - Direct

- 1 Q He was real tore up. And who was the worst out of you?
- 2 A Reggie was drunker than all of us.
- 3 Q Reggie was drunker than all of you?
- 4 A Yes, sir.
- 5 Q Who was worse between you and Jason?
- 6 A I think I was.
- 7 Q All right. How about Josh, or Little Scrappy?
- 8 A No, he wasn't that drunk.
- 9 Q He wasn't that drunk? But yet you were driving?
- 10 A Yes, sir.
- 11 Q Okay. Had you had anything other than just alcohol? I
- 12 want you to be honest with the jury.
- 13 A No, sir.
- 14 Q Not you? Had anybody else in the car had anything
- 15 other than alcohol?
- 16 THE COURT: You got to answer.
- 17 THE WITNESS: Yes, sir. I had something other
- 18 than alcohol.
- 19 BY MR. CLEMENTS:
- 20 Q You did?
- 21 A Yes, sir.
- 22 Q What else?
- 23 A I was smoking weed, drinking liquor, stuff like that.
- 24 Q Smoking weed and drinking liquor?
- 25 A Yes, sir.

Sw - C. Smith - Direct

1 Q Ms. Smith, I want to ask you a few things. I want you
2 to tell me about this now. In 1996 did you have a
3 conviction for assault on police while resisting arrest?

4 A Yes, sir.

5 Q And in 1996 did you also at the same time get a
6 conviction for possession of crack cocaine?

7 A Yes, sir.

8 Q Got four months on that?

9 A Yes, sir.

10 Q In 1997 did you get a conviction for breaking into an
11 automobile or fuel tank?

12 A Yes, sir.

13 Q And in 2001 did you get a resisting arrest conviction?

14 A Yes, sir.

15 Q In 2005 did you have a unlawful weapon?

16 A Yes, sir.

17 Q Has law enforcement -- did they charge you in this
18 incident?

19 A Which incident?

20 Q This incident regarding Josh Phillips and the Nichols
21 Night Life. Did they charge you with anything?

22 A Yes, sir.

23 Q What did they charge you with?

24 A Accessory after the fact.

25 Q Accessory after the fact?

Sw - C. Smith - Direct

- 1 A Yes, sir.
- 2 Q And do you know what that means?
- 3 A Yes, sir.
- 4 Q What does that mean?
- 5 A That means I'm charged with knowing about the -- being
6 at the, what you call it? I forgot what the place at.
7 Being at the crime -- he say you charged with being -- I
8 forgot I got charged with 'cause I was at the -- at the
9 scene of the crime where I left the scene of the crime
10 with the, with him in my vehicle.
- 11 Q Okay. Have you been promised anything to testify
12 today?
- 13 A No, sir.
- 14 Q All right. Are you telling the truth?
- 15 A Yes, sir.
- 16 Q Ms. Smith, do you work anywhere?
- 17 A No, sir.
- 18 Q Do you receive SSI?
- 19 A Yes, sir.
- 20 Q Can you tell the jury what you receive SSI for?
- 21 A For being mentally retarded and schizophrenia.
- 22 Q Okay. I marked this as State's Exhibit 89 for
23 identification. Do you know what that is?
- 24 A Yes, sir.
- 25 Q And what is that?

Sw - C. Smith - Direct

1 A It's from the social security place.

2 Q Stating your condition or what does it state?

3 A You asked for information from your records,
4 information that you ask --

5 THE COURT REPORTER: I can't hear her.

6 THE COURT: You need to speak up.

7 THE WITNESS: Can I read it?

8 THE COURT: Yes. She wants to read it.

9 THE WITNESS: You asked for information from
10 your record. The information that you request is shown
11 below. If you want anyone else to have this information
12 you may send them this letter. Conswella Smith has been
13 receiving SSI benefits since 19-- what is it -- since
14 January 24th, 1992. Onset date for, for the disability
15 condition -- I don't know that word. This -- I don't know
16 this word right here.

17 BY MR. CLEMENTS:

18 Q Okay. We're going to put that into evidence, but
19 that's your record?

20 A Yes, sir.

21 MR. CLEMENTS: Your Honor, we move to have this
22 introduced into evidence at this time.

23 MR. ANDERSON: I haven't any objection, Your
24 Honor.

25 THE COURT: All right, it's in evidence without

Sw - C. Smith - Cross

1 objection.

2 (WHEREUPON, State Exhibit No. 89 was admitted into
3 evidence.)

4 BY MR. CLEMENTS:

5 Q Ms. Smith, do you know what the truth is or not?

6 A Yes, sir.

7 Q All right. What are you telling here today?

8 A The truth.

9 Q Are you holding anything back?

10 A Not if I can remember. I don't remember nothing else.

11 Q Are you testifying to the best of your ability?

12 A Yes, sir.

13 Q Ms. Smith, please answer any questions Mr. Anderson or
14 Mr. Lawson may have.

15 MR. ANDERSON: Beg the Court's indulgence just a
16 moment --

17 THE COURT: Certainly.

18 MR. ANDERSON: --so I can read the last exhibit
19 that was introduced.

20 THE COURT: You may do so.

21 (Pause.)

22 **CROSS-EXAMINATION**

23 BY MR. ANDERSON:

24 Q Now you're Conswella Smith?

25 A Yes, I am.

Sw - C. Smith - Cross

1 Q Have you ever been known as Conswella Hollingsworth?

2 A Yes, I have.

3 Q Did you change your name or were you married, or how
4 did you go from Hollingsworth to Smith?

5 A When I was in school my name was Hollingsworth, but
6 once I got grown and got my identification they told me I
7 could no longer use that name, I have to go with what my
8 social security had on it, my social security card.

9 Q Someone, I guess at the social security office or
10 either someone at the highway department told you you
11 couldn't use Hollingsworth anymore?

12 A Yes, sir.

13 Q So you've never been married?

14 A No, that's why I added that.

15 Q How old are you, Ms. Smith?

16 A 34.

17 Q And when were you born?

18 A [REDACTED], 1975.

19 Q How long have you been known as Smith?

20 A All my life 'cause my mama was a Smith.

21 Q Who is Janie Hollingsworth?

22 A That's my mama. She's a Smith. My grandma -- her mama
23 was a Smith, and her and my dad wasn't married before I
24 got, you know, before she had me so I'm born with Smith.
25 I always went Hollingsworth at school.

Sw - C. Smith - Cross

- 1 Q How far did you go in school?
- 2 A Huh?
- 3 Q Ma'am?
- 4 A I couldn't hear you.
- 5 Q How far did you go in school?
- 6 A Ninth grade.
- 7 Q Did you receive any — take any special type of classes
- 8 or just regular classes?
- 9 A No, sir, I was in special classes.
- 10 Q Did you pass the eighth and move into the ninth grade?
- 11 A No, sir.
- 12 Q They just promoted you?
- 13 A I didn't go back to school that year.
- 14 Q You were in the ninth grade. Did you graduate from
- 15 junior high and go into high school?
- 16 A Yes, sir.
- 17 Q Let's talk about the 28th if you don't mind. That's
- 18 September 28th, 2007. You went to the King George Club
- 19 first?
- 20 A Yeah.
- 21 Q And you were driving a jeep?
- 22 A Yes, sir.
- 23 Q Now when you went into the King George Club you went in
- 24 with just Joshua; is that right?
- 25 A Yes, sir.

Sw - C. Smith - Cross

1 Q Reginald and Jason stayed outside?

2 A And talked to their sister, yes, sir.

3 Q Now you said you had rented a jeep or that one of them
4 had rented the jeep.

5 A Yes, sir.

6 Q I think you said Reginald rented it?

7 A Uh-huh.

8 Q How did Reginald rent the jeep?

9 A I'm not sure.

10 Q Did he give somebody drugs for it?

11 A I don't know.

12 Q Do you know where he got it from?

13 MR. CLEMENTS: Your Honor, I think that's asked
14 and answered.

15 THE WITNESS: I don't know.

16 MR. CLEMENTS: She said she didn't know so I
17 would object.

18 THE COURT: I will let him proceed with this.
19 This is cross-exam. Proceed.

20 BY MR. ANDERSON:

21 Q You said when you went inside you started drinking beer
22 and liquor. How many drinks did you have?

23 A About seven or eight.

24 Q All right. And that was at the King George Club?

25 A Yes, sir.

Sw - C. Smith - Cross

1 Q So you had seven or eight there? How long were you in
2 the King George Club?

3 A From the time that I left from the Nichols Club and
4 went down to King George -- when I left King George I went
5 to the Nichols Club and I went to Nichols club ever since.

6 Q Okay. How many drinks did you have at King George Club
7 in Green Sea?

8 A I'm not even sure.

9 Q A second ago I thought you told me seven or eight?

10 A You asked me did I have that at the Nichols Club.

11 Q At the King George Club?

12 A Oh, I don't even think I drunk nothing. We had gin.
13 We had gin before we got there so I didn't get nothing to
14 drink.

15 Q So you were drinking before you went out that night?

16 A Yeah, on the way there. On the way to the club we
17 drank a gin.

18 Q How many gin did you drink?

19 A Like a half a gallon.

20 Q And then you went to the Nichols Club; is that right?

21 A Yes, sir.

22 Q How many drinks did you have at the Nichols Club?

23 A That's what I was saying seven or eight.

24 Q So you had seven or eight additional drinks there?

25 A Uh-huh.

Sw - C. Smith - Cross

1 Q So half gallon of gin and then seven or eight
2 additional drinks?

3 A Uh-huh.

4 Q Now what type of drinks were these seven or eight?
5 Were they beer, were they wine, were they liquor?

6 A Beer and liquor.

7 Q Seven or eight more beers and liquor drinks. Now also
8 I think you indicated that while you were drinking you
9 were also smoking a little bit?

10 A Uh-huh.

11 Q Is that a yes?

12 A Yes, sir.

13 Q You were smoking marijuana?

14 A Yes, sir.

15 Q How many blunts do you think you smoked?

16 A I don't know. About three or four. I smoke blunts
17 every day.

18 Q Educate this jury for me. And what is a blunt?

19 A It's marijuana laced with a cigar. You take a cigar.
20 You take tobacco out and put the weed in it and marijuana.

21 Q How big were these cigars?

22 A They were big.

23 Q So there was a lot of marijuana?

24 A Yes, sir.

25 Q And you had three or four of those?

Sw - C. Smith - Cross

1 A Yeah, probably more, I'm not sure.

2 Q Now Mr. Clements asked you earlier if you remembered
3 giving a statement in this case.

4 A Uh-huh.

5 MR. ANDERSON: May I approach, Your Honor?

6 THE COURT: Yes, sir.

7 BY MR. ANDERSON:

8 Q That says voluntary statement at the top, not under
9 arrest. Do you recognize that?

10 A Yes, sir.

11 Q Is that your signature?

12 A Yes, sir.

13 Q That was given to by Detective Woods?

14 A I'm not sure.

15 Q Well it says -- it's got his name at the top kind of
16 right underneath yours at the top?

17 A Yeah, yes, sir.

18 Q Says you're 32 years old. Talks about where you lived,
19 talks about what kind of education you had?

20 A Yes, sir.

21 Q And then at the bottom it's got where you signed it; is
22 that right?

23 A Yes, sir.

24 Q You signed it appears at 9:10 p.m. on September
25 the 29th?

Sw - C. Smith - Cross

1 A Yes, sir.

2 Q That statement that you gave, you've got your initials
3 at the very end of it and then a line drawn; is that
4 right?

5 A No, that's not no line drawn. That's how I write my
6 initials, my name.

7 Q All right, let me ask you a question.

8 A I didn't draw that line. I don't know who did.

9 Q Somebody drew a line all the way down.

10 A I didn't draw that line.

11 Q Somebody did.

12 A Okay.

13 Q I'm asking you. You didn't draw the line. Somebody
14 else did?

15 A Must have did because I don't remember drawing a line.

16 Q That's your initials at the very end of that statement?

17 A Yes, sir.

18 Q That statement, how many lines long is that, seven?

19 A Yes, sir.

20 Q And you gave that statement to Detective Woods?

21 A Yes, sir.

22 Q Did he ever tell you to take your time and write out
23 whatever you wanted to?

24 A Yes, sir.

25 Q Did he tell you to tell him the truth? Let's talk

Sw - C. Smith - Cross

1 about this first statement for a second if you will, okay?

2 A Okay.

3 Q In that statement you indicate that you went to the
4 Green Sea Club with Reggie, Jason, and Josh; is that
5 right?

6 A Yes, sir.

7 Q And then you say you went to the Nichols Club?

8 A Uh-huh.

9 Q You also say that you drank beer and they drank liquor?

10 A We all drank liquor. I was -- I was drunk when I wrote
11 this. That's why they -- she rewrote it for me.

12 Q Okay. We'll get to that in a minute, okay?

13 A Okay.

14 Q Later you say Josh got out of jeep.

15 A Yes.

16 Q Is that right?

17 A I see it, yes, sir.

18 Q And that's the jeep that had been rented; is that
19 right?

20 A Uh-huh.

21 Q And then Josh got into another jeep or a Tahoe?

22 A Yes, the beige jeep.

23 Q He got in with two dudes from Lakeview?

24 A Uh-huh. He was talking to two dudes, the two dudes in
25 that white jeep.

Sw - C. Smith - Cross

1 Q All right. I think your statement says, got into
2 another Tahoe jeep.

3 A Yeah, I think he got in and bought some weed or
4 something like that.

5 Q What does your statement say?

6 A It says, I think that's the way the dudes were from,
7 but I didn't get to see them anymore.

8 Q But it says Josh got out of Ruth's jeep and got into
9 another Tahoe jeep?

10 A Tahoe jeep with two dudes from Lakeview or somewhere.
11 I'm not sure where they was from.

12 Q But he got into another car?

13 A Yeah, it was, yeah, at the club.

14 Q And then you indicated you didn't see him anymore?

15 A I didn't see them. That's the two dudes.

16 Q Well, I think your statement says I didn't see him
17 anymore.

18 A Hold on a second. It says the dudes were from but I
19 didn't see to see him anymore.

20 Q Him.

21 A See, it says, Tahoe jeep with two dudes from Lakeview.
22 I think that's the way -- that's where they from, the
23 dudes were from. But I didn't get to see them -- see him
24 anymore.

25 Q You didn't get to see Josh anymore; isn't that right?

Sw - C. Smith - Cross

1 Isn't that what you're saying?

2 A No, that's the dude that was driving the jeep with the
3 dreads.

4 Q Okay. And then you say, we came home Conway?

5 A Uh-huh.

6 Q At any point in time did you say Josh went inside the
7 club and shot anybody?

8 A No, sir.

9 Q At any point in time did you say Josh robbed anybody?

10 A No, sir.

11 Q At any point in time did you say, Josh got in the car
12 and said, drive, I just merked two niggers?

13 A Yeah.

14 Q Did you -- you put that in that statement?

15 A It's not in the statement but I told you I was drunk
16 and Ms. Judy Barker remarked -- she wrote down the words
17 that I was telling her.

18 Q Okay. We're going get to that in just a second, all
19 right?

20 A Cool.

21 Q Is that in that first statement?

22 A I wasn't even in the statement. I didn't -- I was
23 drunk this night. That's why she asked me did I want to
24 redo a statement and I say, yes, ma'am, 'cause I am drunk.

25 Q Okay. But then a little bit later that statement was

Sw - C. Smith - Cross

- 1 at 9:10 p.m.; is that right?
- 2 A Yes, sir.
- 3 Q And you were wasted?
- 4 A I was wasted every day that they came there.
- 5 Q And you had drank a half gallon of gin?
- 6 A Not only me. I wasn't drinking by myself.
- 7 Q Okay. You drank seven or eight liquor drinks or beers
- 8 by yourself?
- 9 A Once I got to that club, yeah.
- 10 Q And you smoked three or four blunts?
- 11 A Probably more than that.
- 12 Q Okay. Within a little while later on 9/29/07 somebody
- 13 read you your Miranda warnings; is that right?
- 14 A Yes, sir.
- 15 Q Now that first statement that you gave, that is a
- 16 voluntary statement and then in parentheses underneath it
- 17 it says, not under arrest. Isn't that right? On that
- 18 first piece of paper I gave you.
- 19 A I don't see it.
- 20 Q Right up here at the top.
- 21 A Oh, yes, sir.
- 22 Q Voluntary statement. Then right underneath it —
- 23 A Yes.
- 24 Q —not under arrest; is that right?
- 25 A Yes, sir.

Sw - C. Smith - Cross

1 Q But then about four hours later — excuse me, not that
2 long, not that long, I apologize. A couple of hours later
3 you were read your Miranda warnings by Judy Barker; is
4 that right?

5 A Yes, sir.

6 Q When did she read those Miranda warnings to you?

7 A I don't remember. I mean, I know she did 'cause I seen
8 her but I'm not sure.

9 Q At the bottom of the page does it say 11:29 p.m.?

10 A Yes, sir.

11 Q So roughly two hours later that you gave that first
12 statement?

13 A Uh-huh, yes, sir.

14 Q And Miranda warning, that tells you as Mr. Clements
15 just said earlier, you have the right remain silent?

16 A Yes.

17 Q Anything you say can and will be used against you in a
18 court of law. You have the right to speak to an attorney.

19 If you cannot afford an attorney one will be afforded to
20 you. If you decide at any time to exercise these rights
21 and not answer any questions or make any statements. Do
22 you understand all these rights that I have explained them
23 to you.

24 A Yes, sir.

25 Q And you put your initials by all of those statements;

Sw - C. Smith - Cross

1 didn't you?

2 A (There was no verbal response.)

3 Q And from that point in time you decided to give another
4 statement; is that right?

5 A Yes, sir.

6 Q And so then you gave another statement to Chief Page
7 and Captain Barker?

8 A Yes, sir, that's Judy Barker.

9 Q And this is a copy of that statement?

10 A Yes, sir.

11 Q And that's the one that was written for you by Judy
12 Barker?

13 A Yes, sir.

14 Q Now that one doesn't say you're not under arrest, does
15 it?

16 A No, sir.

17 Q At the top of the page it's got the date which is
18 September the 30th, 2007?

19 A 1:47 a.m. 30 September.

20 Q A.m.?

21 A I think so, yes, sir.

22 Q So we've now bled over from the day before into the
23 early morning hours of September 30th; is that right?

24 A Yes, sir.

25 Q And again, it's got your name at the top, your date of

Sw - C. Smith - Cross

- 1 birth, and it's got your address; is that right?
- 2 A Yes, sir.
- 3 Q It's got [REDACTED] Coletta Court, Unit [REDACTED]?
- 4 A Uh-huh, yes, sir.
- 5 Q Did Reginald live with you?
- 6 A Yes, sir.
- 7 Q How about Jason, did he live with you?
- 8 A No, sir.
- 9 Q Were you and Reginald boyfriend and girlfriend?
- 10 A At the time? Yes, sir.
- 11 Q Now did you know anybody that worked at the club in
- 12 Nichols?
- 13 A No, sir.
- 14 Q You didn't know Ms. Love?
- 15 A No, sir.
- 16 Q You didn't know Ms. Bynum?
- 17 A No, sir.
- 18 Q You didn't know Tio?
- 19 A No, sir.
- 20 Q Do you know whether or not Reginald knew them or
- 21 whether or not Jason knew them?
- 22 A All I know they said they people down there.
- 23 Q Okay. They said their peoples was out there?
- 24 A Yes, sir.
- 25 Q Okay. Now the second statement, this was handwritten

Sw - C. Smith - Cross

1 for you by Judy Barker; is that right?

2 A Yes, sir.

3 Q And this statement appears to be what I handed you, is
4 that your signature at the bottom of the first page? Is
5 that your signature at the bottom of the second page?

6 A Yes, sir.

7 Q And just like on the first one we talked about on the
8 bottom of the -- on the second page it's got a line drawn
9 down and it's got your initials on it on the second page?

10 A Yes, sir.

11 Q You see that?

12 A Yes, sir.

13 Q Well, let's talk about this second statement for a
14 minute, okay?

15 A Okay.

16 Q Do you want to read it first or you just want to go
17 ahead and talk about it?

18 A You can go ahead, whatever you want to do.

19 Q In the second statement you indicated you picked up
20 Josh at the Green Sea club?

21 A Uh-huh.

22 Q Is that right?

23 A Yes, sir.

24 Q And that Josh had a handgun in his pants?

25 A Yes, sir.

Sw - C. Smith - Cross

1 Q Did that cause you any alarm at that time?

2 A No, sir.

3 Q I mean, that didn't bother you at all that he had a
4 handgun in his pants?

5 A No, sir.

6 Q Okay. You were drinking at the time. And then you and
7 several other car loads followed from the Green Sea Club
8 to the Nichols Club; is that right?

9 A Yes, sir.

10 Q And that's when you said you heard the racking of a
11 shotgun?

12 A The gun in the back, yes, sir.

13 Q But actually, you think it may not have been a shotgun;
14 it may have been a handgun?

15 A Yes, sir.

16 Q And did you get alarmed at that time?

17 A Excuse me?

18 Q Did you get alarmed at that time?

19 A No, sir.

20 Q Did you get scared?

21 A In a way I was, yes, sir.

22 Q Did you say, hey, Josh, I'm not going to put up with
23 any of that, you need to get out?

24 A No, I kept, I kept telling my boyfriend. He was like,
25 don't worry about it, it ain't nutting. He know him, he,

Sw - C. Smith - Cross

1 you know what I'm saying, he have a gun ever day so I
2 didn't think nothing.

3 Q So you kept talking to Reginald about this case?

4 A No, Reg-- it wasn't a case at the time. It was -- we
5 was just going out to the club chilling.

6 Q Okay. You and Reginald were talking about the gun
7 though on the way there?

8 A No, I was asking questions about him because that was
9 his cousin and I wanted to know a little bit about him but
10 I didn't know that much about him. But they all keep --
11 everybody have a gun.

12 Q So prior to this you didn't know Josh. You just --

13 A I had met him that Friday.

14 Q So that's the night you met him at Green Sea?

15 A Uh-huh. No, I didn't meet him there. I met him at
16 somebody else party or something.

17 Q Okay. You'd only known him a couple of days; is that
18 fair to say?

19 A About two days, yes, sir.

20 Q What time did the club close that night?

21 A I don't remember. I don't --

22 Q You think you don't remember because of how much
23 alcohol you had consumed?

24 A I just forgot. I know it was like getting daybreak
25 'cause it was like a little bit light, like about to be

Sw - C. Smith - Cross

- 1 day time. I know it was in the morning time.
- 2 Q Now did you see any other cars in the parking lot?
- 3 A When, when I came to the club?
- 4 Q No, when you were getting ready to leave the club?
- 5 A Yes, I seen a little Honda and a truck, like, tan color
- 6 truck.
- 7 Q You saw two other cars?
- 8 A Yes, sir.
- 9 Q A Honda and a truck?
- 10 A Uh-huh.
- 11 Q You know whether or not the truck was running?
- 12 A I'm not sure.
- 13 Q What about the Honda, was the Honda running?
- 14 A It was a lady sitting in the car.
- 15 Q You could see her?
- 16 A Yes, sir.
- 17 Q You know whether or not she ever saw you?
- 18 A I think she did 'cause she almost ran into me.
- 19 Q She almost ran into you?
- 20 A Yes, sir.
- 21 Q Well, I'll ask about that in just a second, okay. Did
- 22 Reginald Evans ever pass out?
- 23 A Yes, sir.
- 24 Q And did Jason also go to sleep as well or pass out?
- 25 A Jason woke up. Jason got back up.

Sw - C. Smith - Cross

1 Q At some point in time thought was he in the car asleep?

2 A Uh-huh.

3 Q Is that a yes?

4 A Yes, sir.

5 Q So Jason was sleeping in the car. Reginald pretty much
6 passed out in the car?

7 A Yes, sir.

8 Q And then that's when Joshua decided go back inside?

9 A No, sir.

10 Q What happened according to your second statement?

11 A Reggie was sleep. Josh went to use the restroom. And
12 instead of us — we was going to just turn around, but I
13 said let's go get some gas. But when we went down the
14 road Jason said that the store was closed so we didn't go
15 to the store. And when I came back that's when the lady
16 in the Honda that was sitting there, she almost pulled out
17 and ran into me.

18 Q Okay. Where is that in your second statement?

19 A I didn't put it — she didn't ask me all that.

20 Q Well, did she ask you, Conswella, tell me a little bit
21 about what happened but don't tell me everything?

22 A No, she asked me to tell her what I remembered at that
23 time and —

24 Q Okay. And so since then you've remembered more?

25 A Yes, I remember.

Sw - C. Smith - Cross

1 Q Okay. Did you contact Mr. Barker and say, Ms. Barker,
2 I'd like to make another statement, I remember more?

3 A She told me I didn't need another statement.

4 Q So Ms. Barker told you ---

5 A She said this should be fine.

6 Q I've heard all I needed to hear?

7 A Yes, she said.

8 Q Don't need to hear anything else?

9 A Yes, sir.

10 Q That's what she told you?

11 A She didn't say nothing about hear. She said this
12 should be enough. And she told me I was free to leave.

13 Q She said, based on what you've told me and based on
14 what I've written that's enough?

15 A Say again.

16 Q Ma'am?

17 A I couldn't understand you.

18 Q She said, based on what you told me and based on what
19 I've written that's enough, I don't need anymore?

20 A No, she didn't say that.

21 Q How did she say it?

22 A She said this, I asked her was that -- she said is this
23 it. I said, yes, ma'am.

24 MR. CLEMENTS: We object to Hearsay.

25 THE COURT: Well, it's within the parameter of

Sw - C. Smith - Cross

1 the statement and the taking of the statement. I'm going
2 to let that in.

3 MR. ANDERSON: Yes, sir.

4 BY MR. ANDERSON:

5 Q What did she tell you?

6 A She just said when I got through writing the statement
7 she said, that's all you're going to write? I said, yes,
8 ma'am. She said, this should do it. And she said she got
9 it put on her file's desk so.

10 Q In your second statement did you put in there when Josh
11 came out of the club he said, I just merked two niggers.
12 Did you put that in your second statement?

13 A I don't know; I'm not sure.

14 Q Okay. Read that. Just look at it for a minute and
15 tell me what's in there.

16 A I don't see nothing about that.

17 Q But you remember that afterwards?

18 A Yes, sir, I remembered a lot of stuff after. That's
19 why I told my lawyer everything I know.

20 Q Now you were still drunk and high when you gave this
21 statement too; weren't you?

22 A I wasn't drunk. I was just high —

23 Q Oh, just high?

24 A —when I wrote that statement. I just had weed 'cause
25 I told him what I had smoked; didn't I?

Sw - C. Smith - Cross

1 Q As a matter of fact, the US marshals and deputies
2 previously come by your house earlier that day; hadn't
3 they?

4 A Yes, sir.

5 Q And then after they left you decided to smoke a little
6 bit more?

7 A Uh-huh. They even came in and caught some of it. They
8 charged him with it.

9 Q But the marshals, even though they found some marijuana
10 they didn't charge you with it?

11 A Yes, sir. No, they charged Jason with it 'cause he was
12 the only one had the bag. I didn't have no bag.

13 Q They left it there with you?

14 A Naw, they took it.

15 Q What did you smoke?

16 A What you mean? I had already smoked when they got
17 there. I didn't know it was them at the door.

18 Q Okay. About what time was that?

19 A I don't even remember 'cause I'm not sure what day it
20 was. I remember them coming out there, bunch of them.

21 Q Now in this second statement that you did, Ms. Barker,
22 you stated that Josh said he would kill anybody that
23 brought up his name?

24 A Yes, sir.

25 Q And Josh said he would burn down your house.

Sw - C. Smith - Cross

- 1 A I didn't say that. It don't say that. It said that he
2 said if anybody mention his name he will burn this mother
3 fucker down. That's what he had stated. And I told my
4 boyfriend and he told me not to worry about it, he just
5 fucked up, just go lay down.
- 6 Q Okay.
- 7 A That's what he me.
- 8 Q The part about burn that mother fucker down, show me
9 where that is in that.
- 10 A I didn't write it in the statement. This is after --
11 this is after.
- 12 Q Okay. Well tell me what that statement does say about
13 burning down.
- 14 A Wait a minute. Let me get to it. (Reads to herself.)
15 Which one you say read now?
- 16 Q Second page.
- 17 A Right here where it says, it said went to take to us --
18 Jerome and his girlfriend left. Josh was talking about
19 killing anyone that brought up his name, and he said he
20 would burn down my house.
- 21 Q So he said he would burn down your house and --
- 22 A Uh-huh. Yes, sir.
- 23 Q And right before that he said, I will kill anyone that
24 brings up my name; is that right?
- 25 A He was just -- he was fussing with my boyfriend. They

Sw - C. Smith - Cross

1 was -- he was talking about he was going to kill him.

2 Q After he said I will kill anybody that mentions my name
3 and I will burn down your house.

4 A Uh-huh.

5 Q What did you do according to that statement?

6 A I asked Reggie, I called Reggie ---

7 Q According to that statement what did you do?

8 A It don't say. It just says, when I woke up around
9 2:30 a.m. Josh was gone and the jeep was gone. And it
10 just say Ms. Captain Barker is writing this statement. It
11 say he would burn down my house. I laid down.

12 Q All right. So after he said I will burn down your
13 house you went and laid down?

14 A No. About ten -- yeah, not too long after that 'cause
15 my boyfriend told me not to pay it no attention, to go in
16 the room, and I left him in the front room. I went to
17 sleep.

18 Q And you went on to sleep?

19 A Yes, sir.

20 Q And you left Jason, Reggie, and Josh just watching TV?

21 A Uh-huh, 'cause he told me --

22 Q You woke up several hours later?

23 A At about 2:30.

24 Q You weren't very concerned about anything Josh said,
25 were you?

Sw - C. Smith - Cross

1 A Yeah, I asked Reggie why he saying that shit for. I
2 was like, why he keep saying that. They was like, don't
3 worry about it, just lay down, I'll handle Scrappy.

4 Q Did you call the police at that time when you woke up
5 later?

6 A No, the police came there.

7 Q Did you call them before they got in?

8 A No, sir.

9 Q Did you call them after Josh made that statement about
10 killing anybody or burning your house down?

11 A No, 'cause I asked my boyfriend why did he make that
12 statement. He said not to worry about it, he just high,
13 he tripping. So it's his cousin and he know him, I mean,
14 you know what I'm saying. I didn't think nothing of it
15 'cause it was my house.

16 Q You never did hear any gunshots, did you?

17 A I heard a lot of noise. When I came back up to the
18 club I did hear a lot of noise. Jason kept asking me, did
19 I hear that, and I was like hear what. When I turned the
20 radio down I heard something loud it was like thunder, but
21 I wasn't sure, you know what I'm saying, it was a gunshot.
22 But afterwards come to find out it was a gunshot.

23 Q You put you heard something loud, your heard thunder in
24 your statement?

25 A No.

Sw - C. Smith - Cross

1 Q Okay.

2 A I didn't even put nothing about no gunshot or nothing
3 in this statement. I had wrote -- Ms. Judy Barker wrote
4 this statement for me. After that nobody never came back
5 to talk to me or nothing.

6 Q Did you ever say that, hey, I saw a bunch of money on
7 Joshua? Did you ever say that to anybody?

8 A No, sir.

9 Q Did you ever, hey, I saw Joshua with a lot of stuff in
10 his hands?

11 A Yeah.

12 Q You did? You said I saw him with a shooter?

13 A A shooter and a CD case and a coat or something like
14 that. I don't know what.

15 Q A coke?

16 A No, a coat, or it was like a jacket or something he had
17 in his hand with a CD player with a CD thing that holds
18 CDs in it and a --

19 Q I see in your second statement where you indicated you
20 saw a shoe.

21 MR. CLEMENTS: Your Honor, if he'd allow the
22 witness to finish her statement.

23 THE COURT: Let her finish, Counsel.

24 (Witness reads to herself.)

25 THE WITNESS: Okay. Go back to it. Come back

Sw - C. Smith - Cross

1 to me. Come show me what you're talking about. I don't
2 know what you're talking about.

3 BY MR. ANDERSON:

4 Q Well, in your second statement you indicated you saw
5 him come out with a shoe.

6 A No, it didn't. My second statement it says ---

7 Q Wait a minute, let me go to it. I'll find it for you.

8 A Okay, come show me where it's at.

9 MR. ANDERSON: Your Honor, may I approach the
10 witness?

11 THE COURT: Yes.

12 THE WITNESS: Oh, right here, I've got it. Josh
13 came out the club with stuff his hands. He had a white
14 shoe and a lot of other stuff. I know he had CD chamber.
15 I guess I could -- a case that holds CDS which you can zip
16 it up, something like that.

17 BY MR. ANDERSON:

18 Q All right. Did you tell Ms. Barker he had a CD case?

19 A No, I just told her he had some stuff in his hands.

20 Q Okay. Did you tell Ms. Barker he had a coat?

21 A She didn't ask me.

22 Q Okay. Did she ever do any question and answers with
23 you?

24 A A lot of people came in there questioning me, asking me
25 questions and stuff.

Sw - C. Smith - Cross

1 Q Okay. But to your knowledge the two statements we've
2 talked about are the only two that you signed?

3 A Yes, sir.

4 Q Okay. Have you seen any other reports that have got
5 your signature on them?

6 A When they asked me questions they didn't write it down.
7 They just asked me questions. Then one person would go
8 out and another one could come in, all right, 'cause...

9 Q Let's talk about that vehicle almost running into you.

10 A Okay.

11 Q Where were you parked?

12 A In front of the club.

13 Q Okay. And I think Mr. Clements asked you which
14 direction you were headed in; is that right?

15 A Yes, sir.

16 Q And you were headed back towards Marion or Mullins?

17 A Yes, sir.

18 Q So the — I guess the back of the car would have been
19 Nichols?

20 A Yes, sir.

21 Q All right. Now when you were on the highway were you
22 in the parking lot?

23 A The highway.

24 Q You were in the highway?

25 A Yes, sir.

Sw - C. Smith - Cross

- 1 Q You never pulled into the parking lot?
- 2 A No, sir.
- 3 Q Now the car that pulled off, how did it almost hit you?
- 4 A Because when I was coming up she was like trying to
- 5 come out this way. But she was already face like the car
- 6 was faced — the front end was this way and the back end
- 7 was like backed up to the club. When she came she just
- 8 swerved around.
- 9 Q Was she going slow?
- 10 A No, sir.
- 11 Q She was going fast?
- 12 A She almost hit me.
- 13 Q How fast do you think she was going?
- 14 A I don't know. I know she was going fast.
- 15 Q Were her tires spinning?
- 16 A Naw, I don't remember that you will.
- 17 Q How long did it take her to get out of the parking lot?
- 18 A When I pulled up she just swerved out about like a
- 19 person — you coming into a driveway and a person is
- 20 coming up she just swerved around and went on out.
- 21 Q Did it scare you?
- 22 A I was wondering why she was driving like that.
- 23 Q At any point in time did you see Jason roll down his
- 24 window and wave?
- 25 A No. Jason window was already down and he was like,

Sw - C. Smith - Cross

1 man, go ahead, just go ahead, don't stop, you know what
2 I'm saying. That's what he was-- that's what he was
3 saying is what ---

4 Q Who was he saying that to?

5 A He was telling me that not to stop but was like don't
6 leave his cousin at the club.

7 Q Did you ever come to the club and beep the horn?

8 A Well, that's why I was pulling off because he didn't
9 come out when I blew the horn. When I went to pull off
10 that's when he came ---

11 Q The car had already left ---

12 MR. CLEMENTS: Your Honor, if he would allow her
13 to finish.

14 THE COURT: Let her finish, Counsel.

15 Go ahead.

16 THE WITNESS: Yes, sir.

17 BY MR. ANDERSON:

18 Q Had the car already left?

19 A Yes, uh-huh, yes, sir.

20 Q That was when you were beeping the horn?

21 A No. When I came there I blew the horn. The lady was
22 sitting in the car. A heavy set lady was sitting there
23 like she was listening to the radio. I don't know what
24 she was doing. When I pulled up to come close and that's
25 when she just mashed the gas and scooted off like that.

Sw - C. Smith - Cross

1 Q Had you parked yet before he pulled off?

2 A I didn't never park. I just stopped there near the
3 road.

4 Q So the car was still in drive?

5 A No, I stopped -- yeah, I was in drive but I was on the
6 brakes like, yes, sir.

7 Q Did Joshua ever get out of that car and go in?

8 A Again, he was already in.

9 Q He was already in the club?

10 A Yes, sir.

11 Q Okay.

12 A I just came back to give him a ride home.

13 Q How long had y'all been gone?

14 A Not too long. About five minutes.

15 Q Five minutes? You pled guilty to several different
16 things?

17 A That I was guilty to.

18 Q Okay. That includes an unlawful weapon?

19 A I was driving my cab and I had got robbed a week
20 before. My gun was registered. I just had it in the
21 wrong place. The man said I had unlawfully carried it.

22 Q Okay. Pled to assault on law enforcement, pled to
23 possession of crack?

24 A Uh-huh.

25 Q And pled to breaking and entering a motor vehicle?

Sw - C. Smith - Cross

1 A Yeah, it was my boyfriend car.

2 Q And then pled to resisting arrest?

3 A Yes, sir.

4 MR. ANDERSON: Court's indulgence a moment,
5 Your Honor.

6 THE COURT: Yes, sir.

7 BY MR. ANDERSON:

8 Q How long did you and Reginald date prior to this night?

9 How long had y'all been boyfriend/girlfriend?

10 A We really was just cutty buddies. You know, like we
11 was just messing around, you know, fooling around. We
12 would break up and make back up.

13 Q This happened in the end of September of 2007. Had
14 y'all been seeing each other before that time?

15 A (Shakes head.)

16 Q Is that a yes?

17 A Yes, sir.

18 Q Was it a couple of weeks, a couple of months, how long
19 had it been prior?

20 A Year.

21 Q A year? So y'all had been going out?

22 A Yes, sir.

23 Q Messing around, break up, get back together. Is that
24 right?

25 A Yes, sir.

Sw - C. Smith - Redirect

1 Q How long after this did y'all date, mess around, things
2 like that?

3 A We broke up when I got -- when I got locked up and he
4 got locked up we just started talking to other people.

5 Q And that was a few days later?

6 A No, it was like four or five months. Four of five
7 months after I was locked up.

8 Q Okay. Four or five months after y'all were locked up
9 y'all broke up? So that would have been maybe sometime in
10 2008; is that right?

11 A I'm not sure.

12 Q Okay. Have you been out with him any since then?

13 A Yeah. I see -- yeah.

14 Q And Reginald is his brother?

15 A Who brother?

16 Q Excuse me, Jason is his brother?

17 A Yes, sir.

18 MR. ANDERSON: That's all the questions I have,
19 Judge.

20 THE COURT: Redirect.

21 (WHEREUPON, State Exhibit No. 90 was marked for
22 identification only.)

23 **REDIRECT EXAMINATION**

24 BY MR. CLEMENTS:

25 Q Mr. Anderson's been questioning you about your

Sw - C. Smith - Redirect

1 statement. Captain Barker -- and I've had that marked as
2 State's Exhibit 90 for identification. Is that -- that
3 it?

4 A Yes, sir.

5 Q Is what you told here today the truth?

6 A Yes, sir.

7 Q Is what you put in this the truth?

8 A Yes, sir.

9 Q Which one had more details? This or your testimony
10 today? Do you know what I mean by more detail?

11 A Like when y'all ask me questions, I guess, I can tell
12 more there than I wrote on there, Ms. Judy Barker wrote
13 for me.

14 Q Okay, all right. Both of them are the truth?

15 A Yes, sir.

16 MR. CLEMENTS: Your Honor, I move State's
17 Exhibit 90 into evidence at this time.

18 THE COURT: What about that? Any objection?

19 MR. ANDERSON: No, sir, Your Honor.

20 THE COURT: No objection. In evidence without
21 objection.

22 MR. CLEMENTS: That's all we have, Your Honor.
23 (WHEREUPON, State Exhibit No. 90 was admitted into
24 evidence.)

25 THE COURT: Recross.

Sw - J. Phillips - Direct

1 MR. ANDERSON: Nothing further of this witness,
2 Your Honor.

3 THE COURT: Okay, you may step down.
4 The next witness lengthy?

5 MR. CLEMENTS: Yes, Your Honor, it is.

6 THE COURT: All right, let's take a short
7 recess, 15 minutes.

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

9 THE COURT: All right, bring the jury out.

10 (WHEREUPON, the jury was returned to the courtroom at
11 approximately 2:37 p.m., and the following proceedings
12 commenced in open court.)

13 THE COURT: All right, next witness please.

14 MR. CLEMENTS: Your Honor, we'll call Jason
15 Thomas Phillips.

16 CLERK OF COURT: Sir, if you'd come around and
17 let me swear you in please, sir. Place your left hand on
18 the Bible, raise your right hand.

19 WHEREUPON,

20 JASON THOMAS PHILLIPS,
21 having been duly sworn by the Clerk of Court, testified as
22 follows:

23 CLERK OF COURT: Thank you, sir. Have a seat in
24 the witness box.

25 THE COURT: All right.

Sw - J. Phillips - Direct

1 **DIRECT EXAMINATION**

2 BY MR. CLEMENTS:

3 Q Could you please state your name for the record.

4 A Jason Thomas Phillips.

5 Q Mr. Phillips, where do you live?

6 A North Carolina.

7 Q Where in North Carolina?

8 A Mount Airy.

9 Q Mount Airy? Do you have any family or people here?

10 A Yeah, I sure do.

11 Q Who are some of your people here?

12 A Henry Jun-- well, most of the Phillips here.

13 Q Okay. Do you know Joshua Phillips?

14 A Yeah, I knew him, but I don't know him good. I knew
15 him but I don't know him well.

16 Q Do you have any kind of family relationship to him?

17 A Naw, not really, no.

18 Q All right. He's not a cousin or anything ---

19 A Yeah -- well, he a cousin, yeah.

20 Q How far distant a cousin, do you know?

21 A Third I think.

22 Q Third?

23 A Yeah.

24 Q Okay. Do you know him to go by any other name than
25 Josh or Joshua, any nickname?

Sw - J. Phillips - Direct

1 A Little Scrappy.

2 Q Little Scrappy?

3 A Yeah.

4 Q Okay. Mr. Phillips, do you have any kind of criminal
5 record?

6 A All I got is like a trespassing and a threat -- a
7 trespassing and a threatening.

8 Q Were those convictions or were those just charges?

9 A They was charges. They were dismissed.

10 Q They were dismissed?

11 A Uh-huh.

12 Q Okay. No other criminal record?

13 A No.

14 Q Okay. And that was from what state?

15 A North Carolina.

16 Q Okay. Do you remember back to September 28th,
17 September 29th, 2007.

18 A Yeah, I remember somewhat, yeah.

19 Q All right. Do you remember where you were during that
20 time period?

21 A Yeah.

22 Q Where were you?

23 A Well, I was at King George and then we went to Nichols
24 Club.

25 Q Okay. And King George, can you tell this jury where

Sw - J. Phillips - Direct

- 1 this is?
- 2 A They're located I think close to Loris somewhere.
- 3 Q Okay, in Horry County?
- 4 A Yeah, Horry County, yeah.
- 5 Q Okay. And you're kind of soft spoken Mr. Phillips. I
- 6 know —
- 7 A I'm sorry.
- 8 Q —you're not that comfortable, but I'm going to ask
- 9 you if you would, if you would face this jury and speak up
- 10 loudly so all of them can hear you and so the court
- 11 reporter can take down every word that you say, okay?
- 12 A Can you ask the question again please. Can you ask the
- 13 question again?
- 14 Q All right. Where was the King George Club?
- 15 A Horry County.
- 16 Q Horry County?
- 17 A Horry County, yes, ma'am — yes, sir.
- 18 Q Who did you go to the King George Club with?
- 19 A Reggie and Conswella.
- 20 Q And Reggie, being Reggie who?
- 21 A Evans.
- 22 Q Reggie Evans?
- 23 A Yeah.
- 24 Q Are you kin to Reggie Evans?
- 25 A Yes.

Sw - J. Phillips - Direct

1 Q What kin are you to he?

2 A My half brother.

3 Q Your half brother?

4 A Yes.

5 Q Okay. And Conswella, who is Conswella?

6 A Well, she was dating my brother at the time.

7 Q Okay. And you know her last name?

8 A Smith.

9 Q Okay. What vehicle were you driving?

10 A We were driving a Jeep Cherokee. Cherokee I think,
11 yeah.

12 Q And who did that Jeep Cherokee belong to?

13 A A woman named Ruth.

14 Q All right. How did you get the Cherokee, or how did
15 y'all get the Cherokee from Ruth?

16 A I guess my brother got it somehow. I don't know. He
17 got it somehow.

18 Q Okay, all right. But it belonged to a lady named Ruth?

19 A Yes.

20 Q Do you know where she lived, where she's from?

21 A Huh-uh.

22 Q Okay.

23 A No.

24 Q All right. Y'all went to the King George Club. When
25 did you get up with Josh that evening?

Sw - J. Phillips - Direct

- 1 A At King George.
- 2 Q Okay. And when you got to the King George Club do you
3 know about what time of night it was?
- 4 A No, I don't remember.
- 5 Q You don't know?
- 6 A No.
- 7 Q Okay, that's fine. And what did you do at King George
8 Club?
- 9 A Well, me and my brother, we sat out in the jeep and
10 Conswella, she went in.
- 11 Q Okay.
- 12 A Then we stay out there about an hour, hour-and-a-half,
13 then we left.
- 14 Q Okay. And when you say "we", who all left?
- 15 A It was me, Reginald, Conswella and Joshua.
- 16 Q And Josh? Okay. Were you drinking during that time
17 period?
- 18 A No. No.
- 19 Q You weren't?
- 20 A No, I wasn't drinking at the time. How.
- 21 Q About Reggie or Conswella?
- 22 A I think Conswella have, yeah.
- 23 Q All right. When you left the King George Club with you
24 Reggie, Conswella and Josh, where did y'all go?
- 25 A We went to Nichols Club. I think the name of it was a

Sw - J. Phillips - Direct

1 hole in the wall, something like that.

2 Q Hole in the wall?

3 A Yeah.

4 Q Could it have been the Nichols Night Life?

5 A Yeah, yeah.

6 Q I'm gonna show you State's Exhibit 22. Tell me if you
7 recognize this.

8 A Yes.

9 Q What is that?

10 A That's the Nichols Club.

11 Q That's the Nichols Club?

12 A Yeah.

13 Q Okay. Do you know about what time of night it was when
14 you got to the Nichols Club?

15 A I sure don't.

16 Q Okay. When you got to the Nichols Club did you stay in
17 the car there or did you go inside?

18 A Well, we got out. We got out and we went to the door.
19 She pat us down and then we paid. But then before I —
20 before I paid I was talking to my cousin Henry Junior and
21 them. Henry Junior, Dan Lee (ph), and some other peoples.

