

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Kershaw County

Honorable Clifton Newman, Circuit Court Judge

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S.C. SUPREME COURT

DERRICK MCDONALD,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-000317

APPENDIX

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INDEX

INDEX	i
TRANSCRIPT OF JURY SELECTION HELD MAY 5, 2008	1
TRANSCRIPT OF TRIAL HELD MAY 6-9, 13, 2008	186
TRANSCRIPT OF POST-TRIAL MOTIONS HELD SEPTEMBER 3, 2008	1738
APPLICATION FOR POST-CONVICTION RELIEF	1769
RETURN.....	1777
AMENDED APPLICATION FOR POST-CONVICTION RELIEF	1784
TRANSCRIPT OF POST-CONVICTION RELIEF HEARING HELD DECEMBER 12, 2017	1787
ORDER GRANTING POST-CONVICTION RELIEF	1890
RESPONDENT’S MOTION TO RECONSIDER, ALTER, OR AMEND PURSUANT TO RULE 59(e), SCRCP	1914
APPLICANT’S RESPONSE TO STATE’S MOTION TO RECONSIDER, ALTER OR AMEND	1946
TRANSCRIPT OF MOTION TO RECONSIDER HEARING HELD MAY 17, 2018.....	1950
APPLICANT’S SUPPLEMENTAL RESPONSE TO STATE’S MOTION TO RECONSIDER, ALTER OR AMEND	1997
RESPONDENT’S POST-MOTION TO RECONSIDER, ALTER, OR AMEND PURSUANT TO RULE 59(e), SCRCP HEARING MEMORANDUM.....	2002
ORDER GRANTING RESPONDENT’S MOTION TO RECONSIDER PURSUANT TO RULE 59(e), SCRCP AND DENYING POST-CONVICTION RELIEF	2033
INDICTMENTS	2062

1 plan to offer -- on behalf of Mr. Cannon, do you plan
2 to offer any testimony other than the testimony of
3 your client?

4 **MR. KENDRICK:** No, Your Honor.

5 **THE COURT:** And, Mr. Whitlark, does Mr. McDonald
6 plan to offer any evidence other than his own
7 testimony?

8 **MR. WHITLARK:** No, sir.

9 **THE COURT:** All right. Thank you very much.
10 All right, counsel. It's 3:00. Approach the bench,
11 please.

12 (Whereupon, a bench conference is had)

13 **THE COURT:** We'll stand at ease for about ten
14 minutes.

15 (Whereupon, a break is taken)

16 **THE COURT:** Let me see you one more time,
17 counsel. Approach the bench, please.

18 (Whereupon, a bench conference is had)

19 **MR. MEADORS:** Your Honor, for the record, the
20 State will consent to everybody else. We're fine
21 with whatever Your Honor or everybody decide.

22 **MR. WHITLARK:** McDonald doesn't oppose it, Your
23 Honor.

24 **THE COURT:** All right. The matter on the floor
25 is juror number 26, Sheila T. Brown, has expressed to

1 the Court that she needs to leave this afternoon for
2 a personal matter. And I'm just concerned that if we
3 keep her on and lose the alternate and then she has
4 to leave, there would be insufficient time for
5 deliberation, and it could upset the whole -- we'd
6 have to do all this over again. Now, the alternate
7 has said he is prepared to stay. So the State has
8 not objected to releasing Sheila Brown. Any
9 objection from Mr. Whitehead's counsel?

10 **MR. RILEY:** No objection.

11 **THE COURT:** Mr. McDonald's counsel?

12 **MR. WHITLARK:** No objection, Your Honor.

13 **THE COURT:** Mr. Cannon's counsel?

14 **MR. KENDRICK:** No objection, Your Honor.

15 **THE COURT:** I'm going to do that and then be
16 prepared to do closing argument.

17 (Pause)

18 **THE COURT:** All right. Is the State ready to
19 proceed?

20 **MR. MEADORS:** Yes, sir. Judge, in the charge --
21 and thank you -- I briefly looked over this. There's
22 also Mr. Moak's charge there was in there. Are you
23 planning on that? I didn't know if you had it.
24 Thank you.

25 **THE COURT:** I just didn't retype it entirely

1 from Mr. Moak's charge. The State is ready?

2 **MR. MEADORS:** Yes, sir.

3 **THE COURT:** Defense ready?

4 **MR. WHITLARK:** McDonald is ready, Your Honor.

5 **MR. KENDRICK:** I'm ready. I do have one issue
6 on the charge I'd just like to put on the record.

7 **THE COURT:** All right.

8 **MR. KENDRICK:** Would you like me to do it now or
9 do it later?

10 **THE COURT:** Well, tell me now so if I need to --

11 **MR. KENDRICK:** Your Honor, on page 23, when it
12 talks about a deadly weapon depends on the facts and
13 circumstances of the case, we agree with that. The
14 following sentence lists or says: "The following are
15 examples of instruments which he may be deadly
16 weapons."

17 **THE COURT:** Do you want me to take them all out?

18 **MR. KENDRICK:** Yes, sir. I think that the
19 sentence above sufficiently explains to the jury that
20 they may find --

21 **THE COURT:** All right. That's fine.

22 **MR. MEADORS:** Well, Judge, I've always heard --

23 **THE COURT:** I know. They know what a deadly
24 weapon is.

25 **MR. KENDRICK:** Thank you, Your Honor.

1 **THE COURT:** Anything else from Cannon? From
2 Whitehead?

3 **MR. RILEY:** Judge, on page 3 of your charges.

4 **THE COURT:** Yes, sir.

5 **MR. RILEY:** The tenth line down under multiple
6 defendants.

7 **THE COURT:** Mm-hmm (affirmative).

8 **MR. RILEY:** I request that that line should
9 read: "May convict one and acquit the others."

10 **THE COURT:** Okay. Well, yeah. I probably will
11 do that. I mean, some of these things are in the
12 singular. And I would just as a matter of course put
13 them in the plural. But I'll be glad to do it. Yes,
14 sir.

15 **MR. RILEY:** I've got a couple of other instances
16 of that same sort of thing. Do you want me to just
17 skip over them?

18 **THE COURT:** Well, I mean, those are grammatical.
19 I'm more concerned about the substantive charges.

20 **MR. RILEY:** Okay.

21 **THE COURT:** But I understand there are multiple
22 defendants. And I will speak in the plural where
23 that is appropriate.

24 **MR. RILEY:** Going to a substantive point, Judge,
25 on page 7.

1 **THE COURT:** Yes, sir.

2 **MR. RILEY:** The eighth line, "the defendant is
3 guilty of the crime charged", I would request "beyond
4 a reasonable doubt".

5 **THE COURT:** "If you're firmly convinced beyond a
6 reasonable doubt".

7 **MR. RILEY:** Yes, sir. Yes, sir.

8 **MR. MEADORS:** Your Honor, I don't think that's
9 -- I think it's beyond a reasonable doubt. Firmly
10 convinced is the way to explain beyond a reasonable
11 doubt as a definition of it. But not firmly
12 convinced of beyond a reasonable doubt.

13 **THE COURT:** Well, I've got a definition.

14 **MR. MEADORS:** It's just Grippon, which I think
15 Your Honor is always --

16 **THE COURT:** All right. I understand. I may not
17 make that change.

18 **MR. RILEY:** Yes, sir.

19 **THE COURT:** Anything else?

20 **MR. RILEY:** No, sir.

21 **MR. WHITLARK:** Nothing.

22 **THE COURT:** All right. Bring the jury, please.

23 **MR. WHITLARK:** Your Honor. Your Honor, one
24 thing, Your Honor.

25 **THE COURT:** Oh, I'm sorry.

1 **MR. WHITLARK:** Yes. On the statement of the
2 defendants, there is no phrase characterizing the --
3 when the court says they found it admissible, can you
4 describe for them the different quantum of proof in
5 that, from beyond a reasonable doubt to
6 preponderance, that you only need a preponderance and
7 it's up to them to decide beyond a reasonable doubt?

8 **MR. MEADORS:** Your Honor, I don't think that's
9 appropriate for the jury. Your Honor makes the
10 initial determination in camera. That's why it's in
11 camera. And then it's like one standard for the jury
12 all alone. They don't need to know about your
13 standard.

14 **THE COURT:** I've got reasonable doubt
15 throughout. They've got to find --

16 **MR. WHITLARK:** It's page 12, Your Honor. Yeah.
17 No. I'm sorry, Your Honor. Page 13 I think. Where
18 is it? Your Honor, that's clearly the law of --

19 **THE COURT:** Just show me. Tell me what you're
20 talking about. Where are you talking about?

21 **MR. WHITLARK:** Okay. It says 30 under there,
22 Your Honor. That's fine.

23 **THE COURT:** On 12 I say: "The State has the
24 burden of proving beyond a reasonable doubt that the
25 alleged statement was voluntary." I say it at the

1 bottom of page 12.

2 **MR. WHITLARK:** Yes, sir.

3 **THE COURT:** Does that satisfy your concern?

4 **MR. WHITLARK:** Yes, sir. I just don't like that
5 sentence where it says that the Court has already
6 found it admissible. That's all.

7 **THE COURT:** I think it's the law. Bring the
8 jury, please.

9 **MR. MEADORS:** Judge, they are going to rest in
10 front of the jury. Will you take a break then or
11 will we proceed right then?

12 **THE COURT:** We'll proceed. Do you want to rest
13 in front to the jury, or do you want me to do it?

14 **MR. KENDRICK:** You can do it. That's fine with
15 me, Your Honor. I don't know if everybody else is
16 along.

17 **THE COURT:** It's a formality.

18 **MR. KENDRICK:** Yes, sir.

19 **THE COURT:** I'll do it unless somebody has an
20 objection.

21 (Jury in at 3:42 p.m.)

22 **THE COURT:** Mr. Newman, you figured it out,
23 didn't you?

24 **JUROR:** Yes, sir.

25 **THE COURT:** All right. Thank you very much.

1 Mr. Newman has been seated, is seated as of this
2 moment as one of the regular jurors. Ms. Brown just
3 had a compelling reason to leave. And we'll continue
4 the trial.

5 Now, at this time I been advised that the
6 defendants also rest. So you will hear no more
7 evidence in this case. The remaining portion of the
8 trial will consist of the summation of the lawyers at
9 that time and my instructions on the law of South
10 Carolina as it applies to this case.

11 And at that time, once that is completed, the
12 case will be turned over to you for deliberation.
13 And that will be in -- I don't know how long it's
14 going to take; but, nevertheless, it will be turned
15 over to you this afternoon, and you can deliberate
16 and we'll go from there.

17 So, at this time, Mr. Meadors, you may conclude
18 with your final summation.

19 **MR. MEADORS:** If it please the Court?

20 **THE COURT:** Yes, sir.

21 **MR. MEADORS:** Solicitor, Ms. McDuffie, Mr. Moak,
22 defense counsel, Madam Forelady: Good afternoon,
23 ladies and gentlemen. I want to start off by
24 thanking you like I did Monday for being here,
25 thanking each and every one of you for listening,

1 paying attention, for being here and for fulfilling
2 you all's oath. As I said in my opening, being a
3 juror is not an easy job; but without you all, the
4 system would fail. So thank you all for being here
5 and thank you for your attention.

6 What we're doing right now is called closing
7 arguments. It's never made sense to me, because we
8 can't really argue. You can't say, John, Joanna or
9 Moak or Mark or Dave or any of us, what about this
10 and back and forth. We can't do that. But it's a
11 chance for us to let you all know what we think the
12 evidence is and the reasonable inferences from that
13 evidence. And that's it. That's what we're allowed
14 to argue to you all from, evidence that came from
15 that witness stand and the reasonable inferences.

16 And that's what you all must decide the case on,
17 from the evidence that came from this stand and this
18 enclosed right around here, beside Jenny, the court
19 reporter. That's what you have to decide the case
20 on.

21 I'm going to briefly go through now the law as I
22 did in the beginning very briefly, and then I want to
23 talk again about the burden and some of the types of
24 evidence, and then we're going to go through it.

25 Presumed innocent unless and until, unless and

1 until the State proves them guilty beyond a
2 reasonable doubt. I submit to you the evidence has
3 met that and gone beyond it. And as I go through,
4 I'll show you. The burden, you all know it, I'm
5 going to briefly say it again. Your Honor is going
6 to charge it to you. Beyond a reasonable doubt, not
7 beyond all doubt. It's not a whimsical, fanciful,
8 imaginary doubt. If I told you the river is going to
9 stop tomorrow, that's not a reasonable doubt.

10 Beyond a doubt that makes reasonable people
11 hesitate to act. But more, if you're firmly
12 convinced, firmly convinced of the defendant's guilt,
13 under the oath you took you must find him guilty. If
14 you think there's a real possibility, a real
15 possibility that he's not guilty, a real possibility
16 we haven't met our burden, then you should find him
17 not guilty.

18 As I told you in my opening, it wrecks of common
19 sense. That's what it is. You didn't leave it out
20 there. You brought it in here. And I submit to you,
21 you know it. Reasonable doubt is you know it. And
22 as we go through this evidence, ladies and gentlemen,
23 I submit to you you know it.

24 You know, there were two references to one of
25 the last witnesses about playing football, Mark

1 Austin, sitting up there. Mr. Whitlark asked him a
2 question and then I asked him a question. My brother
3 played football at Wofford. He, like Mr. Austin, was
4 an was a guard. He was an All American at Wofford.
5 I know that's a smaller school. You may not have
6 known that. But he was good. And I used to love to
7 go watch him with his girlfriend play when I was in
8 college. Invariably I would watch my brother. He
9 was a guard and he was cool. I'd watch him and I'd
10 watch make him good blocks. And I was proud of him.
11 But in do doing that, I couldn't keep my eye on the
12 ball all the time. He wasn't always going with the
13 ball. I was looking for him.

14 In this case, in this trial, and as you listen
15 to these closing arguments, the ball is here and the
16 ball has been here. I respectfully submit they have
17 tried to distract you watching guards, playing fakes,
18 going the other way. But in trials, in trial you
19 have to keep your eye on the ball, keep your eye out
20 on what the case is about, the evidence.

21 I won't tell any more stories. I just thought
22 of that story after Mr. Austin was talking. But the
23 key is, reasonable doubts, sometimes questions are
24 just questions. Just because you've got a question
25 about something doesn't make it a reasonable doubt.

1 It doesn't. You can't answer everything. If that
2 was our burden, let's go home. We'd never convict
3 anybody.

4 And what they have done throughout this trial in
5 their cross, and what I submit to you all three of
6 them are going to do in their closings, is try to
7 suggest to you some things that are reasonable doubts
8 that aren't. Maybe some of them are just questions.
9 Some of them got up there and talked to them. And I
10 submit to you, you can answer every one of them.
11 There are no reasonable doubts. Some people call
12 them red herrings that they'll throw out here and
13 here. It's like a shotgun approach. Boom. And you
14 go all over here. Well, the target is here in the
15 middle. Keep focused on the target. Keep your eye
16 on the balls.

17 This is The State of South Carolina vs.
18 Christopher Whitehead, Robert Cannon and Derrick
19 McDonald. It's not The State of South Carolina vs.
20 Melissa Davy, J.D. Davy, her dad, Danny Catoe,
21 Captain Thomley, George Marthers, Phil Crawford, me,
22 The State of South Carolina, John Meadors. It's not
23 me. It's not against Helen Zoch. It's not The State
24 of South Carolina against Zack Waltemath or Molly
25 Waltemath.

1 Throughout this trial -- and Mr. Whitlark in
2 particular -- or Adrian Duran. It's not about them.
3 This trial is not about them. But those are examples
4 of the smoke screens they want to take you away.
5 There is no evidence that those folks are anything
6 more than a smoke screen. None.

7 How many people have told somebody we're going
8 to be heros when we get out of here? They ain't got
9 anything on us. How many people said, we're going to
10 go beat somebody's ass; we're going to go beat Josh's
11 ass? That's what this case is about. Stay focused
12 on it.

13 Evidence and the reasonable inferences in there.
14 That's all you're allowed to consider. And I hope
15 that's all they're going to argue in their closings.
16 What are some other examples? See, this is the last
17 time I get to argue to you. There are three going to
18 go up, and then you'll hear the judge's charge and
19 you all will go back and reach a verdict. I am going
20 to cover all of them. I may have miss some. I may
21 give some they didn't think of. I don't know. But
22 when you get back there, discuss it all. Use your
23 common sense.

24 What are some other potential things I think
25 they may bring up? They are implying I think, I

1 guess, I know, that these officers cheated, that they
2 lied. Through their questioning of them on cross,
3 they're saying, well, didn't they ask for so-and-so,
4 didn't they ask for so-and-so, didn't they tell you
5 this here? Didn't you threaten the death penalty?
6 And they said no. And this is not a death penalty
7 case, just to make that clear. They are charged with
8 murder and burglary. But they're not on trial.

9 But that's what you'll do. When you have a very
10 strong direct and circumstantial evidence case, which
11 this is, that's what they'll try to do. That's what
12 they'll try to do, take your attention away from that
13 statement of where they said, I got a bat and hit
14 him. That's direct evidence.

15 I don't believe I heard any of these other
16 witnesses, Mr. Duran or Melissa Davy or anybody else,
17 say they got a bat and hit somebody. That's what
18 this case is about. But they don't want to you focus
19 on that. That's a smoke screen.

20 Phone call from Zack. And I'm going to go over
21 this more in detail, too. You all saw that young man
22 on the stand. You saw him on the stand. You saw his
23 demeanor. That's what you decide this case on, the
24 demeanor, the credibility of these people you saw
25 here. Did somebody call you? Yeah. Who? It was

1 Christopher Whitehead. Have you heard his voice
2 before? Yes. What did he say? Why don't you go
3 help me beat Josh's ass. Excuse my language. I
4 don't want to. He called back. Don't worry about
5 it. We've got it handled now. We've got it handled
6 now.

7 Now, he said 7 or 8:00 he thought it was. And I
8 can remember specifically Mr. Whitlark asked one
9 witness, would you and Mr. Meadors stretch that? I
10 guess he's implying I'm lying. Well, if I did, I
11 didn't do a good job of it, did I? But not one
12 question about the content of that statement on
13 cross, just about anything else. Because they
14 couldn't cross him on it. He was said beat. You
15 want to go? Let's go beat Josh's ass. There's no
16 question about that. You saw his demeanor.

17 The phone calls are there to support it. And
18 I'm going to go through when I go through the
19 statement. He might have been off on his time. That
20 doesn't mean that conversation didn't happen. You
21 judge his credibility. You look at the phone calls
22 in relation to Wal-Mart. And don't let me forget
23 Wal-Mart. Please don't let me forget Wal-Mart before
24 I sit down.

25 And if it was exactly right that that young man

1 remembered when these phone calls were made exactly,
2 then maybe you should worry. That's a smoke screen.
3 I hope they won't talk about it long.

4 A couple of other things they may or may not
5 bring up. The Workers' Comp form. You heard Pat,
6 you heard Cecile say, you know, he was fine Tuesday.
7 He came back Tuesday night with a mask. He and
8 Robert and Christopher, they were all there. He was
9 fine. The next day he came in, you heard Cecile say
10 he was limping. What happened? I'll tell you what.
11 I got hurt playing around. I'm going to tell Ms.
12 Pat, I'm going to tell Ms. pat I got hurt here at the
13 job so she'll have to pay for it.

14 Cecile said, I'm not having any part of that.
15 She tells Pat later on in the week about that. The
16 form says the 12th the injury happened. It got sent
17 to Columbia and it comes back. Well, it's got 12
18 everywhere. That's a question. Is that a reasonable
19 doubt they're going to argue about? Maybe. But
20 there's no question he got injured when he kicked
21 that metal door in, that new metal door in. That's
22 what the circumstantial evidence shows you. There's
23 no question that Cecile says it was Wednesday when he
24 came in and said he was hurting. He wasn't hurt the
25 day before. And it was Pat who said that. Are they

1 lying? That's a smoke screen.

2 You know, Melissa Davy, I'm sure they're going
3 to talk about her. She's sitting in the courtroom.
4 She testified. Melissa Davy didn't kill Josh. They
5 had an argument. They were separated. Somebody
6 asked Lieutenant Crawford, when you talked to her,
7 did you have an uneasy feeling about her? Did you
8 think she might be holding something back? Yeah.
9 Could that perhaps be that phone call came into Zack,
10 she knew about it, said they're going to beat his
11 ass. And, I mean, maybe they didn't go over there.
12 Maybe there's a little guilt there, with no offense
13 to anybody out in the audience. I don't know. But
14 she didn't kill him. She didn't kill him.

15 She didn't say, I got a bat and went over there
16 and beat him up. She didn't say anything about a
17 chicken put down on the side of the head or a tree
18 being thrown over on him. She went over there and
19 found him and called Helen and was on the phone with
20 Helen when they came over. Those are in the records.
21 Go look at them.

22 And, you know, no forensics. I bet we'll be
23 here -- just watch the clock. Maybe each and every
24 one of these folks will say, no forensic, no
25 forensic. Well, congratulations, gentlemen. You

1 wore Latex gloves and you didn't leave anything.
2 You're watching TV, too. CSI, too. They tried to
3 get prints. Congratulations. Congratulations. You
4 didn't leave anything. But guess what folks? You
5 don't come into a criminal courtroom and get rewarded
6 for that. You know, they did a good job killing him,
7 didn't leave any forensics. Reward them for being a
8 good criminal? No, ma'am. No, sir.

9 You know why we didn't find any forensics.
10 Because they made sure they didn't leave any. With
11 gloves. That's why. That's why. They planned on
12 not leaving anything. They worked on not leaving
13 anything. They burned their clothes so there
14 wouldn't be any. They're the reason we don't have
15 any.

16 Joshua Zoch is dead. He's in a cemetery and
17 hopefully some better place. But he's not on trial
18 in this courtroom. They tried to put him on trial.
19 Talking about a prior charge which has got nothing to
20 do with this. He's not on trial. He didn't kill
21 himself. You remember how Dr. Sexton said one of the
22 things they look at to make sure it's not suicide,
23 well, he ruled that out. This isn't The State of
24 South Carolina vs. Joshua Zoch. It's not a suicide
25 case or your coroner's inquest.

1 Putting the victim on trial, which they did.
2 They even asked his mom or grandmama about, did you
3 know he was a snitch? Did you know he was snitching?
4 I knew he talked to the police. Mr. Whitlark asked
5 him grandmama.

6 Now, that throws in one thing though. You know,
7 in this state we don't have to have motive. We don't
8 have to have it. You don't have to have
9 premeditation, a plan. They put it in here. One of
10 these fellows, somebody said thought he was a snitch.
11 Another one said, well, he wasn't a snitch. I don't
12 think he's a snitch, not on me. But that's a motive.
13 There was a reason they went over there. We didn't
14 have to show it, but that sure was a reason they went
15 over there.

16 And finally -- I don't know how many times we'll
17 here this -- but finally a rush to judgment. A rush
18 to judgment, that they rushed in deciding this case.
19 Well, I thought I heard somebody saying, why didn't
20 you all arrest Robert that first night? Well, do you
21 want them to rush to judgment or not? Well, they
22 didn't arrest Robert that first night that had given
23 a statement and he said he touched him. He was
24 cooperating. You come down tomorrow, we'll talk to
25 you. They then go get McDonald who at that point --

1 Mr. Cannon -- that told them he hit him with a bat.
2 Well, now they're saying, why didn't you rush to
3 judgment there?

4 But then they get to Mr. McDonald the next day.
5 Why are you rushing to judgment? I don't understand
6 that. It's common sense law enforcement, as I'll go
7 over with this statement. I hope we don't hear rush
8 to judgment.

9 You know, the elements of a burglary, entering a
10 dwelling of another without consent with intent to
11 commit a crime. Clearly it's Kershaw County.
12 Clearly it's a residence, 2505 Joshua Zoch was
13 staying at, his grandparents had and were leasing to
14 him. Intent to commit a crime. Robbery, murder.
15 The place was ransacked. And one of the elements, as
16 the judge will charge you, is during the nighttime
17 hours. Well, there's no doubt about that. Those
18 elements were there. I'm going to go through that in
19 a minute as we go through.

20 Murder, briefly. And Mr. Kendrick I think said
21 after my opening I was throwing out these things to
22 appeal to you all's passions or whatever. No, ma'am.
23 No, sir. I am explaining the facts to you. And
24 we've got to show malice to you. And that's not a
25 game. It's not funny or something we take lightly,

1 explaining the injuries to Joshua's body. And my
2 boss would fire me if I got up here and just stood
3 here and said, well, he got hit with a baseball bat.
4 I can't do that.

5 And the facts bring it out to you all that show
6 malice and feel malice. And in a minute I'm going to
7 ask you all to go back there and touch and hold
8 malice, because you've got something to touch and
9 hold in this case.

10 Murder is the unlawful killing of another human
11 being with malice aforethought, the intentional
12 unlawful killing of another with malice aforethought.
13 And the person died as a proximate result thereof.
14 We talked about it before. Intentional. You can't
15 open somebody's mind, but you can look at their
16 actions or inactions. They intend to do it. I'm
17 going to beat your ass. They go buy gloves.

18 Intention. You don't have to see it. You can
19 see it in actions before, or actually intent before
20 and after. Leaving, packing up, quitting Sonic, crew
21 chief, "F" Sonic. Leaving.

22 Malice aforethought. We've got so much malice
23 here to show you. Malice: Evilness, wickedness.
24 Boating him while he's on the couch. And there's no
25 doubt about that. I can't wait to go over Dr.

1 Sexton's testimony with you all in a minute. I can't
2 wait. I mean, I cannot wait. That shows malice.

3 Meanness, evilness, wickedness. It can be
4 express. We don't always have it. We've got it in
5 this case. We've got it from Christopher Whitehead.
6 Let's go beat Josh's ass, shortly before they did. I
7 don't know if they meant to kill him or not. If they
8 thought he was a snitch, they just wanted to beat him
9 up real bad, I don't know. But they did kill him.
10 And they did it with the bat and the potpourri bowl,
11 six, seven times and the injuries on his head.
12 Meanness, evilness, wickedness. It can be express
13 and it can be inferred. And I'm going to ask you to
14 infer it.

15 The judge will tell you this law. Inference
16 with the use of a deadly weapon. This will kill you.
17 And that he died as a proximate result thereof.
18 Well, you know, you heard Dr. Sexton. You heard Dr.
19 Sexton. And, ladies and gentlemen, finishing up on
20 the law here before we get into the facts, there are
21 two, as I told you, types of evidence. Direct
22 evidence is something you hear, feel, taste; and you
23 come in here and take the stand and tell you all
24 about it. Zack Waltemath saying that was his voice,
25 Chris Whitehead, that said, I'm going to go beat

1 Josh's ass.

2 Michael Jenkins who comes in here doesn't know
3 anybody. I'd never seen him until last February. He
4 comes in here and says I see and hear. Hear. Direct
5 testimony. Somebody nextdoor says, we're going to be
6 heros. They've got nothing on us. We're going to be
7 heros when we get out of here. He hears the name
8 Josh. That's direct evidence. Rocky Branch. That's
9 direct of evidence people coming in here.

10 The law also says circumstantial evidence is
11 another type of evidence. You all listen to this,
12 please. I think I mentioned this to you.
13 Circumstantial evidence. And you'll hear the Judge's
14 charge. Circumstantial evidence is indirect evidence
15 or proof of a chain of facts and circumstances
16 indicating the existence of a fact. Isn't that
17 beautiful? Chain, indirect evidence or proof of a
18 chain of facts and circumstances indicating the
19 existence of a fact.

20 We have incredible circumstantial evidence.
21 And, Ladies and Gentlemen, the law makes absolutely
22 no distinction whatsoever in the weight or value, no
23 distinction whatsoever in the weight or value to be
24 given to direct or circumstantial evidence, nor is a
25 greater degree of certainty required on behalf of the

1 State. Nor is a greater degree of certainty required
2 of circumstantial evidence than of direct evidence.

3 The law says, and the judge will charge you, you
4 weigh all the evidence, direct and circumstantial
5 evidence. And after weighing all of it, if you're
6 not convinced of the guilt of the defendant beyond a
7 reasonable doubt, you've got to find him not guilty.
8 But if you are, if you are with direct and
9 circumstantial evidence, you must find him guilty.
10 That's pure. Direct, circumstantial evidence.

11 The final thing is credibility and
12 believability. Every case in the world, every case.
13 in this county, in Richland County, every other state
14 in this nation comes down to that. Credibility,
15 believability of the witnesses involved in the case.

16 Who has got the most to gain or lose? You know,
17 getting back to these officers and talking about I
18 guess why they cheat and not do this and not do that,
19 you know, I was thinking about it last night. Why do
20 they even keep the notes of these other people? Why
21 did they even keep them? Making a note here, making
22 a note here which has nothing to do with this case?
23 Why did they even keep them? Why didn't they just
24 toss them in the trashcan? They kept everything
25 together. Everything is given to the defense. If

1 they were cheating, they wouldn't keep any of it.
2 Well, they have nothing else to do. They write it
3 all down, what they do, and we provide it over.

4 Credibility, believability. I was thinking
5 about this. Why, why if you were cheating and you
6 were trying to frame these young fellows would you
7 even keep the notes that you initially took from
8 McDonald, from Cannon, initially from McDonald when
9 he said, well, I was with Christopher Rust. I slept
10 in his car, I think he said. And then I went home
11 with him.

12 Of course Mr. Mark Whitlark tried to ask him on
13 the stand, well, he said he went and slept with
14 Christopher Rust's house that night. And the officer
15 said, well, no, sir. That's not he said. He said he
16 went and slept out in the car first, slept out in the
17 car first. Then he went home with Christopher Rust.

18 Well, you all saw Christopher Rust come in here.
19 Credibility? Believability? Let's see. Is Danny
20 thinking, well, you know, back when he told me this,
21 that would be on Monday; you know, I'll bet you old
22 Christopher Rust is going to see this thing on
23 Saturday. I'll bet you he's going to see it on
24 Saturday with his mama and come down this weekend to
25 the Sheriff's Department or down here and give a

1 statement. Look, I saw this guy is arrested. He
2 came to my house, mama's house at 1:30 in the morning
3 that day. Kind of unusual? Unusual coming there at
4 1:30 in the morning.

5 And he initially tells Danny Catoe, I slept in
6 his car and then went home. No, sir. No, ma'am.
7 And you know what that does? That right off the bat,
8 that establishes credibility, the lack of credibility
9 of Derrick McDonald. You saw Christopher Rust.
10 There wasn't much cross on him, was there? He came
11 down with his mama and said, look. This young man
12 came to my house at 1:30. He seemed a little upset.
13 It took him 'til the next day. Credibility,
14 believability.

15 Where is Whitehead's confession? If they're
16 cheating, let's sign him up. Sign him up. Make him
17 sign. George, if you're cheating, why didn't you
18 sign that thing? You said you witnessed the
19 statement. Why didn't George just go on back and
20 sign that after Danny took that statement? That
21 would have been pretty easy to cheat. He didn't. He
22 said, I was sitting there. I watched most of the
23 statement. I wasn't there at the end when they went
24 over. That's honest. Attack him. They're not on
25 trial.

1 Why not get a statement from McDonald right on
2 the scene that first time? Why not, instead of
3 taking those notes I was in Chris Rust's car, I slept
4 in. He said, no, I want to talk wait and talk to my
5 mama before I talk to you all any more. Fine. They
6 let him go. Why not sign him up right then and get
7 that full statement? Credibility, believability.

8 What happened, ladies and gentlemen? Melissa
9 and Joshua Zoch got in a fight. She left I think
10 early that morning, Sunday morning. Everybody knows
11 what this calendar is by now, State's No. 8.
12 Everybody knows. Gets in a fight and she ends up
13 going back to Melissa -- excuse me -- Molly and Zack
14 Waltemath's house that Sunday.

15 I can't remember. I don't think she saw him
16 Sunday. On Monday she says she hooks up. I think
17 she goes and does an application. Melissa says he
18 does an application at a Bi-Lo or something -- I'm
19 not sure -- where he fills out an application.
20 That's where she gives him 60 bucks to buy her a
21 present I think. He ends up spending that on crack.
22 She gets angry about that, too. That's the day
23 initially I think the Waltemaths and Molly and Zack
24 said that they rode in with her or her grandfather
25 that week.

1 Molly didn't remember working that first day,
2 that Monday. Showed her the records. Well, I came
3 in later on that afternoon. But I did see Josh that
4 Monday morning. I did see him. But she's staying
5 with Molly and Zack Sunday night and Monday night,
6 Tuesday night. That's not in dispute. That's not in
7 question.

8 We go into Tuesday. And I think Cecile said she
9 went over to see Joshua Monday night -- I'm not
10 sure -- with some other group of folks. You all
11 remember that better than I do. But I think she did.
12 Tuesday they go into work. Cecile is working crew
13 shift. So is Chris Whitehead. They kind of worked
14 their way up. That's one thing you kind of heard
15 about Chris Whitehead in this. He'd worked himself
16 up with Pat Heathcoe. And Old Pat, she's trying to
17 help these folks with their first job in life, giving
18 them a place to work, establish some credibility.

19 He's worked himself up to crew chief, did a good
20 job. She's about to give him his keys. So they're
21 working that morning shift, working that morning
22 shift. Tuesday they come in. He is not injured on
23 Tuesday at work. He's not injured. He works. They
24 come that night.

25 And here is where the time starts to come in,

1 ladies and gentlemen. That night, Chris has already
2 worked that day. You hear Allen Brown say, well,
3 shortly after 10:00 on December the 12th, 2006,
4 Robert Cannon comes in with a mask. Did know it was
5 Robert Cannon? It was Robert. It was light and all
6 that. It wasn't funny. Robert, you don't work any
7 more, leave.

8 Then who does he see come in? Derrick McDonald
9 right after. You don't work any more, leave. Chris
10 Whitehead, right after. He might have gone to the
11 back as I'm talking to Derrick McDonald. You're not
12 working any more, Chris, how about leaving. Cecile
13 comes in there sometime at that point to check her
14 schedule and leaves. But there's no question the
15 three of them are together shortly after 10:00 or
16 10:20, undisputed.

17 Now, that's in the statement. But I guess they
18 didn't make that up because, you know, there are
19 other witnesses there, too. So that's okay. I guess
20 they did take that down when they said that. But
21 that's in the statement. We know what happened that
22 night. And I'm going to go over that in a minute.
23 We know what happened that night.

24 And, folks, the next morning Wednesday, when
25 they come in, that's when Cecile, co morning crew

1 chief leader, sees Christopher Whitehead limping,
2 sees a scratch under his eye. And that's when he
3 tells her. She said, what happened? I hurt myself
4 last night playing around with some folks. Well, he
5 hurt it as he's knocking down the thick metal door
6 that Helen told you she'd gotten because the house
7 had been broken into. And gotten scratched somehow,
8 with the Christmas tree or tussling with the victim.
9 I don't know. I don't know. But that.

10 And he said, come on and tell me -- I'm going to
11 go tell Pat that I hurt it. He was trying to get
12 Workers' Comp to pay for it. No, sir. No, ma'am.
13 I'm not doing that. Thursday Chris Whitehead comes
14 back in. And Pat says, that's when he told me. He
15 told me Wednesday, the Thursday before he left I've
16 got to fill out this form. I've got to fill it out.
17 The injury happened on the 12th. And he left at
18 10:30.

19 Folks, we go to Friday, the 15th of 2006. And
20 if you say state and county employees don't work
21 hard, maybe a lot of them don't. But December 15th,
22 2006, they busted their tails. In one day -- it
23 almost reminds me of that show Hill Street Blues;
24 when you see so much happen in an episode it will
25 almost wear you out in one day. They had this kind

1 of a day. They had already responded to the scene.
2 Sellers has. And I'm going back over the scene.
3 Don't worry about that. They had already responded
4 to it. They got the name of Melissa Davy. I think
5 Sellers said he got Zack and Molly's name.

6 Thursday they go -- and they do realize that
7 Sonic is a central point here. They go to Sonic that
8 morning. They talk to Cecile briefly and they talk
9 to Pat. Do they have the name at that point of Chris
10 Whitehead? Yes. They do. Do they have the name of
11 Derrick McDonald and Robert Cannon? Yes, they do.

12 There's nothing wrong with that. They're trying
13 to solve a murder. They're looking for people that
14 might be connected, people that had bad blood. It's
15 okay for them to have names of suspects. They go out
16 and start looking for, they go looking for Derrick
17 McDonald.

18 Well, what has Pat Heathcoe told them after they
19 get to Sonic? Crew chief leader to be, crew chief
20 leader who is going to get the keys, came in at 6.
21 He's gone at 6:50. That's what Cecile said, gone at
22 6:50. Mama brought him at 6. He talked to her when
23 he came back and he left. Abruptly left. Been a
24 good worker. Noticed some change in him. You notice
25 it's real? I said, what kind of change? She

1 commented, she said he was a smartie tail the last
2 few weeks. A smartie.

3 So they knew he'd left. They knew Derrick
4 McDonald knew these folks. They'd been seen down at
5 the Sonic on Tuesday night with a mask. Yeah, that
6 makes you wonder a little bit, a mask with these
7 folks. Law enforcement, they go out and look for
8 him. While they're going to look for Derrick
9 McDonald, do they find Derrick McDonald? On their
10 way they see Christopher Whitehead. Well, that's
11 circumstantial evidence. He doesn't live in there.
12 He's supposed to be working. Route restricted. He
13 wasn't going to work. And they run into Christopher
14 Whitehead.

15 So they already know he left that morning at
16 6:50. Danny had run up on him. Danny Catoe had run
17 a D.L. license. He looks at it. That's Christopher
18 Whitehead. I want to talk to you. He didn't arrest
19 him. He didn't arrest him for anything involving
20 this. He arrested him for DUS because he was DUS. I
21 want to talk to you about Joshua Zoch. "I don't have
22 a damned thing to say about it."

23 If that's all we had, let's get out of here.
24 But the first time he talks to him and they talk to
25 him, "I don't have a damned thing to say about that."

1 And what's kind of interesting right before that is
2 Pat has called him that morning after she got there
3 at 10. She wasn't supposed to work that morning.
4 And she said, Chris. And Chris had never left before
5 like that. Chris, what's going on? "F" Sonic. Why
6 would he be talking to Pat that way? Fixing to give
7 you keys. Something has happened to that young man
8 week. His leg, his eye, "F" Sonic, I don't know a
9 damned thing about it.

10 They then go after Christopher Whitehead on back
11 to Derrick McDonald's house. He's not there. They
12 leave a card. They go back to Sonic, get a statement
13 from Allen Brown. He's already told them about what
14 he saw Tuesday. They talked to Cecile Trapp. And
15 then what do they do? They go back to Derrick
16 McDonald's house. And we'll get to that first oral
17 statement.

18 Some of this I may already have covered. Chris
19 Rust's car, at 10:30 he slept there until Chris Rust
20 got off at 11:30. No, sir. No, ma'am. You saw
21 Christopher Rust. So right off the bat, there's
22 credibility starting to go down the tubes for Derrick
23 McDonald.

24 Another person told Derrick he had to go make
25 some moves. I've already been over the notes. Why

1 notes? Why do you keep them if you're trying to give
2 a story to this jury? Why do you keep them? And I
3 covered it a minute ago. I don't want to talk
4 without talking to my mother. They let him go. They
5 didn't try to keep him there. They didn't try to
6 make him write a statement. They let him go.

7 Where do they go from there? They then go to
8 Robert Cannon's house. You all have all these if you
9 want to see them. Straight from the testimony. I'll
10 put them over here so they don't have to get up and
11 come over. They start talking to him. They're at
12 Robert Cannon's house now. They go inside and they
13 read him his rights.

14 And, ladies and gentlemen, His Honor is going to
15 charge you; you all have to decide whether these
16 statements were freely and voluntarily given beyond a
17 reasonable doubt, like everything else. And to do
18 that you use your common sense. You watch the
19 demeanor of the witnesses testifying. You see what
20 they wrote down, their observations, their responses.
21 And the judge -- and you will have to decide what all
22 he's asking the officers. I mean, that's what you
23 all -- that's why I was asking them.

24 You have the right to remain silent. Did they
25 read him that? Did he appear to understand that?

1 Did you have any trouble communicating? Were your
2 responses timely? Could you understand them? Could
3 you understand them? Did they appear to be under the
4 influence of any alcohol or drug? Did you hold out
5 any hope of reward or promise? How do you know he
6 did? I circled it. All the way down.

7 "Anything you say can and will be used against
8 you. You have the right to talk to a lawyer and to
9 have him present with you while you are being
10 questioned. If you cannot afford to hire a lawyer,
11 one will be appointed to represent you before any
12 questioning if you wish. You can decide at any time
13 to exercise these rights and not answer any questions
14 or make my statement."

15 Did you read him those? Yes, sir. Did he
16 understand them in your opinion? Yes, sir. Did he
17 sign that he did? Yes, sir.

18 Waiver of rights. "This is to certify I have
19 read or had read to me" -- that's even on the form --
20 "read or have read to me the above statement of my
21 rights. I understand each of these rights, and
22 having these rights in mind, I waive them and
23 willingly make a statement. No promises or threats,
24 no promises or threats have been made to me and no
25 pressure or coercion of any kind has been used

1 against me."

2 Who signed that? Robert Cannon. Did he
3 understand it? He said he did. Did he appear to?
4 He appeared to.

5 Marthers down here. There is George over there.
6 Sign it. Rights were read at 6:45. In the
7 defendant's house with his parents there his rights
8 were read. He signed it. All these folks are in his
9 house and he signed it right there and he read it.
10 You heard him testify.

11 And then he starts talking. This is real.
12 First he says, well, you know, Chris Rust -- maybe I
13 guess that's somebody else that might have done. Is
14 this State of South Carolina vs. Chris Rust? Chris
15 Rust told Robert Wednesday that Josh was dead around
16 8 p.m. I wonder if he said, I know. Robert doesn't
17 know that another person did it, but he thinks he did
18 or may know who did, is what Robert tells them
19 initially.

20 Another person named Melissa would also get in
21 arguments and Josh would pump, pump, pump this other
22 person out. About two weeks back Robert, another
23 person and B.J. went to Josh's house. Melissa asked
24 them to leave after another person brought the blunt.
25 That was the whole reason of going over there.

1 His parents are in there. He's talking to them,
2 and he says, you all, I want to tell you a little bit
3 more. Maybe he didn't want his parents to know what
4 he had been involved in. I wouldn't. And isn't that
5 real? Let me go talk to you all away from them a
6 little bit. There was even a question, could they
7 hear it? I don't know. But how can you make that
8 up?

9 And they go outside. And now I guess it becomes
10 The State of South Carolina vs. Captain David
11 Thomley. We're now switching to a different
12 courtroom. They come out outside and Captain Thomley
13 is talking to him. And he says Thomley comes, takes
14 him out there to the truck, and he wants to ask
15 Captain Thomley, his boss; as people want to talk to
16 my boss and not me many a time, I want to talk to
17 you.

18 Captain Thomley took the stand. What did he
19 talk to you about? He wanted to know, he'd like to
20 talk but he wants some help. He said I tell him --
21 and he looked at you all and put his hand on the
22 Bible. He said, I told him I'll make your
23 cooperation known to the judge and to the solicitor.
24 And I said, are you doing it? I'm doing it. Did he
25 totally cooperate? He did. He cooperated. I'm

1 telling you all now. He cooperated, Judge. And
2 Thomley told you that that's what he told him, that
3 he'd let him know he cooperated. Did you promise him
4 anything? No, sir. Did you threaten him? I did
5 not. Did you hold out any hope of reward? No, sir,
6 no, ma'am. I didn't.

7 He leaves. Think about this. Please think
8 about this. If these guys weren't telling the truth,
9 why would they even say that? Did he ask you for;
10 anything? No. He didn't say anything to me. I
11 didn't even say anything about cooperation. That is
12 credible. Why not say just say, no, nothing
13 happened. He didn't ask me for anything. Nothing.

14 And then they go back inside and he gives them a
15 statement. I don't think they'll need to come down
16 and see this, so I can do it up here. Who filled in
17 the top part in, Danny? He did. Did he have any
18 trouble doing it? No, sir. Did he have any trouble
19 with his social security?

20 And these weren't questions just to bide time
21 for the courtroom and make copies for the record.
22 It's to show that he had the ability I think to write
23 down social security. Sometimes I forget mine. I
24 have to think for a minute. It doesn't come right
25 out. But he said he didn't have any trouble writing

1 this. He didn't have any trouble writing that. He
2 knew. He was thinking. Was there any hesitation?
3 No.

4 On Tuesday -- and this was after, y'all; this
5 was after Danny Catoe had talked to him. What's your
6 procedure? I talk to him, make some notes of what he
7 said. He read those notes out to you in the record.
8 Did you have any trouble understanding him? No, sir?
9 Did you promise him anything during all that? No, I
10 did not. Did you hold out any hope of reward? No, I
11 not did. Did he appear to understand you? Yes. Did
12 he ask for an attorney ever during the taking of this
13 statement? No, sir. No, ma'am.

14 On Tuesday, the 12th of December, 2006, at
15 2 p.m. another person got off work and picks me up.
16 We got to the mall and I got a new cellphone and
17 shoes. Is Danny just going to write that up, throw
18 that in? We then went to pick up another person and
19 then we went to McDonald's in Blythewood and eat.
20 And from there we went to Sonic.

21 I had on a ski mask. I had on a ski mask and
22 was joking around while another person talked to a
23 girl in the back. And another person was talking to
24 he Leroy. I don't know Leroy's last name. We then
25 left Sonic and went to the Two Notch Wal-Mart, and

1 another person and another person got a ski mask. So
2 we went riding and another. You all will read it.
3 You all can see it. And another person said, you
4 know, we need to do something with these masks.

5 I mean, he'd almost have to be a fiction writer
6 to be coming up with this, just sitting there doing
7 all this. These are the words he said he told him
8 when he's sitting down just writing. He says, do you
9 mind if we put it on one of our statement forms? He
10 said, no. Well, he came in here and showed you all.

11 And I asked -- and the mask -- and we need do
12 something with these masks. And I asked and another
13 person asked, like what? And another person said,
14 like beat Josh's ass. Because he's a snitch.
15 There's your motive. There's your motive. And I
16 told another person I didn't think he was a snitch.
17 Well, I don't think he's a snitch. Another person
18 then asked if me and another person wanted to ride
19 and we said whatever.

20 Whose signature is that at the bottom? Whose
21 signature? Robert Cannon. Eye witnessed. Marthers
22 witnessed it. Did you force him to sign it? No.
23 Did you read the statement: "I have made the
24 foregoing statement freely and voluntarily, without
25 fear, threat, promise of reward or hope of reward of

1 any kind. This is to certify I've read or had read
2 to me the foregoing statement consisting of five
3 pages and a true copy has been given to me."

4 When we got through, did you go over it with
5 him? Yes, I did. Did he sign it? Yes, sir. Did
6 you see him? Did you make him sign it? No.

7 This is page 2. Because I had nothing else to
8 do and no certain time to be home, that was about
9 11 p.m., another person was real quiet in the car
10 while we were going to Josh's house. We pulled up to
11 Josh's about 11:30.

12 Well, you know, that's written, why we pulled up
13 to Josh's house, like, you know, he knew where Josh's
14 house was, and the testimony about he had been out
15 there one time before a couple of weeks ago and
16 Melissa had asked him to leave with somebody else.
17 So he knew that was Josh's house. And how would
18 Danny Catoe have made that up and known he knew that
19 was Josh's house? These are his words. Danny, no
20 offense, is not capable of doing that. Nobody is.
21 Nobody is.

22 We pulled up to Josh's house about 11:30.
23 Another person knocked on the front door and Josh
24 didn't answer. So another -- that's telling, isn't
25 it? He didn't answer it. He was either sleep or had

1 something in his system, but he was out. He didn't
2 answer. So another person said that he was going to
3 pull one of my moves and kick the door. So another
4 person went to the side door and he and another
5 person busted it in. He went in first and me and
6 another person followed him to watch the fight.

7 Josh was asleep on the couch. And another
8 person yelled, hey, bitch. And when Josh looked up,
9 another person hit him with a glass lamp. Right
10 after that Josh was in a daze. And another person
11 drags him off the couch part of the way.

12 This was found in the sofa, one just like this,
13 the glass. And this is what was dropped on his head.
14 It's consistent with the injury on the temple.
15 You've got a picture over here that Doc showed you.
16 When you go back there I want you to sit around the
17 room and pass this around. I want everybody to feel
18 it and touch it because that's what was dropped on
19 his head while he was on the couch and caused these
20 cuts. Go back there. You will actually get to hold
21 up malice in this case. You get to touch it.
22 Because this is what was dropped on him as he lay on
23 the couch. That's real.

24 And another person drags him off the couch part
25 of the way. Then another person started

1 pressuring -- the glass lamp. Josh in a daze. Then
2 another person started pressuring another person to
3 hit Josh with the bat that was in the house. And
4 another person hit Josh in the back of -- signed --
5 indicating that he then back over it -- the head.
6 After that Josh was basically crawling.

7 That's one thing Dr. Sexton said that could have
8 been consistent with, couldn't it? On the socks.
9 Dragged, crawling. Basically crawling trying to get
10 up. And the whole time another person was talking
11 shit to him about being a snitch. Talking shit about
12 him being a snitch. Malice, meanness, evilness,
13 intentional conduct?

14 At that time another person kicked Josh in the
15 ribs and asked Josh where the weed was and Josh just
16 grunted. Grunting. That's when another person asked
17 me to check the room and we started pulling drawers.
18 Another person flipped the mattress and another
19 person was just standing there.

20 Then Josh went unconscious, and I not Josh a
21 towel, got Josh a towel and put it to his head.
22 Another person said F-U-C-K, we don't have anything,
23 and pushed the Christmas tree over. That tree is
24 over.

25 Another person then got mad again, got mad

1 again. He's on the floor beat, bleeding. Because he
2 can't find anything to steal, he gets mad again.
3 Malice? Mad again and took the house phone. But
4 before another person left, he got some frozen
5 chicken from the freezer and put it on Josh's head to
6 try and stop the bleeding. After that we went back
7 out the same way we came in.

8 We left, and another person dropped another
9 person off first and me second, and I guess he went
10 home.

11 Did you and another person and another person
12 have gloves on? Yes. What kind of gloves? Purple
13 Latex. And I had on two pair, white and purple ones
14 on top. Where was the bat that was used to hit Josh?
15 It was in Josh's house. I just looked over there and
16 another person picked it up.

17 Well, you know, they don't get any bonus points
18 for their being an instrument of death in somebody
19 else's house when they break in, any more so than
20 they would if there was a gun there and they picked
21 it up and used it. They came in and used a bat.

22 And, finally, what were you, another person and
23 another person wearing? Black pants and shirts and
24 ski masks. What color was the ski mask? Mine was
25 black and theirs was black or dark blue. Did you all

1 change clothes that night after the incident? Yes,
2 and another person done something with them.

3 And I don't know if anybody is going to get up
4 here and argue he made this up or did that. I don't
5 know. But right here it said, I asked Danny Catoe to
6 write this for me, and this is in my own words as
7 they are written. Robert Cannon, 12-15-06, 9:51.
8 Signature five times. Actually he wrote his
9 signature six if you count the top one when he filled
10 it out. And then when they go back, he reads it over
11 and tells them is it freely and voluntarily given.
12 He looks at it and signs each page. Credibility,
13 believability?