22 Q Okay. Henry Junior and who?

23 A Phillips.

24 Q And who else?

25 A Dan Lee.

Sw - J. Phillips - Direct

1 Q And some other people?

2 A Yeah, some other people.

3 Q Some of your kind people?

4 A Yeah.

5 Q Okay. You were talking to them outside for a while?

6 A Outside for a while, yeah.

7 Q Okay. Did you later go in?

8 A Yeah, I later go in.

9 Q Was it cover fee or was it free entrance?

10 A It was cover fee, yeah.

11 Q Do you know how much?

12 A I don't remember. Five dollars I believe. I'm not
13 sure.

14 Q You're not sure?

15 A Yeah.

16 Q Okay. And they collected money up where?

17 A At the door.

18 Q At the door, okay. When you went inside what did you
19 do?

20 A We went to the bar, got a couple of drinks, and then I
21 was talking to lady at the bar and then they went outside
22 to smoke a blunt and I went with them.

23 Q When you say "they," who is they?

24 A Conswella, my brother, and Joshua and the lady at the
25 club.

Sw - J. Phillips - Direct

- 1 Q Okay. Y'all went outside?
- 2 A Uh-huh.
- 3 Q Okay. Smoked a blunt?
- 4 A Yeah.
- 5 Q And what exactly is a blunt?
- 6 A What exactly is a blunt?
- 7 Q Yeah.
- 8 A Weed, weed.
- 9 Q Okay.
- 10 A Like when —
- 11 Q Weed and what?
- 12 A In a blunt. Weed in a blunt, yeah.
- 13 Q All right. And did you smoke more than one blunt that
- 14 night?
- 15 A Naw, I just smoked one. I was drinking a lot so.
- 16 Q You were drinking a lot?
- 17 A Yeah.
- 18 Q Were you doing anything else besides drinking and
- 19 smoking a blunt?
- 20 A Popping pills.
- 21 Q Popping pills?
- 22 A Yeah.
- 23 Q What kind of pills were they?
- 24 A I don't remember.
- 25 Q Do you know someone by the name of Kamica Phillips?

Sw - J. Phillips - Direct

- 1 A No.
- 2 Q You don't know Kamica Phillips?
- 3 A No, that don't ring a bell. It doesn't ring a bell.
- 4 Q Okay, all right. How many people were at the club, if
- 5 you know?
- 6 A There was a lot of people there. When we got there
- 7 there was a lot of people there.
- 8 Q Lots of people there?
- 9 A There was a lot of people there, yeah.
- 10 Q What kind of activities were going on other than
- 11 drinking on the inside and smoking blunts on the outside?
- 12 A Well, there was -- there was at the dance floor and we
- 13 was all on the dance floor.
- 14 Q Okay. What kind of music did they have?
- 15 A Rap, mostly rap though.
- 16 Q Okay. A DJ or band or?
- 17 A Yeah, I think it was a DJ.
- 18 Q Okay.
- 19 A Yeah.
- 20 Q All right. And what else was there to do there?
- 21 A Just drink, play pool.
- 22 Q Okay.
- 23 A I mean, I think we played pool too so.
- 24 Q All right.
- 25 A Yeah.

Sw - J. Phillips - Direct

- 1 Q Were you there a pretty good while?
- 2 A Yeah.
- 3 Q Okay.
- 4 A Yeah.
- 5 Q What -- got around towards the end of the time you were
6 there how would you describe the condition you were in?
- 7 A I was -- when I got there?
- 8 Q Not when you got there so much but when before you
9 left?
- 10 A Before I left?
- 11 Q Yeah.
- 12 A Oh, yeah, I was tore up.
- 13 Q Tore up?
- 14 A Yeah, I was drunk.
- 15 Q Okay. How about your brother Reggie?
- 16 A He was hit. He was just throwing up, slapped down, and
17 just sick.
- 18 Q So who was better off, you or he?
- 19 A He -- I was, I was, yeah.
- 20 Q What kind of condition, if you know, did you observe
21 Conswella to be in?
- 22 A She was all right. She wasn't -- she was tore up too
23 but she wasn't like my brother was.
- 24 Q Okay. What about Little Scrappy?
- 25 A Pretty sure he was drunk too.

Sw - J. Phillips - Direct

1 Q Okay. You see Little Scrappy in the courtroom?

2 A Yeah.

3 Q Can you point him out for the jury?

4 A (Indicated by pointing.) There.

5 Q Can you describe what he has on?

6 A Brown shirt.

7 Q Okay.

8 MR. CLEMENTS: May the record reflect the
9 witness identifying the defendant, Your Honor.

10 THE COURT: It will.

11 BY MR. CLEMENTS:

12 Q And Jason, you were pretty tore up you said, but were
13 you aware of what was going on around you?

14 A No.

15 Q Really?

16 A Yeah, really.

17 Q Okay. Do you recall anything unusual going on while
18 you were there at the club, any kind of altercations or
19 anything stands out out of the ordinary?

20 A No.

21 Q Okay. You remember what you were doing when you got
22 ready to leave?

23 A Yeah. When we got ready to leave when we was -- me and
24 Conswella was talking to the lady at the bar. And then
25 they was about to close so then me, Conswella and Reggie

Sw - J. Phillips - Direct

- 1 went to the jeep.
- 2 Q How about Josh?
- 3 A I don't think he was at the Jeep at that time.
- 4 Q Okay.
- 5 A So ---
- 6 Q What did you do next?
- 7 A Well, I was so tore up I then went down falling asleep
- 8 so at that time I was pretty drunk.
- 9 Q All right. And you remember pulling off at all?
- 10 A Well, before that we didn't pull off. We was -- we had
- 11 jump my cousin Henry Junior off because he had a -- his
- 12 battery went dead.
- 13 Q Okay, all right. You remember doing that?
- 14 A Yeah.
- 15 Q All right. What do you remember next?
- 16 A And then Joshua asks Swella to pull to the -- closer to
- 17 the door, closer to the door.
- 18 Q Why?
- 19 A To use the bathroom I think.
- 20 Q Okay. And what do you remember next?
- 21 A Then---
- 22 Q Were you arguing -- let me ask you this. Were any
- 23 argument or anything going on between you and anyone in
- 24 the car or any disagreement?
- 25 A Yeah, we asked him for a cigarette.

Sw - J. Phillips - Direct

- 1 Q Who is he?
- 2 A Joshua.
- 3 Q Okay.
- 4 A And then I said, no. And I was scared. I thought he
- 5 was going to do something me.
- 6 Q Why?
- 7 A I don't know; I just did.
- 8 Q What did he call you?
- 9 A A pussy.
- 10 Q Okay. And what was your response?
- 11 A I told him I wasn't no pussy.
- 12 Q All right. This before he went to the bathroom?
- 13 A Yeah, it was before.
- 14 Q Okay. What, if anything, did you notice Josh having on
- 15 his person or about him?
- 16 A Huh?
- 17 Q What, if anything, did you notice Josh having or
- 18 carrying or having on his person or on his clothes?
- 19 A I don't know.
- 20 Q Nothing?
- 21 A Nothing. I don't know.
- 22 Q All right. And what, if anything else, do you remember
- 23 him saying right before y'all left other than asking you
- 24 for a cigarette and calling you a name?
- 25 A Well, when he come to the car 'cause we had stopped and

Sw - J. Phillips - Direct

1 let him out and then we went and turned around or
2 whatever. And then when he came out he, you know, all he
3 had was shoe in his hand and then he told Conswella to
4 drive so I don't know.

5 Q Okay, before he came out did you hear anything?

6 A Yeah, I hear about five gunshots.

7 Q You sure they were gunshots?

8 A Yeah, they was gunshots?

9 Q You heard gunshots before?

10 A Yeah.

11 Q Okay. Can you tell this jury what cars, if any, were
12 in the parking lot?

13 A I don't remember her name. It's the Love lady car,
14 well, she wasn't driving her car. I think she was driving
15 the lady at the club car.

16 Q Okay. That car was in the parking lot?

17 A Yeah.

18 Q Was there any other vehicles in the parking lot that
19 you remember?

20 A No.

21 Q You don't remember any?

22 A I don't remember any.

23 Q Could there have been other vehicles in the car -- in
24 the parking lot?

25 A Yeah, could have but I don't remember, you know.

Sw - J. Phillips - Direct

- 1 Q Why don't you remember or why didn't you know that?
- 2 A I mean, I was -- I don't know -- I don't know. I don't
- 3 know. I really don't remember much of nothing so.
- 4 Q Okay, all right. Well just -- all we want to know is
- 5 what you remember. If I ask you a question, you don't
- 6 know the answer, I want you to tell me the truth.
- 7 A Okay.
- 8 Q Okay. So you remember hearing five gunshots you said?
- 9 A Yeah, yeah.
- 10 Q Right. Where were you when you heard these five
- 11 gunshots?
- 12 A I was in the jeep.
- 13 Q Where in the jeep?
- 14 A In the back seat.
- 15 Q Okay. Did you ever stick your arm out the window and
- 16 stick your head out or do anything like that?
- 17 A No, I was -- I stick my head out the window see what
- 18 was going on.
- 19 Q Okay.
- 20 A You know what I'm saying.
- 21 Q All right. What else did you do when you stuck your
- 22 head out, anything?
- 23 A No, I just -- he was running to the jeep.
- 24 Q Okay.
- 25 A So.

Sw - J. Phillips - Direct

- 1 Q Do you remember what the car did? You said you saw a
2 car in the parking lot. Do you remember what that car
3 did?
- 4 A Yeah, it went -- it went on. It sped out.
- 5 Q Sped out before you got to the car?
- 6 A Yeah.
- 7 Q Okay. And when he got in the car what did he have in
8 his hand?
- 9 A Some shoes.
- 10 Q What else?
- 11 A Some money I think. And that's all I seen.
- 12 Q Okay. What part of the jeep did he get in?
- 13 A On the passenger side in the back seat.
- 14 Q Passenger side on the backseat? Where were you seated?
- 15 A On the driver's side in the back seat.
- 16 Q Okay. Where was the car parked at when he ran out to
17 the car?
- 18 A It was facing towards the Mullins way.
- 19 Q Facing towards Mullins?
- 20 A Yeah.
- 21 Q Was it in the parking lot on the highway, half off the
22 highway, where was it?
- 23 A I think it was like half off the highway.
- 24 Q Okay.
- 25 A Half off the highway.

Sw - J. Phillips - Direct

- 1 Q Facing towards Mullins?
- 2 A Yeah.
- 3 Q I'm gonna show you State's Exhibit 22 again. You
- 4 remember, if this refreshes your recollection or not, you
- 5 remember seeing that vehicle?
- 6 A Yeah, I think so, yeah.
- 7 Q You think so?
- 8 A Yeah.
- 9 Q You be sure?
- 10 A I can't be sure though but I think.
- 11 Q Okay. Now this car --
- 12 A See, I was really drunk so I don't know. I probably
- 13 glanced at it, didn't know what it was so.
- 14 Q So the car was facing which direction if it was -- if
- 15 you were looking -- if the car was in this picture was it
- 16 facing this direction or that direction?
- 17 A This direction.
- 18 Q So this direction is the way to Mullins?
- 19 A Uh-huh.
- 20 Q What is that direction?
- 21 A Nichols -- well, that way is like towards Sunny Mart I
- 22 think is what it was.
- 23 Q Sunny Mart in Nichols?
- 24 A In Nichols, yeah.
- 25 Q What direction the car that pulled out, what direction

Sw - J. Phillips - Direct

1 did it go in, this direction or that direction?

2 A That direction.

3 Q Towards Nichols?

4 A Yeah.

5 Q Mr. Phillips, if you can tell this jury what else you
6 remember after Josh got in the car. You said he had some
7 shoes and some money and some other stuff.

8 A Uh-huh.

9 Q What else do you remember happening, what else do you
10 remember being said?

11 A Well, all I remember is we went to Mullins. Then we
12 was -- we went to Mullins projects and then at that time
13 he was talking about killing somebody. While we was
14 riding he was talking about killing somebody.

15 Q Do you know who he was talking about killing?

16 A No.

17 Q Was he talking about killing somebody in the future or
18 killing somebody in the past or do you know?

19 A In the future. He talking about -- we was talking ab
20 out killing somebody just then.

21 Q He was talking about killing somebody just then?

22 A Yeah.

23 Q Okay. How far did you go in the jeep? Did you keep
24 riding in the jeep?

25 A Yeah.

Sw - J. Phillips - Direct

1 Q Until when?

2 A Until we got to Conway.

3 Q All right. And who was riding in the jeep when you got
4 to Conway, do you remember?

5 A Yeah, Joshua he was riding with us. Well, he was
6 driving and --

7 Q Okay, what happened to Conswella and what happened to
8 Reggie, do you know?

9 A Well, they said they ran and went to my other brother
10 house, Jerome Owens.

11 Q Where did they run from?

12 A I don't know the project name, but I know it close to
13 golf (ph) street projects.

14 Q Okay.

15 A Yeah.

16 Q So if they ran from the projects did the car stop?

17 A Yeah.

18 Q Why did the car stop?

19 A We -- first we had got out and then Joshua talking to
20 me and then my brother wanted me and him to get some gas
21 because we need some gas.

22 Q Okay.

23 A And then we went to Sav Way and get some gas. I
24 pumped; he paid.

25 Q Who is we?

Sw - J. Phillips - Direct

- 1 A Me -- Joshua paid and I pumped.
- 2 Q Okay. And Reggie and Conswella were gone by then?
- 3 A Yeah.
- 4 Q Okay. And after y'all got gas at Sav Way what did
- 5 y'all do?
- 6 A We was trying to go look for my brother and Conswella
- 7 and we couldn't find them so we went ahead and went to
- 8 Conway.
- 9 Q Went to Conway?
- 10 A Yeah.
- 11 Q All right. On the way to Conway what direction did you
- 12 go in or what road did you travel on?
- 13 A I think -- on the way to Conway?
- 14 Q Yeah.
- 15 A Well, we took 41 to 501.
- 16 Q You took 41 to 501?
- 17 A To 501.
- 18 Q An then when you got to 501 which direction did you
- 19 head in?
- 20 A To Conway.
- 21 Q East or west?
- 22 A I don't know road signs.
- 23 Q Okay. Just to Conway?
- 24 A Just to Conway, yeah.
- 25 Q Okay. And did anything happen on the way to Conway on

Sw - J. Phillips - Direct

1 Highway 501?

2 A Yeah. Well, I about half asleep then too, but I heard
3 I heard him, you know, doing something with something. I
4 looked over and I seen him have the gun and then he was
5 washing it off and threw it out the window.

6 Q He was washing it off or wiping it off?

7 A Yeah, wiping it off. Then he threw it out the window
8 and then he through clip out the sunroof.

9 Q Out the sun roof?

10 A Yeah. So he through that one way and the clip the
11 other way.

12 Q All right. I'm gonna show you what's been marked
13 State's Exhibit 5. You recognize that?

14 A Well, it's pretty dark but it look like it could be it.

15 Q It look like it could be it?

16 A Yeah.

17 Q But you don't -- you can't say for sure?

18 A I can't say for sure.

19 Q Okay. I'm gonna show you State's 7-B. Does that look
20 familiar to you?

21 A No.

22 Q Do you know if that could be it or not?

23 A No, I don't know if it could be it or not.

24 Q You don't know if it could be it or not? So you can't
25 say yes?

Sw - J. Phillips - Direct

- 1 A Yeah. I mean, I can't say yes 'cause I don't.
- 2 Q Can't say no either?
- 3 A Yeah. No, I really can't say either one. I can't say
- 4 either one.
- 5 Q What did you see him throw out the window?
- 6 A A gun.
- 7 Q You knew it was a gun?
- 8 A Yeah.
- 9 Q And what did you see him throw out the sunroof?
- 10 A A clip.
- 11 Q What kind of clip, hair clip?
- 12 A No, it was for a gun.
- 13 Q A clip for a gun?
- 14 A Yeah.
- 15 Q Ammo clip?
- 16 A Yeah.
- 17 Q Where did y'all go from there?
- 18 A We went to Conway and then we went to Conswella house,
- 19 Conswella Smith house. And then, you know, when we went
- 20 there, you know, we talked for a minute and then -- but I
- 21 can't remember half of nothing then. He left and then
- 22 we -- me and my brother fell asleep at Conswella.
- 23 Q All right. You say you can't remember half of what was
- 24 going on. Why was that?
- 25 A I was still intoxicated.

Sw - J. Phillips - Direct

1 Q Okay, all right. Did Josh have anymore discussions or
2 was anything else said to you at all by him about what
3 happened at the Nichols Night Life before y'all left?

4 A No.

5 Q Nothing?

6 A Nothing.

7 Q After he left Conswella you went to sleep before or
8 after he left Conswella's?

9 A I went to sleep before.

10 Q And you woke up where was he?

11 A He was gone.

12 Q Did you see him any time the next week after that?

13 A I ain't seen him none. I ain't seen him none.

14 Q All right. Did you ever have opportunity to talk with
15 the police shortly thereafter?

16 A Yes.

17 Q Can you tell this jury about that?

18 A Oh, yeah. Well, the next day I went to -- I got Ruth
19 to take me to Shady Moss' (ph). That where I was staying
20 at the time.

21 Q Who was that?

22 A That was -- I was staying with my cousin at the time
23 Sheila. I can't remember her last name.

24 Q Who took you?

25 A Ruth.

Sw - J. Phillips - Direct

1 Q And that was the lady that owned what?

2 A Owned the jeep.

3 Q Okay.

4 A Yeah. And then me and my brother got a cab trying to
5 go get a transmission for my pop's, for my dad's jeep.

6 And then the cops pulled us in the cab and they was asking
7 us all kind of questions so.

8 Q And at that time did you cooperate with them?

9 A Yes.

10 Q Fully?

11 A Not fully but.

12 Q Why not?

13 A Because I was scared. I mean, I was scared. I didn't
14 know what to think or what to say.

15 Q Were you scared of Josh at al?

16 A Yeah, I was.

17 Q Why?

18 A I just was scared. I mean, I mean he's scary to me.

19 Q Okay. What did the cops do then when you stopped you
20 and you were on the way to get a transmission?

21 A Well, they read us our rights and 'cause at first asked
22 us our name and we told them. And then they read us our
23 rights and whatever. And they was asking a lot of
24 questions. I can't remember half of them they was telling
25 me.

Sw - J. Phillips - Direct

1 Q Okay. Did they let you go then?

2 A No. They took us back to Shady Moss where I was
3 staying. I guess they were searching my cousin house,
4 Sheila. And I mean, then afterwards they let us go though
5 I think in confident.

6 Q Did they ever come back to you?

7 A Yes.

8 Q To serve a warrant? Serve a warrant?

9 A Yeah.

10 Q And they served a warrant on you?

11 A Yeah.

12 Q What did they serve a warrant on you for?

13 A Accessory after.

14 Q Accessory after the fact?

15 A Yeah.

16 Q Do you know what that means?

17 A Not really. I thought -- I always thought it means
18 after, you knew something after.

19 Q You did something afterwards?

20 A Yeah, II thought I know.

21 Q So then did they take you into custody?

22 A Yes?

23 Q Okay. What happened after they took you into custody?

24 A We was looking for my brother 'cause -- I can't
25 remember his name but the detective that arrested me. We

Sw - J. Phillips - Direct

- 1 was looking for my brother, trying to find my brother.
- 2 Q Do you see him in the courtroom here today?
- 3 A Yeah, him (indicated by pointing).
- 4 Q This gentleman right here? Detective Bill?
- 5 A Yeah.
- 6 Q Okay, all right. Did you find your brother then?
- 7 A No, we went -- I mean, we were searching everywhere, I
- 8 mean, but see, I didn't know even knew where he was.
- 9 Q Okay.
- 10 A But then I get -- they got a call then they finally
- 11 found him.
- 12 Q What condition was your brother in that night?
- 13 A He was -- he was really drunk. He was drunk. Talking
- 14 about this night that they picked him up?
- 15 Q No, the night this all happened?
- 16 A Oh, he was drunk.
- 17 Q Okay. Worse off than you or better?
- 18 A He was worse off than me.
- 19 Q Okay. Out of the four of you in the vehicle who was
- 20 the worse off?
- 21 A My brother Reginald.
- 22 Q So you didn't find your brother with Detective Bell.
- 23 Where did you go from there?
- 24 A Then I guess they got a call whatever, and they end up
- 25 finding him somehow. I don't know how they find him but

Sw - J. Phillips - Direct

1 he was ---

2 Q You with them then? Were you with them?

3 A Yeah. Yeah, I was with them. I seen where they
4 handcuffed my brother and everything, yeah.

5 Q All right. What did they do after that after they had
6 both you and your brother? What about Conswella, did they
7 have her at that time?

8 A I didn't see Conswella at that time.

9 Q All right. So what did they do with you and your
10 brother?

11 A They took -- I think they took us back in to the police
12 station or somewhere; I don't know.

13 Q You don't remember?

14 A I know they took us to police station whatever to the
15 county.

16 Q Did you cooperate with them then?

17 A Yes. Well, I ain't gave no statement at that time. I
18 ain't gave them a statement at that time.

19 Q You didn't gave a statement at that time?

20 A I don't think I did.

21 Q Okay.

22 A I don't remember.

23 Q All right. Did they mirandise you?

24 A What that means?

25 Q You have a right to remain silent. Anything you say

Sw - J. Phillips - Direct

1 can and will be used against you in a court of law. You
2 have a right to a lawyer.

3 A Yes.

4 Q They read you your rights?

5 A Yes.

6 Q Okay. Did you understand those?

7 A Yeah.

8 Q And you said you didn't give them a statement at that
9 time?

10 A I don't think I did.

11 Q Why not?

12 A 'Cause I think I gave all my statements before, before
13 they came and — 'cause when I came to Conswella house
14 that night after it happened, you know, whatever, they
15 came. The police came to Conswella's and told me and
16 Reggie, the driver, ride with them so we can go write a
17 statement or whatever and —

18 Q You gave them a statement that first time?

19 A Yeah.

20 Q Okay, all right. Was that statement completely true or
21 fully cooperative or?

22 A Some of it wasn't, but then I thought about it; and
23 then the last statement that I wrote, it was fully true.

24 Q Okay. So you gave one statement and corrected the
25 statement?

Sw - J. Phillips - Direct

- 1 A Yes.
- 2 Q Do you know when you did those?
- 3 A I sure don't.
- 4 Q I show you this. Does that look familiar at all?
- 5 A Yes.
- 6 Q Whose handwriting is that?
- 7 A Mine.
- 8 Q Okay, all right. Is that your signature down there?
- 9 A Uh-huh, yep.
- 10 Q And then this Page 2?
- 11 A Yep.
- 12 Q Those your initials?
- 13 A Yeah, that me.
- 14 Q You put that X on there?
- 15 A I don't think I did.
- 16 Q But did you put those initials?
- 17 A Yeah, I put those initials.
- 18 Q And then after that you did more?
- 19 A Yeah, then I put this.
- 20 Q Okay, all right. What's the date and time on that?
- 21 A The date is 9/30/07 and the time is 2:50-- 2:53 a.m.
- 22 Q Okay, all right. Tell me about this gun you saw
- 23 Scrappy throw out the window. What did you tell the
- 24 police about that?
- 25 A Well, I told --

Sw - J. Phillips - Direct

1 Q First let me ask you this. Did you tell the police
2 about that from the beginning?

3 A No.

4 Q Why not?

5 A 'Cause I was scared 'cause he said he was going to come
6 and get us if we told.

7 Q Okay. When did you change your mind about telling
8 them?

9 A When I -- when I, I guess when I figured, you know,
10 'cause they were pressuring me and I was scared and 'cause
11 I ain't never been in this situation like that, you know,
12 so.

13 Q So they kind of hemmed you up and that changed your
14 mind?

15 A Yeah, yeah.

16 Q And when you changed your mind then what did you do,
17 what did you tell them about the gun?

18 A I told them, you know, where they could find the gun --
19 well, where he threw it at, not where they could find it,
20 where he threw it at. He threw it on the first bridge on
21 501 going towards Conway -- or going towards Aynor.

22 Q Going towards Aynor?

23 A Yeah.

24 Q Okay. And did you help them look for it or you just
25 told them that?

Sw - J. Phillips - Direct

1 A I just told them. Well, I -- before that I went I went
2 to the projects. I thought he could have threw something
3 then, that then, and I took them there. But then they
4 couldn't find nothing.

5 Q In the Mullins projects?

6 A Yes.

7 Q Okay, all right. And nothing was found there?

8 A Nothing was found there.

9 Q All right. Did you go out there with them to the 501
10 bridge?

11 A No.

12 Q You didn't?

13 A No.

14 Q Okay, all right. Did they come back and tell you what
15 they found or tell you anything about---

16 A No.

17 Q Anything --

18 A I ain't even knew they found the gun.

19 Q You didn't even know that?

20 A I ain't even knew.

21 Q Okay.

22 MR. CLEMENTS: Beg the Court's indulgence a
23 moment.

24 THE COURT: All right.

25 BY MR. CLEMENTS:

Sw - J. Phillips - Cross

1 Q Mr. Phillips.

2 A Yes, sir.

3 Q You told this jury you'd been charged with accessory
4 after the fact?

5 A Uh-huh.

6 Q You understand that?

7 A Yeah.

8 Q Have you been promised anything today or made any
9 threats or anything about your testimony today in regards
10 to that charge?

11 A No. No. Only thing my lawyer told me was to tell the
12 truth, the whole truth.

13 Q Have you told the whole truth as best you can remember?

14 A Best I can remember, yes, sir.

15 Q All right. I want you to tell the whole truth as best
16 you can remember to Mr. Lawson and Mr. Anderson, whichever
17 one questions you.

18 A Okay.

19 **CROSS-EXAMINATION**

20 **BY MR. ANDERSON:**

21 Q Jason, in this case you've been charged with the
22 accessory after the fact?

23 A Yes, sir.

24 Q Do you have an attorney for that charge?

25 A Yes.

Sw - J. Phillips - Cross

1 Q Is he here in the courtroom?

2 A Yes. He right there in the front row.

3 Q He's discussed this charge with you?

4 A Yes.

5 Q Has he told you what you're facing as far as time is
6 concerned?

7 A No.

8 Q He never discussed that with you?

9 A No.

10 Q But you agreed to testify for the State?

11 A Yes, sir.

12 Q You're hoping to get some credit for that later?

13 A No, not really, no.

14 Q No?

15 A No.

16 Q So if the judge gives you the maximum sentence later
17 that's all right with you?

18 A I mean, I ain't, I mean I ain't do nothing, I mean.

19 MR. ANDERSON: Your Honor, may I approach the
20 witness.

21 THE COURT: Sure.

22 BY MR. ANDERSON:

23 Q You got your Miranda warnings on November 29th, 2007;
24 is that right?

25 A I guess. I don't remember.

Sw - J. Phillips - Cross

- 1 Q Did you sign that?
- 2 A Yeah, that's my signature.
- 3 Q Those your initials in the columns?
- 4 A Yep.
- 5 Q What time did you sign that statement?
- 6 A It says 11:12. 11:00 -- 11:12 p.m.
- 7 Q So 11:12 p.m.
- 8 A Uh-huh.
- 9 Q What time -- I mean, what day?
- 10 A 9/29/2007.
- 11 Q All right. And later you handwrote a statement; is
- 12 that right?
- 13 A Yeah.
- 14 Q So first you read your Miranda rights, then you
- 15 handwrite a statement?
- 16 A Yeah.
- 17 Q And that statement was written on 9/30/07, September
- 18 the 30th of '07?
- 19 A Yeah. Yeah.
- 20 Q And that was given approximately 1:28 a.m.?
- 21 A Yeah.
- 22 Q So approximately two hours after you were given your
- 23 Miranda warning you wrote that statement?
- 24 A Yeah.
- 25 Q What did you do in that intervening two hours?

Sw - J. Phillips - Cross

1 A What did I do?

2 Q Did you talk to law enforcement?

3 A Yeah, I was talking to law enforcement.

4 Q And shortly after giving that statement, at the bottom
5 of that somebody made an X and you put your initials in
6 four different places?

7 A Yeah, that what they told me to do.

8 Q Okay. And then after you did that at 2:53 a.m. that
9 same morning you gave another statement?

10 A Yeah.

11 Q Okay. I think you indicated you live in North Carolina
12 right now.

13 A Yes.

14 Q Don't know Joshua that well?

15 A Yeah.

16 Q You and he are distant cousins?

17 A Yeah.

18 Q Prior to that night did you and he have much
19 interaction?

20 A No.

21 Q He was not with -- he did not go to the King George's
22 Club. He didn't ride with you, did he?

23 A No.

24 Q He was already at that club?

25 A Yeah.

Sw - J. Phillips - Cross

- 1 Q Conswella and Reginald, your half brother, rode
2 together?
- 3 A Conswella, me, and Reginald.
- 4 Q Reggie? Reggie is your half brother?
- 5 A Yes.
- 6 Q Three of y'all road together?
- 7 A Yes.
- 8 Q Now prior to that Conswella had been drinking?
- 9 A Yeah.
- 10 Q She'd been drinking pretty heavy?
- 11 A See, I'm not really sure if she was drinking when we
12 got to Kings 'cause I was outside. She was in the club.
13 I don't know if she was drinking or not in the club.
- 14 Q Were you with her before y'all went to King's Club?
- 15 A Yes.
- 16 Q Was she drinking gin at that time before y'all went?
- 17 A I don't remember.
- 18 Q You and your brother Reginald stayed outside?
- 19 A Yes.
- 20 Q Conswella went into the King George Club?
- 21 A Yes.
- 22 Q Y'all stayed outside for about an hour and-a-half?
- 23 A Yeah. I mean, we was talking to people and — that
24 basically it, just talking to people.
- 25 Q Were you smoking anything at that time?

Sw - J. Phillips - Cross

- 1 A No.
- 2 Q So for an hour and a half you just stayed outside that
- 3 club and talked to people?
- 4 A Yeah.
- 5 Q Were you drinking anything?
- 6 A Nope, not at that time I wasn't.
- 7 Q Wasn't drinking anything, wasn't smoking anything, just
- 8 stayed outside the club for an hour and-a-half?
- 9 A Yes.
- 10 Q Reginald, your half brother, is with you?
- 11 A Yes.
- 12 Q His girlfriend is in the club?
- 13 A Right.
- 14 Q Ruth, whose jeep it was.
- 15 A Uh-huh.
- 16 Q You know how Reginald got the jeep?
- 17 A No.
- 18 Q You know if he rented the jeep?
- 19 A I mean, he could have.
- 20 Q Have you ever rented a vehicle?
- 21 A No.
- 22 Q Are you related to Ruth?
- 23 A No.
- 24 Q Is Reginald related to Ruth?
- 25 A No.

Sw - J. Phillips - Cross

1 Q Did Reginald say I paid her cash money for it?

2 A I don't know. I wasn't with him at that time.

3 MR. CLEMENTS: Object to any Hearsay, Your
4 Honor. He's asking what Reginald said.

5 THE COURT: It is Hearsay. What are you
6 offering that? Any exception other than Hearsay rule?

7 MR. ANDERSON: I'll move on, Your Honor.

8 THE COURT: All right.

9 BY MR. ANDERSON:

10 Q You, Reginald, Joshua, Conswella left the King George
11 Club in Loris, Green Sea area?

12 A Yeah.

13 Q Came back to Marion County?

14 A No. We went to Nichols Club.

15 Q Is Nichols in Marion?

16 A Well, I thought Nichols County.

17 Q Okay. Went to Nichols?

18 A Yeah.

19 Q Went to Nichols Night Club or Night Life?

20 A Yeah.

21 Q I think you said, I believe it's the hole in the wall
22 club?

23 A That's what I thought it was; I don't know. That was
24 my first time going there.

25 Q When you got there I think you said you ran into some

Sw - J. Phillips - Cross

- 1 of your cousins?
- 2 A Yep.
- 3 Q Talked with them?
- 4 A Yeah.
- 5 Q Were you drinking at that time?
- 6 A No.
- 7 Q Were you smoking at that time?
- 8 A No.
- 9 Q What time of the evening was this or what time of
- 10 morning was this?
- 11 A Don't remember.
- 12 Q You think you were still September 28th, you know,
- 13 before midnight or you think you crossed over after
- 14 midnight, do you know?
- 15 A No.
- 16 Q Do you know how long you stayed at the Nichols Night
- 17 Club?
- 18 A About three, four hours I think; I'm not sure. You
- 19 know, I know it was late in the morning.
- 20 Q Prior to that time before going to the Nichols
- 21 Nightclub did you have anything to drink?
- 22 A Say that again.
- 23 Q Before you went to the Nichols Nightclub did you drink
- 24 anything?
- 25 A No, no.

Sw - J. Phillips - Cross

1 Q I think earlier on direct examination you indicated you
2 got pretty drunk.

3 A At Nichols, yeah, at Nichols club, yeah.

4 Q So when you got to the Nichols club would it be safe to
5 say you started drinking pretty fast, pretty heavy?

6 A Yeah, when I got into the club.

7 Q How many do you think you had?

8 A I know I had like three, three cups of liquor. And I
9 had like three cups of liquor, popped some pills. I
10 smoked some weed.

11 Q Do you know what kind of pills they were?

12 A No, I sure don't.

13 Q Did somebody give them to you?

14 A Yeah.

15 Q Somebody in the club give them to you?

16 A Yeah.

17 Q Did you buy them?

18 A No.

19 Q They were just given to you?

20 A Yeah.

21 Q When you say three cups of liquor, was it a little
22 Styrofoam cup like the one right here at the Solicitor's
23 table or was it bigger than that?

24 A Bigger than that.

25 Q Was it one like right there on the clerk's desk?

Sw - J. Phillips - Cross

- 1 A It was smaller than that, like one of the plastic cups.
2 About that size, about that size.
- 3 Q All right. Was there anything in it other than liquor,
4 ice?
- 5 A I think some ice was in it.
- 6 Q Okay. Anything to cut it with? I mean, any Doctor
7 Pepper or Mountain Dew —
- 8 A I had orange juice.
- 9 Q Orange juice. So it was vodka and orange juice?
- 10 A I think it was gin and orange juice.
- 11 Q You had three or four cups of that?
- 12 A Yeah.
- 13 Q Popping pills?
- 14 A Yeah.
- 15 Q Smoked some marijuana?
- 16 A Yeah.
- 17 Q Who did you go outside and smoke with?
- 18 A My brother, Conswella, the lady in the club, Joshua I
19 think.
- 20 Q Now the lady in the club was that Ms. Love or was that
21 Ms. Bynum?
- 22 A I think Ms. Love.
- 23 Q Did Ms. Love have a nickname?
- 24 A Not I'm aware of, no. I think my brother said that was
25 little mama or something.

Sw - J. Phillips - Cross

- 1 Q Little mama?
- 2 A Yeah. Her name was little mama or something.
- 3 Q How long did y'all stay outside talking?
- 4 A About a good 30 minutes?
- 5 Q Did y'all smoke one blunt, more than one blunt?
- 6 A Just one.
- 7 Q Do you know if Conswella smoked more than one?
- 8 A No, I don't know 'cause I wasn't with her the whole
- 9 time at the club, I mean, at the -- at that time.
- 10 Q I think on -- you said you were doing some dancing,
- 11 playing some pool; is that right?
- 12 A Yes.
- 13 Q I think you said you were tore up?
- 14 A Yeah.
- 15 Q Reggie was so torn up he was sick and throwing up?
- 16 A Yeah, right.
- 17 Q I think you indicated Conswella was drunk?
- 18 A I never said Conswella was drunk I don't think.
- 19 Q You didn't say that on direct?
- 20 A Naw, I never said she was drunk.
- 21 Q Okay.
- 22 A I said she might have been; I don't know.
- 23 Q Now I did write this down. Maybe I misunderstood you.
- 24 You said the Little Scrappy was drunk too?
- 25 A Yeah I said he could been too. I mean, he probably was

Sw - J. Phillips - Cross

1 because we all was drinking.

2 Q I think you indicated that you weren't really ware of
3 what was going on, nothing really stood out to you that
4 night?

5 A Yeah. Yeah.

6 Q Now tell me about when you got ready to leave. Who was
7 with you in the car?

8 A When we got ready to leave it was me, me, my brother,
9 Conswella, and Joshua when we got ready to leave.

10 Q And what time was that?

11 A I don't remember.

12 Q Was there anyone else inside the club?

13 A Yes, I believe so. I believe the owners was in there.

14 Q All right. Anybody else?

15 A I don't know 'cause I was outside so I don't know who
16 all was in there.

17 Q Could have been some other people there?

18 A There could have been, I mean, I don't -- I mean, I
19 don't know.

20 Q I think you indicated you'd actually gone outside and
21 fallen asleep?

22 A Yes.

23 Q And what point in time -- I think you indicated this --
24 and at what point in time did y'all turn the car around?

25 A After -- what you mean? Say that again.

Sw - J. Phillips - Cross

1 Q All right, I'll back up. You tell me. How did y'all
2 leave?

3 A How did we leave?

4 Q Yes, sir.

5 A In the jeep.

6 Q Okay. What happened before y'all left, if anything?

7 A What happened before?

8 Q Yes, sir.

9 A See, I don't know, I was really drunk that time. I was
10 falling asleep. But I know my cousin Henry, Junior came
11 to the car. He came to the car, asked my brother was he
12 all right, you know what I'm saying. And then they were
13 trying to start their car and they couldn't start their
14 car so we jumped them off.

15 Q Were they in the parking lot?

16 A Yeah, they was in the parking lot.

17 Q Okay. And then what happened?

18 A And then after that Josh told us to come go to the --
19 close to the door.

20 Q And was Josh in the jeep or was he outside?

21 A He was in the jeep.

22 Q He said pull close to the door?

23 A Yeah.

24 Q So y'all were still in the parking lot when you jumped
25 off Henry's car?

Sw - J. Phillips - Cross

- 1 A Right, yes.
- 2 Q If I show you State's 22 there's that red truck, but
- 3 you don't really remember that being there?
- 4 A Yeah, yeah.
- 5 Q Where was Henry's car?
- 6 A On this side somewhere.
- 7 Q On the other side?
- 8 A Yeah, on that side.
- 9 Q Of the truck?
- 10 A Yeah.
- 11 Q So it would have been maybe out of this picture. You
- 12 might not ---
- 13 A Yeah.
- 14 Q ---have been able to see it?
- 15 A It was about like this.
- 16 Q Y'all pulled over there, got close enough to him to
- 17 jump him off?
- 18 A Yes.
- 19 Q Then where did y'all pull?
- 20 A Then he told us to pull to the door and we pulled about
- 21 somewhere about up in here somewhere.
- 22 Q Somewhere on this side?
- 23 A Yeah, somewhere about right here somewhere.
- 24 Q All right. Was there another car there?
- 25 A Yes.

Sw - J. Phillips - Cross

- 1 Q All right. Did you see anybody else in this other car?
- 2 A Yes.
- 3 Q Did you ever wave to them?
- 4 A No, I ain't wave to her.
- 5 Q Did you ever tell Conswella to beep the horn?
- 6 A Huh?
- 7 Q Did you never tell Conswella to beep the horn?
- 8 A No.
- 9 Q Did you ever roll your window down and say Joshua?
- 10 A No.
- 11 Q Come on?
- 12 A No. I was just seeing what's going on when I peeked my
- 13 head out the window.
- 14 Q All right. I think you indicated earlier that you
- 15 heard four or five shots?
- 16 A Yeah.
- 17 Q You jumped Henry off; I guess he left.
- 18 A Yeah.
- 19 Q Joshua said, pull close to the door.
- 20 A Right.
- 21 Q Joshua got out.
- 22 A Right.
- 23 Q Went inside?
- 24 A Right.
- 25 Q How long was he in there before you heard four or five

Sw - J. Phillips - Cross

1 shots?

2 A I don't know, a good five minutes maybe. Five or seven
3 minutes.

4 Q Five or ten minutes?

5 A Five or seven.

6 Q Five or seven minutes, all right. Did you ever see
7 that other car come back while y'all were waiting?

8 A No.

9 Q That car was already there?

10 A What car are you talking about?

11 Q The one that was backed up to the door.

12 A That car was already there, then she pulled off.

13 Q Now when she pulled off was she in a hurry? Was she
14 driving slow; was she driving fast?

15 A She sped up, sped up. She heard the gun shots too.

16 Q Going to your statement, Jason.

17 A Uh-huh.

18 Q The first statement that you gave, the one that you
19 gave on 9/30/2007 at 12:28 a.m. When I say 9/30,
20 September 30th, 2007 at 1:28 a.m. Did you handwrite that
21 statement out?

22 A Yes.

23 Q And prior to handwriting it out you talked with
24 Detective Martin Bell?

25 A Yeah.

Sw - J. Phillips - Cross

1 Q And you had been Mirandized approximately two hours
2 earlier?

3 A Yes. Something like that, yeah.

4 Q And after you were Mirandized you were talking with
5 police for those two hour period?

6 A Yeah.

7 Q And this statement it appears was given at the Marion
8 County Sheriff's Office?

9 A I guess so. See, I'm not really familiar with Marion
10 so I don't know where I was at.

11 Q What does it say at the top of the page?

12 A Yeah, Marion County Sheriff's Office.

13 Q Okay. So were there other deputies around?

14 A Well, I was talking to one.

15 Q Were you in a room?

16 A Yeah, I was in a room.

17 Q Anybody else in the room other than you and him?

18 A I don't remember.

19 Q How big of a room was it?

20 A I don't know my measurements; I don't know.

21 Q Was it as big as this room?

22 A No, it was smaller than this room.

23 Q Was it as big as from me to you?

24 A Probably so.

25 Q Okay. Was it this wide?

Sw - J. Phillips - Cross

- 1 A No.
- 2 Q Okay.
- 3 A I don't think so.
- 4 Q All right. Just you and him in there?
- 5 A See, when I wrote the first statement I was intoxicated
- 6 then too.
- 7 Q Okay. So you were drink too which you gave this
- 8 statement?
- 9 A Yeah.
- 10 Q Did you ever tell Martin Bell, whoa, man, I ---
- 11 A No, I ain't never told -- see --
- 12 Q ---I'm drunk?
- 13 A ---when I wrote that last statement I ---
- 14 Q Oh, we're gonna get to that in just a second. All
- 15 right, when you wrote this first statement you were still
- 16 intoxicated?
- 17 A Well, I wasn't -- I won't say that drunk, but I mean, I
- 18 know what I was doing.
- 19 Q I mean, didn't you just tell me you were intoxicated
- 20 when you wrote that first statement?
- 21 A Yeah, I said I was -- I said I was drinking. I mean, I
- 22 was drinking.
- 23 Q You told me you were intoxicated?
- 24 A Well, okay. I did say that, I'm sorry, I did say that.
- 25 Q You tell me.

Sw - J. Phillips - Cross

1 A I didn't say that.

2 Q I mean, you weren't drinking in there with the
3 detectives, were you?

4 A No, no, it wasn't nothing like that.

5 Q I mean, he didn't have any marijuana and y'all were
6 smoking together, were you?

7 A No, no, no.

8 Q Okay. Were you intoxicated when you gave this first
9 statement?

10 A Well, I mean, I been drinking that night.

11 Q Well, this is in the morning. This is 1:28 in the
12 morning.

13 A What I'm saying, before they came and got me we were
14 drinking.

15 Q I thought you looked all over for your brother.

16 A Not the night this time. Not at this time.

17 Q All right.

18 A Well, when I was giving the statement.

19 Q Can I see that Miranda warning for a second. A Miranda
20 warning was given on September the 29th, 2007 at the
21 Marion County Sheriff's Office at 11:12 p.m.; is that
22 right?

23 A Yeah, that's what it says, I mean. That's what it
24 says.

25 Q Did you sign that?

Sw - J. Phillips - Cross

1 A Yeah.

2 Q Okay. Two hours later you wrote that statement; is
3 that right?

4 A Yeah.

5 Q Okay. You didn't leave the Marion County Sheriff's
6 Office and go drink, did you?

7 THE COURT: Yes, sir.

8 MR. CLEMENTS: Your Honor, it got my attention
9 for a while. Some chance of this being published to the
10 jury, Your Honor, I would object unless they want to put
11 it into evidence.

12 THE COURT: Do you want to put it in?

13 MR. ANDERSON: Not at this time, Your Honor.

14 THE COURT: All right. Your objection is
15 reference to the wordage?

16 MR. CLEMENTS: Publication of the words. If he
17 can use it to refresh the witness' recollection the proper
18 way, then I don't have a problem with it, but the
19 publication has been going on I do I have a problem.

20 THE COURT: I sustain the objection.

21 BY MR. ANDERSON:

22 Q State the time and take your form and read that
23 statement.

24 (Pause.)

25 THE WITNESS: Okay.

Sw - J. Phillips - Cross

1 BY MR. ANDERSON:

2 Q You remember being read your Miranda rights?

3 A Yeah, I remember that.

4 Q You signed it?

5 A Yeah.

6 Q That was done on September the 28th -- excuse me, 29th,
7 2007?

8 A Yeah.

9 Q After those rights were read to you did you ever leave
10 Marion County Sheriff's Office?

11 A Did I leave?

12 Q Yes, sir.

13 A No, not at that time, no.

14 Q Okay. Did you have anything to drink with you?

15 A No.

16 Q Did you have any alcohol with you?

17 A No.

18 Q Any beer?

19 A No.

20 Q Any liquor?

21 A No.

22 Q Any wine?

23 A No.

24 Q Did you have any marijuana or pills with you?

25 A No.

Sw - J. Phillips - Cross

1 Q You gave a statement to Martin Bell, wrote a statement
2 approximately two hours later?

3 A Yeah.

4 Q In that first statement when you said Joshua came out
5 of the building, did you indicate he had anything in his
6 hand?

7 A Yes.

8 Q You did?

9 A Yeah.

10 Q In the first statement?

11 A Yeah.

12 Q Please show it to me.

13 A No, I didn't, I'm sorry. No, I didn't.

14 Q In that first statement?

15 A You ask me ---

16 Q Did you say anything about a gun?

17 A No, not in that first statement, no.

18 Q In that first statement did you say anything happened
19 in the club?

20 A No.

21 Q In that first statement I believe you said, if he'd had
22 a gun he could have shot me?

23 A In the first statement?

24 Q Yes, sir.

25 A These two together here. Yeah.

Sw - J. Phillips - Cross

1 Q It's on the second page.

2 A Yeah.

3 Q About six lines down?

4 A I thought that was separate from this one. Yeah, I
5 said that.

6 Q Okay. Then ---

7 A Because I heard gunshots at the club. You know, I
8 mean, ain't nobody else was there but the lady ---

9 Q You don't know. You didn't go inside, remember?

10 A Right, that's what I'm saying, I mean. I ain't say I
11 ain't said -- I say could have been somebody in there.

12 Q Right.

13 A But I ain't know.

14 Q You don't know who was inside? Sir, you don't know who
15 was inside, do you?

16 A I mean, I don't know.

17 Q Okay. Then you gave a second statement; is that right?

18 A Yeah.

19 Q And that second statement was given how long
20 afterwards?

21 A I don't know. I don't remember but it says right here
22 2:53 a.m.

23 Q On September 30th?

24 A 9/30/07, yeah.

25 Q So approximately an hour-and-a-half later; is that

Sw - J. Phillips - Cross

1 right?

2 A Something like that, probably, yeah.

3 Q And the second statement, that's when you decided to
4 suddenly talk about the gun?

5 A Yeah. See, you know, I wasn't being honest at that
6 time 'cause I was scared. At the first two statements I
7 was scared.

8 Q Okay.

9 A You know what I'm saying.

10 Q But you were in the custody of the Marion County
11 Sheriff's Office.

12 A Yeah, yeah.

13 Q You were in their building?

14 A Yeah.

15 Q With a detective?

16 A Yeah.

17 Q Okay.

18 A I was still scared.

19 Q Okay.

20 A Because he already say he was gonna do something to us
21 if we told, if we told anybody.

22 Q In that second statement you said when he came out he
23 had money in shoes with him?

24 A Yep.

25 Q In that second statement you said I think he had a gun

Sw - J. Phillips - Cross

1 with him in Mullins.

2 A In the second statement?

3 Q Yes, sir.

4 A Yeah.

5 Q And that second statement you talk about how he talked
6 about about shooting people; is that right?

7 A Yes, a man and woman.

8 Q And that second statement you go on to talk about what
9 he did with the gun?

10 A Yes.

11 Q None of that previously been mentioned?

12 A Huh?

13 Q None of that in that second statement had been
14 mentioned in the first statement?

15 A Yeah. But see, I mean, I wasn't being honest. Like I
16 said, I was totally honest so I'm being honest now so.

17 Q Did you tell that to law enforcement?

18 A No.

19 Q They were being honest with you?

20 A No.

21 Q Did you write that in your second statement, hey, I was
22 lying in the first one, I didn't tell it all?

23 A Say that again.

24 Q Did you put in your second statement I wasn't telling
25 the whole truth, I was lying I, was holding back. Did you

Sw - J. Phillips - Cross

1 put that in your second statement?

2 A No.

3 Q Did you put in your second statement, lord have mercy,
4 I was scared of Joshua, that's why I didn't tell all in
5 the first time?

6 A No. But I -- I told them I was scared. I told her I
7 was scared of him.

8 Q Did you call law enforcement when you woke up that
9 morning?

10 A No.

11 Q Did you call anybody to tell them you were scared of
12 Joshua?

13 A No, but I mean, I was scared.

14 Q Okay.

15 A I mean, I was scared. I ain't knew what to do at that
16 point.

17 Q Did you tell law enforcement how to get in touch with
18 Ruth so they could check her car?

19 A I didn't know how to get in touch with her. She didn't
20 have a phone.

21 Q Didn't you say she gave you a ride that morning?

22 A Yeah, but I didn't know how to get in touch with her.
23 She ain't had no phone that night.

24 Q Did you know where she lived?

25 A No.

Sw - J. Phillips - Cross

1 Q How did you meet up with her?

2 A I don't really know. I don't really know. I think my
3 brother --

4 Q You were still intoxicated at that time?

5 A No.

6 MR. CLEMENTS: Your Honor, if he would give the
7 witness a chance to finish his statement.

8 THE COURT: Let him answer, counsel. Go ahead.

9 BY MR. ANDERSON:

10 Q You don't know how to get in touch with her?

11 A No, I just don't know how to get in touch with her.

12 Q Did you ever give a statement how she looked?

13 A No.

14 Q Where she lived?

15 A No.

16 Q Description of anything?

17 A No.

18 Q The jumper cables you used to jump off Henry's car,
19 where did you get those?

20 A Down the street.

21 Q Down the street?

22 A From -- I don't remember but I know we got them from
23 down the street from some of his people's house, some of
24 them.

25 Q How far away?

Sw - J. Phillips - Cross

1 A About a quarter of a mile down the street from the
2 club.

3 Q Quarter of a mile?

4 A Maybe a quarter of a mile. I'm not sure.

5 Q Walk down there?

6 A No. I didn't went and go get them.

7 Q Okay. You don know how they got there?

8 A I mean, yeah, somebody at the club probably went and
9 got them.

10 Q Probably went and got them.

11 A Yeah.

12 Q You don't know how they got there?

13 A I know there was some jumper cables there.

14 Q You indicated earlier that the girl that had backed up
15 to the front also heard gun fire?

16 A I said she could have heard gunshot.

17 Q She could have?

18 A Yes. That the reason why sped off.

19 MR. ANDERSON: Judge, that's all the questions I
20 have at this time.

21 THE COURT: Redirect.

22 MR. CLEMENTS: Beg the Court's indulgence a
23 moment. Your Honor, we ask Mr. Phillips be released from
24 his subpoena.

25 THE COURT: Suitable?

Sw - E. Moultrie - Direct

1 MR. ANDERSON: I don't have any objection, Your
2 Honor.

3 THE COURT: All right, he's released.
4 These papers that he's -- who do these papers belong
5 to?

6 MR. CLEMENTS: I think those are Mr. Anderson's,
7 Your Honor.

8 MR. ANDERSON: Those are mine, Your Honor.

9 THE COURT: Okay.

10 MR. CLEMENTS: Your Honor, if I can check
11 downstairs briefly one second.

12 THE COURT: Yes.

13 MR. LAWSON: Your Honor, may I approach.

14 THE COURT: Yes.

15 MR. CLEMENTS: Your Honor, our next witness we
16 call will be Mr. Eric Moultrie.

17 CLERK OF COURT: Mr. Moultrie, please come up
18 here, let me swear you in please.

19 WHEREUPON,

20 **ERIC LORENZO MOULTRIE,**
21 having been duly sworn by the Clerk of Court, testified as
22 follows:

23 THE CLERK OF COURT: Have a seat in the witness
24 box.

25 **DIRECT EXAMINATION**

Sw - E. Moultrie - Direct

1 BY MR. CLEMENTS:

2 Q Mr. Moultrie, can you please tell this jury your name.

3 A Eric Lorenzo Moultrie.

4 Q Where are you from, Mr. Moultrie?

5 A Conway, South Carolina.

6 Q Conway, South Carolina. And presently right at this
7 time where are you sleeping every night?

8 A Jay Reuben Long Detention Center.

9 Q Jay Reuben Long Detention Center? And what are they
10 holding you for in Jay Reuben Long Detention Center?

11 A Breach of trust.

12 Q Breach of trust? How old are you, Mr. Moultrie?

13 A 42.

14 Q 42. And you've been in trouble with the law before?

15 A Yes, sir.

16 Q Who currently has the charges on you?

17 A Horry County.

18 Q Horry County. Have you signed a proffer agreement with
19 Horry County?

20 A Yes, sir.

21 Q And I want pass to you what's been marked State's
22 Exhibit 88 for identification purposes. You recognize
23 that?

24 A Yes, sir.

25 Q Is that your signature?

Sw - E. Moultrie - Direct

1 A Yes, sir.

2 Q And is that the deputy solicitor's signature?

3 A Yes, sir.

4 Q Fran Humphries?

5 A Yes, sir.

6 Q And is that your attorney's signature?

7 A Yes, sir.

8 MR. CLEMENTS: Your Honor, at this time I ask to
9 move State's Exhibit 88 into evidence.

10 THE COURT: Any objection?

11 MR. ANDERSON: No, Your Honor.

12 THE COURT: It's in evidence now without
13 objection.

14 (WHEREUPON, State Exhibit No. 88 was admitted into
15 evidence.)

16 MR. ANDERSON: Your Honor, may Mr. Clements and
17 I approach?

18 THE COURT: Sure.

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

21 THE COURT: All right, Mr. Moultrie, listen to
22 the question, answer the question and only the question,
23 okay. Don't volunteer anything, just answer the question.

24 BY MR. CLEMENTS:

25 Q Do you know Joshua Phillips?

Sw - E. Moultrie - Direct

- 1 A Yes, sir.
- 2 Q Have you had conversations with him before?
- 3 A Yes, sir.
- 4 Q Have you had conversations with him regarding the
5 murder of Angelique Bynum and Larry Maltonin Clark in
6 Nichols?
- 7 A Yes, sir.
- 8 Q Where did you have those conversation with him?
- 9 A Prison.
- 10 Q In jail?
- 11 A Yes, sir, in jail.
- 12 Q Okay. Was that after he was arrested on this charge?
- 13 A Yes, sir.
- 14 Q Okay, all right. Now has the -- has the Twelfth
15 Circuit Solicitor's Office, being me, made any promises to
16 you of any kind?
- 17 A No, sir, none whatsoever.
- 18 Q Okay. But you do have a proffer agreement?
- 19 A Yes, sir.
- 20 Q With the Fifteenth Circuit Solicitor's Office?
- 21 A Yes, sir.
- 22 Q And what is your understanding of that agreement that
23 you're supposed to do?
- 24 A Just come in here and tell the truth.
- 25 Q And have they promised you anything to tell the truth?

Sw - E. Moultrie - Direct

1 A Nothing whatsoever.

2 Q Other than the considered cooperation ---

3 A Yeah, that's right.

4 Q ---with any sentence you received?

5 A Yes, sir.

6 Q Mr. Moultrie, I want to take a moment if can go over
7 your record. Other than this breach of trust charge that
8 you said you have hanging over your head in Horry County,
9 do you have any other charges pending of any nature?

10 A No, sir.

11 Q Okay. But you do have a criminal record?

12 A Yes, sir.

13 MR. CLEMENTS: Beg the Court's indulgence a
14 moment. May we approach, Your Honor.

15 THE COURT: Sure.

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

18 BY MR. CLEMENTS:

19 Q Thank you for waiting on us, Mr. Moultrie.

20 Mr. Moultrie, do you have a conviction of breach of trust
21 with fraudulent intent over five thousand dollars
22 conviction from 1996?

23 A Yes, sir.

24 Q Do you have an assault and battery high and aggravated
25 nature conviction from 1996?

Sw - E. Moultrie - Direct

1 A Yes, sir.

2 Q Do you have an armed robbery conviction from 1996, all
3 these at the same time?

4 A Yes, sir.

5 Q Now Mr. Moultrie, you testified you talked with
6 Mr. Josh Phillips in jail?

7 A Yes, sir.

8 Q How did y'all talk to each other? Through bars,
9 through a vent, how?

10 A Through the cell vent.

11 Q Through the cell vent. Did you ever have occasion to
12 be outside the cell with him?

13 A Yes, sir, on the rec field.

14 Q Did you have a chance to talk with him?

15 A Yes, sir.

16 Q Can you please tell this jury what he told you about
17 September 29th, 2007 at the Nichols Night Life?

18 A Yes, sir.

19 Q Please tell the jury what he told you.

20 A All he told me was that he left the beach during a
21 concert. He went to some bar down in Nichols and he went
22 inside and he robbed some man and some girl and shot them
23 and on the way out he dropped some money in the club and
24 he spotted a vehicle that he didn't know, two other people
25 were sitting in and he left.

Sw - E. Moultrie - Direct

1 Q Okay. Did he say what kind of weapon he used?

2 A A Mexican 45.

3 Q Mexican 45?

4 A Yes, sir.

5 Q Okay. Did he say anything about who he was riding
6 with?

7 A He said it was -- if I ain't mistaken it was a girl and
8 two other guys or one other guy.

9 Q Okay.

10 A One of them was his cousin or something.

11 Q Okay. And what did he say that he would do to his
12 victims?

13 A He lays them down.

14 Q He lays them down?

15 A Meaning kill them if he rob them.

16 Q All right. What, if anything, did he say about the
17 people that he was riding with if they told on him?

18 A He would kill them.

19 Q Okay. Please answer any questions Mr. Anderson or
20 Mr. Lawson may have.

21 MR. CLEMENTS: Beg the Court's indulgence, Your
22 Honor. I have one other matter to question Mr. Moultrie
23 about.

24 BY MR. CLEMENTS:

25 Q Mr. Moultrie, do you see the gentleman that you talked

Sw - E. Moultrie - Cross

1 with in this courtroom today?

2 A Yes, sir.

3 Q Can you please point him out for me?

4 A Yes, sir, sitting right there (indicating).

5 Q And could you describe what he has on?

6 A A brown plaid shirt.

7 Q Thank you. Please answer any questions Mr. Anderson
8 has.

9 **CROSS-EXAMINATION**

10 BY MR. ANDERSON:

11 Q Mr. Moultrie, you're 42 years old?

12 A Yes, sir.

13 Q Presently in jail?

14 A Yes, sir.

15 Q Been in jail for a while; haven't you?

16 A Yes, sir.

17 Q Tell me and this jury what a proffer is.

18 A Well, from my understanding a proffer agreement -- my
19 proffer agreement was just to come down here and tell the
20 truth. Nothing was discussed to me about we'll let you
21 off or nothing like that. Just to come down here and tell
22 the truth. That was my proffer agreement.

23 Q Are you -- is your proffer agreement to say anything
24 about hoping to get help in the future?

25 A No, sir, but it would be nice.

Sw - E. Moultrie - Cross

- 1 Q Let's look at State's exhibit that was entered just
2 recently. Let's see exactly what it does say about help
3 in the future, all right. I refer you to State's 88.
4 Look over that document for me for a moment please, sir.
5 How many pages is State's 88?
6 A Six -- well, five. How many pages?
7 Q Pages.
8 A Okay, just one page.
9 Q How many pages is that document that is stapled
10 together that has the red sticker on the front?
11 A Oh, you're talking there's three pages.
12 Q Okay. Three pages?
13 A Three pages.
14 Q Does it have your signature on the last page which
15 would be page 3?
16 A Yes, sir.
17 Q Does it have your attorney's signature?
18 A Yes, sir.
19 Q Does it have one of the deputy solicitor's signature?
20 A Yes, sir.
21 Q On the second page, does paragraph four indicate
22 anything about cooperation and the State will consider
23 that?
24 A It says the State shall consider the extent and degree.
25 You want me to keep on?

Sw - E. Moultrie - Cross

1 Q Please.

2 A Of Eric Moultrie's cooperation in the election of
3 charges and the recommendation of sentence and shall agree
4 to advise any sentencing court of the extent and degree of
5 Eric Moultrie's cooperation at the time of sentencing.

6 Q So by testifying here today the State, when your
7 pending charges coming up they're going to say, hey,
8 Judge, he testified over in Marion County. Isn't that
9 what that says?

10 A That's what this says but I aim never done nothing like
11 this before so I don't know what they'll do at the time of
12 sentencing.

13 Q Isn't that why you have Ms. Horry West your attorney
14 also sign it?

15 A Well, that was proper procedures.

16 Q Okay. That paragraph is in there?

17 A No. Well by court law it's proper procedures if you
18 locked up in jail to have attorney present when you talk
19 to these type of people.

20 Q I'm talking about paragraph four that you read. This
21 says your cooperation.

22 A Yeah, my cooperation.

23 Q Will be known to the sentencing judge.

24 A Yes, sir.

25 Q Okay. And that's what you're doing here today; you're

Sw - E. Moultrie - Cross

1 cooperating?

2 A Yes, sir.

3 Q Okay. I'm not trying to fool you here?

4 A No, I know. I'm only doing what's right by the law.

5 Q Well let's talk about doing right by the law, okay.

6 The Solicitor left out a few things on your prior record.

7 In 1996 you were convicted of breach of trust with

8 fraudulent intent more than five thousand dollars?

9 A Yes, sir.

10 Q And that was a ten year sentence you received?

11 A Yes, sir.

12 Q And at the same time you pled guilty to another count

13 of breach of trust with fraudulent intent more than five

14 thousand dollars; is that right?

15 A Yes, sir.

16 Q And in that same time you pled guilty to another count

17 of breach of trust with fraudulent intent more than five

18 thousand dollars; is that right?

19 A Yes, sir.

20 Q And I don't want to beat a dead horse but you also pled

21 to another count —

22 A Yes.

23 Q —of breach of trust with fraudulent intent more than

24 five thousand dollars?

25 A Yes, sir.

Sw - E. Moultrie - Cross

1 Q And for good measure you pled guilty to an armed
2 robbery at that time; is that right?

3 A Yes, sir.

4 Q And you also pled guilty to an assault battery of a
5 high and aggravated nature?

6 A Yes, sir.

7 Q And you received a twelve year sentence for those and a
8 ten year sentence for the other ones to run concurrent?

9 A Yes, sir.

10 Q Now breach of trust greater than five thousand dollars,
11 what is a breach of trust?

12 A Well, my breach of trust is — I operated a detail
13 business and I didn't bring the vehicle back on time.

14 MR. CLEMENTS: Your Honor, I object. I don't
15 think that's proper impeachment. I think he can ask him
16 about the conviction. If he denies them then he can go
17 further but other than that I don't think —

18 THE COURT: Cannot go into the facts and
19 circumstances. That's absolutely prohibited by the United
20 States Supreme Court but I will allow him to query him
21 concerning his understanding of that specific charge, what
22 he pled guilty to, what the charge is. So ask him what
23 breach of trust is. I'll let him answer that.

24 BY MR. ANDERSON:

25 Q Breach of trust with fraudulent intent, what is that?

Sw - E. Moultrie - Cross

1 A You're giving me consent to take something of yours and
2 to bring it back at a certain time.

3 Q And you did that on four different occasions?

4 A Yes, sir.

5 Q Armed robbery with a deadly weapon, what is that?

6 A By you doing an armed robbery and you got a weapon but
7 — go ahead.

8 Q No, go ahead.

9 A But mine, I was dumb to the law then. If I know the
10 law I would have never pled it to it because I never had a
11 weapon.

12 Q And you're currently in jail on some additional
13 charges?

14 A Breach of trust. That's all.

15 Q Some new charges?

16 A Yes, sir.

17 Q Not these old charges?

18 A One new breach of trust.

19 Q You paroled out on the old charges?

20 A No, sir. That's why I caught the breach of trust. He
21 was trying to send me back on community supervision and it
22 would have exceed my original sentence and that's
23 unconstitutional so I took a vehicle, went to a certain
24 destination, parked it, locked the keys in a no parking
25 zone not too far from the police so the man can get his

Sw - E. Moultrie - Cross

1 vehicle back and I flee.

2 Q You're pretty good at these breach of trusts.

3 A While I was gone the law was overturned so that's why I
4 didn't get no time for it, got time served.

5 Q So you didn't commit breach trust while you were locked
6 up, did you?

7 A No, sir.

8 Q So you were actually out when you committed the new
9 one?

10 A Yes, sir.

11 Q So you would have had to have gone before the parole
12 board?

13 A No, sir.

14 Q You never went before the parole board?

15 A No, sir. It was a community supervision upon your
16 release of that charge. I didn't make parole. That's the
17 new 85 percent statute but it was overturned while I was
18 on the run because if you violate it, say I keep violating
19 I had a 12 year sentence they can violate me 12 times.
20 If that's the case I been done 24 years on 12 years and
21 that's unconstitutional so it was -- the law was
22 overturned while I was on the run.

23 Q So you were on the run?

24 A Yes, sir.

25 Q Did you actually go to Georgia?

Sw - E. Moultrie - Cross

1 A Yes, sir.

2 Q You were caught in Georgia?

3 A Yes, sir.

4 Q Explain to me in talking through the cell vent. I
5 mean, you're in one cell and someone else was in another
6 cell next to yours and so at some point in time I guess,
7 hey man, what you in here for?

8 A Well, talking through the cell vents you — plumbing
9 utilities, this cell and this cell is hooked on the same
10 line and so you got two vents right here and you can hear
11 one another through the vents.

12 Q Right. And so y'all were talking back and forth?

13 A Yes, sir.

14 Q And Mr. Phillips decided to just more or less, hey man,
15 let me tell you what I did; is that right?

16 A No, he told me what they had him for and then as days
17 go by he start questioning me about the law and so—

18 Q Because —

19 A And —

20 Q You know the law?

21 A I know a little bit about the law.

22 Q He told you he was at a concert at the beach?

23 A He told me he left from doing a con— he do rap.

24 That's what he told me. He left. He do rap.

25 Q And he left a concert and just stopped by at this club.

Sw - E. Moultrie - Cross

1 A He went to this club.

2 Q Did he indicate he had left that concert and gone
3 straight to the club?

4 A What he told me on the way leaving the club one of his
5 cousins or somebody called him up and said they wanted to
6 make a lick. And he told me he didn't need no money, he
7 had money. And so he went to this club and he parked and
8 he parked and he say he was going to go on and use the
9 bathroom, told them to stay in the vehicle.

10 Q So one of his cousins wanted to rob the place?

11 A Called him up, say he needed a lick.

12 Q That's what his cousin had called and told Joshua?

13 A That's what he told me. I can only go by what he told
14 me and I can only tell the court what he told me.

15 Q 'Cause you want to cooperate?

16 A I'm only doing what's right by the law.

17 Q Were you doing what was right by the law when you took
18 the car and parked it?

19 A Sir. If I -- yeah, if I had to do it again I do it
20 again for the simple fact they weren't supposed to be
21 sending me back the two more times and I know I was right
22 so I felt I ain't done nothing wrong. Only thing I was
23 wrong about was taking the man's vehicle.

24 Q Now you're trying to cut your time a little bit more
25 here today?

Sw - E. Moultrie - Cross

1 A No, sir, because I really -- my charges is really
2 little simple charge and I know if I say I could have got
3 on bond I know if I have sit about ten months or so
4 they'll come with a plea or time served.

5 Q So you pled guilty to something you didn't do?

6 A No, I committed that crime, but I felt I had a good
7 reason to, which I was still wrong.

8 Q But it was his cousin's idea to rob somebody?

9 A That's what he told me his cousin had called him up,
10 say he wanted to make a lick. He went to the club, told
11 them to stay in the vehicle. He went in there and robbed
12 them, shot both of them, and ran out.

13 Q So there would be cell phone records of that?

14 A Cell phone?

15 Q If the cousin called him?

16 A I don't know. I don't know what type of cell phone he
17 used.

18 Q Okay. You remember he got the call from his cousin
19 then there might be some phone records?

20 A It stand to reason. I can only go what he said. I
21 don't even know if his cousin called him. I don't know if
22 that was the case.

23 Q You're not sure what the truth is, are you?

24 A I know two people was killed. I know that much about
25 it.

Sw - E. Moultrie - Cross

1 Q Who told you that?

2 A Joshua Phillips.

3 Q Now you believe the part about the people dying, but
4 you don't believe the part about the cousin?

5 A No, I'm just saying, when people in jail, right,
6 they'll tell you sometime part of the truth but they won't
7 tell you the whole truth?

8 Q What about the people who get in front of law
9 enforcement, do they tell part of the truth?

10 A I'm telling the truth.

11 Q Okay.

12 MR. ANDERSON: Court's indulgence for a moment,
13 Your Honor.

14 THE COURT: All right.

15 BY MR. ANDERSON:

16 Q When did you give this statement to law enforcement?

17 A I can't remember the date, sir. It was — if I ain't
18 mistaken it was sometime last year.

19 Q March of last year?

20 A That probably was March. I can't remember the exact
21 date and month.

22 Q And that was roughly 16, 17 months ago?

23 A Something like that.

24 Q Did he ever tell you anything about splitting the
25 money?

Sw - E. Moultrie - Cross

1 A About splitting the money?

2 Q Yes, sir. Did he ever tell you about splitting the
3 money with ---

4 A If I ain't -- if I ain't mistaken he didn't say nothing
5 -- -- if I can't mistaken I can't remember recall
6 everything back then because, see, it's been so long.
7 It's been so long so I can't recall everything about the
8 money part. I -- what I -- the statement I made today,
9 that's the part I do remember fully one hundred percent.

10 Q Have any of your charges been dismissed from the last
11 16, 17 months?

12 A No, sir.

13 Q No?

14 A No. Well, I caught -- when I was in Atlanta I was
15 riding with somebody else, but see, Atlanta couldn't
16 charge me with the same charges South Carolina had me for,
17 see what I'm saying. But I was riding with somebody else
18 so them charges just never -- it was false statement of
19 name and everything.

20 Q Okay.

21 A And talking about that's all it was.

22 Q That's all it was?

23 A But I didn't do no -- nothing in Atlanta.

24 THE COURT: Redirect.

25 MR. CLEMENTS: No questions, Your Honor. We'd

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1 ask Mr. Moultrie be released from his subpoena.

2 THE COURT: All right, thank you. You're free
3 to go.

4 MR. CLEMENTS: Your Honor, we have our last
5 witness, and I think 30 minutes ago they said they were
6 about ten minutes away, doctor Schandl. And I can check
7 to see if she's downstairs.

8 THE COURT: Well, she's gonna be --

9 MR. CLEMENTS: She's gone outside the door.

10 THE COURT: Wait just one second. She is going
11 to be lengthy.

12 Are you okay? Everybody okay? This is going to be
13 lengthy. You need a short bathroom break? 15 minutes.

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

15 MR. CLEMENTS: Your Honor, we would call Doctor
16 Cynthia Schandl.

17 WHEREUPON,

18 **CYNTHIA ANNA SCHANDL,**

19 having been duly sworn by the Clerk of Court, testified as
20 follows:

21 THE CLERK OF COURT: Have a seat in the witness
22 box.

23 THE COURT: All right.

24 **DIRECT EXAMINATION**

25 BY MR. CLEMENTS:

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1 Q Could you please state your name and spell your last
2 name for the record.

3 A Yes. My name is Cynthia Anna Schandl, S-C-H-A-N-D-L.

4 Q Can you please tell this jury where you work and what
5 your designation is and your occupation.

6 A Yes. I'm employed at the Medical University of South
7 Carolina within the department of pathology and laboratory
8 medicine as a forensic pathologist.

9 Q And you are a medical doctor; is that correct?

10 A That's correct.

11 Q Doctor Schandl, could you please explain to this jury
12 what forensic pathology is.

13 A Yes. Forensic pathology is a field of pathology so
14 first an explanation of what pathology is. And pathology
15 is simply the study of disease or states that are not
16 considered normal. Forensic pathology takes it one step
17 further, and we're looking for at causes of death and then
18 manners of death. And often we're in the medical legal
19 profession so that's why we'll sit here in the courtroom
20 and talk to you folks. But basically what we're looking
21 at is people -- the coroners of our state refer cases to
22 our office at MUSC as well as several others around the
23 state so that we might determine cause of death and manner
24 of death whether that's do to a natural disease process or
25 whether that's due to a gunshot wound or whether that's

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1 due to any number of things. And then taking that
2 information which will be the cause of death, heart attack
3 for example, then designating the appropriate manner of
4 death from which we have five choices which include
5 natural. So a heart attack might be a natural manner of
6 death. Suicide, homicide, accidents. So for example, a
7 car crash might be an accident. And then the fifth choice
8 is undetermined. So that falls under the — although we
9 do not certify the deaths we are asked to provide our
10 expert opinions regarding the cause of death and the
11 manner of death to the coroner.

12 Q Doctor Schandl, could you please make the court and
13 jury aware of your curriculum vitae, your education,
14 training, and experience.

15 MR. LAWSON: Your Honor, we'll stipulate to the
16 doctor's qualifications.

17 THE COURT: She's qualified. I've qualified her
18 myself before but you may enlighten the jury in that
19 regard briefly.

20 BY MR. CLEMENTS:

21 Q Briefly, Doctor Schandl, if you can tell this jury
22 about your training, your degrees, and how many times
23 you've testified as an expert witness.

24 A Yes, sir. in order to to become a forensic pathologist
25 one must first go through college and have a bachelors

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1 degree. One must then go through medical school and get a
2 medical degree. And after that one must have specialized
3 training in pathology, which is called a residency, and
4 that is four year program after medical school. And then
5 in order to specialize particularly in forensic pathology
6 there's another year called a fellowship. So five years
7 after medical school of training, of additional training.
8 And after all that training you're legible to take Board
9 exams. There's a national board exam. The American Board
10 of Pathology has a board exam and so there are boards in
11 anatomic pathology, clinical pathology, and then should
12 you specialize in forensic pathology and several others.
13 I am boarded in all three, anatomic pathology, clinical
14 pathology, and forensic pathology.

15 I've been now working at MUSC for about five years
16 on faculty as a forensic pathologist, and during that time
17 I've testified in approximately fifty cases in courts and
18 done over a thousand autopsies.

19 Q Thank you, Doctor Schandl. Did you have an occasion to
20 do autopsies on individuals from Marion County with the
21 date of death 9/29/07?

22 A Yes, sir.

23 Q Who referred those victims to you for your autopsy?

24 A These cases we had two individuals referred to autopsy
25 at the same time from the coroner of Marion County, Jerry

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1 Richardson.

2 Q And can you please tell us the name of those two
3 individuals?

4 A Yes. Angelique Bynum and Larry Maltonin Clark.

5 MR. CLEMENTS: May I approach, Your Honor.

6 THE COURT: Yes.

7 BY MR. CLEMENTS:

8 Q I'm gonna show you what's been marked State's Exhibit
9 Number 12 for I.D. Can you tell me what that is a copy
10 of.

11 A Yes. This is a notarized copy of the autopsy report
12 and associated documents such as diagrams and so forth
13 that were generated from my office by me, the reports and
14 the documents that we generated during the examination.
15 This one is on Larry Clark.

16 Q And I'm gonna show you what's been marked State's
17 Exhibit Number 13 for I.D. Can you identify that.

18 A Yes. This is the same sentence set of documents as for
19 Mr. Clark for Ms. Angelique Bynum. The -- again, the
20 autopsy report and associated diagrams and other
21 documents.

22 MR. CLEMENTS: Your Honor, at this time we move
23 to have State's Exhibit 12 and 13 entered into evidence.

24 THE COURT: Any objection?

25 MR. LAWSON: Yes, Your Honor, object to the

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1 autopsy reports coming in. The doctor is going to testify
2 as to the contents. I feel that there is items included
3 in the report that are hearsay and also additional
4 information that is improper to be presented as evidence.

5 THE COURT: I will withhold the ruling on
6 admissibility at this time and proceed with examination
7 and I'll make a final ruling at that time.

8 MR. CLEMENTS: Thank you, Your Honor.

9 BY MR. CLEMENTS:

10 Q Doctor Schandl, can you please tell this jury when you
11 received the remains of Ms. Angelique Bynum?

12 A Yes, sir. May I refer to those documents in my --

13 THE COURT: Oh, yes. Yes.

14 THE WITNESS: --in my profession? Thank you.

15 THE COURT: You may refer to them and quote them
16 as you please.

17 THE WITNESS: Thank you, sir. Ms. Angelique
18 Bynum, we began her autopsy on September 30th, 2007 at
19 about 10:00 in the morning.

20 BY MR. CLEMENTS:

21 Q And when you do an autopsy about how can does it take?

22 A It's quite depending on each case, depending on the
23 complexity of the case, depending on how many different
24 things that we're going to need to record. As you might
25 imagine, as we are measuring each individual, for example,

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1 wound, if there are more wounds it takes longer to do that
2 examination. So it can take anywhere from two hours to
3 five hours to do the initial external examination and
4 internal examination, what we call the gross examination
5 as differentiated from the microscopic examination which
6 we do later on of tissue we look at under the microscope.
7 But the autopsy itself that day is what we call the gross
8 examination when we look externally, internally for any
9 injuries or diseased processes.

10 Q When you received the body of Ms. Angelique Bynum were
11 you able to ascertain to a reasonable degree of medical
12 certainty and forensic pathology certainty the cause of
13 death?

14 A Yes, sir.

15 Q And what was that cause of death?

16 A I will quote and then I will explain. Cerebral and mid
17 brain laceration due to penetrating gunshot wound to the
18 head and contributory is perforating gunshot wounds to the
19 abdomen and left forearm. So Ms. Bynum was shot one time
20 in the head in about this location. This bullet we call
21 it penetrating to distinguish it from perforating meaning
22 we did recover a bullet from that wound. This gunshot
23 wound went in through her skull and through her brain, and
24 we recovered the bullet at the base of the brain, so in
25 the skull. So it went all the way through her brain and

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1 mid brain, different parts of her brain. So that is the
2 cause of death and all that you wording cerebral and mid
3 brain laceration is what I'm referring to the bullet went
4 through the brain itself.

5 Q Doctor Schandl.

6 A Yes, sir.

7 Q Can you, using my head, where was the point of entry of
8 the wound?

9 A The point of entry was slightly to the left side and in
10 about this location, and the direction after it hit her
11 was essentially down a bit to her right and a little bit
12 forward. Something like this.

13 Q So she was shot from the left-hand side?

14 A I don't know from what side she was shot. All I know
15 is that's -- when it did hit her it was on her left side.
16 I don't know, you know, she may have been moving. I don't
17 know where the shooter was.

18 Q But it entered on her left side and went towards her
19 right side?

20 A That's correct.

21 Q Okay. Now where was the shot on her left forearm and
22 her abdomen. If you could again use me to demonstrate.

23 A Yes. There was a through and through or perforating
24 gunshot wound that was to her left arm on the pinky side,
25 and that was essentially in about this area here. It went

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1 through and through on the pinky side from this way, that
2 way, or you know, I don't know where her arm is again.
3 But from the back of her arm to more of the front of her
4 arm. You know, I don't know where that was in space. And
5 then the other gunshot wound was to her stomach almost at
6 the middle but a little bit to the left so in about this
7 area, and that went to the back and down and to the right
8 and out the buttock. And that particular gunshot wound
9 went through her small intestine before exiting. So
10 that's another perforating gunshot wound. We do not
11 recover a bullet, perforating meaning it went in and then
12 it also went as opposed to the one that was penetrating
13 which went in and did not go out so we did recover the
14 bullet.

15 Q Doctor Schandl, someone that is shot in the head like
16 that through the brain what would be the prognosis of how
17 long they would live after being shot through the brain
18 like that?

19 A Well, that is always a difficult question to answer.
20 The best person to answer that is whoever was there when
21 she was shot. But from a medical point of view that
22 injury is not survivable and the fact that it went through
23 the brain stem suggests to me that she probably died quite
24 quickly.

25 Q Would that be a immobilizing wound?

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1 A Yes.

2 Q And for the jury's benefit can you explain what an
3 immobilizing wound would be.

4 A Well, this particular -- again, it went through a very
5 central portion of the brain called the mid brain and so
6 that would essentially cease function of vital organs that
7 below that in the brain stem including the heartbeat and
8 breathing and all these sorts of things so she would
9 become immediately disabled by that.

10 Q Okay. Did you do a toxicology study on Ms. Bynum's
11 remains?

12 A Yes. We do routinely do toxicologic analysis on our
13 postmortem cases, and in this case I believe we had blood,
14 femoral blood to send, uh-huh.

15 Q And can you tell this jury what femoral blood is.

16 A Femoral blood is blood that's obtained from the groin.
17 We differentiate it from central or cardiac blood which is
18 more likely to have false elevations of different drugs.
19 So femoral blood is what we call peripheral blood which
20 has a more accurate representation of what drugs were
21 present at the time of death and less likely to be
22 effected by decomposition and other things that are going
23 on in the central area so it's further out, more
24 peripheral. So that's the preferred specimen for
25 toxicology if we can get it.

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1 Q And what were the results of the toxicology study?

2 A Ms. Bynum, the toxicology came back positive for
3 cannabinoids including delta nine, tetrahydrocannabinol
4 which is THC, the active, the active part of marijuana and
5 metabolite delta nine carboxy THC. Also positive for
6 nicotine which is in cigarettes or chewing tobacco, other
7 places you can get nicotine and its metabolite cotinine.

8 Q But negative for anything else?

9 A That's correct.

10 Q Okay. So there was some tobacco and marijuana use
11 before death?

12 A That is correct.

13 Q Okay. Did you retrieve any items from her body at the
14 autopsy, and if so, can you tell what they were and what
15 you did with them?

16 A Yes. Generally speaking we'll receive bodies as they
17 were at the scene so with clothing and whatever is in
18 their pockets and so forth, and those things we take off
19 before we -- as we're going through the autopsy.

20 Camouflage capris pants, camouflage sleeveless tank top,
21 tan panties, tan bra, yellow metal necklace, yellow metal
22 bracelet, two post-style earrings with clear stones, keys
23 on a ring, travel toothbrush, tube of lip gloss. Change
24 which included three dimes, three pennies, a nickel, and a
25 quarter. Cash, which included two one hundred dollar

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1 bills, two ten dollar bills, and thirty-seven one dollar
2 bills. A hair pin, left and right fingernail clippings,
3 pulled head hair, and two tubes of blood. And then we
4 also transfer all the pieces of bullet that we found in
5 this case. There were several fragments as well as the
6 main projectile. And all those items were transferred as
7 evidence to Eddie Edwards of the Marion County Sheriff's
8 Office.

9 Q All right. Doctor Schandl, can you tell us and and
10 answer basically the same questions in regards to autopsy
11 of Mr. Larry Maltonin Clark.

12 A Yes, sir.

13 Q Did you have a conclusion to a reasonable degree of
14 medical certainty and certainty in the field of forensic
15 pathology as to cause of death?

16 A Yes, sir. And again, I will read it and then explain.
17 Cerebral, cerebellar and brain stem laceration due to
18 distant penetrating gunshot wound to the head.
19 Contributory are, is a perforating gunshot wound to the
20 right thigh. So in this case Mr. Clark was similar in a
21 way to Ms. Bynum in that he was also shot in the head. In
22 this case he was shot in the right side of his forehead
23 and this projectile or bullet went back into the left and
24 down and through the skull here. And we recovered that
25 bullet in the tissues of the neck. But similar to

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1 Ms. Bynum it went through vital brain structures and in
2 this case including the brain stem and would have had a
3 similar immediate disabling effect after that gunshot
4 wound. He also had a gunshot wound to the inner right
5 thigh that was again a through and through it did. It
6 didn't break any bones or anything, but it was a through
7 and through gunshot wound to the right leg. So he was
8 shot twice.

9 One other injury that he had was a laceration that
10 was right below that gunshot wound to his head. I don't
11 know from what but a laceration indicates some form of
12 blunt trauma as opposed to an incision which is a nice cut.
13 The laceration might have skin bridges or other things
14 that suggest that was a blunt trauma from something that
15 was linear so it was a linear laceration below that. I
16 don't know from what.

17 Q Would that type of injury been consistent with somebody
18 like falling and hitting their head on a table?

19 A Yes, that is certainly possible. It's a nice, it's a
20 straight laceration, very little associated bleeding, so
21 suggesting that it might have happened right around the
22 time of death so it's certainly consistent with what we
23 would call -- what I would call a terminal fall so the
24 individual is shot and then drops from that injury
25 striking something on the way down. That's certainly

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1 possible.

2 Q Okay. Did you do a toxicology study on Mr. Clark?

3 A Yes, sir.

4 Q What were the results of that toxicology study?

5 A We were fortunate again to be able to obtain peripheral
6 blood, and there were no drugs and no alcohol detected for
7 Mr. Clark.

8 Q Okay. Doctor Schandl, do you have an opinion as to a
9 reasonable degree of medical certainty as to the manner of
10 death Angelique Bynum?

11 A Yes, sir.

12 Q And what would that opinion be?

13 A Homicide.

14 Q Do you have an opinion to a reasonable degree of
15 medical certainty as to the manner of death for Mr. Larry
16 Maltonin Clark?

17 A Yes, sir.

18 Q And what is that opinion?

19 A Homicide.

20 Q And again, can you explain to the jury what the term
21 homicide means in layman's terms?

22 A To the forensic pathologist it simply indicates that
23 one individual died by another's hand.

24 Q Doctor Schandl, please answer any questions Mr. Lawson
25 may have.

1 A Yes, sir.

2 **CROSS-EXAMINATION**

3 BY MR. LAWSON:

4 Q Good afternoon, Doctor. As I understand it you are at
5 the Medical University in the pathology department?

6 A Yes, sir.

7 Q And this -- these bodies were brought to you from
8 Marion County?

9 A That's correct.

10 Q All right. You don't come to Marion County and do the
11 autopsies here?

12 A That is correct.

13 Q Okay. And when you finish the autopsy, anything that
14 you gather evidence-wise, the clothes that the individual
15 comes in, you have to take those off to do your autopsy.
16 You gather those up, any items of evidence that you find
17 be it bullets or fragments thereof, you package all that
18 up and you give it back to the agents that brought the
19 body to take it back to Marion County; is that correct?

20 A Yes. In the case of a homicide everything will go back
21 to a law enforcement agent.

22 Q All right. The toxicology is done by blood studies; is
23 that correct?

24 A Yes, sir.

25 Q Is that -- is the tox study something that you request

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1 and send the blood to have tested?

2 A Yes, sir.

3 Q Okay. So that part does not come back to Marion
4 County?

5 A That's correct. Now the coroner may opt to have SLED
6 do the testing, but in this case we used our private
7 laboratory.

8 Q Okay. And if SLED were doing the toxicology then the
9 blood from toxicology would come back with all the other
10 evidence that comes back from the autopsy?

11 A That's variable. We may send it from our office or we
12 may send it back with the investigator.

13 Q So you can send things directly to SLED and but
14 primarily that's just basically blood for toxicology very
15 seldom?

16 A Generally speaking, yes.

17 Q Very seldom you send other evidence?

18 A Very seldom.

19 Q And in this case none of -- that didn't happen at all?
20 Everything was sent back to Marion County with the
21 exception of the blood for toxicology?

22 A That is correct.

23 Q And as it relates to any information in relation to
24 what occurred all of that you gathered from the coroner or
25 from police reports that you were provided at the time of

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1 performing the autopsy; is that correct?

2 A Yes, that is correct. I have no independent knowledge
3 of those facts.

4 Q Okay, and that -- you -- and you rely on that
5 information in making initial assessment on I think -- you
6 do an initial autopsy just from looking basically at
7 whatever wounds you may be able to see visually and what
8 you been told as it relates to the incident report and you
9 do an initial report; is that correct?

10 A The preliminary report is generated after the
11 conclusion of all the gross examination so the entire
12 internal and external examination.

13 Q Okay. But it's just the rough version, I guess, or
14 it's a condensed version?

15 A The preliminary report is simply a statement of the
16 cause and manner of death.

17 Q Okay. Without any detail on injuries or type of
18 injuries or anything else?

19 A Generally. We occasionally do add some other details
20 to that preliminary report under preliminary findings, but
21 usually in a case such as this it's quite straight
22 forward; we do not.

23 Q And what you were telling, I think, as regards to with
24 the solicitor that the angles which may be measured when
25 you take 45-degrees down to the back to the right don't

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1 actually tell you anything in relation to the placement of
2 where the gun was or where the shooter may have been
3 because people can be mobile and can be moving, different.
4 They could be standing, sitting, stooping, bending,
5 whatever, all of which can affect the angles?

6 A That is correct.

7 Q Okay. I don't have any other questions.

8 THE COURT: Redirect.

9 MR. CLEMENTS: Your Honor, at this time we'd ask
10 that Doctor Schandl be released from her subpoena, and we
11 think testimony sufficient we'll withdraw our proffer of
12 State's Exhibit 12 and 13 pursuant to Mr. Lawson's
13 objection.

14 THE COURT: Have a nice trip back to Charleston.

15 THE WITNESS: Thank you.

16 MR. LAWSON: No objection, Your Honor.

17 THE COURT: Next witness please.

18 MR. CLEMENTS: Your Honors, the State rests.

19 THE COURT: The State rests. All right, jurors,
20 I've got to take up a number of matters here now as a
21 matter of law. I'm required to try this case under
22 constitution rules. It's not under my rules,
23 constitutional rules. And this will take me some time to
24 do and so I'm going to release you for the evening and
25 we'll start back at 9:00 in the morning. 9:00. You may

1 leave now.

2 No one leaving but the jury. Have a good night's
3 rest.

4 (WHEREUPON, the jury was removed from the
5 courtroom at 4:45 p.m., and the following proceedings
6 commenced in open court.)

7 THE COURT: Motions by Defense please.

8 MR. LAWSON: May it please the Court.

9 THE COURT: Yes, hold it one moment.

10 THE DEPUTY: Could you please instruct some of
11 the witnesses. I got one sitting out here that's
12 trying -- was speaking to some of the jurors as they went
13 out and I instructed her not to do it no more.

14 THE COURT: Okay.

15 THE DEPUTY: It was on the Defense side. We
16 looked. I didn't want to bring it up a problem later.

17 THE COURT: All right. Do you know who the
18 person was?

19 THE DEPUTY: It's the lady -- she's sitting out
20 here still now, Your Honor.

21 MR. LAWSON: Could I just have one minute, Your
22 Honor.

23 THE COURT: Yes.

24 MR. LAWSON: Plus I need to try and find Mr.
25 Anderson.

1 THE COURT: Okay. Well, I need to identify this
2 person. I'm not going to let that take place. Now that's
3 not gonna to take place.

4 THE DEPUTY: I don't think she meant any harm,
5 but I didn't want it to become a question later.

6 THE COURT: I understand.

7 (Woman brought into courtroom.)

8 Ma'am, what is your name please.

9 UNIDENTIFIED PERSON: Yolanda Phillips.

10 MR. LAWSON: It's Yolanda Phillips, Your Honor.

11 THE COURT: Ms. Phillips, you cannot talk to the
12 jurors and that means absolutely no statement to jurors.

13 YOLANDA PHILLIPS: I didn't know.

14 THE COURT: Ma'am?

15 YOLANDA PHILLIPS: I didn't know.

16 THE COURT: You didn't know that?

17 YOLANDA PHILLIPS: No.

18 THE COURT: Nobody told you you couldn't talk to
19 jurors? Well, for the sake of everybody alive in the
20 courtroom there is an absolute prohibition against talking
21 to jurors. And if you talk to jurors I'm going to give
22 you jail time, point blank, jail time. That's not going
23 to happen because the State Supreme Court has ruled we
24 must have a pristine jury verdict. Now sometimes I don't
25 make myself clear. Sometimes I'm a little ambivalent or

1 equivocating in regard to my statement.

2 If you hadn't understood my statement raise your hand
3 up just like you do in church. Just like slide your hand up
4 and I'll try to make it clearer. Just slide your hand up.

5 (There was no response.)

6 THE COURT: If it occurs again it's gonna be
7 jail time in Marion County. Do you understand that,
8 ma'am?

9 YOLANDA PHILLIPS: Yes, sir.

10 THE COURT: Ma'am?

11 YOLANDA PHILLIPS: Yes, sir.

12 THE COURT: Thank you so much. All right, let
13 her go.

14 Counsel.

15 MR. LAWSON: If I can have just one second, Your
16 Honor.

17 (Pause.)

18 THE COURT: All right, motions for the Defense.

19 MR. ANDERSON: Your Honor, if it please the
20 Court, at this point in time counsel for Joshua Phillips
21 would make a motion for directed verdict. And Your Honor,
22 I'm sure you would have a plethora of cases up there
23 concerning directed verdict motions.