14 And right here, as they read back over it, you
15 actually see a scratch out. It says Chris. And that
16 was a typo or written wrong. And he goes back and
17 writes Josh. And Danny gets him initial it so I can
18 come in here to argue this to you all. Is he making
19 him go over that, too? No. They went over it. No,
20 that's wrong. Let's correct that and change it so
21 nobody will think I cheated.

22 And then what happened? And then what happens?
23 He's just told him some information. And they go
24 talk to see Derrick McDonald. They go see Derrick
25 McDonald. And they didn't arrest him that night.

1 His parents were there. They talked to him. They
2 arrested him the next day. But they didn't arrest
3 him that night. They went to look for another
4 person. And who did they go to look for? Derrick
5 McDonald. On this statement Robert Cannon hadn't
6 even admitted to touching him. I was there and I
7 went in other rooms; kind of easing back, kind of
8 starting off with, you know, I was told about it to
9 start with, don't really know who did it; well, I
10 know something about it. I want to talk to you away
11 from by parents. Okay. I was there, but I didn't
12 really touch him.

13 All right. We're going to start. And we go to
14 Derrick McDonald who they had talked to earlier and
15 he didn't give them any statement. And they go to
16 Derrick McDonald's house. And in the meantime,
17 somewhere during the process, you remember when they
18 left Derrick before, when they left the car there, he
19 said he wanted to talk to his mother, well, his
20 mother called and talked to Danny. They were
21 finishing up with this. Does Danny tell them what
22 they're going there then? No. Would that be a smart
23 thing to do, for a law enforcement officer to do?
24 No.

25 They go to Derrick McDonald's house. They get

1 to Derrick McDonald's house and they have an arrest
2 warrant. They have an arrest for Derrick McDonald.
3 They go inside. Do they tarry? I might have even
4 asked that question. They've got an arrest warrant.
5 The folks are in the house. Do they joke around and
6 talk? No. We have an arrest warrant. They come in
7 with the help of two Richland County deputies I
8 think.

9 And actually I think one of the deputies goes to
10 the wrong son. Danny says, no, that's not him. And
11 they're going out. And they're heading outside. And
12 here, credibility, believability? These officers
13 tell you. Did anybody ask for a lawyer? Well, the
14 mama said, I'll get you a lawyer. But, folks, as the
15 judge is going to tell you, those are individual
16 rights. The person who has to tell you, the person
17 who is being arrested, I want a lawyer. He never
18 told them that.

19 And if these guys are lying and cheating, why
20 wouldn't they even say, well, the mama said I'll get
21 a lawyer as he went out? He didn't say anything.
22 Why did they even tell you that if they're not
23 telling the truth, if they're not being believable,
24 if they're not being credible?

25 They take him outside. Are the parents happy

1 he's arrested? I guess not. The evidence you heard,
2 they went and got him. They brought him out. They
3 took him outside. They put him in the truck and they
4 took him back to the Sheriff's Department. And on
5 the way back to the Sheriff's Department they read
6 him his rights orally, read them like they're doing
7 now, like they did on the stand. Did he say anything
8 then? He said, this is the way we came the other
9 night. This is the way we came the other night.

10 Danny said, well, I don't want to talk with you
11 any more. I don't want to talk with you any more
12 until we get back to the Sheriff's Department. I can
13 either take you to jail or take you to the Sheriff's
14 Department. I'd like to go talk to you.

15 He reads him his rights. You've got to decide
16 the credibility, believability. Credibility,
17 believability. So they go to the Sheriff's
18 Department. What happens when they get to the
19 Sheriff's Department? He reads him his rights again.
20 I know you all don't want me to go through all these
21 again. And I won't. You all are smart. You all
22 know that I went through each one of these questions.
23 Remember the questions I asked and the answers he
24 gave. If you want to hear them more from the
25 stand -- I'm sorry for that -- you can replay any

1 testimony if you all want to hear me talking to him
2 and asking all these questions. But he sat down and
3 he read him his rights at the Sheriff's Department,
4 each right. And he initials it.

5 Did he appear to understand them? Yes, he did.
6 Was he under the influence of alcohol or drugs?
7 Didn't appear to be. Could he understand your
8 questions? Could you understand his answers? Were
9 they timely? And that just means like if I ask you
10 something and you wait two or three minutes. You all
11 know that. Was it appropriate subject matter wise?
12 Yes, appeared to be. Did he sign? Yes, he did. Did
13 I sign? Yes. Did Marthers sign? Yes, he did.

14 Then he started talking to him. His practice,
15 he takes notes as he's talking. And he takes a
16 statement from Derrick McDonald. I think he filled
17 in part of this, and this might have been the officer
18 filled in that part because he left it blank. I
19 can't remember. You all can better than I can. But
20 again, this is to illustrate his mind was thinking
21 where he could write down his social security number.
22 He didn't have to think about it, which shows he's
23 communicating and could at least think. He talked to
24 him, gave his number, gave his address, didn't have
25 any trouble doing it.

1 About 5:30 or 6 p.m. Tuesday, the 12th, 2006, of
2 December, another person and another person came to
3 my house and asked if I wanted to make some money.
4 After a while I decided to go with them. We left and
5 went to Sonic and I checked on trying to get my job
6 back. After we left the Sonic we went to the
7 Wal-Mart on Two Notch and bought a ski mask, and
8 bought a ski mask, and some box of purple gloves. We
9 were still in the parking lot when another person
10 called Zack.

11 You know, they didn't even -- Zack didn't even
12 tell them about this phone call until ten days later
13 when he talked to them. Well, I guess Danny is
14 cheating and got a crystal ball or something and is
15 smart enough to know that Zack is going to tell me
16 this in ten days that he called me. That's when they
17 first learned about it. That's why this is real.
18 You can't get around that.

19 Somebody calls Zack from Wal-Mart.
20 Circumstantial evidence doesn't get any better than
21 that. Remember the example I gave you about it
22 snowing? I'm going to show you some snow here in at
23 the end. It's starting to snow. It's starting to
24 fall.

25 After a while I decided to -- or I checked on

1 trying to get my job back. I'm sorry, y'all. Went
2 to Wal-Mart on Two Notch, Latex gloves. We were
3 still in the parking lot when the other person called
4 Zack and asked him if someone was at home.
5 Zack told him that he would call back in ten minutes,
6 but another person called back and told him the
7 situation was being handled.

8 It sure was. That's when they started planning.
9 See that word right there? Planning. We don't have
10 to prove motive, premeditation. They were planning
11 on how we were going to get into the house. Got
12 gloves, got a mask, got a plan. But still didn't
13 know whose house we was going to.

14 Well, that's real. What's the testimony of
15 McDonald? Didn't hang out. Derrick McDonald had
16 never been to that house before. Robert had. Robert
17 said in his statement, well, we went to Josh's house.
18 McDonald didn't know where they're going. Knew they
19 had a plan, knew they were going to mess with
20 somebody and rob somebody, had a plan with some
21 gloves. Did Danny know that he didn't know?

22 I didn't know whose house it was until we were
23 already there. Another person had told me that I was
24 to stay put outside to make sure no one came up. So
25 another person parked beside the road in front of the

1 house and we went to the side door. The door was
2 sturdy and we all -- should be three -- kicked the
3 door on the count of three. Another person and
4 another person went in, and myself and I shut the
5 door behind me and I went to another window to watch
6 out.

7 That's when my name was -- and use common sense
8 there -- and I went into the living room/dining room
9 area. Another person then cut on the lights and
10 picked up a glass bowl with flower petals in it,
11 picked it up over his head and hit Josh in the head
12 with it while Josh was asleep on the couch.

13 Then another person dragged Josh out of the
14 couch, but I first grabbed a bat that was against the
15 wall. I first grabbed a bat that was against the
16 wall and I started hitting Josh in the body. I first
17 grabbed a bat that was against the wall and started
18 hitting Josh in the body. Derrick McDonald's words.

19 Then another person told me to stop to ask Josh
20 a question. Hit him, beat him, now lets ask him
21 something about where the money and dope was. And I
22 called -- I could stop. Again, common sense. Could
23 that be could not stop? Was that a planned thing,
24 too, there? Did they mess that up? I could stop the
25 bat and I hit Josh in the back of the head.

1 You heard how Sexton described those injuries.
2 I also think I hit him one time in the temple area of
3 his head. Josh then started bleeding more, more, and
4 I got scared. That's real. That's when another
5 person and another person started kicking and
6 stomping Josh, kicking and stomping Josh. You
7 remember the injuries Dr. Sexton talked about and
8 they're back there. I won't show them to you now.
9 On the side. Would that be consistent with kicking?

10 Josh and another person kicking. Another person
11 had told me to go get the car and pull it up. The
12 last thing I saw was another person pushing the tree
13 over on Josh. Then another person and another person
14 came out with plastic bags of stuff and told me to
15 pop the trunk. I did and got in the back seat.

16 Then another person dropped me off at my house
17 and gave me some DVD's and stuff that I didn't want.
18 So I burned them and my clothes in a burn barrel at
19 my house. All of my clothes and shoes and everything
20 burned completely up.

21 And all they can out of this is, did you all go
22 check the burned barrel? Well, no, we didn't. But
23 does that mean that didn't happen? He tells them he
24 burns his clothes in the burn barrel after he admits
25 hitting him with a bat?

1 And finally, I asked Danny Catoe to write this
2 statement for me in my own words as it is written,
3 derrick McDonald, 12-16-06. One, two initials signed
4 down here, right here that he read that. No initials
5 here. Do you know what this is? At first there were
6 three pages, three pages of complete things. So he
7 gets him to go back and make it four because he had
8 him write this. Does that make sense that he writes
9 his initials there? Did he make him write all this
10 stuff? Is he over there making him write this?

11 DJM. He changed. He added one more initial
12 there. Changed there. Initialed here. Initialed
13 here. Puts D.J. on the front and then D.J. on the
14 second. I can't explain why. He goes by D.J. That
15 may be a question. It's not reasonable doubt. But
16 it's his hand doing it. Look at all of these and see
17 if they're the same.

18 He is arrested. That all happened the 15th.
19 That's a long day. It look them a long time to get
20 through it. They're out doing their job, looking for
21 what evidence they had that leads them to folks and
22 leads them to other folks.

23 So what happens the next day? And I don't have
24 a blowup of this. But then State vs. Phil Crawford I
25 guess. He talks to Phil Crawford. Phil Crawford

1 reads him his rights. Did he appear to understand
2 them? Yes, sir. Under the influence of alcohol or
3 drugs? No, sir. I can't help the fact his parents
4 went out of town. That's not our fault. That's not
5 my fault. Phil gets him and talks to him. Is there
6 anything you want to add? No, sir. Anything you
7 want to change? No, sir.

8 Ever say it's not his statement that he wrote,
9 Phil, when he took the stand? No, he didn't say
10 that. What did he add? Well, he adds the DVD's,
11 hair dryer, I think phone. I can't find it right
12 now. But you all know what it is. Listed all those
13 things he listed. You all know what they are. He
14 told him about them. Did you threaten him? No. Did
15 he sign it? Yeah, he signed it.

16 He wrote them down. He filled it out. He put
17 what I stole. Did you know what he stole? No. Did
18 you know what was in there? I didn't know what he
19 stole. I didn't know what was in there. Did he give
20 you that information? Yeah. Is that credible? Is
21 that believable? Here's the stuff I took out of
22 there. I do want to add something.

23 And what else do you want to add? Well, I think
24 I want to add, I know I want to add, he grabbed me
25 and I kicked him. I think that's what he said. He

1 grabbed me and I kicked him. So now, think about it.
2 Chris Rust's car went home from Chris. Well, no,
3 sir. No, ma'am. And if you know that now because
4 Chris Rust came in and told you that Saturday.
5 That's credible. You can't get beyond that. No
6 cross, no cross on Chris Rust about that. He comes
7 in at 1:30.

8 Then comes back while he's there. Well, but I
9 didn't really hit him or touch him. And then, well,
10 here's the things I took. Well, okay. He grabbed me
11 and I did kick him. I did kick him. That's the real
12 Robert Cannon as he progresses down the road in
13 trying to tell the truth. And he was arrested.

14 Now, ladies and gentlemen, I am close to summing
15 up. Get my boards out of here. Oh. It's right
16 there. Grabbed me and I did kick him. That's the
17 last thing he told him. Grabbed me and I did kick
18 him.

19 Now, that statement, the circumstantial
20 evidence, the phone calls, all of that is
21 corroborated. But all of that in and of itself is
22 nothing. It's not like you have an inmate or a
23 witness or somebody from jail who is up here and
24 testifying and looking for corroboration.

25 These are sworn police officers here in the line

1 of duty who are telling you what was said to them.
2 So you don't need any more. But, gosh, we've got it.
3 Gosh, we've got it, don't we? You don't need it.
4 But if anybody needs anything else, let me show you a
5 couple of things that just can't be explained any
6 other way, cannot be explained any other way.

7 When you look through these statements, you
8 know, the first thing they said was they went to --
9 do you remember the statements? They go to Wal-Mart.
10 And I meant to do this earlier. You all bear with
11 me. We were still in the parking lot when another
12 person called Zack and asked him to see if someone
13 was at home. Zack told him that he would call back
14 in ten minutes, but he called back and say, hey, it's
15 being handled. It's being handled.

16 Go back here and look at these phone calls from
17 the Waltemath house. I know he's off a little bit.
18 You know, I surely didn't do his testimony right if I
19 was trying to from a trunk number. Trunk number. I
20 don't understand all that, but I know people that do.
21 When an Alltel number calls, it's going to go to a
22 trunk number.

23 And you heard "Dog", Investigator Austin, say
24 that number is 530-1646 which is on that Workers'
25 Comp thing which is Chris Whitehead. It's an Alltel

1 number. And you heard him say he had subpoenaed a
2 lady named Angela Evans that said that 530-1646
3 number had no detailed billing. So if you're going
4 to see a phone call from an Alltel number, which that
5 was, this will go to a trunk line, and that's all you
6 can ever show.

7 And look at this, ladies and gentlemen.
8 9:53 p.m. there's a call from an Alltel trunk line.
9 10:14, a call from an Alltel trunk line. 10:43 p.m.,
10 Wal-Mart receipts, which don't let me forget those.
11 And 11:40:04 a call from an Alltel trunk line. Did
12 Danny know all that was going to be able to show up
13 when he's taking that statement if he's making it up?
14 He said two. Could there have been three calls?
15 Nothing is absolutely perfect. Maybe there were
16 three times he talked to him. Incredible
17 circumstantial evidence.

18 Well, what about the time they've got in there?
19 Not that you question what these folks say. They're
20 up here. You don't need any other corroboration from
21 these officers on the stand. These guys told them.
22 But what did they say? What time did they get over
23 there?

24 Y'all don't get frustrated with me. I'm almost
25 through. We pulled up to Josh's house about 11:30.

1 11:30. Well, I guess, I guess then you knew that
2 Cosmo Bacco, a great American, was going to be out
3 walking, was going to be out walking his son's dog
4 who he doesn't usually keep sometime around the end
5 of Prince of Bel-Air which was about 11:25 to 11:30,
6 tells them I don't know when later. It certainly
7 wasn't then. Cosmo says, I was walking down the
8 street later and talked to him. And, lo and behold,
9 I hear something loud, it sounds like a kick. It
10 sounds like a kick. That's incredible circumstantial
11 evidence, isn't it?

12 And then later hears some yelling and hears
13 voices, male voices leaving. He says he hears what
14 sounds like a muffler or a loud car. He doesn't know
15 what it is. He was a mechanic. I don't exactly what
16 that means, except he knows car. That's incredible
17 circumstantial evidence.

18 What else do we have? You don't need that to
19 corroborate that. But isn't that incredible? The
20 chicken, pictures of the chicken. The tree. And,
21 folks, I talked to you about the phone call. You've
22 got the scene. You've got Dr. Sexton. Dr. Sexton,
23 you looked at these pictures? I looked at them. I
24 do it every time. Show them the pictures. Look at
25 the scene. I know when to shut up. I know when a

1 man has got limitations. I know when to let experts
2 talk.

3 Dr. Sexton, do you have an opinion what
4 happened? Yes, sir, I do. Look at these pictures.
5 You know, Josh Zoch talked to you all. He talked to
6 you all. He didn't come in here and talk to you, but
7 his body talked to you through Dr. Sexton. He talked
8 to you through Dr. Sexton.

9 What happened? Well, the injuries and what I
10 saw on these pictures and the blood spatters are
11 consistent with him being on the couch, that couch
12 being turned over, him being at least once while he
13 was on there. Because remember the spots got formed.
14 Being hit again, that's what makes the blood spatter.
15 I'm not going to go over the pictures with you. Go
16 back and look at them.

17 It's over here. I showed him this picture. On
18 this side it's over here. That's consistent with him
19 getting hit in the back. Did Danny know all that was
20 going to pan out just right? And then he's pulled
21 off the couch and his shirt is up and he's on his
22 back and then he's hit again with his shirt up which
23 means he's been dragged. Of course that's he's gone
24 by the little round table and the glass top has been
25 knocked off and his blood is smeared on the side as

1 he's being dragged off.

2 Socks, blood on top of them, consistent with
3 being dragged. And then you can see it again and
4 again. And the deadly blow probably. You heard him
5 describe how hard that blow had to be to pop open
6 that head. It probably came when he was against a
7 hard surface at the bottom there. Maybe that last
8 below after he wouldn't say where the money and weed
9 was, the money or whatever they were looking for as
10 they ransacked the house. That's corroboration.

11 And finally, finally, as we close in, as we
12 close in, Christopher Whitehead is overheard -- I
13 said it before. I mean he tells Pat "F" sonic. He's
14 overheard telling Mike Jenkins who is in there on
15 checks and got a simple possession of marijuana and
16 has got some other charges which he says are in
17 dispute. He says they're still pending. He says
18 everything has been cleared up. You saw his
19 credibility.

20 He says he was in A2. He's in A3. Harvey comes
21 in here, right there. He says, were they in A pod?
22 Yes, sir. Was he in A2? Yes, sir? Was he in A3?
23 Yes, sir. He was in there one night. He went in
24 there one night because some drunk guy comes in there
25 and doesn't like what's on TV. And then what's his

1 name, Jenkins said on the stand, this ain't no
2 Holiday Inn. And so he puts him there for one night.
3 And he hears him say Josh. He hears him say, we'll
4 be heros when we go back to school. They ain't got
5 anything on us. We'll be heros.

6 That's what -- a not guilty verdict will make
7 them heros. If we go back out we'll be heros. He's
8 bragging about Josh, bragging about killing him,
9 bragging about Rocky Branch.

10 Then he sees him again at a service, telling the
11 priest how much it's bothering him. Did he make that
12 up? Then he leaves out and he sees Christopher
13 Whitehead's name there as he's leaving. And then he
14 sees him again -- I don't know -- some kind of room
15 where they get some kind of shots for something. I
16 don't know. Then he hears that same voice.

17 Even Harvey said, well, it's a little
18 distinctive. He hears that same voice mentioning
19 Josh and Rocky Branch again. Does he know him?
20 Yeah. He's mad about somebody bragging and being a
21 hero about killing somebody. Yes. And he goes after
22 him. That's real.

23 Direct evidence. Let's go beat Josh's ass.
24 That's direct evidence. And finally, you know, my
25 favorite show used to be Columbo. You'd get to see

1 it then. You'd get to see what happened and watch
2 him figure it out. And it would always be, there'd
3 always be something at the end where they'd say, got
4 you.

5 Well, if you look at the two Wal-Mart
6 receipts -- and I don't know what that 31-minute
7 phone call Mr. Whitlark was talking about. I guess
8 somebody was talking to Wal-Mart earlier in the day.
9 It has nothing to do with this.

10 But if you look at these two receipts at the
11 Wal-Mart when you go back there, I almost -- I will
12 get excited talking to you about these. I'm going to
13 get excited. I'm going to get excited. And when you
14 go back and review the evidence, talk about these.
15 Look at them. Every one of you touch these. Because
16 they tell these statements -- in their statements
17 they say we go to Wal-Mart. We go to Wal-Mart on
18 December 12th, 2006. Calls made to Zack.

19 But we go to Wal-Mart. We buy purple Latex
20 gloves and a ski mask. There's no dispute from
21 anybody. There's already one ski mask Robert Cannon
22 has earlier. But on December 15th they tell these
23 investigators we go to Wal-Mart and get purple gloves
24 and ski masks. He can't know that. He's not smart
25 enough. I'm not smart enough. Nobody is smart

1 enough to know that, except the people that did it.

2 This is the case. How do you explain this?

3 They've got a box of purple gloves and a mask. They

4 told him about it December 15th. And guess what?

5 This lady right here, this lady, as she has been

6 trained and taught to do, she don't need

7 corroboration. These guys are good officers. You

8 know they're not lying. These fellows sitting here

9 beat somebody to the death and go into their house

10 without permission.

11 No, we don't need this. But she kept pushing.

12 And I don't care if it's this year, next year, the

13 year after, it wouldn't have matter because thanks to

14 her, they found them. Because it can never change.

15 And that's why it's pure. It's like that snow. This

16 is pure as the driven snow.

17 Because when they went back and we brought in

18 Darla from Wal-Mart, Darla from Wal-Mart, guess what

19 we found? We found that on December 12th at

20 10:43 p.m. -- this is the case, ladies and gentlemen;

21 you can't get around this -- at 10:43:53 there was a

22 box of purple Latex gloves. You heard Darla Harris

23 say that. Well, Darla, can anybody ever go back in

24 time and change that? No, sir.

25 Darla, how many Wal-Marts in the world are

1 there? How many Wal-Marts in the United States? How
2 many Wal-Marts in this state? How many Wal-Marts in
3 the Columbia area or stores? They told about one
4 Wal-Mart on Two Notch. They told them they did it.
5 They did. Darla, how many gloves did you all sell?
6 One box of purple gloves. One on December 12th at
7 10:43. How many boxes of purple gloves were sold in
8 your Wal-Mart on that day? One.

9 That's the case. You can't get around it. They
10 told them that. She doesn't find it until a year and
11 a half later. We tried it next year. I don't care
12 when we found it. I'm glad we found it. I don't
13 think we needed it. That's pure. That's snow.

14 And then 29, 30, 31, 32, 33, 34, 35, 36, 37, 38,
15 39, 40, between 9:39 and 9:49, 20 something seconds
16 later, guess what's bought? Excuse me. 27 seconds
17 right before that -- and I just got them out of
18 order -- guess what's bought? Guess what's bought?
19 What do they tell you in their statements? One
20 three-hole mask. Look at the times. 27 seconds
21 apart. What do did they tell them they bought? A
22 mask and a box of purple gloves. Darla, how many
23 three-hole masks were sold at Wal-Mart on Two Notch
24 on 12-12? One. One.

25 I'm going to use this as an example of

1 circumstantial evidence in every case I try from here
2 on. That's circumstantial evidence, proof of a fact,
3 proof of a chain of facts and circumstances which
4 establishes a fact that they bought those purple
5 gloves and three masks, three-holed masks from
6 Wal-Mart at 12-12, around the same time the calls
7 were being made to Zack Waltemath which they told you
8 about. There is no doubt about it. No doubt about
9 it.

10 As you go back to your room -- and, you know,
11 they can control everything. Oh, they may argue
12 there wasn't a video. It doesn't last for 30 days.
13 You don't have to have a video. I can assure you
14 they'd be arguing the video was wrong. Or like they
15 said, you don't have a recorder or a tape player down
16 there while you're talking to them. Well, I'm sure
17 they'd say, didn't you talk to them before you had
18 it? You said something before you had it or promised
19 them. I'm sure they'd have said that. But this is
20 real. This is real.

21 And they can't control everything. You can
22 control the forensic evidence. Think about this.
23 You can control it by using gloves. You can control
24 it through your lawyer's questioning. It's just a
25 question. You know what? It just hit me. A

1 question is just a question. All a lawyer would have
2 to say is, well, you threatened them the death
3 penalty, didn't you? No. Well, that's a great
4 example of a question is just a question. That ain't
5 a reasonable doubt. As a matter of fact, the only
6 answer you've heard was no. You threaten or promise
7 him? Death penalty? No. That's all you've heard.

8 If you find them not guilty, you'll have to
9 disbelieve every officer you've heard, because that's
10 all you've heard. But one thing they couldn't
11 control just by a question, wearing the gloves or
12 anything else was these. They told them that. They
13 can't control that these are kept by Darla. They can
14 never control that.

15 And not that you all needed it, because the
16 evidence was there. The statements, the phone calls,
17 the beat your ass, we're going to be heros; you all
18 didn't need it. But you got. There's not a
19 reasonable doubt. We submit there's no doubt.

20 When you go back to your jury room, you'll reach
21 a verdict. Verdict simply means to speak the truth.
22 I didn't even pick up this bat and swing it around
23 and put on the gloves. I was going to, but I'm not
24 going to do that. You all know that.

25 When you go back to the jury room, when you

1 reach a verdict, and all verdict means is to speak
2 the truth, my dad has always told me the greatest
3 power we have in life is our power to choose. We can
4 choose to work too much, neglect your family, choose
5 to drink too much, choose to do drugs, what have you.
6 But your greatest power is to choose. Everything we
7 do in life, our greatest power is to choose for
8 ourselves, for others. You all's greatest power.

9 Well, on December 12th, 2006, these three
10 defendants chose for whatever reason, maybe they
11 thought he was snitching on them; I tell you what,
12 from the evidence and them being in Columbia and over
13 there was a Columbia narc, the inference is he wasn't
14 even snitching. And he wasn't snitching on them if
15 he was snitching. But they decided they were going
16 to go get him, going to beat him up. They ended up
17 killing him.

18 And the judge is going to charge you about the
19 hand of one is the hand of all. The act of one is
20 the act of all. If you go to rob somebody and you
21 don't go inside and they get robbed, get killed,
22 you're just as guilty. Act of one, the hand of one
23 is the hand of all. Doesn't that make sense?

24 When they chose to go in and hit and hit and hit
25 and hit and hit and hit and rob, they made their

1 choice. Shortly you'll be making your choice,
2 exercising your greatest power. And it's the end.
3 And we ask you to use your common sense, determine
4 what's credible, believable, determine the
5 corroborating evidence if any you need and return a
6 verdict that says to all three of these defendants
7 you killed Joshua Zoch maliciously with a bat and
8 dropped the potpourri bowl; you killed him, you were
9 angry, you didn't find anything, you went in his
10 house without permission, and then you went away.
11 You left your job, packed up and were heading away.
12 And we're going to find you guilty. Thank you?

13 **MR. KENDRICK:** May it please the Court?

14 **THE COURT:** Yes, sir. I was going to give
15 Mr. Meadors an opportunity to collect his -- all
16 right, Mr. Kendrick.

17 **MR. KENDRICK:** As you all know, my name is Josh
18 Kendrick and I represent Mr. Cannon. I like to watch
19 Mr. Meadors do a closing argument. He is dramatic.
20 He knows how to bring that drama to the courtroom.
21 He started out in his closing argument talking about
22 what we had been doing in this trial, what we were
23 going to say, what we were going to say in this
24 closing, the smoke screens we've been throwing up,
25 the accusations we've been slinging around, I assume

1 to get you to think that we have done something
2 improper.

3 And there was a time in my practice when the
4 solicitor would say that I'd get up, and I'm still
5 not that old but I was a little bit younger, and I'd
6 get fired up and I'd yell and I'd scream and I'd
7 waive my arms and I'd try to bully a jury into
8 believing me and believing my client. I'd try to
9 convince you to overlook things. I'd try to convince
10 you that because I could be louder, because I could
11 be in the right place at the right time, swing my
12 hands the right way, show you the right poster board
13 that I was the person that was right.

14 Since that time I have learned a little bit from
15 lawyers like Mr. Meadors and other lawyers. And I
16 don't know if I've improved at all, but that's not
17 really in my bag of tricks. One of the things that I
18 was thinking about in this case over the week was,
19 you know, how did we get here? What is it that we're
20 doing? What is the problem here? What is it that
21 that's creating all of these questions?

22 Well, I am a fan of books, probably because I'm
23 a nerd. And an old detective named Sherlock Holmes
24 who a lot of you have probably heard of, he is an old
25 British guy that solved most of his cases. And he

1 had a saying that he lived by when he was
2 investigating his cases, that he could never come up
3 with a theory before you have all the facts. Because
4 what happens is you start twisting the facts to match
5 your theory instead of finding the theory that
6 explains your facts.

7 Now, that's what happened here. And it happened
8 in December. It happened the week of May 5th. It's
9 still going on. We are looking at these facts and
10 they are trying to convince us to make these facts
11 fit a theory. That isn't how we do this.

12 From start to finish there have been problems
13 with what people are saying, from Mr. Waltemath
14 getting up here and saying, I got phone calls from
15 between 7 and 8, when the phone records that are in
16 evidence clearly show that couldn't have happened.
17 All the way 'til this morning when a client gets or a
18 person or witness gets up here and says he doesn't
19 have any pending charges. I asked him about the
20 Clerk of Court records that show he does. Well, I
21 don't know. You didn't hear anything else about
22 that. They glossed it over. Because if he came in
23 here and he's lying, if he's not telling the truth,
24 well, that doesn't fit our theory. It doesn't help
25 us at all.

1 It is so important that we follow that rule that
2 you all have been following all week. And the judge
3 every night when you go home has told you, don't
4 discuss this case with anyone. Don't come to any
5 decisions on this case until you've heard all the
6 evidence. Why does he tell you that? To avoid that
7 danger, the danger that you might say, you know what?
8 Man, that was a great opening argument. That was
9 dramatic. That must have been what happened. And
10 then you start looking at these facts in the same
11 slanted view that they have been presented to you
12 this week. You make these facts fit the answer
13 instead of making them give you the answer.

14 Ladies and gentlemen, the reason we're asking
15 these questions, the reason we're cross examining
16 these witness is absolutely not because I have some
17 desire to create a smoke screen, not because I'm
18 trying to distract you, not because I'm trying to
19 throw out a red herring. I don't think I have any
20 more cliches for this type of action. But that's
21 what I was just accused of. From right here when I
22 was sitting right there, that's what I was accused of
23 doing.

24 I was accused of doing that because I want an
25 answer. I do not have the luxury of looking at these

1 facts and making them fit a theory, because I don't
2 have one. All I can tell you is that my client did
3 not do this. I don't know what happened. The State
4 is in a different position because they're coming in;
5 as Mr. Meadors just so dramatically told you, he
6 thinks my client committed a crime. And he comes
7 with these poster boards and he brings you this
8 testimony, he brings you these facts that will help
9 support that.

10 I don't have that luxury. I have got to ask
11 these people about the shortcomings of this
12 investigation. I have got to ask them why they did
13 certain things and why they didn't do certain things.
14 Why? Because that's how we get to the truth. That's
15 how we get to the verdict. That's how you speak the
16 truth. You don't know about this case. You all
17 aren't allowed to know about it. All you know is
18 what comes from that stand.

19 They say the best way to get to the truth is
20 through cross examination. It is one of best methods
21 we have for finding the truth. Following right along
22 with that is a jury trial. Because you are asked by
23 the judge, and I guess we all, at least in my world,
24 when the judge asks you to do something it's not
25 really a request. It's something we have to do. And

1 I think you all have gotten that. You've got to what
2 he tells you to do. Those are your instructions.

3 You all went through a long process to get here
4 and we've got you sitting in this box and you've got
5 to do what we asks you to do. And he says don't
6 deliberate, don't think about this case until we're
7 at the end. You all are in my position. You don't
8 have the luxury either of saying that's what
9 happened. Let's make the facts fit.

10 So, why are we asking these questions? Why are
11 we exploring what really happened here? Why are we
12 trying to find out what went on in this
13 investigation? Because someone has to. Because
14 until May the 6th of 2008 and ending today it has not
15 been done. Nobody has looked at this. Nobody has
16 asked these questions.

17 Look at the testimony that you heard. Allen
18 Brown can't tell us anything. Cosmo Baccomo, he saw
19 the people come in and go out. In ten minutes he
20 heard two voices. And they asked him. He got up and
21 he asked him again, are you sure? How many did you
22 hear? Two voices. Oh, it could have been more. He
23 said he heard two voices. That's what's in the
24 record. Two. And from the first noise to the last
25 noise, ten minutes. Ten minutes.

1 He heard a car and he said he heard a car with
2 what he referred to as extensions, custom pipes that
3 make a car loud, make the car louder. Whoa, whoa.
4 Wait a minute. What if there is a hole in the car or
5 something? Yeah, I guess so. But he was pretty sure
6 that he heard a car with custom pipes.

7 Now, I have no idea how you would make that
8 determination. I don't know all about cars.
9 Mr. Baccomo does. He told you that from the stand.
10 He's a mechanic by trade. He knows vehicles. He
11 knows what he heard. He saw a little car with custom
12 pipes. That's not what Mr. Whitehead drives. That
13 doesn't make sense in their case. But if we dispute
14 what Mr. Baccomo saw as far as the size of the car,
15 we put some old pipes on them, then it does fit the
16 theory now. We've taken those facts and we've
17 twisted them a little bit to match our theory.

18 Mr. Waltemath comes up here. He got those phone
19 calls between 7 and 8. What have they told you to
20 help prove that those calls were made? There is a
21 trunking number that could belong to any Alltel
22 customer on the Alltel network? And those calls were
23 made two hours after Zack says they're made. Ahh.
24 But if we make those the calls that Mr. Whitehead
25 made and if we put them around that timeframe where

1 those trunking numbers are, they fit our theory.
2 Even though with have no way of telling whose phone
3 that was and that the only witness testimony about
4 those calls in fact doesn't link to that night. The
5 times are wrong. Well, if we twist it a little bit,
6 it helps us.

7 But we don't have that luxury. We don't have
8 the ability to take the facts and make them fit our
9 theory, because we're not allowed to have a theory
10 right now.

11 Ms. Heathcoe comes in and insists that this
12 injury happened on the 13th. Why? Well, because
13 that's the night after the killing happened. So if
14 it did, it's great evidence. The only problem is the
15 official form from the Workers' Comp Department of
16 South Carolina says the 12th.

17 Think back on the testimony. Cecile Trapp said
18 the 12th. And the State asked her, whoa, whoa, whoa,
19 don't you mean the 13th? Oh, yeah, I mean the 13th.
20 Think about what she said. She didn't remember
21 anything about this week. Ms. Trapp -- I wrote it
22 down. I write the whole time on these pads. She
23 really didn't remember much. I was at the Sonic for
24 about ten minutes or so. Oh, yeah, I saw everybody
25 out there, saw them all. Well, they were all

1 separate according to any testimony we've heard, but
2 she saw them all ten minutes. She can't verify they
3 were there and doesn't really remember their being
4 there. She doesn't remember. She doesn't know.

5 I mean, what happened on the 12th? Oh, wait
6 wait, wait. I meant the 13th. The forms from the
7 South Carolina government say the 12th, filled out by
8 Ms. Heathcoe. I'm not calling her a liar. I'm not
9 sitting here accusing her of anything. But I think
10 she made a mistake. And I think we're taking that
11 mistake and we're trying to fix it so it fits with
12 what we want to happen here. And that isn't how this
13 works. That isn't what the 12 of you all are allowed
14 to do. It's not what I do.

15 Ms. Trapp talked about being inside of the
16 victim's house. She talked about seeing some guy's
17 I.D. and a social security number that was
18 photocopied and then she got nervous. And there is
19 testimony in there that Mr. Zoch was working for the
20 police. He was trying to catch somebody who was
21 selling drugs to him. And the State accuses of us of
22 putting him on trial and trying to besmirch his name
23 and doing something horrible.

24 Well, what we're doing is we're trying to do
25 what hasn't been done yet. Up to this point nobody

1 has done that. Nobody has explored what he was
2 doing, a clearly dangerous activity. Nobody has
3 looked into that. Nobody picked up the phone and
4 said, hey, Richland County, you guys got a narc
5 working in Kershaw? Who is he working for? Nobody
6 did that.

7 Why? Because that wouldn't really fit. We'd
8 have to maybe change our theory. And we don't want
9 to change your theory because we like it, because
10 it's easy, it's wrapped up. They're not going to do
11 that. The evidence is there that he was in danger.
12 But we don't know, so I have to ask these questions.

13 Melissa Davy, she testified. Again, she had bad
14 blood with my client. She didn't know what Mr. Zoch
15 did. And I'll be honest with you. I don't think you
16 heard any evidence about it at all. But somebody
17 told the police that because they got his name from
18 somewhere.

19 I asked Ms. Davy questions about phone records,
20 about where she was and timelines. And that doesn't
21 make me a bad person. It doesn't mean I'm trying to
22 throw a smoke screen up or sneak something over. I
23 want to know what happened. I want to know why she
24 can't explain these holes in her story. I want to
25 know why the documentary evidence doesn't support

1 what she says. I want them to answer that question.

2 And I've been thinking maybe I'm the only
3 person, and my co-counsels that Mr. Meadors also
4 pointed out were asking these questions. But I hope
5 all 12 of you will join us in looking for the answers
6 to these questions, trying to figure out why these
7 things don't make sense. I think you have to join
8 us. I think you swore you would at the beginning of
9 the week.

10 Mr. Sellers says that this house was thoroughly
11 ransacked. They went through every bit of it. I
12 asked him. I broke my rule. I really wasn't sure
13 how he was going to answer. I said, well, you went
14 through every inch of this. This is worse than the
15 usual? He was like, yep, the worst I've ever seen.
16 Pay particular attention to that office that was
17 tossed. Somebody looking for something. Somebody
18 who was scared. I don't know. We don't have an
19 answer to that. Will we? Not now. They didn't give
20 us one. I tried to get one and I didn't. And I've
21 actually I guess been accused of some terrible thing
22 for doing that.

23 Mr. Catoe gets up here. And I don't have any
24 personal problems with Investigator Catoe. I don't
25 even really know him. I'm not from Kershaw County.

1 But I'll tell you what. That's the man who's in
2 charge of finding out who commits crimes. And when
3 he thinks he's found that out, he has the power to
4 take somebody into custody. Then one day they end up
5 here in this trial which is a very serious business.

6 So I would not stand up here and apologize for
7 asking him those tough questions. I don't feel
8 guilty about it. I don't feel like I did anything
9 wrong. I don't feel like I hurt his feelings. I
10 have to do that. Like you swore in front of that
11 judge that you would do your duty, five years or so
12 ago I swore in front of some judges that I would do
13 my duty. And I take that very seriously.

14 I have rarely ever given an oath. So when I
15 have, I've thought about it. So if that means I have
16 got to make him uncomfortable, if that means I've got
17 to seem like I'm being mean to him, I can't apologize
18 for it. I have to do it. And I think that -- forget
19 about my client deserving me doing it; you all
20 deserve me to do it.

21 We've got you all stuck in a Kershaw County
22 courthouse for five days in a row not for no reason,
23 ladies and gentlemen. You deserve it. You deserve
24 for me to ask those tough questions.

25 He got a list. Catoe tells us we knew we've got

1 the right guy because we got a list. We got a list
2 of stuff he look, like the house phone. You all look
3 through these pictures back there in the jury room.
4 I don't remember which picture it is. 68, 69. Take
5 a look at it. See what's in there. See if there's
6 anything in that picture that they claim was stolen
7 from the house. Does that matter? I don't know.
8 Maybe not to them. Maybe it doesn't matter to you.
9 But it matters to me. Because you've got my client
10 here in a pretty serious situation. And I'm pretty
11 sure I want the facts to support what the State is
12 asking you to do to him. And if they don't, I'm
13 asking you not to convict him. And they don't.

14 They don't support the findings that they want
15 you to make, that big dramatic finding that says the
16 end. They don't support the end that he wants you to
17 give.

18 You heard him on the stand under those tough
19 questions. He didn't do any further investigation.
20 And he said, I quote, he got what he needed. Well,
21 you know what? The investigation that resulted in my
22 client sitting at this table took less than half the
23 time we've been sitting here. Humor me. Look into
24 some of these questions. Find out about these
25 people.

1 You know, the solicitor got up here, and I guess
2 he was daring me to say rush to judgment. Because
3 I'll agree. When you predict what somebody is going
4 to say, then they say it, it seems kind of stupid.
5 He's already told you. It steals my thunder. Well,
6 ladies and gentlemen, I don't know what happened
7 there. I don't even know you can call what they did
8 a judgment. It was just a little decision. They
9 didn't have all the facts. They still don't have all
10 the facts. I don't know why.

11 On Wednesday at the scene of the crime nobody
12 talks to the three people who found the body at all.
13 Nobody questioned them about anything. Again, I'm a
14 jerk for asking him about that, making a big deal out
15 of it.

16 Well, Ladies and Gentlemen, there is a person
17 who has been killed. Let's see what happened. Let's
18 try to find out. The next day something happened
19 that puts my client in that chair. Somebody says
20 something to give them the name Robert Cannon. And
21 wherever that investigative file is that he has,
22 there is nothing in there. Where did the name come
23 from? I don't know.

24 It's funny that Mr. Meadors says I'm accusing
25 him of making it up because I don't know if that's

1 what I'm doing. I don't know what he did to get this
2 out of my client, because it's not there. And you
3 saw him. You got the opportunity to look at the
4 demeanor when he was answering those questions. He
5 didn't want to answer those questions. Maybe I
6 wouldn't either. But he didn't want to answer them.
7 Because there were failings in this investigation he
8 didn't want to talk to about. Because if the
9 investigation was no good, then what do you guys
10 think about the result? Can we trust it? I don't
11 think we can.

12 And you all are going to have to make that
13 decision. But look at what happened to get these
14 people here. Look at the facts and come up with a
15 theory. There isn't one. We don't know who did
16 this.

17 Mr. Marthers came up here and testified, and he
18 didn't say anything. He didn't want to answer my
19 questions. And I don't know what to do on that.
20 Again, I can't apologize for doing my job if he
21 didn't want to talk. He didn't know anything. He
22 didn't hear anything. He didn't see anything at all.

23 And that brings us to the part that I think you
24 all would assume troubles me the most, and that's
25 that my client made a statement in this case. I will

1 be honest with you because that's what you deserve.
2 I said something at the beginning to you, that you're
3 a jury. You have a powerful responsibility, and you
4 deserve a certain level of respect from the attorneys
5 in this case. And I will tell that you statement
6 could be troubling.

7 But look at how it was taken. The judge is
8 going to charge you on the law, that if that
9 statement was involuntary, if you have any doubt that
10 that statement was involuntary, you can't consider
11 it. And he's going to tell you that if you think any
12 slight threat or promise of leniency was made, then
13 that's enough for to you say it wasn't voluntary.

14 Now, why does that matter? Ladies and
15 gentlemen, that is not a technicality. That is not
16 some loophole we've come up with. Because if it was,
17 I would have sat down a long time ago. Because if I
18 thought you all were just going to say that's a
19 loophole, you all wouldn't buy that. I don't want
20 you to. I'm not here for loopholes. I'm not here
21 for smoke screens. I'm here to see if we can find
22 the truth.

23 But a 17-year-old kid who has never been in
24 trouble with the police is told that he's just going
25 to be a witness to something at his house after over

1 an hour of questioning, and you're just going to be a
2 witness because you've got nothing to worry, why does
3 the law require no threats or promises of leniency be
4 made? Because it changes the way we think.

5 The solicitor would have you believe that no one
6 would confess to this crime unless they did it.
7 Really? Think about your experience in life. People
8 don't ever admit to something they did wrong for
9 unknown reasons when it's not true? In your head
10 you're like, wow, this is pretty serious. You're
11 right. It is pretty serious. But my client is
12 pretty young, pretty inexperienced. He doesn't know
13 what's going to happen. He has no idea.

14 And of course these officers came up and denied
15 that they did that because they know the law just as
16 well as I do sometimes. They know they're not
17 supposed to do that. But when you're under pressure
18 to get a conviction, to get an arrest and make
19 something happen, maybe you cut a corner.

20 Look at the circumstances. I was going to
21 explain to you all about circumstances and whatnot,
22 but I don't need to any more. I want you all to
23 think about what Mr. Meadors told you and listen.
24 And that's the best explanation. I couldn't have
25 done it as well if I tried.

1 So look at the circumstances surrounding what
2 happened and how the statement was given and tell me
3 if you really think it was a voluntary thing that
4 happened. My client is in his house denying he's
5 involved. I didn't do it. I didn't do it. I didn't
6 do it. I didn't do it. He says he wants to get away
7 from his parents so we can get him some help. He'll
8 tell us more. He doesn't want to get away from his
9 parents. He wants to get away from the cops. He's a
10 17-year-old kid sitting in his house, never been in
11 trouble with the law going, oh-oh, these guys are in
12 here sweating me over some murder I heard about. He
13 didn't know what to do. Because he's young. He's
14 17. At the time you don't know what you're doing.

15 Think about the decisions you made when you're
16 17. I try not to think about the ones I made. But
17 you don't make the right decisions. You don't have
18 the maturity level to. He goes outside with these
19 offerers when they mention -- I didn't bring this up.
20 They put that in their notes. And really because
21 they put something in their notes, that then makes
22 them, they couldn't possibly have done anything
23 wrong? Under that theory, they'll never do anything
24 wrong. They're just cops. They can come up with an
25 argument either way, that they wouldn't have done it

1 if they wouldn't have put it in their nets. Maybe
2 they left it out. Maybe they put it in. Who knows?

3 Here is the simple fact. In their notes it says
4 he wants to get some help. My client is talking to
5 Investigator Catoe, and then Catoe's boss shows up
6 and has a conversation with my client. And my client
7 says, aha, I'll tell you all what you want to know.

8 What you've heard is that there is no way he
9 could have given that statement without having been
10 there. I'm not going to insult your intelligence. Look
11 at the statement. Look at the evidence from the
12 scene. They knew what happened that night. They had
13 theory. They just didn't have a person to arrest.

14 After they make this arrest with these facts,
15 what supports what happened? I mean, I appreciate
16 what Mr. Meadors says about we can't congratulate
17 them for getting away with something. But really?
18 No forensic evidence makes them more likely to have
19 done this? That's silly. That's insulting. We know
20 about forensic evidence in this day and age.
21 Everybody does. You cannot tell me that the lack of
22 it makes something more likely.

23 Again, under that theory, they're always going
24 to win; much like he said under some theories you'd
25 never convict everybody. Well, under some theories

1 you would convict everybody. And we surely don't
2 want that to happen.

3 Everything that went into that statement was at
4 the scene. I'm not saying that Investigator Catoe
5 made this up out of the blue. No. But he knew what
6 questions to ask. And all he needed was a yes, a
7 maybe or a kind of, and he could get this statement.
8 He had plenty of time, from 6:47 to 9:51, three
9 hours. It's a five-page statement, not a 30-page
10 statement. Five pages. That seems long when it's
11 this big. But look at it on the piece of notebook
12 paper. It's not going to take ten minutes to write
13 it down.

14 So they talked to you about this exciting
15 evidence that we have from the Wal-Mart store, this
16 receipt. Could not get any better than that, right?
17 Well, we've got to switch here again. I didn't hear
18 how we're going to pull this one off. So let's think
19 about it for a minute.

20 They claim my client already had a ski mask.
21 And they claim the other two clients had ski masks.
22 But only one was bought. But if we blow the receipt
23 up real big in front of you and wave it around and
24 get excited about it, maybe you won't think about
25 that. That's why I'm here, to remind you of these

1 holes.

2 Because that receipt by itself they say solely
3 makes this statement absolutely credible. It pins my
4 client to the ground. He cannot escape that Wal-Mart
5 receipt. Except for the fact that Wal-Mart receipt
6 doesn't accurately reflect their theory of the case.
7 Whether it was hoping I wouldn't point it out, was
8 hoping you wouldn't think about it, they didn't give
9 you how that fits into their theory. We didn't get a
10 chance to twist that fact.

11 And I will tell that you the reason we probably
12 didn't get a chance to do that is exactly what
13 Mr. Meadors described that evidence as. It's pure
14 documentary evidence. It can't be twisted. But if
15 we make it exciting enough, if we make it case
16 breaking enough, you'll lose sight of the sight of
17 the search for the truth. And they think you'll find
18 it. You'll think it was given to you when it wasn't.
19 I am the one giving you smoke screens? That doesn't
20 appear to be the case.

21 The pathologist, Mr. Meadors tells you, that's
22 who they used to have the victim talk. And that may
23 be the case. But one thing, you saw me when it was
24 my turn to ask him a question. I'm not going to ask
25 Dr. Sexton questions. He's been a doctor a lot

1 longer than I have been a lawyer. He's one brilliant
2 man. But there is one answer that he will never,
3 ever be able to give. Who did it? He doesn't know.

4 I suppose if there was forensic evidence you
5 might be able to tell. But as Mr. Meadors so ably
6 pointed out to you earlier, there is not. I'm going
7 to leave that to you to tell you what it means, to
8 think about. Does it make it more likely it
9 happened? I don't think so.

10 We finished up this trial with Mr. Jenkins. And
11 that, ladies and gentlemen, for lack of better words
12 is almost ridiculous. He clearly admits he knows
13 this family. He knows this victim. He comes up with
14 a perfect story because without that story the person
15 he is talking about, there's nothing against him at
16 all. There is not a shred of evidence.

17 But you heard what Mr. Meadors was saying, when
18 he said it out in dramatic language, the kind of
19 stuff that makes you forget the reality of what
20 happened right here in this chair. And let's think
21 about the difference between what happens. We didn't
22 have to ask him the tough questions. He couldn't
23 answer them, period. I don't know you. Mr. Meadors,
24 I don't know anybody from your office. I don't know
25 you guys. I don't need any help. You've got some

1 pending charges. You're going to need some help
2 eventually, right? No dispute of that. He was shown
3 records from the Clerk of Court and said, I don't
4 know. And nobody fixed it. There's no dispute about
5 that. He got up in that chair and he lied to you
6 all. He lied to you. He lied to you about his
7 motivation to come in here and be a witness. Is that
8 important to you? Does it bother you? Because he's
9 a pretty important witness because they've got
10 nothing here. They've got nothing.

11 But we take this guy; we wrap it all up all
12 neat. Not today, ladies and gentlemen. He's a liar.
13 Not only did he lie about his prior record, thinking
14 of course, well, maybe he didn't lie about what he
15 was telling us. Really? Because this officer who is
16 sitting right up here with the Clerk of Court got up
17 there and testified and told us the truth. He's not
18 on anybody's side. He just came in here and told you
19 what he knew. And you have heard from one of my
20 buddies over here at the table asking him questions.

21 He asked you who was in the cell next to him? I
22 don't remember that. Is that a common question for
23 somebody to ask him? Maybe he gets asked all the
24 time. No. That's a pretty uncommon question.

25 So, Mr. Jenkins, the liar, he lied to you again.

1 But this time the lie relates directly to this case.
2 We haven't been able to twist that one either. And,
3 luckily, we have officers like this. We have
4 somebody with nothing to gain or lose but just wants
5 to tell the truth. It would have been very helpful
6 for him to get up there and say, yeah, I think I
7 remember that. And you know what? I wouldn't have
8 spent an hour cross examining him, because how do you
9 cross that? But he got up there and said, I don't
10 remember that. I don't remember that guy. Why did
11 they even put that guy up? You can't believe
12 testimony like that.

13 He said he didn't tell anybody about this ever.
14 Investigators from the Solicitor's Office got him.
15 He told somebody. He came forward somehow. But he
16 didn't want to tell us the circumstances under which
17 this information got to the solicitor. Through the
18 grapevine? Hey. Through the grapevine we find out
19 there's a critical witness in a major criminal trial.
20 Does that make any sense?