24 THE COURT: Not on that that I have a raft of
25 cases.

1 MR. ANDERSON: I'm not sure that is, Your Honor,
2 but I'm sure the court reporter knows. Anyway, Your
3 Honor, we would make a motion for directed verdict at this
4 time we. Do not believe the State has proved the case
5 beyond even the preponderance of the evidence.

6 THE COURT: Order: The motion posited by the
7 Defense is made pursuant to and by virtue of Rule 19 of
8 the South Carolina Rules of Criminal Procedure. That rule
9 has been applied and analyzed in a gaggle of cases
10 emanating both from the South Carolina Supreme Court and
11 the Court of Appeals as edified in State versus Williams,
12 303 S.C. 274. Quote, when ruling on a motion for a
13 directed verdict the trial court is concerned with the
14 existence or nonexistence of evidence, not its weight.
15 That rule is further stated with certitude in State versus
16 Branham 379 S.C. 487.

17 The State Supreme Court in State versus Kelsey
18 K-E-L-S-E-Y, 331 S.C. 50 inculcates the Bench and Bar.
19 Quote, if there is any direct evidence or any substantial
20 circumstantial evidence reasonably tending to prove the
21 guilt of the accused then the case is properly submitted to
22 the jury. End of quote.

23 For a number of years there was some degree of
24 disputation in regard to the writing of the State Supreme
25 Court and the South Carolina Court of Appeals as to the

1 exact statement of the circumstantial evidence rule in South
2 Carolina. In State versus Cherry the Court of Appeals held
3 an en banc hearing with all nine judges participating. As a
4 consequence of that en banc hearing the Court of Appeals,
5 divided in various opinions, with at least five opinions
6 indicating dissonance concerning the verbiage and language
7 of circumstantial evidence rule. Since I now serve as a
8 circuit judge I do not think it is narcissistic, but if it
9 is I don't care. I did write an opinion in regard to State
10 versus Cherry that was both a dissent and a concurrence,
11 concurring and part and dissenting in part. That's about as
12 ambivalent as you can be.

13 The State Supreme Court then took a look at this rule.
14 In State versus Grippon, which is now the absolute
15 circumstantial evidence rule in South Carolina, 327 S.C. 79,
16 the State Supreme Court articulated a proper circumstantial
17 evidence charge. And, so as to bring the matter to full
18 circle, in the final review of State versus Cherry reported
19 at 361 S.C. 588, the state court said, quote, we hold that
20 Grippon is the sole remaining charge to be utilized by the
21 courts of this state in instructing juries in cases relying
22 in whole or in part on circumstantial evidence. We hold
23 that the recommended language in Grippon is the sole and
24 exclusive charge to be given in circumstantial evidence
25 cases in this state along with a proper reasonable doubt

1 instruction. End of quote. This is the quintessential
2 paradigmatic circumstantial evidence case. Applying Grippon
3 and Cherry as I'm instructed to do by the State Supreme
4 Court, I deny the motion for directed verdict and will
5 submit this to the trial jury with the Grippon charge and
6 the reasonable doubt charge in regard to instructions to the
7 jury. And it is so ordered. All rights are reserved and
8 protected for purposes of review and appeal.

9 Counsel for Defense?

10 MR. ANDERSON: Your Honor, if it please the
11 Court.

12 THE COURT: Yes.

13 MR. ANDERSON: One of the last items the State
14 introduced when it came to the proffer, Your Honor, I
15 would — it has a paragraph in the proffer. I'm referring
16 to State's 88. Your Honor, there is a paragraph in here
17 that talks about a polygraph.

18 THE COURT: Yes.

19 MR. ANDERSON: I would like for that to be taken
20 out. I've spoken to Mr. Clements about that.

21 THE COURT: That's suitable; isn't it?

22 MR. CLEMENTS: Your Honor, I have no problem
23 with that. There was no testimony that he was asked to
24 take a polygraph, took the polygraph, and I have no
25 problem deleting that portion of the proffer.

1 MR. ANDERSON: That's on Page 2, Your Honor,
2 photograph two and hand it up to the Court.

3 THE COURT: All right. My ruling is that any
4 reference to a polygraph any form or fashion must be
5 extirpated or redacted from this document. And I would
6 ask you, Mr. Anderson, to cooperate with the court
7 reporter so as to get it done in some form or fashion
8 that's suitable to the Defense.

9 MR. ANDERSON: Yes, sir, Your Honor.

10 THE COURT: All right.

11 MR. CLEMENTS: Your Honor, if I might suggest,
12 we could take that page out, cut the page and copy it on
13 the copier deleting that paragraph and then stick it back
14 in.

15 THE COURT: Do it so that everyone is satisfied.
16 All right, Mr. Anderson.

17 MR. ANDERSON: Yes, sir.

18 THE COURT: I don't want you to be responsible
19 for this yourself so I certainly include the public
20 defender, but I am going to provide for a complete review
21 of his Fifth Amendment rights ---

22 MR. ANDERSON: Yes, sir.

23 THE COURT: ---on the record.

24 MR. ANDERSON: We would ask that you do that,
25 Your Honor.

1 THE COURT: I will do that under State versus
2 Orr. Are we ready to do that now?

3 MR. ANDERSON: Yes, sir.

4 MR. LAWSON: One moment. Just on the matter
5 whether he has a right to testify or not testify. We
6 haven't made a decision.

7 THE COURT: Oh, you haven't made a decision yet?

8 MR. LAWSON: No, sir, and I was going to ask if
9 we could talk with him and do that first thing in the
10 morning.

11 THE COURT: All right. Now lawyers, I'm gonna
12 do it at 9:00, not 9:05, not 9:10. I'm gonna do this at
13 9:00 because I don't like the jury waiting back there
14 wondering what the world we're doing so.

15 MR. LAWSON: And Your Honor, and it may be that
16 we can tell you before. Well, I mean, not before you
17 leave but I think ---

18 THE COURT: No, we'll do it first thing in the
19 morning; that's fine. But lawyers, you are experienced
20 with absolute exactitude in regard to the applicability of
21 this particular matter, but for your protection and
22 because of the duty imposed by the Court under State
23 versus Orr and Brown versus State and finally State versus
24 Torrence. Mr. Torrence received the death penalty when I
25 tried him in Lexington and has now gone on to an

1 ecclesiastical venue.

2 MR. LAWSON: And Your Honor, I would advise just
3 that we have discussed this and have been discussing it
4 with Mr. Phillips for a number of weeks now. It's not
5 something that we're just starting tonight, but now is do
6 or die.

7 THE COURT: That's correct.

8 MR. LAWSON: So it's really become a lot more
9 crystallized tonight right now, and I would just like the
10 opportunity to go back over everything that we've been
11 over.

12 THE COURT: I absolutely agree. Now I would
13 like to have a response from you, defense counsel, as to
14 other witnesses. Are you planning to call other witnesses
15 for defense, or have you made that decision?

16 MR. LAWSON: That would -- if we -- if we call
17 other witnesses I would think that we would also call the
18 defendant. If we decide not to call him we probably will
19 not call other witnesses either. It's all -- it all ties
20 together.

21 THE COURT: It is concatenated.

22 MR. LAWSON: Yes, sir. And Your Honor, and I
23 will let the solicitor know as soon as I know. I know I
24 can call him -- I have his cell phone. I can call him on
25 the way home tonight and let him know which way we're

1 going.

2 MR. CLEMENTS: So Your Honor, being that I don't
3 understand what con —

4 THE COURT: Concatenated. Concatenated is
5 connected, connected, and connected.

6 MR. CLEMENTS: So what I think that connects me
7 to is that in the morning, come what may, I need to be
8 prepared to do opening statements at 9:00, I mean, closing
9 statements at 9:00.

10 MR. ANDERSON: He can give opening if he wants
11 to, Your Honor.

12 THE COURT: Well, he — under the rule, you
13 know, depends on what you present. If you don't present
14 any testimony then you have the guarantee last. We'll
15 apply the rule. And I know this lawyers: We will analyze
16 exactly where we are tomorrow in the morning, that kind of
17 thing. And hopefully we'll have plenty of time for the
18 jury to analyze the matter if it's submitted to them
19 tomorrow before 7 p.m. tomorrow night. Now 7 p.m. I have
20 to recognize that I will be here and have to stay here,
21 but at 7 p.m. those people who are I suppose Spurrier fans
22 —

23 MR. ANDERSON: I don't know that they're
24 Spurrier fans, Judge; they're Carolina fans.

25 THE COURT: Have a good night's rest everyone.

1 (WHEREUPON, the proceedings were concluded for the day to
2 be reconvened at 9:00 a.m. on September 3, 2009.)

3 THE COURT: This is for general purposes insofar
4 as an issue that was posed yesterday. I've been so
5 fortunate to be asked to speak at CLEs at the law school
6 for judges and lawyers on a plethora of occasions.
7 Yesterday when the issue was raised about an autopsy
8 report I knew there was a case on point because in the
9 back of my mind I said, Anderson, you used that in a
10 lecture one time. The case is State versus Cutro,
11 C-U-T-R-O, 365 S.C. 366, 618 S.C. 2d, 890, 2005 case. A
12 unanimous Supreme Court a unanimous State Supreme Court
13 said autopsy reports are not hearsay under Rule 803 South
14 Carolina Rules of Evidence. Subsection 8 of this rule
15 excepts from hearsay public records and reports containing
16 matters. There is a duty to report. Autopsies are
17 required in cases of death if law enforcement deems it
18 necessary. Addition, subsection nine of 803 specific
19 excepts from Hearsay records of vital statistics including
20 reports of death if report thereof was made a public
21 offense pursuant to requirements of law. Autopsy reports
22 are required to be kept by the medical examiner's office
23 Section 17-5-280, period. We conclude evidence of autopsy
24 reporters was admissible under the Rules of Evidence, end
25 of quote. Just thought you might want to know about that

1 case. You probably already knew it. I'm just for the
2 record putting on there, Ms. Court Reporter, that I think
3 there was a case out there on the issue of admissibility
4 of autopsy reports.

5 All the jurors in the jury room? You're lacking one?
6 Check outside there and see if...

7 (Pause.)

8 THE BAILIFF: Everybody is here, Judge.

9 THE COURT: Got them all? All right, Mr. Lawson
10 and Mr. Anderson, what is the decision regard to the
11 defendant taking the stand or not?

12 MR. LAWSON: May it please the Court, Joshua
13 Phillips will not take the stand, Your Honor, nor will the
14 Defense present a defense in the case.

15 THE COURT: All right. Swear him, Ms. Clerk.

16 CLERK OF COURT: Raise your right hand.

17 WHEREUPON,

18 JOSHUA LEE PHILLIPS,
19 having been duly sworn by the Clerk of Court, testified as
20 follows:

21 THE COURT: Come forward and take this witness
22 stand. What is your full name.

23 THE DEFENDANT: Joshua Lee Phillips.

24 EXAMINATION BY THE COURT

25 Q Mr. Phillips, do you understand that you are on trial

1 for two counts of murder, two counts of armed robbery, and
2 possession of a weapon during commission of a violent
3 crime, you understand that?

4 A Yes, sir.

5 Q Okay. There is a basic constitutional right given to
6 you by the Fifth Amendment of the United States
7 Constitution. The Fifth Amendment states that a person is
8 not required to testify in a trial when a person is on
9 trial for murder. You are not required to take the stand
10 in this case. You understand that?

11 A Yes, sir.

12 Q And if you do not take the stand it will not be used
13 against you at all because I will instruct the jury that
14 they cannot use that against you and they cannot even talk
15 about that in the jury room. Do you understand that?

16 A Yes, sir.

17 Q You also have the absolute right to testify.

18 A Yes, sir.

19 Q You have the right to take this witness stand and
20 testify and present evidence to the jury. And you have
21 the right to testify in full but it will be limited to my
22 rulings as to what's relevant, and I would not allow you
23 to take the Fifth Amendment if you take the stand. You
24 understand?

25 A Yes, sir.

1 Q What is your decision in this case? Are you going to
2 testify or not testify?

3 A Not testify.

4 Q Is that decision not to testify made freely and
5 voluntarily on your part?

6 A Yes, sir.

7 Q Has anyone put any pressure on you in any way in regard
8 to that decision?

9 A No, sir.

10 Q Has anyone threatened you in any way in regard to that
11 decision?

12 A No, sir.

13 Q Have you discussed this matter with your lawyers in
14 detail concerning your Fifth Amendment right?

15 A Yes, sir.

16 Q Have you discussed it with them to your satisfaction?

17 A Yes, sir.

18 Q And you've asked them all the questions you had on your
19 mind?

20 A Yes, sir.

21 Q And your decision now is you will not testify?

22 A Yes, sir?

23 Q And you're satisfied with that decision?

24 A Yes, sir.

25 Q You understand it completely?

1 A Yes, sir.

2 Q Do you want to ask me any questions about your Fifth
3 Amendment privilege?

4 A No, sir.

5 Q Thank you, sir. Please go back over there.

6 MR. ANDERSON: Thank you, Your Honor.

7 THE COURT: You're welcome.

8 Order: Under State versus Orr, 304 S.C. 185, 403 S.C.
9 2d 623, a circuit judge is required to hold a hearing in
10 regard to the Fifth Amendment privilege in a case. Brown
11 versus State, 340 S.C. 590, 533 S.E.2d 308 explicates with
12 exactitude the Fifth Amendment privilege must be discussed
13 on the record with the defendant insofar as the exercise of
14 that privilege. Finally, State versus Torrence, 305 S.C.
15 45, 406 S.C. 2d 315 is relevant and controlling in reference
16 to the Fifth Amendment privilege.

17 Today I have held a hearing by taking testimony from
18 the defendant concerning the Fifth Amendment privilege. I
19 conclude without any doubt whatsoever that the defendant
20 understands the Fifth Amendment privilege; he has discussed
21 the Fifth Amendment privilege with specificity with his
22 lawyers; and that he now decides that he will not testify in
23 the case. I rule that the decision of the defendant not to
24 testify is made freely and voluntarily on his part after a
25 full and complete review of his Fifth Amendment privileges

1 with his counsel. And it is so ordered.

2 All right. The defendant will not present any
3 evidence; is that correct?

4 MR. LAWSON: That's correct, Your Honor.

5 THE COURT: All right. Under the rules of
6 course the Defendant will get the last argument under this
7 scenario. You understand that, Mr. Solicitor?

8 MR. CLEMENTS: We understand that, Your Honor.

9 THE COURT: The basic charge, I will use the
10 basic charge in regard to the pending charges here. I
11 will charge in depth the presumption of innocence rule. I
12 will then instruct the jury that the burden of proof is
13 upon the State to establish his guilt beyond a reasonable
14 doubt. I will define reasonable doubt by State versus
15 Manning, M-A-N-N-I-N-G, a murder case tried in Dillon
16 County. The State Supreme Court has ruled without
17 question that this is the proper definition of reasonable
18 doubt so I will use the State versus Manning charge. You
19 lawyers know that and I know, have it memorized.

20 I'll instruct the jury concerning the role of the jury
21 as to the facts and evidence in the case. I will give the
22 jury a detailed instruction concerning their evaluation of a
23 witness' testimony. I will give the jury a brief
24 instruction in terms of a person who has a past criminal
25 record testifying at trial. I then will go to a detailed

1 charge on the defendant not testify, and I will cover that
2 with specificity insofar as a charge. I will charge State
3 versus Grippon in regard to direct and circumstantial
4 evidence quoting the case in haec verba. I will give a
5 charge on expert witnesses which is efficacious in this case
6 because of the testimony of the pathologist. I will give a
7 charge on identification as to that issue in this case and
8 will give that with certitude.

9 I then will go to the charge of murder. I will
10 explain the charge of murder using of course the common law
11 definition but buttressing that with Section 16-3-10, which
12 is in fact the specific code provision that adopts the
13 common law rule in this state in reference to murder. I
14 will give to the jury the implied inference of malice which
15 is allowed now under the United States Supreme Court
16 decisions and of course under the precedent extant from the
17 state Supreme Court. I will give the jury a detailed charge
18 in regard to armed robbery and certainly will begin with
19 16-11-330 of the Code of Laws and work from there. Finally,
20 I will give the charge on possession of a firearm during
21 commission of a violent crime 16-23-490 and will use 16-1-60
22 as the definitional code provision identifying the crimes
23 that do constitute violent crimes under the law s.

24 O as to give absolute information to the lawyers in
25 the case I decline to charge voluntary manslaughter. There

1 is absolutely no evidence of voluntary manslaughter in this
2 case to say the least. The record extant at this point
3 simply presents and posits to the jury not guilty or guilty
4 of murder. In regard to armed robbery I will not charge
5 common law robbery because it's either arm robbery or not
6 guilty. And then the last charge is simplistic under the
7 statute in regard to possession of a firearm during
8 commission of a violent crime.

9 Any further requests from the State as to charge
10 information?

11 MR. CLEMENTS: Beg the Court's indulgence a
12 moment.

13 THE COURT: Yes, sir.

14 MR. CLEMENTS: Your Honor, that's everything
15 we'd ask for on a charge.

16 THE COURT: All right. Defense?

17 MR. LAWSON: No, Your Honor.

18 THE COURT: All right. This is just simply for
19 information only, how long do you intend to argue, Mr.
20 Solicitor, or have you kind of left that up in the air?

21 MR. CLEMENTS: Your Honor, I don't really know
22 but I'd rather ask for more time than I would need. This
23 is a lot of witnesses in this case, a lot of facts I have
24 to touch on. Your Honor, I would ask — I'd ask for 45
25 minutes to an hour, but I believe I'll be way shorter than

1 that.

2 THE COURT: Defense, any idea?

3 MR. LAWSON: May it please the Court, I like --

4 I don't like to argue longer than I ask my preacher to
5 preach 'cause I think I put people to sleep just like he
6 does or she does, whatever the case may be. And I would
7 do the same thing. I very seldom argue even into 30
8 minutes but I'd ask for 30 to 45 minutes, Your Honor.

9 THE COURT: All right. Let the record show that
10 I decline to limit the argument in this case. Ordinarily
11 I do place some time parameters on argument, but in this
12 case I have decided not to place any limitation whatsoever
13 and will apply what I call the Billy Graham rule. If you
14 can hold them beyond 45 minutes then go at it.

15 All right. Finally, verdict forms. I've got it here
16 in terms of the verdict, not guilty or guilty of murder on
17 count one. Not guilty, guilty of murder on count two. And
18 the count three of armed robbery, if I can find it. Count
19 four on armed robbery and count five on possession of a
20 weapon during commission of a violent crime, and my law
21 clerk has them in that order. And just simply checking,
22 Counsel, I got the original indictment in front of me so as
23 to make sure what we're talking about. Count one is murder;
24 it involves Maltonin Clarke. Count two is murder; it
25 relates to Angelique Bynum. Count three is the possession

1 of weapon during commission of a violent crime. That's
2 where it fits within the indictment. And count four is
3 armed robbery, and count five is armed robbery. Everybody
4 understand that?

5 MR. LAWSON: Yes, Your Honor.

6 MR. CLEMENTS: Yes, Your Honor.

7 THE COURT: Okay, all right.

8 MR. LAWSON: Your Honor, may we approach?

9 THE COURT: Sure.

10 MR. CLEMENTS: Your Honor, and we have one more
11 housekeeping issue, Your Honor. Yesterday you instructed
12 me to make sure -- and I don't know if Mr. Anderson and
13 Mr. Lawson had a chance to look at it. Mr. Anderson
14 raised the issue about the proffer had a paragraph
15 involving polygraph.

16 THE COURT: Yes, yes. Has that been done in the
17 way of curative action?

18 MR. CLEMENTS: Your Honor, I asked the court
19 reporter to go with me. I took that page out, made a copy
20 of it so she could keep original page for the record, and
21 Your Honor, I cut out that paragraph and then made a copy
22 and kind of slid everything up, Your Honor. And I would
23 just ask defense counsel to look at that right now and
24 make sure it's suitable and Your Honor look at it to make
25 sure it's suitable.

1 MR. ANDERSON: Your Honor, that's suitable with
2 the Defense.

3 THE COURT: Okay.

4 MR. CLEMENTS: Do you need to see it, Your
5 Honor?

6 THE COURT: No. As long as you lawyers agree
7 that's permissible from my standpoint. Everybody's
8 satisfied with that. Let the record show that. All
9 right, anything further?

10 MR. CLEMENTS: Nothing further from the State,
11 Your Honor.

12 THE COURT: Anything further from Defense?

13 MR. LAWSON: I'd like to approach, Your Honor.

14 THE COURT: Sure.

15 MR. LAWSON: Maybe if we can step in chambers it
16 may help, for advice.

17 THE COURT: All right.

18 (Court's Exhibit Number 1 was marked
19 and made a part of the record.)

20 (Pause.)

21 THE COURT: Mr. Lawson, you're recognized.

22 MR. LAWSON: May it please the Court, Your
23 Honor, my office has been involved in this case for since
24 the date it happened almost, and I met Joshua Phillips I
25 guess about a month after he was charged with this when he

1 came back for a bond hearing. I have been fully advised
2 of all the possibilities in this case. Your Honor, I was
3 given and have in my file a number of records relating to
4 Joshua's mental health and he had some major issues when
5 he was young and was under the health care of Pee Dee
6 Mental Health. I have discussed that with him in the area
7 of possible defenses that it may raise, but in this case
8 it — there is no way that the mental health issues become
9 a matter of defense based on my client's assertion to me
10 in relation to his not being present at the commission of
11 the crime, nor any history of any lapse of memory or
12 anything to that extent.

13 We have discussed it at length and in detail as to the
14 possibility of asserting a defense, and it was decided by
15 both Joshua and myself that it would not be a possibility or
16 beneficial in this case because of the assertion by him that
17 he was not involved in the case nor was he present at the
18 commission of the crime. And so as a result, we did not
19 pursue any issues in relation to mental health as it relates
20 to an insanity defense or in mitigation by that way and
21 that's the reason that we did that. And as I said, he and I
22 have talked about it a number of times and I think he
23 understands fully the situation and what we would have to
24 assert in order to make that a viable defense in this case.

25 THE COURT: Let that show for the record and let

1 me buttress that presentation by this statement: I have
2 had the experience, very positive experience, in the past
3 with Mr. Lawson in a number of major cases including a
4 death penalty case; and his experience convinces me that
5 he has reviewed with this defendant in detail this
6 particular issue and has come to a conclusion that is
7 certain proper and is supported in ever aspect at this
8 point in this trial.

9 MR. LAWSON: Thank you, Your Honor.

10 THE COURT: You're welcome. All right, are
11 there gonna be two arguments for Defense or just one?

12 MR. LAWSON: Just one, Your Honor.

13 (WHEREUPON, the jury was returned to the courtroom at
14 approximately 9:25 a.m., and the following proceedings
15 commenced in open court.)

16 THE COURT: Good morning, jurors. Everyone
17 feeling okay? Madam Forelady, give me your special
18 attention because you are responsible for using these
19 forms that I now explain to you jurors. All jurors,
20 please listen carefully. There are five verdict forms
21 that I need in this case, five verdict forms. The verdict
22 must be unanimous, not eleven to one, not ten to two. It
23 must be absolutely unanimous. Unanimity is mandated by
24 the constitution. So when you sign the verdict form in
25 each case, Madam Forelady, it is an assurance to the Court

1 that you have signed a unanimous verdict. Do not sign the
2 form -- I don't care what it is -- it must be unanimous.
3 Whatever the verdict is it must be unanimous.

4 Now the first verdict form I have is, it has the
5 caption of the case what we call the caption. State of
6 South Carolina, County of Marion in the Court of General
7 Session, the State of South Carolina versus Joshua Lee
8 Phillips, defendant. Then it has the verdict over to the
9 right has the indictment number, then it has count one.
10 Then the two possibilities are, one, not guilty. If you
11 find him not guilty of this offense. Possibility two is
12 guilty of murder. Now this relates to Maltonin Clark.
13 Count one relates to Maltonin Clark. Count one relates to
14 Maltonin Clark. It's not indicated on the verdict form, but
15 it's indicated as count one. But that deals with Maltonin
16 Clark. Count two is the same form in terms of its format
17 with exception it deals with count two. And count two is
18 the murder of Angelique Bynum in terms of the pending
19 charge. That's the pending charge that relates to Angelique
20 Bynum. Then number three, count three, is the charge of
21 possession o weapon during commission of a violent crime.
22 That is presented in that form. Not guilty of course, the
23 jury unanimously finds the defendant not guilty sign number
24 one. Or number two is guilty of possession of a weapon
25 during commission of have crime. If the jury unanimously

1 comes to that conclusion sign that form. You see the two
2 possibilities.

3 In terms of count four, it is armed robbery and that
4 of course relates to Angelique Bynum. And count five
5 relates to armed robbery in terms of Maltonin Clark. Now
6 these verdict forms are presented to you because I must have
7 the verdict in written form. Madam Forelady, you will use
8 the verdict forms and will sign. Once again, do not sign
9 until all twelve freely and voluntarily agree. That is
10 absolutely constitutionally mandated and required. Once
11 again, do not sign until all twelve come to the conclusion,
12 whatever the verdict is, it must be unanimous.

13 Mr. Solicitor, you're recognized.

14 MR. CLEMENTS: Thank you, Your Honor. If it
15 please the Court.

16 THE COURT: Well, for the record in terms of
17 bringing this matter to conclusion the Defense rests.

18 MR. LAWSON: That's correct, Your Honor.

19 THE COURT: And is ready to proceed at this
20 point.

21 MR. ANDERSON: Your Honor, we also renew our —

22 THE COURT: That is noted for the record —

23 MR. ANDERSON: Yes, sir.

24 THE COURT: ---with absolute reference back to
25 the grounds and reasons articulated.

1 MR. ANDERSON: Thank you, Your Honor.

2 THE COURT: You're welcome.

3 Mr. Solicitor.

4 MR. CLEMENTS: Thank you, Your Honor. Ladies
5 and gentlemen of the jury, I want to thank you. It's been
6 a hard four days; it's not over with yet. Y'all have been
7 watching and been observing and been listening very
8 carefully and very attentively, and I want to thank you on
9 behalf of the State of South Carolina and on behalf of
10 Joshua Phillips. Like every citizen the judge charged you
11 with early in his charge at the beginning that he is
12 presumed to be innocent until proven guilty beyond a
13 reasonable doubt, and that the burden of proof was on the
14 State represented by myself and Mr. Waller over there.
15 And y'all have listened carefully and it's about to go
16 into your hands, and you're about to be the judge of the
17 facts that you listened to. And I just want to talk about
18 those for a little bit.

19 I started to prepare a big speech for you today and
20 draw up some charts, and I thought, you know, there's no
21 need for me to do that because it's not about how great I
22 can argue at the end of this thing or how great Mr. Lawson
23 or Mr. Anderson can argue at the end of this. It's about
24 the facts of this case, and that's what it's about. And
25 that's what you got to decide. And all I can do is just

1 remind you and tell you the way I view the facts. And
2 Mr. Lawson and Mr. Anderson tell you how they view the
3 facts, but you're the one to determine what the facts are,
4 not us. You're the one to determine the weight that you put
5 on these facts. And Judge Anderson is gonna charge you at
6 the end on a lot of areas of law. One thing he's gonna
7 charge you on is that as the jury your duty is to weigh the
8 credibility, the believability of the witnesses; that you
9 can listen to and believe all of what a witness says, part
10 of what a witness says. None of what a witness says. And
11 that you have no friends to reward, no enemies to punish,
12 that you just simply judge the facts and bring back a
13 verdict that tells the truth.

14 Now one of my law professors when I was in law school
15 talked to me about trial advocacy, and when you're trying a
16 case as a lawyer and you get up and you argue a case. And
17 he told me, he says, Ed, if you got the law on your side you
18 argue the law; if you got the facts on your side, you argue
19 the facts. And if you've got both of them on your side you
20 argue both of them. And I said, well, professor, what do
21 you do if you don't have either one of them. He said, you
22 blow smoke. So I don't know if y'all have ever been in
23 church and had those funeral home, handheld funeral home
24 fans, well, you might need them today -- I don't know --
25 because I know that when I sit down I'm the last person

1 that's gonna speak for Maltonin Clark, Tio Clark, and I'm
2 the last person that's gonna speak for Angelique Bynum. And
3 then I know that the police are gonna be attacked. They're
4 gonna be attacked about they didn't do this and they didn't
5 do that and they didn't do the other. And I know that the
6 witnesses we put up on the witness stand that aren't law
7 enforcement officers, they're going to be attacked; that
8 they couldn't see, they don't know what they were talking
9 about; that they're lieing. They had some kind of deal cut;
10 that they drank too much; they smoked too much blunts. That
11 you know, they're trying to get something out of it for
12 themselves. All that is gonna come. Well, I submit to you,
13 just fan that smoke out the way and you judge things for the
14 truth that they are. You saw these people on this witness
15 stand. You saw their demeanor. And you judge their
16 credibility. Don't take what I say about it or anybody else
17 says about it. You judge their credibility because you saw
18 them, you heard them, and you know what was said.

19 Now let's get back to that morning that this terrible
20 thing happened. Had a couple of people trying to earn a
21 living running a club, cleaning up. Somebody comes in and
22 shoots both of them in the head and in the body to rob them.
23 Why? I'll tell you why? I'll tell you exactly why. You
24 got a copy of Conswella Smith's statement that you're gonna
25 take back to that jury room with you and you're gonna have a

1 chance to read it. And you heard it from her on this
2 witness stand. And you will see she tells you that Josh
3 Phillips, Little Scrappy, said, I'm not going home broke.
4 That's the reason why they were shot in the head. That's
5 the reason why they were put to death. 'Cause he wasn't
6 home broke. Now can you rob somebody and not kill them?
7 Certainly. You can rob somebody and not kill them. You can
8 put a mask over your face. You can tie a bandanna around
9 your face so nobody can see what you look like if you want
10 to and rob them and not kill them.

11 But what did Eric Moultrie say that Josh Phillips told
12 him. Josh Phillips said, when I rob somebody I lay my
13 victims down. Ladies and gentlemen of the jury, he lay Tio
14 Clark down. He lay Tio Clark down right here behind this
15 pool table by shooting him in the head and shooting him
16 through the back. We don't know which shot came first. He
17 might have shot him in the thigh and went down. And you
18 heard the testimony from Doctor Schandl that he had a
19 laceration across his head that she could associate with a
20 terminal fall. maybe he shot him in the leg, he fell, hit
21 his head on that pool table and then he comes up and shoots
22 him in the head. Or maybe he shot him in the head first and
23 then fired one more shot and went through his leg. I don't
24 know what happened first but I do know that Josh Phillips
25 laid him down.

1 Angelique Bynum, he laid her down right behind that
2 cooler. And you'll have the pictures. No need for me to
3 pull them out now and show them to you. I won't waste your
4 time on that. Y'all look on that in the jury room; you look
5 at the pictures. Where she is where she is behind that
6 counter and she fell over and she was shot in the head. And
7 you heard Ila Simmons, the SLED agent, talked about how it
8 was massive amounts of gunshot residue on her hands. She
9 was shot very close proximity, put to death right there in
10 her own place of business trapped in that corner as Josh
11 Phillips lay her down. And then she was shot through the
12 arm and the abdomen. Which one came first? I don't know.
13 But we know she laid down and both of them were laid down
14 with a .45 caliber slug to the head.

15 Blue bag, you'll see in the pictures. Blue bag was
16 there kind of on top of them. And you heard Jacqueline talk
17 about how it was kept up on top of that counter with the
18 sawed-off shotgun in it. You know, argument might be made,
19 well, they shouldn't have had that shotgun, it was illegal
20 to have a sawed-off shotgun. Well yeah, it's illegal but
21 that's got no relevance here. Why was it there? Hank
22 Anderson asked Jacqueline Love, why would you need a
23 sawed-off shotgun? I'll tell you why you need a sawed-off
24 shotgun in a little club like that with no security as
25 Jacqueline Love said for protection. You need a shotgun for

1 the Josh Phillipses of the world. That's why you would need
2 that shotgun. For the Josh Phillipses of the world that
3 come in and rob you and lay you down. Unfortunately she
4 couldn't get to it; she couldn't get it out of that bag.
5 She didn't have time. Two totally unnecessary deaths.
6 Totally unnecessary.

7 What did law enforcement do? They immediately went to
8 the scene. You have a hysterical lady come pulling up and
9 you heard the testimony of the officers. She came flying up
10 she slammed on the breaks she said and pulled in as soon as
11 she saw the marked cars there in the parking lot. Well, I
12 don't know what they're gonna say, but from the questions
13 and stuff it sounds like the Defense would want to blame
14 Jacqueline Love for the death of Angelique Bynum and Tio
15 Clark like she was a suspect. Well, ladies and gentlemen,
16 y'all know that's bologna. What sense does it make if
17 somebody was involved in a murder and armed robbery, what
18 sense does it make they leaving the scene and they see
19 police cars, that they're gonna slam on breaks and pull over
20 and say, well, let me tell them about it so they'll know
21 about it real soon and I'll make them think well it ain't me
22 and then I'll get away. That's -- that would be stupid.
23 What you would do is you'd drive slowly by them and go on
24 your way and they wouldn't know you had anything to do with
25 it hopefully. If you had something to do with it. But

1 Angelique Bynum and Tio Clark were not harmed in any way by
2 Jacqueline Love. She pulled — she got out of there as
3 quick as she could as soon as she realized what was going on
4 and was scared to death. And as soon as she saw police to
5 get help she pulled in there and told them in a hysterical
6 fashion they said. She was hysterical and upset and she
7 just wanted to go. Why didn't she stay 'cause she was in
8 police protection? She wanted to go; they needed to get to
9 the scene quick as they could. And they did.

10 Jacqueline Love didn't have anything to do with this.
11 Jacqueline Love was very fortunate, I think, that she
12 escaped with her life. If she had happened to be in there
13 cleaning up with them instead of sitting in the car waiting
14 on Angelique to finish, then we would be here today on a
15 triple homicide, not a double homicide. But thank the Lord
16 for Jacqueline that she was in that car and not inside that
17 building. She testified she went in there. They were
18 cleaning up and almost finished; they were getting ready to
19 mop the floor. And there were two individuals in that club.
20 One way in, one way out. You saw the pictures. Back door
21 padlocked with two pad locks. And she saw Josh Phillips,
22 Little Scrappy, the person she had talked to about his
23 tattoos, about his teardrop tattoos, talked to in the club,
24 observed him in the club, fully lit, the same Joshua
25 Phillips that she had waited on in the clothing store,

1 talked to there, recognized, knew who she was talking about,
2 and she saw him go in the club. So now you got three people
3 in the club. And only one comes out alive. You got three
4 minus two equals one. Simple arithmetic. This is not hard.
5 Three minus two equals one. And that one is Joshua
6 Phillips.

7 You listened to Jacqueline Love on the stand. You
8 heard the consistency that she stopped, told the police,
9 gave a description, went home back to Loris, pulled the car
10 behind the building. Defense wants to make it look like she
11 was hiding from something. Yeah, she was hiding from
12 something. She knew there were other people in the car.
13 They saw her. She knew she had talked to Scrappy in the
14 club, knew that was him, maybe he remembered talking to her
15 at the clothing store. Knew she was in Loris so she goes
16 and hides that car behind the house. Anything wrong with
17 what? Absolutely not. Well, the police, they're probably
18 going to be really criticized today, law enforcement. What
19 did they do? Detective Woods, he sent somebody to the car
20 to make sure they had Horry County process it, take the
21 swabs, do whatever they needed to do, do the DNA test. They
22 did what they needed to do even though they knew it was
23 probably not anything involved in this, but they made sure.
24 But what does she do once she got home and got her family
25 knew she was safe? What did she do? Immediately almost she

1 came back. It was about an hour. They said she was back at
2 the scene checking on her loved one Angelique Bynum, check
3 on her friend Tio Clark, coming back to the scene. She knew
4 it was safe. She had family members to support them 'cause
5 she was scared to death. But she came back. And what did
6 they do? They give her a gunshot residue test. What was
7 it? Negative. They talked to her. They got her
8 statements. They got -- was anything inconsistent with
9 anything she said? No, nothing inconsistent. Not any
10 inconsistency whatsoever. Defense may want you to believe
11 there was something inconsistent, but just because you give
12 a brief story when you're upset and hysterical, then you
13 come back and add details and you don't contradict yourself,
14 is that inconsistent? That's not inconsistent, is it? You
15 just add more details. You just add more details.

16 Now let me give you an example about that. To show
17 you what's not contradictory, what's not accident. The
18 judge has admonished you. Under the law you cannot talk
19 about this case with anybody. You cannot even talk about
20 this case with each other until it goes in the jury room and
21 the judge sends word to you you can begin your
22 deliberations. And then once you deliberate and once this
23 case is over with, it's okay for you to talk about it if you
24 want to, but if you don't want to you don't have to talk to
25 a sole about it. Well, after this case is over, when you go

1 home and your loved one may say, well, tell me what you've
2 been doing all week. Now you tell them a little bit because
3 you're tired, you're going in getting in the shower, and
4 then you come back later and y'all sitting around eating and
5 then you tell them a lot more details. Well, those are two
6 different stories, right? One is a brief story and the
7 other one got a whole lot more details. Have you
8 contradicted yourself? Have you been inconsistent? No, you
9 haven't. Jacqueline Love is not inconsistent. Jacqueline
10 Love is not contradicting herself. You heard. You heard
11 the different things she told. She added detail and added
12 detail. You answer for yourself. You think she
13 contradicted herself or she was inconsistent? I would
14 submit to you she's not inconsistent. I would submit to you
15 she's telling the truth. She's telling the truth. She came
16 back to the scene and gave a gunshot residue test. They
17 talked to her, asked her for a description of the suspect.
18 She saw him run in. She saw him run out. And she described
19 him because she had full opportunity to observe him and talk
20 with him and could identify him. So what did they do? They
21 prepared a photo lineup and they brought it to her. And you
22 heard Detective James, she immediately said, that's him, and
23 signed it and dated it and put the time on it. 9/29/07,
24 8:30 a.m., Jacqueline D. Love. Is there anybody else on
25 here with vitiligo? No, there's not. There's not. But did

1 she have any hesitation? No. Did she have opportunity to
2 observe him, know what she was talking about? Absolutely
3 yes. And that's who she ID'd. And that's who they began to
4 look for immediately. And Defense is trying to make issue
5 about, well, you didn't do this, you didn't do that, didn't
6 put out a bolo. Well, somebody put out a bolo because you
7 heard from the CADD report there was a bolo put out again to
8 all units. And I can't remember the exact time but they
9 said from the stand -- maybe you remember it. Somewhere
10 around 10 or something. So there was at least two bolos put
11 out, and they began to look for Josh Phillips. Did they
12 find Josh Phillips in Marion County, Horry County? Did they
13 find Josh Phillips? No, they didn't. Who found Josh
14 Phillips? Law enforcement in the State of Kentucky found
15 Josh Phillips. And you heard from Sergeant Mat Godsey from
16 this stand. They had fliers who he was. They looked for
17 him. They found him, came up on him, asked him who he was.
18 He gave them a fake name. Why would he give name a fake
19 name if he didn't have something to hide. And then he saw
20 the fliers and he said, well this is you. And he knew the
21 jig was up. But he still tried to play it off. Well, yeah,
22 that's me, but what's this all about, what's all this about.
23 Put your hands behind your back; I'll explain it to you
24 later. What does he do? He flees again, and they have to
25 go pen him up in the attic of an abandoned house. He won't

1 come down. They shoot up pepper spray and pepper ball, and
2 he's trying to kick his way out through the walls and get
3 away and then he falls through and they take him into
4 custody. There's an old saying that the guilty flee when
5 none pursue. And he fled all the way to Kentucky. And I
6 would argue to you, ladies and gentlemen of the jury, that
7 that in and of itself is conscienceness of guilt. That is
8 conscienseness of guilt that he fled all the way to
9 Kentucky.

10 Jacqueline Love I.D.'d him. She saw him in the
11 clothing store. She talked to him in the club, talked to
12 him about his teardrop tattoos, observed him in the club, in
13 the lit area of the club. She saw him going in to the club,
14 had enough light to see him, knew it was him, laid her head
15 back listening to music, window rolled up, car running, air
16 conditioning on. I hear some pops. Hear some pops. And
17 you know, she didn't really think anything about it she
18 said. And then she noticed the car, somebody sticking their
19 head out, she said is waving. Jason Phillips said he wasn't
20 waving, he was looking out to see what's going on. Well, I
21 believe he was waving. What are you doing, what are you
22 doing? Or either maybe he knew what he was doing; I don't
23 know. But he was there. And then she thinks, man, that
24 might be gunshots. So what did she do? She pulls up. And
25 you can look in the pictures. And you can see, and you

1 know, saw those oversized stickers make it look like there
2 wasn't a whole lot of room. But she had car backed up,
3 compact car. She pulls out she says at an angle. Pulls out
4 where she can look through. And I just want to ask you,
5 when you go in your jury room, that door is open, before you
6 walk in there stand about here and look through and see what
7 you can see all the way to that back wall. You look at the
8 pictures. That's about the same distance to that bar. You
9 can say this is the screen door and this is the interior
10 door —

11 MR. LAWSON: Objection, Your Honor. He's —

12 THE COURT: Just a second. All right, he is —

13 MR. LAWSON: —asking the jury to basically
14 view the scene without the scene.

15 THE COURT: The lawyer can, in fact, present
16 suppositional inference to the jury provided it's
17 identified as an example or simply for illustrative
18 purposes so stay within that rule.

19 MR. CLEMENTS: Thank you, Your Honor.

20 Just in an example, that's what I'm doing. This is an
21 example. Look and see if you can see, you know. Look and
22 seen if you can see it from here to that back wall. I
23 submit to you you can. And she looked through her car
24 window and looked and saw Jason Phillips behind that counter
25 where nobody goes, unless they're working there, fumbling

1 around. What was he fumbling around for? He was getting
2 money. He was stuffing money in his shoe, a shoe, and
3 grabbing some other stuff, a CD case Conswella said so he
4 could come running out. Well, where did he get shoes from?
5 I don't know. I do know in this picture Angelique Bynum is
6 barefooted. But they said he came out with a shoe and some
7 money. That's what Jason said; that's what Conswella said.
8 And she saw that and didn't see Angelique and knew she had
9 heard those popping sounds and saw him, teardrops, two
10 teardrop tattoos, and said I gotta get out of here. And
11 that probably took, you know, the speed of thought is what?
12 Fastest thing you can think of. Looks, thinks, gone. That
13 doesn't take any amount of time. And what did Jason
14 Phillips say and what did Conswella Smith say? Conswella
15 said, she almost hit us. He just got out of there. Jason
16 Phillips said, she sped off. He said he heard five
17 gunshots. He knew what gunshots were and she -- he figured
18 she heard that; she's gone.

19 Does the story make sense? That's what you got to
20 determine. Is she credible? Is she believable? Does the
21 story make sense? Has she got some reason to lie? She
22 doesn't have any reason to lie. Has she got some reason to
23 lie on Josh Phillips? No, she got no reason to lie on Josh
24 Phillips. Everything she did makes sense to me. You answer
25 the question, does it make sense to you what she did. And I

1 believe you will say that it does make sense. And it makes
2 sense that she could see him. It made sense that she sped
3 off. It made sense that as soon as she saw police she
4 stopped and told them. And it made sense to me that as
5 scared as she was that she went home to the safety and
6 comfort of her family and then immediately came back. That
7 all makes sense to me. Does it make sense to you? If it
8 makes sense to you do you believe her? And if you believe
9 her, Josh Phillips is guilty. Three minus two equals one.

10 Conswella Smith, you know, there's a lot that can be
11 said about Conswella. You can say she got a bad history
12 with the law. You can say, good Lord, that woman drinks a
13 lot. You can say, she sure does smoke a lot of blunts. She
14 don't need to be doing that. You can say, you know, she
15 suffers from some mental retardation; she's on SSI. But you
16 know, there's -- I would submit you there's one thing you
17 can't say about Conswella Smith. You can't say she's a
18 liar. If I ever saw anyone as brutally honest it was
19 Conswella Smith. I ask you when you're back in that jury
20 room I ask you to ask yourself if you agree me with that.
21 You agree that she was brutally honest. I mean, she told it
22 all, the good, the bad, and the ugly on herself. And she
23 told that Josh Phillips wasn't going to go home broke. She
24 told Josh Phillips ran out, had a shoe in his hand, and had
25 a CD case, had all these other things and later on kept

1 talking about anybody mention my name in this I'm gonna kill
2 'em, I'll burn your house down. And Mr. Anderson challenged
3 her greatly, as he should, doing his job, a good lawyer.
4 And Mr. Lawson is a good lawyes. He challenged her and she
5 just answered truthfully on everything. Well, he got, you
6 know, it ain't no big deal for her to see a gun. Worried
7 her a little bit but she was scared. But you know, said go
8 on to sleep, he just tripping, go on to sleep, so she went
9 to sleep. That was her environment she was kind of used to.
10 And she said to Judy Barker, heard somebody racking a
11 shotgun, like racking a shotgun back behind her.

12 (Indicating with gun.)

13 MR. CLEMENTS: What was that sound she heard
14 behind her? I'll tell you exactly what that sound was,
15 ladies and gentlemen. That was the sound of preparation
16 to lay somebody down. That was the sound of preparation
17 to lay somebody down. Conswella, y'all believe her or
18 not? The judge is gonna tell you, you can believe all
19 what somebody says, part of what somebody says, none of
20 what somebody says. What does she say matches up to
21 everything else we know in this case? I would submit a
22 lot. A lot.

23 Jason Phillips. Jason Phillips, he's out partying.
24 He was honest. I was smoking blunt. I was popping some
25 pills, and I was drinking. I wasn't as tore up as Reggie.