21 I say that's another piece of evidence that you
22 can't quite twist to make fit other than to say that
23 that was just -- that's a guy who just wants to score
24 something. He wants you all to settle it for him
25 because he can't settle it. He could barely get up

1 there and competently testify because he's a liar.
2 Don't accept that. We're not in here for vengeance.

3 And Mr. Meadors told you that one of us, and I
4 think it's usually Mr. Whitlark he was talking about,
5 who got up here and did just what I had to do and
6 help me seek the truth, help find out what happened,
7 do what the State won't do.

8 He talks about that 31-minute phone call to the
9 Wal-Mart earlier in the day. That doesn't matter.
10 We got so excited about our evidence when yesterday
11 we find out that we got a link to Wal-Mart. We got a
12 link to it. We know what happened. But wait a
13 minute. One of the witnesses who either lied or
14 doesn't remember what happened, he also has a link to
15 Wal-Mart. Forget about it. It's a smoke screen.
16 It's not a smoke screen. It's another fact that
17 can't be twisted. It's another fact that can't be
18 twisted.

19 The argument here, Mr. Meadors has done a very
20 good job. I have nothing but respect for him. I
21 love working against him. He is twisting these
22 facts, and it's not malicious. He is not doing
23 something evil. He's trying to win his case. I am
24 not trying to win this case. I am trying to find out
25 what happened. And when there is no answer to what

1 happened, we cannot convict. It happens sometimes.

2 It is one of the great disappointments of the
3 jury trial that we come in here, and by the last
4 commercial break we don't have the Matlock moment
5 that leads us to the actual verdict; everything
6 wrapped up neatly, somebody confesses, we figure out
7 who did it. In a real trial, that doesn't always
8 happen. And I apologize. Because I know that would
9 probably make this week a lot easier if you all had
10 that exciting moment. But sometimes we can't find
11 out what happened.

12 But our concern here is did my client, Robert
13 Cannon, commit these crimes? If you don't know, then
14 you can't convict him. If you are not sure, then you
15 can't convict him. It's about the levels of
16 certainty. It's about what you do with the
17 information you have that would make you certain.

18 When I was a kid my brother and I used to put
19 puzzles together. My brother is a little more
20 patient. He still is. He's not that little anymore.
21 But he would jam all the pieces together and be done.
22 So I guess he'd go outside and play basketball or
23 something. And I would try to show him you've got a
24 picture here, there's no doubt about it. But hold it
25 up, man. There's a bunch of holes in it. The pieces

1 didn't fit right. He tried to jam them together.

2 Each one of those holes is a reasonable doubt.

3 Now, ladies and gentlemen, because I didn't come
4 up here and give you some alternate story about what
5 that reasonable doubt means, I don't have to do that.
6 The law says you can't even consider that. I just
7 have to show you that the State hasn't proven its
8 case. They haven't given you an answer. They have
9 not found the truth for you. And because they
10 haven't, you cannot convict these people.

11 My client, Robert Cannon, is not guilty. Not
12 guilty. They haven't proved it. That statement
13 wasn't voluntary. The facts don't fit this theory.
14 And they've twisted it for five days in a row now.
15 I'm going to ask you all to take those facts, untwist
16 them, and return a verdict of not guilty. Thank you.

17 **THE COURT:** Mr. Riley.

18 **MR. RILEY:** May it please the Court. Ladies and
19 gentlemen, here we are approaching the end of a very
20 long week, a week that's been an ordeal for everyone
21 concerned. It's been an ordeal for the Zoch family.
22 It's been an ordeal for the defendants' families, the
23 McDonalds, the Cannons, the Whiteheads. It's been an
24 ordeal for all of us that have been working in this
25 courtroom.

1 Pretty soon the work we've been doing will come
2 to an end, and you'll be charged by the judge and
3 asked to retire to your jury room. And your real
4 work will just be beginning. You'll have to decide
5 the fate of these defendants.

6 The difficulty in a case brought by the
7 government that involves three defendants such as
8 this one is that inevitably there is a lot of
9 repetition. And I'll be repeating a lot of things
10 that Mr. Kendrick said. And Mr. Whitlark who will
11 follow me will probably be repeating things also.
12 That's just inevitable. And I ask you to bear with
13 me.

14 I wanted to first of all mention to you the
15 issues of credibility and believability of witnesses
16 that have been mentioned multiple times. There was
17 one point where I was convinced that what I wanted to
18 do with my life was to be an historian. And one of
19 the first things that aspiring historians are taught
20 is the unreliability of human memory, that the more
21 distant in time a person's corrections of any event,
22 the more unreliable they are.

23 We are now 18 months or more away from the
24 events that we're in court and have been in court all
25 week about. Documents, on the other hand,

1 contemporaneous documents, do not lie. They don't
2 have fallible memories. It's all there in black and
3 white. It's written on a piece of paper. It's a
4 record, an indelible record, not like the human
5 memory which is very flexible, very fallible.

6 What does that document that was completed as to
7 Christopher Whitehead's on-the-job injury show? In
8 three different places, in three different places on
9 that document it shows the date of December 12th,
10 2006. Pat Heathcoe remembered a different day,
11 remembered Christopher telling her about his
12 on-the-job injury on the 13th or the 14th. The
13 document doesn't support that. That's an official
14 Workers' Compensation Commission document, a
15 government record. You will have that with you back
16 in your deliberation room. You'll be able to look at
17 it. You'll be able to see that in three different
18 places it says 12-12-06.

19 The other issue, the phone calls that Zack
20 Waltemath testified to that he alleges were made on
21 the night of the 12th to him by Christopher
22 Whitehead, he says he was called two times between
23 7 p.m. and 8 p.m. You will have with you back there
24 the actual phone logs. They do not show that. That
25 is a contemporaneous document, probably computer

1 generated. That isn't Zack Waltemath's memory
2 speaking. That is a document speaking. It shows
3 what it shows. It isn't subject to change. I ask
4 you and urge you to remember these things when you're
5 deliberating on Mr. Whitehead's case.

6 The folks who work at, or did work at Sonic, the
7 State presented Allen Brown and Chris Rust. Of
8 course a lot of these folks do still work or did work
9 there at the Sonic. Allen Brown and Pat Heathcoe,
10 both of them said Chris Whitehead was a good
11 employee. Allen Brown testified as to the fact that
12 he knew for a fact that Chris Whitehead also was
13 working a second job working part time as an
14 assistant manager at a movie theater. He was an
15 eager, industrious young man, working two jobs.

16 Pat Heathcoe testified that she was about to
17 give him keys to the store so that he could open up
18 the store in the morning. She believed in his
19 abilities, his responsibility as an individual that
20 much. She said that he was reliable, dependable, a
21 good employee doing a good job, had gotten several
22 pay raises and was about to be given keys to the
23 store so that he could open up each morning.

24 Cecile Trapp, she also was a Sonic employee at
25 the time. She testified that Christopher left

1 abruptly on Friday, the 15th, without any
2 explanation. But yet there was an explanation. He
3 had told her, and she had stated to the police, that
4 he had gotten word that a cousin of his had been
5 arrested, a cousin of whom he was very close. He was
6 upset. He was disturbed. He was worried. He was
7 concerned. He knew that his cousin needed money in
8 order to post bond. That was a distresses piece of
9 news for Christopher Whitehead. She also admitted
10 that she had walked off the job without explanation,
11 without a word, abruptly left work on two occasions.
12 It wasn't something that Christopher Whitehead had
13 done and no one else had done. She admitted she had
14 done it on two occasions.

15 Okay. Melissa Davy, the young lady has been
16 through a great ordeal. And I don't have anything
17 but sympathy for what she's been through. She in
18 many particulars during her testimony; here again, we
19 get back to reliability of the human memory, she was
20 inconsistent, stumbled over certain things, had
21 certain things wrong or recollected them incorrectly.
22 Josh Kendrick pointed out one particular error in her
23 recollection of the events of that week.

24 Then we get into the police witnesses. I
25 couldn't help but notice, I wanted to draw your

1 attention to the fact that when the government
2 attorneys were directly examining the police
3 officers, it was, yes, sir; no, sir; here, sir; up,
4 sir; down, sir; yes, sir, to the left, to the right.
5 When they were being questioned by the defense
6 attorneys it was like trying to move a mule that
7 didn't want to move. Let's think about that answer,
8 was generally the way they would begin to respond to
9 each of our questions. It was an unfortunate thing.
10 I just couldn't help but remark on it.

11 When they approached Christopher Whitehead on
12 the 15th, Officer Catoe and officer Marthers, you
13 recall, I think it was Officer Marthers said -- I
14 asked him if he -- if Christopher Whitehead could
15 have left the scene at any point. He said he could
16 have walked away. I said why? He said he was
17 driving under suspension. Where were they at that
18 time? Where were those Kershaw County deputies at
19 that time? They were in Richland County. They were
20 across the county line.

21 Mr. Kendrick has already talked extensively
22 about Darla Harris' testimony, the lady from
23 Wal-Mart. Again, I can't but agree with Mr.
24 Kendrick's statement. What we have here is a theory
25 that has been created to fit the facts.

1 The pathologist, Dr. Sexton, I asked him if it
2 was possible that the time of death was the afternoon
3 of December 13th. I think I misspoke when I asked
4 the question. I think I said December 14th, but that
5 was the day he performed formed the autopsy. So he
6 knew what I meant. It was just an error on my part.
7 He said probably not but he wasn't really sure. The
8 time of death, the afternoon of December 13th,
9 probably not, but he wasn't really sure. That was
10 inconsistent with his findings.

11 Michael Jenkins, Mr. Kendrick discussed his
12 testimony. I want to discuss it as much as anyone.
13 Mr. Jenkins took the witness stand. And as Mr.
14 Kendrick has already pointed out, he lied to you. He
15 lied to the judge. He lied to this court. He lied
16 to our entire judicial system.

17 He said, oh, no, I don't have any pending
18 charges. He sure does. He's got two pending forgery
19 charges here in Kershaw County. He denied that. He
20 didn't remember very clearly the layout, the physical
21 description of A Pod where he allegedly overheard
22 this remark. And that's another key point.

23 Here is an individual, Christopher Whitehead,
24 who when the police approached him about this case
25 for the first time on December 15th, he said, I don't

1 know a thing about it. Or if you prefer Mr. Catoe's
2 version, I don't know a damned thing about it. And
3 throughout the entirety of the 18 months since then
4 he has stuck by that. He has not discussed the case.
5 He has not given statements. He has not confessed to
6 anything. He has not said, I remember this, I
7 remember that. He has been consistent. Is it likely
8 that an individual like that would start shouting out
9 things in the Kershaw County Detention Center? Is
10 that reasonable? Is that sensible? Does that stand
11 up to the smell test?

12 Also I couldn't help but notice before Mr.
13 Jenkins testified he was sitting directly with the
14 Zoch family. I feel nothing but remorse and
15 compassion for the Zochs. Their loss has been
16 terrible. They have suffered enormously. So has
17 Christopher Whitehead.

18 In a few minutes -- now I forgot where I laid my
19 glasses. In a few minutes I'll be through and then
20 Mr. Whitlark will address you. The judge will charge
21 you on the law and you'll begin your deliberations.

22 It been a privilege for me to represent
23 Christopher Whitehead throughout this case. I've
24 enjoyed getting to know him. He's a fine young man.
25 I want to thank also Mr. Meadors and his entire

1 staff. It's been a privilege and an honor working
2 with them and with my co-counsel, Mr. Whitlark and
3 Mr. Kendrick.

4 Tomorrow, May the 10th, is Christopher
5 Whitehead's 20th birthday. Today he is 19. Tomorrow
6 he will turn 20. When you go back to your jury room,
7 you hold in your 12 pairs of hands that young man's
8 entire future. I beg you, I beg you not to make a
9 mistake. Don't make a mistake. Thank you very much.

10 **THE COURT:** Mr. Whitlark, you may proceed.

11 **MR. WHITLARK:** May it please the Court? Good
12 evening.

13 **THE COURT:** Just hold on. She needs to step
14 outside, please. Ask Ms. Tolkey to take her out.
15 All right, Mr. Whitlark.

16 **MR. WHITLARK:** May it please the Court, Your
17 Honor. Good evening. It's no longer afternoon. I
18 know it's been rough. But you are the protectors of
19 our community, the fortresses that guard the rights
20 of every American citizen. I can't begin to tell you
21 the responsibility you've got here today. The lives
22 of these three young men are in your hands.

23 And when you go back there and you are deciding
24 this case, you are setting an example for our
25 children, for our community and for the history of

1 this country. Every time we have the exercise of a
2 jury trial, we reaffirm what we believe in and what
3 we are. And the judge is going to charge you about
4 what the rights of people are. You've heard
5 presumption of innocence. And I'm going to try to go
6 fast because I know we've been sitting here a while.
7 But we don't want to go too fast, not too fast.

8 The presumption of innocence, it's not just a
9 phrase. You took an oath, and the judge is going to
10 charge the law. You must presume they're innocent.
11 You must do it. That's your duty. And when you are
12 considering any fact in this case, any single
13 situation that happened, any set of circumstances
14 that was talked about or any piece of physical
15 evidence, any factor, you have to; if you come down,
16 there's two choices you can make. You've got to take
17 the one that presumes the innocence of these men.

18 Now, we have also what's called the burden of
19 proof. And I know that you've heard it and you're
20 going to hear it once again from the judge. I'm
21 briefly going to tell you, the burden of proof is
22 beyond a reasonable doubt, a very heavy burden.

23 Why is it so heavy? Because you've heard this
24 saying: "It is better to let a 100 guilty men go
25 free than to put one innocent man in prison. And

1 that's the truth. That's a true saying. And that's
2 why the burden of proof is beyond a reasonable doubt.
3 You've seen it. I'm not going to delay you here too
4 much. But preponderance of the evidence in a car
5 wreck case or a medical mal case, 51/49. 51/49, you
6 win the case. But in a criminal case it's got to be
7 100 to nothing before you can convict these men. It
8 starts off weighted heavily in favor of an American
9 citizen. I've told you this. He's presumed
10 innocent. Mr. McDonald is my client, but these young
11 men are in this together. Presumed innocent. And in
12 order to convict, they've got to take that scale all
13 the way down to the other end. If you are even
14 doubting, having a reasonable doubt about one fact
15 that's required to convict him, you have got to find
16 him not guilty under your oath.

17 This case again is an exercise of our American
18 way of life. And we're going to be talking about
19 some stuff here. Is this the way we want things
20 done? Because if you'll look at the way things were
21 done in this case, every single person that was being
22 searched out by the police was arrested before, oh,
23 let's get some information from them. Arrest them
24 and then starting asking them questions. Good way to
25 get answers. They arrested every single person they

1 could get their hands on in this case.

2 And it's a great way to solve cases. But is it
3 what we want in our communities? Is this the way we
4 want things done? If somebody is guilty and they're
5 doing wrong, go get them. But they were looking for
6 anything they could get. On Chris Whitehead, they
7 looked for something on him, and they got him. And
8 you all know that now.

9 They were looking for anything. They heard his
10 name. They heard his name. Ms. Davy told them about
11 him. They've already admitted that. They were
12 looking for him. They got up to Sonic and they heard
13 the name of Mr. Derrick McDonald and Mr. Robert
14 Cannon. And they said let's go get them. And they
15 did the same thing to them.

16 You remember when you're going through the
17 circumstances of what this means. You grab a
18 17-year-old kid at his house and you are going, hi,
19 we're the police. We want to talk to you about a
20 murder. And you're 17 years old. And they're
21 telling you, you want to be a witness in a case or do
22 you want to be a defendant in a death penalty case?

23 Now, folks, I'm not going to talk bad. I'm not
24 talking bad about these policemen here. They're good
25 men. But they made a mistake in this case, and they

1 just can't say they're wrong. Their pride is more
2 important than the lives of these young men. I've
3 been on this case for two months. Two months. And I
4 know one thing for certain. They're innocent. They
5 didn't do this. And I'm a very curious lawyer. I'm
6 a professional lawyer for 27 years. And I'm very
7 curious about this case. And I guarantee you there's
8 some people very interested in this case that may or
9 may not be here, but they're very interested in it; I
10 will tell you that much.

11 When these young men were grabbed by these
12 police, they told the truth. You think back on what
13 their testimony was, what the cops said they said.
14 They told the truth. But because they didn't like
15 this, do you have it perfect? You'd better have it
16 perfect. The guy said, look, I spent the night at
17 this guy's house because he doesn't realize what's
18 going on here.

19 These guys are hot and heavy to get somebody.
20 Why? Why were they pushing so hard on this thing?
21 You've got a civilian working for the police and he's
22 dead. And that's not good for business. That's bad.
23 Do you even know how many -- we don't know how many
24 people work undercover, civilians that turn state's
25 evidence or try to turn people in. Well, there's a

1 lot of them. And when somebody gets killed like
2 this, that is not good. Things don't work. They
3 can't get -- people are scared. They can't get
4 anything done. That's why, one of the reasons that
5 they were moving on this thing so hot and heavy.

6 And you can't forget the name Adrian Duran. I
7 know I said it a thousand times. They arrested him
8 first, ladies and gentlemen. Couldn't remember that.
9 They couldn't remember they arrested this man who is
10 a chief suspect in this case? It doesn't make sense.
11 It kind of worries me.

12 They don't know what the other investigators are
13 doing. There is a bunch of policemen that are
14 involved in this case. Their names came up. They
15 didn't testify. They have pertinent information.
16 I'll guarantee you that. I'll guarantee you that.
17 But it didn't help prosecute these three young men.
18 It's not going to help them.

19 Again, ladies and gentlemen, why is the burden
20 of proof beyond a reasonable doubt so great? Because
21 of what's gone in a case just like this one. Just
22 like this one.

23 Now, the prosecutor is a fine prosecutor for
24 this state. And I know him. He's a good man. But
25 he's lost sight of something. The State always wins.

1 On the oldest courthouse in the United States, it
2 says this: "When justice is done to even the least
3 of our citizens, the state wins."

4 And if not guilty, which it should be in this
5 case, the State wins. And this is not a contest
6 between me and him and the lawyers and everything.
7 This is somebody's life. And it's not a game. This
8 is not a game.

9 Phone calls, the phone calls, things that just
10 didn't happen. The phone calls just didn't happen.
11 What are we going to say about that? I mean, I am
12 looking at this thing, going, okay, let's see what
13 happened. All right. Well, the guy -- there's no
14 proof they called him. But they said they did. Both
15 of them said it. I'll tell you something. That
16 makes me extremely curious right there. Everybody is
17 talking about what's going on over here. Well, I'm
18 looking over here. They both said that.

19 And when Mr. Zack Waltemath was asked the
20 question, I said, did you know he was hurting her, he
21 says, yeah, but I just found that out recently. I
22 said, well, I'm not accusing you of anything. He
23 says, I don't have motive to do this. I said all
24 right. But I just recently found that out. That's
25 curious.

1 You know, what's curious also is on these
2 records on, I think it's Exhibit No. 31 you've heard
3 of that lists the phone calls. He calls her number
4 twice that night, the night they're together watching
5 movies and stuff together. They don't ever leave
6 each other's sight. But he calls him twice. And
7 then our guy, there's no proof, called them.

8 But what we do have them is calling Wal-Mart
9 that day. At 5:00 in the afternoon there's three
10 calls to Wal-Mart from this new boyfriend. Three. I
11 mean, nobody has ever mentioned a word about that. I
12 guess I must be bothering people or something.
13 Because when I found out yesterday, I find this out,
14 because I never looked at it, and I was remiss. I
15 told my client I'm sorry, I've missed something here.
16 That's their number. They brought that thing up here
17 and I wanted a little information. That is
18 Wal-Mart's number. I was going, my eyes bugged out
19 of my head. I said, there's a 31-minute phone call
20 to Wal-Mart of the 12th of December from the new
21 boyfriend's house. I mean, is anybody going to ask
22 about what that means? They must know somebody up
23 there I guess.

24 He said there's no way around this glove thing.
25 Well, I see one. You think about this. I mean,

1 what? Is their best man working at Wal-Mart or
2 something? Is he ordering something? I mean, what?
3 I don't know. You look at that record when you get
4 in there. Look at those first three. It's three of
5 them in a row. And they go up to about 5:30 or 6.
6 How come we don't know this? Why was this never
7 brought up? I must be a pain in people's rear ends
8 here; but, I mean, I see it clearly.

9 Now, the ankle injury, we're going to prove that
10 he came in there and he had done something to this
11 guy and he had a scratch. Well, it happened on the
12 12th. And that's a fact. It happened the day
13 before. I mean, the lady didn't want to say it. She
14 wanted her glasses or whatever. But do you know what
15 the truth was? It did happen the day before.

16 And everybody had hysteria. And that's another
17 thing to think about in this case. Those Kershaw
18 County officers, and I'm telling you, they're good
19 men. I know them. They made a mistake and they
20 can't admit it. When they came up to that Sonic,
21 they had certain information. And when they got
22 there, they heard a couple of things that really like
23 threw gas on the fire. I'll tell you that.

24 They said, the guy was up here with a ski mask.
25 I mean, they're going like this. They're already

1 looking for people and then they hear there's a black
2 man up there with a ski mask. Well, that's great.
3 They're going like this. Where is he at? Of course
4 it turns out it's Robert Cannon. And they heard his
5 name. They said we've heard his name before. They
6 heard it from Ms. Davy. They said, that's that guy,
7 the tennis shoe guy. Well, we don't see any tennis
8 shoes in this case. But he's the tennis shoe guy.

9 My client, they don't even know his name. My
10 client is up there going like this. It's one of
11 those stories you tell your kids. Don't get in the
12 wrong car one night. Be careful who you ride around
13 with or something. Believe me, I've told my kids
14 about this story. Believe me.

15 Now, the facts that you can't get around is what
16 the solicitor is talking about here. And I'm going,
17 all right. I said I agree with you. Let's talk
18 about those facts. Now, this was a brutal killing,
19 ladies and gentlemen. This wasn't something, where
20 is your pot at or something? This was a killing.
21 You heard what the coroner said. Six blows,
22 different blows could have killed him, any one of
23 them, dead. This isn't something like, hey, what's
24 up, Buddy? They went to kill him. This was not some
25 kind of thing where, let's go find some pot or

1 something. He was killed, period.

2 And anybody that's calling that something else,
3 about some buddies being over to rough him up or
4 something, they're not looking at it the right way.
5 And that's why I say these are good men but they've
6 overlooked some things here, big things, things that
7 don't add up.

8 And you start pulling it apart and then you
9 start looking. You go like this. What about this
10 guy he was drug dealing with? See, there's no
11 question that 36 hours before they arrested him, 36
12 hours, then they start finding out stuff. Well, you
13 know, he was out on a bond for burglary and grand
14 larceny of a drug dealer that he knew two months
15 before this. Two months.

16 Of course that's the guy they picked up first.
17 Because you know what? These are pretty good cops.
18 They're going like this, we're going to solve it, you
19 know, right now. And then what happened in this case
20 was this. I told you a little bit ago, don't forget
21 this. We've got a lot of people that are turning
22 people in for drugs and stuff. There is a lot of it
23 going on. And when one of them turns up dead like
24 this, with this kind of publicity on it, that's not
25 good for business. And they were moving. They said

1 we've got to solve this right now. And I know that
2 these men are trying to do the right thing. But when
3 they say a rush to judgment, that's what it was.

4 They went and they saw that ski mask and they
5 said, well, get Whitehead because we heard he said
6 something about a snitch, too. If that word "snitch"
7 came up, they were on it. And it did come from him.
8 And they heard it. Of course he's small potatoes
9 compared to what we're talking about here.

10 But these guys were with him, and he wasn't
11 going to talk. He wasn't going to say anything.
12 They knew it. And they said, well, who was he with?
13 And that's when these young men right here, Mr.
14 Cannon and Mr. McDonald, had their future almost
15 decided.

16 But that's why you're sitting here today,
17 because we are not going to let this happen and they
18 go quietly into prison. You can't let it happen. If
19 you look at the facts of this case it looks like
20 something. It's like cotton candy when you go to the
21 fair. You know, it looks substantial, but you bite
22 into it and there's nothing there but hot air. And
23 that's what this case is.

24 They say don't mention that there's no evidence
25 of fingerprints, no evidence of footprints, no

1 evidence of anything, no DNA. No articles were ever
2 found from a robbery. But do you know what? There's
3 a picture, and I'm not going to dig through here. I
4 know you all are tired. I am, too, because we've
5 been here all week. There's a picture in here of Mr.
6 Whitehead's car. And it shows his trunk open with a
7 bag with some shoes in it.

8 I mean, it just looks like what would have
9 happened in this case. But it's not evidence of
10 anything. It just looks like evidence. Why did they
11 want to put that picture in here? You've got to
12 think about. Oh, leave it open. The trunk is open,
13 shoes and a plastic bag. I said, well, what is it?
14 Is it something to do with the case? No. Nothing.
15 But it looks like something you heard, that they had
16 a plastic bag and some shoes and then they show his
17 car.

18 If his car was what this fellow, the all
19 American guy or whatever you call him, where is it?
20 It should be sitting right here in front of us. They
21 haven't even gone and looked at it.

22 And I know one thing right now. We've been
23 sitting here a long time. Right now we've been
24 sitting here a long time. But I don't want to go too
25 fast, but I just want to try to point out something

1 to you. Why not go to the burned barrel? Just go
2 over there and end this thing? They never even went
3 there. They have no physical evidence that the guy,
4 according to the statement, burned it in the barrel.
5 Take ten minutes, you go get a warrant, you walk up.
6 As a matter of fact, you might not even need one. Do
7 you mind if I go in here and just get some of this
8 plastic and these DVD's and clothes you burned? But
9 you know what? They never even went over there.

10 And why is that important? Because they're not
11 inclined to go over there. They know there's nothing
12 in it. You know why? It's not true. That's why.
13 If it was true, believe me, they'd have been there.

14 These officers have got a rough job, and I don't
15 envy them. They had lot of pressure on them in this
16 case. But once they committed to these three, let's
17 get these three here, they just forgot everybody
18 else.

19 Every single article taken from this scene of
20 this murder shows up in their statements, handwritten
21 by Investigator Catoe. You know what the problem on
22 those statements is? And I'm going to tell you. I'm
23 hoping to make this a short trip for you all back
24 there. I hope so. If you think these guys are
25 guilty, just don't even -- I'm wasting my breath.

1 Just find them guilty. Just send them to prison.

2 Why would they both put in about phone calls
3 that never happened? Why would they be in the
4 statements? Melissa Davy told Catoe that, and so did
5 the young man. That. Both of them. They both knew
6 it. Of course it turns out it's not true.

7 You see, when you're doing that, sometimes you
8 make mistakes. Forget about, you know, maybe
9 somebody is going to get these records some day.
10 There's one mistake that wasn't made though. Robert
11 Cannon has got a ski mask on. Think about that when
12 you're back there.

13 You know, normally even in a criminal case, I
14 like to prove my client didn't do it. I don't want
15 to leave it to the chance of, well, they didn't quite
16 prove it. I like to prove they didn't do it. And I
17 don't have to do that. The judge is going to tell
18 you about that. In this case I'm close. I am close.
19 But I can't do it.

20 As of the date of this thing, I'm almost there
21 but I'm not quite. But when you go back there and
22 you're looking through this stuff, you keep in mind
23 what I said. If you want to, I can go to every
24 single piece of evidence and tell you, and I can
25 point to a flaw in it. And I give you my word on

1 that.

2 You know, some of the witnesses in here, they
3 think they're doing the right thing. These guys did
4 this. Come on, let's give them a little extra to our
5 testimony. You know what I mean? Just a little bit
6 extra. And they all went up and saw the solicitor.
7 And he's trying to do his job, too. Except I told
8 him, I said, not everybody is guilty. My grandma is
9 not guilty is what I told him. I know he thinks
10 everybody else is. But, no. He's a great solicitor.
11 He is. We need him.

12 But I told you he's losing sight of that saying
13 on the courthouse, y'all. The State wins when
14 justice is done. And to convict these men, he is
15 innocent, he is innocent, and he is innocent; and if
16 you convict them, it won't be justice. It will be a
17 horrible injustice and a terrible thing.

18 Now, the phone calls, the Workers' Comp claim,
19 you can just scratch that. We've got documentary
20 proof it's not true.

21 Now, the statements, the statements were trying
22 to be used to do the right thing. But these young
23 men, both of them, they were being pressured, like
24 pressured. And they said this. This is what
25 happened. I want some help. I mean, what's going

1 on? The guy says, look, we're just wanting you to be
2 a witness. Either you be a witness. We want
3 Whitehead. He's going after a snitch. And they told
4 them that. And these boys both asked do we need
5 lawyers? Their parents were there. Do you think
6 Robert Cannon's parents would have left town the next
7 day if he was going to be charged with murder? We're
8 going on a trip. All right, son. Everything is
9 fine. I mean, you've got to think about stuff like
10 that.

11 And Cannon, they leave him there. Do you think
12 that possibly they made a promise to him that
13 violated his Constitutional rights? In this country
14 and in this jury box the end does justify the means.
15 You can't just do anything you want to to get a
16 conviction. That's what they do in East Germany and
17 in Communist countries. I mean, I just want to go
18 round everybody up and say, you ain't getting out of
19 jail until you do what we say. That's not what we
20 believe in. I know I'm going to fight against it.

21 So many things are just so coincidental in this
22 case. And, see, I worked on it two months. You've
23 had it for a week. And it's unfair to you really.
24 You could sift through this thing for a very long
25 time and see all these things.

1 But the most important anything to remember is
2 that to be convicted, it's got to be proof beyond a
3 reasonable doubt. I've pointed out some doubts to
4 you here. And if you -- and I can sit here and I
5 can't communicate with you about who wants to go to
6 the bathroom, who wants to do this. But if you want
7 me to, I can go through every one of these. The bat,
8 they keep calling it a baseball bat. It's a softball
9 bat. Why did they not send it to SLED until a month
10 ago or two months ago? I mean, other things.

11 **MR. MEADORS:** Your Honor, I object. That's a
12 mischaracterization of evidence.

13 **MR. WHITLARK:** Well, it was sent twice. I
14 understand that. But a lot of evidence was starting
15 to be gathered here. Because you know what? They
16 don't want you to do the same thing that everybody
17 did in the beginning on this case. We got 'em. Just
18 sign this thing. Just ship them off to prison. It
19 won't be right. It will be wrong if you do it.

20 Now, since we know that the phone calls did not
21 happen, the ones from Whitehead, and we now know also
22 that there's calls out from that number to Ms. Davy
23 who was there allegedly, you want a reasonable doubt?
24 Called the Wal-Mart three times, too. I guess
25 everybody missed that.

1 Now, like I said, folks, I'm not saying anything
2 bad about these policemen. They're good fellows.
3 They're good men and they're hard workers. But they
4 couldn't get around the fact that there's no
5 fingerprints, no DNA. No eye witnesses put them on
6 scene. No footprints are there, and no stolen items
7 were ever found, ever.

8 And suddenly two men, two young men who are real
9 nervous and who are wanting to know if they can get
10 lawyers and stuff are suddenly just signing right up
11 and volunteer to sign a statement. Now, I do want
12 the police to be successful in their jobs. I don't
13 like crime or criminals either. But I don't want any
14 American facing this if I can help it.

15 Now, since we know that those things are not
16 true, those two big things I keep talking about, the
17 phone calls and the Workers' Comp claim are not
18 correct, and we do know now -- and it's a terrible
19 thing and my heart does go out to Ms. Zoch, I mean,
20 the grandma. I hate this for her. But her son was
21 turning people in for selling drugs. And that's a
22 dangerous job, a very dangerous job.

23 And it won't be the first time, and I'm sorry to
24 say, it won't be the last but there's casualties in
25 that. And, you know, you're messing around with drug

1 dealers of various types out there, and I've met some
2 of them, they are dangerous people. They can be. I
3 mean, these aren't country club people you're dealing
4 with. And if they think like you've got my driver's
5 license, my social security card and they find out
6 about it, you know, that's not going to be good for
7 you. And they did. Remember that? Remember what
8 Trapp said. They had the driver's license and social
9 security card of a black man named Chanin Smith.

10 And the grandma says, well, you know, he was
11 working on turning in a drug dealer. I'm going,
12 well, where is this guy at? I mean, what was he
13 doing that night? And they get all over me because
14 they say, well, he's just trying to bring up third
15 party responsibility. I said no kidding. Look what
16 was happening.

17 I mean, if you had blinders on, you'd still have
18 to feel bad about not saying, well, let's go talk to
19 this fellow we arrested first again. A lot of
20 evidence wasn't gathered in this case until
21 afterwards. A real investigation wasn't done.
22 That's why I said that.

23 And when you get down to it, the policemen in
24 this case, they are good men. They were trying to do
25 the right thing. But they made a very big mistake.

1 And I know you get sick of hearing that from me. But
2 these young men get one chance at this, ladies and
3 gentlemen. One. Their lives are on the line here,
4 and they're innocent. What do you do? How do you
5 tell somebody that you're innocent and that you
6 didn't do it and they won't believe you, nobody
7 believes you? It's a hopeless feeling. And until
8 two months ago they didn't think they had a chance.

9 And I talked to Mr. McDonald, my client, and I
10 said, I believe you. And I think everybody here, if
11 you look at this evidence under the oath and the duty
12 that the judge is going to tell you about and you
13 know about, you sift through this, because everywhere
14 you look you'll see what I'm talking about; there's
15 always some kind of little twist to it. If you're
16 going that could have been this, it was.

17 And remember presumption of innocence. If it
18 can cut the way in favor of an acquittal, a not
19 guilty, you've got to do it under your oath. You
20 can't be 80 percent sure, it looks like. No way, not
21 under this system. You've got to be convinced beyond
22 a reasonable doubt.

23 I know you're getting sick of hearing that from
24 me. But if you were going to buy a house or get
25 married to somebody, I mean, obviously you'd want to

1 know a little bit about it, right? And if you go and
2 look at your house and you see cracks in the
3 foundation and all this other stuff, I mean, you're
4 going to go, well, wait a minute. You start seeing
5 cracks. You're going I don't really want this house
6 any more.

7 The same thing when you're looking at this case.
8 If you see one problem, well, we can just get over
9 it, no. When you see a problem, that doesn't explain
10 this and it doesn't explain this and you start
11 looking at it and the whole things starts folding in.
12 I mean, it looks, like I said, cotton candy looks
13 substantial. Bite into it, there's nothing there.

14 Now, this has been a very grueling week and I
15 know that you are ready to sit down and decide this
16 case. And it's a tough one. Like I said, I could
17 sit here and make you fall asleep with something
18 going through all this evidence. But the things I've
19 already pointed out to you, use that as your guide.
20 Use what I've told you as your guide here. Because
21 these things are, as I said -- and you can look at
22 the evidence, and when you're looking at everything
23 else in this case, keep in mind the presumption of
24 innocence. Because no matter what you say and no
25 matter what you do, if you make a mistake here,

1 that's it for these young men. That's it. You don't
2 go to the Supreme Court and fix it or something like
3 that. Nope. When you decide the facts of a case
4 like this, that's it forever. Forever.

5 So you've seen me and the judge writing. You've
6 seen Mr. Meadors, the solicitor, and all of us
7 writing with pencils. Our pencils have erasers on
8 them. The one you're going to write your verdict
9 with does not. And so it's for all time when you do
10 this.

11 Again, ladies and gentlemen, I've got ten pages
12 of notes on the evidence in this case and testimony.
13 And the way you all are looking at me right now, I
14 think I'd better leave it closed.

15 But I can tell you right now there was a man in
16 Germany right before World War II. He was a
17 philosopher and his name was Martin Niemoller. And
18 he wrote that first they came for the Jews. He said,
19 I didn't say anything. I didn't speak up because I
20 wasn't a Jew. So then they came for the trade
21 unionists and I didn't speak up. I wasn't a trade
22 unionist. He said then they came for the Catholics.
23 He said, I didn't say anything because I was a
24 Protestant. And of course then they came for me, and
25 by that time there wasn't anyone left to stand up.

1 No matter what you've thought during this case,
2 ladies and gentlemen, about the way somebody looks,
3 the way their face is, if they've smiled or not or
4 what they've done, keep in mind that you're deciding
5 the rules we live by and the standards we keep in
6 this country.

7 And we have our children to teach and the spirit
8 of our forefathers here, because when you allow an
9 investigation to grab citizens on anything you want
10 to and hold them in jail or take a teen-ager away
11 from his mom by telling a story to the mom and dad
12 and you get him to sign something and you promise
13 them something you don't mean and you do it for the
14 right reason but you're really wrong, I don't want a
15 country like that. I'm going to fight against that.
16 And I know you know what I'm talking about.

17 And if you have even a slight belief in your
18 mind that these boys were coerced or perceived
19 coercion or were promised and they signed these
20 statements, you've got to throw them out. You've got
21 to do it under your duty. It's beyond a reasonable
22 doubt.

23 And if you -- and the judge is going to charge
24 you the law on this. But it says if any coercion,
25 promise or inducement is used, then you've got to

1 think about the mental capacity of the people, too.
2 If it's used and you can see where it affected, it
3 causes an outcome, you've got to disregard it. The
4 statement is out. Because, ladies and gentlemen,
5 when it comes down to it, a murder case and a
6 burglary case was made against these men on one
7 statement of Robert Cannon. They don't have another
8 thing. They say that you can't explain these
9 Wal-Mart things and you can't explain this glove and
10 all that. Yes, you can. And it's a reasonable
11 doubt. And there's a lot of it in this case.

12 And for the lives of these young men and for
13 what we believe in in this country as Americans, you
14 do justice to these fellows. Thank you, Your Honor.

15 **THE COURT:** All right, ladies and gentlemen of
16 the jury. Would you like to take a short break? I
17 see several heads. Let's do that, and then I'll
18 conclude with the law as it applies to this case.
19 Just again, don't discuss the case among yourselves
20 while you're in the jury room. And I will tell you,
21 if any of you need to make phone calls, the clerk
22 will help you out. All right. Where is the clerk?
23 Let somebody make phone calls if they need to make
24 phone calls. All right.

25 (Jury out at 6:30 p.m.)

1 **THE COURT:** All right. We'll stand at ease for
2 about ten minutes.

3 (Whereupon, a break is taken)

4 **THE COURT:** Is the State ready to proceed?

5 **MR. MEADORS:** The State's ready.

6 **THE COURT:** The defense ready to proceed?

7 **MR. WHITLARK:** Yes, sir.

8 **MR. KENDRICK:** Yes, sir.

9 **THE COURT:** Mr. Reuwer has left, is not here,
10 had to leave. Bring the jury.

11 (Jury in at 6:54 p.m.)

12 **THE COURT:** All right, ladies and gentlemen. We
13 now come to the final portion of the trial which
14 consists of my instructions to you on the laws of the
15 state of South Carolina as it applies to this case.
16 You've heard all of the testimony in the case. You
17 will take with you to the jury room all the evidence.
18 There will be no more evidence. And sometimes jurors
19 request more evidence, but there is no more. This is
20 it.

21 You've heard the arguments of counsel for both
22 the State and each of these defendants. And I'll now
23 explain the law as it applies to this case. Under
24 our Constitution and Code of Laws only the jury can
25 make findings of fact in this case. I am not

1 permitted to indicate to you how I might feel about
2 the facts. If I have said or done anything during
3 the course of this trial which would indicate to you
4 that I have an opinion concerning the facts, then you
5 should disregard that. The jury must independently
6 weigh the evidence presented in this trial and render
7 a verdict based solely on that evidence.

8 And the same Constitution and laws that make and
9 designate you the finders of fact, they designate me
10 at the instructor of the law. If you have some idea
11 as to what the law is or what the law ought to be
12 that does not agree with what I now tell you the law
13 is, you're obligated under the oath which you've
14 taken to abandon this preconception on your part and
15 to accept and apply the law exactly as I now state it
16 to you.

17 Now, I charge you, and I'm sure you're aware,
18 there are three defendants in this case. The case of
19 each defendant and the evidence and the law
20 concerning that defendant should be considered
21 separately and individually. Your verdict does not
22 have to be the same for all defendants. The fact
23 that you may find one defendant guilty or not guilty
24 should not control your verdict as to the other
25 defendants. Where more than one person is charged

1 with a crime, if the evidence warrants it, you may
2 convict one and acquit the others. Or you may acquit
3 all. Or you may convict all. It will depend on what
4 your view is of the testimony and the evidence. You
5 must take each defendant and consider the evidence as
6 to that defendant and my instructions to you on the
7 law. You will then write a separate verdict of
8 guilty or not guilty for each individual defendant.

9 The indictments in this case allege two
10 different offenses against each of the defendants.
11 So you will actually have six charges that you will
12 have to consider. The charges, as you know, are
13 burglary in the first degree and murder. Each
14 indictment contains a separate and distinct offense.
15 You must decide each indictment separately on the
16 evidence and the law applicable to it uninfluenced by
17 your decision as to any other indictment.

18 Each of the defendants may be convicted or
19 acquitted on any or all of the offenses charged. You
20 will be asked to write a separate verdict of guilty
21 or not guilty on each indictment.

22 Now, I remind you, the fact that each defendant
23 was arrested, charged and indicted in this case is
24 not evidence in this case, cannot be considered by
25 you as evidence of guilt in this case, nor does it

1 create any presumption or inference of guilt. These
2 documents are simply the formal written instruments
3 by which these cases are brought into Court and
4 contain the charges made against each defendant.
5 These documents are merely the formal documents by
6 which the case is brought into court.

7 Now, each of the defendants has pled not guilty
8 to each of these indictments, and those pleas put the
9 burden on the State to prove the defendants guilty.
10 A person charged with committing a criminal offense
11 in South Carolina is never required to prove himself
12 or herself innocent. I charge you this is an
13 important rule of law, that the defendant in a
14 criminal case no matter what the seriousness of the
15 charge may be will always presumed to be innocent of
16 the crime for which the indictment was issued unless
17 guilt has been proven by evidence satisfying you of
18 that guilt beyond a reasonable doubt.

19 Now, this presumption of innocence does not end
20 when you begin your deliberations, but it accompanies
21 each defendant throughout the trial until you reach a
22 verdict of guilt based on evidence satisfying you of
23 that guilt beyond a reasonable doubt.

24 The presumption of innocence is not a mere legal
25 phrase. It's not a legal theory. It is a

1 substantial right to which every defendant is
2 entitled unless you, the jury, are satisfied from the
3 evidence of the defendant's guilt beyond a reasonable
4 doubt.

5 Well, what is a reasonable doubt at law? A
6 reasonable doubt is the kind of doubt that would
7 cause a reasonable person to hesitate to act. Let me
8 repeat that. A reasonable doubt is the kind of doubt
9 that would cause a reasonable person to hesitate to
10 act.

11 The State has the burden of proving each
12 defendant guilty beyond a reasonable doubt. Some of
13 you may have served as jurors in civil cases where
14 you were told it's only necessary to prove that a
15 fact is more likely true than not true, such as by
16 the greater weight or preponderance of the evidence.
17 In criminal cases, however, the State's proof must be
18 more powerful than that. It must be beyond a
19 reasonable doubt.

20 Proof beyond a reasonable doubt is proof that
21 leaves you firmly convinced of the defendant's guilt.
22 There are very few things in this world that we know
23 with absolute certainty, and in criminal cases the
24 law does not require proof that overcomes every
25 possible doubt. If based on your consideration of

1 the evidence you are firmly convinced that the
2 defendant is guilty of the crime charged, you must
3 find the defendant guilty. If on the other hand you
4 think there is a real possibility that the defendant
5 is not guilty, you must give that defendant the
6 benefit of the doubt and find him not guilty.

7 Now, there are two types of evidence which are
8 generally presented during a trial, direct evidence
9 and what we call circumstantial evidence. Direct
10 evidence is the testimony of a person who claims to
11 have actual knowledge of a fact, such as an eye
12 witness. It is evidence which immediately
13 establishes the main fact to be proved.

14 Now, circumstantial evidence on the other hand
15 is proof of a chain of facts and circumstances
16 indicating the existence of the fact. It is evidence
17 which immediately establishes collateral facts from
18 which the main fact may be inferred. Circumstantial
19 evidence is based on inference and not on personal
20 knowledge or observation, but the law makes
21 absolutely no distinction between the weight or value
22 to be given to either direct or circumstantial
23 evidence, nor is a greater degree of certainty
24 required of circumstantial evidence than of direct
25 evidence.

1 You should weigh all of the evidence in the
2 case, and after weighing all of the evidence, if you
3 are not convinced of the guilt of each defendant
4 beyond a reasonable doubt, you must find each
5 defendant not guilty. Again, you are not to consider
6 the defendants individually. You are to consider the
7 defendants individually and not collectively.

8 Now, some of the evidence in this case may have
9 been admitted solely because of its relationship to
10 the case against one of the defendants. This
11 evidence cannot be considered in the case of any of
12 the other defendants.

13 Necessarily, in any case you must determine the
14 credibility of witnesses who have testified in this
15 case. Credibility simply means believability. It
16 becomes your duty as jurors to analyze and evaluate
17 the evidence and determine which evidence convinces
18 you of its truth.

19 In determining the believability of witnesses
20 who have testified in this case, you may believe one
21 witness over several witnesses or several witnesses
22 over one witness. You may believe a part of the
23 testimony of a witness and reject the remaining part
24 of the testimony of that same witness.

25 You may believe the testimony of a witness in

1 its entirety or reject the testimony of a witness in
2 its entirety. You may consider whether any witness
3 has exhibited to you any interest, bias, prejudice or
4 other motive in this case.

5 Now, a person who has a past criminal record,
6 that's been testified to in this case, is competent
7 to testify during a trial. A past record does not
8 affect the ability of that person to testify. A past
9 record may only be considered by you, if at all, in
10 determining the witness's believability. Remember
11 you are the sole judges of the facts in the case and
12 the believability of any and all of the witnesses.

13 Now, normally a person or a witness cannot give
14 what we call opinion testimony. Normally when a
15 person testifies, and you've witnessed this during
16 the week, they may only testify as to what they
17 either saw, heard or sensed by smell or something of
18 that nature.

19 However, there is an exception when someone is
20 qualified because of education and experience, they
21 are permitted to give their opinion in certain areas
22 if the Court qualifies them in that way. And we did
23 have such a witness and what we've determined to be
24 an expert witness in this case in the case of the
25 doctor who testified who gave opinions after

1 analyzing what he witnessed.

2 Now, in this case, and I want you to listen
3 carefully to this because this deals with a central
4 issue in this case; and that is the issue of the
5 statements given by the defendants. A statement
6 alleged to have been given made by one or more of the
7 defendants has been admitted into evidence in this
8 case. While the Court, that is me, has determined
9 that the statement is admissible, I instruct you that
10 you make the ultimate decision of whether or not the
11 defendant made the statement.

12 If the defendant did make the statement, you
13 must determine whether the statement was made by
14 defendant voluntarily and of his own free will. This
15 means that the statement was not caused by pressure,
16 force, fear, threats, coercion or intimidation or by
17 hope or a promise of leniency or reward of any kind.

18 In determining whether the statement was
19 voluntary, you should consider both the
20 characteristics of the defendant and the details of
21 the questioning. Some of the factors that you may
22 consider are the age of the defendant or the
23 defendants in this case. The defendant's education
24 or lack of education, the defendant's mental ability
25 or capacity, the place and length of the detention,

1 the nature of the questioning, the advice or lack
2 thereof to the defendant of his Constitutional
3 rights, including, but not limited to, the right to
4 remain silent, that any statement could be used
5 against him in a court of law, the right to have a
6 lawyer present, that if he could not afford a lawyer,
7 a lawyer would be appointed to represent him without
8 cost, and that he could stop making a statement at
9 any time.

10 You must consider also a third party; that is, a
11 party not the person whose statement is being taken
12 cannot invoke these rights. The individual has to
13 invoke these rights himself or herself. You must
14 carefully consider all of the surrounding
15 circumstances before you give any weight to an
16 alleged statement.

17 Now, the State has the burden of proving beyond
18 a reasonable doubt that the alleged statement was
19 voluntary. If you determine it was, you may give the
20 statement any further consideration that you deem
21 proper. You must decide what weight, if any, should
22 be given to the alleged statement. If you determine
23 the alleged statement was not the free and voluntary
24 statement of the defendant, you should not consider
25 the statement at all.

1 Now, in order to establish what we call criminal
2 liability, intent is required or criminal intent.
3 For example, the mental state required to be proven
4 by the State for some particular crime might be some
5 purpose, some obvious intent, knowledge of certain
6 facts or recklessness. Criminal intent must be
7 proven by the State beyond a reasonable doubt.

8 Criminal intent is always a matter that must be
9 determined by the jury from the circumstances
10 surrounding the situation. There is no way to prove
11 intent to a mathematical certainty. There's no way
12 medical science can dissect a person's brain and
13 determine what the person had in mind. So the law
14 says that criminal intent may be inferred from the
15 circumstances shown to have existed at the time and
16 place. This is how you make the determination of
17 whether or not the element requiring intent was
18 present.

19 It is not necessary to establish intent by
20 direct and positive evidence, but intent may be
21 established by inference in the same way as any other
22 fact, by taking into consideration the acts of the
23 parties and all of the facts and circumstances of the
24 case.

25 Criminal intent is a mental state, a conscious

1 wrongdoing. It's up to you to determine what each of
2 the defendants intended to do based on the
3 circumstances shown to have existed. Criminal intent
4 can arise from action or a failure to act. It may
5 arise from negligence, recklessness or an
6 indifference to duty or to consequences that are
7 considered by the law to be the equivalent of
8 criminal intent.

9 Now, one of the theories that the state has
10 relied on is known as the hand of one is the hand of
11 all. And let me explain that to you. If a crime is
12 committed by two or more people who are acting
13 together and committing a crime, the act of one is
14 the act of all. A person who joins with another to
15 commit an unlawful act is criminally responsible for
16 everything done by the other person which happens as
17 a probable or natural consequence of the acts done in
18 carrying out the common plan and purpose.

19 For example, two people can be guilty of killing
20 another person when only one of the two had a gun,
21 there was only one bullet and only one of the two
22 fired the shot that caused the death. If two or more
23 people are acting together, assisting each other in
24 committing the offense, the act of one is the act of
25 all. Or as it has sometimes been said, the hand of

1 one is the hand of all.

2 Now, prior knowledge that a crime is going to be
3 committed without more is not sufficient to make a
4 person guilty of that crime. Mere knowledge that
5 another person is going to commit a crime, even if
6 the defendant is present when the crime is committed,
7 is not sufficient to convict a person, a defendant as
8 a principal.

9 Guilt as a principal is shown by actual or
10 constructive presence at the scene as a result of
11 prior arrangement. Therefore, a finding of a prior
12 arranged plan or common scheme is necessary for a
13 finding of guilt as a principal.

14 The State must prove beyond a reasonable doubt
15 by competent evidence the theory of the hand of one
16 is the hand of all. The principal in a crime is one
17 who either actually commits the crime or who is
18 present aiding, abetting or assisting in committing
19 the crime. When a person does an act in the presence
20 of and with the assistance of another, the act is
21 done by both.

22 Where two or more people acting with a common
23 plan or intent are present at the commission of a
24 crime, it does not matter who actually commits the
25 crime. All are guilty. The hand of one is the hand

1 of all.

2 But being present at the commission of a crime
3 means to be sufficiently near to aid and abet and
4 assist in the commission of that crime. However,
5 mere presence at the scene, as I said a moment ago,
6 is not sufficient to convict one as a principal on
7 the theory of aiding and abetting.

8 Intent is also a necessary element, for there
9 must have been a common design or intent to commit
10 the crime, and the crime must have been committed
11 pursuant thereto with the person aiding and abetting
12 by some overt act.