1 Reggie was to tore up he passed out; he doesn't know what's
2 been going on. You know, Defense may ask you when they get
3 up, where's Reggie. Reggie was passed out drunk. Jason, no
4 criminal record, never been convicted of anything, told you
5 he had some dispute about trespassing or something but it
6 was dismissed but no conviction. He was honest about that.
7 And he says Jason had money in a shoe. He had this other
8 stuff he had stolen and he was threatening Jason. Jason
9 said -- to me he's scary. You remember him saying that on
10 the witness stand? To me he's scary. And they went after
11 and dropped off Reggie. And Conswella, they went and got
12 gas and they were -- went and looked for him; they weren't
13 there so they headed on back to Conway to Conswella's house.
14 They were on 501 and what does he say? Josh threw the
15 pistol out the window and threw the clip out the sunroof.
16 And they took that pistol, they found that pistol, Martin
17 Bell, found that pistol in the middle of all the snake
18 skins. Chris Smith spotted it. And there was a bullet
19 still in the chamber. You know, somebody might could
20 criticize him about that. He didn't send the gun with the
21 bullet. Well, you know, he was smart. That gun was cocked;
22 that gun was rusty; that gun was not safe. Had a bullet in
23 the chamber, and that gun already killed to people we know;
24 didn't need to kill anybody else or hurt anybody else. So
25 he shot that bullet and sent that cartridge and that bullet

1 to SLED. And you got this chart, you can take this chart
2 back with you and here is the little legend here Eddie
3 Porter prepared. Shows you where he found the shell casings
4 at, and those are in the pictures. Those shell casings,
5 items 1 through 20. Amy Stephens testified yesterday.
6 Eddie Porter brought back 1 through 20. SLED, the other --
7 all the other items after that were sent by Marion County.
8 You heard from different witnesses like Eddie Sawyer about
9 chain of custody and all those issues. And item 42, the
10 shell casing, Martin Bell retrieved after he shot that gun
11 and the pistol item 43, all that went to SLED and those
12 items were tested by Ken Whitler. And he said, you know,
13 out of the three, out of the -- excuse me, out of the five
14 cartridges, two he could say were shot by this weapon and
15 three, including item 42, the cartridge that Martin Bell
16 shot out of that gun, it was inconclusive. And he explained
17 to you why, you know, sometimes you can't get a clear match.
18 But you got three that could have been shot by -- can't say
19 they weren't but can't say they were -- but they had to be
20 shot by some 45 weapon similar to that or that one. And
21 two, they are at the scene where these two victims were
22 murdered, were shot by that 45 that Jason Phillips saw Josh
23 Phillips throw out the window and told law enforcement
24 vicinity and they found it.

25 And one more thing I want to tell you about this gun.

1 When you take it back in there I want you to look at it. It
2 says Republica Argentina Armando National. I'm not like a
3 lot of people. I have trouble with English much less some
4 foreign language, but it says on the other side, pistola
5 automatica. I don't know, but you ask yourself when you go
6 back there, does that sound like Spanish to you. Now we
7 know Argentina is a long way away, but it sounds like
8 Spanish. What's the closest Spanish speaking country to our
9 boarder? Mexico. And what did Eric Moultrie say that Josh
10 Phillips told him. I shot them with a Mexican 45. I shot
11 him with a Mexican 45.

12 Eric Moultrie, I know he's gonna be attacked. He had
13 a proffer agreement with the Horry County Solicitor's
14 Office. And was he given some kind of deal he testified
15 under oath, no, just told me to tell the truth. But he was
16 honest. It will be nice if it helps him; he hopes it helps
17 him. Well, I'll -- you know, honestly I hope it does too if
18 he told the truth. And ladies and gentlemen of the jury,
19 how would he know anything about anything unless Josh
20 Phillips told him. And he told you from this witness stand,
21 he says, all I can do is tell you what he told me, I don't
22 know if it's truth or not, I just gonna tell you what he
23 told me. He said he was doing some kind of rap concert at
24 the beach. I don't know he said a cousin said he wanted --
25 had called him up and asked him to do a lick. You know,

1 Mr. Anderson asked him, well, there'd cell phone records if
2 that was true; wasn't it? Well, I don't know, he might have
3 called him on his land line, might not have called him on
4 the cell phone, you know. But he said, well I don't know,
5 you know, I don't know if that's true. I just know that's
6 what he told me. And he said, I didn't need any money but
7 he said he went in and he shot them and robbed them with a
8 Mexican 45 and that he always laid his victims down. Well
9 can you believe Eric Moultrie? That's your job, judge the
10 credibility of the witnesses. You know, he was just made a
11 deal and, hey, I know something, I'll come tell the truth.
12 And he was honest about his prior record. He was honest
13 about all that. What would he have to gain from lying when
14 his whole deal says he's got -- his written deal says he's
15 got to tell the truth. Well, I believe he told the truth,
16 but it doesn't matter what I believe. It matters what you
17 believe so, you know, test what he said and see if it
18 matches up with what else we know in this dis. See if it
19 matches up with what else we know, and if it does, has that
20 got a ring of truth to it?

21 And your whole job is to sit here and judge the
22 demeanor of everyone. You know, the witness stand watch and
23 to watch and observe what's going on. You know, I hope you
24 watched Josh Phillips face when Mr. Moultrie came in this
25 room. I hope you did. I hope you saw that body english,

1 that body language. There's a lot more I can tell you.
2 There's a lot of issues in a case like this. There's all
3 these details. But y'all are smart, intelligent people and
4 y'all have been listening. And I just want to tell you to
5 look at this chart, look at this chart, see if you thought
6 law enforcement did as bad a job as Mr. Lawson and
7 Mr. Anderson want you to think they did.

8 And they went all the way down here and they found
9 somebody's I.D., and they made sure that that person wasn't
10 a suspect. And they did a gunshot residue test on him and
11 that was negative, Mr. Gaffney. They did everything they
12 could do in this case. This is not CSI; this is not
13 television. This is this real life. So I want you to look
14 hard at the evidence and see what's there. We don't have an
15 eyewitness that was in this building when this happened. I
16 don't think there was any way possible for that to be
17 because if there was an eyewitness in that building Josh
18 Phillips would have laid them down too. We know he had at
19 least one more bullet because Martin Bell found it in the
20 gun in the chamber when they found the gun so we couldn't
21 have an eyewitness. We got a lot of direct evidence and we
22 got a lot of circumstantial evidence, and Judge Anderson is
23 gonna charge you on what circumstantial evidence is and what
24 direct evidence is. And it's common sense, folks, you know.
25 You go outside and you see a big puddle of water down at the

1 bottom of the stairs and you know somebody dumped that water
2 there or something sprang a leak, you know. There's more to
3 one explanation for it probably but there's one explanation
4 that's gonna make sense. You got to take the circumstantial
5 evidence in this case and see if it makes sense. Josh
6 Phillips runs in; you hear loud noises. Josh Phillips runs
7 out. Angelique Bynum is dead; Tio Clark is dead. Both of
8 them shot in the head and shot in the body. Shell casing,
9 44, two of them match a Mexican 45. Two of them could have
10 been fired by a Mexican 45. You got a shell casing that we
11 know came out of a Mexican 45, and it tested that it could
12 have come out of that Mexican 45. We know Joshua Phillips
13 threw that gun out the window on 501 crossing the bridge at
14 Arial's crossroads close to there and law enforcement found
15 it. You know all those circumstances. You know Jacqueline
16 Love recognized and knew Little Scrappy, saw him run in, saw
17 him run out. He goes in. There's only two in the building.
18 He comes out. There are two bodies that are left.
19 Circumstantial evidence, simple arithmetic. Three minus two
20 equals one.

21 Jason Phillips in the car with him. He runs out with
22 shoe with money. Throws out the gun. Jason's scared of
23 him. Conswella thought he was tripping. I'm gonna burn
24 y'all house down. Anybody mention my name I'm gonna kill
25 'em. And then they all stick around. Josh Phillips

1 hightails it to Kentucky. The guilty flee where none
2 pursue.

3 There's only one verdict that makes sense in this
4 case, ladies and gentlemen. There's only one verdict that
5 tells the truth. Josh Phillips is guilty for the murder of
6 Tio Clark. Josh Phillips is guilty for the murder of
7 Angelique Bynum. He's guilty for the armed robbery of both
8 of them and he's guilty for possession of a weapon, a
9 firearm, during the commission of a violent crime. And
10 Judge Anderson is going to define to you what are violent
11 crime. And I submit to you that murder is a violent crime
12 and armed robbery is a violent crime. That's the only thing
13 that makes sense. Now you know what, somebody can criticize
14 me all day long and tell you all the things I could have
15 done better or different in this trial. Hey, they'd
16 probably be right in some things. I know I could have done
17 better, but I did my job. Whatever your verdict is I did my
18 job. Law enforcement can be criticized and say they didn't
19 do this, they didn't do that in this case, and they should
20 have done this and they should have done that. Yeah, you
21 can always be criticized but I'm gonna tell you they did
22 their job. They found their suspect and interviewed their
23 witnesses. They followed the evidence. They collected the
24 evidence. They preserved the evidence. They did what they
25 needed to do, and they brought the case to me and we brought

1 it to you. And witnesses can be torn apart. You can call
2 them a drunk; you can call them a pot head. You can call
3 them, you know, somebody's broken the law. You can call
4 them a jail house snitch. But you test what they say, and
5 even if all those things are true you can't call them a liar
6 because they didn't lie, ladies and gentlemen of the jury
7 and you know that. You judge their credibility, and you
8 come back with a verdict that tells the truth. And the only
9 verdict that tells the truth in this case is guilty. Thank
10 you.

11 THE COURT: Mr. Lawson, you're recognized.

12 MR. LAWSON: May we take a brief recess, Your
13 Honor, to —

14 THE COURT: Well, let me see if the jury — you
15 want a short recess or is everybody okay? Everybody okay?
16 You ready to go forward? Do you need a recess, Counsel?

17 MR. LAWSON: I'm —

18 THE COURT: All right, jurors, please go to the
19 jury room.

20 (WHEREUPON, the jury was removed from the
21 courtroom at 10:15 a.m., and court was in recess.)

22 THE COURT: Bring the jury out.

23 (WHEREUPON, the jury was returned to the courtroom at
24 approximately 10:24 a.m., and the following proceedings
25 commenced in open court.)

1 THE COURT: Mr. Lawson, you're recognized.

2 MR. LAWSON: May it please the Court.

3 THE COURT: Yes, sir.

4 MR. LAWSON: Mr. Solicitor. Madam Forelady,

5 ladies and gentlemen of the jury, I take this opportunity

6 to thank you. I know it's been a fairly long week. It's

7 been a very crucial week for Joshua Phillips, and we want

8 to thank you for the time and attention that you have

9 taken in listening to the evidence and in what you will do

10 when you go back into your jury room to sit and act as

11 judges of the fact. At the conclusion of my argument the

12 judge will charge you the law and at that point you will

13 then be released to your jury room, and shortly thereafter

14 you will have the exhibits and you will begin your

15 deliberations. As indicated in previous remarks and in

16 opening statement, in this case as in any case in this

17 country, when a citizen such as Joshua Phillips is charged

18 with a crime then the government has to come forward with

19 evidence to prove guilt beyond a reasonable doubt to you,

20 a body of citizens that are seated at the request and at

21 – with the approval of both the government and the

22 defendant who is charged. Once you're seated then you

23 become the total and absolute judges of the evidence in

24 this case. Now the judge rules on the admissibility,

25 whether or not evidence comes in to the case as a matter

1 of law. You on the other hand can look at that evidence
2 and rule on it as a matter of evidence as to the weight
3 and sufficiency of that evidence in establishing or
4 failing to establish guilt beyond a reasonable doubt. The
5 judge will give you a detailed charge at the end of these
6 arguments as to each and every area of the law that you
7 will need to be concerned with in your jury room and to
8 the individual charges with which Josh is charged today.

9 And in each case there are certain elements to the
10 crime and the Government has the duty to prove to you by the
11 evidence beyond a reasonable doubt each and every element of
12 the crime. If their proof falls as to any element of any
13 offense then the defendant, in this case Josh Phillips, is
14 entitled to a verdict at your hands of not guilty. If on
15 the other hand the Government has brought forth evidence to
16 establish guilt beyond a reasonable doubt as to each and
17 every element of each and every crime, then likewise, you
18 have a duty to find Joshua guilty in the case if you believe
19 that the evidence is proof beyond a reasonable doubt. Proof
20 beyond a reasonable doubt, worry about how in the world, or
21 what are we gonna determine and how we determine a
22 reasonable doubt, a doubt someone said a doubt from which
23 you can give a reason, which we all learned in grammar
24 school not to use the term to define the term but we tend to
25 want to do that. It's evidence that causes a reasonable

1 person to hesitate to act. If at the conclusion of the
2 evidence you're firmly convinced that the Government has
3 produced evidence that proves guilt beyond that reasonable
4 doubt, then it's your duty to render a verdict of guilt. If
5 on the other hand, you feel that there is -- that you are
6 not firmly convinced by the evidence beyond a reasonable
7 doubt, then it is your solemn duty to find Joshua Phillips
8 not guilty in this case.

9 Now the prosecutor wanted to say that I was going to
10 get up and I'm gonna attack law enforcement and I'm gonna
11 attack this witness and I'm gonna attack that witness. No
12 matter how much I may want to I'm not gonna attack anybody.
13 But what I am gonna do is explain to you in my mind why
14 there are problems with the case presented by the
15 Government, why there are problems with the investigation
16 that was done, and why I think you as reasonable jurors will
17 have a reason to doubt why you will hesitate to act in the
18 discharge of your duty as it relates to finding Josh
19 Phillips guilty or not guilty. I believe that because of
20 things that were done or things that weren't done that there
21 are reasons to hesitate to act, more than sufficient reasons
22 hesitate to act.

23 Now, am I gonna call people liars? Not my job. My
24 job is to point out to you discrepancies, inconsistencies,
25 things which I believe may lead you to understand that a

1 witness may not be lying but may be confused. For example,
2 there is evidence in this case that Ms. Love said there were
3 two people that she saw in the car. There's also evidence
4 that there were, in fact, three people in the car while the
5 perpetrator was on the inside. That's from the people
6 inside the car. Conswella was driving. Jason was in the
7 car. Reginald was in the car, and supposedly Joshua was
8 inside. That's three people in the car and one inside.
9 Ms. Love saw two people in the car. Now is she lying about
10 seeing two people and not three? Is she purposely telling
11 you that she only saw two people so as to deceive you or to
12 deceive me or to deceive the Court? Do you think that that
13 was an intentional lie or that the other witnesses on the
14 other hand were lying about who was or was not in the car?
15 Maybe there were only two in the car. If that's the case
16 then maybe Joshua wasn't in the building. Maybe he was gone
17 long before. Now I say that because I don't want for you to
18 look at me and think that I am here with the sole duty and
19 sole purpose to go through this case and jump up and down
20 and holler and scream about the job that was done here, the
21 job that was done there. I will say this: Now this, the --
22 just for example, the photo lineup. When you do a photo
23 lineup what is the purpose? It's to identify an individual,
24 identify one individual out of that photo lineup. Now, I
25 want you when you get in your jury room you take a look at

1 this photo line-up and you tell me in your opinion if you
2 think that this is suggestive, suggestive in that it directs
3 the taker of this photo line-up to an individual as opposed
4 to some other individual. Does it look to to you like maybe
5 if I was looking at this I would immediately point there
6 because there is something on this picture that's not on any
7 of the other pictures. That's what we call a suggestive
8 lineup. And what is the critical point with this? At this
9 point when this was done on the 29th, February (sic) the
10 29th, the same day of the offense, a name was attached to a
11 suspect Joshua Phillips. From that point on no one else was
12 suspected, no one else was investigated, no other leads were
13 followed. Nothing else was done other than to establish the
14 guilt of this person, and that was early on.

15 Let me tell you how quickly, as far as law enforcement
16 was concerned, this case was solved. This case was solved
17 before 5:15 because by 5:15 which it happened supposedly at
18 5:00 out at Nichols Night Life at which point Ms. Love comes
19 in to town, sees three police cars, stopped, says so and so,
20 says something's happening out there. I heard some pops
21 like a broom falling or whatever. Suspect -- the person
22 came out and there was a gold jeep Cherokee Laredo with
23 three, two, three, four people inside, and not one do we
24 know. And from the testimony we know -- I did not hear one
25 officer say that they put out a call to have this vehicle

1 stopped. Later in the testimony we find out from Jason that
2 supposedly the Cherokee runs out of gas and they go to Sav
3 Way to get gas. Well, I wonder if Sav Way have cameras? Of
4 course they have cameras. They have cameras on the gas
5 tank? Of course they do. The driveway —

6 MR. CLEMENTS: Your Honor, I would object to
7 arguing facts not in evidence. That's not been
8 established.

9 THE COURT: Once again, I will allow him to use
10 examples in regard to a presentation of suppositional type
11 illustrations with the caveat that that's what you're
12 talking about.

13 MR. LAWSON: Thank you, Your Honor.

14 THE COURT: All right.

15 MR. LAWSON: Now if I'm not mistaken I believe
16 that Mr. Jason Phillips did testify they went and got gas
17 at the Sav Way as it relates to anything any investigation
18 that was done from there that we know of none; there was
19 none for our purposes. There was none; we don't know.
20 And why is it so important to me that that Jeep Cherokee
21 get stopped? It's because I want to know who's in there,
22 as should you, as should the police, as should anybody who
23 wants to solve this case. But as of about 7:00 that
24 morning when they come back and get the statement, and
25 it's interesting. Now we -- we don't have -- we have all

1 handwritten statements, some written out by law
2 enforcement, but none in relation to question and answer.
3 We know -- do know that in some cases there's two hours
4 between one statement and the next statement or between
5 the Miranda warnings and the actual writing of the
6 statement. Was there an interview in the meantime? Was
7 there a conversation with this individual before they give
8 this handwritten statement? Was there information passed
9 back and forth between them whoever was interviewing him
10 and whoever was talking to him during the time before or
11 she or he wrote the statement? Was information,
12 additional information made available? I don't know
13 because nobody took notes; nobody wrote incident report.
14 Nobody did anything that normally you associate with the
15 doing of the investigation of a major crime called
16 homicide or murder. One of the most brutal things that
17 you can be charged with, and the Government has all the
18 resources to conduct investigation. And in this case
19 every investigative situation that was done leads away
20 from Joshua Phillips. All forensic evidence leads away
21 from Joshua Phillips. A lot of blood in this case. The
22 perpetrator of this crime allegedly behind the counter
23 with the victim Bynum also behind the counter with a large
24 amount of blood fumbling around, looking around, searching
25 for something.

1 Do you think the probability is that blood would have
2 gotten on that individual? Do you think that the killer
3 clothes would have had the victim's blood, either Ms. Bynum
4 or Mr. Clark. What do we know about the clothes of Jason or
5 Joshua Phillips? Joshua Phillips' clothes were tested by
6 the DNA laboratory at SLED, and they were tested negative
7 for the victim's blood, either one, neither one. None of
8 their blood found on anything of Joshua Phillips'. That
9 defies reason in this case. The prosecution and the -- I
10 think that Agent Porter, the crime scene investigator from
11 SLED, actually said that it was very tight behind the bar,
12 very little room, very little room back there. The victim
13 that was back there is the one whose hands had a large
14 amount of GSR, gunpowder residue. If you remember, the lady
15 testified that it was a tremendous amount of GSR indicating
16 a close connection between that victim and the gun. If
17 that's the case, I submit to you not only was the gun close
18 to the victim, the shooter was close to the victim. The
19 closer the victim is to the shooter the more likely it is
20 that the victim's blood should be on the shooter and the
21 less likely it is that you're gonna walk out of there free
22 and clear of all forensic evidence. You're looking around
23 behind the bar; you're touching things. There were
24 fingerprints lifted. There were fingerprints lifted; we
25 know that from Agent Porter. He lifted some prints, some

1 latent prints, but none were Joshua Phillips. None were
2 Joshua Phillips. Nothing -- and the clothes, gunpowder
3 residue. The lady testified that gunpowder residue is very
4 flimsy. If it's not tested within six hours on an
5 individual then they don't do the test because it will go
6 away. However, if it's an inanimate object, clothes, or
7 someone who's deceased, it can stay there indefinitely until
8 something is physically done to that piece of property or
9 that piece of clothing such as washing to remove the
10 gunpowder residue. It will stay there, not the six hour
11 test. Was there gunpowder residue on these clothes? There
12 was none. We don't -- there was no test, wasn't done.

13 Is there reason to hesitate to act in this case? Is
14 there a reason to hesitate to act? As we go through this
15 evidence is there a reason to hesitate to act? You know,
16 some of the most -- some of the hardest evidence for a
17 Defense lawyer to address is eyewitness identification, and
18 it's testimony that is very often used in cases. It's often
19 the subject of improper conviction or misidentification.
20 And for an example, have any of you ever been in a store or
21 walking down the street and you see somebody in front of you
22 or you're over to the side and you say, well, that looks
23 like Johnny Smith and you walk over and you tap them on the
24 shoulder, say hey Johnny, how are you doing, and they turn
25 around and it's not them. It's not who you thought it was.

1 It is embarrassing. It makes you feel crazy. You
2 apologize. I'm sorry, I thought you were somebody else.
3 Have you ever said that? I'm sorry, I thought you were
4 somebody else. That is why eyewitness identification has to
5 be critically judged by you, the jury, because I know that
6 Ms. Love wants to tell you who did this and wants you to
7 understand that she is without question telling you who she
8 thinks it is. But let's really look at how much time there
9 was to observe. If we're talking about seconds, seconds
10 that went by, and maybe as you look back on it it may seem
11 like years or it may seem like months or weeks or days that
12 it took for someone to go past you in a car. But if I
13 recall her testimony, she pulls up, goes in, gets her
14 pocketbook, comes out, lays that seat back, turns the radio
15 on, does not see the car pull up, does not see the
16 individual get out of the car as I recall her testimony.
17 Didn't see any of that. Saw somebody go past. Well, that
18 somebody going past, no indication that he went past and
19 stopped and said hello or waves or did anything but that's
20 walking past, just walking past. How quickly. And you're
21 laying back in the car with the car seat leaned back
22 listening to the radio and somebody walks by on the side,
23 how long do you have to observe that person? That's one
24 time. And then pulling out, looking back making sure you
25 don't hit the car in front of you. There's a car parked as

1 we look at -- you will have this back, State Exhibit 10-B,
2 10-A and 10-B. You'll have these back in your jury room.
3 The front of the bar as the car's parked here. There's a
4 car in the road parked right almost in front of the front
5 door. Got to come out and around that car. Now can you do
6 that without looking at the car? You got to look. You got
7 to look. And that's no slam on anybody; that's just the way
8 it is. It had to happen that way. You have to look there.
9 You have to divert your attention. And for every moment
10 attention was diverted from one area it cannot be focused,
11 and if it's not focused then we have to question the
12 identification. And when you look into this jury room
13 walking in, it's broad daylight. You're looking from light
14 to light. The lights are great. I submit we're not dealing
15 with that at Nichols Night Life. Number one, it's
16 nighttime. You ever hear that old saying darkest before the
17 dawn. You know, ride about 5:00 in the morning before it
18 gets daylight? Before the dawn breaks? The darkest time of
19 the night is right before dawn. And to look in this room is
20 totally different than to look in what you were looking at
21 in that situation. You're looking dark to dark, possible
22 light in the back of the bar at the bar. Light outside what
23 do we know from Agent Porter is that there's no light poles
24 on the other side of the road. Unlike Ms. Love's testimony
25 he thought there was a light on the other side of the road.

1 But agent -- and there's pictures and you have the
2 photographs. You look through the photographs. See if you
3 see a pole on the other side of the road that would be
4 holding a street light. There's not one. It's not there.
5 So we're talking about dark, and we're talking about the
6 ability to observe. And I know that this lady wants it to
7 be a long time. We have evidence from some of the State's
8 witnesses that Ms. Love may have been outside earlier
9 smoking a blunt with these people. Maybe that's why
10 everybody seems like time was everlasting to them that night
11 'cause everybody was high. And we know that the people in
12 the car apparently were drinking, to say the least. And the
13 question becomes how much did they remember initially upon
14 arriving at the police station, and all of which was done on
15 September the 29th and 30th, within 24 hours, within 24
16 hours of the occurrence. You have these people who say
17 Joshua came in and threatened them off. He's gonna come and
18 burn down their house us, whatever, if they say anything and
19 within 24 hours they tell him his name. Now if he's that
20 big and bad and they that scared of him it's gonna take them
21 a little longer to bust -- to break them down where they're
22 gonna tell on somebody. Gonna take a whole lot longer.
23 What did they remember when they initially came in? I have
24 no idea. We have no idea. What conversation took place
25 between them and the police prior to their writing out the

1 statement or prior to the police writing out the statement?
2 We don't know. We have no idea. The Government
3 investigating a citizen has to bring forth evidence to prove
4 guilt beyond a reasonable doubt, beyond a reasonable doubt.
5 It is not our duty as citizens to come in and establish that
6 we are not guilty. We have nothing to prove. A citizen has
7 the right to rely on the presumption of innocence and to
8 require the State to prove guilt beyond a reasonable doubt,
9 and that is what must be done. There must be proof beyond a
10 reasonable doubt. You are charged with the duty of finding
11 whether or not that exists in this case. It's the State and
12 the Government that has to bring forth the evidence to you,
13 and they have to do it any time a citizen is accused of a
14 crime, any time a citizen is accused of a crime.

15 Now it's amazing to me Eric Moultrie, did he -- was he
16 honest about his prior record? Well, I mean, how in the
17 world are you going to lie about his prior record. I mean,
18 he's sitting there and he's documenting for the benefit what
19 he's gonna receive on the basis of working with the
20 government and cooperating with the government. Do you
21 think they don't know what his record is? Would he not
22 think that they know what his record is? There ain't no
23 reason -- is ain't the measure of him telling the truth to
24 say he told the truth about his record. That's something he
25 can't lie about. There's a difference between telling the

1 truth and not being able to lie about something. And what
2 does it benefit him? What does it benefit him? And what
3 does it cost him? If -- suppose he comes in and says, you
4 know, I really didn't hear anything. If that's the truth
5 and he tells that, what does that benefit him? Do you think
6 that the government is then gonna say in his sentencing, by
7 the way Judge, Mr. Moultrie cooperated with the government,
8 he testified in a case that he didn't know nothing about it.
9 That's what he said and we believe he was telling the truth
10 so we want to give him credit for not telling us anything.
11 That's not the way it works. He gets a benefit by saying
12 exactly what he said. For him to say otherwise is no
13 benefit at all to him. A jailhouse snitch. You know, and
14 what did he tell you about what this said or what that said.
15 Well, I don't remember that, I just remember what he said
16 about this particular thing, okay? Just this particular
17 thing. That's all you remember. That's all you're supposed
18 to remember; that's fine and dandy. That's where we are
19 with him, say no more. Say no more about Mr. Moultrie.

20 The State solicitor would argue -- has presented an
21 old saying the guilty would flee where none pursueth but
22 unfortunately that's not the case here. There was not a
23 none pursueth where none pursue. Josh was being pursued.
24 He was being pursued. You know, I remember a TV show and
25 then later it was a movie called the Fugitive where a guy

1 was convicted of killing his wife, a surgeon, convicted of
2 killing his wife on the way to prison. The train wrecks,
3 prison train wreck, and he gets loose. And he didn't turn
4 himself right then. He stayed on the run. He stayed on the
5 run to try and establish and find the one arm man, a guy
6 that really, he said, had really done it. He fled. So it's
7 not always so simple as to say the guilty fleeth where none
8 pursueth. In this situation Joshua was being pursued, was
9 being pursued and came back and was no trouble coming back.
10 There's been no trouble as far as anybody knows since that
11 time and he's here in court to answer these charges.

12 You know, we have two witnesses that testified from
13 that evening, Conswella Smith and Jason Phillips. Reginald
14 Evans who I assume was also in the car we did not get the
15 benefit of his testimony. I guess 'cause Paul James had
16 testified earlier that he was supposedly asleep. There's a
17 dog gone good chance that all of them were asleep based on
18 what we know. Ms. Smith, it says that drank a half gallon
19 of gin, seven or eight drinks at the club, and smoked three
20 or four blunts. Blunt being what? That's a cigar she said
21 with the tobacco taken out and marijuana put in and it's a
22 big cigar so we're not talking about a little old hand
23 rolled joint. We're talking about a big cigar; she said big
24 cigar, blunt. She smoked three or four of those all this
25 night and presumably from about 11, 12 or 1, in that

1 neighborhood, from the King George Club over to Nichols
2 Night Life till about 5:00 in the morning. That's what was
3 going on, drinking, smoking, and we know Mr. Phillips also
4 was popping pills. What pills, we don't know; he doesn't
5 know. He's lucky to be here testifying. You mixing all
6 this stuff up there ain't no telling what in the world he
7 was putting inside of him, ain't no telling what in the
8 world he remembers and what is accurate and what is
9 inaccurate.

10 You know, I hate to say that there were times in my
11 younger life when I probably drank a little too much and did
12 things I shouldn't do and there are nights that I have
13 absolutely no recollection of; I just don't remember. And I
14 submit to you that from what I heard on the witness stand
15 sounds like that was what kind of night it was for Conswella
16 Smith and Jason Phillips. Whatever they said is suspect at
17 best. That's the witnesses; that's your evidence. See,
18 because all the police officers, all the investigation,
19 everything that was done, the CSI side, it's absolutely in
20 opposition to Joshua Phillips' guilt. DNA is negative. No
21 GSR on him, on his clothes, anywhere else to be found on him
22 or in or around him. Fingerprints, none, none of his. All
23 of that, all of that —

24 MR. CLEMENTS: We object.

25 MR. LAWSON: —all of our forensic evidence.

1 **THE COURT:** Just one second.

2 **MR. CLEMENTS:** We object to the argument that it
3 was negative. There's no been no testimony evidence that
4 there was any test done on that so it's certainly not
5 negative. It might be nonexistent but we'd object to
6 argument that it's negative. That's facts not in
7 existence.

8 **THE COURT:** Stay witness the record, counsel.

9 **MR. LAWSON:** Yes, sir. You heard it. You heard
10 the evidence; you judge the facts. What I say, what the
11 Solicitor said, that's not evidence. It's what you heard.
12 You heard the evidence. Is there evidence, forensic
13 evidence that places the blame on Joshua Phillips? I
14 think not. But you judge that evidence. And is the bases
15 or the failure of DNA, the failure of gunshot residue or
16 whatever else may be or not be, is reason to hesitate to
17 act and it's reason to find him not guilty and it's your
18 duty to do so.

19 The evidence in this case that indicates that he did
20 this is the testimony from the alleged eyewitnesses. That's
21 all. That's the only evidence that indicates guilt. And
22 why -- and what do we know that the police did in relation
23 to investigating this case as far as suspects and crime
24 scene and this and that? We know they worked the crime
25 scene. We know SLED worked the crime scene. Agent Porter

1 came out; he took a lot of pictures. He did this; he did
2 that. We know that Horry County worked the car, the fusion
3 down in Horry County. And we know what was done here in
4 Marion as far as the investigation is concerned. The
5 Solicitor asked the lead detective in this case, did you do
6 as little as you could on this case. And his answer was
7 yes, I knew I was leaving in November and so I did as little
8 as I could on this case. Now ladies and gentlemen, that
9 upset me and it should upset you. Tried to explain it
10 later. Well, what did you mean by that when you -- well, it
11 was a direct question and he said yes, I know what it means,
12 do as little as you can. It means exactly that. It means
13 you don't do, you don't check to see was the bolo put out on
14 this vehicle. You don't check to make sure that this was
15 done. You don't see that you have incident reports done or
16 investigative reports or notes from anyone. And we go back
17 and we know that Officer Bullard interviewed Ms. Love that
18 morning at the direction of Detective Watson now -- then I
19 think it was Sergeant Watson -- who had decided that he and
20 two were going to go on down there and confront the possible
21 suspect while they may still be there. But then officer
22 Bullard said, no, we were supposed to meet at the police
23 station and go together. Well, then why not all three of
24 you stay there and interview the witness and then go to the
25 police station. She's irate from what doc-- from what

1 Ms. Watts said. She's upset, she's excited. Why not stay
2 there and calm her down? Why not ask her to come back to
3 the police station where it's safe. Why not? Why not get
4 on that radio and say stop this vehicle. Why not? When you
5 find out that day that they went here, here, and here, and
6 you go and talk with people here, here, and here, find who
7 was there, who was with them, who was this, who was that?
8 That's what leads to the appropriate arrest and prosecution,
9 not this. Not this.

10 Ladies and gentlemen, as the judge charges you the law
11 I ask you to listen very closely. You are the judge of the
12 law and I know that you will listen closely and I know you
13 will pay attention. I looked down the list of witnesses and
14 there were 21 people that testified. And I wondered about
15 something. You know, this gun has bothered me. On 501, 41,
16 you come off 41 from Mullins, you come off 501. And then I
17 asked the officer how far was it down to the little Pee Dee
18 River, and he said it wasn't -- he never clocked it. He
19 never really had any occasion to look at it but he said it
20 was close, said it was close. And he -- it's interesting to
21 me that Officer Smith saw that gun from standing up on the
22 top. He's standing up on top looking down and saw the gun.
23 It was totally visible. It was totally visible as though
24 somebody meant for it to be found. And the other thing, how
25 in the world -- I don't understand how you throw a cocked

1 gun off the bridge and it falls down in this area and how it
2 hits and stays cocked. Maybe trying to clear it cocked it.
3 Be that at as it may, the gun is visible. The gun is
4 visible. And it's not thrown here, there, or yonder. It's
5 right there marked the first bridge off 41 on 501.
6 Something doesn't pass the smell test in this case.
7 Something smells just awfully, awfully bad.

8 If, as we look through the witnesses, we have the
9 police officers, none of whom testified that they had
10 anything -- did anything that related to the guilt of Joshua
11 other than taking statements. We have the SLED people who
12 were the experts that testified none of whom said anything
13 about the guilt of Joshua. And then we have the two that
14 were there in the car. We're missing Reginald. We --
15 Reginald Evans did not testify who was supposedly passed out
16 in the car with Jason and Conswella who were obviously
17 intoxicated and high but who -- and Jason I think had said
18 he was sleeping on and off. So you got all this and then --
19 and Ms. Love. The pathologist didn't say anything as it
20 relates to Joshua's guilt. She just manner and cause of
21 death. It's a homicide by gunshot, by gunshot.

22 Now as you do what I know you will do, which is judge
23 this evidence, I want you to look closely and I want you to
24 look at it, to think, does this evidence pass the test of
25 the reasonable juror hesitating act. Is there evidence the

1 existence or nonexistence of which causes you to hesitate to
2 act because a reasonable doubt can come from the evidence or
3 it can come from the lack of evidence. Circumstantial
4 evidence, evidence that is direct and circumstantial.
5 Direct is hear or see, smell, taste, things that are within
6 your senses. Circumstantial evidence is a chain of event
7 which tends to establish a fact. So when viewing
8 circumstantial evidence you look at it the same way as you
9 do direct evidence but you look at it all ways. Always with
10 a view to whether or not it causes a reasonable person to
11 hesitate to act for in that case you have a reasonable
12 doubt. I do not believe that you can look at the evidence
13 in this case and not hesitate to act.

14 Ladies and gentlemen, when you get in your jury room
15 you look at the evidence. You recall the testimony. And if
16 you likewise feel that way it's your solemn duty as the
17 judge instructs it when you find that hesitation to find
18 this defendant Joshua Phillips not guilty. Thank you.

19 THE COURT: Does anyone need to leave? If so
20 you may leave right now just before I start the charge.
21 Anyone need to go? Anyone want to go?

22 Jurors, please if you will, turn and face me and give
23 me your attention. The State charges or accuses the
24 defendant in this indictment with five charges. Murder in
25 regard to Maltonin Clark. Murder in regard to Angelique

1 Bynum insofar as count two. And then we have the possession
2 of a weapon during the commission of a violent crime, and
3 then we have armed robbery, two armed robbery charges. To
4 all of these charges the defendant has pled not guilty.
5 That plea of not guilty places the burden of proof upon the
6 State of South Carolina to prove the defendant guilty beyond
7 a reasonable doubt. The defendant is presumed to be
8 innocent unless and until the State has established guilt
9 beyond a reasonable doubt. A person charged with committing
10 a criminal offense in South Carolina is never required to
11 prove himself innocent. The defendant is presumed to be
12 innocent unless and until the State has established guilt
13 beyond a reasonable doubt. It is a vital, important rule of
14 the law that the defendant in a criminal trial no matter how
15 grave or serious may be the offense with which he is
16 charged, must always be presumed innocent unless and until
17 his guilt has been proven beyond a reasonable doubt.

18 This presumption of innocence is legal proof of
19 negligence. This presumption of innocence remains with a
20 defendant at all times, from the moment of his arrest
21 throughout the trial proceeding and goes into your jury room
22 and remains with the defendant unless and until you, the
23 jury, reach a verdict of guilty beyond a reasonable doubt.
24 The burden of proof is upon the State of South Carolina to
25 establish guilt by evidence to your satisfaction beyond a

1 reasonable doubt considering the charges separately and
2 distinctly. What is a reasonable doubt in the law? A
3 reasonable doubt is the kind of doubt that would cause a
4 reasonable person to hesitate to act. Let me give you that
5 again for the sake of emphasis. What is a reasonable doubt
6 in the law? A reasonable doubt is the kind of doubt that
7 would cause a reasonable person to hesitate to act. By the
8 constitution and laws of the State of South Carolina, you
9 the jury, are the sole judges of the facts and evidence in
10 this case. I am not permitted to intimate any opinion that
11 I may have on the facts or evidence. I tell you now I do
12 not have an opinion on the facts and evidence, but above
13 that, I'm not entitled to an opinion on the facts or
14 evidence. I have made some trial rulings on matters of
15 evidence in your presence. Please do not derive any
16 inference from any ruling that I have made as to any opinion
17 or feeling on the facts.

18 In determining what the facts are in this case you of
19 necessity must pass upon the credibility of the witnesses
20 who took this witness stand. You are the sole judges of the
21 credibility of the witnesses who testified. Credibility in
22 the law means believability, can I believe this witness. Is
23 this witness credible? The value and weight to be given to
24 their testimony is in your sound discretion. You alone must
25 decide the force and effect and the truth of the testimony.

1 In making a determination as to the credibility of a witness
2 there are many factors that you may and should take into
3 consideration such as the appearance and manner of the
4 witness on the witness stands itself known in the law as the
5 demeanor of the witness. Did the witness have an interest
6 in the outcome of this trial, was the witness forthright or
7 hesitant, was the witness' testimony consistent or did it
8 contain discrepancies, what was the ability of the witness
9 to know about the facts concerning which he or she gave
10 testimony, did the witness have a cause or reason to be
11 biased or prejudiced in favor of the testimony that he or
12 she gave, was the testimony of the witness corroborated and
13 made stronger by other testimony and evidence or was it made
14 weaker and impeached by other testimony and evidence
15 presented.

16 A person who has a past criminal record is competent
17 to testify during trial. A past record does not affect the
18 ability of the witness to testify. The past record may be
19 considered by you, the jury, in determining the witness'
20 credibility or believability. Remember, you are the sole
21 judges of the facts in the case and the believability of any
22 and all witnesses. As jurors you have the right to believe
23 a small portion of a witness's testimony and disregard the
24 larger portion, or you may believe a larger portion of a
25 witness' testimony and disregard the smaller part. You may

1 believe a witness's testimony in its entirety, or you may
2 completely reject the witness's testimony in totality, not
3 doing that arbitrarily but if you have sound reason in the
4 record for doing so. You may believe the testimony of a
5 single witness against that of many witnesses or the many
6 witnesses as against the one. Most certainly you do not
7 determine the amount of credibility or believability merely
8 by counting the number of witnesses. Throughout this entire
9 process you have but one single objective, and that is to
10 seek the truth regardless of what source that truth may
11 come.

12 By the very same constitution and laws which make you
13 the finders of the facts I am as the trial judge made the
14 sole and only instructor in the law. Under the oath that
15 you took you must accept as correct the law as I charge it
16 to you. In that regard, neither the Court nor the jury
17 should be concerned with what the law ought to be in this
18 case, but rather what the law actually is. You must then
19 accept the law as I charge it to you under your oath. The
20 defendant is entitled to every inference in his favor which
21 can reasonably be drawn from the evidence. When two
22 inferences may be drawn from the same set of facts, one
23 consistent with a verdict of the guilty and one inference
24 consistent with a verdict of the not guilty, the defendant
25 is entitled to the inference which is consistent with a

1 verdict of not guilty. You cannot find this defendant
2 guilty based upon suspicion, conjecture, or speculation no
3 matter how strong. A conviction can only be based upon
4 proof of guilt beyond a reasonable doubt. And if the proof
5 does not meet that standard you must find the defendant not
6 guilty.

7 The defendant in this case has not testified. That is
8 his constitutional right. It is not a circumstance that you
9 can take into consideration or even allow to enter in your
10 discussion in the jury room. Under the constitution of the
11 State of South Carolina and under the United States
12 constitution it is the defendant's constitutional right not
13 to testify. The burden of proof is upon the State of South
14 Carolina to establish his guilt by competent evidence beyond
15 a reasonable doubt. The fact that the defendant did not
16 take the witness stand and testify in his own behalf does
17 not create any inference against him. The jury must not
18 permit that fact to weigh in the slightest degree against
19 this defendant, nor should this fact enter into the
20 discussions or deliberations of the jury in any manner.

21 In South Carolina there are two kinds of evidence.
22 They both are equally good in the law. They are direct
23 evidence and circumstantial evidence. And on a contested
24 factual issue that you now decide and determine you may have
25 some direct evidence on that issue and some circumstantial

1 evidence on that issue. Direct evidence, what is it?
2 Direct evidence is the testimony of a person who asserts or
3 claims to have actual knowledge of a fact such as an
4 eyewitness. Direct evidence is the production of items or
5 documents or things. Circumstantial evidence, what is it?
6 Circumstantial evidence is proof of a chain of facts and
7 circumstances indicating the existence of a fact. The law
8 makes absolutely no distinction between the weight or value
9 to be given to either direct or circumstantial evidence, nor
10 is a greater degree of certainty required of circumstantial
11 evidence than of direct evidence. You should weigh all the
12 evidence in the case. After weighing all the evidence in
13 the case, if you're not convinced of the guilt of the
14 defendant beyond a reasonable doubt, you must find the
15 defendant guilty. On the other hand, after weighing all the
16 evidence, if you are convinced of the guilt of the defendant
17 beyond a reasonable doubt you must find the defendant
18 guilty.

19 Expert witnesses. Although lay witnesses are limited
20 to testifying about facts within their knowledge and are not
21 allowed to give opinions, there are certain witnesses who by
22 training, education or experience, are considered as experts
23 in a particular field. These witnesses may give the
24 opinions on facts of a matter and conclusions in regard to
25 that field. These opinions constitute evidence to be

1 considered by you in connection with all the other testimony
2 and evidence in the case. You may consider the expert's
3 opinion just as you do all other evidence in the case. It
4 is for the jury to give it such weight as you in your
5 experience and discretion may determine. You must weigh
6 such evidence and accept or reject it in the same manner
7 that you treat all other evidence in the case. The
8 testimony of experts on a subject that is little known to
9 the general public is entitled to consideration. Such
10 testimony, however, must be submitted to your judgment. The
11 testimony of experts is to aid and assist you as jurors, not
12 to dominate or control you in the decision of questions of
13 fact. The opinions, conclusions, and deductions from the
14 evidence before you in regard to expert witnesses do not
15 preclude yours. You are required to decide disputed
16 questions after comparison, analysis, and consideration of
17 all the evidence in the case.

18 Identification. An issue in this case is the
19 identification of the defendant as the perpetrator of the
20 crimes charged. The State of South Carolina has the burden
21 of proving identity beyond a reasonable doubt.
22 Identification testimony is an expression of belief or
23 impression by a witness. You may consider the opportunity a
24 witness had to observe the alleged offender at the time of
25 the offense and to thereafter make an identification. It is

1 for the jury to determine the accuracy of the identification
2 of the defendant. You must consider the credibility of each
3 identification witness in the same way as any other witness.
4 You can consider his or her truthfulness as well as the
5 capacity, opportunity, and circumstances of the observation
6 of the matters about which he or she testified.

7 Two pending charges of murder. The defendant in this
8 case is charged with the murder of Angelique Bynum and
9 Maltonin Larry Clark. What is murder? Murder is defined as
10 the willful, felonious killing of a human being by a human
11 being with malice aforethought; that malice being of either
12 expressed malice or implied malice. Section 16-3-10 of the
13 South Carolina Code of Laws provides: Murder is the killing
14 of any person with malice aforethought either expressed or
15 implied. The State must prove beyond a reasonable doubt
16 that the defendant killed another person with malice
17 aforethought. The presence of malice is a required element
18 of murder. Malice is defined as being hatred or ill will.
19 Malice in the legal sense does not necessarily import ill
20 will toward the individual injured but signifies, rather, a
21 general malignant recklessness of the lives and safety of
22 others or a condition of the mind which shows a heart
23 regardless of social duty and fatally bent on mischief.
24 Malice is the wrongful intent to injure another person. It
25 indicates a wicked and depraved spirit intent on doing

1 wrong. Malice is a legal term implying wickedness and
2 excluding just cause or excuse. Malice is the doing of a
3 wrongful act intentionally and without just cause or excuse.
4 The term malice indicates a formed purpose and design to do
5 a wrongful act under the circumstances that excludes any
6 legal right to do it.

7 Malice may be either expressed malice or implied
8 malice. The words expressed or implied add nothing to the
9 meaning of the word malice. They do not imply different
10 kinds of malice but merely the manner in which the only kind
11 of malice known to the law may be shown to exist; that is,
12 either by positive evidence or by inference. Expressed
13 malice is when there is a deliberate intention to unlawfully
14 take the life of another. Implied malice is when
15 circumstances demonstrate a wanton or reckless disregard for
16 human life or a reasonable prudent person would have known
17 that according to common experience there was a plain and
18 strong likelihood that death would follow the contemplated
19 act.

20 Implied malice. The use of a deadly weapon gives rise
21 to a permissive inference of malice. The jury may draw an
22 inference of malice from the proof of the use of a deadly
23 weapon if you conclude such is proper after considering all
24 of the facts and circumstances in the case. You are free to
25 accept or reject the permissive inference depending on your

1 view of the evidence. The law says if one intentionally
2 kills another with a deadly weapon the implication of malice
3 may arise. If facts are proved beyond a reasonable doubt
4 sufficient to raise an inference of malice to your
5 satisfaction this inference would be simply an evidentiary
6 fact to be taken into consideration by you, the jury, along
7 with all other evidence in the case, and you may give it
8 such weight as you determine it should receive. Malice must
9 be aforethought. Under the definition of murder the malice
10 must be aforethought. Although malice must be aforethought
11 there is no requirement that it must exist for any
12 appreciable length of time before the commission of the act.
13 It may be conceived at the very moment the act occurs.
14 There must be a combination of evil intent and of the act
15 producing the result.

16 You have two charges of murder that are pending
17 against the defendant. You must separately and distinctly
18 evaluate each of the pending charges, count one and count
19 two. Armed robbery, there are two pending chargers against
20 the defendant for armed robbery. Section 16-11-330 of the
21 Code of Laws provides that armed robbery is defined as a
22 robbery committed while armed with a pistol, dirk,
23 slingshot, metal knuckles, razor, or other deadly weapon, or
24 while alleging either by action or words he was armed while
25 using a representation of a deadly weapon or any object

1 which a person present during the commission of the robbery
2 reasonably believed to be a deadly weapon. To convict the
3 defendant of armed robbery the State must prove the
4 defendant: One, committed a robbery; and two, committed the
5 robbery while armed with a pistol or other deadly weapon.