13 Intent means intending the result which actually
14 occurred, not accidentally or involuntarily. Intent
15 may be shown by acts and conduct of the defendants
16 and other circumstances from which you may naturally
17 and reasonably infer intent. The State must prove
18 these elements beyond a reasonable doubt.

19 As I said, the defendants are charged with
20 burglary and murder. First degree burglary. The
21 definition of first degree burglary under our
22 statutes is as follows. The State must prove beyond
23 a reasonable doubt that each defendant entered a
24 dwelling without consent. A dwelling is any building
25 or portion of a building in which a person ordinarily

1 sleeps. A building constructed as a dwelling that
2 has never been occupied cannot be considered a
3 dwelling for purposes of a burglary, but a building
4 is a dwelling even if the residents are temporarily
5 absent from the building.

6 In order to prove that each defendant entered
7 the dwelling, the State does not have to show that
8 the defendant's entire body entered the dwelling.
9 The smallest entry would be sufficient. It may be
10 any part of a body, such as a hand or foot or even an
11 instrument.

12 In addition, the State does not have to prove
13 that force was used to gain entry. If a person
14 enters a building by using deception, artifice or
15 trick or misrepresentation to get consent to enter,
16 this is entry without consent.

17 Next the State must prove beyond a reasonable
18 doubt that each defendant intended to commit a crime,
19 either a felony or a misdemeanor at the time of the
20 entry. The mere entry into a building without
21 consent is not burglary. If the intent to commit a
22 crime is formed after the entry, it is not a
23 burglary.

24 On the other hand, if the defendants entered to
25 commit a crime at the time of the entry, it is a

1 burglary even if the intent was abandoned after the
2 entry. It does not matter that the intended crime
3 was not completed. Intent may be shown by acts and
4 conducts of the defendants and any other
5 circumstances from which you may naturally and
6 reasonably infer intent.

7 And finally the State must prove one of the
8 following. When entering, while in the dwelling or
9 when fleeing the defendant or an accomplice was armed
10 with a deadly weapon or explosive. A deadly weapon
11 is any article, instrument or substance which is
12 likely to cause death or great bodily harm. And
13 whether an instrument has been used as a deadly
14 weapon depends on the facts and circumstances of each
15 case. Some examples might be a pistol or a shotgun
16 or a knife or in this case as alleged a baseball bat
17 or a softball bat, whatever.

18 Or when entering, while in the dwelling or when
19 fleeing the defendant or an accomplice caused
20 physical -- in other words, the first one was when
21 entering, while in the dwelling or fleeing the
22 defendant or an accomplice was armed with a deadly
23 weapon; or when entering, while in the dwelling or
24 when fleeing the defendant or an accomplice caused
25 physical injury to anyone not participating in the

1 crime; or when entering, while in the dwelling or
2 when fleeing the defendant or an accomplice used or
3 threatened to use a dangerous object; or when
4 entering, while in the dwelling or when fleeing the
5 defendant or an accomplice displayed what appeared to
6 be a knife, pistol, revolver or shotgun or other
7 firearm; or when the defendant entered or remained in
8 the dwelling in the nighttime.

9 Nighttime, simply stated, is the period between
10 sunset and sunrise during which there is not enough
11 daylight to recognize a person's face except by
12 artificial light or moonlight. That's the definition
13 of burglary in the first degree.

14 The definition of murder each of the defendants
15 is charged with murder. The State must prove beyond
16 a reasonable doubt that each defendant killed another
17 person with malice aforethought. Malice is hatred,
18 ill will or hostility towards another person. It is
19 the intentional doing of a wrongful act without just
20 cause or excuse and with intent to inflict an injury
21 or under circumstances that the law will infer an
22 evil intent.

23 Malice aforethought does not require that malice
24 exist for any particular time before the act is
25 committed, but malice must exist in the mind of the

1 defendant just before and at the time the act is
2 committed. Therefore, there must be a combination of
3 the previous evil intent and the act.

4 Malice aforethought may be express or inferred.
5 These terms, express and inferred, do not mean
6 different types of malice but merely the manner in
7 which malice may be shown to exist; that is, either
8 by direct evidence or by inference from the facts and
9 circumstances which are proved.

10 Express malice is shown when a person speaks
11 words which express hatred or ill will for another or
12 when the person prepared beforehand to do the act
13 which was later accomplished. For example, lying in
14 wait for a person or any other acts of preparation
15 going to show that the deed was within each
16 defendant's mind would be express malice.

17 On the other hand, malice may be inferred from
18 conduct showing a total disregard for human life.
19 Inferred malice may also arise when the deed is done
20 with a deadly weapon. A deadly weapon is any
21 article, instrument or substance which is likely to
22 cause death or great bodily harm. Whether an
23 instrument has been used as a deadly weapon depends
24 on the facts and circumstances of each case.

25 Now, ladies and gentlemen, and I want to stress

1 this portion of my instructions to you. I instruct
2 you because it's an important rule of our law. I
3 instruct you and emphasize the fact that a defendant
4 does not testify is not a factor to be considered by
5 you in any way in your deliberation and in your
6 consideration of the question of the guilt or
7 innocence of that defendant. It must not be
8 considered by you in any manner whatsoever.

9 A defendant has the Constitutional right to
10 remain silent, and the assertion of this right must
11 not be considered by you in your deliberations. I
12 repeat, under your oath you are to draw no conclusion
13 whatsoever from the fact that a defendant in this
14 case did not testify. The fact that a defendant did
15 not testify should not even be discussed in the jury
16 room. The burden of proof as I have stated to you is
17 on the State. A defendant is not required to prove
18 his innocence. The burden of proof remains on the
19 State to prove guilt beyond a reasonable doubt.

20 Now, ladies and gentlemen, I am required to
21 declare the law as I have just done with these
22 instructions to help and guide you to a just and
23 lawful verdict. Whether some of these instructions
24 will apply will depend on what you find to be the
25 facts. The fact that I have instructed on various

1 subjects in this case must not be taken as indicating
2 an opinion of this Court as to what you should find
3 to be the facts or which party is entitled to your
4 verdict.

5 Your verdict must represent the considered
6 judgment of each juror. In other words, in order to
7 return a verdict, it is necessary that each juror
8 agree. Your verdict must be unanimous. All 12 of
9 you must agree on the verdict. Your verdict cannot
10 be based on sympathy, passion, prejudice, emotion or
11 any other consideration that's not in evidence in
12 this case.

13 Remember at all times that you are not partisans
14 favoring one party over the other. You are judges,
15 judges of the facts. Your sole interest is to seek
16 the truth from the evidence that's been presented to
17 you in this case.

18 I'm going to ask you, ladies and gentlemen, in
19 just a moment to retire to the jury room. But before
20 I do, Madam Forelady, the indictments will go to the
21 jury room with you. On the back or what we call the
22 face of each indictment in the bottom left-hand
23 corner is a block for your verdict. When you've
24 completed your work on each indictment, if you will
25 fill that in with either not guilty or guilty, sign

1 your name and date it, that will complete your work
2 as to that indictment. Once you have completed all
3 six indictments, if you'll knock on the jury room
4 door and let us know, and we will receive your
5 verdict.

6 Now, the clerk tells me she has ordered
7 something of a meal for you. It may be a few minutes
8 before we can collect up all of this evidence and
9 bring it to you. So just relax for a few minutes.
10 Your meal is probably not going to be here for
11 another 15 or 20 minutes probably. Okay.

12 So, if you will, just -- and don't begin -- what
13 I'm basically saying is don't begin your
14 deliberations until you receive the verdicts and the
15 received. Once you receive the verdict forms -- I
16 mean, the indictment forms and the evidence, you may
17 begin your deliberations. Thank you very much.

18 (Jury out at 7:21 p.m.)

19 **THE COURT:** All right. Any exceptions to the
20 charge?

21 **MR. MEADORS:** Yes, sir. I don't, I believe --
22 and I've checked with my co-counsel -- we heard the
23 Moak charge Your Honor said he was going to do. And
24 we had asked about it once before. And you said it
25 was separate but you were going to --

1 **THE COURT:** And I gave it. I read it right into
2 the record.

3 **MR. WHITLARK:** You did.

4 **MR. RILEY:** Yes, sir.

5 **MR. WHITLARK:** He did.

6 **THE COURT:** Right here. I read it right in the
7 middle of the -- I'll tell you where I read it. And
8 if you don't believe me, I'll have the court reporter
9 read it back.

10 **MR. MEADORS:** I'll be honest with you. I was
11 writing a letter, and they told me they thought it
12 was left out.

13 **THE COURT:** I'm not surprised. I said it at
14 approximately the point on page 12 where I have: "If
15 you cannot afford a lawyer, a lawyer will be
16 appointed to represent him without any cost." And I
17 said, at that point I said: "A third party cannot
18 invoke any individual's Miranda rights for
19 themselves." Now, if you want to check with the
20 court reporter --

21 **MS. MCDUFFIE:** No. I'm fine.

22 **THE COURT:** That's the first time in a week Ms.
23 McDuffie has made a mistake.

24 **MR. MEADORS:** That's why I didn't question her.
25 And I apologize.

1 **MR. WHITLARK:** It was exactly as was in the
2 charge.

3 **THE COURT:** Anything further from the State?
4 Anything further? And besides that, I would never
5 overlook anything Mr. Moak gave me.

6 **MR. WHITLARK:** Nothing from McDonald, Your
7 Honor.

8 **MR. KENDRICK:** Nothing, Your Honor. Thank you.

9 **MR. RILEY:** Nothing, Your Honor.

10 **THE COURT:** All right. Let's collect the
11 evidence and make sure it's in proper form to go to
12 the jury. We'll stand at stand at ease until the
13 jury arrives at a verdict.

14 (Whereupon, the jury begins deliberating at
15 7:30 p.m.)

16 (WHEREUPON, Court's Exhibit No. 3 is marked for
17 identification.)

18 **THE COURT:** Are the lawyers out there? I need
19 some lawyers. All right, counsel. The jury has
20 requested a transcript, a transcript of Detective
21 Catoe's testimony and cross examination. Now, the
22 only thing I can do is tell them they can come in and
23 we can listen to it. It's approximately four hours
24 and 20 minutes?

25 **COURT REPORTER:** That would be my guess, Your

1 Honor, at this point.

2 **THE COURT:** Or the court reporter suggested --

3 **MR. MEADORS:** Your Honor, I don't care, but the
4 defendants aren't here. I guess that doesn't matter.

5 **MR. KENDRICK:** I don't believe so, Your Honor,
6 at this point.

7 **MR. MEADORS:** I'm sorry.

8 **THE COURT:** Well, okay. The court reporter has
9 indicated that if they really want the testimony, the
10 transcript, she could have it ready by about 10:00 in
11 the morning. Is that right?

12 **COURT REPORTER:** Yes, sir.

13 **THE COURT:** Here?

14 **COURT REPORTER:** Here.

15 **THE COURT:** So I think the only thing to do is
16 bring the jury. Are you keyed up to start it?

17 **COURT REPORTER:** No. I'm not keyed up to start
18 the playback yet because I just found out about it.

19 **MR. WHITLARK:** Your Honor, I believe the court
20 report should get triple overtime for having to do
21 that.

22 **MR. MEADORS:** Judge, have you given -- I'm just
23 inquiring, have you given transcripts before?

24 **THE COURT:** No.

25 **MR. MEADORS:** I haven't either. I just

1 didn't --

2 **THE COURT:** Well, I mean, it's certainly
3 something that can be done if they insist on it.
4 Only when you do realtime and then you get what you
5 call a dirty copy. And that doesn't help you a whole
6 lot.

7 **COURT REPORTER:** I wouldn't want to give it to
8 the jury.

9 **THE COURT:** So, all right. Let me bring the
10 jury in and explain to them the process and see if
11 they'd like to key it up and start listening. Bring
12 the jury, please.

13 **MR. KENDRICK:** Your Honor, do we not need the
14 defendants in if we bring the jury back?

15 **THE COURT:** If you want them, I'll --

16 **MR. WHITLARK:** We'll waive. I'll waive their
17 presence.

18 **MR. KENDRICK:** That's fine.

19 **THE COURT:** I think it's going to be a
20 five-minute conference. I mean, if we get a
21 transcript, I think yes.

22 **MR. KENDRICK:** Yes, sir.

23 **THE COURT:** I'm just going to try to get a sense
24 of what they want to do.

25 (Jury in at 9:17 p.m.)

1 **THE COURT:** All right. Thank you, ladies and
2 gentlemen. I have a request from a juror. And it
3 says: "I request a transcript of Detective Catoe's
4 testimony and cross examination." Well, let me just
5 sort of explain to you what we can and what we can't
6 do, because we're not quite maybe as technologically
7 adept as we'd like to be.

8 We can play back the transcript. We can play
9 back the testimony. It lasts approximately four and
10 a half hours. He was on the stand approximately four
11 and a half hours. That is direct examination and
12 cross examination. Unless we knew exactly where in
13 that four and a half hours you wanted to hear
14 testimony, we'd have to just start from page 1.

15 The other option, and it would be an unusual
16 option, would be to adjourn for the night and ask the
17 Court reporter to type a transcript and bring it back
18 tomorrow. She said she could probably do it by 10:00
19 tomorrow. Now, I guess the -- I need for you all to
20 make a decision as to what you would prefer. I think
21 probably Detective Catoe's testimony was the most
22 lengthy testimony in the trial. Is that fair to say?

23 **COURT REPORTER:** (Nods head affirmatively).

24 **THE COURT:** Yeah. So that's where we are. We
25 can only do what we can do. I know it's tough to

1 remember all these things as we go along, but that's
2 the capability we have. As I explained to all of
3 you, I'm trying -- I want to try not to have to carry
4 this into next week, but we will if we have to.
5 We'll do what we have to do. So if you all would
6 retire and make a decision about how you want to
7 proceed on this issue.

8 **JUROR:** We're going to have one question I know
9 already. If we adjourn for tonight, does that mean
10 we go home?

11 **THE COURT:** Yeah.

12 **MADAM FORELADY:** Okay. We don't know.

13 **THE COURT:** Well, I was kind of hoping you
14 wouldn't ask that question because as long as you
15 think I'm going to hold you here --

16 **MADAM FORELADY:** Exactly. And I understand
17 that. It's very attractive.

18 **THE COURT:** But, yes. We can go home and then
19 resume again tomorrow morning. So consider that also
20 if you wish to do so.

21 **MADAM FORELADY:** All right.

22 **THE COURT:** All right. Just let us know what
23 you want to do. And if you'd do it in writing, just
24 in writing. If you'll just tell me.

25 **MADAM FORELADY:** Sure. Absolutely.

1 **THE COURT:** We'll stand at ease until we hear
2 from the jury.

3 (Whereupon, a break is taken)

4 **THE COURT:** The jury now wants the whole trial
5 transcript.

6 **MR. WHITLARK:** Just double the triple overtime
7 for the court reporter now.

8 **THE COURT:** Did you say Tuesday?

9 **COURT REPORTER:** Tuesday.

10 **THE COURT:** Where is Meadors? Oh, I'm sorry.
11 "We respectfully request transcripts of the testimony
12 of Danny Catoe, Phillip Crawford, Michael Jenkins."
13 Tuesday? Is that what you're saying?

14 **COURT REPORTER:** Mm-hmm (affirmative).

15 **THE COURT:** Anybody want to look at this? I've
16 said: "Unfortunately, the court reporter would have
17 to work all weekend. She underestimated the Catoe
18 testimony but could probably have it by noon on
19 Saturday. She doesn't want to work on Mother's Day.
20 She has plans. And I cannot be here on Monday.
21 Therefore, Tuesday would be the earliest time we
22 could reconvene with these transcripts. Thank you."

23 Hearing no opposition. Mark it.

24 (WHEREUPON, Court's Exhibit No. 4 is marked for
25 identification.)

1 (Break)

2 **THE COURT:** The answer is: "We do not feel we
3 can be fair and do justice to each defendant on each
4 charge without these transcripts. We will be happy
5 to return on Tuesday at 9 a.m."

6 **MR. WHITLARK:** That's fine. Is that all right
7 with you?

8 **COURT REPORTER:** That's fine.

9 **THE COURT:** That's what we'll do.

10 **MR. MEADORS:** Your Honor, will you instruct them
11 not -- I know that you will -- not to read Martin's
12 columns that are coming out? No offense, Martin.

13 **MR. WHITLARK:** We haven't even seen them yet,
14 John. You might like them.

15 **MARTIN:** I don't usually speak out in court, but
16 I would absolutely agree.

17 **THE COURT:** I will. And not discuss it with
18 anyone else over the weekend. It's very unusual.

19 **MR. MEADORS:** So you are talking about Saturday,
20 Sunday, Monday?

21 **THE COURT:** Tuesday. All right. Bring them in.

22 (Jury in)

23 **THE COURT:** All right, ladies and gentlemen. I
24 have your notes. And I've tried to explain about the
25 difficulty in getting transcripts immediately. So

1 this is fine. The Court has no problem with
2 reconvening on Tuesday. We'll have these transcripts
3 for you at that time.

4 Let me caution you about a couple of things.
5 Now, the press is reporting this locally, and there
6 probably will be some coverage I guess Monday. So
7 I'm going to ask you again not to -- I think there
8 probably was -- I haven't even seen the paper but
9 there may be some coverage today. And there
10 certainly probably will be some on Monday. So again
11 I'll ask not to read the local press.

12 And again, don't discuss the case with anyone
13 else over the weekend. We'll see you on Tuesday
14 morning at 9:00. Is that all right?

15 **MADAM FORELADY:** Appreciate it. Thank you, Your
16 Honor. Wonderful.

17 **THE COURT:** Everybody is agreeable?

18 **MADAM FORELADY:** Yes, sir.

19 **THE COURT:** Thank you very much. We'll see you
20 then.

21 (Jury out at 9:43 p.m.)

22 **THE COURT:** We'll stand adjourned until 9:00
23 Tuesday morning.

24 (Whereupon, the proceedings are concluded for
25 the day, to be reconvened Tuesday morning)

Tuesday, May 13, 2008

(WHEREUPON, Court's Exhibit No. 5 is marked for identification.)

THE COURT: Counsel, approach the bench.

(Whereupon, a bench conference is had)

THE COURT: I think we need the defendants.

(Pause)

THE COURT: All right, counsel. Is Mr. Meadors here?

MR. MOAK: I believe Ms. McDuffie is getting him, Your Honor.

THE COURT: Sir?

MR. MOAK: I believe Ms. McDuffie is getting him, Your Honor.

THE COURT: All right, counsel. The jury has indicated that they'd like to hear the Court's instructions again. And I am prepared to do that. Any objection?

MR. MEADORS: No, sir.

THE COURT: Any objection?

MR. WHITLARK: None from McDonald.

MR. REUWER: No, sir.

THE COURT: Bring the jury, please. Court's Exhibit No. 6.

1 (WHEREUPON, Court's Exhibit No. 6 is marked for
2 identification.)

3 (Jury in at 10:50 a.m.)

4 **THE COURT:** Good morning, ladies and gentlemen.
5 Thank you for being here and being in attendance and
6 being conscientious about this case.

7 I have a note from the jury that you'd like to
8 hear the instructions again, which I am prepared to
9 do at this time. And I will -- it may sound
10 repetitious, but I'm doing it exactly the way I did
11 it the first time.

12 Ladies and gentlemen of the jury, you've now
13 heard all of the testimony in the case. You will
14 take with you to the jury room all the evidence in
15 the case that's been introduced. You've heard the
16 arguments of counsel, both the State and each of the
17 defendants, and I will now explain to you the law as
18 it applies to this case.

19 Under our Constitution and Code of Laws only the
20 jury can make findings of fact in this case. I am
21 not permitted to indicate how I may feel about the
22 facts. If I have said anything or done anything in
23 this case which would indicate to you that I have an
24 opinion concerning the facts in this case, then you
25 should disregard that. This jury must independently

1 weigh the evidence presented in this trial and render
2 a verdict based solely on that evidence.

3 Now, the same Constitution and laws which
4 designate and make you the finders of fact also make
5 me the instructor of the law. If you have some idea
6 as to what the law is or what the law ought to be and
7 it does not agree with what I now tell you the law
8 is, you are obligated under the oath which you have
9 taken to abandon this preconception on your part and
10 accept and apply the law precisely as I now state it
11 to you.

12 I charge that you there are three defendants in
13 this case. The case of each defendant and the
14 evidence and the law concerning that defendant should
15 be considered separately and individually. Your
16 verdict does not have to be the same for all
17 defendants. The fact that you may find one defendant
18 guilty or not guilty should not control your verdict
19 as to any other defendant. Where more than one
20 person is charged with a crime, if the evidence
21 warrants it, you may convict one and acquit the other
22 or you may acquit all or you may convict all. It
23 will depend on your view of the testimony and
24 evidence. You must take each defendant and consider
25 the evidence as to that defendant and my instruction

1 to you on the law. You will then write a separate
2 verdict of guilty or not guilty for each individual
3 defendant.

4 Now, the indictments in this case allege two
5 different offenses against each of the defendants.
6 The charges are burglary in the first degree and
7 murder. Each indictment charges a separate and
8 distinct offense. You must decide each indictment
9 separately on the evidence and the law applicable to
10 it, uninfluenced by your decision as to any other
11 indictment.

12 Each of the defendants may be convicted or
13 acquitted on any or all of the offenses charged. You
14 will be asked to write a separate verdict of guilty
15 or not guilty for each indictment.

16 I remind you again, the fact that each defendant
17 was arrested, charged and indicted in this case is
18 not evidence in this case, cannot be considered by
19 you as evidence of guilt in this case, nor does it
20 create any presumption or inference of guilt. Those
21 documents or these documents are simply the formal
22 written instruments by which the charges are made
23 against each defendant. These documents are the
24 formal documents by which the court is brought into
25 court.

1 Each of the defendants has pled not guilty to
2 each of these indictments and those pleas put the
3 burden on the State to prove the defendant's guilt.
4 A person charged with committing a criminal offense
5 in South Carolina is never required to prove himself
6 or herself innocent.

7 I charge you that this is an important rule of
8 law, that the defendant in a criminal trial no matter
9 what the seriousness of the charge may be will always
10 be presumed to be innocent of the charge for which
11 the indictment was issued unless guilt has been
12 proven by evidence satisfying you of that guilt
13 beyond a reasonable doubt.

14 This presumption of innocence does not end when
15 you begin your deliberations but it accompanies each
16 defendant throughout the trial until you reach a
17 verdict of guilt based on evidence satisfying you of
18 that guilt beyond a reasonable doubt.

19 The presumption of innocence is not a mere legal
20 theory. It's not just a legal phrase. It is a
21 substantial right to which every defendant is
22 entitled unless you, the jury, are satisfied from the
23 evidence of the defendant's guilt beyond a reasonable
24 doubt.

25 Well, what is a reasonable doubt at law? A

1 reasonable doubt is the kind of doubt that would
2 cause a reasonable person to hesitate to act. Let me
3 repeat that. A reasonable doubt is the kind of doubt
4 that would cause a reasonable person to hesitate to
5 act.

6 The State has the burden of proving each
7 defendant guilty beyond a reasonable doubt. Some of
8 you may have served as jurors in civil cases where
9 you were told it's only necessary to prove that a
10 fact is more likely true than not true, such as by
11 the greater weight or preponderance of the evidence.
12 In criminal cases, however, the State's proof must be
13 more powerful than that. It must be beyond a
14 reasonable doubt.

15 Proof beyond a reasonable doubt is proof that
16 leaves you firmly convinced of the defendant's guilt.
17 Now, there are very few things in this world we know
18 with absolute certainty, and in criminal cases the
19 law does not require proof that overcomes every
20 possible doubt. If based on the circumstances and
21 the evidence you are firmly convinced that the
22 defendant is guilty of the crime charged, you must
23 find the defendant guilty. If on the other hand you
24 think there is a real possibility that the defendant
25 is not guilty, you must give the defendant the

1 benefit of the doubt and find him not guilty.

2 Now, there are two types of evidence which are
3 generally presented during a trial, direct evidence
4 and circumstantial evidence. Direct evidence is the
5 testimony of a person who claims to have actual
6 knowledge of a fact, such as an eye witness. It's
7 evidence which immediately establishes the main fact
8 to be proved.

9 Circumstantial evidence on the other hand is
10 proof of a series or chain of facts and circumstances
11 suggesting or indicating the existence of some fact.
12 It is evidence which immediately establishes
13 collateral facts from which the main fact may be
14 inferred. Circumstantial evidence is based on
15 inference, not on personal knowledge or observation,
16 but the law makes absolutely no distinction between
17 the weight or value to be given either direct or
18 circumstantial evidence, nor is a greater degree of
19 certainty required of circumstantial evidence than of
20 direct evidence.

21 You should weigh all of the evidence in the
22 case, and after weighing all the evidence, if you are
23 not convinced of the guilt of each of the defendants
24 beyond a reasonable doubt, you must find each of the
25 defendants not guilty. Again, you are to consider

1 the defendants individually and not collectively.

2 Now, some of the evidence in this case may have
3 been admitted solely because of its relationship to
4 the case against one of the defendants. This
5 evidence cannot be considered in the case against any
6 other defendant.

7 Now, necessarily you must determine the
8 credibility of the witnesses who have testified in
9 this case. Credibility simply means believability.
10 It becomes your duty as jurors to analyze and
11 evaluate the evidence and determine which evidence
12 convinces you of its truth.

13 In determining the believability of witnesses
14 who have testified in this case, you may believe one
15 witness over several witnesses or several witnesses
16 over one witness. You may believe a part of the
17 testimony of a witness and reject the remaining part
18 of the testimony of that same witness.

19 You may believe the testimony of a witness in
20 its entirety or reject the testimony of a witness in
21 its entirety. You may consider whether any witness
22 has exhibited to you any interest in the case, bias,
23 prejudice or other motive in this case.

24 Now, a person who has a past criminal record is
25 competent to testify during a trial. A past record

1 does not affect the ability of that witness to
2 testify. The past record may only be considered by
3 you, if at all, in determining the witness's
4 believability. Remember you are the sole judges of
5 the facts in the case and of the believability of all
6 of the witnesses.

7 Now, normally an individual or a person we refer
8 to as a lay person, you and I, cannot give what we
9 call opinion testimony. Normally when a person
10 testifies they must testify as to what they either
11 saw, heard or sensed by smell or something of that
12 nature.

13 However, there is an exception. When someone is
14 qualified because of education and experience, we let
15 them testify, designate them as experts, and we allow
16 them to give their opinions. They are permitted to
17 give their opinion in certain areas as the Court
18 qualifies them in that way. And as I said earlier
19 last week, Dr. Sexton was such a witness.

20 Now, there are several statements in this case.
21 There are statements in this case allegedly given by
22 the defendants. A statement alleged to have been
23 given by one or more of the defendants has been
24 admitted into evidence in this case. While the Court
25 has determined that the statements are admissible, I

1 instruct you that you make the ultimate decision of
2 whether or not the defendants made that statement.

3 If the defendant did make the statement, you
4 must then determine whether the statement was made by
5 the defendant voluntarily and of his own free will.
6 This means that the statement was not caused by
7 pressure, force, fear, threats, coercion or
8 intimidation or by hope or promise of leniency or
9 reward of any kind.

10 In determining whether the statement was
11 voluntary, you should consider both the
12 characteristics of the defendant and the details of
13 the questioning. Some of the factors you may
14 consider are the age of the defendant, the
15 defendant's lack of education or education or lack of
16 education, the defendant's mental ability or
17 capacity, the place and length of the detention, the
18 nature of the questioning, the advice or lack thereof
19 to the defendant of his Constitutional rights but not
20 limited to the right to remain silent, that any
21 statement could be used against him in a court of
22 law, the right to have a lawyer present, that if he
23 could not afford a lawyer a lawyer would be appointed
24 to represent him at any cost, that he could stop
25 making the statement at any time.

1 Now, a third party, that would be any third
2 party, could not invoke the rights, the Miranda
3 rights or these rights for an individual. An
4 individual has to revoke those rights him or herself.
5 You must consider carefully all the surrounding
6 circumstances before you give any weight to an
7 alleged statement.

8 Now, the State has the burden of proving beyond
9 a reasonable doubt that the alleged statement was
10 voluntary. If you determine it was, you may give the
11 statement any further consideration that you deem
12 proper. You must decide what weight, if any, should
13 be given to the alleged statement. If you determine
14 the alleged statement was not the free and voluntary
15 statement of the defendant, you should not consider
16 the statement at all.

17 Now, in order to establish criminal liability
18 criminal intent is required. For example, the mental
19 state required to be proven by the State for a
20 particular crime might be some specific purpose, some
21 obvious intent, knowledge of certain facts or
22 recklessness. Criminal intent must be proven by the
23 State beyond a reasonable doubt.

24 Criminal intent is always a matter that must be
25 determined by the jury from the circumstances

1 surrounding the situation. There is no way to prove
2 intent to a mathematical certainty. There is no way
3 medical science can dissect a person's brain and
4 determine what the person had in mind. So the law
5 says that criminal intent may be inferred from the
6 circumstances shown to have existed at the time and
7 place. This is how you make a determination of
8 whether or not the element requiring intent was
9 present.

10 It is not necessary to establish intent by
11 direct and positive evidence, but intent may be
12 established by inference in the same way as any other
13 fact, by taking into consideration the acts of the
14 parties and all the facts and circumstances of the
15 case.

16 Criminal intent is a mental state, a conscious
17 wrongdoing. It's up to you to determine what each of
18 the defendants intended to do based on the
19 circumstances shown to have existed. Criminal intent
20 can arise from action or a failure to act. It may
21 result from negligence, recklessness or an
22 indifference to duties or to consequences that are
23 considered by the law to be the equivalent of
24 criminal intent.

25 Now, if a crime is committed by two or more

1 people who are acting together in committing a crime,
2 the act of one is the act of all. A person who joins
3 with another to commit an unlawful act is criminally
4 responsible for everything done by the other person
5 which happens as a probable and natural consequence
6 of the acts done in carrying out the common plan and
7 purpose.

8 For example, two people can be guilty of killing
9 another person when only one of the two had a gun,
10 there was only one bullet and only one of the two
11 fired the shot that caused the death. If two or more
12 people are acting together, are together and acting
13 together, assisting each other in committing the
14 offense, the act of one is the act of all. Or as it
15 has sometimes been said, the hand of one is the hand
16 of all.

17 Prior knowledge that a crime is going to be
18 committed without more is not sufficient to make a
19 person guilty of that crime. Mere knowledge that
20 another person is going to commit a crime, even if
21 the defendant is present when the crime is committed,
22 is not sufficient to convict the defendant as a
23 principal.

24 Guilt as a principal is shown by actual or
25 constructive presence at the scene as a result of

1 prior arrangement. Therefore, a finding of a prior
2 arranged plan or common scheme is necessary for a
3 finding of guilt as a principle.

4 The State must prove beyond a reasonable doubt
5 by competent evidence the theory of the hand of one
6 is the hand of all. A principle in a crime is one
7 who either actually commits the crime or is present
8 aiding, abetting or assisting in the commission of
9 the crime. When a person does an act in the presence
10 of and with the assistance of another, the act is
11 done by both.

12 Where two or more acting with a common plan or
13 intent are present at the commission of a crime, it
14 does not matter who actually commits the crime. All
15 are guilty. The hand of one is the hand of all.

16 Present at the commission of a crime means to be
17 sufficiently near to aid and abet and assist in the
18 commission of the crime. However, mere presence at
19 the scene of a crime is not sufficient to convict one
20 as a principal on the theory of aiding and abetting.

21 Intent is also a necessary element, for there
22 must have been a common design or intent to commit
23 the crime and the crime must have been committed
24 pursuant thereto with the person aiding and abetting
25 by some overt act.

1 Intent means intending the result which actually
2 occurs, not accidentally or involuntarily. Intent
3 may be shown by acts and conduct of the defendants
4 and other circumstances from which you may naturally
5 and reasonably infer intent. The State must prove
6 these elements beyond a reasonable doubt.

7 What is first degree burglary? Each of the
8 defendants is charged with first degree burglary.
9 The State must prove beyond a reasonable doubt that
10 each defendant entered a dwelling without consent. A
11 dwelling is any building or portion of a building in
12 which a person ordinarily sleeps. A building
13 constructed as a dwelling that has never been
14 occupied cannot be considered a dwelling for purposes
15 of a burglary, but a building is a dwelling even if
16 the residents are temporarily absent from the
17 building.

18 In order to prove that each defendant entered
19 the dwelling, the State does not have to show that
20 the defendants' entire bodies entered the dwelling.
21 The smallest entry is sufficient. It may be any part
22 of a body, such as a hand or a foot or even an
23 instrument.

24 In addition, the State does not have to prove
25 that force was used to gain entry. If a person

1 enters a building by using deception, artifice or
2 trick or misrepresentation to get consent to enter,
3 this is an entry without consent.

4 Next the State must prove beyond a reasonable
5 doubt that each defendant intended to commit a crime,
6 either a felony or a misdemeanor at the time of the
7 entry. The mere entry into a building without
8 consent is not burglary. If the intent to commit a
9 crime is formed after the entry, it is not burglary.

10 On the other hand, if the defendant intended to
11 commit a crime at the time of the entry, it is a
12 burglary even if the intent was abandoned after the
13 entry. It does not matter that the intended crime
14 was not completed. Intent may be shown by acts and
15 conduct of the defendants and other circumstances
16 from which you may naturally and reasonably infer
17 intent.

18 And finally the State must prove beyond a
19 reasonable doubt one of the following. When
20 entering, while in the dwelling or when fleeing the
21 defendant or an accomplice was armed with a deadly
22 weapon or explosive. A deadly weapon is any article,
23 instrument or substance which is likely to cause
24 death or great bodily harm. Whether an instrument
25 has been used as a deadly weapon depends on the

1 circumstances and facts of each case. And some
2 examples of deadly weapons may be pistols or shotguns
3 or rifles or knives.

4 Or when entering, while in the dwelling or when
5 fleeing the defendant or an accomplice caused
6 physical injury to anyone not participating in the
7 crime; or when entering, while in the dwelling or
8 when fleeing the defendant or an accomplice used or
9 threatened to use a dangerous object; or when
10 entering, while in the dwelling or when fleeing the
11 defendant or an accomplice displayed what appeared to
12 be a knife, pistol, revolver, shotgun or other
13 fireman; or the defendant or defendants entered or
14 remained in the dwelling in the nighttime.

15 Nighttime is the period between sunset and
16 sunrise during which there is not enough daylight to
17 recognize a person's face except by artificial light
18 or moonlight.

19 Each of the defendants is also charged with
20 murder. The State must prove beyond a reasonable
21 doubt that each defendant killed another person with
22 malice aforethought. Malice is hatred, ill will or
23 hostility towards another person. It is the
24 intentional doing of a wrongful act without just
25 cause or excuse and with an intent to inflict an

1 injury or under circumstances that the law will infer
2 an evil intent.

3 Malice aforethought does not require that malice
4 exist for any particular time before the act is
5 committed, but malice must exist in the mind of the
6 defendant just before and at the time that the act is
7 committed. Therefore, there must be a combination of
8 the previous evil intent and the act.

9 Malice aforethought may be express or inferred.
10 These terms, express and inferred, do not mean
11 different types of malice but merely the manner in
12 which malice may be shown to exist; that is, either
13 by direct evidence or by inference from the facts and
14 circumstances which are proved.

15 Express malice is shown when a person speaks
16 words which express hatred or ill will for another or
17 when the person prepared beforehand to do the act
18 which was later accomplished. For example, lying in
19 wait for a person or any other acts of preparation
20 going to show that the deed was within each
21 defendant's mind would be express malice.

22 On the other hand, malice may be inferred from
23 conduct showing a total disregard for human life.
24 Inferred malice may also arise when the deed is done
25 with a deadly weapon. A deadly weapon again is any

1 article, instrument or substance which is likely to
2 cause death or great bodily harm. Whether an
3 instrument has been used as a deadly weapon depends
4 on the facts and circumstances of each case.

5 Now, ladies and gentlemen, I want to emphasize
6 this last point of law. I instruct you and emphasize
7 the fact that a defendant does not testify is not a
8 factor to be considered by you in any way in your
9 deliberation and in your consideration on the
10 question of the guilt or innocence of the defendant.
11 It must not be considered by you in any manner
12 whatsoever.

13 A defendant has the Constitutional right to
14 remain silent. The assertion of this right must not
15 be considered by you in your deliberations. I
16 repeat, under your oath you are to draw no conclusion
17 whatsoever from the fact that a defendant in this
18 case did not testify. The fact that a defendant or
19 the defendants did not testify should not even be
20 discussed in the jury room. The burden of proof, as
21 I have stated to you, is on the State. A defendant
22 is not required to prove his or her innocence. The
23 burden of proof remains on the State to prove guilt
24 beyond a reasonable doubt.

25 Now, Ladies and Gentlemen, I am required to

1 declare the law as I've done through these
2 instructions to help and guide you to just and lawful
3 verdict. Whether some of these instructions will
4 apply will depend on what you find to be the facts.
5 The fact that I have instructed on various subjects
6 in this case must not be taken as indicating an
7 opinion of this Court as to what you should find to
8 be the facts or as to which party should be entitled
9 to your verdict.

10 Your verdict must represent the considered
11 judgment of each juror. In order to return a
12 verdict, it's necessary that each juror agree. Your
13 verdict must be unanimous in other words. All 12 of
14 you must agree on the verdict. Your verdict cannot
15 be based on sympathy, passion, prejudice, emotion or
16 any other consideration that is not in evidence in
17 this case.

18 Remember at all times that you are not partisans
19 favoring one party over the other. You are judges,
20 judges of the facts. Your sole interest in this case
21 is to seek the truth from the evidence that's been
22 presented to you during the course of this trial.

23 All right, ladies and gentlemen. You may now
24 return to the jury room to continue your
25 deliberations.

1 **JUROR:** Thank you, Your Honor.

2 (Jury out at 11:10 a.m.)

3 **MR. MEADORS:** Judge.

4 **THE COURT:** Yes, sir.

5 **MR. MEADORS:** It's a small point. But when you
6 were talking about burglary in the first charge I
7 guess Friday, when you were defining what a deadly
8 weapon is as one of the elements to find a burglary
9 first, I think you mentioned a bat. Today you
10 didn't. Am I wrong?

11 **THE COURT:** No, you're not wrong. But I did say
12 any instrument that could be used as a deadly weapon.

13 **MR. MEADORS:** Yes, sir. That was the only thing
14 that I found different from last Thursday. I just --

15 **THE COURT:** I think I probably did. I think I
16 may have just -- it's not in the charge. I probably
17 said it.

18 **MR. MEADORS:** I knew it wasn't in the murder
19 charge, but I figured it would be in the burglary.

20 **THE COURT:** What do you want me to do?

21 **MR. WHITLARK:** I know we objected to it being
22 included on the record. So --

23 **MR. MEADORS:** That's fine.

24 **THE COURT:** Thank you very much. We'll stand at
25 ease until we hear from the jury.

1 (Whereupon, a break is taken)

2 (WHEREUPON, Court's Exhibit No. 7 is marked for
3 identification.)

4 **THE COURT:** All right, counsel. We've got a
5 question from the jury. A question from the jury.
6 Approach the bench.

7 (Whereupon, a bench conference is had)

8 (WHEREUPON, Court's Exhibit No. 8 is marked for
9 identification.)

10 **THE COURT:** All right, counsel. The jury
11 advises they have reached a verdict. Are you ready
12 to receive the verdict?

13 **MR. MEADORS:** Yes, sir. The State's ready.

14 **MR. WHITLARK:** McDonald is ready, Your Honor.

15 **MR. KENDRICK:** Yes, sir, Your Honor.

16 **MR. REUWER:** Yes, sir.

17 **THE COURT:** Bring the jury, please.

18 (Jury in at 3:32 p.m.)

19 **THE COURT:** Be seated. All right, ladies and
20 gentlemen and Madam Forelady, has the jury reached a
21 verdict?

22 **MADAM FORELADY:** Yes, we have, Your Honor.

23 **THE COURT:** Would you hand it to the bailiff,
24 please.

25 (Forelady complies)

1 **THE COURT:** Madam Forelady, let me just ask you
2 one question. Just a yes or a no answer I believe
3 will suffice at this time. On the indictment of
4 Robert Cannon, has the jury been able to reach a
5 unanimous verdict on the charge of murder?
6 Unanimous. Just yes or no.

7 **MADAM FORELADY:** No.

8 **THE COURT:** The answer is no?

9 **MADAM FORELADY:** No.

10 **THE COURT:** All right. I have your other five
11 verdicts. Do you believe that after further
12 consultation the jury would be able to reach a
13 verdict on that particular indictment?

14 **MADAM FORELADY:** No.

15 **THE COURT:** All right. If you'll retire to the
16 jury room for just a minute, please. Let me discuss
17 this with the attorneys, and we'll call you in just a
18 minute.

19 (Jury out at 3:37 p.m.)

20 **THE COURT:** All right, counsel. Approach the
21 bench, please.

22 (Whereupon, a bench conference is had)

23 **THE COURT:** All right. Bring the jury.

24 (Jury in at 3:43 p.m.)

25 **THE COURT:** Be seated, please. All right,

1 ladies and gentlemen. I will tell you that this
2 happens from time to time, that a jury is unable to
3 reach a decision, whether it's one charge or four
4 charges or ten charges. And I wanted to discuss
5 something with the lawyers before we proceed.

6 But I'll tell you that when any matter is in
7 dispute, it's not always easy for two people to
8 agree. Therefore, I understand when 12 persons must
9 agree, it becomes much more difficult. But it is
10 important that litigation, and this case is
11 litigation, be ended if it can be ended without a
12 single one of you doing violence to your individual
13 judgments or your conscience.

14 It's your duty as jurors to consult with one
15 another to deliberate with a view towards reaching an
16 agreement if you can do so without violence to your
17 individual judgment. Each of you must decide the
18 case for himself or herself, but do so only after an
19 impartial consideration of the evidence in the case
20 with your fellow jurors.

21 In the course of your deliberations do not
22 hesitate to re-examine your own views and change your
23 opinion if you are convinced that your opinion is
24 erroneous. No juror is expected to give up his or
25 her opinion based on reasoning satisfactory to

1 yourself merely for the purpose of reaching a
2 verdict. And I want you to understand that. Do not
3 surrender your honest convictions as to the weight or
4 effect of the evidence solely because the opinion of
5 your fellow jurors is contrary to your opinion or for
6 the mere purpose of returning a verdict.

7 You are not called upon often to try cases. As
8 one of 46 circuit judges whose work is to try cases
9 from day-to-day throughout the year, it's very
10 unusual, almost unheard of, for a jury to go out and
11 promptly return a verdict. I know you have not had
12 that -- I mean, that has not been the case here.
13 However, at some time we usually get a verdict. And
14 I know have you worked hard on these six indictments.
15 And what I am referring to now is the sole indictment
16 that you have not been able to reach a verdict on.

17 What this means is that while it is normal for
18 jurors to disagree at first, the fact we normally get
19 a verdict also means that after reasonable persons
20 lay aside all extraneous matters and determine to
21 decide the case on the basis of the law and the
22 evidence, then they do somehow come to an
23 understanding and write a verdict.

24 It's never been intended that the verdict of a
25 jury should be the verdict of one person; and, on the

1 other hand, the verdict of the jury is the collective
2 reasoning of all persons put together. The reason we
3 have a jury is so we might have the benefit of
4 collective thought and collective reasoning of the
5 jury.

6 It may help, if you not have already done so, to
7 tell the other jurors how you feel about the case and
8 why you do. And I'm sure you've been doing that.
9 And, on the other hand, it may help if other jurors
10 explain their position to you and exchange views with
11 you. And I ask that you listen to each other and
12 give to the others' thoughts such meanings as you
13 think they should have.

14 A mistrial in a case is a very unfortunate
15 thing. If you as a juror do not agree on a verdict,
16 it doesn't mean that anybody wins or that case is
17 over. It just means at some future time at another
18 term of court before me or some other judge that some
19 other jury will sit where you are in the trial of
20 this case; that is, the sole case that you've been
21 unable to reach a verdict on.

22 The same participants will come. The same
23 lawyers will probably come, and they will basically
24 ask the same questions and presumably will get the
25 same answers. We will go through the entire process

1 again with regard to this single indictment.

2 Now, I have no reason to believe that any other
3 12 jurors from Kershaw County will represent a more
4 cross section of the county, would be more
5 intelligent or might be more capable of solving this
6 controversy than you are. And one day this will have
7 to be decided.

8 I'm going to ask that you again retire to your
9 jury room and further deliberate in this case to see
10 if you can write a verdict with regard to this
11 indictment.

12 Let me close again by saying that while it's
13 important that litigation be ended, it should be
14 ended in the form of a verdict without any juror
15 doing violence to his or her own conscience. No
16 juror is expected to give up an opinion based on
17 reasoning satisfactory to himself or herself merely
18 for the purpose of being in agreement.

19 Now, with these added instructions I'm going to
20 ask you to retire to your jury room and further
21 deliberate solely on the indictment as to Mr. Cannon
22 that you have been unable to reach a verdict on.
23 Thank you very much, ladies and gentlemen. Madam
24 Forelady, if you'll take this with you.

25 (Jury out at 3:47 p.m.)

1 **THE COURT:** All right. We'll await the verdict
2 of the jury.

3 (Whereupon, a break is taken)

4 **THE COURT:** All right, counsel. The jury has
5 informed the bailiff that they have received the
6 verdict. They have reached a verdict. Are you ready
7 to receive the verdict? The State ready?

8 **MR. MEADORS:** Yes, sir.

9 **MR. WHITLARK:** McDonald is ready.

10 **MR. KENDRICK:** Yes, sir, Your Honor.

11 **MR. RILEY:** Yes, sir.

12 **THE COURT:** All right. Let me say this. Ladies
13 and gentlemen of the audience, when the verdict is
14 read, depending on the outcome, I want to say this.
15 I don't want any emotional outbreaks in the room.
16 These things, I understand from both sides of the
17 room that this is a very tense moment. I understand
18 that there are a lot of feelings, a lot of emotions.
19 But I can't conduct an orderly courtroom if people
20 are highly emotional and express that emotion in open
21 court.

22 All of you have sat patiently and listened to
23 this testimony for over a week now. And I respect
24 each and every one of you. You all have conducted
25 yourselves as gentlemen and ladies, and I would hope

1 that would continue. But sometimes when the cases
2 are resolved, one side or the other feels very strong
3 emotion, and I understand that. But I'm going to ask
4 you to keep your emotions as best you can under
5 control. So, thank you very much. Bring the jury,
6 please.

7 (Jury in at 4:55 p.m.)

8 **THE COURT:** All right. Madam Forelady, has the
9 jury reached a verdict on the final indictment that
10 was returned?

11 **MADAM FORELADY:** Yes, we have.

12 **THE COURT:** Would you hand it to the bailiff,
13 please.

14 (Forelady complies)

15 **THE COURT:** All right, Madam Clerk. If you'll
16 publish the verdicts, please, in that order.

17 **THE CLERK:** Thank you, Your Honor. Indictment
18 number 2007-GS-28-19, The State of South Carolina,
19 County of Kershaw, vs. Christopher R. Whitehead,
20 indictment for burglary first degree, the verdict:
21 Guilty. Signed by Colleen Beattie.

22 Indictment No. 2007-GS-28-22, The State vs.
23 Christopher Ryan Whitehead, indictment for murder,
24 verdict: Guilty.

25 **MR. WHITEHEAD:** You all know you sentenced me to

1 life without parole for nothing.

2 **THE CLERK:** Signed by Colleen Beattie,
3 Foreperson.

4 Indictment 2007-GS-28-16, The State vs. Derrick
5 McDonald, indictment for burglary first, verdict:
6 Guilty. Signed by Colleen Beattie, Foreperson.

7 Indictment 2007-GS-28-15, The State vs. Derrick
8 McDonald, indictment for murder, the verdict:
9 Guilty. Signed by Colleen Beattie.

10 Indictment number 2007-GS-28-17, The State vs.
11 Robert Cannon, indictment for burglary first degree,
12 verdict: Guilty.

13 Indictment 2007-GS-28-18, The State vs. Robert
14 Cannon, indictment for murder, the verdict: Guilty.
15 Signed by Colleen Beattie, Foreperson.

16 Madam Forelady and Ladies and Gentlemen of the
17 Jury, if these are your verdicts, please signify by
18 raising your right hand.

19 **THE COURT:** All right, Madam Clerk. Poll the
20 jury, please.

21 **THE CLERK:** Thank you, Your Honor. Rose M.
22 Seawright, was this your verdict?

23 **JUROR:** Yes, ma'am.

24 **THE CLERK:** Are these still your verdicts?

25 **JUROR:** Yes.

1 **THE CLERK:** Thank you. Paula H. Wells, were
2 these your verdicts?

3 **JUROR:** (Nods head affirmatively).

4 **THE CLERK:** Are they still your verdicts?

5 **JUROR:** Yes.

6 **THE CLERK:** Thank you. Leah R. LeCroy, were
7 these your verdicts?

8 **JUROR:** Yes, ma'am.

9 **THE CLERK:** Are they still your verdicts?

10 **JUROR:** Yes, ma'am.

11 **THE CLERK:** Thank you. Colleen A. Beattie, were
12 these your verdicts?

13 **JUROR:** Yes.

14 **THE CLERK:** Are they still your verdicts?

15 **JUROR:** Yes.

16 **THE CLERK:** Thank you. Michelle B. Watkins,
17 were these your verdicts?

18 **JUROR:** Yes.

19 **THE CLERK:** Are they still your verdicts?

20 **JUROR:** Yes.

21 **THE CLERK:** Thank you. Claude F. Jones, were
22 these your verdicts?

23 **JUROR:** Yes.

24 **THE CLERK:** Are they still your verdicts?

25 **JUROR:** Yes.

1 **THE CLERK:** Thank you. Sheila t. Brown. Sheila
2 T. Brown.

3 **THE COURT:** No. She was excused.

4 **THE CLERK:** Excuse me. I'm sorry. James A.
5 Givens, were these your verdicts?

6 **JUROR:** Yes, ma'am.

7 **THE CLERK:** Are they still your verdicts?

8 **JUROR:** Yes, ma'am.

9 **THE CLERK:** Thank you. Charles L. Pinkerton,
10 were these your verdicts?

11 **JUROR:** Yes, ma'am.

12 **THE CLERK:** Are they still your verdicts?

13 **JUROR:** Yes, ma'am.

14 **THE CLERK:** Thank you. Michael B. Ware, were
15 these your verdicts?

16 **JUROR:** Yes, ma'am.

17 **THE CLERK:** Are they still your verdicts?

18 **JUROR:** Yes, ma'am.

19 **THE CLERK:** Susan R. Cox, were these your
20 verdicts?

21 **JUROR:** Yes, ma'am.

22 **THE CLERK:** Are they still your verdicts?

23 **JUROR:** Yes, ma'am.

24 **THE CLERK:** Thank you. Lisa A. Laborne, were
25 these your verdicts?

1 **JUROR:** Yes.

2 **THE CLERK:** Are they still your verdicts?

3 **JUROR:** Yes.

4 **THE CLERK:** Thank you. Your Honor, the jury has
5 been polled.

6 **THE COURT:** Okay. Thank you. Any motions?

7 **MR. MEADORS:** Nothing from the State.

8 **MR. WHITLARK:** Your Honor, we'd ask for ten days
9 to file our motions.

10 **THE COURT:** All right. I'll do so. Other
11 defendants?