6 Robbery is a larceny from the person or immediate
7 presence of another by violence, intimidation, or putting
8 such person in fear. A thing is in the presence of a person
9 in respect to robbery which is sole within his or her reach,
10 inspection, observation, or control that he or she could, if
11 not overcome by violence or prevented by fear, retain his or
12 her possession of it. Robbery is basically larceny
13 compounded or aggravated by intimidation or force used in
14 the taking of property from the person in the presence of
15 another. Larceny is the felonious taking and carrying away
16 of the goods of another against the owner's will or without
17 his or her consent with the intent to appropriate them to
18 one's own use and to permanently deprive the owner of
19 possession of his or her property.

20 There are five elements the State must establish
21 beyond a reasonable doubt to prove larceny. Each of these
22 elements must be present to make out the crime of armed
23 robbery. The elements of larceny are: One, a taking; two,
24 the act of carrying away. This is called asportation in the
25 law. Asportation is the act of carrying away. Three, of

1 the property of another. Four, without the consent or
2 against the will of the owner; and five, with the intent to
3 steal. The asportation of stolen property is an
4 indispensable element of larceny and can be established by
5 the slightest removal of the property with felonious intent.
6 The defendant must intend to permanently deprive the owner
7 of possession by converting the property to his own use.

8 In addition to the elements of larceny the crime of
9 robbery requires two additional elements. These are: One,
10 the property must be taken from the person or immediate
11 presence of another; and two, the taking must be
12 accomplished by violence, intimidation or by putting the
13 person in fear. This violation must be actual personal
14 violence or the threat of it. The degree of force used is
15 immaterial so long as such force or threat of force is
16 actually sufficient to overcome the victim's resistance.
17 This violence or intimidation must either precede or be
18 contemporaneous with the taking. Finally, to constitute
19 armed robbery the State ~~must~~ show the additional element
20 that the robbery was committed while armed with a pistol or
21 other deadly weapon.

22 What is a deadly weapon? That is a factual matter
23 that the jury must decide or determine. You must answer
24 that question factually based on the evidentiary record
25 before you. A deadly weapon is any article, instrument,

1 device, or item which is likely to cause death or great
2 bodily harm. Whether an instrument, device, or object has
3 been used as a deadly weapon depends on the facts and
4 circumstances of each case.

5 There's one pending charge, possession of a firearm
6 during the commission of a violent crime. The defendant is
7 charged with a possession of a firearm during the commission
8 of a violent crime. Section 16-23-490 of the Code of Laws
9 provides: If a person is in possession of a firearm during
10 the commission of a violent crime and is convicted of
11 committing the violent crime he has violated 16-23-490.

12 What is a violent crime? Section 16-1-60 of the Code of
13 Laws states: Quote, for purposes of definition under South
14 Carolina law a violent crime includes the offenses of murder
15 and armed robbery.

16 Madam Forelady and members of the jury, you must use
17 the verdict forms that I have in my hand here. And once
18 again, Madam Forelady, you're required to sign the jury
19 verdict on behalf of the jury and it must be unanimous. Do
20 not sign your name until it is unanimous and hopefully dated
21 today. Date it when you arrive at the verdict. And count
22 one of course relates to Maltonin Clark, a pending charge of
23 murder in regard to Maltonin Clark. Count two is a pending
24 charge of murder as it relates to Angelique Bynum. Count
25 three is possession of weapon during commission of a violent

1 crime. Count four is armed robbery in regard to Angelique
2 Bynum. And count five is armed robbery as it relates to
3 Maltonin Clark. Use these verdict forms, Madam Forelady.
4 In regard to the deliberation you must communicate with the
5 Court in writing. If something comes up, you need further
6 charge or recharge or you need to hear the evidence again,
7 just send me a note out. Any question comes up send me a
8 note in that regard.

9 Now it's 20 minutes till 12 according to my Timex, and
10 that means it's about lunch time. When you get in your jury
11 room if you want some lunch brought in there now we will do
12 that at county expense; but please bear in mind, if you wait
13 till 1:00 to tell me it will be 12:00 before we get it here.
14 There's an hour lag time.

15 Now is every juror on the jury feeling well?

16 (There was no response.)

17 THE COURT: Now jurors, you need to tell me now.

18 There is no way that I'm going to accept a note out later
19 on that you're not feeling well or you got a problem later
20 on about staying. Now this is a serious matter. It's
21 taken us several days to try it, obviously will take you
22 some time to deliberate. Is there any person on the jury
23 not feeling well? If you're not feeling well let me go to
24 the alternate right now. Raise your hand.

25 (There was no response.)

1 THE COURT: Raise your hand.

2 (There was no response.)

3 THE COURT: Ms. Court Reporter, let the record
4 show that I have inquired of the jury as to whether they
5 were feeling well and no one has responded. The second
6 matter I pose to you is, is there any juror who
7 anticipates any problem staying with the case, staying
8 with the case? If you anticipate any problem staying with
9 the case tell me now before I let these two alternates go
10 home. Anyone anticipate any problems staying with the
11 case?

12 (There was no response.)

13 THE COURT: Lift your hand, just raise your
14 right hand. Please, please respond, folk. Please
15 respond.

16 (There was no response.)

17 THE COURT: Once again, later will not be
18 acceptable.

19 (There was no response.)

20 THE COURT: Anyone now?

21 (There was no response.)

22 THE COURT: Let the record show no one has
23 responded. You jurors, the alternates Ms. Davis and
24 Ms. Bennett -- is that correct? No?

25 DEPUTY CLERK OF COURT: She changed her name.

1 THE COURT: That's right, she changed her name.
2 All right, sorry, sorry. Anyway, you two jurors wait
3 right there and I'll give you some specific instructions.

4 You jurors, as you go do your jury room do not begin
5 deliberation. Why? The law says I'm required to let the
6 lawyers object to anything I've said to you and I must let
7 them object in your absence. It may be that I bring you
8 back out. If I do not bring you back out, as soon as you
9 see the verdict form and the exhibits start talking. Now
10 once again, Madam Foreman, you're the spokesperson on behalf
11 of the jury, remember, you want food ordered now just send
12 me out the note and we'll get it ordered now. Thank you.
13 Please go to your jury room.

14 (WHEREUPON, the jury was removed from the
15 courtroom at 11:39 a.m., and the following proceedings
16 commenced in open court.)

17 THE COURT: You two alternates, I thank you for
18 being with the Court. I thank you for staying with us. I
19 thank you for your attention. I appreciate the time and
20 talent you bring to this case. You are now free to go
21 for the week. You're free to go home. You can stay if
22 you'd like. You're free to go. Thank you so much.

23 (Alternates were excuses.)

24 THE COURT: Exceptions or anything further on
25 behalf of the State?

1 MR. CLEMENTS: No exceptions or objections, Your
2 Honor. I do have one concern, Your Honor, and that is --
3 and I might have missed; you might have told the jurors
4 that. I would hope they had draw no inference from the
5 order on the verdict form because you have to put it in
6 some order, and I would hope that they would not draw any
7 inference as to which is listed first per se. Your Honor,
8 if you might could instruct them on that. Just as a
9 result of abundance of caution.

10 THE COURT: Defendant, any objections?

11 MR. LAWSON: No objections, Your Honor. I have
12 no problem with the order wording.

13 THE COURT: All right, bring them out.

14 (WHEREUPON, the jury was returned to the courtroom at
15 approximately 11:41 a.m., and the following proceedings
16 commenced in open court.)

17 THE COURT: Jurors, in order to have a pristine
18 presentation to you, a salubrious presentation, I do not
19 have an opinion in this case, period. I'm not entitled to
20 one and I don't want one. Now I have had to type the
21 verdict form, and I've got the possibilities of verdict
22 listed. And the first one says not guilty, and the second
23 one says guilty of murder. The order that I put them in
24 has no significance. Do not derive any inference from any
25 opinion that I might have as to any order or preference or

1 any inference from the order that I put them on these
2 forms. The bottom line is do not derive any inference
3 from the order of presentation of your possibilities of
4 verdict. Please, it's your call, just follow the
5 instructions in general. Thank you so much. Please go to
6 your jury room and start talking.

7 (WHEREUPON, the jury was removed from the
8 courtroom at 11:44 a.m., and the following proceedings
9 commenced in open court.)

10 THE COURT: All right, Lawyers, all you lawyers
11 please help identify the exhibits. Please help identify
12 the exhibits.

13 (Attorneys review exhibits.)

14 THE COURT: All right, for the record, as soon
15 as the exhibits are identified they will be taken to the
16 jury room. Thank you very much. Court is in recess while
17 the jury deliberates.

18 (Court's Exhibit Number 2 was marked
19 and made a part of the record.)

20 THE COURT: Now folk, give me your attention.
21 The jury has reached a verdict. I do not know what the
22 verdict is, and I certainly do not want to guess what the
23 verdict might be. The point that I now make is this:
24 There's not going to be any reaction to the jury verdict
25 none. Now folk, if you react to the jury verdict I'm

1 going to give you some jail time. The jury is entitled to
2 reach a verdict without any kind of response by
3 individuals. I repeat again, you cannot under any
4 circumstances react to the jury verdict. Sometimes I
5 don't make my statements clear. Sometimes I leave some
6 ambivalence or equivocation in my statements. So if you
7 haven't understood what I said, lift your hand up just
8 like church. Slide your hand right up and I'll try to
9 make it clearer.

10 (There was no response.)

11 THE COURT: All right, deputies, I do not want
12 any reaction. If there's any reaction take them into
13 custody now. Does everybody understand what I said?

14 THE OFFICER: Yes, Your Honor.

15 THE COURT: Bring the jury out.

16 (WHEREUPON, the jury was returned to the courtroom at
17 approximately 1:38 p.m., and the following proceedings
18 commenced in open court.)

19 THE COURT: Ms. Clerk, you're recognized.

20 THE CLERK OF COURT: Thank you, sir. Ladies and
21 gentlemen of the jury, you have reached a verdict?

22 THE FORELADY: Yes, ma'am.

23 THE COURT: Thank you.

24 (Verdict tendered to the Court.)

25 THE COURT: Publish Ms. Clerk.

1 **THE CLERK OF COURT:** Thank you, sir. State of
2 South Carolina, County of Marion. The State of South
3 Carolina versus Joshua Lee Phillips, verdict: Indictment
4 number 2008-GS-33-00071 as to count one; we find the
5 defendant guilty of murder. Signed Jacqueline Edwards,
6 foreperson, dated 9/3/09. State of South Carolina versus
7 Joshua Lee Phillips, indictment number 2008-GS-33-00071 as
8 to count two: We find the defendant guilty of murder.
9 Signed Jacqueline Edwards, dated 9/3/09. State of South
10 Carolina versus Joshua Lee Phillips, verdict, indictment
11 number 2008-GS-33-00071 as to count three: We, the jury,
12 find the defendant guilty of possession of weapon during
13 the commission of violent crime. Signed Jacqueline
14 Edwards dated 9/3/09. State of South Carolina versus
15 Joshua Lee Phillips, indictment number 2008-GS-33-00071 as
16 to count four: We, the jury, find the defendant guilty of
17 armed robbery. Signed Jacqueline Edwards dated 9/3/09.
18 State of South Carolina versus Joshua Lee Phillips,
19 indictment number 0— excuse me, 2008-GS-33-00071 as to
20 count five: We, the jury, find the defendant guilty of
21 armed robbery. Signed Jacqueline Edwards, dated 9/3/09.

22 Is this your verdict say you one say you all?

23 (Jurors responded.)

24 **THE CLERK OF COURT:** Thank you.

25 **THE COURT:** All right. Is there any request for

1 individual polling by the Defense?

2 MR. LAWSON: No, Your Honor.

3 THE COURT: All right. Jurors, thank you some
4 for serving. Thank you for your good attitude this week.
5 Thank you for being here. I know we interfered with your
6 activities and with things you had planned but thank you
7 for being a part of the system. I appreciate very much
8 your service, and I thank you for your time and talent.
9 You're welcome to stay, but you're free to go. If you
10 would like to leave now you may leave right now if you
11 would like to leave.

12 (WHEREUPON, the jury was removed from the
13 courtroom at 1:42 p.m., and the following proceedings
14 commenced in open court.)

15 THE COURT: Mr. Lawson and Mr. Anderson, I
16 recognize you now for Rule 29 posttrial motions.

17 (Pause while attorneys confer.)

18 MR. ANDERSON: Your Honor, can we possibly
19 submit written motions to you?

20 THE COURT: Counsel, I know more about this case
21 right now than I'll ever know. I certainly will give you
22 the right to nex your motion now to the direct verdict and
23 that will be done by the Court. Are there any other
24 matters that you would like to bring to my attention?

25 MR. ANDERSON: No, sir, Your Honor.

1 **THE COURT:** All right. The motions in terms of
2 posttrial motions are referenced back to the motion for
3 directed verdict so that all rights are reserved, all
4 rights are protected, for purposes of appellate review.
5 And all of the motions are respectfully denied. All
6 right, bring him forward for sentencing in front of the
7 clerk please.

8 Mr. Solicitor, in regard to sentencing you're
9 recognized.

10 **MR. CLEMENTS:** Thank you, Your Honor. Your
11 Honor, let the Court know of Mr. Phillips' prior criminal
12 history. Your Honor, he had a juvenile conviction for
13 grand larceny and malicious injury to personal property.
14 A juvenile conviction for failure to stop for blue light
15 and assault on police officer while resisting arrest. And
16 a possession of 28-grams or less of marijuana conviction
17 in 2005. Resisting arrest conviction in 2005. Assault on
18 a police officer while resisting arrest in 2005.
19 Malicious injury to personal property in 2005 which he
20 received a YOA not to exceed five years. Discharging
21 firearm into a dwelling conviction, 2005, YOA not to
22 exceed six years. Assault on a police officer while
23 resisting arrest, a YOA not to exceed six years all
24 concurrent, Your Honor. Burglary second degree
25 conviction, YOA, not to exceed six years, November 2005.

1 Assault and battery of a high and aggravated nature
2 conviction in November 28th, 2005, YOA, not to six years.
3 And the charges for which he was convicted here today,
4 Your Honor. Your Honor, we have members of the family of
5 the deceased.

6 And if you would please stand and state your name. I
7 know this is Mr. Clark's father.

8 FATHER OF VICTIM CLARK: My name is Larry
9 Reaves (ph). I'm — my son's...

10 THE COURT: Yes, sir.

11 THE MOTHER: Katrina Campbell, I'm the mother.

12 UNCLE OF VICTIM CLARK: Macey L. Reaves, uncle
13 of Mr. Clark.

14 MR. CLEMENTS: And no one from Ms. Bynum's
15 family is here; is that correct?

16 VICTIM ADVOCATE: Out of state at this time,
17 Your Honor.

18 MR. CLEMENTS: They were from out of state?

19 VICTIM ADVOCATE: Yes, sir.

20 MR. CLEMENTS: Ms. Bynum's family is out of
21 state, Your Honor. Your Honor, on behalf of the State and
22 the family, Your Honor, we would ask that you consider the
23 facts of this case. You know them, Your Honor, you've
24 heard them, this being a double murder, double armed
25 robbery. And with the prior criminal history of

1 Mr. Phillips and his history of flight, Your Honor, to
2 avoid arrest and prosecution we would ask for the maximum
3 sentence.

4 THE COURT: Anything further?

5 MR. CLEMENTS: And I think, Your Honor, they
6 would like to address the Court as well.

7 THE COURT: Okay.

8 MR. CLEMENTS: If you would stand and state your
9 name again.

10 VICTIM ADVOCATE: If you'd like to speak.

11 MR. CLEMENTS: If you'd like to speak.

12 THE MOTHER: Katrina Campbell.

13 THE COURT: Yes.

14 THE MOTHER: I'm the mother of the victim, and
15 this been so hard. I thank you for serving and doing
16 justice for his mother.

17 THE COURT: Thank you.

18 THE VICTIM: Thank you, Your Honor.

19 UNCLE OF VICTIM CLARK: Macey L. Reaves, I'm the
20 uncle of the victim Maltonin Clark, and I would just like
21 to say that with all the technology it took to bring this
22 to a conclusion of today there is no technology that can
23 put the remorse into the heart of the young man. The only
24 technology that can put heart into the young man is that
25 of God. And I was -- would like to just ask him while he

1 is incarcerated to just think on two of the ten
2 commandments, thou shall not kill and thou shall not
3 steal. If he would just repeat those and give that —
4 those two to everyone that he meets while he is
5 incarcerated that it will be a great deterrence I think to
6 keep the jails from being so full today. Two of the ten
7 commandments, thou shalt not kill and thou you shalt not
8 steal. Thank you, Judge.

9 THE COURT: Thank you.

10 MR. CLEMENTS: That's all from the family, Your
11 Honor.

12 THE COURT: All right. From Defense?

13 MR. LAWSON: May it please the Court, throughout
14 this case I have worked very closely with Joshua and with
15 his family. His family is in the courtroom, Your Honor,
16 his father, his mother, sisters, aunt, and uncle. They've
17 been here the entire time. He has extreme support. His
18 mother rode with me and took me around places in Horry
19 County out I didn't think when I got out the car the sun
20 would be shining we were so far down in the woods. I bet
21 you I've been places people in Horry County don't even
22 know exist in Horry County. Your Honor, they have just —
23 the whole family has supported Joshua in this during this
24 process. He has assisted me as best he could. Obviously,
25 Your Honor, he was locked up and there was only so much he

1 could do but he has been straightforward with me. I know
2 the jury has spoken; but I would ask, Your Honor, he is —
3 it's a -- it's just a very difficult situation, Your
4 Honor, and.

5 THE COURT: Would he like to address the Court?
6 Sir, would you like to say anything?

7 THE DEFENDANT: Yes, sir. Basically the big is
8 family members, I still hold my innocence. I ain't did
9 it. That's all I can say.

10 THE COURT: The jury has spoken. The Court is
11 bound by the jury verdict which relates to two sentences
12 of murder, two sentences of armed robbery, and a charge in
13 regard to possession of a weapon during the commission of
14 a violent crime. The lives of two innocent Marion County
15 citizens was -- was in fact taken under this horrific
16 scenario, and I do believe that we all recognize the human
17 existence that life is so precious and life is so
18 important.

19 Count one, murder, the defendant is committed to the
20 State Department of Corrections for a term of life. A life
21 sentence is imposed. It is consecutive to count two. Count
22 two, the defendant is committed to the State Department of
23 Corrections for a term of life. A life sentence is imposed
24 and it is consecutive, two consecutive life sentences.
25 Count four, armed robbery, 30 years. It is concurrent.

1 Count five, armed robbery, 30 years. It is concurrent. And
2 count three, 10 years. It is concurrent. Thank you so
3 much.

4
5 *** END OF REQUESTED TRANSCRIPT OF RECORD ***
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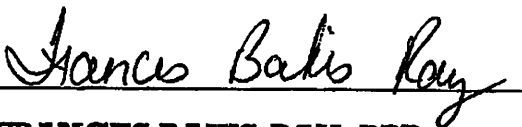
CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF FLORENCE)

**I, FRANCES BAKIS-RAY, Registered Professional
Reporter (RPR), court reporter for the State of South
Carolina, Twelfth Judicial Circuit, do hereby certify that
the foregoing proceeding is a stenographic report and was
transcribed through computer-aided transcription; that the
foregoing transcript contains a true record of the
proceedings.**

**I further certify that I am neither counsel for,
nor related to nor employed by any of the parties
connected to the action, nor am I financially interested
in the action.**

**Witness my hand at Florence, South Carolina,
this 27th day of January, 2010.**



**FRANCES BAKIS-RAY, RPR
My Commission Expires: 9-13-2014**

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF *Marion*)*Joshua Lee Phillips #312606*
Full name and prison number (if any) of Applicant.)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

2012-CP-33-356

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention *Broad River Correctional Institution*
2. Name and location of Court which imposed sentence *Marion County, General Session*
3. Name(s) of co-defendant(s) (if any) *Conswella Smith, Reginald Evans, Jason Phillips*
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) *2008-65-33-00071*
 - (b) _____
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) *September 3, 2009*
 - (b) *Consecutive sentences of life, Concurrent sentences of 30 years and*

Revised 3/2003

- (c) 10 years
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ✓
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Dismissed
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. February 29, 2012
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Effective Assistance of Trial Counsel
 (b) Due Process
 (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
 (a) See Attached
 (b) Lawyer will address
 (c) Lawyer will Address
12. Prior to this application have you filed with respect to this conviction:
 (a) any petition in a State Court under South Carolina Law? yes
 (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? no
 (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? no
 (d) any other petitions, motions or applications in this or any other Court? no
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
 (a) the specific nature thereof:
 i. Direct Appeal
 ii. _____
 iii. _____
 iv. _____
 (b) the name and location of the Court in which each was filed:
 i. South Carolina State Court of Appeals
 ii. _____
 iii. _____
 iv. _____
 (c) the disposition thereof:
 i. Dismissed
 ii. _____
 iii. _____

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

N/A

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) N/A

(b) _____

(c) _____

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? NO
- (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
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
- Jack W. Lawton, Jr. 122 N. 11th St. Florence, South Carolina 29501
 - Jack W. Lawton, Jr. 122 N. 11th St. Florence, South Carolina 29501
 - Joseph L. Savitz III P.O. Box 11564 Columbia, South Carolina 29211
- (b) the proceedings at which each such attorney represented you:
- Trial
 - Trial
 - Direct Appeal
19. State clearly the relief you seek in filing this application:
Dismiss with Prejudice or a New Trial
20. Are you now under sentence from any other court that you have not challenged?
NO

STATE OF SOUTH CAROLINA)

County of Marion)

VERIFICATION

I, Jessica Lee Phillips, 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.

Jessica Lee Phillips

SWORN to and subscribed before me this _____
day of 22 MAY, 2012.

Eugene Smith (L.S.)
Notary Public

My Commission Expires: APRIL 4, 2016

2012 MAY 24 12 12 20

9009

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Joshua Lee Phillips, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Joshua Lee Phillips
Applicant

SWORN or affirmed to and subscribed before me this

22 day of May, 2016.

Eugene Keitt
Notary Public

My Commission Expires: April 24, 2016

2016 MAY 22 PM 3:25

Trial Counsel was ineffective for never requesting a charge on the defense of alibi nor did he object to its omission from the judge's final instructions to the jury. Since the state's conflicting testimony alone supported a charge on that defense. As indicated by trial counsel's closing argument. Applicant's defense was that of alibi and was based upon a crucial conflict in the purported eyewitness testimony. Applicant's two co-defendants testified that there were four people in their car, but an independent witness saw only ~~three~~^{two} in other words, Applicant may have been elsewhere at the times of the murders and armed robberies.

Trial Counsel was ineffective for telling Applicant not to testify, and when Applicant asked trial counsel why shouldn't he testify, trial counsel stated that he wants the last argument.

Trial Counsel was ineffective for not calling several of Applicant's alibi witnesses that would have testified on Applicant's behalf.

Trial Counsel was ineffective for not filing a motion of Summary Judgment when the state failed to disclose of ^{Applicant's} ~~Attendant's~~ case within 180 days of the Statute of Limitation of the S.C. Supreme Court Order. In addition, the Court of General Session forfeited jurisdiction when it didn't try the ^{Applicant's} ~~Attendant's~~ within the 180 days. Statute of Limitation.

Trial Counsel was ineffective for not reaching Applicant with adequate representation during the representation process.

Trial Counsel was ineffective for not requesting a retrial when evidence suggested that the jury and one of Applicant's witnesses had some type of conversation during the recess of Applicant's trial. On the defense side was question on did they know rather than knew if they would talk to the jury or not, but neither side was question about what was the topic of the conversation.

Trial Counsel was ineffective for failing to get Applicant a mental evaluation knowing that applicant has a mental health history since childhood.

Trial Counsel was ineffective for not raising ~~the~~ Applicant's fourth amendment right due to the fact that the officers searched Applicant's mother's home where Applicant lived without a search warrant. Neither did the officers have anyone consent to do so, also taking clothes out the resident that police assume to be Applicant's because they a dark red substance that assume to be blood and was taken to the sled lab but came back negative.

Trial Counsel was ineffective for not correcting and letting a witness that was giving a prior agreement testify in Applicant. that basically promise that if the witness testify in Applicant that the court would give a low sentence at the 3rd recommendation of sentence and shall agree to advise any sentence court of the extent and degree of the witness ~~and~~ cooperation at the time of sentencing for his pending charges. Trial Counsel could have had the witness removed or filed for a motion to have the witness removed.

STATE OF SOUTH CAROLINA)

COUNTY OF MARION)

IN THE COURT OF COMMON PLEAS

2012-CP-33-356

Joshua Lee Phillips, 312606)

Applicant,)

v.)

RETURN

State of South Carolina,)

Respondent.)

Respondent, making its Return to the Application for post conviction relief (PCR) filed May 24, 2012, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Marion County Clerk of Court. Applicant was indicted at the February 2008 term of the Marion County Grand Jury for murder, possession of weapon during commission of violent crime and armed robbery (2008-GS-33-71). Jack Lawson, Esquire, represented Applicant.

On July 22, 2008, the Applicant was tried and found guilty as indicted. The Honorable Ralph King Anderson sentenced Applicant to a life sentence on the murder charge, with all other charges running concurrently. Applicant filed timely notice of intent to appeal and his conviction was affirmed by order filed February 29, 2012.

Attached herewith and incorporated herein are the records of the Marion County Clerk of Court regarding the subject conviction, and Applicant's SCDC records, and if available, the

transcript. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Counsel"
2. "Due Process"

III.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 80 L.Ed.2d 674. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reason

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Respondent submits that Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

The State therefore requests that this Court convene an evidentiary hearing solely on the issue of ineffective assistance of counsel. As to all other allegations, the State moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

V.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

VI.

WHEREFORE, having made its Return, the State requests that the Application be denied and the matter dismissed with prejudice.

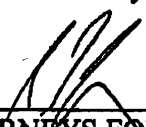
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

TYSON ANDREW JOHNSON, SR.
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

12/14, 2012.

STATE OF SOUTH CAROLINA)

COUNTY OF MARION)

IN THE COURT OF COMMON PLEAS

2012-CP-33-356

JOSHUA LEE PHILLIPS, #312606)

Applicant,)

vs)

AFFIDAVIT OF SERVICE BY MAIL

STATE OF SOUTH CAROLINA,)

Respondent.)

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Marcus L. Woodson, Esquire
1011 E. Liberty St.
Marion, SC 29571

DATED this 14th day of December, 2012.


 Norma Bigbee, Legal Assistant

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF FLORENCE	)	2013-CP-21-925
	)	
	)	
Joshua L. Phillips	)	)
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
State of South Carolina	)	)
<u>DEFENDANT</u>	)	August 30, 2017
		Florence, South Carolina

B E F O R E:

RUSO: THE HONORABLE THOMAS A. RUSSO, JUDGE.

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

STEVEN W. FOWLER, ESQ.
Attorney for the Applicant

LINDSEY A. MCCALLISTER, ASSISTANT ATTORNEY GENERAL
Attorney for the State

KESHIA REED
Official Court Reporter

	<u>I N D E X</u>	
	<u>WITNESS</u>	<u>DIRECT</u> <u>CROSS</u> <u>REDIRECT</u> <u>RECROSS</u>
1	Joshua Phillips	
2	Mr. Fowler	5
3		
4	Hank Anderson	
5	Mrs. McCallister	39 62
6	Mr. Fowler	56 66
7		
8	Ron Smith	
9	Mrs. McCallister	68
10	Mr. Fowler	73
11		
12	Certificate of Reporter	
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1 THE COURT: Are we ready to proceed with Mr.
2 Phillips' matter?

3 MRS. MCCALLISTER: I believe so, Your Honor.

4 MR. FOWLER: Yes, Your Honor.

5 THE COURT: Mr. Fowler's ready. And, Mrs.
6 McCallister, you ready?

7 MRS. MCCALLISTER: Yes, sir.

8 THE COURT: Okay. Go ahead call the case and
9 we'll get started.

10 MR. FOWLER: One moment the witnesses here?

11 MRS. MCCALLISTER: They are.

12 THE COURT: We have Mr. Anderson and Mr. Smith;
13 is that correct?

14 MRS. MCCALLISTER: Your Honor, this is Joshua
15 Lee Phillips vs. The State of South Carolina
16 2012-CP-33-0356. Your Honor, Mr. Phillips was indicted at
17 the February 2008 term of the Marion County grand jury for
18 two counts of murder, possession of a weapon during the
19 commission of a violent crime and two counts of armed
20 robbery. He was represented on those charges by Jack
21 Lawson.

22 On July 22nd 2008, he was -- Mr. Phillips was
23 tried before Judge Ralph King Anderson and found guilty as
24 indicted. Judge Anderson sentenced him to a life
25 sentences on the murder charges with 30 years on the armed

1 robbery charges and five years on the weapon charge to run
2 concurrent to those life sentences, Your Honor. He did
3 file a timely notice of appeal. His conviction was
4 affirmed by order filed February 29th 2012. He filed this
5 application for post-conviction relief on May 24th 2012,
6 Your Honor. Mr. Phillips is present today in the
7 courtroom and he is represented by Steven Fowler.

8 THE COURT: All right. Mr. Fowler, you ready to
9 proceed, sir?

10 MR. FOWLER: Yes, sir, I am, Your Honor.

11 THE COURT: Be happy to hear from you. Call
12 your first witness.

13 MR. FOWLER: If I may, there's a couple of
14 things I like to bring to the Court's attention.

15 THE COURT: All right, sir.

16 MR. FOWLER: One is that I have provided the
17 Court with the Attorney General's knowledge and acquiesce
18 that there were two pages of his application at the back
19 that were kind of light and somewhat transparent and I
20 have provided the Court those two pages.

21 THE COURT: Yes, sir.

22 MR. FOWLER: Okay. And also just for the
23 record, I stipulate that the transcript of record from the
24 August 31st 2009 Marion general sessions court is in the
25 record.

1 THE COURT: And I have that here.

2 MR. FOWLER: Yes, sir. Like to call Joshua
3 Phillips to the stand.

4 THE COURT: Mr. Phillips, if you would come
5 around to be sworn, sir.

6 THE CLERK: Mr. Phillips, stop right here on the
7 corner. Put your left hand on the Bible and raise your
8 right hand as much as you can. Do you swear or affirm
9 that the testimony you give will be the truth, the whole
10 truth, and nothing but the truth so help you God?

11 THE WITNESS: Yes, ma'am.

12 THE CLERK: Thank you. And watch your step and
13 have a seat.

14 WHEREUPON,

15 Joshua Phillips,
16 after first having been duly sworn, testified as follows:

17 DIRECT EXAMINATION

18 BY MR. FOWLER:

19 Q Good afternoon.

20 A Good afternoon, sir.

21 Q You and I have spoken about the PCR, what a PCR is,
22 correct?

23 A Yes, sir.

24 Q And you're fully, willingly and voluntarily going
25 ahead with it today, correct?

1 A Yes, sir.

2 Q Okay. Now, you've heard the attorney general state
3 the case into the record, that's the case that we're
4 talking about today, correct?

5 A Yes, sir.

6 Q Okay. Now, you and I've gone over our notes,
7 correct?

8 A Yes, sir.

9 Q All right. And we presented the Court with the
10 application with your document supplement at the back; is
11 that correct?

12 A Yes, sir.

13 Q All right. My understanding is that -- well, who is
14 your defense attorney?

15 A Mr. Jack Lawson.

16 Q And he has been deceased, correct?

17 A Yes, sir.

18 Q Okay. Now, what charges were you -- I think it's
19 been read, but what charges were you up on in this matter?

20 A Two counts of murder, armed robbery, possession of a
21 firearm during the commission of a violent crime.

22 Q Okay. And would you say those are very serious
23 charges?

24 A Yes, sir.

25 Q Okay. And do you think your representation needed to

1 be very serious?

2 A Yes, sir.

3 Q Okay. What's your take in general on the
4 representation that was provided to you?

5 A I don't feel like I was represented the way I should
6 be due to the fact that I had several alibi witnesses that
7 could have testify on my behalf to where I was at the time
8 in the commission of the crime and none of them was
9 called.

10 Q Okay. Well, now let me ask you this question, so now
11 did you come up with the alibi witnesses or did your
12 attorney or how did that defense come about?

13 A He basically -- I only seen him twice and we had like
14 one conversation about where I was at. I explain to him.
15 I gave him my witnesses name or whatever that can vouch
16 for me or whatever. And he suppose had went and, I guess,
17 investigate them whatever, but I never got any information
18 back on that. It's on the record that I had alibi
19 witnesses downstairs that they told to go downstairs in
20 the conference room to be called, but none was never
21 called.

22 Q Okay. So basically you're saying that you and
23 Mr. Lawson discussed alibi witnesses, correct?

24 A Yes, sir.

25 Q Now, how many times did he meet with you before

1 trial?

2 A Twice.

3 Q Okay. And can you explain those two times for the
4 court?

5 A The first time he met with me he ask me about the
6 case. Like I said, I gave him the run down where I was at
7 and what happened whatever. And the second time he met me
8 I was in the county he just ask me about some guy name
9 Eric Moultry and that was it.

10 Q Okay. So you were up on murder charges, correct?

11 A Correct.

12 Q And he only met with you twice?

13 A Yes, sir.

14 Q Okay. Now, was Mr. Hank Anderson your attorney in
15 this?

16 A He assuming that, you know, with a capital offense
17 you get two attorneys, but Mr. Lawson was -- he did all
18 the work. I never met with Mr. Anderson until trial -- to
19 actual trial.

20 Q Did Mr. Anderson go and meet with you while you were
21 incarcerated before trial?

22 A No, sir.

23 Q All right. Did you send him any correspondence?

24 A No, sir.

25 Q Okay. Did Mr. Lawson send you any letters?

1 A I really can't remember, but I do know I wrote him a
2 few times and that's it. I can't remember if I got
3 anything back and I don't want to answer the question if I
4 can't remember.

5 Q Okay. All right. Now, you were talking about alibi
6 witnesses; is that correct?

7 A Correct.

8 Q Now, why do you in your own personal opinion, why do
9 you feel like the alibi witnesses were important?

10 A Because each one of them could have gave them time
11 and event where I was at on during the time that they say
12 the crime happened and everything. They could have told
13 -- they could have basically gave them the truth about
14 where I was at. I know that I wouldn't -- they couldn't
15 find me guilty not when I have several witnesses telling
16 them where I was at during this time.

17 Q Okay. Can you name any of those witnesses?

18 A Of course.

19 Q How many were there and what were their names?

20 A It was several ---

21 Q And please state it slowly for the transcription?

22 A Johnny McLeod, Yolanda Phillips, Lois McLeod, Caleb
23 Bellamy, Stevie Riggins, and James Riggins.

24 Q So you had several persons that were willing to
25 testify; is that correct?

1 A Correct.

2 Q Now, what did -- to the best of your knowledge --
3 now, let me ask you this question are any of the witnesses
4 in the courtroom today?

5 A Yes.

6 Q Okay. Now, who is in the courtroom today?

7 A My mother and Johnny McLeod is in the courtroom.

8 Q And both of those could have been alibi witnesses,
9 right?

10 A Correct.

11 Q Okay. And they would state -- now, in your knowledge
12 of what Mr. Lawson did or did not do with them, did he
13 interview them?

14 A Not to my knowledge. I really don't know because he
15 never told me, but he ---

16 Q Hold on a second. You're saying that your attorney
17 on these charges never told you if he interviewed your
18 alibi witnesses?

19 A Yes, sir, he never told me that.

20 Q Okay. But you say you spoke with him, correct?

21 A Yes, sir.

22 Q All right. Now, as far as the alibi witnesses, would
23 you have -- they weren't called at trial?

24 A No, sir.

25 Q Do you think your -- the way you would have presented

1 your case would have been different if they had been
2 called?

3 A Yes, sir, of course.

4 Q How so?

5 A Because one of -- I mean from what he told me that he
6 wanted the last argument in my case and that would be best
7 for him for the jury to go in with what he said on his
8 mind. That was one of the main reasons I did not testify.
9 Had I known he was not call my alibi witnesses, I would
10 have testified my own behalf just so I could get my story
11 out. So it will be known where I was at and my alibi
12 witnesses would have testified to the same thing but...

13 Q Well, let me interject this, you talked about last
14 argument. What does that mean? What did Mr. Lawson
15 explain it to you or what's your understanding of the last
16 argument?

17 A Basically that he get the -- I guess, like the
18 closing argument to the jury. He would have the last word
19 to the jury before they go into deliberation.

20 Q So are you saying that his last argument, his closing
21 statement was more -- that he -- was your impression that
22 his -- that the closing argument was more important than
23 the alibi witnesses?

24 A From what he told me basically.

25 Q That's not any kind of defense of where you were,

1 what you were doing at the time?

2 A No, sir.

3 Q Okay. Now, let's go into you're not testifying a
4 little bit. So you thought going in the trial that your
5 alibi witnesses were going to testify?

6 A Correct.

7 Q They were in the courthouse the day of -- the day of
8 the trial, correct?

9 A Yes, sir.

10 Q So was your mind set where, well, I'm not going to
11 testify because I have the alibi witnesses?

12 A Correct.

13 Q Okay. Now, at the end of the trial or at the end of
14 Mr. Lawson's case for you, you indicated you saw that the
15 alibi witnesses were not going to testify?

16 A Yes, sir.

17 Q Okay. Did that come as a surprise to you?

18 A Yeah, a big surprise.

19 Q Why?

20 A Because I was expecting them to testify because that
21 was my only defense, that was my defense of alibi. And
22 they was the ones who could vouch to where my whereabouts
23 during the time of the crimes.

24 Q So if you had known that, you feel like you would
25 have testified or changed the pattern of the defense?

1 A I know I would have testified. And if I knew they
2 wasn't gone be called, I would have said something else to
3 him about them being called during the time.

4 Q Okay. Now, you mentioned something about being at
5 the studio at the time of the alleged offense, correct?

6 A Yes, sir.

7 MRS. MCCALLISTER: Your Honor, objection. I do
8 not think there was any testimony about him being at a
9 studio at the time of this offense. I did not hear that
10 from Mr. Phillips.

11 THE COURT: Obviously, I haven't read the
12 transcript, but apparently it's not in the transcript
13 since nobody testified.

14 MRS. MCCALLISTER: Right. And I did not hear
15 Mr. Phillips say that today, so I would object to that.

16 THE COURT: It hasn't come out today. I sustain
17 the objection.

18 BY MR. FOWLER:

19 Q Could your alibi witnesses provide to the Court on
20 that day, the day of trial where you were?

21 A Yes, of course.

22 Q And several of them were close friends of yours,
23 correct?

24 A Yes.

25 Q So you're saying that on your two conversations with

1 him you thought that the alibi witnesses would be your key
2 to a defense, correct?

3 A Yes, sir.

4 Q And at trial you found out that that was not the
5 case?

6 A Yes, sir.

7 Q Was it too late by the end of the trial for you to
8 testify? Did you talk with Mr. Lawson about why he did
9 not call witnesses?

10 MRS. MCCALLISTER: Your Honor, objection to the
11 form of the question. I think he's leading and that was a
12 compound question.

13 MR. FOWLER: Well, I can rephrase.

14 THE COURT: Go ahead and rephrase.

15 BY MR. FOWLER:

16 Q You stated that you realized at the end of the trial
17 or at some point that the alibi witnesses were not going
18 to be called; is that correct?

19 A Correct.

20 Q Did you have a conversation with Mr. Lawson about it
21 at the time?

22 A No, sir.

23 Q Why not?

24 A The reason I didn't because the trial was going on at
25 that time and, you know, I ain't want to say nothing and

1 get, you know what I'm saying, kicked out of court. By
2 the time the last argument, the trial was already over
3 with. It wasn't nothing else to be said. They done
4 basically said I was guilty and it was over with by the
5 time I realize what was going on.

6 Q Okay. And he didn't bring that to your attention
7 either, did he?

8 A No, sir.

9 Q Did Mr. Lawson bring up the alibi at any point?

10 A Yes, sir, when the case first got started in like
11 when they was making motions, I guess, to do everything,
12 they stated that I had several alibi witnesses and they
13 told them to go downstairs in a big conference room to be
14 waited to be called.

15 Q Okay.

16 MR. FOWLER: May I approach the witness, Your
17 Honor?

18 THE COURT: Yes, sir.

19 BY MR. FOWLER:

20 Q What I'm showing you is the transcript. Can you read
21 what page number that is?

22 A Seventy-two.

23 Q Okay. So it's on page number 72 and with the Court's
24 indulgence can you read from line seven to 24 roughly
25 please?

1 THE COURT: You said 72, I'm sorry.

2 MR. FOWLER: Yes, sir. It's page 72 line seven
3 through 24.

4 THE COURT: Okay. I got you. All right, I'm
5 with you.

6 A I understand why he want to have his mother with him
7 while all there other witnesses I believe are alibi
8 witnesses, your Honor. I ask they be sequestered. I
9 guess that's the word. What is going to be the impact?
10 Do we have a place to lead to just leave them downstairs
11 in terms of the witnesses. We are -- are we sequestering
12 them? Yes, sir. There's a big conference room where the
13 grand jury meets and I would suggest, Your Honor, if it's
14 okay with Your Honor with the sheriff that those people be
15 allowed to make themselves comfortable in that room and
16 that way we can retrieve them very quickly when it's
17 their turn to testify. And, Your Honor, what I anticipate
18 trying to do is having a couple of them sitting right
19 outside the door so we can have them kind of like the on
20 deck circle. I know Your Honor is a fan of baseball fan
21 sit right outside the door to be on deck circle -- on the
22 on deck circle.

23 Q So you're telling me on page 72 page of a 500,
24 roughly 500 page transcript, Mr. Lawson was indicating to
25 the Court that he had witnesses on your behalf?

1 A Yes, correct.

2 Q And he actually ask the Court to have them
3 sequestered?

4 MRS. MCCALLISTER: Well, Your Honor ---

5 THE COURT: I know that's the Solicitor
6 speaking.

7 MRS. MCCALLISTER: That's the Solicitor
8 speaking, yes.

9 MR. FOWLER: I apologize. My context was the
10 Court and Mr. Clements on page 72.

11 BY MR. FOWLER:

12 Q But anyway the point of the story was that many pages
13 into the trial transcript you were thinking alibi
14 witnesses were going to be called?

15 A Of course.

16 Q And Mr. Lawson did not bring any objection to that,
17 correct?

18 A No, sir.

19 Q So he actually -- you was a first-hand witness to
20 that trial. Did you believe that he was actually going to
21 call these witnesses?

22 A Yes, sir.

23 Q Okay. And they could be right outside the door?

24 A Yes, sir.

25 Q Okay. Now, you and I have discussed some case law on

1 this; is that correct?

2 A Correct.

3 Q All right.

4 MR. FOWLER: And I like to approach liberally,
5 Your Honor?

6 THE COURT: That's fine, yes, sir.

7 BY MR. FOWLER:

8 Q And these have been provided to the Attorney
9 General's office. What is this case right here?

10 A Greer vs. The State of South Carolina.

11 MRS. MCCALLISTER: Your Honor, I'm going to
12 object. I don't think that Mr. Phillips can testify about
13 a legal...

14 THE COURT: What is your reason for showing him
15 case law?

16 MR. FOWLER: We like to submit this to the
17 Court, Your Honor. Mr. Phillips and I have discussed
18 these cases.

19 MRS. MCCALLISTER: Your Honor, I think we can
20 make arguments at the end and he can submit the cases. I
21 don't have any issue with the cases being submitted to the
22 Court. I just don't think ---

23 THE COURT: In support of their argument?

24 MRS. MCCALLISTER: Right. I just don't think
25 it's appropriate for Mr. Phillips to testify about those

1 cases.

2 MR. FOWLER: I just didn't want to surprise the
3 Court at the end. I've provided these to ---

4 THE COURT: No, if you've got cases that support
5 your argument as to the position that you're going to
6 argue for Mr. Phillips ---

7 MR. FOWLER: Yes, sir.

8 THE COURT: --- I'll certainly allow you to
9 present that during your argument.

10 BY MR. FOWLER:

11 Q All right. Well, then let's go ahead and do this
12 now. We've discussed two primary cases in terms of alibi
13 defense; is that correct?

14 A Correct.

15 Q And these are State versus -- no, excuse me Greer vs.
16 State and State vs. Robins; is that correct?

17 A Yes, sir.

18 MR. FOWLER: And I like to submit these to the
19 Court at this time with no objection?

20 THE COURT: All right.

21 MRS. MCCALLISTER: That's fine. I don't have
22 any objection to the cases, Your Honor.

23 THE COURT: I understand.

24 MRS. MCCALLISTER: We would just like to have
25 argument at the end.

1 BY MR. FOWLER:

2 Q One of the witnesses was Caleb Bellamy; is that
3 correct?

4 A Yes, sir.

5 Q And you're saying that she particularly told the
6 Court where you were at that time, correct?

7 A Yes, sir.

8 Q Okay. Did Mr. Lawson interview her?

9 A No, sir, not to my knowledge.

10 Q And just again I think -- we might have asked this
11 earlier, but you're saying he did not interview any of
12 your potential witnesses?

13 A Not to my knowledge. The only person that I heard
14 him speak with was my mother, but I don't know what about.
15 He never said.

16 Q And he never give you anything in writing stating
17 what about their statements, correct?

18 A No, sir.

19 Q Okay.

20 MR. FOWLER: Just a moment, Your Honor, if I
21 may.

22 THE COURT: Yes, sir.

23 BY MR. FOWLER:

24 Q Did Mr. Lawson ask the Court to provide the jury with
25 a defense of alibi or ask the Court to tell the jury about

1 that?

2 A No, sir.

3 Q Now, there was also some -- you and I have spoken
4 about this case. Were you clear about what kind of
5 sentence you were getting?

6 A No, sir.

7 Q Why not?

8 A I wasn't aware of it. I was never told what type of
9 sentence I would be getting or what I would be facing.

10 Q You were never told what?

11 A What I would be facing as far as -- I was told the
12 charges, but not how much time I was facing or sentence.

13 Q So you were never told by Mr. Lawson how much time
14 you were getting?

15 A No, sir.

16 Q Now, as to other issues in this, who is Eric Moultry?

17 A A guy that was next door to me. I was locked up with
18 him in Turbeville. I was on parole for my violation for
19 my YOA sentence.

20 Q Okay. But now was he a witness for you or against
21 you in this matter?

22 A Against me.

23 Q Okay. Well, how did you come to find out about what
24 he was doing against you?

25 A Like I said, Mr. Lawson he came to see me and he just

1 ask did I know Eric Moultry and I told him no. And
2 basically that was the end of the conversation. And then
3 during my trial he mentioned that when I seen Eric Moultry
4 come out. He came on the stand, that's when I actually
5 knew who they was talking about because I didn't knew the
6 guy by name. Like I said, I met him at Turbeville. And
7 he actually help me with my law work.