12 **MR. KENDRICK:** The same request, Your Honor.

13 **MR. RILEY:** The same, Judge.

14 **THE COURT:** All right. Thank you. Your motion
15 is granted.

16 All right, ladies and gentlemen of the jury, I
17 am certain this was a difficult task. When we
18 started over a week ago, it perhaps did not appear at
19 that time that things would be as difficult as they
20 probably were for you in the jury room. I don't know
21 that, but the length of time that you started, you
22 put in two or so hours on Friday and you've been here
23 almost all day today. So I know that you've had
24 serious discussions, difficult discussions. And I
25 know it's difficult to make these kind of decisions.

1 But as I said earlier, these decisions have to
2 be made. They don't have to be made in any
3 particular fashion. They just -- some resolution
4 needs to be made of these matters. So I want to
5 thank you for your diligence and your
6 conscientiousness in going through this process with
7 us. It's been difficult for everybody, and I
8 understand that.

9 New, the remaining portion of this trial will
10 consist of the sentencing of the defendants. Now, we
11 don't have the luxury, as some television shows do,
12 like Law and Order, things like that, of waiting
13 several weeks and waiting and accumulating a lot of
14 data and going through another sentencing procedure.
15 We do it immediately following a trial.

16 And that process will take place in about 15
17 minutes. There is a good bit of paperwork that has
18 to be prepared before that can take place. What I'm
19 getting around to is to tell you that you're welcome
20 to stay for that. You're also free to leave. If you
21 do choose to leave, I'm sure you'll read about it in
22 the paper if you wish to do so. Or you can stay.
23 And I would assume the best place for you to stay is
24 right there in the jury box.

25 Now, I'm going to dismiss you for just a minute

1 to go back to your jury room. And if you wish to
2 come back in at the appropriate time after we get the
3 paperwork done, you're welcome to do that. Or, as I
4 say, you're also free to leave.

5 If you choose to leave, I just want to thank
6 you. It's been -- we've come down the long road
7 together. And it's been difficult and I know
8 difficult for you. These things are never -- things
9 of this import are never simple matters. So if you
10 choose to leave, I want to thank you on behalf of the
11 citizens of Kershaw County. I want to thank you on
12 behalf of these attorneys and litigants and myself,
13 the clerk, everybody that has worked with you over
14 these past six or seven days.

15 The penalties for murder are serious, and I'm
16 sure you all knew that. And it becomes now my
17 responsibility to decide how much of a penalty each
18 of the defendants will receive. They've all -- at
19 this stage they've all been treated by the same by
20 you, and there will be what's called a sentencing
21 procedure, in which case the defendants and their
22 attorneys will be able to argue what we call
23 mitigation as to what their sentences ought to be or
24 ought not to be. And that is my responsibility. It
25 now becomes my responsibility. You've handed it to

1 me, and I will do that.

2 So you are now free to go. Good luck to all of
3 you. If you wish to stay, you're welcome to do so.
4 Do you need to talk to them?

5 **THE CLERK:** If I may just a moment, sir, back
6 there.

7 **THE COURT:** The clerk would like to speak with
8 you for just a minute. And I'll be glad to -- after
9 the sentencing procedure, if you wish to stay, I will
10 be glad to speak with each of you collectively or
11 individually if you have any questions about how this
12 trial transpired.

13 Let me just say also, if any of the -- if
14 anybody wants to talk to you after this case is over,
15 you certainly are welcome to talk to them. You're
16 also welcome not to talk to them. If you would feel
17 uncomfortable talking to either members of the press
18 or any of the attorneys or anything like that, you
19 just tell them you don't care to talk to them. It's
20 something personal to you and you'd rather not talk
21 to them. Or if you feel like you can talk to them,
22 they may ask you some questions.

23 If anybody bothers you about that or persists in
24 trying to question you about that, you let me know or
25 somehow let me know and I will take care of it. You

1 have nothing to apologize for about your decision.
2 It was a hard fought case and it was a difficult case
3 and you made a difficult decision.

4 So I want to say thank you and good luck to all
5 of you. You are now free to retire to the jury room.
6 Ms. McDonald wants to speak with you for just a
7 minute after which you may leave or you may come back
8 into the jury room in about 15 or 20 minutes when we
9 reconvene for the sentencing procedure part of this
10 trial. Thank you very much, ladies and gentlemen.

11 (Jury out at 5:05 p.m.)

12 **THE COURT:** All right, counsel. We'll stand at
13 ease until we have everything in order for
14 sentencing.

15 (Whereupon, a break is taken)

16 **THE COURT:** All right, Solicitor.

17 **MR. MEADORS:** If it please, Your Honor. On
18 behalf of the Sheriff's Department and Josh Zoch and
19 the whole Zoch family, we do want to thank the jury
20 for their verdict in this case and thank them for
21 listening.

22 Judge, we have several family members, just a
23 few family members who would briefly like to briefly
24 address the Court if now would be the time you'd like
25 to do that.

1 **THE COURT:** Well, I'll do it in any order you
2 prefer.

3 **MR. MEADORS:** What do you prefer? I didn't know
4 how Your Honor wanted to --

5 **THE COURT:** I don't have strong feelings one way
6 or the other. I want to hear something about each of
7 the defendants --

8 **MR. MEADORS:** Sure.

9 **THE COURT:** -- prior to sentencing. And I'll be
10 glad -- it might be the appropriate time to hear from
11 the family now.

12 **MR. MEADORS:** Okay. Thank you. Then I'll
13 follow up with some brief comments after that.

14 **THE COURT:** Yes, sir.

15 **MR. MEADORS:** Judge, initially is Birgit Zoch.

16 **COURT REPORTER:** I need you to spell your first
17 name for me, please.

18 **MS. BIRGIT ZOCH:** B-I-R-G-I-T. Your Honor, my
19 name is Birgit Zoch. And the first statement I'd
20 like to make is on behalf of Josh's aunt who was here
21 all week and is unable to come here, and she wanted
22 me to read this to you.

23 **MR. MEADORS:** And, Your Honor, the aunt was
24 Jamie Wall Zoch.

25 **MS. BIRGIT ZOCH:** Jeanine.

1 **MR. MEADORS:** Jeanine Zoch who was here.

2 **MS. BIRGIT ZOCH:** May I begin?

3 **THE COURT:** Yes, ma'am.

4 **MS. BIRGIT ZOCH:** "Unfortunately, I cannot be
5 here today to speak about the murder of my nephew. I
6 would like to state that we loved Josh and we remain
7 heartbroken to this day with the void that will never
8 be filled even after a verdict from this court.

9 "Much was said about the word 'hero' this past
10 week. And we wanted to talk about the word 'hero'.
11 A hero is a father that was serving our country in
12 the Army working up to the rank of Sergeant Major,
13 receiving the Purple Heart and retiring after 23
14 years and now teaching teen-agers in high school in
15 Florida. That is a hero, and that was Josh's father.

16 "A hero is also our father who also served his
17 country for 21 years in the Navy and worked 20 years
18 thereafter at Dupont and cared for and loved his
19 grandson. Our father is a hero. And his birthday
20 was May 10th. That's the day he turned 77. And he
21 would have liked to celebrate his 77th birthday with
22 his grandson, Josh.

23 "In closing, as a critical care nurse for 23
24 years, I have seen and cared for patients with
25 traumatic head injuries. It is not pleasant, and it

1 is so painful to me personally to know this is how my
2 nephew died, alone, hemorrhaging and at the hands of
3 these cold-hearted cowards who dare to call
4 themselves heros.

5 "They should hang their heads in shame and
6 remember everyone how they hurt my family, how Josh
7 will never have his 20th birthday, how his family
8 will never be the same, that they took a human life
9 and how they also hurt their own families.

10 "I ask you to keep them away from society
11 forever and a day. Thank you, Mr. Meadors and Ms.
12 McDuffie, Mr. Moak and Ms. Tolkey and all law
13 enforcement officers and court personnel, and to you,
14 Judge Cooper."

15 Now I would like to say a few words on my own
16 behalf. I am Josh's step mom and I loved him. Much
17 was said about him during this trial. Now I want to
18 tell you about my Josh. He was gentle and he was
19 kind. He was funny and he was charming. There
20 wasn't anything he wouldn't do for his loved ones or
21 his friends. He never hurt anyone but himself. And
22 he was smart and full of potential. And now he will
23 never be able to reach it. And we won't be able to
24 share it with him.

25 I looked forward to just seeing him married and

1 having children of his own one day. And we will
2 never be able to hold him again or his grandchildren,
3 our grandchildren. This family has been devastated
4 by this, and we will forever be terrorized by the
5 images in our mind of how he died. So, Your Honor,
6 please keep that in mind when you pass sentence.
7 Thank you.

8 **MR. MEADORS:** Your Honor, next is father, Thomas
9 Zoch.

10 **MR. THOMAS ZOCH:** Thomas Zoch. Your Honor, I'd
11 like to start by saying Joshua, he was my first born.
12 My chosen profession took me away from him
13 frequently. I lived a hard life as an infantryman,
14 and that was my choice. Joshua was a casualty of a
15 military brat. I was not always there to give him
16 direction.

17 But he was a good boy and he'd give you the
18 shirt off of his back. He could walk into a room and
19 he would leave that room making a hundred new
20 friends. I'll tell that you Joshua cared about his
21 entire family. He veered off and he went down the
22 wrong road, but he was not a bad person.

23 Over 23 years of my career in the military I've
24 seen a lot of ugly things. And I will tell you most
25 of my career I was a hard individual. And when my

1 dad called me and told me what had happened, it
2 brought me to my knees. I've had to give many
3 speeches. I've had to speak at many of my soldier's
4 memorial services. And I'll tell that you this
5 brought me to my knees. And since this incident 17
6 months ago I have not been able to recover.

7 Joshua has a younger brother who he looked up
8 to. And because of this incident -- Jonathan, he was
9 here for one day of the trial, and I was very proud
10 of him for standing here and listening to all the
11 horrific things that were said about his brother.
12 Yes, he had some drug problems. Yes, he had some run
13 in's with the law. I think at one time he came
14 before you in juvenile court and you gave him a
15 chance. And I appreciate that.

16 And I ask you today to not have any mercy or
17 sympathy for these three individuals who have sat
18 here and attempted to get through this as a --
19 without being guilty. They deserve the max
20 punishment; and I ask you, sir, from the bottom of my
21 heart, please give it to them. Thank you, sir.

22 **THE COURT:** Thank you, Mr. Zoch.

23 **MR. MEADORS:** Your Honor, part of the reason I
24 love this job is getting to work with victims and
25 along with law enforcement helping them through what

1 is usually the most traumatic times in their lives.
2 And this gentleman coming up here now, his wife, John
3 and Helen Zoch, grandmama and granddaddy, I've just
4 gotten to know them maybe too well. But anyway, I've
5 spent a great deal of time with them in preparing for
6 this. They're wonderful people. And Mr. Zoch would
7 like to address Your Honor.

8 **THE COURT:** Yes, sir.

9 **MR. JOHN ZOCH:** Your Honor, I'm John Zoch. I'm
10 the grandfather. I don't think my wife can say
11 anything, so I'll speak for both of us. Your Honor,
12 between my son and I, we have about 45 years of
13 military service. I am retired. I'm an ex military
14 man. I'm tough. I believe in tough love.

15 When I appeared in your court last time, I
16 begged you to send my grandson back to me so that we
17 could be and try to be the parents that he did not
18 have at that time. And you released him to us under
19 house arrest, the most difficult four months of my
20 life.

21 Josh was a good kid. There is nothing my wife
22 would not have done for that boy, nor I. But I had
23 to take the hard path a lot of times. I had to turn
24 him away to try to make him understand the path that
25 he was on was wrong. I carry so much guilt in

1 myself. I now have to seek medical help to try to
2 get myself out of ruts. I wake up at night. I have
3 to go to bed by myself because my wife can't sleep.
4 When I wake up at night, she's crying. 17 months
5 worth. We loved that boy. We loved that boy so
6 much.

7 After the crimes were committed, my wife and I
8 had the responsibility of cleaning his house up. I
9 think I mentioned before, I see today here in front
10 of the jury box that carpet where he bled out, the
11 blood on the walls and the ceiling. We felt a
12 responsibility to clean it up ourselves rather than
13 somebody else to come in there. But we couldn't stay
14 in that residence over two hours at a time to see all
15 that blood.

16 Your Honor, I've seen a lot of dead people. I
17 have helped contribute to the death in combat related
18 situations and without, I have never seen as heinous
19 crime that I've seen three people completely smash a
20 body. The only thing I've ever seen it compared
21 would be Auschwitz, the pictures I've seen of that.

22 Your Honor, my wife and I would like to ask that
23 whatever sentence, hopefully life without parole. I
24 sleep with two guns because I'm afraid myself that
25 this could be related to something else. But today I

1 have a sense of relief and I can put the guns back in
2 the safe. Thank you very much, Judge. And God bless
3 you all.

4 **MR. MEADORS:** Judge, before I get to my
5 concluding remarks, I also want to -- Jackie, Melissa
6 and John Davy have been here. I want to thank them
7 for being here and the support they have given their
8 family.

9 I always do this, and I want to do it again now.
10 Special thanks out to Sheriff McCaskill, Captain
11 Thomley, Danny Catoe, Phil Crawford, and all the
12 other law enforcement involved. It's not easy being
13 law enforcement out there, especially today. I want
14 to thank them publicly for the fine work they did on
15 this case, the successful, just thank them for their
16 investigation, Judge. I want to thank you all for
17 the job you did.

18 I also want to thank our staff, Emily, Karen,
19 Leslie, Moak, Ms. McDuffie, everybody involved in
20 helping get this prosecution together.

21 Judge, you know, he almost went to Morris
22 Village that day. Helen almost had him in Morris
23 Village. And he wanted to see his girlfriend one
24 more time. I wish he had gone to Morris Village but
25 he didn't. He did have a drug problem. He was

1 trying to fight it, trying to get help for it, had
2 people that loved him.

3 For whatever reason these three defendants chose
4 to beat him to death that day. And I want to say for
5 the record, in my 21 years of prosecution this is the
6 most -- I've talked with the sheriff and I think
7 they'll agree with me -- the most brutal slaying I've
8 been in involved in my 21 years, Judge, as he was
9 asleep on the couch.

10 Judge, I don't know the layout of hierarchy.
11 Mr. Moak is going to speak in a moment. We do think
12 it was Defendant Whitehead's idea to go over there.
13 We think these other two defendants went with him.
14 But then once they got there, it's the hand of one is
15 the hand all, they all participated. They all
16 participated, McDonald with the bat and then finally
17 Defendant Cannon admitting he did hit him and did
18 kick him after he grabbed his legs and went over
19 there.

20 But if we had to do a chart, if you will, I know
21 Your Honor likes to know, I think Whitehead would be
22 first, McDonald would be a close second, and then it
23 would be Cannon after that.

24 Judge, I went and met with Dr. Sexton for two
25 and a half hours. And I want to thank "Dog", "Dog"

1 Austin who everybody has talked about for what he
2 did. And Lear. We went up there and met with Dr.
3 Sexton who I've been doing cases with for years and
4 my boss has been doing cases for years. And I think
5 he's the finest forensic pathologist that I know of.

6 And we kind of laid the pictures out and went
7 over them and put them in order. And even Dr. Sexton
8 was commenting on the brutality of this. I know when
9 to shut up and let somebody talk. And I think he;
10 not that it needed it, but corroborated to a "t" what
11 happened that night with the blood spatter and where
12 the body went. It was the most powerful testimony
13 from a pathologist I've ever seen. And I think that
14 kind of summed it up. And Josh did kind of speak
15 through Dr. Sexton, and I think that kind of speaks
16 for itself. I think that's all I have. Mr. Moak.

17 **MR. MOAK:** Your Honor, as to defendant
18 Whitehead, I filed on February 12th of this year, I
19 believe served it that same day at the pre-trial
20 hearing in Columbia we had before Your Honor a notice
21 of the State's intention to seek a sentence of life
22 without parole on the two indictment numbers that he
23 was convicted of today.

24 The basis for that is his conviction under
25 indictment number 2005-GS-32-2617 for attempted armed

1 robbery in Lexington County. A certified copy of
2 that indictment and a sentencing sheet was attached
3 to what I filed. A copy of both of those were served
4 on Mr. Whitehead and Mr. Riley on February 12th, the
5 same day they were filed, which was ten days previous
6 to the original court date. I believe it's ten days
7 previous to the original court date of February 25th
8 and certainly at least ten days previous to today's
9 court date.

10 **THE COURT:** Let me see that. You didn't tell me
11 that.

12 **MR. MEADORS:** Your Honor, I thought Mr. Moak had
13 told you about it.

14 **THE COURT:** Nobody told me this.

15 **MR. MOAK:** I thought he knew about it. The
16 original is in the clerk's file, Your Honor. So the
17 State is asking for a sentence of life without
18 parole.

19 **MR. MEADORS:** Your Honor, that's been filed and
20 been in the clerk's file for a long time.

21 **THE COURT:** I didn't say it wasn't.

22 **MR. MEADORS:** I apologize. Your Honor, my
23 concluding remarks are, and I'll be through.

24 **THE COURT:** Well, let me look at this.

25 **MR. MEADORS:** Okay.

1 **MR. MOAK:** Your Honor, I mentioned this when we
2 were in your office the week before the trial on that
3 Wednesday when Mr. Meadors was not present.

4 **THE COURT:** This appears to be a sentencing
5 sheet from Lexington County for attempted armed
6 robbery for which he received time served or ninety
7 days plus probation for five years. Is that correct?

8 **MR. MOAK:** I believe that's the basis, that
9 sentence. Yes, your Honor.

10 **THE COURT:** All right.

11 **MR. MEADORS:** Your Honor, my final comments are,
12 I know the age of these gentlemen will be mentioned
13 to Your Honor in mitigation. My final comments would
14 be that Joshua Zoch was too young to die and just did
15 not deserve to die like this. And that's all we'd
16 have. Thank you.

17 **THE COURT:** Well, does anybody else have a
18 record?

19 **MR. MEADORS:** No, sir.

20 **THE COURT:** No records from any of the other
21 defendants?

22 **MR. MOAK:** Convictions, no, Your Honor.

23 **THE COURT:** No convictions of either of the
24 other two defendants.

25 **MR. MOAK:** No, Your Honor.

1 **MR. MEADORS:** No, sir. That's correct, sir.

2 **THE COURT:** All right. Mr. Reuwer or Mr. Riley.

3 **MR. RILEY:** Your Honor, as I read 17-25-45, I
4 don't think the Court has a great deal of discretion.
5 I do want to mention --

6 **THE COURT:** Bring your client around. Well,
7 that's all right. You can stay right there. Stay
8 right there. Go ahead.

9 **MR. RILEY:** I do want to mention just a few
10 things, a few key things. As you know, on Saturday,
11 May the 10th, was Mr. Whitehead's 20th birthday. He
12 and his parents are here with him and have been here
13 throughout the trial. They have two children.
14 Christopher has a sister who was here part of the
15 trial. She is not here today.

16 I want to tell you, Your Honor, that regardless
17 of the heinousness of this crime, it's been a
18 pleasure and a privilege representing this young man.
19 And I've tried to do the very best for him that I
20 possibly can.

21 I think that not only the parents may wish to
22 say a few words to the Court, but I think the
23 defendant would like to also. And I would ask the
24 Court to allow them to do that.

25 **THE COURT:** Yes, sir. I'll be glad to.

1 **MR. RILEY:** I'm sorry, sir?

2 **THE COURT:** You may proceed.

3 **MR. RILEY:** Okay.

4 **MR. WHITEHEAD:** There was a lot of pointing
5 fingers here. And, you know, the sentencing is over.
6 I've been found guilty, and there's nothing I can do
7 about that right now. I do like to say I wish your
8 souls peace for the victim's family. I don't wish no
9 bad on nobody. And I hope that you all pray for my
10 soul to have peace, too.

11 You know, since I've been here, I've given my
12 life to God and I have learned how to show mercy to
13 others when they do wrong to me and I've learned how
14 to turn the other cheek and I've learned how to put
15 my faith in God.

16 Today, on this day, I don't know why I was found
17 guilty. There is a reason. And, you know, I don't
18 know the path or what comes in the future. But like
19 I said, I pray that you all pray for my soul to have
20 a peace as I pray for you all's soul to have peace.
21 I don't wish bad on none of you all. Your son, I
22 knew, not very well. But was a good man. He didn't
23 deserve to die. Just pray for me.

24 **FATHER OF MR. WHITEHEAD:** Your Honor.

25 **THE COURT:** Yes, sir.

1 **FATHER OF MR. WHITEHEAD:** I'm Christopher's
2 father. And I do appreciate the diligent efforts of
3 this Court. I know that this was a very difficult
4 week and a half I suppose or a week and a day for all
5 of us. And everyone had a voice up until now. Of
6 course we really didn't have a voice. So I guess
7 this is just the moment that we can address the
8 Court.

9 You know, I love my son. And I know something
10 about serving my country also. I'm a third
11 generation veteran. I served honorably for 21 years.
12 My grandfather served in World War II. My father
13 served in the Army in the Vietnam era. My uncle
14 served in the Navy during the Vietnam era. And, you
15 know, it was my hope that perhaps one day my son
16 would want to follow in the same suit.

17 My deployments and the times I had to be away
18 from home, I have been there for my son and raised
19 him. And I know that's a very difficult thing. I've
20 been married to the same woman for almost 22 years
21 now. So I know a little something about dedication
22 to the family and burdens that every family faces.

23 I hate drugs. I absolutely hate them. And I
24 know the law enforcement officers and the prosecutor
25 and the people that are here deal with this probably

1 every day. I think it steals our youth and I think
2 it robs them of the lives that they could have. But
3 people use them, trade them or are involved around
4 that process.

5 My prayer is help for the Zoch family because I
6 know that they have lost something that cannot be
7 given back. And I wish to take back nothing from
8 that. I really have considered their loss and their
9 pain. The way the structure of the court is set up
10 somehow just feels, when you're on the defendant's
11 side you kind of feel ostracized and as if you're
12 outside of that. Perhaps the family would feel that
13 they were not considered by any of us, and that is
14 simply not true.

15 But I would ask for your mercy and your
16 leniency. I probably have no right to that. But my
17 son is 20 years old. And that doesn't excuse any
18 actions of what the Court has found, but I know that
19 without hope that there really would be no purpose
20 for living.

21 In the Bible one of the greatest apostles was
22 Paul. He was a murderer. Even God found mercy upon
23 him and made him one of the greatest apostles. I
24 certainly do not profess that that is my son. But
25 what I am saying is that given no opportunity, given

1 life without parole, given no opportunity to do
2 something positive with your life or look forward to
3 something, what hope does any man have?

4 My words are just simple words. I hope I'm not
5 perceived as trying to persuade the Court in any way
6 other than just ask for mercy on my son's life. Give
7 him the opportunity to make amends if that's the way
8 you would like to perceive it. I do love him and I
9 will always love him. And I know the Zoch family
10 loved Josh very much. All parents should love and
11 care, be concerned for the welfare of their children.
12 And I ask for your leniency even though I know that
13 it's been asked that there be no leniency. Thank
14 you, Your Honor.

15 **MOTHER OF MR. WHITEHEAD:** Hi, Your Honor. My
16 name is Radonna Whitehead. I'm Chris' mom. I'm
17 going to do my best to not ramble.

18 **THE COURT:** That's all right.

19 **MOTHER OF MR. WHITEHEAD:** Bear with me if I do.

20 **THE COURT:** Take your time, ma'am.

21 **MOTHER OF MR. WHITEHEAD:** Okay. Today is
22 probably one of the saddest, you know, moments that a
23 mother can have. I can feel for the family of the
24 deceased quite greatly. As our family before
25 Christopher became arrested for this charge, we in

1 turn went through a similar event. But we were on
2 the other side of the coin with our daughter who was
3 attacked by a young man.

4 So I can -- we can completely, 100 percent all
5 of us sympathize with what the family has gone
6 through. But just like in that case, we had to
7 sit -- we had to sit and listen to things. And we've
8 listened to a lot this week. I can -- I can take the
9 jury's -- what the jury found. That's the way the
10 system is set up, too. And with anybody we have to
11 go through those same things.

12 As his mom and listening to those things, I
13 don't agree with what was found. I believe as
14 Christopher stood here and said that he is innocent,
15 and I hope that one day these officers will find the
16 person that is truly guilty of this crime.

17 But regardless of that fact, right now we're
18 looking at my son's -- what you plan on sentencing my
19 son. Now, I know that the solicitor brought up a
20 charge that Christopher recently had. Okay. I hope
21 that you can look at that. And I don't understand
22 the legal matters and what you have to do as far as
23 that, but I also know that that is what you have in
24 front of you, is just a piece of paper. You weren't
25 there. You didn't know that once again Christopher

1 was with some friends, had no idea that another
2 person, another person is the one who had the weapon.
3 He is the one who held up other friends in the car.
4 But once again, the law says by the hand of one, the
5 other, however it's said.

6 And Christopher in being young and just wanting
7 to get things done had no idea of the consequences of
8 his going ahead to make a plea at the age of just
9 turning 17 without his parents present. So,
10 therefore, that charge in our eyes was something that
11 had he been given the right to counsel or been given
12 because of his age may not have been there. But
13 that's something that is there.

14 Christopher had done very well for a long time.
15 He got his G.E.D. It was probably the proudest
16 moment that we could have ever had. He has struggled
17 throughout all of his school with school and with
18 that, and we were excited and pleased that this
19 happened. He had had plans on going to school and
20 continuing. We had even talked on when he finishes
21 probation on him entering the military.

22 Now, I know that the family has already asked
23 that you not give him any consideration as far as
24 lessening his time. But from what I understood, one
25 of the one things that the criminal system says is

1 that you're supposed to try to -- try to find a way.
2 A young man at 20, to put him away for the rest of
3 his life is just to me the worst thing, I mean, that
4 you could do. You're asking citizens to pay for
5 someone to be in a facility for the rest of their
6 life when they have the family and they have the
7 intelligence to eventually be a productive citizen.

8 And Christopher has done -- he has found the
9 Lord. And whether or not that's something that comes
10 up in all trials or whatnot, I don't know. But I
11 know that through the pastor at the jail and through
12 soul searching that Christopher has decided that he
13 wants the chance to be of service to the Lord.

14 And I only hope and can beg of you to give him
15 that chance and to also -- he is my child and he's my
16 husband's child. Please don't take that away from
17 us. Thank you.

18 **THE COURT:** All right. Thank you, Mr. and Ms.
19 Whitehead. Anything further?

20 **MR. REUWER:** No, sir.

21 **THE COURT:** As to Mr. McDonald.

22 **MR. WHITLARK:** Yes, Your Honor. May it please
23 the Court. Your Honor, first of all, I will say this
24 about this whole situation here. This drug cancer
25 that covers our whole society has now harmed an

1 entire roomful of people in a terrible, terrible way.

2 And I know that my client, Mr. McDonald, he is
3 very sorry for the loss that the Zochs have suffered
4 here. And we would say that we just hope that God
5 would help them with the grief they're enduring right
6 now and that somehow over time that their hearts will
7 be healed from the pain of the loss they've suffered.

8 I will say on behalf of Mr. McDonald that
9 regardless of the sentence this Court gives, he is
10 determined, Your Honor, to have a productive and
11 positive outlook on life.

12 Mr. McDonald was in the ROTC in high school when
13 this occurred. He was in the band. And he was a
14 regular participant in the Harvest Hope Food Bank and
15 serving Thanksgiving dinners at the Oliver Gospel
16 Mission. The reason I mention this to you, Your
17 Honor, is because it's a true reflection of the
18 character of this young man. That's why it's so
19 shocking and surprising to even have him in this
20 circumstance.

21 He comes from a good family. I've gotten to
22 know his mother and his brother and his father. And
23 they are good people. They are all horrified by the
24 loss that has been suffered by the Zochs. And again,
25 Mr. McDonald wishes to speak to them if they'll hear

1 his words. But I would ask the Court to keep in mind
2 that this young man is 18 years old. And -- 19 years
3 old. I'm sorry. And when this occurred he was a
4 senior in high school, Your Honor, wanting to go into
5 the Air Force, wanting to be somebody who contributed
6 to society and was a productive participant in our
7 society.

8 Again, Your Honor, it's not an excuse to say
9 that drugs are the catalyst for this entire event.
10 But there's no escape from it, Your Honor. Drugs are
11 the cause of this thing. They're the cause of the
12 motivation to go places, caused them to be in the
13 situation they were all in.

14 And this entire Sonic, I'll call it the Sonic
15 ring of people, were all involved in drugs. And look
16 where it's got us, Your Honor. Standing before you
17 with a ruined, a deceased young man and the lives of
18 three or more ruined. And again, Your Honor, it's
19 not a crutch. But Mr. McDonald is a good young man
20 despite what the jury has found here.

21 And I'd ask the Court to consider showing some
22 sort of hope for him to be a participant in our
23 society some day. To throw his life away and to lock
24 him away forever is not what we actually believe in.
25 We believe in trying to correct people, make them do

1 the right thing. And he was well on his way, Your
2 Honor.

3 Horrible mistake, horrible results and the
4 broken hearts of their family. It's hard to be
5 objective about it. But, Your Honor, Mr. McDonald
6 can be a good member of society. He has shown that
7 through his life. And I would ask the Court to
8 please consider giving him a chance sometime after he
9 has paid his debt to the Zochs and to society to join
10 again our American Society.

11 And now he wishes to speak, Your Honor, if you
12 would allow that. And his mother.

13 **MR. MCDONALD:** Your Honor, ladies and gentlemen
14 of the courtroom, especially the Zoch family, I would
15 like to say that this is the craziest thing I've ever
16 seen in my life in the 19 years that I've been
17 living. I've been through some hard things in my
18 life, but I've never seen or never experienced
19 anything like this before. I can honestly say that I
20 am innocent of this crime.

21 And I can honestly say that even though I am
22 found guilty by a jury of my peers on these two
23 charges, every day I spend in the Department of
24 Corrections I will find out who really did this. I
25 know I was framed. I can't prove that, but I will

1 prove that if I get a chance to come of this. I can
2 honestly say that my father works at the South
3 Carolina Department of Corrections. I've been there
4 before. I've seen the outcome of things, of bad
5 mistakes. This is not a subject of a bad mistake.
6 This is a subject of me, like I said before, being
7 framed. I maintain my innocence.

8 And, yes, I was in the ROTC. Yes, I did have 18
9 days 'til I graduated. Yes, I was going to be in the
10 Air Force to become what some people call a hero. I
11 have been to the Harvest Hope Food Bank. I have been
12 to Salvation Army, served dinner at Thanksgiving. I
13 didn't do these things just because I wanted to flash
14 them in front of you in front of the courtroom, Your
15 Honor. I did it out of the kindness of my heart.

16 I didn't have any charges back then. I've never
17 had any convictions of anything. Yeah, I may have
18 got into a couple of school disciplinary problems,
19 but that was in high school, Your Honor.

20 I just ask you, please, to just have some mercy
21 on my soul, Lord. Because if I'm not mistaken, if
22 the book of Romans in the Bible says that even though
23 evil is done to you, you should not do evil for evil
24 but do good for evil. And it's like putting burning
25 ashes on your enemy's head. And I'm not going to sit

1 here and downgrade these officers of Kershaw County,
2 investigators. I'm just going to say that they did
3 their job. Whether if it was the right way or the
4 wrong way, they did their job.

5 But like I said to the Zoch family, I'm sorry
6 for your loss, specifically the Zoch family, and I
7 will try to find out who really did this every day I
8 spend at the South Carolina Department of
9 Corrections. Thank you.

10 **MR. WHITLARK:** This is Ms. Josie McDonald, Your
11 Honor, the defendant's mother.

12 **MR. MCDONALD'S MOTHER:** Your Honor, first of
13 all, I would like to say my heart goes out to the
14 Zoch family. It's hard, very hard. I can't even
15 imagine what they're going through right now. I know
16 what it feels like to lose a family member. But each
17 death is different. We have had family members who
18 were murdered. And they're cold cases. And they
19 will be because of the timeframe as to when they
20 happened.

21 I have always taught my children to respect the
22 judicial system and law enforcement. Since third
23 grade when I was a home parent, my son has had a love
24 for law enforcement. Right now my youngest child who
25 is not here is afraid of them. And I don't want that

1 to be, not at all.

2 When Derrick was in third grade, as I stated, I
3 was a home parent, I organized a literacy program for
4 his classroom. One of the distinguished guests to
5 come and read a book to him was Mr. Giese because I
6 respected him. And I respect his department and I
7 know he goes by the books. I realize it's the job of
8 the solicitor to make sure that a case is done, to
9 make sure that it's won. But we need to know that we
10 need to make sure that the right person is arrested,
11 because if they're not, then that person is out there
12 to hurt someone else.

13 When you're dealing with someone's life, you
14 can't just rush through a process. Everything, every
15 evidence, maybe I've watched too much CSI, but
16 everything needs to be introduced to the jury. I
17 would not want to make a decision based upon
18 something being taken out and something being put in.

19 No disrespect. This family needs to know what
20 happened to their grandson. They need to know. My
21 best friend died. Her son is still a cold case in
22 Richland County. She went through a very hard time
23 because she never found out who the perpetrators
24 were. She never found out. Her husband is still
25 living. He never found out.

1 Derrick's dad, as he stated, is a correctional
2 officer. He is a former Marine. He served his
3 country. My father did. My mother did. There are
4 several people in our family who were in law
5 enforcement, the military who served their country.
6 Some of them even sat on the bench which I teach my
7 children is to be highly respected.

8 As Mr. Whitlark said, this thing with the drugs,
9 I've heard these children -- and I call them
10 children. I don't care if 18 makes you an adult, if
11 my mother were still living, she'd still be calling
12 me a child. These children sit up here and admit to
13 using drugs. That's what killed this young man, a
14 drug dealer, drugs. And like he said, it's ruining
15 our society. They sat up there and admitted to this
16 without even blinking an eye.

17 But yet still these people can walk out of a
18 courtroom with a slap on the wrist, and they're
19 murdering our children, whether it be with a pipe,
20 whether it be whoever they rob, they steal; they do
21 whatever in order to get it.

22 I'm not a perfect parent. None of us in here
23 are. If there was a book out there that we could
24 pick up and say this is the instructions, this is
25 going to make your child a judge, this is going to

1 make your child a state representative, a president,
2 we would buy every copy of it. But there's not. I
3 did the best that I could as a mother.

4 I believe in my son. I believe in his
5 innocence. And I know that he did not kill Mr. Zoch.
6 I know that in my heart. And, Your Honor, I ask that
7 the Court show mercy to my child. And I ask that
8 this case not be closed. These people who were
9 brought up, who they felt were suspects, they're not
10 going to stop.

11 **THE COURT:** Thank you, Ms. McDonald.

12 **MR. MCDONALD'S MOTHER:** Thank you.

13 **MR. WHITLARK:** Thank you, Your Honor.

14 **MR. JA'NARD MCDONALD:** Ja'nard Nivek McDonald.

15 **THE COURT:** Yes, sir.

16 **MR. JA'NARD MCDONALD:** I am the defendant's
17 brother. I myself, I really don't believe he is
18 guilty of this crime. I have many reasons for that,
19 many personal reasons, you know; because we have had
20 a lot of family members on my father's side of the
21 family that are now still on crack cocaine. We had a
22 friend that we lost because of this what they call a
23 crack game. And if anybody was trying to stop that,
24 my brother would not try to stand in their way. I
25 know that for a fact.

1 I myself had a bad past myself. And, luckily,
2 it had never gotten this far. And since I stopped
3 whatever I was doing, I've been trying to better
4 myself. I've been trying to better other people. My
5 brother will tell you I've spoken to him. I've
6 actually spoken to Rob, you know, while he's been
7 locked up and everything like that.

8 And, I mean, my brother was a geek before all of
9 this happened. You know, he was on orchestra. He
10 played Pokemon, had books a million, you know. He
11 read books all the time, things like that. So I
12 don't know how it got from reading books and stuff
13 like that to being accused of murder. None of it
14 makes sense to me. None of it really makes sense to
15 me.

16 But, you know, to Zoch, to the Zoch family, you
17 know, I want to say that what Joshua was doing as far
18 as working with Richland County, he was doing the
19 right thing, but I don't believe that Richland County
20 was protecting him the right way.

21 I knew your son. I knew your grandson in high
22 school. I didn't really agree with all the things
23 that he did, but that doesn't say that he should die.
24 And I am really sorry for what happened to him. I'm
25 really sorry for what you all go through. Because I

1 know what you're going through. I have lost a lot of
2 family and friends throughout my life also.

3 I'm not going to beg for any mercy for my
4 brother because in my eyes he was already found
5 guilty before he even walked in this courtroom.
6 That's all I have to say. Thank you, Your Honor.

7 **THE COURT:** All right. Thank you.

8 **MR. WHITLARK:** Thank you, Your Honor.

9 **THE COURT:** As to Mr. Cannon.

10 **MR. KENDRICK:** Thank you, Your Honor. Your
11 Honor, I've obviously stood in the courtroom a lot of
12 times and I've been in courtrooms with you before.
13 And I don't know that there is a more difficult time
14 in fashioning a sentence than there is today. And
15 this is one of those tragic situations where no
16 matter what happens we're still all left with a loss,
17 and that can't be changed.

18 I think that when we're looking at sentencing,
19 Your Honor, we look at the strict justice that is
20 demanded whenever we're in a situation like this but
21 we also look for mercy. And I think that's been an
22 overriding concern of the sentencing as long as it's
23 been in place.

24 My client at the time this occurred was 17 years
25 old. He had absolutely no criminal record or

1 involvement with the police. You know, he has come
2 into this court and pled not guilty. I've explained
3 to him, you know, at this juncture, Your Honor, that
4 it's not appropriate to address that. We respect
5 what the jury has done here and ask Your Honor for
6 mercy.

7 I think that the murder statute has a built in
8 element of strict justice, Your Honor, that doesn't
9 leave you with discretion on that part. Even a very
10 minimal sentence is extremely high. For a young man
11 of my client's age, if you give him the lowest
12 sentence you can give him, he will be far older than
13 most of us in this courtroom when he gets out.

14 Your Honor, I think that that's the sentence
15 that he deserves today, because there is no doubt
16 this was a bad situation for all involved. It's a
17 situation where we don't necessarily get anything
18 positive out of. But I ask Your Honor to look --
19 that there is a -- we always want some retribution
20 for a situation like this. And I don't doubt that.
21 And I don't -- I understand it.

22 But, Your Honor, the murder statute of South
23 Carolina has a built in element of retribution that
24 he will have to spend the time day for day and it
25 will be a very long time. So I would say that that

1 minimum sentence on the statute is appropriate
2 because it's far, far from a minimal sentence.

3 Your Honor, I believe my client would like to
4 address you as well as his father and also his mother
5 and his stepmother here. Before I go on, Your Honor,
6 I would like to tell you that last September when the
7 Court put me on this case, I have spent a long time
8 with Mr. Cannon. You know, my job brings me into
9 contact with all kinds of people. And he has always
10 been respectful to me. He's always been very
11 involved in what was going on, very intelligent about
12 it.

13 Again, it's a tragic situation, Your Honor, but
14 I am, in represent the hundreds and hundreds of
15 people that I represent in this court and a lot of
16 other courts, Mr. Cannon is not the normal person I
17 see. He does not have that cold blooded element that
18 I think, you know, you would expect. I think he is a
19 good kid who regardless of what happened has fallen
20 into a very bad situation. I'd ask you to take that
21 into account in sentencing.

22 **MR. CANNON:** At this point in time I just want
23 to pay my respects to the victim's family and ask
24 that they understand that I had nothing to do with
25 this and ask that they just pray for me so I can make

1 it through these years.

2 At this time I would like to say I knew Josh. I
3 met him through Sonic. And he was a good kid. He
4 never gave anybody a hard time. Me and Josh got into
5 one conflict due to Melissa Davy. And Ms. Pat can
6 testify that we handled that respectfully as young
7 men and we never looked back with that. That is all
8 I have to say, Your Honor.

9 **MR. MUNNERLYN:** Your Honor, Mario Munnerlyn.
10 I'm the stepfather of Robert Cannon. And first of
11 all, given that God is first in our lives, I want to
12 explain condolences to the family because I've been
13 on both sides of the fence. Just in Georgetown
14 County within the last four years I've had two first
15 cousins brutally murdered, one by her fiance. He
16 shot her in the back of the head as she laid over her
17 daughter. That happened two and a half years ago.
18 And I also had another cousin who was murdered and
19 his body was chopped up and found in potato salad in
20 Andrews, a section of Georgetown County, South
21 Carolina.

22 And also on October the 16th of 2007, my wife
23 and I, we lost triplets during delivery. So my heart
24 goes out to you all because we've lost children also.
25 So, I mean, I can't sit here and point fingers. Just

1 like I said, we all have to give an account to God at
2 the end of the day. I want God to put mercy on your
3 family; I want God to put mercy on our family. And I
4 just pray that we all can forgive each other, we all
5 can learn from this, we all can move on.

6 To Your Honor, I would like to ask that you give
7 leniency on my son. Because I myself, I mean, I
8 graduated from South Carolina State with a degree in
9 political science, prelaw with a minor in criminal
10 justice. So I do understand the law. And I
11 understand if you do the crime you do the time.

12 But I just ask that you find it in your heart,
13 you find it in the family's heart to please forgive
14 him, forgive all of us, because we've all sinned.
15 We've all fallen short.

16 And just like I said again, I want to say I
17 apologize to all of you. Everyone that has done
18 their jobs, you do what you have to do. I can't
19 knock that. I can't judge that. I don't have any
20 pail to put anyone in. So we can't just be judged
21 just because of one incident. And everyone deserves
22 a second chance.

23 The same way I know you wish Josh would come
24 back, I wish for your sake also. I wish my triplets
25 could come back. I had to see them be burnt. I have

1 their ashes on my mantel. Those are the only
2 children I had by birth. Granted, this is my
3 stepson, and I don't believe in the word "step"
4 because I believe if you accept the calf, you accept
5 the cattle.

6 But our heart goes out also because we've been
7 there also. And I just wanted to just say that. And
8 just to God be the Glory and God bless you all.

9 **MS. DAVIS:** My name is Veronica Davis. And I do
10 apologize, Your Honor. Robert is my middle child. I
11 sat back there when Mr. Whitehead and his wife was
12 talking, and I watched Investigator Catoe, and he
13 made faces. When Mr. McDonald spoke, he made faces.
14 But these are our children, too, Your Honor.

15 To the Zoch family, I know how it feels to lose
16 a child. I carried triplets for nine months, and the
17 day they were born they were taken. So I know how it
18 feels to lose a child.

19 Your Honor, I pray and ask that you have mercy
20 on my child. Robert has never been in trouble, don't
21 have a record, don't now how all this even came
22 about. I was even told I don't even need a lawyer.
23 But I would pray that you have mercy on him. When it
24 happened he was 17 and now he is 19 years old. Allow
25 him, oh, Jesus, to be a man and to get a wife and

1 have children and be able to teach them.

2 I wouldn't wish this on my worstest (sic) enemy.
3 And I know there are obviously people who don't like
4 me, but I wouldn't wish this on anybody. As Mr. Zoch
5 said that he have trouble sleeping, I have Lupus and
6 I have aneurysm. And I've been here all week long.
7 And when I leave here, Your Honor, my head hurts so
8 bad, it feels like somebody is hitting me in the head
9 with a hammer. Don't take my child. Again I say to
10 the Zoch family I am deeply sorry. Just have mercy
11 on him. That's all I have to say.

12 **MR. CANNON, SR.:** Good afternoon, Your Honor.

13 **THE COURT:** Good afternoon, sir.

14 **MR. CANNON, SR.:** To the victim's family --

15 **COURT REPORTER:** I'm sorry. I need his name.

16 **MR. CANNON, SR.:** -- the Zochs, my name is
17 Robert Cannon. This is my son.

18 **THE COURT:** This is Robert Cannon.

19 **MR. CANNON, SR.:** And at the time this happened,
20 he was only 17 years old. I heard about it about
21 three days afterwards. And when I faced my son and
22 talked to him, I looked him in the eyes like I always
23 do and talked to him. He said, "Daddy, I did not do
24 this."

25 All I am here to do is say, all I want to do is

1 show my condolences to the Zoch family. I understand
2 their pain. I can't tell them exactly what's going
3 on in their hearts, what's going on in their minds,
4 but I know they are hurting. I know they are, to
5 lose a son.

6 At this moment the only thing I can ask you,
7 Your Honor, is to have mercy on my son. He is a good
8 boy. He doesn't deserve life in jail. Neither of
9 these boys does for a mistake that they could have
10 made or could not make. I don't know this. None of
11 us in this courtroom know this in our hearts, know
12 this to be the truth.

13 Court started on Monday, on Tuesday last week.
14 On that -- on Monday. I'm sorry -- on that Tuesday I
15 was supposed to be at jury in Federal Court. And I
16 actually had to talk to the staff of George Hardwell
17 to let them know I could not be a juror in their
18 courtroom.

19 I've had a lot of pain, a lot of discomfort, and
20 there is no way that I could try to judge somebody
21 else's life considering my situation. All I just
22 want to ask the Court, to be merciful. This boy
23 deserves a break in life. I haven't been there for
24 him all the time, as you can see. But I'm asking
25 you, I'm pleading with you, please give my son a

1 chance.

2 **THE COURT:** Thank you, Mr. Cannon.

3 **MR. KENDRICK:** That is all we have to say, Your
4 Honor. Thank you.

5 (Pause)

6 **THE COURT:** All right. Mr. Whitehead, in light
7 of some of the comments that have been made here
8 today, just to assure myself, I have gone to the
9 statutes of the state of South Carolina with regard
10 to the life without parole statute and I have
11 double-checked it; that is Section 17-25-45 which
12 provides that a person must be sentenced to a term of
13 life without the possibility of parole if that person
14 has one or more prior convictions --

15 (Defendant Whitehead falls to the floor)

16 **MOTHER OF MR. WHITEHEAD:** Get him a doctor. My
17 goodness. If you don't mind.

18 **DEPUTY:** Sit down, ma'am. Sit down, ma'am.
19 Ma'am, please sit down.

20 **MOTHER OF MR. WHITEHEAD:** He has seizures.

21 **THE COURT:** Does he have medication?

22 **MOTHER OF MR. WHITEHEAD:** He hasn't had a
23 seizure in a long time, but he's had them. And as
24 much stress as he's under, please watch him for that.
25 He has seizures. And as much stress as he's under

1 right now --

2 **THE COURT:** Medication?

3 **MOTHER OF MR. WHITEHEAD:** Medication hasn't been
4 needed because he hasn't had one in a long time.

5 **UNKNOWN PERSON:** Get him into an elevated state,
6 about two and a half inches.

7 **MOTHER OF MR. WHITEHEAD:** Excuse me, Your Honor.
8 I've taken care of his seizures before. Is there any
9 way that I can look at him? I don't see a medical
10 person.

11 (Off the record)

12 (Pause)

13 **THE COURT:** Mr. Reuwer, you ready to continue?
14 Mr. Riley? Mr. Reuwer?

15 **MR. RILEY:** I believe so, Your Honor.

16 **THE COURT:** All right. Well, I wanted to
17 explain that the statutes, the laws passed by the
18 Legislature do not allow me any variation from the
19 sentences that are mandated by that statute. The
20 State has provided a certified copy of an attempted
21 armed robbery that the defendant, Whitehead, pled
22 guilty to in 2005. That statute is a qualifying
23 statute for the life without parole statute.

24 And as much as I would feel differently or might
25 feel differently in terms of sentencing Mr.

1 Whitehead, I have no choice. If I violate the law,
2 if the solicitor violates the law, then there are --
3 the system falls apart. My responsibility is to
4 follow the law as it's written by the Legislature.

5 Therefore, on indictment 2007-GS-28-00022,
6 Christopher Whitehead, indictment for murder, the
7 sentence of the Court is you be committed to the
8 State Department of Corrections for the remainder of
9 your life without parole.

10 On indictment number 2007-GS-28-00019, the
11 offense of burglary in the first degree, the sentence
12 of the Court you is be committed to the State
13 Department of Corrections for the remainder of your
14 life without parole. Both sentences are to run
15 concurrent.

16 As to Mr. McDonald and Mr. Cannon, I feel that
17 both of these defendants should be treated in a
18 similar fashion, both of whom have -- both
19 individuals have denied being a part of these most
20 serious crimes, but the jury has found both of them
21 guilty. And despite their protestations, I must look
22 at this as a guilty plea. I am not the fact finder
23 in this case. The jury was.

24 These are unfortunate circumstances. I mean,
25 they're not unfortunate. They're tragic with regard

1 to all four of the families that are involved in this
2 case. I probably would agree with someone who said
3 that drugs are one of the -- it's been true for a
4 long time -- but one of the most serious blights on
5 this society. None of us are safe from the ravages
6 of the drug culture.

7 However, be that as it may, each of you, Mr.
8 Cannon and Mr. McDonald, are responsible for your own
9 acts, and all acts are the result of choices and
10 those choices bring about consequences. But I do
11 feel in this case that just possibly one or both of
12 you may have something worth saving. And I hope you
13 do. And, frankly, I hope everybody in this room
14 does, for the sake of humanity.

15 Therefore, the sentences as to both are as
16 follows: On indictment number 2007-GS-28-00016,
17 Derrick McDonald, charged with burglary in the first
18 degree; and 2007-GS-28-00017, Robert Cannon, the
19 charge of burglary in the first degree, the sentence
20 of the Court is you be committed to the State
21 Department of Corrections for 35 years.

22 As to indictment number 2007-GS-28-00015,
23 Derrick McDonald, indictment for murder; and
24 2007-GS-28-00018, Robert Cannon, indictment for
25 murder, the sentence of the Court as to each is that

1 you be committed to the State Department of
2 Corrections for a period of 35 years. All sentences
3 are to run concurrent. Anything further?

4 **MR. KENDRICK:** No, Your Honor.

5 **MR. MEADORS:** Thank you.

6 **MR. WHITLARK:** No, Your Honor.

7 **THE COURT:** This court stands adjourned.

8 (Whereupon, the proceedings are concluded)

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CERTIFICATE OF REPORTER:

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

I, Jenny H. Williams, Official Court Reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Kershaw County, South Carolina, on the 6th, 7th, 8th, 9th, 13th days of May, 2008.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

October 20, 2008

Jenny H. Williams
Jenny H. Williams, Court Reporter

STATE OF SOUTH CAROLINA)
COUNTY OF KERSHAW) COURT OF GENERAL SESSIONS
) 07-GS-28-15 - 22

State of South Carolina)
)
) TRANSCRIPT OF RECORD
) (Post Trial Motions)
)
Derrick McDonald,)
Christopher Whitehead,)
)
) Defendants.)

September 3, 2008
Columbia, South Carolina

BEFORE:

THE HONORABLE G. THOMAS COOPER, JR., JUDGE

APPEARANCES:

JOHN MEADORS, DEPUTY ASSISTANT SOLICITOR
JOANNA MCDUFFIE, ASSISTANT SOLICITOR
RON MOAK, ASSISTANT SOLICITOR
Attorneys for the State

NEIL RILEY, PUBLIC DEFENDER
Attorney for Christopher Whitehead

MARCUS WHITLARK, ATTORNEY AT LAW
Attorney for Derrick McDonald

JENNY H. WILLIAMS
Official Circuit Court Reporter
(803) 576-1743

1 Wednesday, September 3, 2008

2 THE COURT: All right. This is a hearing to
3 Defendant McDonald's -- it is Derrick McDonald's
4 motion for a new trial. This motion was filed it
5 looks like -- frankly, I can't read the date on the
6 stamp -- by Mr. Whitlark. Mr. Whitlark, are you
7 ready to proceed?

8 MR. WHITLARK: Yes, I am, Your Honor. I would
9 point out to the Court, I believe that Mr. Neil (sic)
10 was here.

11 THE COURT: Mr. Riley?

12 MR. WHITLARK: Mr. Riley is here. I'm sorry.
13 Mr. Neil Riley. I saw him downstairs.

14 THE COURT: Well, he's not in here where he
15 needs to be. I'll hear his motion if he appears.

16 MR. MOAK: Your client is not in here.

17 MR. WHITLARK: Yeah. My client is not here
18 either. I understand they're bringing him up from
19 downstairs.

20 THE COURT: You've spoken with your client?

21 MR. WHITLARK: No. I have not spoken to him
22 yet.

23 THE COURT: Your client's here?

24 MR. WHITLARK: Yes. They have him downstairs.
25 They're bringing him up now. Do you want me to go

1 round up Mr. Riley, Your Honor?

2 THE COURT: Sir, I set a hearing at 2:00.

3 MR. WHITLARK: Yes, sir.

4 THE COURT: And I've got a jury that's coming
5 back in at 2:30. So I'm doing the best I can.

6 (Pause)

7 THE COURT: All right. Let's see. Well,
8 Mr. McDonald is not here. Mr. Whitehead is here.
9 Mr. Riley, are you prepared to go forward?

10 MR. RILEY: Yes, sir.

11 THE COURT: If Mr. McDonald appears, we'll take
12 up his motion. All right, sir. Mr. Riley, you may
13 proceed.

14 MR. RILEY: Your Honor, does the Court have
15 copies of my two motions?

16 THE COURT: I've got a motion for a directed --
17 renewed motion for a directed verdict and a motion
18 for a new trial.

19 MR. RILEY: Yes, sir.

20 THE COURT: Are those the two that you speak of?

21 MR. RILEY: That's correct, Your Honor.

22 THE COURT: All right. You may proceed.

23 MR. RILEY: Do you have any preference as to
24 which one I discuss?

25 THE COURT: No, sir.

1 MR. RILEY: All right. Judge, the basis for my
2 motion for a new trial, essentially, of course I
3 don't want to belittle or diminish any of the
4 arguments that I make in my supporting memorandum;
5 but, essentially, I want to emphasize particularly
6 the Gullledge case which I have a copy of for the
7 Court.

8 THE COURT: If you want to hand it up, I'll take
9 a look at it.

10 MR. RILEY: All right, sir.

11 THE COURT: I've probably read it, but I'm not
12 familiar with it at this moment.

13 MR. RILEY: This case, Judge, held that --
14 basically the facts were that a transcript was
15 prepared of a conversation by a -- I'm sorry? A
16 transcript of a tape recorded communication between
17 two Highway Patrolmen. The jury apparently had asked
18 for that to be reduced to a transcript. When they
19 began their deliberations, the judge allowed the jury
20 to take the transcript of the tape into the jury
21 room.

22 And the Court, Chief Justice Lewis, writing for
23 the majority, wrote that: "We hold the judge abused
24 his discretion in allowing the jury to take the
25 transcript of the tape into the jury room because it

1 unduly emphasized that evidence."

2 In the case before you, in the Whitehead case,
3 of course Your Honor will remember that the jury was
4 allowed to take into their jury room the transcripts
5 of three witnesses' testimony, Officer Phil Crawford,
6 Officer Danny Catoe, and the quote, unquote,
7 courthouse snitch, Mr. Jenkins', testimony.

8 It is the position of Defendant Whitehead that
9 that was reversible error due to the fact that
10 allowing the jury to have in their hands during their
11 deliberation process a transcript of Mr. Jenkins'
12 testimony unduly emphasized that --

13 THE COURT: Of Jenkins' testimony. You said
14 Crawford's testimony and Catoe's testimony.

15 MR. RILEY: They had transcripts of those three;
16 Crawford --

17 THE COURT: And Jenkins?

18 MR. RILEY: And Jenkins. Yes, sir. And of
19 course I am particularly concerned with the jury
20 being allowed to have in their jury room a transcript
21 of Jenkins' testimony, because, as Your Honor
22 recalls, he was the individual who allegedly
23 overheard a conversation by an unidentified
24 individual while he was incarcerated. He only later
25 on learned who the identity of that speaker was; and,

1 according to his testimony, that speaker was
2 Defendant Whitehead. I believe that under the
3 Gulledge holding, allowing the jury to have that
4 transcript with them unduly emphasized that evidence.
5 That's point number one.

6 Point number two, I probably should have started
7 with this instead of making it point number two. I
8 think that Jenkins' testimony was inadmissible
9 because of the fact that, granted, as the Court held,
10 voice identification testimony under the rules of
11 evidence is admissible. However, the indicia of
12 reliability as to Mr. Jenkins' identification of the
13 speaker who allegedly uttered inculpatory comments
14 about this incident were just unreliable. He didn't
15 know who it was that was speaking. He couldn't see
16 who was speaking.

17 He only learned later allegedly by asking
18 Officer Harvey who is an employee of the Kershaw
19 County Detention Center who it was that was housed in
20 the cell next to him. Officer Harvey, if you'll
21 recall, Judge, testified he didn't recall Jenkins
22 asking him about it. He didn't recall the question
23 or him ever answering that question.

24 THE COURT: Didn't Jenkins later identify the
25 Defendant from a face-to-face confrontation in some

1 sort of other setting, some other room, some other --
2 my recollection has to do with a prayer group or
3 something like that.

4 MR. RILEY: Your Honor is correct. But that was
5 after -- that was supposedly after he had asked
6 Officer Harvey who it was that was in the cell next
7 to him.

8 And you'll recall, Your Honor, I argued
9 vigorously at trial that due to the layout of the
10 holding cells and due to the effect that the
11 acoustics are not exactly as good as they are, for
12 example, in this courtroom; bare walls, no
13 sound-ending materials, no carpeting, et cetera, et
14 cetera, Mr. Jenkins really and truly wasn't certain
15 that the voice he heard was coming from the cell next
16 to him. He couldn't have been certain of it.

17 It could have been a voice that carried not only
18 from some other cell in that particular area where he
19 was; but because of the way the vents connect to
20 floors, it could have been a voice that was coming
21 from a different floor entirely. Your Honor may
22 recall testimony about the vents.

23 THE COURT: I remember the vent locations.

24 MR. RILEY: Right. Mr. Jenkins during his
25 testimony -- and of course this all was incorporated

1 in the transcript that the jury had in their
2 possession -- he also testified about a later
3 confrontation between him and Defendant Whitehead
4 which took place in the activities room of the
5 detention center and was during a visit by the prison
6 chaplain for the holding of some sort of a prayer
7 service.

8 He said that he went after Whitehead because he
9 was -- he candidly admitted he was a friend of the
10 victim, the decedent; and he said that he went after
11 Whitehead after once again hearing his voice,
12 realizing that was the individual that Officer Harvey
13 had told him had been incarcerated in the cell next
14 to him.

15 And there again, Judge, Mr. Harvey said
16 according to his records there was absolutely no
17 incident report of any kind of a scuffle or
18 confrontation or physical altercation between Mr.
19 Jenkins and Mr. Whitehead.

20 THE COURT: All right.

21 MR. RILEY: In addition, Judge, the other points
22 that I would like to just briefly touch upon; and I
23 think that my distinguished co-counsel will probably
24 be spending a lot more time on this than I, we feel
25 that the evidence, the admission of the statements by

1 the co-defendants was unduly prejudicial.

2 I realize that the Court held a Jackson v. Denno
3 hearing and ruled that those statements after
4 redaction could come in. But we believe that as the
5 third Defendant who did not sign a statement, made no
6 statement whatsoever, the admission of his
7 co-defendants' statements was unduly prejudicial.

8 We also would argue that the Court allowed too
9 many of the inflammatory photos of the crime scene to
10 be admitted into evidence, that errors were made
11 during the testimony of two witnesses, witness Catoe.
12 And here again, Catoe's transcribed testimony was
13 with the jury during their deliberations. Witness
14 Catoe specifically said the name Chris during his
15 reading of Defendant Cannon's statement.

16 Also in his closing argument to the jury
17 Solicitor Meadors said not only the name Chris; he
18 also used the number three, referring to three
19 defendants.

20 Judge, my renewed motion for a directed verdict,
21 this brief was prepared 99 percent by Mr. Reuwer and
22 Mr. Kirincich who is here today. Basically the
23 argument that we presented to the Court at the close
24 of the State's case, I am renewing that argument as I
25 believe the rules allow me to do at such a setting as

1 this.

2 We argue that not only is there no direct
3 evidence connecting Mr. Whitehead to the crime, no
4 fingerprints, shoe prints, tire tracks, DNA evidence,
5 hair, fibers, nothing of that sort; but the
6 circumstantial evidence is also of such a weak
7 nature, a thin nature that a directed verdict should
8 have been granted by the Court.

9 And, essentially, Judge, without belaboring the
10 Court's time, that is the position of Defendant
11 Whitehead as to the two motions.

12 THE COURT: All right. What's the State's
13 position?

14 MR. MOAK: Your Honor, the only thing new that
15 I've heard today that was not already argued before
16 you back at the trial, Your Honor, is this thing
17 about the transcripts being admitted to the jury
18 room. Our position on that is, my recollection is
19 the jury had a question. They wanted to rehear the
20 testimony.

21 And both sides, both the State and the defense,
22 agreed that the transcripts would go into the jury
23 room. I don't see how you can agree to it and then
24 call foul after you've already agreed to it. I just
25 don't see how you can possibly make that argument.

1 Again, I mean, under the rules, I believe you
2 have to have a contemporaneous objection to later
3 complain about it. Not only did they not object to
4 it; they agreed to it. So that's our position on the
5 transcripts going back into the jury room.

6 Everything else that I heard Mr. Riley say, Your
7 Honor; and I've read the brief and the written
8 motion, they really appear to be just a written
9 version of what was already argued at trial, Your
10 Honor.

11 For example, the prejudicial photographs, we had
12 a great many more photographs that we would have
13 liked to have admitted, and we culled those down with
14 the input of the defense attorneys and presented
15 those. They did object to them when they were
16 admitted, but we feel that --

17 THE COURT: I think they did object to them but
18 I ruled them admissible. I think they objected to
19 them.

20 MR. MOAK: Yeah. They objected to it. But the
21 ones that they objected to, they actually had input
22 on the selection of those pictures. There were some
23 that were clear --

24 THE COURT: The ones that were introduced into
25 evidence I think they objected to and I admitted them

1 over their objection.

2 MR. MOAK: Yes, Your Honor. I agree. Our
3 position is that those pictures fairly and accurately
4 depict the scene, gave the jury an accurate picture
5 of what happened and were not unduly prejudicial. I
6 believe they were more of a distance of the body
7 rather than close ups that we had. They showed the
8 layout of the room. And you can see where the
9 objects were. But they were not close ups. They
10 were not autopsy photographs. Our position is they
11 were not unduly prejudicial and you were correct in
12 allowing them into evidence.

13 The Jackson v. Denno, we had an extensive
14 hearing before we even swore the jury on Jackson v.
15 Denno. I believe all of that was explored. I
16 believe you correctly ruled that the jury was allowed
17 to hear the statements, and it was up to them to
18 decide whatever weight or reliability or credibility
19 they wanted to assign them. I believe it's clear
20 from the verdict that they decided that the
21 statements that were redacted that were put in,
22 apparently they --

23 THE COURT: Well, that's not the test, whether
24 the jury can read the questions. The test is, was it
25 a sufficient redaction to protect those who were not

1 giving the statement; in other words, the
2 co-defendants. That's always problematical.

3 MR. MOAK: But again, Your Honor, they had the
4 same arguments at trial. You ruled on them. Our
5 basic position is your rulings at trial were correct.
6 The statements -- I mean, as to the lack of
7 circumstantial evidence, reading the written brief,
8 there is actually something that they mentioned at
9 closing arguments that I noted at trial that was
10 actually an incorrect statement of the facts about
11 the pipes of the car, Your Honor.

12 As to Mr. Whitehead, I believe one of the
13 co-workers from the Sonic that was not involved in
14 this had seen him at the Sonic with the other two
15 co-defendants the night of the incident. One of the
16 questions from that witness was about the loudness of
17 this car. And that witness who didn't know what kind
18 of pipes was on the car stated it was louder than
19 normal, you could hear it coming.

20 Mr. Bacco who heard a vehicle at the home
21 around the same time that the incident, our position
22 is the incident took place, heard a vehicle that was
23 louder than normal and he thought it might not have
24 been stock pipes. The only witness that could have
25 testified as far as any knowledge that that car did

1 not have stock pipes would have been Mr. Whitehead
2 and he chose not to testify.

3 So when they're putting it in as a fact that
4 that car had stock pipes and it could not have been
5 the one that Baccomo heard, that's a fact that's not
6 in the evidence, Your Honor. What's in the evidence
7 is he's driving a car that's louder than normal.

8 He is with the two co-defendants that night.
9 The two co-defendants have admitted to being there.
10 And even in their redacted statements they allege
11 there's somebody else with them. The unredacted
12 actually identifies Mr. Whitehead, but the redacted
13 ones actually identify somebody else involved in it.

14 Mr. Whitehead the next day tells Cecil Trapp
15 that he is going to file a Workmen's Comp claim for
16 his foot because he was out with his friends and got
17 hurt. Our position is the two friends he's talking
18 about are the two co-defendants and he hurt his foot
19 kicking the door in. And he filed that Workers' Comp
20 claim.

21 I think we've got ample circumstantial evidence
22 that was admitted properly that ties Mr. Whitehead to
23 this incident, that ties Mr. Whitehead to being with
24 the co-defendants and being an active participant of
25 this crime.

1 So I believe that it was properly submitted to
2 the jury; all the evidence, the statements, the
3 photographs, the transcripts. I mean, as to this
4 Gulledge case, Your Honor, they agreed to submit that
5 transcript to the jury. I don't see how they can
6 claim now after the fact foul on something they'd
7 agreed to.

8 MR. MEADORS: Beg the Court's indulgence.

9 MR. MOAK: And as to the voice identification,
10 as Your Honor may recall, there was a lot about that
11 voice identification at the trial. And I believe
12 Your Honor correctly focused on when you decided to
13 admit the voice identification is what the actual
14 testimony was.

15 Jenkins said that he heard a voice of the cell
16 nextdoor, wherever it was he heard the voice, talking
17 about killing Mr. Zoch. And there was something
18 about he saw Whitehead's name on a sign-in sheet or
19 whatever.

20 But later on when he got in the altercation with
21 Mr. Zoch (sic), he testified he heard that voice;
22 it's the same voice he'd initially heard. He got in
23 the altercation with him and that was that Defendant.
24 He identified him as the one he got in the
25 altercation with. So actually, you know, he himself

1 identified the Defendant by hearing the same voice,
2 tying that voice to the face.

3 I believe the thing about the sign-in sheet and
4 all that other stuff inbetween actually was, you
5 know, really irrelevant as to whether or not he got
6 the right voice and the right face. The witness
7 testified that's the same voice. That's the guy who
8 the voice was coming from. And I believe he actually
9 pointed out in trial that that's the guy I heard.

10 So, I mean, whether or not you can find him
11 credible or not, I believe there is enough there to
12 pass the bar of admissibility and let the jury decide
13 whether or not he's credible and decide what weight
14 they want to put to that evidence. So again, I would
15 submit that that was properly admitted.

16 THE COURT: So your position on the corpus
17 delicti issue is that there was sufficient
18 evidence --

19 MR. MOAK: Yes, Your Honor.

20 THE COURT: -- circumstantial evidence --

21 MR. MOAK: Yes, Your Honor.

22 THE COURT: -- to overcome the corpus delicti.

23 MR. MOAK: Your Honor, you've got the Defendant
24 with the other Defendant. We've got Mr. Whitehead
25 with the other two co-defendants. The two

1 co-defendants had admitted their involvement in this.
2 The door was kicked in. We've got the Defendant with
3 a hurt foot or ankle which would be consistent with
4 kicking that door in. We've got the Defendant
5 driving a loud vehicle which was heard by Mr.
6 Baccomo, the neighbor, around the same time as the
7 incident.

8 We've got the -- I believe the co-defendants'
9 statements, we actually confirmed that, because there
10 was part of a purple glove found in the home, and one
11 of the co-defendants in his statement said they went
12 to Wal-Mart and bought that. And I believe
13 Mr. Whitlark is complaining about that in his motion.

14 But, Your Honor, we went to that Wal-Mart. It
15 was to me amazing that in all the Wal-Marts in the
16 world, there was only one box of those purple gloves
17 that was sold in every Wal-Mart in the world. I
18 believe there was a couple of thousand of them in the
19 United States. That night there was only one box
20 sold and it was sold from the store in Spring Valley
21 which is where the guy said he went to. So I believe
22 that corroborates the statement of what they did that
23 night.

24 So I guess I would say that we have sufficient
25 circumstantial evidence tying Mr. Whitehead to this

1 crime to prove corpus delicti.

2 MR. MEADORS: In addition, Your Honor, just if I
3 could add briefly. There was a phone call to Zack
4 Waltemath I believe who said around the same time
5 period who he identified as Defendant Whitehead
6 called and said, come go with us to beat Josh's ass,
7 which again would be incredible circumstantial
8 evidence alone in our opinion along with these other
9 items that Mr. Moak has mentioned.

10 THE COURT: All right. Mr. Whitlark.

11 MR. RILEY: Judge, could I follow up, Your
12 Honor?

13 THE COURT: Oh. All right. Go ahead.

14 MR. RILEY: Very briefly, Judge.

15 THE COURT: Sure.

16 MR. RILEY: I couldn't help but notice that Mr.
17 Moak carefully stayed away from directing any
18 attention to the Gullledge decision. The Gullledge
19 decision doesn't say that the judge allowed the jury
20 to take the transcript of the tape into the jury room
21 over anybody's objection. It doesn't say there was
22 any objection. The judge just decided to allow the
23 transcript to go into the jury room.

24 Secondly, Judge, on the Bruton issue, I'd like
25 to point out Rule 17 of the South Carolina Rules of

1 Criminal Procedure. "If an objection has once been
2 made at any stage in the admission of evidence, it
3 shall not be necessary thereafter to reserve rights."
4 Thank you, Judge.

5 THE COURT: Yes, sir. I understand that. All
6 right, Mr. Whitlark. You have moved on behalf of
7 Mr. McDonald --

8 MR. WHITLARK: Yes, Your Honor.

9 THE COURT: -- for a new trial.

10 MR. WHITLARK: Yes, sir. May it please the
11 Court, Your Honor?

12 THE COURT: Yes, sir.

13 MR. WHITLARK: Your Honor, first of all, before
14 I begin I'd like to say that the fact that there was
15 no forensic evidence connecting him to this has to be
16 considered in reviewing all of this, because anything
17 that was admitted into evidence has to carry a lot of
18 weight, particularly those receipts from Wal-Mart.
19 Clearly they're hearsay, Your Honor. And I believe
20 the Court let them in under the Business Records
21 Exception.

22 However, Your Honor, this lady was not the
23 custodian. And you did define for me that the modern
24 age we live in that there is no records custodians
25 normally anymore. However, Your Honor, basically

1 what we had here was a lady that was reading off of
2 computer records. So that's definitely hearsay.

3 The statement that no other gloves were sold in
4 any other stores was further hearsay, Your Honor.
5 And basically we had no right to confront whoever
6 gave that information to this young lady. We had no
7 right, we had no ability to question whether or not
8 these records were legitimate or accurate and how
9 they were kept.

10 Despite the fact that the young lady said that
11 she worked in the area with the computers and was
12 able to pull those off, Your Honor, still clearly is
13 extremely prejudicial to these young men, letting
14 those two receipts in which were cash receipts. We
15 didn't have the cashier that did the transaction.

16 And most importantly, I meant to mention to Your
17 Honor that Wal-Mart is famous for filming what goes
18 on in their stores, Your Honor. The fact they didn't
19 produce a videotape of this transaction also lends
20 the unreliability to this equation.

21 The fact that we weren't able to cross examine
22 any of these people that either did the transaction
23 or compiled the records was extremely prejudicial.
24 And I on that point, Your Honor, would say that that
25 should grant us a new trial because of the

1 prejudicial nature of those two receipts.

2 Do you want me to just go in order, Your Honor?

3 THE COURT: Yes, sir.

4 MR. WHITLARK: Next, Your Honor, the statements.

5 I mean, clearly, Your Honor, the admission of the
6 statements is reversible because, number one, they
7 were hampered by the police. Number two, they were
8 gotten from Mr. Cannon which started this whole case
9 after they obviously made a promise to him, Your
10 Honor.

11 I mean, all of the circumstantial evidence
12 surrounding the taking of the statement from Robert
13 Cannon shows that he didn't want to talk to them
14 until a higher authority came. And they admitted
15 this on the stand, that he wanted to talk to somebody
16 in authority, he wanted some help. They admitted
17 that.

18 I believe it was Captain Thomley who came and
19 talked with him face-to-face for a few minutes. And
20 then, at that point after a lengthy period of time of
21 not discussing anything with them, he gave a full --
22 he signed a Miranda waiver and gave a full statement
23 to them.

24 The problem with this, Your Honor, is that it
25 shouldn't be admissible because it's not voluntary.

1 It's not voluntary because they promised him
2 something. And so the facts, the circumstantial
3 evidence around Robert Cannon is very, very strong,
4 Your Honor. It's extremely strong showing that they
5 promised him something.

6 They didn't take him into custody after he gave
7 that statement. His parents who were there the whole
8 time felt relaxed enough to leave town the next day
9 with no concerns. And basically these are
10 circumstantial evidence of the atmosphere that was
11 projected by these police to Mr. Cannon.

12 And I believe, Your Honor, that the fact that he
13 was 17 and had no lawyer with him and was talked to
14 by these police officers should be considered by the
15 Court and on that basis would ask that the Court
16 grant a new trial because without that evidence I
17 don't believe they could have gotten a conviction,
18 based on the lack of evidence, lack of forensic
19 evidence.

20 Next, Your Honor, I'll talk about the statement
21 of Jenkins, Your Honor, which has been gone into by
22 Mr. Riley. Jenkins was not an expert in any voice
23 identification, Your Honor. And the fact that he
24 gave untruthful testimony during the proffer of his
25 testimony about his record and about some other

1 matters, Your Honor, and the fact that we didn't
2 receive a copy of his record until he was on the
3 stand, I did not know that the young man had a record
4 that extensive. And I believe that's a Rule 5
5 violation.

6 Like I said, Your Honor, anything that the Court
7 considers in this case is important in weight because
8 of the lack of forensic evidence. There is
9 absolutely none connecting these young men to this.
10 And so any little piece of evidence cannot be viewed
11 reasonably as harmless in this case. Anything they
12 got in there carried weight.

13 So on that basis we'd ask for a new trial
14 because he shouldn't have been convicted because that
15 evidence certainly could have helped the jury decide
16 guilt.

17 Also, Your Honor, in general in this case, there
18 was a real lack of evidence. And the fact that the
19 Court, the Court itself stated I believe, I believe
20 you stated, Your Honor, after the Jackson v. Denno
21 hearing that this is just barely enough under a
22 preponderance standard to let it go in front of this
23 jury.

24 Of course we know the standard changes to beyond
25 a reasonable doubt because it's a voluntary statement

1 and so forth if they meet the requirements of Miranda
2 under the Fifth Amendment. And, Your Honor, nothing
3 really changed after that. The evidence came in that
4 the jury was given. But as a matter of law, Your
5 Honor, I don't believe that a jury based on the facts
6 could find beyond a reasonable doubt that these were
7 voluntary without promises, inducements or coercion,
8 the statements; and I'd ask the Court to grant a new
9 trial on that basis. Thank you, Your Honor.

10 THE COURT: What's the State's position?

11 MR. MEADORS: Very briefly, Your Honor.
12 Initially, Mr. Cannon's statement I don't think is an
13 issue here for these proceedings. He did not file
14 any post-trial motions.

15 As far as -- but just for the record, Cannon's
16 and McDonald's statements, there was a lengthy
17 Jackson v. Denno hearing before Your Honor. Your
18 Honor initially decided these were freely and
19 voluntarily given. The jury obviously was instructed
20 that they must also find that these statements were
21 freely, voluntarily given and not coerced. Both
22 sides argued it. The jury came back with their
23 decision that they were voluntary apparently.

24 And, Your Honor, I think all the rights were
25 preserved and the jury was instructed by Your Honor

1 correctly on the law. So everything that could be
2 done to ensure that these two Defendants were given
3 the opportunity specifically -- well, actually just
4 McDonald -- the Jackson v. Denno, the jury, they were
5 properly instructed. So we don't think that's an
6 issue at this point, Your Honor.

7 Judge, besides that, just going down the list;
8 got them together at Sonic, phone call to Zack
9 Waltemath: Come on with me; let's go beat his ass.
10 Purple gloves found. The scene that is described in
11 two of the co-defendants' statements matches the
12 scene that's there. Two of the individuals did
13 confess, implicating themselves. We went to extremes
14 to redact so there'd be no further reference, I think
15 the only way you can do it, keeping it in context.
16 We did that.

17 Afterwards the Workers' Comp claim that
18 Whitehead made to Pat Heathcoe. That's a jury issue.
19 He said he was fine the day before. That was an
20 issue whether or not they believed him. Obviously
21 they didn't believe him. The statements to Pat
22 Heathcoe which was inconsistent with his demeanor
23 prior. I'm talking about Whitehead now, how he just
24 quit, how he left.

25 And then the hearsay -- excuse me -- the

1 comments, the hero comment that Mr. Jenkins heard Mr.
2 Whitehead bragging. We're going to be heros. They
3 ain't got any evidence on us. When we get out we'll
4 go back to school. He identified that same voice
5 when he sees him later in the multipurpose room.
6 That's the same voice I heard bragging about killing
7 Mr. Zoch. Your Honor, we respectfully say Your Honor
8 let that go to the jury as you should and I think the
9 jury found Mr. Jenkins credible.

10 Judge, beg the Court's indulgence. Beyond that,
11 as just to Mr. McDonald, clearly, Jackson v. Denno I
12 think is the only thing I've heard. That was
13 properly submitted to the jury.

14 THE COURT: Well, he challenges the admission of
15 the cash receipts from Wal-Mart.

16 MR. MEADORS: Your Honor, I don't know how else
17 you can do it. We brought somebody from Wal-Mart.
18 It was introduced as a Business Record Exception. I
19 can't control whether or not there was video. There
20 was great cross by all these lawyers on that fact;
21 where is the video. The jury heard all that. We had
22 somebody from Wal-Mart that came in and said this
23 receipt came from this Wal-Mart on this date and then
24 there were purple gloves purchased here I believe
25 along with a mask.

1 And, Judge, we're forgetting -- well, I know you
2 aren't, but I was forgetting -- when they were first
3 at Sonic earlier that evening there was a mask there.
4 They came in. If you remember, Mr. Cannon was joking
5 around. And that was -- I can't remember his last
6 name. Mr. Allen Brown recognized him, said, get out
7 of here. Robert, I know that's you. Get out of here
8 with your mask. That going in with circumstantial
9 evidence, a mask was purchased, gloves were
10 purchased, that's great circumstantial evidence,
11 Judge, and direct evidence.

12 THE COURT: You think that those receipts were
13 self authenticating?

14 MR. MEADORS: Yes, sir. I don't think there's
15 any question about it when you have somebody from
16 Wal-Mart come and said, this came from our system,
17 this cannot be altered before or afterwards.

18 THE COURT: No. What's shown on -- the
19 information shown on the receipt would seem to me
20 that it would authenticate where it came from. It
21 didn't need a witness to testify where it came from.

22 MR. ANDERS: It was self authenticating. I
23 think it showed the store, the address. And I
24 apologize. The store, the address, the time which
25 did corroborate two of the confessions that they had

1 been there approximately at this time, corroborated
2 the phone call Mr. Waltemath said he got.

3 But, Your Honor, as far as the receipts, we
4 think it's self authenticating. We brought somebody
5 from Wal-Mart to testify these came from our store.
6 They couldn't be altered. There's no way to alter
7 them before and afterwards. And it was a couple of
8 years after this when we got them. I think that
9 added to the fact that they were what they were.

10 THE COURT: Any reply? Yes, sir.

11 MR. WHITLARK: Yes, Your Honor. Your Honor,
12 just as a point here, I've been involved in a case
13 where Wal-Mart employees have falsified evidence in a
14 criminal case. So, you know, as far as that goes, I
15 don't think that should carry any weight at all with
16 the Court.

17 But the fact is, Your Honor, Cannon's statement
18 is important, because without Cannon's statement they
19 can't get a warrant for McDonald. And that's why
20 this whole case hinges on whether it was voluntary or
21 involuntary, whether it was a promise or a threat to
22 Cannon. Without Cannon there is no case because they
23 could not get a warrant. All of it would have been
24 fruit of the poisonous tree, Your Honor. And
25 anything McDonald says, Your Honor, would not be

1 admissible because Cannon's statement was the
2 supporting document supporting the evidence for a
3 warrant.

4 So I would ask the Court to consider again the
5 youth of this young man. He was 17 years old. Mr.
6 Cannon was. And all of the indicia in this case, all
7 of the circumstantial evidence says he was promised
8 something, Your Honor; particularly the fact they
9 didn't take him into custody after he confessed to a
10 murder.

11 THE COURT: All right, sir.

12 MR. MEADORS: And, Your Honor, just to follow
13 up. And specifically on Mr. Cannon, there was a
14 Jackson v. Denno hearing. At least one, maybe two
15 officers were called. In addition, Captain Thomley
16 was called. And it was fully explored that he came,
17 had a conversation with Mr. Cannon after that. And
18 he said the conversation was we'd put in a word. And
19 did you do that? He did. He put in a word with me.
20 And we'll put in a word with the Court if you
21 cooperate. That was argued completely before Your
22 Honor made an initial ruling. And the jury heard all
23 that. So we would ask Your Honor to again deny these
24 motions and rule as you did previously. Thank you.

25 THE COURT: All right. I'll review the file. I

1 need to do that before I make the decision. I'll let
2 you know. I'll take it under advisement. I'll let
3 you know. Thank you very much.

4 MR. MEADORS: I know there's several family
5 members for the Defendants here. The record will
6 acknowledge that. And also Mr. Zoch's grandparents
7 are also present. I want the record to reflect that.

8 THE COURT: Sure. Absolutely.

9 MR. RILEY: Thank you, Judge.

10 THE COURT: Thank you very much.

11 (Whereupon, the proceedings are concluded)

12

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1 CERTIFICATE OF REPORTER:

2

3

4 STATE OF SOUTH CAROLINA)

)

5 COUNTY OF RICHLAND)

6

7

8 I, Jenny H. Williams, Official Court Reporter for the
9 Fifth Judicial Circuit of the State of South Carolina, do
10 hereby certify that the foregoing is a true, accurate and
11 complete Transcript of Record of the proceedings had and
12 evidence introduced in the Post Trial Motions of the
13 captioned case, relative to appeal, in the Court of
14 General Sessions for Kershaw County, South Carolina, on
15 the 3rd day of September, 2008.

16 I do further certify that I am neither of kin,
17 counsel nor interest to any party hereto.

18

19

February 10, 2009

20

21

Jenny H. Williams, Court Reporter

22

23

24

25

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF Kershaw)

IN THE COURT OF COMMON PLEAS

Full name and prison number (if any) of Applicant.)

Derrick McDonald #328344)

v.)

State of South Carolina)

2015-CP-28-443

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 5th Circuit Court of General Sessions, Kershaw County
3. Name(s) of co-defendant(s) (if any) Robert Cannon, and Christopher Whitehead
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2007-GS-28-00015, 35 years for Murder
 - (b) 2007-GS-28-00016, 35 years for Burglary 1st Degree
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) 5/13/08, 35 years for both indictments to run concurrent.
 - (b) _____

ATTEST True, Correct & Certified
Copy of Original on File in this
Court Revised 3/2003

Derrick McDonald
Clerk of Court Kershaw County

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ✓
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- Court of General Sessions (Motion for new trial)
 - Court of Appeals (Direct Appeal)
 - South Carolina Supreme Court (Writ of Certiorari)
- (b) the result in each such Court to which you appealed:
- Denied Motion for New Trial
 - Conviction affirmed, Rehearing denied in Direct Appeal
 - Conviction affirmed as modified in Writ of Certiorari
- (c) the date of each such result:
- Sept. 15th, 2008
 - Sept. 12th, 2012, Rehearing denied Nov. 30th, 2012
 - April 22, 2015
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- _____
 - _____
 - Opinion No. 275/5
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:

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2015 MAY -8 AM 11:12
JUDICIAL COUNCIL
CLERK OF COURT
KERSHAW COUNTY, S.C.

- (a) Ineffective Assistance of Trial Counsel
 (b) Ineffective Assistance of Appellate Counsel
 (c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) See Supplement Page 1
 (b) _____
 (c) _____

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? 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. Motion for Reconsideration (New Trial)
 ii. _____
 iii. _____
 iv. _____
 (b) the name and location of the Court in which each was filed:
 i. General Sessions Court in Richland County (5th Circuit)
 ii. _____
 iii. _____
 iv. _____
 (c) the disposition thereof:
 i. Denied
 ii. _____
 iii. _____

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 JUDICIAL CLERK OF COURT
 Kershaw County, S.C.

iv. _____

(d) the date of each such disposition:

i. October 2008

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?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) _____

(b) _____

(c) _____

17. Were you represented by an attorney at any time during the course of:

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JOYCE McDONALD
CLERK OF COURT
KERSHAW COUNTY, S.S.

- (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? Yes

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:
 - i. J. Marcus Whitlark, 1708 Main Street - P.O. Box 7702, Columbia, SC 29202
 - ii. Nothan J. Sheldon, (Contact the above listed attorney for further information)
 - iii. Robert M. Dudek, SCCID, 1330 Lady Street, Suite 401, Columbia SC 29201
- (b) the proceedings at which each such attorney represented you:
 - i. Trial and Motion for New trial
 - ii. Trial
 - iii. Direct Appeal, Petition for Rehearing, and Writ of Certiorari

19. State clearly the relief you seek in filing this application:

New Trial

20. Are you now under sentence from any other court that you have not challenged?

No

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 2015 MAY -8 AM 11:12
 JOYCE M. McNEAL
 CLERK OF COURT
 Kershaw County, S.C.

11. State concisely, and in the same order, the facts which support each of the grounds set out in

(10):

(a) Trial counsel was ineffective because of the following reasons:

1. He failed to contemporaneously object to Crawford issue which arose at the admittance of an insufficiently redacted statement of a non-testifying co-defendant. This error caused the petitioner to be unable to raise the issue in direct appeal.
2. He failed to have me brought into the courtroom at a critical stage of the trial proceedings, when transcripts of certain testimonies were allowed to be viewed in the deliberation room, a hearing where I was supposed to be present.
3. He erred in deciding to allow the transcripts of certain testimonies to be brought into the jury deliberation room, which unduly emphasized that evidence.
4. He failed to present exculpatory evidence which would've impeached the state's evidence. Failing to do this caused the SC Supreme Court to consider that evidence to be overwhelming, causing my Bruton issue to be considered harmless.

(b) Appellate counsel was ineffective for not challenging the Brady violation that was objected to by petitioners trial counsel.

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2015 MAY -8 AM 11:12
JOHN H. MOULDER
CLERK OF COURT
Kershaw County, S.C.

STATE OF SOUTH CAROLINA)

County of)

VERIFICATION)

I, _____, 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.

J. M. D. II

SWORN to and subscribed before me this 6th
day of May, 2015.

Susan H. Frye (L.S.)
Notary Public

My Commission Expires:

My Commission Expires
March 5, 2018

FILED FOR RECORD
2015 MAY -8 AM 11:12
JOYCE HODGKINS
CLERK OF COURT
KERSHAW COUNTY, S.C.

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

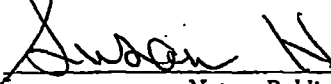
I, _____, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.



Applicant

SWORN or affirmed to and subscribed before me this
____ day of May, 2015.



Notary Public

My Commission Expires: _____

My Commission Expires
March 5, 2018

FILED FOR RECORD
2015 MAY -8 AM 11:12
JOYCE HEDENALD
CLERK OF COURT
KERSHAW COUNTY, S.C.

STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW

Derrick McDonald, #328344

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

2015-CP-28-443

RETURN

Respondent, making its Return to the Application for Post-Conviction Relief (PCR) filed May 8, 2015, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Kershaw County. Applicant was indicted at the February 2007 term of the Court of General Sessions for Kershaw County for Murder (2007-GS-28-0015) and Burglary First Degree (2007-GS-28-0016). Applicant was represented by J. Marcus Whitlark, Esq. and Nathan J. Sheldon, Esq. Applicant proceeded to trial on May 13, 2008. He was convicted as indicted. The Honorable G. Thomas Cooper sentenced Applicant to thirty-five years for each charge. The sentences were to be served concurrently.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected by Robert M. Dudek, Esq. Following the submission of briefs by both sides, the South Carolina Court of Appeals affirmed Applicant's conviction. State v. McDonald, 400 S.C. 272, 734 S.E.2d 167 (Ct. App 2012). Applicant filed a Petition for Rehearing on September 27, 2012. By Order dated November 30, 2012, the Court of Appeals denied the Petition. Applicant then filed a Petition for Writ of Certiorari on March 1, 2013. The State made its Return on May 1, 2013. The

Supreme Court of South Carolina found that “the court of appeals erred, for the jury would readily infer from the face of the codefendant’s confession that it referred to and incriminated McDonald.” State v. McDonald, Op. No. 27515 (filed April 22, 2015). “[N]evertheless [the Supreme Court] affirm[ed] McDonald’s conviction, for the error was harmless in the light of the overwhelming evidence of guilt.” Id. The Remittitur was issued on May 8, 2015.

Attached herewith and incorporated herein by reference are the records of the Kershaw County Clerk of Court regarding the subject conviction(s), the transcript from Applicant’s trial hearing, Applicant’s records for the Department of Corrections, and Applicant’s appellate records. Respondent reserves the right to amend its return upon the receipt of other relevant records.

II.

In his Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance Counsel, in that;
 - a. Counsel “failed to contemporaneously object to Crawford¹ issue which arose at the admittance of in insufficiently redacted statement of a non-testifying co-defendant. This error caused the petitioner to be unable to raise an appeal”,
 - b. Counsel “failed to have me brought into the courtroom at a critical stage of the trial proceedings, when transcripts of certain testimonies were allowed to be viewed in the deliberation room, a hearing where I was supposed to be present”,
 - c. Counsel “erred in deciding to allow the transcripts of certain testimonies to be brought into the jury deliberation room, which unduly emphasized that evidence”,
 - d. Counsel “failed to present exculpatory evidence which would’ve impeached the state’s evidence. Failing to do this cause the SC Supreme Court

¹ Crawford v. Washington, 541 U.S. 36 (2004).

- to consider that evidence to be overwhelming, causing my Bruton² issue to be considered harmless", and;
2. Ineffective Assistance of Appellate Counsel, in that;
 - a. Counsel "was ineffective for not challenging the Brady³ violation that was objected to by petitioner's new trial."

III.

Applicant's first claim is an allegation of ineffective assistance of trial counsel. Respondent contends that Applicant's trial counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief proceeding, the Applicant bears the burden of proving the allegations in their application. Id. Where ineffective assistance of counsel is alleged as a ground for relief, 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. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, Applicant must prove that counsel's performance was deficient. Under this prong, attorney

² Bruton v. United States, 391 U.S. 123 (1968).

³ Brady v. Maryland, 373 U.S. 83 (1963).

performance is measured 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 reasonable 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 the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The 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 allegation that appellate counsel was ineffective is also without merit. Respondent contends that Applicant's appellate counsel rendered adequate assistance and provided representation within the range of competence required by appellate attorneys. A defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985). Where ineffective assistance of appellate counsel is alleged, the Applicant must show that appellate counsel's performance was (1) deficient; and (2) that there was prejudice from the appellate counsel's deficiency. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). To be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair. *Id.* Appellate counsel must provide effective assistance but need not raise every non-frivolous issue presented by the record. *Id.* Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not

ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

When a claim of ineffective assistance of appellate counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. *Id.*

Respondent submits that Applicant cannot satisfy either requirement of the Strickland v. Washington test with regard to the ineffectiveness claims against appellate counsel. However, the allegation of ineffective assistance of appellate counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

V.

Respondent therefore requests that this Court convene an evidentiary hearing solely on the issue of ineffective assistance of trial and appellate counsels. As to all other allegations, Respondent 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.

VI.

Applicant must specify any claims he intends to raise at the PCR trial. Any claims not *specifically* laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing. S.C. Code § 17-27-10 et seq; SCRCP 71.1. All claims should be made well in advance of the PCR hearing. If Applicant has an attorney appointed, the attorney, and not the

inmate, is the only one authorized to file amendments. SCRCP Rule 11. Filings by inmates will not be considered at the PCR hearing.

VII.

Each and every allegation contained within the application not either expressly admitted, qualified or explained is hereby denied.

VIII.

WHEREFORE, having made its Return, Respondent requests that a hearing be held solely on the claims of ineffective assistance of counsel.

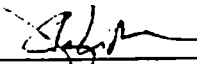
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Assistant Deputy Attorney General

J. CLAYTON MITCHELL
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

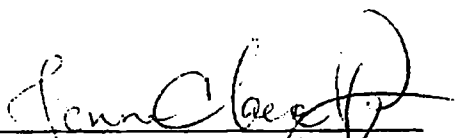
9/9, 2015

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF KERSHAW	)	
	)	
	)	2014-CP-28-443
	)	
DERRICK MCDONALD, #328344	)	
	)	
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:

Kristy Grafton Goldberg, Esquire
Law Office of Kristy Goldberg, LLC
1720 Main Street, Suite 301
Columbia, SC 29201

DATED this 9th day of September, 2015.


 Jenna C. Brown, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF KERSHAW	)	DOCKET NO.: 2015-CP-28-443
	)	
DERRICK MCDONALD,	)	
SCDC # 328344	)	
Applicant,	)	
v.	)	AMENDED APPLICATION FOR
	)	POST-CONVICTION RELIEF
STATE OF SOUTH CAROLINA,	)	
Respondent,	)	

FILED FOR RECORD
2017 OCT 12 AM 9:53
JANET C. HASTY
CLERK OF COURT
KERSHAW COUNTY, S.C.

Based upon further investigation and research, the Post-Conviction Relief Application filed on behalf of the above named Applicant is hereby amended as follows:

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) Ineffective assistance of counsel for failure to object when the Court analyzed the factual determinations and reached a decision in the Jackson v. Denno hearing using an incorrect burden.
- (b) Ineffective assistance of counsel for failure to object when the Court instructed the jury that they would be conducting a "search for the truth."
- (c) Ineffective assistance of counsel for failure to file or argue a Motion to Sever.
- (d) Ineffective assistance of counsel for failure to present compelling argument regarding the photographs of Christopher Whitehead's car which was already entered into evidence.
- (e) Ineffective assistance of counsel for failure to properly preserve Crawford issues for appellate review during trial.
- (f) Ineffective assistance of counsel for failure to sufficiently and effectively argue under Bruton that admission of the co-defendant's statement violated the Applicant's rights under the Confrontation Clause.
- (g) Ineffective assistance of counsel for failure to ensure that the Court properly provided a limiting instruction under Bruton and failure to object when the insufficient instruction was given.
- (h) Ineffective assistance of counsel for failure to object when the Court allowed the jury during deliberations to review the transcripts of testimony of three trial witnesses.
- (i) Ineffective assistance of counsel for failing to ensure that the Applicant was present during all critical stages of trial.
- (j) Ineffective assistance of counsel as counsel was ineffective for failing to present evidence before the jury.

- (k) The cumulative effect of trial counsel's errors constitute ineffective assistance of counsel.

Respectfully Submitted,


Kristy G. Goldberg
Attorney for Applicant

Columbia, South Carolina

This 11 Day of October, 2017.

STATE OF SOUTH CAROLINA)
COUNTY OF KERSHAW)

IN THE COURT OF COMMON PLEAS

DOCKET NO.: 2015-CP-28-443

DERRICK MCDONALD,)
SCDC # 328344)

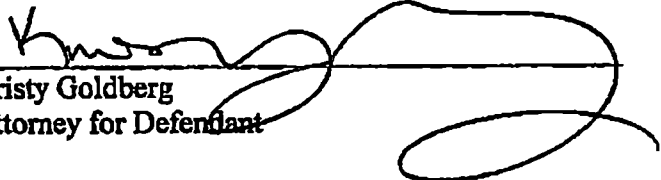
Applicant,
v.)

CERTIFICATE OF SERVICE

STATE OF SOUTH CAROLINA,)
Respondent,)

FILED FOR RECORD
2017 OCT 12 AM 9:38
JANET C. HASTY
CLERK OF COURT
KERSHAW COUNTY, S.C.

I certify that on this date I served the Amended Application for Post-Conviction Relief in this case on The State of South Carolina by delivering a copy of this application to the Office of the Attorney General via U.S. mail at Post Office Box 11549, Columbia, South Carolina 29211-1549.


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Columbia, South Carolina

This 11 Day of October, 2017.

1 STATE OF SOUTH CAROLINA) IN THE COURT OF
2) COMMON PLEAS
3 COUNTY OF KERSHAW) OF THE FIFTH
4) JUDICIAL CIRCUIT
5)
6 DERRICK JEROME MCDONALD,)
7 Applicant,) TRANSCRIPT OF RECORD
8 vs.) 2015-CP-28-00443
9 STATE OF SOUTH CAROLINA,)
10 Respondent.)
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December 12, 2017
Columbia, South Carolina

B E F O R E:

HONORABLE CLIFTON NEWMAN, Judge.

A P P E A R A N C E S

KRISTY G. GOLDBERG, ESQUIRE
For The Applicant

JESSICA E. KINARD, ASSISTANT ATTORNEY GENERAL
For The Respondent

Julie A. Cendroski,
Circuit Court Reporter
Seventh Judicial Circuit

I N D E X

<u>WITNESS</u>	<u>PAGE</u>
ANNOUNCEMENT OF CASE	
By Ms. Kinard	4
OVERVIEW OF CASE	
By Ms. Goldberg	5
<u>DERRICK JEROME MCDONALD</u>	
DIRECT EXAMINATION	
By Ms. Goldberg	10
CROSS-EXAMINATION	
By Ms. Kinard	28
REDIRECT EXAMINATION	
By Ms. Goldberg	35
<u>J. MARCUS WHITLARK</u>	
DIRECT EXAMINATION	
By Ms. Goldberg	37
CROSS-EXAMINATION	
By Ms. Kinard	65
REDIRECT EXAMINATION	
By Ms. Goldberg	74
CLOSING ARGUMENT	
By Ms. Goldberg	74
CLOSING ARGUMENT	
By Ms. Kinard	85
REPLY CLOSING ARGUMENT	
By Ms. Goldberg	97
COURT TAKES UNDER ADVISEMENT	101
CERTIFICATE OF COURT REPORTER	103

1
2
3
4
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6
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14
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EXHIBITS

MARKEDENTERED

NO EXHIBITS PROFFERED

DERRICK MCDONALD VERSUS THE STATE OF SOUTH CAROLINA

THE COURT: Ready?

MS. KINARD: Yes, sir. Thank you, Your Honor.
May it please the Court. This is the matter of Derrick McDonald versus the State of South Carolina. It's a Kershaw County case with Case Number 2015-CP-28-0443. Applicant filed his application for post-conviction relief on May 8th, 2015.

He's presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Clerk of Court in Kershaw County. He was indicted at the February 2007 term of the Kershaw County grand jury for murder and burglary first degree. He was represented by Mr. Whitlark and Nathan Sheldon.

He proceeded to trial on May 13th, 2008, and was convicted as indicted. The Honorable G. Thomas Cooper, Jr. sentenced him to 35 years for each charge to be served concurrently.

A timely notice of appeal was filed on his behalf and an appeal was perfected by Bob Dudek of the office of Appellate Defense. Following the submission of briefs by both sides, the South Carolina Court of Appeals affirmed his conviction in a published opinion. The cite is 400 S.C. 272.

He filed a petition for a rehearing on September

1 27th, 2012. And by order dated November 30th, 2012, the
2 Court of Appeals denied that petition.

3 He then filed a petition for a writ of certiorari
4 on March 1st, 2013, to which the State made its return
5 on May 1st, 2013. And the Supreme Court of South
6 Carolina found that the court of appeals erred for the
7 jury would readily infer from the face of the
8 codefendant's confession that it referred to and
9 incriminated McDonald. Nevertheless, the Supreme Court
10 affirmed his conviction, for the error was harmless in
11 light of the overwhelming evidence of guilt. Remittitur
12 issued May 8th, 2018.

13 The State is present and ready to proceed. Mr.
14 McDonald is present and represented by Kristy Goldberg.

15 THE COURT: Ms. Goldberg.

16 MS. GOLDBERG: Thank you, Your Honor. May it
17 please the Court. For our first matter we are
18 proceeding today on the amended application which was
19 filed October 12th, 2017. Is there a copy of that
20 particular amended application in your file?

21 THE COURT: Yes.

22 MS. GOLDBERG: All right. That is the one we are
23 proceeding today. Now, Your Honor, if I may, I would
24 like to give a brief introduction about the facts and
25 the law, the history of this case and where we are

1 today.

2 THE COURT: Okay.

3 MS. GOLDBERG: Your Honor, as briefly stated by
4 the State, there was an appeal resulting from this
5 trial. First it went to the Court of Appeals. That was
6 filed September 12th. The issue on appeal was whether
7 or not the trial court erred in allowing a codefendant's
8 written statement into evidence without adequately
9 redacting portions implicating McDonald because it
10 denied him his right to confront and cross-examine under
11 Bruton.

12 The court of appeals held: We find the neutral
13 phrase "another person" inserted into the codefendant's
14 statement avoided the Bruton problem. The redacted
15 statement only implicates the statements maker, and it
16 does not limit the participants to three, which would
17 have implicated the three defendants in trial. And then
18 further the Court gave the jury a limine instruction.

19 They also held that counsel did not raise a
20 Crawford violation argument until later in the trial.
21 So any argument specifically under Crawford was not
22 preserved. Now, the Supreme Court then reviewed this
23 issue. They filed their opinion April 22nd. They
24 reversed the Court of Appeals decision on that legal
25 issue.

1 They did say that the Court of Appeals erred
2 because the jury would, as Ms. Kinard said, would
3 readily infer from the face of the codefendant's
4 confession that it referred to and incriminated
5 McDonald. They said that the redaction in the statement
6 when it replaces the defendant's name with an obvious
7 indication of deletion, such as a blank space or a word
8 deleted or a similar symbol that refers directly to the
9 existence of the non-testifying codefendant facially
10 incriminates the defendant through inference.

11 In this case the Supreme Court held that the jury
12 was left with the inescapable conclusion the
13 codefendant's confession referred to McDonald and
14 Whitehead, the other two defendants, who were seated at
15 counsel table. And under Bruton in its progeny this is
16 insufficient to satisfy the demands of the Confrontation
17 Clause. So the law of this case is that there was
18 already a legal error in place. Bruton was not
19 sufficient to protect and his Confrontation Clause where
20 rights were violated.