8 Q Okay. So now what did he -- did he get something in
9 return for testifying against you?

10 A Yes, sir.

11 Q What did he get?

12 A They said something about a proffer agreement. That
13 if he was come to Horry County -- well, Marion County and
14 testify on me that they would take it into consideration
15 with his sentence.

16 Q Okay. Now, what's your understanding -- so you're
17 saying he got a proffer agreement?

18 A Yes.

19 Q To the best of your knowledge?

20 A Yes.

21 Q Do you know what a proffer agreement is?

22 A No, sir.

23 Q Did Mr. Lawson ever tell you what a proffer agreement
24 was?

25 A No, sir.

1 Q Okay.

2 MR. FOWLER: If I may approach?

3 BY MR. FOWLER:

4 Q Page 717 to 718 and I like to start reading -- this
5 is Eric Moultry on direct start reading from line 18 on
6 page 717 to the next page line six?

7 A It starts, okay, but you do have a proffer agreement?
8 Yes, sir, with the Fifteenth Circuit Solicitor's office?
9 Yes, sir. And what is your understanding of that
10 agreement that you were supposed to do? Just come in here
11 and tell the truth. And have they promise you anything to
12 tell the truth? Nothing whatsoever other than the
13 considered cooperation, yeah, that's right. With any
14 sentence you receive? Yes, sir.

15 Q Okay. So basically you're saying Mr. Moultry is one
16 you met while you were incarcerated, correct?

17 A Yes, sir.

18 Q And you actually confided in him, correct?

19 A Yes, sir.

20 Q And he came and testified against you at your trial,
21 correct?

22 A Yes, sir.

23 Q Did Mr. Lawson ever tell you about that?

24 A No, sir, he just ask me who he was -- did I know who
25 he was and I actually didn't know him by name. Like I

1 said, I met him on lock up and you can't even see people.
2 Only reason why I knew who he was when he came through the
3 doors in the courtroom because like when we go out for
4 rec, we get to see, but I never knew him his name
5 actually.

6 Q And you're saying based on his testimony he was the
7 benefactor of a proffer agreement, correct?

8 A Yes, sir.

9 Q And Mr. Lawson really never explained to you what
10 your proffer agreement -- what a proffer agreement is,
11 correct?

12 A Correct.

13 Q Okay. So did Mr. Lawson go over the list of
14 witnesses that the State had against you?

15 A No, sir.

16 Q Okay. And briefly how many witnesses did the State
17 have against you during this trial?

18 A A whole lot besides my co-defendants or whatever, but
19 a whole lot.

20 Q Do you have a number?

21 A Probably about 20 or 30 maybe more.

22 Q Okay. So you're saying there was a lot of witnesses
23 against you and Mr. Lawson -- let me rephrase it this way.
24 Did he ever give you the names of these witnesses before
25 trial?

- 1 A Not that I can remember.
- 2 Q And he never went over the possible substance of
- 3 their conversation -- their possible testimony against
- 4 you, right?
- 5 A Not that I could remember.
- 6 Q Did Mr. Anderson?
- 7 A No, sir.
- 8 Q Okay. Did anyone else from their office?
- 9 A No, sir.
- 10 Q Okay. Now, you and I have spoken about your
- 11 history -- a little bit of your personal history. Now, do
- 12 you suffer or at the time of the trial did you suffer from
- 13 any kind of mental illnesses?
- 14 A Yes, sir.
- 15 Q What were they or are they?
- 16 A Schizophrenia and bipolar.
- 17 Q Now, do you take medications for them?
- 18 A Yes, sir.
- 19 Q Do have you -- have you seen doctors on these?
- 20 A Yes, sir.
- 21 Q So you're saying -- so let me rephrase it this way.
- 22 Do you feel like your mental health history would have
- 23 been a good thing for you and Mr. Lawson to discuss?
- 24 A Yes, sir.
- 25 Q Did he ever discuss it with you?

1 A No, sir.

2 Q Did you bring it to his attention?

3 A Yes, sir.

4 Q How did you bring it to his attention?

5 A I told him that I like to get an evaluation. I ask
6 him to get my records from Palmetto Pee Dee Behavioral and
7 Health, but he was like since I'm not pleading guilty none
8 of that matters.

9 Q Okay. Explain that to me since you're not pleading
10 guilty none of that matters?

11 A He told me that since I wasn't pleading guilty to the
12 charges -- plead -- basically plead with my mental illness
13 and none of that matters because I'm not admitting to the
14 crimes. So mental health does not play an issue, so he
15 didn't request none of it.

16 Q But was there a sentencing portion of this trial
17 where you were sentenced?

18 A I don't understand what you're asking?

19 Q Well, I mean they sentenced you to...

20 A Yes, sir.

21 Q So he never brought up any of that to the Court's
22 attention?

23 A No, sir. No, sir.

24 Q Okay. Also now this is another topic, but it's one
25 of several, but, you know, goes into the overall

1 performance I think. You were wearing a stun belt at the
2 time of the trial?

3 A Yes, sir.

4 MRS. MCCALLISTER: Your Honor, objection. This
5 is beyond the scope of the allegations in the application.
6 I don't see ---

7 THE COURT: What relevance is that got to do
8 with any of the allegations contained in the application?

9 MR. FOWLER: Your Honor, I think it goes to the
10 performance of Mr. Lawson. He was wearing a stun belt and
11 if you -- testify he can tell the Court how it does affect
12 him and how he felt like ---

13 THE COURT: What control does Mr. Lawson have
14 over that?

15 MR. FOWLER: Well, if you're asking me, he could
16 have asked the Court to have it removed before my client
17 went up. I asked for his shackles to be undone. So, I
18 mean, Mr. Lawson could have had some impact on how he was
19 dressed or incarcerated at trial so to speak.

20 MRS. MCCALLISTER: Your Honor, whether that's
21 true or not, it's not been pled.

22 THE COURT: It's not been pled, so we're not
23 going to get into that.

24 MR. FOWLER: Okay.

25 THE COURT: All I'm saying is you're bound by

1 your application, whatever the allegations are in the
2 application. And I know you're trying to stretch that
3 over into being Mr. Lawson's -- an element of the
4 ineffective assistance, but that's not part of it. That's
5 not part of the application.

6 MR. FOWLER: Well, and, yes, sir, Your Honor,
7 and I'm just trying to paint the complete picture of
8 representation.

9 BY MR. FOWLER:

10 Q Now, one thing that was gone into in the transcript
11 was your sister heard something in the hall by a juror; is
12 that correct?

13 A Yes, sir.

14 Q All right. Tell me a little bit about that?

15 A Okay. Well, my sister -- my sister told me that
16 after the trial and everything ---

17 MRS. MCCALLISTER: Objection, Your Honor.
18 Anything that his sister told him is hearsay.

19 MR. FOWLER: Your Honor, it's in the transcript
20 and I'll be more than happy to read it or have my client
21 read it.

22 THE COURT: It's in what transcript? The trial
23 transcript?

24 MR. FOWLER: Yes, sir.

25 THE COURT: Can you give us a page?

1 MR. FOWLER: I'll be more than happy to. Page
2 751 to 752, Your Honor. They brought up a deputy. And if
3 I approach, I'll have my client read it.

4 THE COURT: Well, it's in transcript, that's
5 part of the record and so instead of reading 751 -- until
6 when?

7 MR. FOWLER: 752, Your Honor.

8 THE COURT: I mean, it's there. I'm making a
9 note right here of it. You can certainly ask him
10 questions regarding it.

11 MR. FOWLER: I like to ask him questions from
12 it.

13 THE COURT: If it's in the transcript, Ms.
14 McCallister I think it's relevant.

15 MRS. MCCALLISTER: Your Honor, if I may, it's in
16 the transcript that a woman and the jurors may have had
17 some interaction. I don't think what she said to them or
18 what they said to her is in the transcript, so that would
19 be my objection.

20 MR. FOWLER: We can discuss how it's phrased in
21 the transcript.

22 MRS. MCCALLISTER: Sure, certainly.

23 THE COURT: As long as you stick to the
24 transcript, that's fine.

25 MR. FOWLER: I'll be more than happy to, Your

1 Honor. Thank you.

2 BY MR. FOWLER:

3 Q You and I discussed this issue previously, correct?

4 A Yes, sir.

5 Q And you're saying -- and on page 751 it talks about
6 how there was some discussion about -- or a motion about
7 the witnesses talking about the jurors talking in the hall
8 in front of the public?

9 A Yes, sir.

10 Q All right. To the best of your recollection -- I got
11 page 751 and 752 here, but to the best of your
12 recollection, what is the transcript say -- they put a
13 deputy on the stand, correct?

14 A They ---

15 MRS. MCCALLISTER: Your Honor, I'm sorry I just
16 -- I have an objection again. I don't think that's a fair
17 characterization of what's said in the transcript. I
18 don't think there's -- it's not a motion.

19 THE COURT: The transcript speaks for itself,
20 Mr. Fowler.

21 MR. FOWLER: I'm just trying to elicit what he
22 -- the reason why page 751 and 752 are what they are. I'm
23 trying to get some respective from him. And he's
24 indicated that this is something that he feel like
25 Mr. Lawson was not prepared for or addressed to the Court.

1 On line 17, all right. Do you know who the person was?
2 This lady she's sitting out there, Your Honor. Mr. Lawson
3 address the Court on the next page says, Well, I need to
4 try and identify this person. I'm not going to let that
5 take place now, that's not going to take place. And the
6 deputy says I don't mean any harm. The Court understands.
7 And then they talk about Yolanda Phillips who -- and goes
8 from there. So, I mean, I'm trying to stay within the
9 four corners of the transcript, Your Honor.

10 MRS. MCCALLISTER: Your Honor, I think he said
11 that the sister overheard the jurors talking. The
12 transcript reflects that the sister was talking to the
13 jurors and that's what we were trying to correct that, so
14 that's the frame work that we're talking about here.

15 THE COURT: The allegation here in the
16 transcript seems to be -- is Yolanda Phillips his sister?
17 Is that your sister?

18 MR. PHILLIPS: Yes, sir.

19 THE COURT: Well, the allegation in the
20 transcript is that the deputy claims that Ms. Phillips was
21 speaking to one of the jurors.

22 MR. FOWLER: His indication has been different
23 to me that she overheard something.

24 THE COURT: That's not in the record. And so is
25 it in the application?

1 MR. FOWLER: I think so, Your Honor.

2 MRS. MCCALLISTER: Your Honor, I believe the
3 issue of Ms. Phillips and the juror is listed in the
4 application. I believe that the allegation is that
5 Mr. Lawson should have made some kind of motion about
6 that. So if that what he wants to ask him about -- my
7 original objection was because he started to say what his
8 sister told him. I think that is hearsay.

9 THE COURT: That is hearsay.

10 MRS. MCCALLISTER: So if he wants to ask about
11 what he thinks Mr. Lawson should have done, I think that's
12 appropriate and within the application.

13 THE COURT: Okay.

14 MRS. MCCALLISTER: That's all. I just didn't
15 want to get into hearsay.

16 THE COURT: I agree.

17 BY MR. FOWLER:

18 Q What do you think Mr. Lawson should have done about
19 that situation?

20 A I believe that he should have objected and held a
21 hearing due to the fact that really no one know what was
22 said.

23 Q You think it could have been a mistrial possibly?

24 A Yes.

25 MRS. MCCALLISTER: Your Honor ---

1 THE COURT: Sustain as to the leading.

2 MRS. MCCALLISTER: Thank you.

3 THE COURT: Do we need to ask the witness what a
4 mistrial is?

5 MR. FOWLER: Your Honor, Mr. Phillips and I've
6 had several conversations and he's raised several points
7 that I feel are somewhat valid.

8 THE COURT: Okay. But you can't lead and you
9 been doing a lot of it. And they're going to be objecting
10 to it and so you can't lead.

11 MR. FOWLER: I understand. Thank you, Your
12 Honor.

13 BY MR. FOWLER:

14 Q Was the jury instructed at the end of the trial about
15 armed robbery?

16 A No, sir.

17 Q Okay. Did you and Mr. Lawson have any conversations
18 about if the jury should have been charged with armed
19 robbery or use that or have that as a ---

20 A No, sir.

21 Q Do you know why not why Mr. Lawson didn't bring that
22 up?

23 A No, sir.

24 THE COURT: I'm going just so I'm clear. I'm
25 trying to stay along with everything. There was no jury

1 charge on armed robbery. Have you read the transcript?

2 MR. FOWLER: My understanding in discussions
3 with my client, my client has indicated that there's --
4 didn't have the jury charge with the elements of armed
5 robbery.

6 THE COURT: Ralph King Anderson did not charge
7 the jury properly on armed robbery in a murder and armed
8 robbery case. Mr. Fowler, did you read the transcript?

9 MR. FOWLER: I have read the transcript, Your
10 Honor, but I'm just going with what my client has
11 indicated to me as a relative type thing.

12 THE COURT: Well, and let me just say this and
13 I'm certainly -- I want to hear everything that needs to
14 be said in Mr. Phillips' application, but the reason we
15 appoint attorneys to represent folks that apply for
16 post-conviction relief -- if there's a transcript and in
17 this case Judge Ralph King Anderson gave the jury the
18 charge of the law on armed robbery. Is it relevant that
19 the defendant in this case Mr. Phillips disagrees with
20 Judge Anderson's charge on the law?

21 MR. FOWLER: I'm trying to elicit that from my
22 client, Your Honor. My client and I had several
23 discussions on this and he feels like -- and my
24 understanding is that he feels that needs to be read.

25 THE COURT: You're a trained attorney. You

1 agree with your client's position on that?

2 MR. FOWLER: Well, my understanding is that I
3 like to make sure the client has anything that's raised
4 necessarily raised and whether or not it was what have
5 you. I just want to bring that to the Court's attention.

6 THE COURT: All right.

7 BY MR. FOWLER:

8 Q You stated that Attorney Lawson knew of a potential
9 illegal search at your home; is that correct?

10 A Yes, sir.

11 Q Was that raised at trial?

12 A No, sir.

13 Q Okay. So it wouldn't be in the transcript, would it?

14 A No, sir.

15 Q Okay. And that's something that you had brought to
16 Mr. Lawson's attention, correct?

17 A Yes, sir.

18 Q Go ahead.

19 A Because even the officer nobody told them that they
20 could come in the house. They didn't have a search
21 warrant.

22 MRS. MCCALLISTER: Your Honor, objection, that's
23 hearsay. I don't think that he can testify about that if
24 he was not present for the search.

25 THE COURT: Sustained.

1 BY MR. FOWLER:

2 Q But there were other issues that you and Mr. Lawson
3 did not bring to your attention that you feel is relevant,
4 correct?

5 A Yes, sir.

6 Q Now, you're familiar with Strickland vs. Washington,
7 correct?

8 A Yes, sir.

9 Q Now, in general, in general terms do you feel that
10 Mr. Lawson violated the standard of representation to you?

11 A Yes, sir.

12 Q Why do you feel that way?

13 MRS. MCCALLISTER: Your Honor, objection. I
14 think ---

15 THE COURT: It's a valid question why do you
16 feel your attorney was ineffective, I guess, is what the
17 question is.

18 MR. FOWLER: That's the question I asked, Your
19 Honor.

20 THE COURT: That's valid.

21 A I feel that he was ineffective because he didn't call
22 none of my alibi witnesses in. If I may -- I say like
23 what he didn't object to that should have been objected
24 to. I don't want -- because just then she said that it's
25 not on the record about the illegal search and seizure

1 when the officer said on the record that it wasn't no
2 search warrant. It's in the transcript that it wasn't a
3 search warrant to go in the house and nobody gave them
4 permission. And basically my alibi witnesses that's the
5 main thing I feel like I wasn't represented right because
6 if he would have called my alibi witnesses, they could
7 have indeed testify to my whereabouts. And everything
8 from my knowledge, everything that I was convicted off of
9 was circumstantial evidence, no physical evidence
10 whatsoever. And my alibi witnesses could have testified
11 to where I was at during the time of these crimes. And
12 that's just what I feel.

13 Q And just to reiterate a point these alibi witnesses
14 were in the courtroom the day of trial?

15 A Yes, yes, all of them.

16 Q And you feel because of Mr. Lawson's performance that
17 you are where you are today?

18 A Yes, sir.

19 Q Is there any other issues within the application
20 that you feel need to be brought to the Court's attention
21 at this time?

22 A No, sir.

23 MR. FOWLER: I have no further questions, Your
24 Honor.

25 THE COURT: Cross.

1 MRS. MCCALLISTER: No, Your Honor. I don't have
2 any cross. I think the only thing I wanted to point out
3 is page 830 and 831 is the instruction on the armed
4 robbery issue.

5 THE COURT: Of the trial transcript?

6 MRS. MCCALLISTER: Yes, Your Honor.

7 THE COURT: What was that again now?

8 MRS. MCCALLISTER: 830 to 831.

9 THE COURT: And that's the Court's charge on the
10 law regarding armed robbery?

11 MRS. MCCALLISTER: Yes, Your Honor.

12 THE COURT: All right. And no questions for
13 this witnesses?

14 MRS. MCCALLISTER: No questions for this
15 witness.

16 THE COURT: Thank you.

17 Yes, sir.

18 MR. PHILLIPS: Can I comment on what she said
19 about the armed robbery? What I was meaning about the
20 element of armed robbery nobody testified at trial that I
21 took anything. Thank you, sir.

22 THE COURT: Yes, sir, thank you.

23 (WHEREUPON, the witness leaves the witness
24 stand.)

25 THE COURT: Okay. All right. Mr. Fowler,

1 anything further witnesses, sir?

2 MR. FOWLER: No further witnesses, Your Honor.

3 THE COURT: All right. Recognize the State.

4 MRS. MCCALLISTER: Thank you, Your Honor. We
5 would call Hank Anderson.

6 THE COURT: Mr. Anderson, if you would please
7 around to be sworn, sir.

8 THE CLERK: Do you swear or affirm that the
9 testimony you give in this case will be the truth, the
10 whole truth, and nothing but the truth so help you God?

11 THE WITNESS: Yes, ma'am.

12 THE CLERK: Thank you. Have a seat.

13 WHEREUPON,

14 Hank Anderson,
15 after first having been duly sworn, testified as follows:

16 DIRECT EXAMINATION

17 BY MRS. MCCALLISTER:

18 Q Mr. Anderson, were you involved in representing
19 Mr. Phillips?

20 A Yes, ma'am, I was.

21 Q On these charges?

22 A Yes, ma'am.

23 Q Okay. Can you tell me a little bit about how you
24 became to be involved in his representation?

25 A Yes, ma'am. Before they went to the circuit wide

1 public defender, I was, I guess, the chief or the head
2 public defender in Marion for a very brief period of time.
3 It was short lived, but I was the head at one time. Then
4 Mr. Lawson became the circuit wide public defender. He
5 took over Florence County and Marion County. This was his
6 case. I continued to work solely in Marion County.
7 Since, it was a double homicide, very serious case. I
8 asked Jack if there was anything I could help him to do.
9 And he asked me to look over the case and sit with him and
10 take notes. And I told him I would cross examine or talk
11 to any witnesses he wanted me to. And he had already
12 prepared a great deal. He gave me, I think, three or four
13 witnesses to cross, but I sat with him the entire time. I
14 was there for the trial and a little bit before the trial
15 not much.

16 Q Were you involved then in any of the investigation
17 that went in preparing the case for trial?

18 A I did not interview any witnesses. I had a copy of
19 the discovery and Jack and I went over that together. I
20 prepared for the people that he wanted me to handle. And
21 he gave me some advice on some things. And I told him
22 what I would ask a few of the witnesses he was preparing
23 for, so we did that together.

24 Q Okay. So to your knowledge did Mr. Anderson
25 interview the witnesses?

1 A I'm Mr. Anderson.

2 Q I'm sorry. Did Mr. Lawson interview the witnesses?

3 A Yes, ma'am.

4 Q The witnesses you ended up cross examining?

5 A No, he did not -- the witnesses that I crossed were
6 state's witnesses and I do not believe that he interviewed
7 them.

8 Q And do you know did Mr. Lawson interview witnesses
9 just in general?

10 A From what I can gather from looking back at the
11 notes, I had a trial notebook and Mr. Lawson had a trial
12 notebook. I see where he made a lot of notes under
13 people's names. I can only guess that he was making those
14 notes while he was talking to those individuals.

15 Q Okay. Do you have those notebooks and those notes
16 with you today?

17 A Yes, ma'am, I do.

18 Q Do you have the case file with you today?

19 A Yes, ma'am.

20 Q Okay. Those notes did he give you access to the case
21 file and his notes while you were helping to prepare for a
22 trial?

23 A Yes, ma'am.

24 Q Okay. Do you know if in those notes there are any
25 notes about interviews with Johnny McLeod?

1 MR. FOWLER: Your Honor, I like to object to
2 this. The notebook or notes have not been verified. I
3 mean, there's speculation on Mr. Anderson's part so far.
4 So I'd like to object to him reading from those notes that
5 are presumably Mr. Lawson's, but we don't know for a fact
6 they are.

7 MRS. MCCALLISTER: Your Honor, maybe I can lay
8 some more foundation for that question.

9 THE COURT: All right.

10 BY MRS. MCCALLISTER:

11 Q Mr. Anderson, you said that you had the case file
12 with you today; is that correct?

13 A That's correct.

14 Q Where did you get that case file from.

15 A From the Marion County Public Defender's office.

16 Q Okay. And is that where that case file is normally
17 kept?

18 A Yes, ma'am, any cases handled in Marion after it's
19 closed, we put it in storage.

20 Q Okay. And you retrieved this case file from the
21 Marion County Public Defender's storage?

22 A Yes, ma'am.

23 Q Okay. To your knowledge, has that case file been in
24 storage since it was -- since the case was actually
25 closed?

1 A Yes, ma'am.

2 Q Okay. Are you familiar with Mr. Lawson's
3 handwriting?

4 A Yes, ma'am.

5 Q Okay. The notes that are in the file are they in
6 Mr. Lawson's handwriting?

7 A Yes, ma'am, to me that looks just like Jack's
8 handwriting.

9 Q Okay. Do any of those notes in Mr. Lawson's
10 handwriting indicate that he ever interviewed Johnny
11 McLeod?

12 MR. FOWLER: And, Your Honor, once again he is
13 not an expert on handwriting. Those could have been done
14 by an intern during the summer session of Marion County
15 Public Defender's office.

16 THE COURT: Mr. Anderson, how long did you work
17 with Mr. Lawson not just on this case, but just in
18 general?

19 MR. ANDERSON: Judge, I bought Mr. Lawson's law
20 practice from him when he went to work with Ed Clements.
21 I paid Jack a check every month. I went through a lot of
22 Jack's old books that he had in his library. When his
23 house burned down, I let him live in my house on Madison
24 Avenue. So to answer your question, I've known Jack for
25 probably well over 20 years before he passed away and had

1 intimate dealings with him.

2 THE COURT: And during all that at that time in
3 your dealings with him both personally as well as
4 professionally, did you have opportunities or occasions to
5 view handwriting that you knew to be Jack Lawson's
6 handwriting?

7 MR. ANDERSON: Yes, sir.

8 THE COURT: Numerous times?

9 MR. ANDERSON: Yes, sir.

10 THE COURT: Did he have distinctive handwriting?

11 MR. ANDERSON: Yes, sir. And, Judge, we don't
12 have any summer interns in Marion.

13 THE COURT: I understand. You're not holding
14 yourself out to be a handwriting expert?

15 MR. ANDERSON: No, sir.

16 THE COURT: All right. But is it your
17 understanding based upon all your experience with
18 Mr. Lawson and the times you worked with him, that does
19 appear to be handwritten notes from him in that file?

20 MR. ANDERSON: Yes, sir. And he and I made
21 notes during the trial and I've got my notebook and his
22 notebook. I mean, I've looked at it prior to today and
23 that appears to be Jack's writing.

24 THE COURT: Mr. Fowler, anything -- you want to
25 ask anything further of Mr. Anderson?

1 MR. FOWLER: Well, you know, Your Honor, he said
2 that he's not an expert on handwriting and, I mean, I know
3 a lot people for 20 years, business people and I don't
4 know what their handwriting looks like. And secondly, you
5 know, he said earlier even on his direct examination, the
6 notes under the names he can only guess that that's
7 information. With Mr. Lawson obviously being deceased, we
8 don't know if a name on there -- he could have wrote it at
9 midnight. He could have wrote it while he was
10 interviewing the potential witness for five hours. I'm
11 just of the mind set that because he's not an expert,
12 because he doesn't know the context of these notes, that
13 these notebooks or at least Mr. Lawson's should be -- I
14 object to them coming in and I object to him reading
15 them.

16 THE COURT: So Mr. Phillips has filed a
17 post-conviction relief application alleging ineffective
18 assistance of counsel, that being Jack Lawson. Mr. Lawson
19 unfortunately has passed away. And you object to any of
20 Mr. Lawson's file coming into the record in this
21 courtroom?

22 MR. FOWLER: Your Honor, I object to anything
23 that is outside the scope of what is in the public record
24 of this case. Earlier the Attorney General held me to
25 staying within the four corners of the transcript and

1 that's what I'm asking the Court to hold this case to
2 because we could go on all day about how -- I don't know
3 what's in those. My understanding is that those -- I
4 object to Mr. Lawson's alleged notes coming into this
5 courtroom, Your Honor.

6 MRS. MCCALLISTER: Your Honor, I think
7 Mr. Anderson has authenticated that that is the file.
8 It's the case file. It came from the Marion PD's storage
9 facility. It's been there since the trial was over and
10 the case was closed. Whether -- I don't think it's even
11 relevant whether that is Mr. Lawson's handwriting or not.
12 All we're trying to get at is were there notes in a file
13 and what was in the file.

14 THE COURT: This is the case file that
15 Mr. Anderson used in preparing his portion of the trial?

16 MRS. MCCALLISTER: Yes.

17 MR. FOWLER: And, Your Honor, if I may
18 additionally although he has worked with the Marion County
19 Public Defender's office and apparently with Mr. Lawson,
20 you know, I don't even know if it comes in under the
21 business records exception because he hasn't -- he's not
22 been proven to be the gatekeeper or custodian of the file.
23 It's been with a public entity apparently, so I don't even
24 think it comes in under the business exception.

25 THE COURT: It hasn't been with a public entity.

1 The Public Defender's office -- the word public may be in
2 there, but that's not a public entity. Their files are
3 not open to the public.

4 MR. FOWLER: Well, my understanding is that
5 Mr. Lawson is deceased. He's not here to testify on his
6 behalf. He's not an expert and we object to those notes
7 coming in.

8 THE COURT: Overrule. You may proceed.

9 MRS. MCCALLISTER: Thank you, Your Honor.

10 BY MRS. MCCALLISTER:

11 Q The notes in the file is there any note in the file
12 that indicates someone on the defense team interviewed
13 Johnny McLeod?

14 THE COURT: I apologize. So that my ruling is
15 clear, I'm going to overrule. I think it has been shown
16 through the testimony that the file in question is a
17 file -- is the file of the Twelfth Circuit Public
18 Defender's office as it relates to Mr. Phillips' case back
19 during the time of this trial. That it has been in the
20 possession of the Twelfth Circuit Public Defender's office
21 and been kept in storage in their facilities and that --
22 so I'm going to allow the testimony regarding the contents
23 of that file to be subject to questioning.

24 MRS. MCCALLISTER: Thank you, Your Honor. Do
25 you need me to repeat my question?

1 THE COURT: You better repeat it.

2 BY MRS. MCCALLISTER:

3 Q Okay. Do the notes in the file or the file in any
4 way indicate that Johnny McLeod was interviewed by the
5 defense team?

6 A The notice indicate that Mr. Lawson saw Joshua
7 Phillips -- he interviewed him in detail on 8-6-2009. And
8 there are probably three and a half to four pages of
9 notes. One portion of the notes say possible witnesses
10 and that's Quanselo (sic) Smith, Reginal Evans, Jason
11 Phillips, Lauriann McLeod, Henry Lee McLeod, Derell Smith,
12 Robert Phillips, Stevie Riggins, James Gaddie, Johnny
13 McLeod and by Johnnnny McLeod he's got a phone number
14 [REDACTED]-0350. And it looks like a Yolanda Phillips. And
15 then on the very next page eight four interviews at Marion
16 office called Stevie Riggins and left message. Called
17 Johnny McLeod phone number disconnected.

18 MR. FOWLER: Your Honor, I like to object to
19 this under hearsay as well. It's -- he's reading all into
20 the notes -- into the record, but it's someone else's
21 notes at the very basic and I would think that this is a
22 hearsay situation, Your Honor. So I like to object under
23 that ground.

24 THE COURT: Solicitor.

25 MRS. MCCALLISTER: Your Honor, I'm not asking if

1 -- I'm not asking him to testify did Mr. Lawson talk to
2 these people or call these people. I'm asking whether the
3 file indicates those names were in there. The defense
4 team was aware of them and there was some kind of
5 investigation. That's all I'm trying to get in whether he
6 called him on that day is not my question.

7 THE COURT: Well, then let's restrict the
8 response to those questions.

9 MRS. MCCALLISTER: Okay.

10 THE COURT: To the extent on the hearsay, I'm
11 going to sustain that and let you restrict your
12 questioning to those areas.

13 MRS. MCCALLISTER: Okay.

14 MR. FOWLER: And could you repeat those areas
15 one more time please just for clarification.

16 THE COURT: I'm going to let you ask your
17 questions and you can object if she goes into something
18 that you feel is objectionable.

19 MRS. MCCALLISTER: Thank you.

20 BY MRS. MCCALLISTER:

21 Q Mr. Anderson, your role in this trial was to cross
22 examine which witnesses?

23 A I cross examined, I think, the last three witnesses
24 that testified and that was Quanselo Smith, Jason Thomas
25 Phillips, and Eric Lorenzo Moultry. And I also did the

1 opening statement in the trial.

2 Q Okay. And were you present in the courtroom through
3 the entire trial?

4 A Yes, ma'am.

5 Q Mr. Phillips has raised the issue of alibi witnesses.
6 Do you recall having witnesses present at the trial?

7 A I do believe there was some people there on behalf of
8 Mr. Phillips. We made a motion to sequester. The State
9 also made a motion to sequester, so all witnesses had to
10 leave the courtroom. My notes reflect that we ask if his
11 mother could stay in the courtroom, but I think that was
12 overruled. When I say his mother, I'm referring to Joshua
13 Phillips.

14 Q Okay. Do you know -- so those people that were there
15 on his behalf were sequestered for what purpose?

16 A So they would not hear other people testify.

17 Q Okay. So at that time a decision had -- do you know
18 if a decision had been made at that time as to whether
19 those people were definitely going to be called as
20 witnesses or not?

21 A We didn't know.

22 Q Okay.

23 A So we didn't know what other witnesses were going to
24 testify to?

25 Q You didn't know what other witnesses were going to

1 testify to?

2 A We didn't know what the State's witnesses were going
3 to say. We didn't know if we were going to actually need
4 them in the courtroom.

5 Q Okay. So the sequestration was a precautionary
6 measure?

7 A Yeah. Judge Anderson said anybody that may testify
8 on either side is sequestered.

9 Q Okay. And the decision about whether those witnesses
10 were going to testify or not was going to be made at some
11 later date based on the State presenting their case first?

12 A That's correct.

13 Q Correct, is that what you're saying?

14 A Yes.

15 Q Do you recall discussing with Mr. Phillips the
16 decision whether he wanted to testify or not?

17 A Yes.

18 Q Okay. Were you present -- did you -- were you
19 present for that conversation?

20 A Yes, I was.

21 Q Did you participate in that conversation?

22 A I did.

23 Q Okay. When did that conversation take place to your
24 knowledge?

25 A According to my trial notes, the person that did the

1 autopsy exam testified. The State closed and we recessed
2 for the day. We came back on September the 3rd and Jack
3 and I met with Mr. Phillips that morning before we started
4 back. We went over his right to testify. We came
5 upstairs. We went on the record and the defendant
6 Mr. Phillips was questioned by Judge Anderson whether or
7 not he wanted to testify.

8 Q Okay. So you had -- is that the only conversation
9 that you participated in with Mr. Phillips about his right
10 to testify?

11 A Yes.

12 Q Okay. And that occurred -- I think you said you
13 recessed for the day and came back the next morning and
14 you had the conversation that morning?

15 A Before the trial started back.

16 Q Before the trial started back. And then you
17 immediately came upstairs and put the decision on the
18 record?

19 A Judge Anderson put him under oath and asked him what
20 he wanted to do.

21 Q Okay. Did you discuss with Mr. Phillips how the
22 issue of alibi witnesses and his testimony might be
23 related? Do you have any discussions on that?

24 A My notes don't reflect that I discussed that with
25 him.

1 Q Okay.

2 A And I don't remember.

3 Q Okay.

4 A I can tell you this. I put defendant was questioned
5 by Judge Anderson. Defendant did not testify. And then
6 my very next note says defense did not put up any
7 testimony. Then we renewed our motion for directed
8 verdict and we went to closing.

9 Q Okay. Do you recall the issue at some point of one
10 of the defense witnesses or someone who was there on
11 Mr. Phillips behalf approaching a juror?

12 A I vaguely remember that, but I don't remember that
13 anywhere in my notes.

14 Q Okay. Were you present for any discussions where
15 Mr. Phillips perhaps brought up his mental health issues?

16 A I was not.

17 Q Okay. Do you recall any discussions with
18 Mr. Phillips about whether or not there was an objection
19 to be made to the search of the home?

20 A I remember the search that he's talking about, but I
21 think Mr. Lawson and I both thought that that search was
22 probably good for us.

23 Q Do you recall why you thought that?

24 A It was nothing that really linked him to what they
25 accused him of.

1 Q Okay. And you -- I think you said that one of your
2 jobs -- one of the witnesses that you cross examined was
3 Eric Moultry; is that correct?

4 A That's correct. He was the last one I crossed.

5 Q Okay. Do you recall cross examining him about a
6 proffer agreement?

7 A I did.

8 Q Okay. So the defense was aware of the fact that Mr.
9 Moultry had this agreement?

10 A Yes.

11 Q Okay. And was it an agreement with the Twelfth
12 Circuit Solicitor's office or some other Solicitor's
13 office, do you recall?

14 A I'm not sure. I know that he was doing time for a
15 breach of trust, but I'm not sure if it was from the
16 Twelfth Judicial Circuit or the Fifteenth Circuit.

17 Q Okay. The Fifteenth Circuit would that be Horry
18 County?

19 A Horry County.

20 Q Horry County, okay.

21 A And I didn't bring that file up here with me. I just
22 brought my notebook. It may be in the box behind you.

23 Q It may be in the big file?

24 A Yes, ma'am.

25 MR. ANDERSON: If I could step down for a

1 minute, Judge?

2 THE COURT: Yes, sir, that be fine.

3 (WHEREUPON, a pause in the proceedings.)

4 A All right. What's your question?

5 Q Was the proffer agreement with the Twelfth Circuit
6 Solicitor's office?

7 A It was with the Fifteenth Circuit. It was between
8 Orrie West, Eric Moultry and Fran Humphries who was the
9 deputy solicitor over in Horry County.

10 Q Okay. So it was an Horry County agreement and you
11 had a copy of that agreement?

12 A Yes, I do.

13 Q Okay. And you had the chance to cross examine Mr.
14 Moultry on that agreement; is that correct?

15 A I did.

16 Q Okay. Is there anyway to keep out his testimony
17 because he had a proffer agreement, that you can think of?

18 A No.

19 Q Okay. Going back to the issue of alibi if you know,
20 was alibi discussed as a possible defense?

21 A I do not know if it was or not. I did not discuss it
22 with him.

23 Q Okay.

24 MRS. MCCALLISTER: Beg the Court's indulgence,
25 Your Honor.

1 THE COURT: Yes, ma'am.

2 (WHEREUPON, a pause in the proceedings.)

3 MRS. MCCALLISTER: I think that's all the
4 questions I have for this witness, Your Honor.

5 THE COURT: Cross.

6 CROSS-EXAMINATION

7 BY MR. FOWLER:

8 Q Mr. Anderson, you said that you -- on direct that you
9 were involved in the representing of Mr. Phillips; is that
10 correct?

11 A Yes, sir.

12 Q And you said that a double homicide is a very serious
13 case, correct?

14 A Yes, sir.

15 Q How many times did you meet with Mr. Phillips?

16 A I met with him once.

17 Q Okay. When was that?

18 A I would think the day that we started the trial.

19 Q So you didn't meet with him -- you didn't go to the
20 trial or met with him any before trial?

21 A No, sir.

22 Q Okay. Did you ever go to or speak with any of Mr.
23 Phillips -- my understanding is that from what my client
24 said is that there were several witnesses on his behalf
25 that he had brought to your attention or to the Court's

1 attention; is that correct?

2 A I don't think I can answer your question without
3 reading Jack's notes again.

4 Q Well, I'm not asking you to read Jack's notes. I'm
5 saying what was his main defense in this trial based on
6 your knowledge?

7 A That he didn't do it.

8 Q Okay. But did he have any kind of -- why didn't he
9 do it? I mean, you're his attorney what was your defense
10 in terms of him proving to the Court that he did not do
11 it?

12 A I'm trying to think of the shortest way to answer
13 your question. This was Jack's case. It was always
14 Jack's case. Jack asked me to sit in with him and help
15 him. It was Jack's baby so to speak. It was his theme
16 and theory. It was his -- he knew what defense he wanted
17 to go with. He just asked me to sit with him and take a
18 few of the witnesses so that he wouldn't have to do
19 everything.

20 Q Well, but you are listed as his counsel of record,
21 correct?

22 A I'm still living.

23 Q Well, I guess my question is in terms of this case
24 you provided the opening statement for Mr. Phillips,
25 correct?

1 A That's correct.

2 Q And you crossed examined or you -- you crossed the
3 witness?

4 A Yes, sir, three of the last four.

5 Q All right. So you did have a stake in this, correct?

6 A Yes, sir.

7 Q Okay. In terms of defenses, did you and Jack ever
8 talk about defenses for Mr. Phillips?

9 A Yes, sir.

10 Q Okay. What were they?

11 A To try and prove reasonable doubt.

12 Q And how were you going to do that?

13 A The statements that the witnesses gave were
14 conflicting. The statements that the witnesses gave were
15 not accurate. The statement of the witnesses gave were --
16 each witness gave at least two statements. They were
17 conflicting within themselves. They were conflicting with
18 one another. Everyone was drinking. A lot of people
19 testified that they were smoking marijuana, popping pills.
20 Therefore, anything they had to say could not be deemed
21 very accurate.

22 Q Now, but you were in the courtroom earlier when we
23 read the transcript about the alibi witnesses, correct?

24 A I was in the courtroom, but I did have to step out
25 and take a phone call.

1 Q Okay. Well, as his attorney, you were familiar with
2 alibi witnesses, correct, for Mr. Phillips at trial,
3 right?

4 A I did not talk to any witnesses, that was between him
5 and Mr. Lawson and I think Mr. Smith was also involved in
6 that.

7 Q Okay. So -- but there were witnesses there that day,
8 correct?

9 A As far as, I know, yes, sir, there were.

10 Q I apologize. There were just three. I think I might
11 have talked over you. There were witnesses for
12 Mr. Phillips during the time of the trial, correct?

13 A Yes, sir, as far as I know they were there to testify
14 for him. I do not believe that they were there for moral
15 support.

16 Q Okay. And they were -- so why weren't they called?

17 A That was part of the trial strategy with Mr. Lawson,
18 Mr. Phillips and myself.

19 Q Did you discuss that with Mr. Phillips that -- even
20 though these alibi witnesses were there that they were not
21 going to be called?

22 A I do not specifically recall talking to Mr. Phillips
23 about that. I do recall his right to testify. He decided
24 not to. Therefore, we had the last argument.

25 Q So how much work did you do in terms of bringing

1 these alibi witnesses to court?

2 A How much work did I personally do?

3 Q Right.

4 A None.

5 Q You weren't -- so even though they were in the
6 building, you were not familiar with them, correct?

7 A No, sir, I was not.

8 Q So when did you start work on this case?

9 A Probably three to four weeks before it went to trial.

10 Q Okay. So is it fair to say that you did not have a
11 strong of depth of knowledge of this case?

12 A No, sir, that's not a fair statement.

13 Q Why is that not a fair statement?

14 A Well, if you know what you're doing, Mr. Fowler, and
15 you have tried a murder case before and you work and you
16 can get ready for a murder case in a week, but you got to
17 work.

18 Q Now, earlier you also listed -- well, you mention
19 that there were several witnesses on both sides, correct,
20 that both against Mr. Phillips and for Mr. Phillips that
21 needed to be interviewed or found out what their testimony
22 was, right?

23 A I didn't interview them. As far as what the State
24 was testifying to, I had all of their discovery. I had
25 everybody statement and I prepared if I had to cross

1 examine anybody I was ready for it.

2 Q Okay. Did you talk with Mr. Phillips about any of
3 his mental illnesses or anything like that?

4 A No, sir.

5 Q Did you talk with him about Eric Moultry before
6 trial?

7 A Not to my knowledge.

8 Q And just to be clear again, I mentioned it on the
9 record I think they've certainly mentioned on your side.
10 Eric Moultry was there to testify against my client,
11 correct?

12 A Yes, sir.

13 Q And who did the cross-examination of Eric Moultry?

14 A I did.

15 Q Okay. So with that being said, how did you bring up
16 the issue -- and I think we read it into the record or
17 mentioned it earlier, how did you handle him getting a
18 proffer from the State as to testifying against my client?

19 A I don't know, I have to go back ---

20 THE COURT: Do you have a page and line number?

21 BY MR. FOWLER:

22 Q I guess, I'm referring to page 717 and 718, that's
23 where the proffer came in. And I was just asking the
24 witness, you know, what -- if he was the one
25 cross-examining Eric Moultry and apparently Eric Moultry

1 had a proffer from the State, what was his trial strategy
2 or his questioning of Eric Moultry?

3 A My cross-examination begins on page 721.

4 Q Okay. Well, now Eric Moultry is addressed on -- what
5 I brought up was on page 717, but now what preparation did
6 you do in terms of preparing to cross-examine Mr. Moultry?

7 A I listen to his interview that was done at the J.
8 Ruben Long detention center. I reviewed his proffer. I
9 reviewed his prior record. And then I wrote out my
10 cross-examination.

11 Q Now, he was in the same incarceration area as my
12 client, correct?

13 A I don't know.

14 Q All right.

15 MR. FOWLER: Just a moment, Your Honor, please.

16 (WHEREUPON, a pause in the proceedings.)

17 MR. FOWLER: No further questions, Your Honor.

18 THE COURT: Anything further of this witness
19 redirect?

20 MRS. MCCALLISTER: Just briefly, Your Honor.

21 REDIRECT EXAMINATION

22 BY MRS. MCCALLISTER:

23 Q I believe you testified that you met with Mr.
24 Phillips one time; is that right?

25 A That's correct.

1 Q Does the file reflect how many times someone --
2 anyone else from the defense team met with Mr. Phillips?

3 A According to the file, he was met with on 5-22-2009,
4 5-29-2009 ---

5 MR. FOWLER: Your Honor, I like to object again
6 under hearsay in that if that's not his personal notes he
7 can't testify.

8 THE COURT: All right. I'm going to overrule.
9 It's part of the case file of the Public Defender's
10 office. It's information that's within the case file.

11 A On 8-6-2009, on 8-24-2009. Those are what I see in
12 the case file.

13 Q Okay. Does the case file reflect whether there's any
14 correspondence or anything additional letters or anything
15 like that the defense sent Mr. Phillips?

16 A Their office notes from 8-11-2008, that Joshua called
17 from the Turbeville Correctional Institute and he also
18 called on September the 18th 2008 from the Turbeville
19 Correctional Institute about his bond hearing. And then
20 there are a few letters in the file.

21 Q And to your knowledge was there a bond hearing?

22 A Yes, ma'am.

23 Q Okay. Do you know when that was?

24 A Yes, ma'am. There was a bond hearing in front of
25 Judge Nettles. And he set bond in the amount of \$150,000

1 with electronic monitoring. I had the date, but I do not

2 ---

3 MR. FOWLER: I think the question was the bond
4 hearing ---

5 THE COURT: The date of the bond hearing.

6 MRS. MCCALLISTER: I'm sorry if he did, I didn't
7 hear anything.

8 THE COURT: I don't think he answered the date.
9 He answered that it was a bond hearing before Judge
10 Nettles and the amount of the bond.

11 A 5-29-2009.

12 Q Okay. And did Mr. Lawson handle -- who handled the
13 bond hearing?

14 A Mr. Lawson did.

15 Q Okay. You talked a little bit about how -- about
16 your strategy for the defense and I think you said your
17 strategy was to prove reasonable doubt is that correct or
18 not prove reasonable doubt, but create reasonable doubt?

19 A That's correct.

20 Q Okay.

21 A That would have not been my theory, but that was the
22 theory of the case.

23 Q Okay. That was Jack's theory?

24 A Yes, ma'am.

25 Q Okay. And you were present for the trial, correct?

1 A Yes, ma'am.

2 Q Okay. Did the defense attack the police work that
3 was done in this case?

4 A Yes, ma'am.

5 Q Okay. Did the defense cross-examine the State's
6 witnesses?

7 A Yes, ma'am.

8 Q Okay. Did the State -- I mean, I'm sorry did the
9 defense make objections?

10 A Yes, ma'am.

11 Q Did the defense make motions?

12 A Yes, ma'am. We made pretrial motions and we also
13 made motions during the trial.

14 Q Okay. Did you make motions with respect to witness
15 testimony and limitations that might be put on that?

16 A Yes, ma'am.

17 Q Okay. Did you make any motions ---

18 MR. FOWLER: Your Honor, just to be clear, is
19 that direct examination or redirect off my cross just for
20 ---

21 THE COURT: It's redirect.

22 MRS. MCCALLISTER: It is redirect, Your Honor,
23 and he asked him what their strategy was for -- how they
24 were going to create reasonable doubt, so that's what I'm
25 getting at.

1 THE COURT: All right. I'll allow it.

2 MRS. MCCALLISTER: All right.

3 BY MRS. MCCALLISTER:

4 Q Did the defense object to the introduction of any
5 evidence?

6 A Yes.

7 Q Okay.

8 MRS. MCCALLISTER: Beg the Court's indulgence,
9 Your Honor. I think that's all I have.

10 THE COURT: Yes, ma'am.

11 (WHEREUPON, a pause in the proceedings.)

12 MRS. MCCALLISTER: That's all I have.

13 THE COURT: Anything further of this witness?

14 RECROSS-EXAMINATION

15 BY MR. FOWLER:

16 Q She just ticked off several things about
17 cross-examinations, about making objections, make motions.
18 Those are basically standard things that happen at a
19 trial, correct? Those are just basic motions and things
20 to do at trial. It doesn't reflect the overall trial
21 strategy; is that correct?