21 The Court rejected the State's argument that it
22 was the limine instruction was sufficient. But then the
23 Court did find harmless error. Now I want to, just to
24 kind of acclimate the Court to this case so that you
25 understand what you'll be hearing and what to expect,

1 I'm gonna hand the Court the Supreme Court opinion.
2 This is just something that you can -- and it's just a
3 clean copy of the opinion.

4 THE COURT: All right.

5 MS. GOLDBERG: In finding harmless error -- or
6 the court lists several items of circumstantial evidence
7 that they believe that they -- that were worth citing, I
8 suppose.

9 THE COURT: Thank you.

10 MS. GOLDBERG: So this is somewhat of a summary
11 of the evidence that was presented in the trial for your
12 information. The co-worker testified, said that white
13 -- Defendant Whitehead was going to the victim's house
14 to fight him. A witness saw McDonald with the
15 codefendants. A witness said that another defendant,
16 Whitehead, drove around with a loud muffler. A receipt
17 states that gloves and a ski mask were purchased at
18 Walmart. Note that those aren't linked to anyone.

19 The victim's neighbor heard loud noises at 11:30
20 in a car with a loud muffler. A witness testified that
21 they saw McDonald up at 1:30 a.m. and visibly upset.
22 And the morning after this incident, Defendant Whitehead
23 was injured at work.

24 So just, I'm noting for the record that all the
25 circumstantial evidence, the majority of it actually

1 doesn't relate to Mr. McDonald at all. But the Court
2 does say beyond independent evidence of guilt, McDonald
3 gave a confession that was entirely consistent with
4 Cannon's confession.

5 The reason that this is important is because the
6 court of -- the Supreme Court found that because
7 McDonald gave a confession, that was why there was
8 overwhelming evidence. That is why the core
9 Confrontation Clause issue, the Bruton issue wasn't
10 enough to overturn it. A large part of our case today
11 is gonna have to do with that confession itself. So I
12 just want the Court to understand where that plays into
13 the history of the case.

14 At this time, at this time I will call my first
15 witness to the stand and that will be Derrick McDonald.

16 (Witness comes forward.)

17 THE CLERK: Right here, sir. Raise your right
18 hand the best you can. (Complies.) Do you swear or
19 affirm the testimony you shall give this Court will be
20 the truth, the whole truth and nothing but the truth so
21 help you God?

22 THE WITNESS: I do.

23 THE COURT: Please have a seat there, sir. State
24 your full name for the record.

25 THE WITNESS: Derrick Jerome McDonald.

DIRECT EXAMINATION OF DERRICK MCDONALD BY MS. GOLDBERG

1 DERRICK JEROME MCDONALD,
2 having been duly sworn, testified as follows:
3 DIRECT EXAMINATION
4 BY MS. GOLDBERG:
5 Q. All right, sir. Where are you currently housed?
6 A. I'm currently housed at 386 Redemption Way.
7 McCormick Correctional Institution.
8 Q. And what sentence are you serving?
9 A. 35 years mandatory.
10 Q. On what conviction?
11 A. Murder and burglary first degree.
12 Q. You aren't serving any other convictions from any
13 other unrelated incidents?
14 A. No, ma'am.
15 Q. Did you have a prior record before this trial?
16 A. No, ma'am.
17 Q. Did you plead guilty or did you have a jury
18 trial?
19 A. I had a jury trial.
20 Q. Do you recall the dates?
21 A. I believe it was the week of May 5th, if I'm not
22 mistaken.
23 Q. 2008?
24 A. 2008, yes, ma'am.
25 Q. And when were you arrested?

1 A. I was arrested December 15th, 2006.

2 Q. Were you in jail the entire time between arrest
3 and trial?

4 A. Yes, ma'am, I was.

5 Q. How old were you when you were arrested for this
6 offense?

7 A. Eighteen.

8 Q. Tell me about the history of your legal
9 representation in this case. Who was your first
10 attorney?

11 A. My first attorney was, if I'm not mistaken, Joe
12 Nathan Chapman. But due to a large caseload, I was then
13 given Mr. Charlie J. Johnson. Mr. Charlie Johnson
14 received a, I think, a promotion and he was appointed
15 somewhere. And then I received another attorney. I
16 don't remember his name. I met with him one time. The
17 conversation wasn't good, and we ended up hiring
18 Mr. Whitlark.

19 Q. Do you know about how long Mr. Whitlark
20 represented you prior to trial?

21 A. I want to say -- I want to say six months maybe.
22 I'll say five because one of those was a bond hearing.

23 Q. Okay. So you think maybe five to six months?

24 A. Yeah. Five to six months, yes, ma'am.

25 Q. While he represented you, did he come to the jail

1 and meet with you?

2 A. Yeah. I believe we met one time in the jail, the
3 county jail at the time.

4 Q. Did he review the evidence with you and your
5 defense with you and prepare for trial?

6 A. He wasn't even given the full discovery by the
7 State and, therefore, it's hard for us to do that. He
8 didn't know -- I believe it's in the transcript at trial
9 where he was talking about not proceeding with the
10 motion. I mean the Brady motion. Motion of discovery.

11 Q. By the time trial started had he received all of
12 that?

13 A. No, ma'am. If I'm not mistaken, I believe by
14 that Saturday -- now I may be right or I may be wrong on
15 certain things, but I believe it was some polygraph
16 notes that was relevant to the case and some other
17 things that he didn't receive until that weekend.

18 Q. So there's some specific items of discovery that
19 they received last minute.

20 A. Yeah, that they received last minute.

21 Q. The general discovery, the incident report, the
22 witness statements, the bulk of the information, did he
23 have that in preparation for trial?

24 A. I got the bulk of the discovery, I believe it was
25 maybe 15 to 20 days before I went to trial, I believe.

1 Q. Did you get that from Mr. Whitlark?

2 A. Yes. I believe he brought it. When we met that
3 time, that's when he brought it.

4 Q. Now, once the trial began there was a hearing
5 called a Denno hearing. Do you know what that is?

6 A. Yes, ma'am, I do.

7 Q. What is that?

8 A. It is a suppression motion.

9 Q. What's your understanding?

10 A. My understanding that is a Jackson v. Denno
11 hearing, is a suppression hearing.

12 Q. Suppression of what?

13 A. Statements. Alleged statements, excuse me.

14 Q. Now, you testified in that hearing.

15 A. Yes, ma'am, I did.

16 Q. Who else testified on your behalf in that
17 hearing?

18 A. My mother, Josie McDonald; my brother, Janario
19 (phonetic) McDonald, both testified.

20 Q. What did you testify about or what was the
21 substance of your testimony?

22 A. Specifically, the substance of the testimony was
23 about what happened that day that I was arrested, as far
24 as my implication of my particular right, my right to an
25 attorney. And the ---

DIRECT EXAMINATION OF DERRICK MCDONALD BY MS. GOLDBERG

1 Q. The factual ---

2 A. The factual matters about what happened when they
3 arrested me. So I was basically testifying that I
4 invoked my Fifth Amendment right or my right to an
5 attorney. I didn't want to speak to the police officers
6 unless I had an attorney present.

7 Q. You testified that you asked for an attorney.

8 A. Yes, ma'am, I did.

9 Q. Is there anything else important factually that
10 you testified to?

11 A. I testified that my response that I received from
12 the officers was I hope that you say this because you
13 saw it on TV because that's not the way the system
14 works.

15 Q. Anything else related to whether or not your
16 statement was coerced?

17 A. Other than the fact that they were on the way to
18 what I thought were the county jail, but we ended up
19 going to the sheriff's department. They mentioned
20 death penalty cases and stuff like that, you know. That
21 was pretty much all that I was gonna testify to.

22 Q. And what do you mean they referenced death
23 penalty cases?

24 A. Well, just asking me to talk to them, you know,
25 because this is a death penalty case, nighttime

1 burglary, murder, stuff like that. It was a long time
2 ago, but I do remember those points and things that they
3 said.

4 Q. Your mom and brother testified also. What did
5 they testify to?

6 A. Okay. Their testimony came in, basically
7 testified about what happened when the police came to
8 arrest me at the house that evening. I believe it was
9 around is 11:30. And their testimony was about what did
10 they witness during that exchange. And my brother and
11 my mother both testified to the fact that they heard me
12 verbally tell the police I want an attorney.

13 Q. So it had to do with your request for an
14 attorney?

15 A. Yes, ma'am.

16 MS. GOLDBERG: Your Honor, if I may approach the
17 witness with the transcript?

18 THE COURT: All right.

19 BY MS. GOLDBERG:

20 Q. All right. This is page 127. If you look at
21 that answer starting online 11, is that your answer,
22 something that you stated to the Court?

23 A. Yes, ma'am, that's exactly what I said.

24 Q. And what did you tell the Court?

25 A. I told him, I said, I don't know anything to

1 talk, talk to you about. And then that's when he stated
2 to me that this is a death penalty case. If you do not
3 talk to me I can't help you, but if you talk to me and
4 give a statement you will be a witness and not a suspect
5 in this matter.

6 Q. Now, the investigator testified in the Denno
7 hearing as well; is that right?

8 A. Yes, ma'am, he did.

9 Q. Do you recall that he admitted that he told --
10 admitted telling you this generally or do you remember
11 what he did?

12 A. It was, really it was said in such a way by
13 saying that you don't recall or saying that you don't
14 remember saying that, it's not saying that you did say
15 it, but you also didn't say that you didn't say it. So,
16 if I'm not mistaken, that was his exact response. I
17 remember telling him that.

18 Q. And as far as this conversation ---

19 THE COURT: What page in the transcript did you
20 have him read?

21 MS. GOLDBERG: That was 127.

22 BY MS. GOLDBERG:

23 Q. And as far as the conversation regarding what he
24 said to you in enticing you to get you to make a
25 statement, there weren't any other witnesses to that

1 conversation, were there?

2 A. Other than Investigator George Marcus because he
3 was actually in the truck with us.

4 Q. Okay. Now, that information that you presented
5 in the Denno hearing, did you present that in the trial
6 itself before the jury?

7 A. I wish that I did.

8 Q. Okay. Did you testify at all in front of the
9 jury?

10 A. No, ma'am, I didn't.

11 Q. Why not?

12 A. My attorney advised me, he basically said that in
13 his opinion the State did not prove guilt and that he
14 wanted to have the last say so in closing arguments,
15 basically saying that if I was to testify or if he was
16 to present a defense, then the solicitor would have the
17 last word to the jury.

18 Q. It was because he wanted to have the last word?

19 A. Yes.

20 Q. Do you think it was a mistake for you not to have
21 testified?

22 A. Extremely. A big mistake.

23 Q. Any particular reason why?

24 A. Yes, ma'am. Firstly, what you brought up earlier
25 about the overwhelming evidence, overwhelming evidence

1 is only overwhelming when it's not impeached. So
2 everything that was brought forth by the State, it was
3 uncontested or at times that it was contested, I guess
4 it took there was no others taken.

5 If I would have been able to bring, if I may say
6 so, in the Jackson v. Denno hearing is based off of
7 ponderance of evidence (sic). So that is like, you
8 know, civil cases, like 51 percent. So in beyond a
9 reasonable doubt, if this was barely able to go in front
10 of a jury based on preponderance of evidence, then no
11 jury, based on a reasonable doubt standard would
12 actually see he's completely in trouble and differences
13 in testimony as without any reasonable doubt to convict.

14 So I think that had the same evidence that had
15 been presented at the Jackson v. Denno hearing presented
16 in the evidentiary or in the trial, I believe that that
17 would have been a whole lot of evidence for them to
18 consider. And I say that based on the fact that the
19 actual jury instruction says that they're supposed to
20 consider those specific elements in whether or not the
21 statement isn't voluntary or without coercion.

22 They have to hear those things. If they don't
23 hear it, then they actually don't have the basis to
24 judge it, and they're supposed to be the judges of the
25 facts.

1 Q. The jury is supposed to consider whether the
2 statement itself is voluntary as well.

3 A. Exactly.

4 Q. So let's talk about the end of the Denno hearing
5 when the judge was making the determination as to
6 whether to admit it or not. Do you have an issue with
7 the judge's ruling?

8 A. Yes, ma'am, I do.

9 Q. And what is that?

10 A. Well, after a little research I found out that in
11 the Jackson v. Denno hearing the State has the burden of
12 proof, which means they have to show that an invocation
13 was not made. They have to show that there was no
14 coercion. They have to show that I was Mirandized.

15 So if that's the case and my mother and my
16 brother are witnesses, testifying for someone who does
17 not have the burden of proof, then that means the State
18 had the burden of proof to show that they were lying.
19 To give an order to say that you find no invocation
20 would be to say that you deemed my mother and my brother
21 not credible. Speaking specifically about my mother's
22 testimony, she wasn't even cross-examined, so how do you
23 not impeach a witness but then say that she's not
24 credible? So I have a big problem with that.

25 Q. And then when the judge actually made his ruling,

1 do you believe that he made the ruling based on the
2 correct verdict?

3 A. No, I don't. He can't. It's -- well, I can't
4 speak for him, but I can say that from what I researched
5 and studied, I don't see how a person could make that
6 analysis based on the burden of proof not being on me
7 if they had done nothing to prove that the testimony
8 that was given was not credible and not true.

9 Q. So during pretrial you challenged the statement,
10 you and your counsel challenged the statement fully. Do
11 you believe you put everything out there you could have
12 put out there?

13 A. No, ma'am. I think that I didn't know at the
14 time. But, also, and the Jackson v. Denno hearing in
15 nature is basically my word against the word of
16 officers, which means that automatically, you know, I
17 mean in my opinion, it's here. My word is here, their
18 word is here. (Indicating.)

19 So I think what could have been done, which would
20 have been excellent, it is common knowledge that now
21 polygraph examinations and testimony about polygraph
22 examinations are available and are admissible at
23 pretrial hearings. Had a polygraph examination been
24 given to me simply for invocation and the circumstances
25 around that day alone, I think that that evidence

1 presented before that judge would have been overwhelming
2 that, you know, someone was not being truthful on the
3 investigation side of this. And I think that would have
4 been very prevalent to that portion. So I think that
5 could have been. I think that would have been an open
6 and closed case.

7 Q. And then as far as your testimony in trial, I
8 believe you stated that your concern was that your
9 statement was never actually challenged with any
10 evidence before the jury.

11 A. No. No, ma'am. It was never. Basically in the
12 eyes of the jury in that box they saw an officer of the
13 law get up and say he told me this. Okay, he told me
14 that. And then they just went back in the deliberation
15 room. And if I may say, it had a substantial amount of
16 weight because they asked to rehear his testimony.

17 Q. The jury asked to rehear the testimony of three
18 witnesses. Do you recall who they were?

19 A. If I'm not mistaken, it was Investigator Danny
20 Catoe, Investigator, I think, Crawford or Marcus and it
21 was Michael Jenkins, a jailhouse witness.

22 Q. And let's go, since you brought that up, let's go
23 ahead and talk about that. So what were the
24 circumstances of -- how did you find out that the jury
25 was asking for that information?

1 A. I found out, the trial was over and it was the
2 deliberation stage and we were in the back, I believe
3 eating pizza. I believe we were eating pizza. And Mr.
4 Whitlark came and told us, guys, the deliberation's
5 gonna be on hold for a while because they're gonna get
6 transcripts of certain testimony. They asked to see
7 some testimony, so they're gonna get it and then they're
8 gonna deliberate.

9 Q. Let me, let me stop you right there. This is the
10 Kershaw County Courthouse, right?

11 A. Kershaw County courthouse. And Kershaw County
12 courthouse there's a holding cell behind, I guess, let
13 me see how I will put it here. You will go out a door
14 to the side, on this side, and then you go around the
15 back and there's a holding cell in the back
16 (indicating). We were in the holding cell in the back.

17 Q. Was it on the same floor as the courtroom?

18 A. Oh, yes, ma'am.

19 Q. So it wasn't three stories down?

20 A. No, it wasn't. It wasn't a long way or I
21 couldn't be retrieved.

22 Q. Okay. So you were never brought back into the
23 courtroom when the request from the jury was made known?

24 A. I had no idea that the jury even came back out in
25 the courtroom.

1 Q. Okay. So tell me, tell me again, what did
2 Mr. Whitlark tell you when back there?

3 A. Basically that the jury had asked to read
4 testimony and that they had decided to give it to them
5 in transcript form and that, I guess, deliberations will
6 take place as soon as they got the copies from the court
7 reporter because they had to give them the transcripts.

8 Q. Okay. So they weren't gonna play the audio in
9 open court over again?

10 A. No, ma'am. I wish they would've though.

11 Q. The jury was given actual transcripts?

12 A. They were given, yeah, transcript forms.

13 Q. Did you have a problem with that?

14 A. Yes.

15 Q. And what was your problem? With any or all of
16 that right now, what was your problem?

17 A. The first problem is, is I'm supposed to be
18 present at every critical stage of the trial, so how a
19 hearing was held in my absence, I don't understand how
20 that happened. Well I didn't at the time, but in the
21 transcripts you will see that Mr. Whitlark specifically
22 said I waive my client's presence.

23 So that's my first problem is that my presence
24 was waived. And the reason why I have a problem with
25 that is because the question they specifically asked

1 was, was can we -- they had two decisions, either get a
2 transcript and let them take it to the jury room or we
3 can let them rehear the testimony. And I feel like when
4 you put it in transcript form, it's on paper form, that
5 unduly emphasizes that evidence.

6 And the reason why I say that is because, okay,
7 well let's say they only care about the whole totality
8 of his testimony. They really just want to see one part
9 of it, i.e., the questionable alleged statements, which
10 is nine times out of ten the reason why they ask for it
11 in the first place. So now they basically have this
12 insufficiently redacted statement in the jury room
13 reading over it.

14 MS. GOLDBERG: And beg the Court's indulgence.

15 BY MS. GOLDBERG:

16 Q. If you had been present in court when the jury
17 made this request, what difference would that have made?

18 A. It would have made a big difference because I
19 would have said, well, wait a minute. You just said you
20 wanted the last word, right? Okay, well you're not
21 getting the last word when you do this. Like, they're
22 gonna have the transcripts of this guy's word. That's
23 the last word they're gonna not only hear, but see.

24 Q. Do you think that undermined the entire trial
25 strategy that you had?

1 A. It crushed it, for lack of a better word. It
2 just destroyed it. Looking back now, I just really wish
3 that I would have been able to say something, you know?
4 Because I mean this, this is my life so, you know, a
5 decision like that, that's very critical, you know?

6 Q. The State, and what your testimony was that you
7 think in this case the State's witnesses actually got
8 the last word?

9 A. Oh, yes, they did. That's -- I could say with
10 assurance they got the last word.

11 Q. And did those witnesses that they brought the
12 testimony from, Catoe, Crawford and Jenkins, one of
13 those is related to your actual statement?

14 A. Yes, ma'am. Danny Catoe, because he's the
15 officer, the investigator that said that I gave him a
16 statement.

17 Q. Did he have anything else really relevant to say
18 to this case or was his involvement basically that he
19 took your statement?

20 A. He wrote every statement pretty much that was
21 involved in the case. But he, he didn't really have any
22 other dealings with me, no. No, ma'am.

23 MS. GOLDBERG: Beg the Court's indulgence.

24 BY MS. GOLDBERG:

25 Q. Mr. McDonald, you know that the Bruton and

1 Crawford issues were looked at, or at least the Bruton
2 issue, technically was looked at on your appeals? Do
3 you understand that? Have you reviewed your appellate
4 opinions?

5 A. Yes, ma'am, I have.

6 Q. All right. So now what errors do you think that
7 your trial counsel made in trial regarding these issues?

8 A. The first error that I see dealing with the
9 Bruton, Crawford issue is not coping with it. The
10 problem that I had in direct appeal, if you look at even
11 the order that Chief Justice Few wrote, it was a
12 confusion on which case needed to be discussed, was it
13 Crawford or was it Bruton?

14 But I say that it was both, simply because of the
15 words of Judge Cooper, and I have it in my papers, when
16 he ordered that he made in the trial, I believe it's
17 page 990, starting at line 10, if I'm not mistaken, in
18 the trial transcript. He basically said that it is his
19 opinion that if the statements are sufficiently redacted
20 then there is no Crawford issue. And these very words
21 was cited by the Court of Appeals when they were trying
22 to shoot down the reasons why I was proceeding. They
23 were trying to give weight to the reason why this
24 procedure was barred.

25 So with him using those words, I don't understand

1 how someone could say that Crawford is not an issue here
2 when Crawford deals with the point made period crux of
3 the adversarial process that we call trial. Me being
4 able to cross-examine a witness, you know, who is
5 testifying against me or saying something against me,
6 would be the baseline accuser.

7 So I believe that by not contemporaneously
8 objecting to Crawford, coupled with Bruton, that
9 actually raised that confusion because it it would have
10 been put together, then a judge can rightly see, okay,
11 yeah, he's right, if this is not sufficiently redacted,
12 then that means he's implicated, which means that he
13 needs to cross-examine him and that's what Crawford
14 deals with.

15 Q. And you believe it's a much more powerful
16 argument when the two are put together?

17 A. Of course. Of course. As you can see the
18 Supreme Court felt like that the order from the Court of
19 Appeals was wrong. So it just adds more weight, the
20 fact that, okay, now it's not just a Bruton issue, it's
21 the fact that what did we do with the fact that this guy
22 was implicated and he didn't have the opportunity to
23 cross-examine the witness. That's not Bruton, that's
24 Crawford.

25 MS. KINARD: Your Honor, I would just like to

1 object to any legal conclusions that may be raised.
2 Mr. McDonald has certainly obviously done his research
3 and studied up on all of this, but the fact is that he's
4 not an attorney and I'd ask that the Court not consider
5 any legal conclusions that he has.

6 THE WITNESS: I apologize.

7 MS. GOLDBERG: Your Honor, I believe that's all
8 the questions I have for Mr. McDonald.

9 THE COURT: Cross-examination.

10 MS. KINARD: Thank you, Your Honor.

11 CROSS-EXAMINATION

12 BY MS. KINARD:

13 Q. Mr. McDonald, you certainly gave very thorough
14 and competent testimony and I appreciate that. I do
15 have a couple of questions. Did your arguments -- now
16 that I objected to you making legal statements, but I
17 want to make sure I understand your testimony regarding
18 the Jackson v. Denno hearing. Is your argument that
19 Judge Cooper should not have made a finding based on the
20 preponderance of evidence standard?

21 A. No. My argument is that Judge Cooper should not
22 have made a finding on preponderance of evidence with
23 the burden of proof being on me. It's a big difference.

24 Q. And you believe that's, that's what he did?

25 A. Yes, ma'am.

1 Q. Do you believe that's an appropriate issue for
2 PCR?

3 A. No. Actually my issue on PCR is that my attorney
4 was ineffective for failing to object when he made the
5 analysis. So that's my actual argument is that it
6 wasn't objected to.

7 Q. Thank you. I just wanted clarify that point.

8 A. Yes, ma'am.

9 Q. Did you work with Mr. Whitlark while he was
10 trying to redact the statements?

11 A. No, ma'am. That was, at that time, way above my
12 head. I knew that they were working. I believe, if I'm
13 not mistaken, he worked with co-counsel, Mr. Kendrick
14 and Mr. Riley, which were my codefendants' attorneys.

15 Q. Were you aware of a lot of these issues at the
16 time of trial or are these things that you've come to
17 learn since then based on your research?

18 A. It depends which issues we're talking about.
19 When it comes to the Jackson v. Denno hearing and the
20 analysis that was made, that came after the fact that I
21 found out that what he said and the way he said it was
22 wrong and that it should have been objected to. I
23 obviously knew about Bruton and Crawford because I'm
24 hearing it at trial, so as I was hearing it at trial it
25 made sense and I understood what he was basically

1 saying, so I understood that then.

2 Q. But, for example, you said if you had been in the
3 courtroom when the jury asked for the transcript, would
4 you have known?

5 A. That at the time I knew right then that, okay,
6 well, they're getting back. In my head I'm like, all
7 right, well that doesn't really make sense to me, but I
8 didn't know that I could do anything about it at the
9 time. You know, they already received it. So then
10 after that, shortly after that we went to the county,
11 went back to the county jail.

12 When I really found out that there was an issue
13 was when my attorney and Mr. Riley filed for a
14 post-trial motion. And in the post-trial motion one of
15 their direct issues was sending the transcripts into the
16 jury room. So when you file a post-trial motion saying
17 that the very thing that you said was cruel with a foul
18 play, in the words of Mr. Ronald Mope, that's when I
19 knew something was wrong.

20 So you all guys asked for this to be done and
21 then you turn around and put into motion to undo what
22 you did and it wasn't even -- it was outside of my
23 presence? So that's when I knew something was wrong.
24 And I've been working on that since, since that day.

25 Q. All right, thank you. Let's go back just a

1 little bit to the general representation of Mr.
2 Whitlark. You said you retained him to represent you;
3 is that correct?

4 A. Yes, ma'am.

5 Q. About six months before trial?

6 A. So it would have to be my mom to tell you exactly
7 when, but I want to say five to six months.

8 Q. Okay. And you said he did a bond hearing with
9 you?

10 A. Yeah. He was, he was -- the bond hearing, if I'm
11 not mistaken, was in November of 2007.

12 Q. Okay. And what was the result of that? Were you
13 denied bond?

14 A. No. The result of it was that I -- okay, it was
15 in October and the result was that if they didn't take
16 me to trial in November I'll receive a bond. I never
17 received one and I went to trial in May.

18 Q. Okay. I'm sorry, I found the place in the
19 transcript I was looking for, it's page -- it's part of
20 the ruling on the Denno issue, page 253. But in that
21 Judge Cooper discusses an argument made by Mr. Whitlark.
22 It has to do with invocation by another. Do you
23 remember that argument at the Jackson v. Denno hearing?

24 A. Yes, ma'am, I do.

25 Q. And do you remember your mother testified on your

1 behalf that you said you wanted a lawyer, but also was
2 there an implication that she said she wanted that you
3 needed a lawyer?

4 A. When my mother gave testimony, she gave testimony
5 to a confusing and chaotic situation where the police
6 officers were coming to arrest me. In the process of
7 her talking about this, and this is the problem that got
8 a lot of things confused some more. Me asking for an
9 attorney at the same time as her hysterical talking
10 about her son, her son needing an attorney are two
11 different things.

12 But I think it got crossed because third party
13 guilt, I never -- I mean, excuse me, third party
14 invocation was never even something that I even brought
15 up because I asked for an attorney myself. So I
16 thought, I mean, for me it was mor less did you or did
17 you not ask for an attorney. So I don't know about the
18 third party, but...

19 Q. Do you recall Mr. Whitlark arguing about third
20 party invocation?

21 A. I remember him mentioning that my mother
22 testified about asking to get me an attorney. But to
23 me, I mean, I didn't pay too much attention to it
24 because of the fact that I asked for an attorney myself.
25 And to me that was the issue, not really what my mom

1 said.

2 Q. So it's two separate issues in your mind?

3 A. In my mind, her saying that and me saying I --
4 and her testifying that she said that I need an attorney
5 and her testifying saying that she heard me ask for an
6 attorney are two totally different situations.

7 Q. And you maintain at the judge's ruling that you
8 did not provide a clear invocation is incorrect?

9 A. I maintain that, yes, based on the fact that one
10 of the witnesses was not cross-examined, like so how
11 could she not be deemed credible? So I felt like my
12 attorney should have objected and kind of asked him
13 specifically to point that out. Okay, wait a minute,
14 you said that no implication was made. The State didn't
15 prove that he didn't make an invocation. That's,
16 that's...

17 Q. Did the State provide a signed waiver of your
18 rights?

19 A. Yes, they did.

20 Q. And you stated later that you actually didn't
21 sign the statement later?

22 A. I signed a blank piece of paper.

23 Q. And I realize that's what you say.

24 A. Yeah. Yeah. You look at -- if you look at the
25 transcripts you see everything surrounding the

1 statement, the alleged statement. You see all the
2 testimony, but specifically about that is the fact that
3 I invoke my right to an attorney before the waiver.

4 Q. But you did sign a waiver at some point in time?

5 A. Yeah, I signed the waiver, but I thought that the
6 paper at the time was just saying that they advised me
7 of it. You know, just to say this is really proof that
8 we told you that you have the right to an attorney.
9 That's the reason why I signed it. If I would have
10 known that they were saying if I signed this paper,
11 you're saying you don't want an attorney, it would have
12 never been signed.

13 Q. Did you ever volunteer any information to law
14 enforcement officers before or after you were
15 Mirandized?

16 A. No, ma'am, I did not. Not any information saying
17 that I committed any crime.

18 Q. Okay.

19 A. I told them where I was that night and that was
20 it.

21 MS. KINARD: Beg the Court's indulgence. I don't
22 have any further questions. I believe Ms. Goldberg may
23 have redirect. Thank you.

24 MS. GOLDBERG: Thank you, Your Honor, may it
25 please the Court.

REDIRECT EXAMINATION

BY MS. GOLDBERG:

Q. Just because you went into it a little bit, just so we're clear, three codefendants, right?

A. Yes, ma'am.

Q. Two gave statements.

A. Allegedly.

Q. Allegedly. Did either you or the other codefendant actually write those statements?

A. No, ma'am.

Q. The other codefendant challenged his as well, correct?

A. Yes, ma'am.

Q. Both of you challenged those as not being your true statement, true and correct statement?

A. Yes, ma'am.

Q. And then again, when you were not in a courtroom during -- she asked you a little bit about your mindset, so when -- if you had been in the courtroom at the time when the jury asked for the additional transcript, what was your immediate reaction to that?

A. My immediate reaction was, okay, so we're gonna go back out there and let them hear it. You know, that's ---

Q. Right.

1 A. So we could do that. Because I'm thinking, do we
2 have to go back out there?

3 Q. Right.

4 A. And that's when he basically said no, no, they're
5 gonna give them a transcript.

6 Q. Right. And did you have a problem with that at
7 the time you heard that?

8 A. At the time that I heard it, I had no problem
9 with it but for the fact that it just happened outside
10 of my presence more than anything. I didn't know the
11 full significance of what that would mean until I was
12 like, wait a minute. I was back in my cell or open pod
13 and I'm like well that may mean to hear all this stuff
14 that we said that was wrong or was believable or not
15 supposed to go before the jury and now they're gonna get
16 the redo, you know, while they deliberate back there.

17 MS. GOLDBERG: No further questions.

18 MS. KINARD: Nothing further, Your Honor.

19 THE COURT: All right. Thank you, sir.

20 (Witness leaves witness stand.)

21 MS. GRAFTON: Your Honor, at this time Applicant
22 would call attorney Mark (sic) Whitlark.

23 (Witness comes forward.)

24 THE WITNESS: Good morning, Your Honor.

25 THE COURT: Good morning.

1 THE CLERK: Do you swear or affirm the testimony
2 you shall give this Court to be the truth, the whole
3 truth and nothing but the truth so help you God?

4 THE WITNESS: I do.

5 THE COURT: Please have a seat there. State your
6 full name for the record.

7 THE WITNESS: My name is James Marcus Whitlark.

8 JAMES MARCUS WHITLARK,
9 having been duly sworn, testified as follows:

10 DIRECT EXAMINATION

11 BY MS. GOLDBERG:

12 Q. Good morning, sir.

13 A. Good morning.

14 Q. All right. Tell the Court when and how you got
15 involved in this case.

16 A. I got involved in this case, I was approached by
17 Josie McDonald, who was Derrick's mom. She came to see
18 me several times to talk to me about it. And I didn't
19 think it was five months, by the way. I think it was
20 less time than that.

21 Q. How long do you think you represented him before
22 trial?

23 A. You know, my recollection is it was only 60 or 90
24 days, my recollection. I do recall that I did go and
25 request a bond be set on him. I do remember what he was

1 testifying to, and the judge did say exactly what he
2 said. He was to get a bond by -- if he doesn't go to
3 court by November, he's to have a bond and nothing was
4 ever done.

5 Q. When you took on this case, did you request and
6 receive discovery?

7 A. Yes, we did receive some discovery.

8 Q. And go ahead and tell me about that.

9 A. Well, you know, some of the critical discovery,
10 of course, wasn't given to us until, you know, on the
11 threshold of trial. You know, standard procedure.
12 Anyway, pretty, pretty serious, critical evidence wasn't
13 given until that time regarding some of the other
14 suspects in the case.

15 Q. Did you believe when the trial began that you
16 were sufficiently prepared for trial?

17 A. No. No, I didn't.

18 Q. Did you work closely with counsel for the
19 codefendants in this case?

20 A. Yeah. Well, during the trial I did, yes, with
21 Mr. Kendrick and Neil Riley, yeah. I mean...

22 Q. Both of the codefendants, had they had their
23 attorneys for a significant period of time?

24 A. Yes, they had. And it was one of the reasons I
25 wasn't raising hell about getting more time because they

1 had been working on the case. And when I came in there,
2 of course I saw that they had, you know, been preparing
3 it so we all were, you know, on the same page here,
4 trying to prepare the same thing.

5 But as we got a little further into it, I saw
6 some things that I felt like we needed to pursue in this
7 case. Some other people that I thought had a greater
8 motive to have killed this young man than Mr. McDonald.

9 Q. Did you ever consider filing or arguing a motion
10 to sever or did you already file a Motion to Sever?

11 A. Well, to be honest with you, I did consider it
12 and I didn't do it and I consider that to be a mistake.
13 And the reason that's a mistake is because some of the
14 decisions made were joint decisions, which really that's
15 not what you're supposed to do when you're representing
16 somebody. But we would have these -- we would all three
17 talk, all three attorneys. We would decide things, you
18 know, as a committee. And that was an error in my
19 opinion, first of all.

20 And we should have made a motion to sever because
21 there were -- obviously the redaction of statements and
22 the failure to be able to confront a witness and things,
23 you know, pretty important rights. It was a problem
24 because we were all in trial together. He should have
25 been tried by himself, and I believe he would have been

1 acquitted if he had been tried by himself.

2 Q. Now, I'm gonna grab the transcript and direct you
3 to a couple of pages. This is gonna be page 267, lines
4 11 through 18. There you go. Now those are preliminary
5 instructions to the jury prior to the trial starting; is
6 that right?

7 A. I see that, yes.

8 Q. Okay. And in the that excerpt from the
9 transcript the jury is told that the attorneys are there
10 to help the jurors search for the truth. Do you see
11 that?

12 A. I do.

13 Q. Was there any objection?

14 A. No, I didn't object to it.

15 Q. Is there any particular reason why you didn't
16 object?

17 A. I didn't feel like it was something I should
18 object to.

19 Q. Would you agree that it's improper burden
20 shifting?

21 A. Yes. I did quite a bit of objecting in this
22 trial, by the way. Enough to get Judge Cooper about to
23 arrest me. So, you know, if I had known that was the --
24 I looked at that, but I didn't know that.

25 Q. But the jury's burden or standard is not to

1 search for the truth, correct?

2 A. That's right.

3 Q. Now, if you'll look again on page 273, 274.

4 A. Uh-huh.

5 Q. You'll note the judge also tells the jury that
6 they're gonna determine what the true facts are. Is
7 that accurate?

8 A. That's what it says.

9 Q. Any objection there?

10 A. No.

11 Q. Would that also be improper burden shifting?

12 A. Anything that shifts the burden onto the
13 defendant is improper, so I agree.

14 Q. That's all before the jury even hears any of the
15 evidence in this case at all; is that right?

16 A. Yes.

17 Q. Now I'm gonna have you look at page 1462. And
18 these are in the judge's closing statements to the jury.
19 In that case the judge tells the jury that their sole
20 interest is to seek the truth from the evidence that's
21 been presented to you in this case. Do you see that?

22 A. I do see it.

23 Q. Do you object?

24 A. I did not object.

25 Q. Did you have any strategic reason for not

1 objecting to any of these statements?

2 A. I simply didn't know to object.

3 Q. Didn't know to?

4 A. Yes. I didn't realize it would be burden
5 shifting.

6 Q. Do you believe you should have, though?

7 A. Oh, yes. Oh, yeah. You live and learn, Ms.
8 Goldberg.

9 Q. You recall the Denno hearing in this case,
10 correct?

11 A. Oh, yes, I do. I remember it very clearly.

12 Q. Who -- what witnesses did you present in that
13 hearing?

14 A. Mrs. Josie McDonald, his brother, and Derrick.

15 Q. You argued that particular issue pretty
16 extensively, the Denno, correct?

17 A. I did, along with their testimony. They had very
18 compelling testimony.

19 Q. This was an issue that you really wanted to put
20 up the best fight you could on; is that fair?

21 A. Absolutely. Since there was no forensic
22 evidence, the only thing they had was a statement
23 written by the chief investigator assigned by my 17 or
24 18-year-old client. So absolutely I put up quite a bit
25 of evidence in the Jackson v. Denno hearing.

1 Q. And your view, and just to understand that I'm
2 correct on what you just said, you believe that the only
3 real evidence in this case were the statements?

4 A. Yes. That's all they had. Well, of course, they
5 had what they claimed to be evidence in this case.

6 Q. Was there anything else significant to you that
7 you thought was problematic?

8 A. I just think that they went and got the first
9 three guys they could get to sign a statement and they
10 put them with the suspects in this case, who had a much
11 greater motive than Derrick McDonald to kill this guy.
12 This guy was a C.I. turning people in, okay?

13 Q. The victim was?

14 A. Yes. And they caught him copying their driver's
15 license stuff. He was the admitted C.I. for these
16 people. He had armed robbed a guy who he used to drug
17 deal with, put a gun to his girlfriend's head 60 days
18 before this. We had two witnesses that said that that
19 guy said I'm not waiting around for the court to figure
20 this out, I'm gonna get him.

21 Of course, we couldn't find that fellow. His
22 name was Adrian Duran. And he had, you know, in my
23 opinion fled, along with another fellow that they had
24 that was well known that this deceased fellow had copies
25 of his driver's license.

1 They all worked together at a restaurant, so it
2 was available to them. And he copied that stuff. And,
3 you know, I thought that guy might have a pretty strong
4 motive to kill him because he was setting him up to turn
5 him and have him arrested and he knew it.

6 Of course he wasn't around either, so we have two
7 people who have very strong motives to kill this fellow
8 and they're both gone. You know, flight is evidence of
9 guilty, in my opinion, you know. Of course, I -- we
10 couldn't find him. And that's one of the reasons we
11 should -- I needed more time in that case because I
12 wanted to run those guys down. I had a few questions
13 for them.

14 As a matter of fact, the one fellow, Mr. Duran,
15 was the first person that the Kershaw sheriff went and
16 picked up because, you know, of course what's the
17 implication of that? In their mind, yeah, here's the
18 guy that did it because it was less than two months
19 before that, that this CI working for the sheriff's
20 department had armed robbed him and put a gun to his
21 girlfriend's head right in her house. Okay?

22 He was arrested for burglary. I kept calling it
23 an armed robbery, you know, to use a gun, you know. In
24 any event, that's one of the reasons we needed more
25 time. And I made a mistake not asking for a continuance

1 and not asking for a sever in this case. And, you know,
2 I'm firmly convinced of that now. You know, hindsight's
3 20/20, Ms. Goldberg, but, you know.

4 Q. And it sounds like one of your big concerns in
5 talking about all that is that there were people out
6 there who had motive to kill the victims.

7 A. Yeah, absolutely.

8 Q. Did the State ever introduce any motive on the
9 behalf of these defendants?

10 A. They had something on Whitehead, the third -- the
11 other guy. They had some kind of fight or argument.

12 Q. But no motive for Mr. McDonald?

13 A. No. McDonald didn't barely even know this guy.
14 Okay, so you know.

15 Q. And the statements was the substantive evidence
16 in this case. Now ---

17 A. Look, I'm gonna cut to the chase on this thing
18 for you. Derrick McDonald was a very well spoken
19 witness, okay? And I made a big mistake not putting him
20 on the stand. There's no doubt about it because he told
21 -- he told me, and I believe every word of it because
22 that's my job is to be able to judge the truth and the
23 veracity of witnesses.

24 And he was going they told me I'd be a witness in
25 this case and that they were after Whitehead, which they

1 were. They were after the other guy. There's three of
2 them, okay? Then the other guy did have some
3 difficulties and did want to go have conflict with the
4 deceased. McDonald barely knew the guy.

5 And, as I said, McDonald is a very intelligent
6 man, okay? He's well spoken. The Jackson v. Denno
7 hearing, he handled himself very nicely. And I should
8 have put him up there cause we didn't have any other
9 evidence, but we won that last argument because I know
10 Cooper and I thought that we had -- that they had such a
11 lack of evidence that he might not submit it to a jury
12 because we made a very strong motion. I said, no, no,
13 you kids, let's do a jury, there's not enough evidence.

14 But while it was going on, we did another one of
15 these committee meetings, because the other two
16 witnesses were not as smart as McDonald, okay? And I
17 was, I was worried, you know, that they were gonna get
18 slaughtered up there and that was worth doing. But as
19 we went into it, at the moment I talked him into let's
20 do it for these reasons. I knew I made a mistake.

21 Q. Well ---

22 A. McDonald should have been up there. That jury
23 should have heard from McDonald.

24 Q. Let me -- and let me kind of go from the
25 beginning of what you were talking about towards the end

1 of what you were talking about.

2 A. All right.

3 Q. So you put Mr. McDonald on the stand during the
4 Denno hearing. You knew how he presented as a witness.

5 A. Well, I learned.

6 Q. That day.

7 A. I was actually surprised because he handled
8 himself very nicely.

9 Q. Okay.

10 A. And I said, you know -- and it was then that I
11 was going like -- I actually, I think this way about it.
12 When he was testifying in Jackson v. Denno, of course
13 the jury's not there. But I was picturing in my mind
14 how he was gonna sound in front of the jury and I said
15 this is gonna be good because he's gonna deny this and
16 they're gonna believe him. Of course, then we didn't
17 put him up.

18 Q. So we'll go into that a little bit more --

19 A. Well ---

20 Q. -- specifically in a second, but to stick with
21 the Denno hearing, just to kind of go procedurally --

22 A. Yeah..

23 Q. -- if you will look with me on page 253 -- I'm
24 sorry, 252.

25 A. All right. I'm familiar with this transcript, I

1 believe, so...

2 Q. I'm sorry?

3 A. I said I'm very familiar with this transcript.

4 Q. Okay. 252, lines 16 through 17.

5 A. Right.

6 Q. Now in this excerpt, the trial judge ruled that
7 he did not find a clear invocation of counsel by a
8 preponderance of the evidence on behalf of either of the
9 two defendants; is that right? You might need to look
10 at the --

11 A. Yeah, you know something?

12 Q. -- following page as well.

13 A. You know, but I'll be honest with you. You know,
14 there's a lot going on in the case right here. But when
15 you go back and read this, I mean, I see your point,
16 okay?

17 Q. And if you'll look at ---

18 A. I don't see that the defendants, by a
19 preponderance of the evidence -- all right, okay, I see
20 it.

21 Q. Okay. The ---

22 A. But that's incorrect. That's wrong.

23 Q. The judge used the incorrect word?

24 A. Yes.

25 Q. Okay. He said he did not believe the defendant's

1 met their burden to --

2 A. Right.

3 Q. -- prove they --

4 A. Right.

5 Q. -- invoked counsel?

6 A. Yes. That's, that's absolutely incorrect.

7 Q. And then if you'll look on page 255 --

8 A. Uh-huh.

9 Q. Lines 3 through 5.

10 A. Uh-huh, go ahead.

11 Q. Go ahead and tell me what that says.

12 A. Lines three through five?

13 Q. Uh-huh.

14 A. Yeah, absolutely. It's clear there's a theme in
15 here.

16 Q. The judge said he did not find by a preponderance
17 of the evidence --

18 A. Yes.

19 Q. -- that there were promises.

20 A. Yes. Yeah, there's a theme throughout this that
21 he's saying that the defendants have to prove by a
22 preponderance of the evidence.

23 Q. Now I know and I understand that you were
24 objecting to the statements as a whole, so it's not that
25 you didn't object to the statements.

1 A. Well, I always object to a statement written by
2 an investigator and signed by my client. Okay? I've
3 got a problem with that.

4 Q. Is there any particular strategic reason that you
5 didn't object to the way the judge ruled and the burden
6 he placed?

7 A. It just went over my head. I wasn't listening.
8 You know, this is all standard stuff, and I've been in
9 two or three or four murder cases with Cooper and I've
10 heard it all before, okay? And, you know, I'll be
11 honest with you, I'm just sitting there going like this,
12 well, he's gonna let them in. You know, I'm just not
13 listening.

14 Q. Should you have objected in that case?

15 A. Yes, absolutely. Should have done a lot of stuff
16 we didn't do in that case.

17 Q. Well, and going into what you were talking about
18 a minute ago, so you understood that once those
19 statements were admitted in and would be brought before
20 the jury, the jury then would still have to determine
21 whether the statements were voluntary.

22 A. Yes. But you know something? Look, things were
23 moving fast and this was, you know, this was a very
24 complicated, complex case. And by the way, there was
25 more than -- there was two other suspects. The

1 boyfriend of the girlfriend of the dead guy. The dead
2 guy was beating that girl and that boyfriend knew about
3 it and he perjured himself on the stand about three
4 times about where he was that night, by the way. Just
5 to let you know that. So do you know why I'm telling
6 you that? Because I have an opinion about this case and
7 I don't think Mr. McDonald killed anybody, okay? So...

8 Q. Did you ---

9 A. But anyway, we made some mistakes which were not
10 -- I should have objected to that because clearly that's
11 like law 101, defendants are not to have any burden of
12 anything, so that was a mistake.

13 Q. The statements ultimately did come in in front of
14 the jury and no, no evidence was presented by the
15 defense to oppose those, correct?

16 A. No. And I just told you that Mr. -- he should
17 have been allowed to, you know, contradict what they
18 were saying there because he had -- he's a very good
19 witness. And I asked him when we were in there, I
20 remember, during the trial I was going you know what, it
21 was the other two I was worried about getting
22 cross-examined. I wasn't worried about him.

23 And I made the decision. I was going I'm doing
24 the wrong thing. I think you better put him up. It was
25 all moving so fast, you know. And I really thought

1 because, just based on experience, that they didn't have
2 enough evidence to submit it to the jury. They didn't
3 have any forensic evidence in this case connecting him
4 to this thing.

5 Q. And that's where I'm going with this. You
6 mentioned a minute ago something about this committee
7 meeting. Can you tell the Court how the decision was
8 made to not put up any evidence in this case?

9 A. Well, first of all, there was the first line of
10 it was gonna be, you know, Cooper -- cause Judge Cooper
11 started coming around in this case. You know, he --
12 you'd have to be in front of him. As the trial
13 progressed, Cooper started going, you know, I think
14 you're on to something here about, you know, how come
15 you have done no investigation with these other people
16 who had a clear motive.

17 The picked -- by the way, the fellow they picked
18 up that this dead guy armed robbed, well he failed the
19 polygraph when they asked him did you kill this guy and
20 do you know anything about the killing. And they
21 polygraphed his girlfriend. She failed it as well.
22 And, as a matter of fact, you know, there's other things
23 like that. I'm not giving you all the details, but of
24 course I wanted that into evidence, but you know.

25 Q. But how was the decision made to not present any

1 evidence in this case?

2 A. Because -- why was it made or what was ---

3 Q. How and why. Tell me about what happened.

4 A. Well, we thought the Judge may not even submit it
5 to the jury because to actually his attitude about this
6 matter turned around, okay?

7 Q. Based ---

8 A. And I mean he was going you all barely have got
9 enough here. He kept saying stuff like that.

10 Q. So the defense was hopeful that the directed
11 verdict --

12 A. Uh-huh.

13 Q. -- might be granted?

14 A. And then, yeah. And then the other thing would
15 be able to get the last argument to the jury, which was
16 something that's extremely important.

17 Q. Okay. So once the defendant, the directed
18 verdict motion was not granted, the reason that no
19 evidence was presented was to preserve last closing?

20 A. Yes. But again, the only the thing I remember
21 most about this was that I thought I made a mistake. I
22 should have put him up right then and there. I was
23 getting ready to say, look, I don't think you have the
24 evidence so put him up and deny this.

25 Q. You wanted to get up, you wanted to fix your

1 mistake at the time, right?

2 A. I, I -- but I didn't, okay?

3 Q. And why not?

4 A. Huh?

5 Q. And why not? What kept you -- what made you
6 hesitate?

7 A. I wanted the last shot at the jury at that point
8 after our first thing didn't work, okay? But, you know,
9 I mean these are things, decisions you're trying to make
10 as things are happening, okay? And, you know, regarding
11 -- the big thing in this case is this, McDonald should
12 have been able to deny that they did this and tell the
13 jury that they were telling you're gonna be a witness.

14 Look, do you want to be a defendant in a death
15 penalty trial or do you want to be a witness against
16 Chris Whitehead, the guy we were telling you did it,
17 just help us out here? I mean, they were definitely
18 saying this to him and this other defendant. There's no
19 doubt about it.

20 I mean, look, the guy did a statement implicating
21 himself, the other defendant, Mr. Cannon. He signed a
22 statement saying okay, we murdered him, basically.
23 Well, they didn't take him into custody when he signed
24 that. When he signed it they left him there. Well,
25 they just, you know, left him there. I mean, that was

1 clear proof to me that they had promised him he's not
2 gonna be a defendant, I mean to me.

3 Q. Correct.

4 A. But, you know, I know they didn't.

5 Q. And the jury didn't get to hear any of that.

6 A. No.

7 Q. Now, when --

8 A. And they should have.

9 Q. -- you realized you were making a mistake and you
10 hesitated to act and you still thought you lost one in
11 last closing, was the fact that you had made an
12 agreement with co-counsel about not entering evidence,
13 did that play into your decision to --

14 A. Yes.

15 Q. -- correct your mistake?

16 A. Yes. Yes, it did. Look, it was a mistake.
17 McDonald should have been able to refute this. That's
18 my opinion, because he's a very good witness. And at
19 the time I didn't know how good he was until he did that
20 Jackson v. Denno. And then when we got up there, I
21 mean, you have to understand these are things you have
22 to decide instantaneously both basically. And, of
23 course, in hindsight I know it was mistake. I thought
24 it was when we -- when I didn't put him up. Should
25 have.

1 Q. Do you recall the part of -- do you recall during
2 deliberations when the jury requested to rehear the
3 testimony of witnesses?

4 A. Yeah. Well, look, the jury deliberated for
5 two-and-a-half days, okay? You know, that to me is
6 grounds right there. I mean, the only evidence they had
7 is an alleged signed confession. Well, why did it take
8 them two-and-a-half days to decide guilt? I mean, I was
9 going okay. And, of course, the judge, when they came
10 back and said they couldn't reach a decision, he kept
11 urging them and urging them. I should have objected. I
12 think I did object to that. I said, I don't want you
13 saying a word to this jury.

14 Q. And all of the witness testimony they wanted to
15 rehear had to do with the statements made by the
16 defendant. Is that ---

17 A. Say that again. I'm sorry.

18 Q. The witnesses they wanted to read the testimony
19 on -- from --

20 A. Yeah.

21 Q. -- that all -- that just had to do with
22 defendant's statements; is that right? To your
23 recollection ---

24 A. You know why I thought they wanted to hear it?
25 Because that guy was not telling the truth, the chief

1 homicide investigator.

2 Q. You hoped they were looking ---

3 A. I think that they didn't believe him.

4 Q. They didn't after that though.

5 A. Convicting them but, you know -- look, again
6 two-and-a-half days to decide this thing when they've
7 got signed confessions from all three defendants? I
8 mean, you know, that in itself is grounds for reasonable
9 doubt to me.