22 A Well, some of the motions that we made I don't think
23 your average public defender or your average defense
24 attorney would have made the motions we made, but yes,
25 sir, we made motions.

1 Q But you totally ignored the alibi defense, correct?

2 A If the alibi defense was ignored, it was because it
3 wasn't credible.

4 Q Okay. But you had alibi witnesses there that day
5 during the trial?

6 A As far as I know there were witnesses there.

7 Q Okay. So if the credibility issue was raised,
8 shouldn't that have been raised before you brought all the
9 alibi witnesses to court?

10 A That would depend on what other witnesses said and I
11 did not interview the alibi witnesses.

12 MR. FOWLER: If I may have a moment?

13 THE COURT: Yes, sir.

14 (WHEREUPON, a pause in the proceedings.)

15 BY MR. FOWLER:

16 Q Were these alibi witnesses that were at court that
17 day, were they subpoenaed to be there?

18 A I have no idea.

19 Q Why not?

20 A I didn't subpoena them. I didn't talk to them.

21 MR. FOWLER: No further questions.

22 THE COURT: Anything --

23 MRS. MCCALLISTER: Nothing further, Your Honor.

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

25 (WHEREUPON, the witness leaves the witness

1 stand.)

2 THE COURT: Call your next witness.

3 MRS. MCCALLISTER: Thank you, Your Honor. We
4 call Ron Smith.

5 THE CLERK: Do you swear or affirm that the
6 testimony you give in this case will be the truth, the
7 whole truth and nothing but the truth so help you God?

8 THE WITNESS: I do.

9 THE CLERK: Thank you.

10 THE COURT: Yes, ma'am.

11 MRS. MCCALLISTER: Thank you, Your Honor.

12 WHEREUPON,

13 Ron Smith,
14 after first having been duly sworn, testified as follows:

15 DIRECT EXAMINATION

16 BY MRS. MCCALLISTER:

17 Q Mr. Smith, where are you employed?

18 A With the Florence County Public Defender's office.

19 Q Okay. And how long have you been there?

20 A Thirteen years.

21 Q Okay. And what is your position there?

22 A I'm an investigator.

23 Q What does an investigator do?

24 A We go locate witnesses. We follow up on the
25 defendant's alibies. We review police reports to confirm

1 the accuracy of the police reports things of that nature.

2 Q Okay. Were you -- and did you do any investigation
3 on the case of Joshua Phillips?

4 A The answer to that would be I was with Jack, but I
5 did not personally do any investigation because that's
6 Marion County. I work for Florence County.

7 Q Okay. Can you then explain what your role was in the
8 case?

9 A My role in the case was to be with Jack when he went
10 out to locate witnesses at more less as a security for his
11 safety.

12 Q Okay. So you observed Mr. Lawson going out into the
13 community; is that correct?

14 A Yes, I did.

15 MR. FOWLER: Your Honor, I like to object to
16 this witness because he's said that he's the security
17 person. He doesn't have any personal knowledge of this
18 case. He indicated that he was basically the safety
19 detail for Mr. Lawson. I don't know they're friends or
20 what, but the point of the story is it's been shown that
21 he has no specific knowledge about this case and I like to
22 strike -- move to strike him as a witness.

23 THE COURT: He testified he's the investigator
24 for the Public Defender's office and he accompanied
25 Mr. Lawson during Mr. Lawson's preparing of this case. So

1 he can testify to what he did. I'm not sure why that's
2 objectionable because there's allegations to -- from the
3 applicant that Mr. Lawson didn't do anything other than
4 meet with him twice. And so it's relevant testimony to
5 hear what occurred behind the scenes. So I'm going to
6 overrule.

7 MR. FOWLER: Thank you, Your Honor.

8 BY MRS. MCCALLISTER:

9 Q You just testified I believe that you accompanied
10 Mr. Lawson when he went out to locate witnesses; is that
11 correct?

12 A That's correct.

13 Q Okay. Where did you go to try to locate witnesses?

14 A Well, we went to Conway to the Housing Authority in
15 Conway and he talk -- spoke with the defendant's mother.
16 I think that -- Mr. McLeod I can't think of his first name
17 right now and his sister also. They had already been to
18 the Marion County Public Defender's office and Jack had
19 interviewed them at that location as well. We went to a
20 location in Loris to a Pizza Hut and I cannot remember the
21 witness' name, but he testified that he was with the
22 defendant for a short while that night. They met over at
23 a club in Conway and then he left and went to a club in
24 Nichols. From there, we tried to locate a producer of
25 rap music. And I think that was somewhere outside of

1 Loris and Green Sea. I can remember that we had to go to
2 North Carolina to get to it through a circle to come back
3 into it. It was like a -- Jack and I both kind of joked
4 in the sense that it was like a wagon path road or kind of
5 thing. It probably was not on the map kind of thing, but
6 we got there it was a overgrown building. You could tell
7 that it had been abandoned for a good period of time. The
8 witness we were looking for we never found. We got
9 information that he was in Omaha, Nebraska. Jack went on
10 the internet through the department of corrections trying
11 to locate him there. We were never able -- the short of
12 it is we were never able to locate him. Also went to
13 Florence County -- I'm sorry Marion County detention
14 center and spoke with the defendant. What stands out in
15 my mind on that more than anything else was on the last
16 occasion Jack met with him, they discussed his right to
17 decide whether he wanted to testify or not. Jack
18 explained to him if he testified he would lose his last
19 argument. He also indicated that if any witness testified
20 for him, he would lose his last argument. Thus, that's
21 why he when he chose ---

22 MR. FOWLER: Objection, Your Honor, hearsay.

23 THE WITNESS: Well, you asked a question.

24 THE COURT: All right, hold on. Your objection
25 I apologize?

1 MR. FOWLER: Hearsay.

2 MRS. MCCALLISTER: Your Honor, I can move on.

3 THE COURT: All right, sustained.

4 BY MRS. MCCALLISTER:

5 Q Did you do any investigation with Jack or help Jack
6 in any way regarding tracking down medical records or
7 mental health records?

8 A No, I did not.

9 Q Okay. These witnesses that you were trying to track
10 down in Green Sea and Loris and Conway and all these
11 places and you did locate some of them; is that correct?

12 A Yes, we did.

13 Q Okay. Who were the people that you located, do you
14 know?

15 A That was eight years ago and like I said been given
16 my testimony, I did not do any notes at all. So I cannot
17 -- the ones who showed up off that list that would be the
18 ones we located.

19 Q Okay. But some of them you just were never able to
20 find?

21 A The main one that stands out in my mind more than
22 anything else is the one from Nebraska.

23 Q Okay.

24 A He allege that he was with him that night listening
25 to rap music and that stood out in my mind.

1 Q So your recollection is the reason that you were
2 looking for that witness is because Mr. Phillips claimed
3 that's who he was with that night?

4 A That's correct.

5 Q And that's the witness that you could never locate?

6 A That's correct.

7 MRS. MCCALLISTER: I think that's all I have for
8 this witness, Your Honor.

9 THE COURT: Any cross?

10 CROSS-EXAMINATION

11 BY MR. FOWLER:

12 Q When did you -- you said that you did a fairly
13 thorough search of witnesses; is that correct?

14 A Well, we began the -- I join Jack a couple weeks
15 prior to the trial. We left here at the crack of dawn and
16 we got home after dark each and every night.

17 Q Do you know how long this case had been ongoing
18 before the trial?

19 A Not really I don't recall. I'm sure I looked at the
20 incident report that told me what had happened, but I
21 can't recall when it was.

22 Q But you're saying your involvement in it ---

23 A Was about two weeks.

24 Q Was about two weeks before trial?

25 A Right.

1 Q Okay. And when did you mention this information
2 about finding these witnesses to my client?

3 A I never did. I didn't talk to your client.

4 Q Did you ever send him any kind of report or anything
5 like that?

6 A No, I did not.

7 Q Okay. Now, are you -- at the time in 2008, 2009
8 point were you located in Florence or Marion County?

9 A From the time I went to work with the Public
10 Defender's office, I am employed by Florence County.

11 Q So you were -- this was a Marion County case,
12 correct?

13 A That's correct.

14 Q All right. So you weren't employed by any Marion
15 County entity on this, correct?

16 A That's correct. However, I was employed by the chief
17 public defender, which also has authority in Marion
18 County.

19 Q Even at that time 2009?

20 A Yes.

21 Q Now, you mentioned earlier I think you said you
22 didn't know -- there were witnesses there that day for my
23 client?

24 A That's correct.

25 Q How many were there again do you remember?

1 A I can -- about 15 I believe is what...

2 Q So you're telling me that about 15 ---

3 A You know, that's not a -- that's off the top my head.

4 That's not 100 percent sure kind of thing, but I know it
5 wasn't 30 as your client referred to them.

6 Q But it was more than one more or two, correct?

7 A Yes.

8 Q Now, were they subpoenaed?

9 A Part of them were, yes. I can remember doing -- when
10 they came into the office -- and I cannot tell you Molly's
11 last name. Hank could.

12 THE COURT: Molly Sloane.

13 A Sloane. Okay. Thank you. Ms. Sloane did subpoenas
14 and gave to these people.

15 Q Okay. So there were several subpoenas -- there were
16 several persons who were subpoenaed there for the trial,
17 correct?

18 A Yes.

19 Q On behalf of my client, correct?

20 A That's correct. They were on standby.

21 Q But they were in the building?

22 A They were in the building awaiting his decision as to
23 whether he wanted to testify or not testify.

24 Q Okay. Do you recall the name Stevie Riggins?

25 A No, I don't. Like I told you, eight years ago and

1 I'm doing this all by memory. I've heard it in the
2 courtroom today, but I don't recall it from when I was
3 there.

4 Q So you don't remember a lot about this case from
5 eight years ago, do you?

6 A No, not a whole lot, no, sir.

7 MR. FOWLER: Just a moment, Your Honor, if I
8 may?

9 THE COURT: Yes, sir.

10 (WHEREUPON, a pause in the proceedings.)

11 MR. FOWLER: No further questions.

12 THE COURT: Anything further of this witness?

13 MRS. MCCALLISTER: No, Your Honor.

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

15 (WHEREUPON, the witness leaves the witness
16 stand.)

17 MRS. MCCALLISTER: That's the State's case, Your
18 Honor.

19 THE COURT: All right.

20 MRS. MCCALLISTER: We would just ask to heard on
21 some arguments.

22 THE COURT: I will certainly do that. Mr.
23 Fowler, I'll be happy to hear from you on behalf of Mr.
24 Phillips and then I'll hear from the State.

25 MR. FOWLER: Is this closing argument portion,

1 Your Honor?

2 THE COURT: Yes, sir.

3 MR. FOWLER: Your Honor, my understanding is
4 that there was some work that went into this case in terms
5 of having witnesses there in the courtroom that day. They
6 were in the building. There were motions before the Court
7 that these persons were not to be -- not to be in the
8 courtroom. They had that much gravitas to them, that they
9 were not allowed to hear other witnesses, Your Honor. We
10 all know that Mr. Lawson's passed away several years ago
11 and obviously he's not here to testify, Your Honor, but
12 Mr. Anderson was. And from hearing from Mr. Anderson, you
13 know, it sounds like he was partly involved, but not. But
14 then he talk a little bit like he was very involved. So
15 for me personally, I mean, I just don't know how much
16 involvement Mr. Anderson had on this.

17 And also this was a case that there were several
18 witnesses that the State's witness, Your Honor, said that
19 there was possibly 15 persons here or at the Marion County
20 court that day in terms of anticipating that they would
21 be -- to testify. Approximately, 15 and several of those
22 based on his recollection were subpoenaed. It sounds like
23 to me like that is an alibi defense case that my client, I
24 think, reasonably understood it was going to be an alibi
25 defense case. Apparently, the gentleman also went out

1 there trying to search for these witnesses although it was
2 two weeks before trial which in my opinion is not very
3 much time to get a bunch of witnesses together.
4 Apparently, there was some work done to subpoena alibi
5 witnesses. Well, these alibi witnesses did not appear
6 before the Court, Your Honor. And it's speculation at
7 this point whether Mr. Lawson's -- or my client saying
8 basically that he did not tell him, okay, that were moving
9 from a alibi witness theory to something else. You know,
10 the State mentioned several things, basic things that are
11 courtroom procedures, but that -- my point was that this
12 is not relating to a strategy. And to have a strategy of
13 potentially 15 people there -- several of them subpoenaed
14 and not use that as a defense in my opinion to me it would
15 create a lot of confusion my client's part.

16 My client also on the stand went over various
17 deficiencies in Mr. Lawson's representation. The lack of
18 pretrial communication on something that's serious. The
19 lack of adequately going after Eric Moultry in terms of
20 him ratting him seemingly and being at the same facility
21 as my client, knowing my client what have you. That was
22 not gone into, Your Honor. And, of course, you know, we
23 have the issue that was within the four corners of the
24 document, apparently some discussion with some witnesses
25 and things along those lines that potentially could have

1 been done out of order, Your Honor. So the thing about it
2 is today and as I've have discussed with my client today
3 and several times before, there was an alibi witness
4 strategy that was impacted and implemented by his
5 attorney, that in my opinion was not adequately explained
6 to my -- it's almost like a run away bride type situation.
7 You had all these witnesses here. You had all them under
8 subpoena and then my client in my opinion has the rug
9 pulled under him saying, well, we're not going to use
10 these 15 people that we have mentioned to the Court to be
11 sequestered and are waiting downstairs or waiting in
12 another part of the courtroom -- courthouse. We're not
13 going to do that. So when that was taken away from him,
14 Your Honor, the whole strategy went a part. It was not
15 adequately explained I don't think. There several issues
16 mental health potentially that were also not done and I
17 think even Mr. Anderson said that he only worked on it a
18 few weeks before trial. And that, you know, as an
19 experienced litigator that might be great, but he also
20 said that this was a double homicide in a very serious
21 case and needed more than three weeks attention before the
22 trial date of August of 2009.

23 So, Your Honor, we are standing firm on the
24 alibi witness defense. It was not implemented by his
25 attorney. That attorney that's here today has no

1 clarification on that, Your Honor. And we would like to
2 ask for a ruling in our favor, Your Honor.

3 THE COURT: All right. Thank you, Mr. Fowler.
4 Mrs. McCallister.

5 MRS. MCCALLISTER: Thank you, Your Honor. On
6 the issue of the alibi witnesses, Your Honor, I believe
7 the case is Walker v. State. It's 407 South Carolina 400
8 ---

9 THE COURT: Give me that again?

10 MRS. MCCALLISTER: 404 South Carolina -- S.C. 4
11 -- let me start over. 407 S.C. 400.

12 THE COURT: All right. Walker vs. State.

13 MRS. MCCALLISTER: Walker v. State, Your Honor,
14 and that case says that counsel has a duty to investigate
15 alibi witnesses and ascertain whether their testimony
16 would aid the defense. And I think the testimony here
17 today from the investigator and Mr. Anderson was that
18 witnesses were interviewed. They attempted to locate
19 witnesses based on what Mr. Phillips was telling them.
20 Your Honor, they're not magicians. They can't force
21 somebody to appear in court or conjure them up if the
22 person is not cooperating or doesn't want to be found or
23 simply can't be found. So, Your Honor, we would argue
24 that Mr. Lawson and Mr. Anderson met their burden by going
25 out to investigate and trying to locate them.

1 Your Honor, the 15 witnesses or so that were
2 there that day some of them were subpoenaed, some of them
3 were not. I believe the transcript reflects that it was
4 Mr. Clements who called them alibi witnesses not
5 Mr. Lawson. So I don't know that we can conclusively say
6 they were even there to testify about an alibi. We don't
7 have those witnesses here today. They have not been
8 offered. So we don't know what their testimony is, Your
9 Honor. And we would point -- we would point the Court to
10 Glover v. State on that point, Your Honor, 318 S.C. 496
11 which says that PCR applicant must produce witnesses. The
12 alibi witnesses are not at the PCR hearing or otherwise
13 introduced the witnesses testimony in a manner consistent
14 with the rules of evidence and then applicant's mere
15 speculation as to what the testimony would have been is
16 not enough to satisfy his burden.

17 On the issue of whether, you know, applicant's
18 decision not to testify, Your Honor, I think, Mr. Anderson
19 testified that they had overnight before -- the judge gave
20 them overnight to make that decision. They talked about
21 it all together. They came upstairs. Your Honor, I think
22 the transcript also reflects that on page 759 Mr. Lawson
23 in the transcript says that they are not just starting
24 these discussions tonight. They been talking about it for
25 weeks, but they would like overnight to discuss it again.

1 Mr. Lawson also says that if Mr. Philips decides not to
2 testify, they probably will not call any other witnesses
3 and says that it's all connected, Your Honor. And I think
4 that goes to his trial strategy. I understand
5 Mr. Fowler's issue was that maybe the client didn't
6 understand the trial strategy, but the strategy is
7 Mr. Lawson's to decide and that it is his to make those
8 decisions if the trial strategy is going to change. Your
9 Honor, I think Mr. Anderson made clear that the strategy
10 was up in the air and depended on what other witnesses
11 were going to say. And they needed to hear that testimony
12 first. And I think that's reasonable, Your Honor. You
13 can't just -- you might have a plan, but you can't just
14 stick to it at all costs if the evidence isn't coming in
15 the way that you thought it is. You have to adjust. And
16 it appears that they may have been what Mr. Lawson did and
17 we would submit that's valid.

18 Your Honor, the applicant was sworn and
19 questioned regarding his decision not to testify. We feel
20 like the transcript reflects that that was a voluntary
21 decision. It was discussed at length with his attorneys
22 and that he was satisfied with that decision at the time.

23 Your Honor, on the issue of whether Mr. Lawson
24 should have made a motion or requested some sort of
25 hearing on whether a witness approached the jury, I think

1 the transcript reflects that that was actually the
2 defendant's witness and that she attempted to speak to the
3 jury, not that the jury attempted to speak to her. In
4 that case, I don't think it's relevant necessarily what
5 was said. That was his witness. So I don't know what
6 basis Mr. Lawson could have to ask for; you know, a
7 mistrial or retrial or something like that on the basis
8 that they're defense witnesses were attempting to speak to
9 the jury. I don't think the transcript reflects that
10 anything necessarily was even said and that the deputies
11 just intercepted it. The State's position is that that is
12 not a reason to grant relief, Your Honor.

13 On the issue of applicant's mental health, Mr.
14 Lawson on page 771 and 772 puts on the record that he is
15 aware that applicant had mental health issues when he was
16 young. He discussed that with him and any possible
17 defenses that mental health issues may raise. Mr. Lawson
18 states that Mr. Phillips maintained he was not present at
19 the time of the commission of the crime. He has no
20 history of memory lapse, that they have talked at length
21 about the issue and applicant understands why they are
22 pursuing mental health insanity as a defense or in
23 mitigation.. So, Your Honor, we think that the transcript
24 is clear on Mr. Lawson's strategy on that point as well.

25 As to the issue of the search of applicant's

1 home, I think the transcript reflects that there was
2 consent to search. The officer testified that there was
3 consent given. The evidence that was obtained from that
4 search Mr. Anderson testified they felt like that actually
5 helped them. I think that testimony is on page 560, 568
6 and 569. Given the fact that they felt like it helped
7 them, I don't think that there's any basis from them to
8 have objected to that search. And they felt like it
9 helped them and I think it's reasonable strategy not to
10 object to it. I don't even think even if they -- and then
11 the issue of not objecting to the witness who had a
12 proffer agreement Mr. Anderson testified that he actually
13 cross-examined that witness. He was aware of the proffer
14 agreement. He reviewed witness' statement. He reviewed
15 the proffer agreement. He wrote out his
16 cross-examination. He think the transcript reflects that
17 Mr. Moultry was thoroughly examined on that issue. I
18 think there are two issues that have been raised in the
19 application, Your Honor, that I did not hear any testimony
20 on. And we would ask that the -- that, Your Honor,
21 dismiss them. I think that there's an issue raised about
22 not disposing of the case within 180 days. And actually
23 that maybe the only issue, Your Honor, I'm sorry I
24 misspoke. It's just that one issue. I think that's all
25 from the State, Your Honor.

1 THE COURT: All right. Okay. Folks, I'm going
2 to take the opportunity to review the transcript, the
3 areas that have been pointed out by both the applicant as
4 well as the State. The cases that were submitted by the
5 applicant in support of their position regarding the alibi
6 and I will review all that. And I'll have a decision for
7 you after I had a chance to review all those things.
8 Thank you.

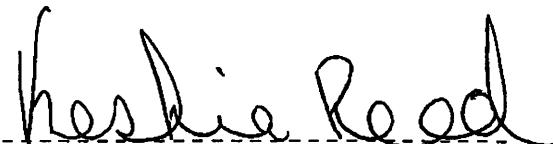
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CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
)
COUNTY OF FLORENCE)

I, Keshia Reed, Court Reporter in and for the State of South Carolina At Large, do hereby certify that the above-entitled cause was heard as hereinafter set out; that I was authorized to and did transcribe the said proceedings; and that the foregoing and annexed pages, numbered 1 through 86, inclusive, constitute a true and accurate transcription of my stenographic report of the said cause taken during the said hearing. In the Court of Commons Pleas for Florence County, South Carolina, on the 30th day of August, 2017.

I do further certify that I am neither of kin, counsel nor interest to any party hereto. In witness whereof, I have hereunto affixed my signature this 9th day of October 2018.


Keshia Reed, Court Reporter

STATE OF SOUTH CAROLINA
COUNTY OF MARION

FILED
) IN THE COURT OF COMMON PLEAS
2018 JAN 29 TWELFTH JUDICIAL CIRCUIT

Joshua Lee Phillips, #312606,

Applicant,

v.

State of South Carolina,

Respondent.

MARION COUNTY SC
CHRISTY H GRAY
CLERK OF COURT
Case No. 2012-CP-33-0356

ORDER OF DISMISSAL

FILED
2018 JAN 29 AM 11:07
MARION COUNTY SC
CHRISTY H GRAY
CLERK OF COURT

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed by Joshua Lee Phillips (Applicant) on May 24, 2012. Respondent made its Return on December 12, 2012. An evidentiary hearing into the matter was convened on August 30, 2017, at the Florence County Courthouse. Steven W. Fowler, Esquire, represented Applicant. Lindsey McCallister, Esquire, of the South Carolina Attorney General's Office, represented Respondent. At the hearing, Applicant testified on his own behalf. Hank Anderson, Esquire, and Ron Smith testified for the State. This Court had before it a copy of the records of the Marion County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the application, the State's Return, the trial transcript, and Applicant's appellate records.

PROCEDURAL HISTORY

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Marion County Clerk of Court's orders of commitment. Applicant was indicted at the February 2008 term of the Marion County Grand Jury for two counts each of murder and armed robbery and one count of possession of a weapon during the commission of a violent crime

(2008-GS-33-0071). Jack Lawson (Counsel), Esquire,¹ and Hank Anderson, Esquire, represented Applicant. On August 31 through September 3, 2009, Applicant proceeded to a jury trial before the Honorable Ralph King Anderson and a jury. After the jury convicted Applicant as indicted, Judge Anderson sentenced Applicant to consecutive terms of confinement for life on each count of murder, plus concurrent terms of thirty years each for each count of armed robber and five years for the count of possession of a weapon during the commission of a violent crime.

A notice of appeal was filed on Applicant's behalf, and an appeal was perfected by Joseph Savitz, III, Esquire, of the South Carolina Commission on Indigent Defense – Appellate Defense Division, pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Phillips, Op. No. 2012-UP-143 (filed on February 29, 2012). The remittitur was issued on March 16, 2012.

SUMMARY OF FACTS ADDUCED AT TRIAL

At approximately 5:15 a.m. on the morning of September 29, 2007, a woman approached three officers from the Marion County Sheriff's Department at the Sunny Mart in Nichols. Tr. pp. 127-129, 177-78. The woman was "hysterical," and reported to the officers she had just left the Nichols Night Life club, where a man was inside shooting people. Tr. p. 129, 178, 487. The woman also reported the man left in a gold Jeep with three other people. Tr. pp. 179-80, 478. The woman told the officers the shooter was a black male with twists in his hair, who she knew as Scrappy.² Tr. p. 180, 487, 493. Upon arrival and entry to the club, the officers discovered two deceased victims, spent shell casings, and a wallet with dollar bills scattered on the floor. Tr. pp. 131-34, 183. The male victim's red pickup truck was idling in the parking lot, and the

¹ Mr. Lawson died on November 2, 2011.

² Testimony at trial established Applicant's nickname was Scrappy or Little Scrappy. Tr. p. 258, 600-01, 664-65.

lights were on inside the club. Tr. p. 139, 183, 282-83. Both of the deceased victims inside the club had suffered gunshot wounds to the head. Tr. pp. 739, 744.

Later that morning, the woman who first reported the incident, Jacqueline Love, returned to the crime scene and was interviewed by a detective there. Tr. pp. 144-45, 225, 230. Based on Ms. Love's description of the shooter,³ another officer on scene suggested Applicant as a possible suspect. Tr. p. 255, 494. The officer prepared a photo lineup with Applicant's picture, and Ms. Love immediately identified Applicant as the man she had seen inside the club. Tr. p. 257-58, 494-96, 506. Ms. Love also identified Applicant from the stand at trial. Tr. pp. 477, 499-500, 507-08.

Once Applicant was identified, officers searched his house and were able to identify Applicant's codefendants, who were in the car with him. Tr. pp. 384-85, 602-03, 611. Applicant's codefendants testified at trial that Applicant went into the club after closing, they heard gunshots, then Applicant ran back to the car, and they drove off. Tr. pp. 604-08, 659-60, 665-68. One codefendant further testified he helped Applicant dispose of the gun. Tr. p. 675. Officers eventually located a .45 caliber pistol near the 501 bridge in Mullins, which was consistent with shell casings found at the crime scene. Tr. pp. 367-68, 385-86, 445. Applicant fled to Kentucky and was apprehended there a few weeks later. Tr. pp. 216-19.

ALLEGATIONS

In his application, Applicant alleges he is being held unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
 - a. Counsel failed to call alibi witnesses or ask for instructions on alibi defense;

³ Applicant suffers from vitiligo, which is visible around his mouth, and has two tear drop tattoos on his face. Tr. p. 494; see also Applicant's records from the South Carolina Department of Corrections.

- b. Counsel advised Applicant not to exercise his right to testify because Counsel "wanted last argument" but Applicant would have testified if he had known no witnesses would be called;
 - c. Counsel failed to file a motion to dismiss the case after the solicitor failed to dispose of it within 180 days;
 - d. Counsel did not make any motions for mistrial or retrial based on contact between Applicant's mother and a juror.
2. Violation of Due Process
- a. Counsel failed to challenge search warrant

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusion of law as required by S.C. Code Ann. Sec. 17-27-80 (2003).

Ineffective Assistance of Counsel

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland, 466 at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

Applicant testified Counsel represented him on these charges and did the preparation for trial, although Mr. Anderson assisted at trial. Applicant testified he only met with Counsel twice before trial. Applicant testified at the first meeting he gave Counsel a "run down" of the case, they discussed his alibi, and he gave Counsel the names of some potential witnesses. Applicant testified the second time he met with Counsel, Counsel asked about "a guy named Eric" who was a potential witness for the State. Applicant further testified he could not remember whether Counsel sent him any letters prior to trial, but Applicant sent several letters to Counsel. Applicant testified he never met Mr. Anderson until the day of trial.

Mr. Anderson testified he assisted Counsel at trial as second chair, and he was present for the entire trial. Mr. Anderson testified he was also involved with preparation approximately three to four weeks prior to the trial, and he and Counsel reviewed all the discovery and prepared witnesses together. Mr. Anderson testified his role was to deliver the opening statement and to cross-examine three witnesses - Conswella Smith, Jason Phillips, and Eric Moultrie. Mr. Anderson testified he had obtained the case file from the Marion County Public Defender's Office, where it had been in storage since the trial. Mr. Anderson also testified he was familiar with Counsel's work and handwriting, and he recognized Counsel's notes in the file. Mr.

Anderson testified Counsel had prepared a trial notebook which contained notes on Counsel's investigation and case preparation, indicating Counsel had talked with several witnesses prior to trial. Mr. Anderson also testified notes in the case file indicate Counsel met with Applicant at least four times prior to trial, as well as sent several letters. Mr. Anderson testified he met with Applicant once at the jail prior to trial.

Issue #1 – Counsel failed to call alibi witnesses or ask for jury instructions on alibi defense.

"[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Walker v. State, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012), overruled on other grounds by Walker v. State, 407 S.C. 400, 756 S.E.2d 744 (2014). However, failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). In order to prevail on a claim of ineffectiveness based on Counsel's failure to call a favorable witness, the South Carolina Supreme Court has repeatedly held a PCR applicant *must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence* at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (emphasis added). Applicant's speculation the witness' testimony would have been favorable cannot, by itself, satisfy his burden of showing prejudice. Glover v. State, 318 S.C. 396, 498-99, 458 S.E.2d 538, 540 (1995). Additionally, "[c]ourts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel."

Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) (citing Goodson v. United States, 564 F.2d 1071 (4th Cir. 1977)).

Applicant testified he gave Counsel the names of several alibi witnesses, but Counsel never told Applicant whether those witnesses were investigated, and the witnesses were not called at trial, even though several were present. Applicant testified the witnesses were Johnny McLeod, Yolanda Phillips, James Riggins, Stevie Riggins, and Kayla Bellamy, all of whom could verify Applicant's whereabouts at the time of the crime. Applicant testified he had no knowledge as to whether Counsel ever interviewed any potential witnesses, except for his mother, Yolanda Phillips, and Counsel never told Applicant if he did.

Applicant further testified he was surprised at trial when no witnesses were called on his behalf, and he stated if he had known ahead of time, he would have changed his decision not to testify. Applicant testified the witnesses were in the courthouse during trial, and he anticipated they would be called because Counsel asked to have them sequestered, and he had no other defense. Applicant further testified Counsel and Mr. Anderson advised him not to testify because they wanted to have the last argument to the jury, but he would have testified if he had known his attorneys were not going to put up any defense. Applicant also testified Counsel did not request a jury instruction on the alibi defense.

Mr. Anderson testified documentation in the case file reflects the defense listed Stevie Riggins, Yolanda Phillips, and Johnny McLeod as potential defense witnesses, among others. Mr. Anderson testified some alibi witnesses were present in the courtroom, and the defense asked to have witnesses sequestered because they had not yet made a decision about whether Applicant would testify and present witnesses. Mr. Anderson further testified they waited to make the decision about whether to call defense witnesses until after the State had presented its

case. Mr. Anderson also testified the main defense strategy was to deny Applicant's involvement and show the State's theory was not reasonable. Mr. Anderson testified the State relied on witnesses who admitted to smoking marijuana and drinking on the night of the crime, and they gave conflicting, inaccurate statements, all of which the defense attacked on cross-examination. Mr. Anderson also testified he and Counsel repeatedly pointed out poor police work, made motions to limit witnesses' testimony, and objected to the introduction of evidence. Mr. Anderson further testified if the alibi witnesses were not called, it was because Counsel did not find them to be credible.

Counsel's investigator, Ron Smith, also testified for the State. Mr. Smith testified he accompanied Counsel on several trips to Loris and Green Sea several weeks before trial to attempt to locate the people Applicant had named as potential alibi witnesses. Mr. Smith testified they were specifically searching for a music producer who had a studio between Loris and Green Sea, as well as a witness from the Loris Pizza Hut who might have seen Applicant that night. Mr. Smith testified Applicant told him and Counsel that Applicant was with the music producer listening to music all night, but they could never corroborate that alibi. Mr. Smith testified they searched for several days from dawn until after dark, but they were unable to locate any of the witnesses, and the music studio building appeared to be abandoned and overgrown. Mr. Smith further testified they received information the music producer might have gone to Omaha, NE, and Counsel attempted to track him down through the Nebraska Department of Corrections, but was unsuccessful. Mr. Smith testified he and Counsel also went to the Conway Housing Authority and interviewed Applicant's mother, sister, and Johnny McLeod.

This Court finds Applicant has failed to prove either Counsel or Mr. Anderson was deficient or failed to render reasonably effective assistance under prevailing professional norms

in regards to their handling of a potential alibi defense at trial. This Court finds Counsel and his investigator, Mr. Smith, investigated Applicant's alleged alibi and interviewed the witnesses they were able to locate. Therefore, neither Mr. Anderson nor Counsel was deficient. This Court finds credible Mr. Smith's testimony regarding the extensive search the defense undertook to locate the music producer and substantiate Applicant's alibi. Further, this Court finds credible Mr. Anderson's explanation of the defense strategy and why defense witnesses were present at trial but ultimately not called to testify.

Additionally, Applicant did not call any alibi witnesses to testify on his behalf at the evidentiary hearing. Applicant's assertion alone these witnesses would have provided favorable testimony is not enough to meet his burden as to this allegation. See Glover, 318 S.C. at 499, 458 S.E.2d at 540 ("The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice."). This allegation is therefore denied and dismissed.

Issue #2 – Counsel advised Applicant not to testify without informing Applicant no witnesses would be called in his defense.

"The right of a criminally accused to testify or not to testify is fundamental." State v. Rivera, 402 S.C. 225, 241-42, 741 S.E.2d 694, 702-03 (2013) (citing Rock v. Arkansas, 483 U.S. 44, 52, (1987)). "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so." Id. Further, it is the defendant who retains the ultimate authority to decide whether or not to testify. United States v. McMeans, 927 F.2d 162, 163 (4th Cir. 1991) (citing Jones v. Barnes, 463 U.S. 745, 751 (1983)). Under Strickland, in order to prove ineffective assistance of counsel based on his claim Counsel prevented him from exercising his right to testify, Applicant must show both that his attorney violated his right to testify and that his testimony had a

"reasonable probability" of changing the outcome of the trial. United States v. Rashaad, 249 F. App'x 972, 973 (4th Cir. 2007).

Applicant testified Counsel and Mr. Anderson advised him not to testify because they wanted to have the last argument to the jury, but he would have testified if he had known his attorneys were not going to put up a defense or call witnesses on his behalf. Mr. Anderson testified he, Counsel, and Applicant discussed Applicant's right to testify multiple times throughout the course of the representation. Mr. Anderson further testified, and the transcript confirms, Counsel requested additional time to discuss the matter of Applicant's testimony with Applicant, and the trial court allowed a recess overnight in order to make the decision. See Tr. p. 759. Mr. Anderson also testified Applicant was thoroughly questioned on the record by the trial court about his decision. Mr. Smith also testified he was present for the final conversation between Applicant, Mr. Anderson, and Counsel, and Counsel thoroughly explained Applicant's right to testify and the significance of preserving the defense's opportunity to make the last closing argument.

This Court finds Applicant has failed to prove Counsel or Mr. Anderson was deficient in his advice to Applicant regarding his right to testify. This Court finds Mr. Anderson's testimony on this issue to be credible and also finds Applicant's testimony was not credible. Further, this Court has reviewed the trial transcript, which confirms Mr. Anderson's testimony and reflects the trial judge advised Applicant of his right to testify if he wished. Tr. p. 762-65. Applicant informed the trial judge he had made the decision not to testify. Tr. p. 765. Significantly, the transcript also reflects Counsel explained to the trial court the decisions as to whether Applicant would and whether the defense would call any additional witnesses were linked, and if Applicant did not testify, the defense likely would not put up any other witnesses. See Tr. p. 759.

Further, this Court finds Applicant failed to prove prejudice because it is not reasonably likely his testimony would have changed the outcome of the case. Applicant did not offer any testimony at the evidentiary hearing to establish an alibi or refute the testimony of the eyewitness, Ms. Love, or his codefendants, all of whom placed him at the scene as the shooter. This allegation is therefore denied and dismissed.

Issue #3 - Counsel failed to file a motion to dismiss the case after the solicitor failed to dispose of it within 180 days.

This Court finds Applicant failed to present any testimony, argument, or evidence at the hearing regarding the allegation in his application that Counsel was ineffective for failing to file a motion to dismiss the case after it was not disposed of within 180 days. Therefore, this Court deems that allegation abandoned, and the allegation is dismissed.

Issue #4 - Counsel did not make any motions for mistrial or retrial based on contact between a member of Applicant's family and a juror.

Applicant testified ^{that} at trial, his sister overheard a juror say something in the hallway during a recess in trial. Applicant testified he felt Counsel should have asked to hold a hearing to find exactly what was said, and possibly move for a mistrial. Mr. Anderson testified he had no specific memory of this event. This Court has reviewed the transcript and finds Applicant's family member, Yolanda Phillips, approached a juror and attempted to speak to him or her, which was reported to the trial judge by courtroom deputies. See Tr. pp. 751-52. The Court finds Applicant has failed to prove either deficient conduct on the part of Mr. Anderson or Counsel or that he was prejudiced as he did not call the juror in question to testify. See, e.g., Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) ("This Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the

testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. . . .). This allegation is therefore denied and dismissed.

Issue #5 – Counsel failed to obtain Applicant's mental health records or make any motions to have Applicant evaluated for competency.

Although not specifically raised in his application, at the hearing, Applicant testified he had mental health issues Counsel did not investigate. "[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Walker v. State, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Cl. App. 2012), overruled on other grounds by Walker v. State, 407 S.C. 400, 756 S.E.2d 744 (2014). Further, "[c]ounsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" Strickland, 466 U.S. at 690. There is a strong presumption that counsel's decisions are based on tactical strategy rather than neglect. Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (quoting Massaro v. United States, 538 U.S. 500 (2003)). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). See also Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel); Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy). "Courts must be wary of second guessing counsel's trial tactics; and

where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) (citing Goodson v. United States, 564 F.2d 1071 (4th Cir. 1977)).

Applicant testified he asked Counsel to obtain his mental health records and to have him evaluated for competency, but Counsel told him it was irrelevant because he was pleading not guilty. Applicant testified he and Counsel never discussed his mental health history. Applicant further testified he suffers from schizophrenia and bipolar disorder. Mr. Anderson testified he was not present for any discussions with Applicant regarding Applicant's mental health. However, this Court has reviewed the transcript which reflects Counsel was aware of Applicant's mental health history and obtained copies of Applicant's records for his file. Tr. p. 772. Further, Counsel explained on the record he had discussed the issue with Applicant, including possible defenses, but Applicant asserted he was not present or involved in the crime in any way, so Counsel did not pursue the matter as part of a defense or as possible mitigation. Tr. p. 772.

This Court finds Applicant has failed to prove Counsel was deficient with respect to the handling of Applicant's mental health history, as the record reflects Counsel was aware of the issue, obtained the relevant records, discussed his findings with Applicant, and articulated a reasonable trial strategy for not pursuing a defense or mitigation based upon Applicant's mental health. Additionally, Applicant has failed to prove he was prejudiced in any way because he did not introduce the records themselves or any expert testimony indicating he was incompetent or incapacitated at the time of the crime or trial. See, e.g., Bannister, 333 S.C. at 303, 509 S.E.2d at 809 ("This Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. . . ."). This allegation is therefore denied and dismissed.

Issue #6 – Counsel did not properly challenge the testimony of Eric Moultrie, who testified against Applicant at trial pursuant to a proffer agreement.

Although not specifically raised in his application, at the hearing, Applicant testified Counsel and Mr. Anderson were deficient in their handling of the testimony of Eric Moultrie, who testified against Applicant at trial pursuant to a proffer agreement with the Fifteenth Circuit Solicitor's Office. Applicant testified Counsel never explained what a proffer agreement was or reviewed the State's list of potential witnesses with Applicant prior to trial. Applicant testified, however, Counsel asked him prior to trial if he knew someone by that name, but Counsel never explained the context of who Mr. Moultrie was or that he would be testifying against Applicant. Applicant gave conflicting testimony as to whether he knew Mr. Moultrie. Applicant testified he only recognized Mr. Moultrie once he entered the courtroom to testify, not by name, but he also testified he told Counsel he knew Mr. Moultrie because Mr. Moultrie had helped him with some legal paperwork while they were both at the Turbeville Correctional Institution.

Mr. Anderson testified he prepared the defense's cross-examination of Mr. Moultrie, and he had a copy of the proffer agreement and was aware of its contents. Mr. Anderson testified although he did not talk to Applicant about Mr. Moultrie, he prepared for Mr. Moultrie's testimony by listening to his interview, reviewing the proffer agreement and Mr. Moultrie's criminal history, and wrote out questions for cross-examination. Mr. Anderson further testified he thoroughly cross-examined Mr. Moultrie regarding the content and effect of the proffer agreement.

This Court finds Applicant has failed to prove either Counsel or Mr. Anderson rendered ineffective assistance regarding the testimony of Mr. Moultrie and their handling of the proffer agreement. Applicant has presented no evidence of any basis for Counsel or Mr. Anderson to challenge the testimony, and Mr. Anderson was thoroughly prepared to address the issue, which

he did at length on cross-examination. Therefore, this Court finds neither Counsel nor Mr. Anderson was deficient, nor was Applicant prejudiced in any way by Counsel or Mr. Anderson's handling of the issue.

Due Process Violation

Applicant alleges infringement of his rights under certain amendments to the United States Constitution, specifically a violation of his Fourth Amendment right to be free from unreasonable search and seizure, and claims Counsel should have challenged the search of his home. Applicant testified he brought up the issue of a potentially illegal search of his home with Counsel, but Counsel never filed any motions or otherwise raised it at trial. Mr. Anderson testified he and Counsel discussed the issue, but they agreed the search was not harmful to Applicant's case as nothing incriminating was found in the home.

This Court finds Applicant has failed to prove Mr. Anderson or Counsel was deficient in any way in their handling of the allegedly illegal search of Applicant's home. Applicant has offered no evidence the search was indeed illegal or that there was any meritorious motion his attorneys could have made at trial. Further, this Court finds credible Mr. Anderson's assessment the search was actually helpful to Applicant because nothing linking him to the crime was found. This allegation is hereby denied and dismissed.

CONCLUSION

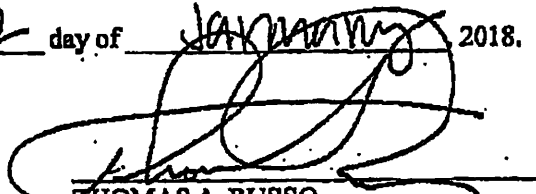
Based on all the forgoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Neither Counsel nor Mr. Anderson was deficient, nor was Applicant prejudiced by any alleged deficiencies in Counsel's or Mr. Anderson's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty days from receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, Applicant must serve and file a notice of appeal. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. The application for post-conviction relief be denied and dismissed with prejudice; and
2. Applicant is remanded to the custody of Respondent.

AND IT IS SO ORDERED this 22 day of January 2018.


 THOMAS A. RUSSO
 Chief Administrative Judge
 Twelfth Judicial Circuit

Florence, South Carolina.

FILED
 2018 JAN 29 AM 11:07
 MARION COUNTY SC
 CLERK OF COURT
 MCGHEE X-M-GRAY

INDICTMENT FOR

STATE OF SOUTH CAROLINA)
)
 COUNTY OF MARION)

MURDER POSS OF WEAPON DURING COMMISSION
 OF VIOLENT CRIME ARMED ROBBERY

At a Court of General Sessions, convened on FEBRUARY 21, 2008, the Grand Jurors of MARION

County present upon their oath:

COUNT ONE - MURDER

That JOSHUA LEE PHILLIPS did in MARION County on or about September 29, 2007, violate Sections 16-03-0010, 0020 and 16-01-0060 of the Code of Laws of South Carolina (1976), as amended, in that he did feloniously, wilfully and with malice aforethought kill one Maltonia Clark, by means of shooting the victim in the head and that the said Maltonia Clark did die as a proximate result thereof.

COUNT TWO - MURDER

That JOSHUA LEE PHILLIPS did in MARION County on or about September 29, 2007, violate Sections 16-03-0010, 0020 and 16-01-0060 of the Code of Laws of South Carolina (1976), as amended, in that he did feloniously, wilfully and with malice aforethought kill one Angelique Bynum by means of shooting the victim in the head, and that the said Angelique Bynum did die as a proximate result thereof.

COUNT THREE - POSSESSION OF WEAPON DURING THE COMMISSION OF VIOLENT CRIME

That JOSHUA LEE PHILLIPS did in MARION County on or about September 29, 2007, violate Section 16-23-0490 of the Code of Laws of South Carolina (1976), as amended, in that he was in possession of and did visibly display a weapon, to wit: a firearm during the commission of a violent crime, to wit: armed robbery.

COUNT FOUR - ARMED ROBBERY

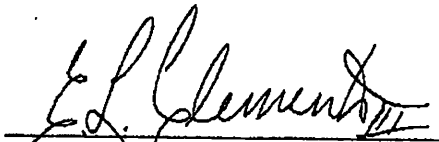
That JOSHUA LEE PHILLIPS did in MARION County on or about September 29, 2007, violate Sections 16-11-0330(A) and 16-01-0060 of the Code of Laws of South Carolina (1976), as amended, in that while armed with a deadly weapon, or while alleging, either by action or words, that he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, to wit: a firearm, did feloniously rob Angelique Bynum, by means of force or intimidation, goods or monies of the said Angelique Bynum, to-wit: armed robbery.

ATTACHED TO AND BECOMING A PART OF THE ORIGINAL INDICTMENT FOR MURDER POSS OF WEAPON DURING COMMISSION OF VIOLENT CRIME ARMED ROBBERY WITH THE AFORESAID NAME(S) OF JOSHUA LEE PHILLIPS SHOWN THEREON:

COUNT FIVE - ARMED ROBBERY

That JOSHUA LEE PHILLIPS did in MARION County on or about September 29, 2007, violate Sections 16-11-0330(A) and 16-01-0060 of the Code of Laws of South Carolina (1976), as amended, in that while armed with a deadly weapon, or while alleging, either by action or words, that he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, to wit: did feloniously rob Maltonia Larry Clark, by means of force or intimidation, goods or monies of the said Maltonia Larry Clark, to-wit: armed robbery.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



SOLICITOR

WITNESSES
INSPECTOR KENNY DAVIS MCSO
Barker

PROS:

D/O: 09-29-2007

ARREST WARRANT NO.

J955024 (1); J955025 (2); J955026 (3);

J955094 (4); J955095 (5).

ACTION OF GRAND JURY

James B. Bell
[Signature]
Foreman of Grand Jury

VERDICT

Foreman of Petit Jury

Date:

DOCKET NO. 2008 - GS - 33 - 00071

967

The State of South Carolina,

County of MARION

COURT OF GENERAL SESSIONS

FEBRUARY TERM 2008

THE STATE

VS.

JOSHUA LEE PHILLIPS

Indictment for

MURDER
POSS OF WEAPON DURING
COMMISSION OF VIOLENT CRIME
ARMED ROBBERY