10 Q. Is there any particular reason why when the jury
11 sent the note in and discussions were had on the record
12 about replaying testimony or what to do, is there any
13 particular reason you waived your clients presence and
14 didn't bring him in so he would understand what was
15 going on?

16 A. I can't remember.

17 Q. Did you ---

18 A. I'm sure I did that, but I don't, you know, I
19 shouldn't have, but I don't remember.

20 Q. When the decision was made to prepare written
21 transcripts of the testimony of those three witnesses
22 and send it back to the jury, did you object to that
23 decision or did you agree or acquiesce?

24 A. I agreed to it, as I recall. And the reason,
25 I've already told you the reason. I don't think the

1 jury believed either one of those investigators because
2 their cross-examination was, you know something, they
3 basically didn't know anything about the case. I can't
4 remember. I said, you're the chief investigator and you
5 don't know this file? I mean, the guy kept saying, I
6 didn't handle that. Someone else did, I don't remember.
7 I said, well, SLED said there was -- here's a simple one
8 for you.

9 You submitted all these evidentiary things to the
10 SLED lab, didn't you, sir? No, but I think I should.
11 And they sent it back to you. There was no connection
12 between Mr. McDonald and the other defendants. No, you
13 know, there's no connection at all, do they? I'm not
14 sure what the report said. That's the chief
15 investigator. I was going, really?

16 Look, first of all, he's right about one thing,
17 they should have played the audio with it.

18 Q. And why should they have ---

19 A. Because the guy stares at you with a stupid look
20 on his face and he's the chief investigator, he says
21 nothing for 30 seconds.

22 Q. Right.

23 A. You know, that's not in the transcript.

24 Q. Why should they -- well, but why should they have
25 played the audio versus given written transcripts?

1 A. Because of what I just told you. I don't know.
2 I said: You're the chief investigator and you don't
3 know? So I said: Did you talk to the people that were
4 at the scene that found the body? No. I said: Do you
5 know what they said? No. These are the kind of answers
6 we were getting. That's why I thought the jury wanted
7 that transcript.

8 Q. There was beneficial --

9 A. I think that's ---

10 Q. -- information in that testimony?

11 A. Yeah. Yeah. Yeah.

12 Q. Did you ---

13 A. Look, they didn't do an investigation, in my
14 opinion. And to be frank with you, I think Judge Cooper
15 may have mentioned that on the record. He said it was
16 something about the blankest investigation he's ever
17 seen.

18 Q. Did you consult with your client at all before
19 deciding to agree to let the transcript --

20 A. I -- you know something --

21 Q. -- go to the jury?

22 A. -- probably not. I don't know, I don't remember.
23 I mean, probably not.

24 Q. When the jury received the written
25 transcripts ---

1 A. For the reasons I just told you.

2 Q. -- they were actually able to review as much or
3 as little as the testimony of the State's witnesses
4 after closing arguments had already been made. Is that
5 a fair --

6 A. Yes, it is.

7 Q. -- assessment?

8 A. And in hindsight, you know, you're going well,
9 you know what, I guess they are getting the last word,
10 aren't they? Because, you know, of course they're
11 testifying that oh, yeah, he said he'd do it.

12 Q. Okay.

13 A. You know, You had to be there, I guess, to hear
14 what they were saying, but this chief investigator in
15 this case wrote most of the statements out. You know,
16 some of them were written after they had signed
17 something. You know, I mean come on. I didn't think
18 Cooper was gonna submit it to the jury, to be honest
19 with you.

20 Q. Is there any point in reserving the right to last
21 closing argument if the jury then is allowed to hear the
22 State's evidence after the fact?

23 A. No. It totally defeats the purpose of it.

24 Q. Undermines the whole defense strategy?

25 A. It only defeats the purpose of doing it

1 strategically. Sorry.

2 Q. Now, going back to the Bruton issue -- well, let
3 me start over.

4 Did you read the appellate opinions in this case?

5 A. Yes, I did.

6 Q. Okay. Are you aware that the Court of Appeals
7 found that the Confrontation Clause argument wasn't
8 preserved?

9 A. I probably agreed with it. I mean, you know,
10 they're the experts.

11 Q. Do you agree with that?

12 A. (Nods head up and down.)

13 Q. No strategic reason that wasn't preserved more
14 technically?

15 A. You know something? You know what they call it?
16 They call it making a mistake, okay?

17 Q. Now, when the statements were actually presented
18 to the jury, the Court did not give a limine instruction
19 immediately after the fact explaining how they should or
20 shouldn't consider those statements and what context.
21 Is there any particular reason why you didn't request
22 one?

23 A. No. Because I think I was still stunned that
24 they were even letting them into evidence. I said, you
25 can't let a statement into evidence written by a cop. I

1 was just going what are you talking about? I thought
2 there was a rule against it. A police officer, excuse
3 me.

4 Q. I'm gonna have you look with me on page 827. I
5 think I have that so I will hand that to you.

6 A. This whole thing with those statements in that
7 case was a, you know, a cluster blank, so...

8 Q. Eight -- page 827 is your cross-examination of
9 Investigator Catoe.

10 A. Yeah.

11 Q. Now, the Court of Appeals and the Supreme Court,
12 in their review, ultimately found that there was a
13 Bruton violation and that the defendant, like
14 Mr. McDonald was facially incriminated by inference,
15 basically saying it was really bad but it's still
16 inference.

17 On page 827, you actually told the jurors who the
18 other person in the statements were. Is that -- do you
19 see that?

20 A. Yeah, that was roughly -- yes.

21 Q. And what did -- who did ---

22 A. Well, I knew it was gonna come in.

23 Q. Okay. So it wasn't just inference of the
24 statements themselves, you just completely told the
25 jurors who the statements referred to.

1 A. Yeah. Well, you can see Mr. Renner (phonetic)
2 picks up on that, doesn't he? But, you know, they were
3 gonna hear it anyway. I mean, you know something,
4 there's a difference between legalities and realities,
5 okay? I've got 12 people sitting and listening to this.
6 You know, well, I'm gonna act this and then go, ohh,
7 this third guy's not Mr. McDonald. I mean, you know,
8 come on. I mean, you know, yeah.

9 Q. You didn't believe that your client was
10 adequately protected but ---

11 A. I knew they were gonna know it was him. I think
12 I told the judge that. I said none of this redaction
13 stuff is gonna work. They're gonna know it's Derrick
14 McDonald.

15 Q. Right.

16 A. I said, you know, come on, are you kidding? I
17 think I actually said it more than once.

18 Q. Right.

19 A. I said this isn't gonna work. I said you can't
20 redact out these facts. And, you know, he's already
21 overruled my objection to any of it. But, you know
22 something? Why shouldn't you say McDonald's name when
23 they're gonna know it anyway?

24 Q. Okay.

25 A. And they go, no, let's act like we're trying to

1 pull something on them.

2 Q. Okay.

3 A. Okay? You know, you have to understand. I mean,
4 I was -- of course, I like Mr. Renner. He's a pretty
5 sharp fellow. He gets right on them. I guess they were
6 assuming there were previous objections to this. So,
7 you know, he knew about it so I should have known
8 because I figured, you know, since we went to law school
9 together I should know as much as him but I didn't.

10 Q. Okay. Now, as you know, the Appellate Court
11 ultimately found that Mr. McDonald's constitutional
12 rights were violated but they found overwhelming
13 evidence in part because he gave a statement.

14 A. Yeah.

15 Q. How would that have been different if the judge
16 had used the correct standard in the Denno hearing?

17 A. Well, we probably would have won. But you know
18 something, Mr. McDonald had a lot more rights than that
19 violated than the one you're talking about in this case.
20 But anyway...

21 Q. All right. Beg the Court's indulgence. No
22 further questions.

23 MS. KINARD: Thank you, Your Honor.

24 THE COURT: Yes.

25 CROSS-EXAMINATION

1 BY MS. GRAFTON:

2 Q. Mr. Whitlark, you testified you became involved
3 in this case about 60 to 90 days before trial.

4 A. You know, that's my general recollection. I
5 know, I know it wasn't long.

6 Q. Okay.

7 A. I do know this, I wanted more time to prepare
8 that case once I started looking and seeing all this
9 stuff. We needed more time to run down those other
10 people.

11 Q. Do you recall about how many times you met with
12 Mr. McDonald?

13 A. Not very many. I was too busy trying to find,
14 you know --

15 Q. Were you investigating?

16 A. -- the people that did it. Huh?

17 Q. Were you investigating the case?

18 A. Yes.

19 Q. Did you hire an investigator?

20 A. There was one hired, Ross Kendrick. I'd gotten
21 court approval for the funds for that I believe.

22 Q. And you were sharing information --

23 A. Yes. Well, that --

24 Q. -- between the other attorneys?

25 A. -- was one of the reasons I didn't ask for a

1 continuance, we were sharing information, you know, and
2 I thought that they had gotten everything.

3 Q. I'm sorry, you thought what?

4 A. I thought that they had, you know, exhausted it.
5 You know, they told me they'd been investigating it and,
6 you know, I hadn't. I had some exceptions to that after
7 we started -- we got close to trial and in trial.

8 Q. Part of the investigation that you did when you
9 requested a, I believe, it was a burglary file or you
10 called it armed robbery regarding the decedent?

11 A. Right. And that's on this fellow, this guy that
12 I told you about that they picked up first. And he
13 failed a polygraph on the question, did you kill this
14 guy? I mean, you know, yeah, I went to find that fellow
15 and they wouldn't give me that file. I didn't know all
16 this until right then, okay? I didn't know all these
17 details.

18 Q. Were you ever provided with a copy of that file?

19 A. Yeah. Judge Cooper ordered them to give us the
20 stuff and we got it. But, of course, you know, we're
21 already in court. I think they were already in trial
22 when we got this.

23 Q. You were already in trial and ---

24 A. Yeah.

25 Q. -- you swore the jury, okay.

1 A. So, you know, I think I was asked before did they
2 turn over everything to you? Well, not exactly because
3 I remember specifically asking for this when I
4 discovered that the decedent had just armed robbed and
5 burglarized somebody's house two months before this. I
6 was going, well, where's he at? I was going, you know,
7 here's your chief suspect.

8 You know, this guy's already a criminal, you
9 know. And he sat there and watched McDonald or the
10 decedent put a gun to his girlfriend's head. Yeah, I
11 wanted to find that fellow. And they should have turned
12 that information over to me. And if they had, I
13 probably would have asked for a continuance because I
14 would have been even more zealously trying to find that
15 guy.

16 Q. When you met ---

17 A. Although we did, we did have subpoenas for them.
18 We were looking for him, believe me.

19 Q. When you met with Mr. McDonald, did you discuss
20 strategy for the defense in this case?

21 A. More or less. You know, more or less. You know,
22 Mr. McDonald was in high school, okay? And, you know,
23 we were pressed for time. I didn't have time to discuss
24 strategies with somebody who was a junior or senior in
25 high school. I said, this is what we're gonna do. You

1 know, and I probably made a mistake doing that because I
2 didn't realize how smart this fellow was. McDonald is
3 intelligent. He's well spoken. And I knew if I'd have
4 spent more time with him, I probably would have learned
5 that and likely change my strategy in this case.

6 However, the point of the matter is this, I don't
7 think I spent enough on this case in any respect, to be
8 honest with you. This case deserved more preparation.

9 Q. Did Mr. McDonald relay his version of events to
10 you?

11 A. Yes.

12 Q. And so you had that to work from while you
13 were preparing your investigation and ---

14 A. Yes. And you know what? It wasn't like it was a
15 big shock to me that the police promised him you're just
16 gonna be a witness, we're not gonna arrest you. You
17 know, when he told me that I believed him, I still
18 believe him.

19 Q. You discussed the elements of the charge and what
20 the State had to prove in order to get a conviction?

21 A. Say it again.

22 Q. Did you discuss with him what the State had to
23 prove in order to get a conviction?

24 A. Yes.

25 Q. So he knew how ---

1 A. I believe so. I mean, you know, it's hard to
2 remember these conversations. I did tell him, you know,
3 he knew what was going on, you know? And I told him,
4 you know, they've got -- because I told him they've
5 gotta prove this beyond a reasonable doubt with more
6 certainty, okay? And I said that's a hard burden.

7 See, that was one of the ways that I convinced
8 him not to testify because I told him. I said, look, I
9 don't think they've proven this thing beyond a
10 reasonable doubt. But like I told you, in hindsight, he
11 should have been allowed to refute and to explain what
12 those policemen did to him. This kid is in high school
13 and it's at midnight and they're riding him around in
14 Kershaw County, okay, asking him questions. I think he
15 was probably scared.

16 And if somebody told -- two cops wearing guns
17 told me, do you want to be a witness or do you want to
18 get electrocuted in the electric chair, I'd probably,
19 you know, I want to be a witness. And that's what I
20 believe they told him. And I didn't give him a chance
21 to say that to the jury. I've already told you this.

22 Q. I appreciate that. So, and just to make sure
23 that I understood, and I apologize for reiterating this,
24 but your strategy regarding having him testify was that
25 you thought it probably wouldn't get to the jury based

1 on a directed verdict motion?

2 A. I didn't think they had enough evidence to submit
3 it to the jury. Of course, I'm a little more liberal in
4 my view of things than Judge Cooper is in this regard.
5 But I will say this about it. McDonald -- well, this
6 was a close call case. The jury deliberated
7 two-and-a-half days, okay?

8 Q. That's long.

9 A. They had some questions. And, as a matter of
10 fact, they came back and they couldn't make a decision.
11 And if he had been allowed to testify, it probably would
12 have tipped the scale. He probably would have been
13 acquitted. At least him. So, you know, that was a
14 mistake.

15 Q. Okay. Let's talk about the Jackson V. Denno
16 issue just a little bit more.

17 A. Sure.

18 Q. When you argued, you argued a bit about
19 invocation on behalf of another regarding his mother and
20 brother saying he needs a lawyer, he needs a lawyer.
21 And the issue Judge Cooper ruled on was there was no
22 clear invocation by Mr. McDonald. And, in fact, there
23 was a waiver of rights. Do you recall arguing all that?

24 A. I remember, yes. I remember that I raised the
25 issue that his mother was going crazy and she was going

1 I'm gonna get him a lawyer. I want a lawyer for him.
2 And you know what? He wouldn't say a word to this guy,
3 to this cop. He just told them, you know, he told them
4 what he really did that night.

5 And then, you know, it turns around that he
6 waives his right to a lawyer. I don't -- you know, I
7 find that hard to believe. So, in other words, I
8 believe that he did tell this policeman I want a lawyer.
9 And they should have stopped questioning him. They
10 shouldn't have taken him to the station.

11 They told his mother they were taking him to the
12 jail, but they took him to the police department instead
13 and began to question him again. And I think they took
14 advantage of him being as young as he was to scare the
15 hell out of him and get him to sign this thing. And
16 that's what I think happened.

17 Q. Okay. Let's move to the Bruton issue. When it
18 came to redacting these statements, how did that happen?
19 Was it in one of those committee meetings where the
20 three of you got together to do the redactions?

21 A. You know something, I remember it. I remember
22 they were doing it. And I said this is a waste of time.
23 They're gonna know exactly what's going on. It was this
24 guy and blank. I mean, you know, I mean I told the
25 judge this over and over again this is not gonna work.

1 You're gonna violate their rights. They're gonna know
2 it's them. You're defeating the whole purpose of it,
3 things like that. But, you know, I got overruled, so...

4 I did keep bringing it up, though. I said, you
5 know, are we joking here? I mean, they're gonna know
6 exactly what's going on here. There's a blank there
7 instead of McDonald's name. But, you know, of course
8 I'd already been overruled so he let them in.

9 Q. You had been overruled, but do you believe that
10 you continued to extraneously object to any of --

11 A. Of course --

12 Q. -- it getting in?

13 A. -- I objected to it because I knew the result of
14 it was gonna be that they were gonna, they were gonna
15 know it was him. I mean, you know, it wasn't -- this
16 was a no brainer. I mean, redacted statements like this
17 under the circumstances of this case just didn't work at
18 all, okay? You might as well -- why do you think I said
19 his name? They were already gonna know it was him. I
20 mean, you know, come on. Oh, they're not gonna know
21 it's him?

22 I mean, look, I remember this, okay? And I also
23 remember that that whole thing about redacting the names
24 and all that, that was just a joke, okay? They were
25 gonna know it was him, and I said that to Judge Cooper.

1 And I said, so what's the point? I mean, either he keep
2 it all out, is what I told Cooper or, you know, you
3 might as well just forget it. I mean, they're gonna
4 know it's him. But I believe Mr. -- I believe my
5 associate in that case was arguing that issue more than
6 I was, so...

7 Q. Did Mr. McDonald express a desire to testify
8 during the trial?

9 A. Yes.

10 Q. So he did want to testify and it was, as you
11 explained before you ---

12 A. Yeah. Well, you know, nobody wants to testify in
13 a case but, yeah, he told me he wanted to say what
14 happened to him and why. The only evidence they have is
15 a statement written by the chief homicide detective up
16 in Kershaw County at 1 o'clock in the morning to a high
17 school kid with no lawyer.

18 Q. Was there ever any consideration of a plea
19 agreement in this case?

20 A. No. I was convinced he was innocent. I did
21 advise him do not plead to anything because I thought he
22 was innocent.

23 Q. I have no further questions. Thank you, Mr.
24 Whitlark.

25 THE COURT: Any redirect?

CROSS-EXAMINATION OF J. MARCUS WHITLARK BY MS. KINARD

1 MS. GOLDBERG: Just briefly, Your Honor.

2 REDIRECT EXAMINATION

3 BY MS. GOLDBERG:

4 Q. You said that Mr. McDonald did want to testify?

5 A. Yes.

6 Q. He told you that much?

7 A. Yes.

8 Q. And the reason he didn't was because?

9 A. I convinced him not to and I, you know and I just
10 told you something. This case bothers me.

11 Q. Thank you.

12 A. I don't think he did it, in other words.

13 Q. Thank you, sir.

14 MS. GOLDBERG: Nothing further, Your Honor.

15 THE COURT: All right. You may step down.

16 THE WITNESS: Yeah. Thank you, Your Honor.

17 MS. GOLDBERG: No further witnesses from the
18 Applicant. We do have argument at the appropriate time.

19 MS. KINARD: And no witnesses from the State,
20 Your Honor.

21 THE COURT: All right. I'll hear the argument.

22 CLOSING ARGUMENT

23 BY MS. GOLDBERG:

24 All right. Thank you, Your Honor. May it please
25 the Court. I will just briefly go over the amended

1 application in order. The first allegation is that in
2 the Denno hearing the judge did use the incorrect
3 burden. Citations from the record are all I don't find
4 there was an invocation. I don't find a clear
5 invocation by a preponderance of the evidence on behalf
6 of the two defendants. I don't find by a preponderance
7 of the evidence a clear invocation of Robert Cannon or
8 Derrick McDonald. For the record, that's page 252 and
9 254.

10 The State does have the burden. The State must
11 show the statement was made voluntarily by a
12 preponderance of evidence. Where the evidence conflicts
13 as to whether Defendant's statement is involuntary, it
14 is the providence of trial court to determine the
15 factual evidence by a preponderance. Again, the burden
16 is on the State.

17 The Court said on page 255: But I don't find,
18 again, by preponderance of the evidence that there were
19 promises of leniency. Now, there is certainly
20 conflicting testimony on this issue and it's very and
21 somewhat troubling, but I still don't believe I can find
22 by a preponderance of the evidence that there was a
23 promise of leniency.

24 Again, the burden is incorrect there. The
25 defendant does not have the burden to prove that. The

1 State has to prove the lack of promise or the lack of
2 coercion. The State has to prove the voluntary nature.

3 Later in the ruling the judge again said: And I
4 can't find that. Although that may be what they
5 believed, I mean based on the evidence I heard, I can't
6 find that based on the preponderance.

7 So he's saying the defendants have not proven the
8 issue. So I believe defense counsel should have --
9 well, first of all, appellate court did not review this
10 issue because no objection was made. So the fact was
11 the judge used the wrong standard. If it had been
12 raised, it would have likely been successful on appeal
13 because it is an incorrect standard in conjunction with
14 the Bruton error that the Court already found, and the
15 fact they found harmless error because of the statement.
16 If the Court of Appeals had noted and actually been able
17 to review this error with the Denno hearing, it is
18 likely that the Court -- the case would have been
19 overturned on appeal.

20 Also, if McDonald or the codefendants' statements
21 had been found inadmissible at that point in time, that
22 clearly would have changed everything because that was
23 such a substantial part of the evidence in this case.

24 The second allegation that the judge told the
25 jury was that they were to search for the truth. There

1 is case law, State versus Beaty, which clearly says --
2 State versus Beaty says:

3 A trial court should refrain from informing the
4 jury, whether through comments or through its charge,
5 that they're role is to search for the truth or to find
6 true fact or to render a just verdict. These phrases
7 may be understood to place an obligation on the jury
8 independent of the burden of proof to determine
9 circumstances surrounding the alleged crime.

10 THE COURT: What year was that?

11 MS. GOLDBERG: That was 2016.

12 THE COURT: So how can you -- you're citing a
13 that 2016 case --

14 MS. GOLDBERG: Well, I ---

15 THE COURT: -- to referencing a 2007 trial?

16 MS. GOLDBERG: Let me, let me pull it because I
17 believe what I may have misguidedly done is pulled the
18 most recent case, but I believe that they have prior
19 cases. Now -- because I do know, and I believe that it
20 cites -- this issue has been cited for more than one
21 case out there. That being said, courts often will say
22 that this is clearly incorrect. The appellate courts
23 are not okay with this. Judges, please refrain from
24 using this language in your statements to the jury.
25 However, all the cases I've seen they have found within

CLOSING ARGUMENT BY MS. GOLDBERG

1 the context of the case it's been harmless error.

2 But in this particular case, I think it is
3 important the, the judge said it to the jury twice
4 during his preliminary statements, and then again during
5 his closing remarks to the jury, book ending the case
6 with this instruction to search for the truth, which is
7 a -- which is burden shifting.

8 Even if there wasn't case law that said that at
9 the time, burden shifting has always been an apparent
10 problem and something attorneys should object to. I
11 think any failure to object to those phrases would be
12 unreasonable.

13 Failure to request a severance.

14 THE COURT: Is there any authority that failure
15 to object to a jury being instructed that their duty is
16 to search for the truth, are there any authority where
17 that's been found to be a ground for PCR?

18 MS. GOLDBERG: I don't recall. I do have here a
19 couple other cases where it's been addressed. State v.
20 Emery, State v. Gillespie and State v. Simmons, but I
21 cannot tell Your Honor offhand if those are PCR's or
22 appeals. Beg the Court's indulgence.

23 Your Honor, obviously my client wanted to speak
24 with me. As you've seen and heard, he's very well
25 versed in all these issues. He tells me that

1 State v. Emery is a PCR case.

2 THE COURT: Pardon?

3 MS. GOLDBERG: He tells me he believes State v.
4 Emory is a PCR case where the issue was waived because
5 of a failure to object. I don't have that with me here
6 today, but that's his recollection.

7 As to failure -- ineffective assistance to her
8 failure to request a severance, that is because of just
9 the nature of this case, the specific trial. We know
10 that a specific trial right of the defendant was
11 violated and that his Confrontation Clause rights were
12 violated through the joint trial because of the Bruton
13 violation; therefore, prejudice of his appearance.

14 Trial counsel testified he should have requested
15 a severance. If he had, the statement from the
16 codefendant wouldn't have been offered unless the
17 codefendant had made himself available to testify.

18 Issue D, I guess I did not say this at the
19 beginning. Issue D is being withdrawn. There was no
20 testimony offered to that anyway.

21 Issue E, I think my client very eloquently argued
22 for me in stating that he believes the Crawford, the
23 specific Crawford objection in conjunction with a
24 Bruford -- I'm saying it wrong now, Bruton objection
25 would have been more powerful together when he testified

1 that he believes that would have made a difference in
2 the appellate court. Beg the Court's indulgence.

3 Subsection F, ineffective assistance for counsel
4 to sufficiently and effectively argue Bruton. I mean,
5 essentially we just have a case here where we know it
6 was always improper. It wasn't argued to the level
7 where it wasn't -- where it was suppressed.

8 But more so than that, it's so much worse because
9 even though the Court did engage whatever protections
10 they could, which were insufficient, by redacting the
11 statements and having another person, Mr. Whitlark then
12 actually mentioned the codefendants by name when
13 cross-examining that investigator. He states that he
14 did so because he thought it was apparent to the jury
15 anyway, but any protection he may have had at that point
16 in time were gone at that point.

17 THE COURT: He undid the redactions through his
18 cross-examination?

19 MS. GOLDBERG: Completely undid the redaction.
20 So even though those protections were limited and not
21 sufficient, there really were no protections here at
22 all. And what is important to this case is that, you
23 know, that is an issue. We know there was a Bruton
24 problem anyway, but the Bruton violation in this case
25 it's -- let me back up.

1 Clearly the defendant was prejudiced in that his
2 codefendant statement, Cannon, was used against him to
3 implicate him. He wasn't able to cross-examine Cannon.
4 He also then obviously did not testify himself. If this
5 Court finds any merit at all to the Applicant's -- and
6 I'm going backwards a little bit -- to the Applicant's
7 arguments regarding the Denno hearing and the statement
8 itself, then this Court should also grant relief on the
9 Bruton issue because McDonald's statement is the reason
10 that the Supreme Court found Bruton issues to be
11 harmless error. So if there's an issue with the
12 statement as well, the Bruton issue cannot be harmless
13 error.

14 Then I'm gonna jump ahead to the final one. On
15 that one I'm gonna come back. But I did put in here the
16 cumulative effect of trial counsel's errors constitute
17 an ineffective assistance of counsel. As Your Honor,
18 I'm sure, is aware in South Carolina, no courts have
19 adopted that. No courts have actually ruled against it
20 either.

21 So far essentially the appellate courts have
22 either found one particular issue just worthy of the
23 level necessary to prove prejudice or none at all.
24 There have been no court to have said the combination of
25 errors are such to have created prejudice to such an

1 extreme extent the case should be overturned. I believe
2 this is that case where it's clear.

3 The Bruton -- his Bruton protections were
4 completely violated and if it weren't for the errors of
5 counsel regarding his statement, there would not have
6 been overwhelming evidence. So I think this is like no
7 other case, a perfect one to show cumulative errors.

8 The other one that is important in this case is
9 the whole of the issue involving the jury wanting to
10 rehear testimony. There was a situation where the jury
11 wanted to hear the testimony of three witnesses. Those
12 three witnesses had to do with the statements that were
13 offered.

14 Trial counsel did not ask for the defendants to
15 be present in the courtroom to hear what was going on to
16 have any input on any decision that was made. There is
17 a case, State v. Gullede. In that case an audiotape
18 was entered into evidence and played for the Court,
19 played for the jury during deliberations. The Supreme
20 Court held that the judge abused his discretion in
21 allowing the jury to take a transcript of that audiotape
22 back into them with -- during deliberations because it
23 unduly emphasized that.

24 That has to do with the transcript itself. And
25 then there's case law regarding how the applicant has a

1 right to be present during all critical stages of trial.
2 State v. Whaley says the defendant has a constitutional
3 right to be present at every stage of the criminal
4 proceeding against him. Although the right to be
5 present is substantial, no presumption arises from
6 prejudice.

7 What we have here is that the defendant had been
8 told even though you make a great witness, I want --
9 you're not gonna testify because we're gonna have the
10 last closing and that's our best strategy.

11 Then a hearing is held, Defendant is not brought
12 into the courtroom, he has not consulted. Trial counsel
13 makes a decision without consulting him that the
14 transcripts are okay to go back to the jury
15 deliberations. He agrees to it. He doesn't object.

16 He doesn't even put it on the judge's -- you
17 know, he doesn't submit an objection so that the judge
18 can have discretion and overrule, it's just an agreement
19 between all the parties. But those transcripts do go
20 back to the jury.

21 That does unduly emphasize that evidence because
22 they are in transcript form. The jury could look for
23 only little pieces of the testimony they wanted to.
24 They didn't have to hear the cross-examination, the
25 impeachment. They didn't have to consider that

CLOSING ARGUMENT BY MS. GOLDBERG

1 testimony as a whole.

2 In addition, the State got the last word, and
3 that clearly undermined the strategy of the defense
4 counsel. That, allowing that, not objecting to that was
5 unreasonable. Failing to present evidence and allowing
6 the defendant's statement be presented by the State and
7 not challenged for the sole strategy of reserving
8 closing argument, last closing argument, and then
9 letting that go and letting the State get the last word,
10 that as a whole was unreasonable. That is the
11 Applicant's case.

12 THE COURT: So what do you make of Mr. Whitlark?

13 MS. GOLDBERG: Your Honor?

14 THE COURT: What do you make of Mr. Whitlark?

15 MS. GOLDBERG: I make of Mr. Whitlark that he's
16 very passionate about this case and always has been.
17 He's stated that he's made mistakes. It appears that he
18 -- my under -- my view of what he has testified today is
19 that at times he allowed his co-counsel to steer the
20 trial and acquiesce to their decisions, which may have
21 been in the best interest of their client but were not
22 necessarily in the best interest of Mr. McDonald and he
23 should not have done that.

24 THE COURT: All right. Ms. Kinard.

25 CLOSING ARGUMENT

1 BY MS. KINARD:

2 Thank you, Your Honor. In this case I am at an
3 unusual place because the appellate courts have said
4 that they find that Mr. Whitlark was ineffective in
5 certain instances, and as far as they can say issues
6 were not preserved and should have been. Therefore, I
7 think the -- what we have to do is look for prejudice
8 based under the two Brunswick (phonetic) requests and
9 see whether Mr. Whitlark's actions or inactions
10 prejudiced Mr. McDonald.

11 THE COURT: How do you -- what does that mean,
12 finding whether prejudice exists and doesn't exist,
13 meaning that he was gonna be found not guilty and
14 actually was not guilty because we think the jury might
15 have been hung? How does that, how does that fly in the
16 context of prejudice, there being no prejudice?

17 MS. KINARD: The way that our Supreme Court has
18 defined prejudice is based on a reasonable probability.
19 I'm trying to find the exact quote.

20 MS. GOLDBERG: I think it's a reasonable
21 probability the outcome would have been different.

22 MS. KINARD: That is the basis of it, yes.

23 MS. GOLDBERG: So arguably --

24 THE COURT: Okay.

25 MS. GOLDBERG: -- it could have been hung, could

CLOSING ARGUMENT BY MS. KINARD

1 have been not guilty. Either one of those would have
2 been different outcomes.

3 MS. KINARD: It is not necessarily guilty or not
4 guilty. Ms. Goldberg is exactly right. So just any,
5 any difference, any reasonable probability that the
6 outcome would have been different. And it's arguable
7 that that could be applied to each allegation of the
8 defendant's.

9 So, for example, via the Denno and even though
10 Mr. Whitlark did argue vehemently for certain aspects of
11 it if, for example, his argument could have changed and
12 it could have changed the outcome of it, if the Court
13 believes that the failure to do so would have, you know,
14 there is a reasonable possibility that an act or an
15 action that were done by him would change the outcome of
16 that, then I believe that it is a step-by-step analysis.
17 And that is the State's position to briefly address the
18 human error. I'll go back to that one.

19 THE COURT: Do you agree that the judge used the
20 wrong standard in the Jackson v. Denno hearing as to who
21 had the burden of showing prejudice?

22 MS. KINARD: The way he worded his ruling does
23 imply that; however, his ruling also shows that he
24 looked at the, the cumulation of testimony, the
25 cumulation of evidence. He specifically relied on the

1 signature on the waiver and the signature on the
2 statements. He listened to the testimony of all of the
3 witnesses, and I think that is clear from the way he
4 said ---

5 THE COURT: So he decided -- what did he decide
6 in relation to McDonald and the other guy?

7 MS. KINARD: That there was no clear invocation
8 in the record.

9 THE COURT: And his right to what?

10 MS. KINARD: To have an attorney present during
11 questioning.

12 THE COURT: And, therefore, the statement is
13 voluntary?

14 MS. KINARD: Yes, sir, that was his ruling.

15 THE COURT: Based on the weight of the content?

16 MS. KINARD: Yes, Your Honor. And the fact that
17 he did go on to sign ---

18 THE COURT: And McDonald didn't show that he did
19 -- that he didn't carry his burden showing that he did
20 invoke his right.

21 MS. KINARD: That is the implication. I will
22 admit the first time I read the ruling, it didn't occur
23 to me that way. I, I read through it and said what is
24 she talking about? Wrong burden. It's, you know,
25 preponderance of the evidence that, that's the standard.

CLOSING ARGUMENT BY MS. KINARD

1 But the burden I do -- I think it may have been
2 in-artfully worded, but I don't think that precludes the
3 understanding that he did review everything and, and he
4 still found the statements admissible.

5 THE COURT: Well, if he -- did he talk about the
6 statement showing that it was voluntarily -- that it was
7 waived or he misspoke in terms of what the defendant did
8 not show?

9 MS. KINARD: He spoke of it in terms of what the
10 defendant did not show unfortunately. The wording --
11 I'm looking now at page 254. "I do not find a clear
12 invocation", which makes it sound as if the defendant
13 had to prove their position.

14 Moving on to subsection B, search for the truth
15 and whether that puts an undue burden on the jury or the
16 burden shifting. In terms of attorney performance, Mr.
17 Whitlark testified that it wasn't until basically right
18 now he realized that was an issue. And one of the
19 guidelines in Strickland versus Washington is that we
20 need to take away the history of facts in hindsight when
21 we were reviewing the attorney's performance. And
22 several of the issues ---

23 THE COURT: Of course, of course the decision now
24 is not based on whether he realized we either like the
25 things or not. You know, we have lawyers all the time

1 that tend to fall on the sword and everything. His view
2 of what he should have done or should not have done, is
3 that really important?

4 MS. KINARD: No, sir. Ultimately it's not. It
5 should be an objective analysis as to whether his
6 conduct, his performance falls under the guidelines
7 propounded in the PCR case law system. So by him saying
8 I really screwed that up, does not -- we have to look at
9 it in terms of prejudice. And what we think is a
10 mistake actually made a difference in the outcome of a
11 trial.

12 So his failure to object, for example, the search
13 for the truth commentary, I believe in his closing,
14 probably did not ultimately effect anything. We don't
15 have any proof showing that failure to object to those
16 comments made any difference in the outcome of the
17 trial, or that there is any reasonable probability that
18 the outcome would have been different. And that is the
19 test we use for prejudice.

20 THE COURT: And I questioned the solicitor about
21 citing cases based in 2016, but State v. Aleksey from
22 2000 says that that was improper to tell the jury they
23 must search for the truth. And this was like seven
24 years later. Even though it is stated, again, because
25 it is used in conjunction with other things that maybe

CLOSING ARGUMENT BY MS. KINARD

1 reversed it. But it instructed the courts not to do
2 that.

3 MS. KINARD: Yes, Your Honor, I'm aware of that
4 case.

5 THE COURT: Uh-huh.

6 MS. KINARD: Continuing on. Severance, that is a
7 strategic issue. I believe Mr. Whitlark testified that
8 now in hindsight he believes he should have done that,
9 but at the time based on the preparation reached in hand
10 working with codefendants' attorneys. He did not
11 believe that that was a choice that should have been
12 made.

13 Again, hindsight is 20/20. Hindsight in the best
14 in Strickland and Strickland encourages us to look at
15 the current situation and current meaning at the time of
16 the trial. During preparation in that trial. And based
17 on the information, he had available the weekend to
18 decide that moving for severance was not the best course
19 of action. And that ---

20 THE COURT: May I?

21 MS. KINARD: (Nods head up and down.)

22 THE COURT: He said he wasn't ready for trial.
23 He didn't get an expert. He decided to use the
24 information that the other lawyers, other defendants
25 had.

1 MS. KINARD: The investigator, yes, sir.

2 THE COURT: The investigator. So how about his
3 individual obligation to his client Mr. McDonald?

4 MS. KINARD: There is certainly a, you know, the
5 standard applies to his representation of Mr. McDonald
6 and whether he represented Mr. McDonald and made it in a
7 respectable, reasonable, efficient manner. At that ---

8 THE COURT: Let me just ask you this before I
9 forget. Why is this case coming up, is it 12 years
10 after the conviction?

11 MS. KINARD: Well, in the ---

12 MS. GOLDBERG: Part --- go ahead.

13 MS. KINARD: The appeals process took quite a
14 while.

15 MS. GOLDBERG: The Supreme Court opinion wasn't
16 until mid-2015.

17 THE COURT: So PCR waits until after all the
18 appeals?

19 MS. KINARD: Yes, Your Honor.

20 MS. GOLDBERG: He has to file after Remittitur.
21 And in this particular case, the PCR application was
22 filed May 8th of 2015.

23 THE COURT: So he has one year after the verdict?

24 MS. KINARD: Yes, sir.

25 MS. GOLDBERG: Yes, sir.

CLOSING ARGUMENT BY MS. KINARD

1 MS. KINARD: He has a year from the date of
2 conviction if there's no appeal or a year from
3 Remittitur if there is an appeal, so that, that explains
4 the difference.

5 THE COURT: Okay.

6 MS. KINARD: Sometimes appeals get hung up, as
7 you're well aware. I'm sorry, were you asking another
8 question?

9 THE COURT: No.

10 MS. KINARD: Okay. Crawford and Bruton, for
11 better or worse we do have the guidance from the
12 appellate courts on those issues, as well as Mr.
13 McDonald's testimony that he believes they would have
14 been more powerful together. I believe that is
15 arguable. And, and certainly since it deals with a
16 statement goes a little bit to the Denno issue. But,
17 again, we have to look at prejudice. And I want to go
18 ahead and speak about Mr. Whitlark's stating that, you
19 know, actually using Mr. Whitehead's name in his
20 cross-examination. And I believe that is what we look
21 to the actuality of the trial.

22 He testified many times that he thought the
23 actuality was different than the legality and that he
24 understood that in the way the case was playing out,
25 those reactions were meaningless. It was quite obvious

1 what the issues were and that he, he argued repeatedly
2 regarding redactions, trying to make the best redactions
3 possible, but ultimately the statements were the bulk of
4 the case. They weren't the only evidence that existed
5 against Mr. McDonald.

6 So the statements were going to come in. Well,
7 excuse me, were not necessarily going to come in, but on
8 the issue that needed his ultimate attention and he
9 argued for those the best that he could.

10 THE COURT: The other guy, did he, what did he do
11 that incriminated -- what did he say that incriminated
12 McDonald? What was his name?

13 MS. KINARD: Whitehead?

14 THE COURT: Yeah.

15 MS. KINARD: Your Honor, I do not remember off
16 the top of my head.

17 MS. GOLDBERG: What -- Christopher Whitehead
18 didn't give a written statement, he just made an oral
19 statement to police that was incriminating in some way,
20 but I don't think, and I don't really remember because
21 that's not a real part of these allegations, but I don't
22 think, if I remember right, that his statement
23 implicated the other two.

24 THE COURT: How about the other one?

25 MS. GOLDBER: It was Robert Cannon's written

CLOSING ARGUMENT BY MS. KINARD

1 statement that implicated Mr. McDonald.

2 THE COURT: What did it say?

3 MS. GOLDBERG: It was a three-page written
4 statement detailed, you know, about the incident.

5 THE COURT: Saying that McDonald was present?

6 MS. GOLDBERG: Present and involved.

7 THE COURT: (Nods head up and down.)

8 MS. KINARD: Regarding the transcripts and the
9 case law cited by Ms. Goldberg, I believe that is also a
10 strategic decision based on the part of Mr. Whitlark. I
11 honestly can't remember if he was questioned as to
12 strategy on that issue, but he decided that, you know,
13 at that time it would not be harmful for the transcripts
14 to go back. He testified basically that at that point
15 there was actually some information in there that could
16 have been helpful, whether it came in through cross or
17 any other way. And then ---

18 THE COURT: Those are the transcripts of the
19 confessions?

20 MS. KINARD: No, sir. The transcripts of the
21 three witnesses. The transcripts that went back in the
22 jury deliberations.

23 THE COURT: Which witnesses?

24 MS. KINARD: There were three investigators.

25 MS. GOLDBERG: Well, it was two investigators and

1 a jailhouse witness who had overheard Christopher
2 Whitehead say something implicating himself. But the
3 test -- the testimony of those investigators did read
4 and include the substance of the statements, as well as
5 testify to the facts and circumstances of the case.

6 MS. KINARD: Unfortunately she's correct on that.

7 THE COURT: Well, has there been instances where
8 any appellate court says it's okay to send in the
9 transcript of the testimony to the jury?

10 MS. KINARD: No, Your Honor, I don't. I'm not
11 aware of any case law on that.

12 THE COURT: You know, we get that request all the
13 time to have, you know, the jury have to come into court
14 to rehear testimony.

15 MS. KINARD: To rehear it.

16 THE COURT: To send a transcript back, that's --
17 I have never heard of that being approved let alone a
18 lawyer agreeing to it. Of course, they said they were
19 deliberating for three days and, you know, and quite
20 often the lawyers don't want to stick around while the
21 jury is in a three-day deliberation. I don't know what
22 the circumstance was there, whether that was for the
23 lawyers' convenience or -- it's kind of hard to get any
24 sensible response on that from Mr. ---

25 MS. KINARD: And I think he's very puzzled about

CLOSING ARGUMENT BY MS. KINARD

1 that, Your Honor. I, I attempted to ask that and could
2 not get a response.

3 THE COURT: Right.

4 MS. KINARD: So lastly, to look to cumulative
5 error, as Ms. Goldberg acknowledged, there is no, no
6 case law in South Carolina documenting cumulative error.
7 I just prepared to argue to the Supreme Court on
8 cumulative error, and I believe that in doing that we
9 get to a very ugly place in PCR's. There are a lot of
10 states that haven't got to cumulative error in PCR's,
11 but there are formats for applications and the way that
12 PCR's are adjudicated are very, very different parts.

13 We start from the threshold of basically allowing
14 everything. Allow the applicant to bring as many
15 instances they want, as many allegations as they want,
16 as long as they fit within the PCR act. And many states
17 have adopted cumulative error. If you look at PCR's
18 from the statement that you've got to tell us why we
19 should even give you a chance.

20 THE COURT: And this is not the case for treading
21 new ground on that?

22 MS. KINARD: I don't think so, sir. I think
23 that, assuming arguendo, you are applying to, to grant
24 any portion of these I think that there could be
25 argument that they might be strong enough on their own.

1 I certainly don't think that cumulative error is
2 necessary here. And I think it leads us to, to use a
3 phrase you don't like the slippery slope of PCR's
4 changing overall.

5 So ultimately the State's argument is that
6 prejudice against Mr. McDonald does not exist on any of
7 these that Mr. Whitlark argued to his ability. And even
8 if he admitted he made mistakes, we should not look at
9 them with 20/20 hindsight. We should look at them as
10 they occurred in the throws of the trial, under the
11 circumstances that existed with the time pressures, with
12 the co-counsel, with all of those elements. And for
13 that reason the State asks that you deny any relief to
14 Mr. McDonald.

15 THE COURT: All right.

16 MS. KINARD: Thank you.

17 THE COURT: Response?

18 REPLY CLOSING ARGUMENT

19 BY MS. KINARD:

20 Your Honor, one thing. It's not really a
21 response, but just to answer your factual question you
22 were asking about the transcripts. The court reporter
23 informed the Court that if they played it, played the
24 testimony orally it would be about four hours and twenty
25 minutes. Counsel all agreed to give the jury the option

1 to either listen to it or give them transcripts, which
2 were prepared, I think, overnight or over the weekend.
3 And then they decided to do the transcripts.

4 So I think it was -- I think it's in part because
5 the jury was looking for something specific and didn't
6 want to sit for four hours and twenty minutes. And that
7 may be why counsel agreed to that. I still would argue
8 it's unreasonable. So I think if, even when you know
9 the jury's looking for something specific, there's a
10 likelihood that it might not go your way, so you want
11 them to hear your cross too and all of your points again
12 too instead of just the one they go looking for.

13 THE COURT: Well, I tell them it will take four
14 hours, they quite often say it's not that important.

15 MS. GOLDBERG: Right. Right. But, Your Honor,
16 the only case I have found as close on point of that as
17 possible is that Gulledge case I found. And while that
18 wasn't a transcript of testimony that went back, it was
19 a transcript -- it was a transcript. It was transcript
20 of the audiotape that had been entered, and the Court
21 did find that that did unduly emphasize the evidence and
22 that that was improper.

23 THE COURT: You know, it's sort of like, you
24 know, you have cases where there's a deposition. And
25 jurors request a lot of things because they don't know,

1 they don't know what they can get or can't get, but
2 copies of accident reports, statements that's not in
3 evidence and all kinds of things, but for the Court to
4 give them what's allowed under the law.

5 MS. GOLDBERG: Right. So...

6 THE COURT: And the lawyers can make sure that
7 that's all that they get.

8 MS. GOLDBERG: As far as the cumulative evidence
9 standard, I do think some of these issues are
10 particularly unique. For instance, I would argue that
11 giving the jury the transcripts of the State's witnesses
12 was wrong, improper, prejudicial. There should have
13 been an objection no matter what. That being said, had
14 the defendant put up a defense, might be a different
15 argument regarding prejudice.

16 But in this particular case because the defendant
17 did not put up a defense solely because they wanted the
18 last word, they are related. So that's why in this
19 particular case there may be some cumulation in these
20 issues as to the amount of prejudice. Had, had that --
21 it emphasizes why the defendant should have presented
22 evidence and testified and challenged that statement,
23 because without that they presented nothing and they
24 didn't challenge his statement. The jury had nothing
25 else to do but to believe that when he had perfectly

1 good testimony that he could have presented and just
2 didn't for no valid, logical, strategic reason given the
3 way it played out.

4 Also, the unique circumstance of the fact that we
5 already know there is an error of law in this case,
6 based on the appellate decisions. Not a counsel error,
7 but an error of the law. Put that in conjunction with
8 the Denno issue, makes the prejudice all the more
9 important from the Denno issue because the Court of
10 Appeals relied on that statement and that confession in
11 not overturning the case.

12 So I don't know that this necessarily opens the
13 door to all kinds of -- you know, I think it's very
14 unique in its issue regarding cumulative error and
15 potential prejudice.

16 THE COURT: Well, it would be cumulative to show
17 that the lawyer did not perform up to professional
18 standards. I mean, you can -- all those things can be
19 cumulative to indicate that factor, wouldn't it?

20 MS. GOLDBERG: Yes, Your Honor.

21 THE COURT: Right.

22 MS. GOLDBERG: And the, I guess, the prejudice
23 increases based on the types of errors and how they
24 interplay with each other.

25 THE COURT: All right. Okay. Well, I would like

1 for both sides to submit proposed orders in the case.
2 Ms. Goldberg, submit an order granting and the State
3 submitting a denying. An objectively written order
4 based on the record.

5 MS. KINARD: Thank you, Your Honor.

6 THE COURT: An objectively written proposed order
7 based on the record.

8 MS. GOLDBERG: And you don't have to do this or
9 make any decisions, but it may make the record clearer
10 if -- do I need to write the order granting based on
11 every single allegation and does she need ---

12 THE COURT: Based on what you think I should --

13 MS. GOLDBERG: Okay.

14 THE COURT: -- should agree with. Obviously you
15 wouldn't include something you abandoned.

16 MS. GOLDBERG: Well, and what we can obviously do
17 is I will -- I'll draft it that way, granting on every
18 issue.

19 THE COURT: Right.

20 MS. GOLDBERG: She can write her order denying on
21 every issue. And if Your Honor decides to mix the two
22 in some regard, we can work together, you know, if not
23 every issue is worthy of bringing ---

24 THE COURT: Every order is an order of a Court.
25 I don't typically sign any order that is a proposed

1 order.

2 MS. GOLDBERG: That they would just be proposed
3 orders?

4 THE COURT: Right.

5 MS. GOLDBERG: Yes, Your Honor. Okay.

6 THE COURT: And how long do you need to do that?

7 MS. KINARD: I'd ask for 60 days, if possible due
8 to the holidays and I have another term in January.

9 MS. GOLDBERG: That's fine with me.

10 THE COURT: All right, then 60 days.

11 MS. GOLDBERG: Thank you, Your Honor.

12 THE COURT: E-mail it. E-mail it. All right.

13 (Whereupon, hearing concluded at 12:21 p.m.)
14

15 --- THIS ENDS REQUESTED TRANSCRIPT ---
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1 COURT REPORTER CERTIFICATE

2
3 I, the undersigned Julie A. Cendroski, Court
4 Reporter for the Seventh Judicial Circuit Court of the
5 State of South Carolina, do hereby certify that to the
6 best of my ability the foregoing is a true, accurate,
7 and complete transcript of record of all the proceedings
8 and evidence introduced in the hearing and/or trial of
9 the captioned case, relative to appeal, in the Court of
10 Common Pleas for Richland County, South Carolina, on the
11 12th day of December, 2017.

12 I do further certify that I am neither of kin,
13 counsel, nor interest to any party hereto.
14
15
16
17

18 s/Julie A. Cendroski
19 Julie A. Cendroski
20 Circuit Court Reporter
21 Seventh Judicial Circuit
22
23
24
25

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF KERSHAW	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
Derrick McDonald,	)	C.A. No. 2015-CP-28443
S.C.D.C. No. 328344,	)	
	)	
Applicant,	)	
v.	)	ORDER GRANTING
	)	POST-CONVICTION RELIEF
State of South Carolina,	)	
	)	
Respondent.	)	

2018 APR -5 PM 12:52
 KERSHAW COUNTY, S.C.
 CLERK OF COURT
 J. MARCUS WHITLARK

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed May 8, 2015 and amended October 12, 2017. Respondent made its return on or about September 9, 2015. An evidentiary hearing was held on December 12, 2017, at the Richland County Courthouse. Applicant was present and represented by Kristy Goldberg, Esq. Assistant Attorney General Jessica Kinard represented Respondent.

Witnesses who testified at the hearing included the Applicant and Applicant's trial counsel J. Marcus Whitlark. The Court had before it Applicant's Record on Appeal including the original trial transcript and Appellate orders, the Kershaw County Clerk of Court records, the South Carolina Department of Corrections records, the PCR applications and the State's Return.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Kershaw County Clerk of Court. Applicant was indicted at the February 2007 term of the Kershaw County Grand Jury for Burglary, First Degree (2007-GS-28-0016) and Murder (2007-GS-28-0015). Attorney J. Marcus Whitlark, Esq. and Nathan J. Sheldon, Esq. represented the Applicant at trial which began May 6, 2008 before the Honorable G. Thomas Cooper and a jury. The jury found the applicant guilty.

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 Court
 Janet C. Neely
 Clerk of Court Kershaw County

and Judge Cooper sentenced the Applicant to thirty-five years for each charge, the sentences to be served concurrently. A Motion for a New Trial was argued on September 3, 2008 and denied by the Court on September 15, 2008.

A timely Notice of Appeal was filed on the Applicant's behalf whereupon the Applicant was represented by Robert M. Dudek, Esq. Following the submission of briefs by both sides, the South Carolina Court of Appeals affirmed the Applicant's conviction by order filed September 12, 2012. State v. McDonald, 400 S.C. 272, 734 S.E.2d 167 (Ct. App 2012). The issue presented on Appeal was whether or not the trial court erred in allowing the codefendant's written statement into evidence without adequately redacting the portions implicating McDonald, denying him his right to confront and cross examine the witnesses under Bruton. The Court of Appeals held: "We find that the neutral phrase 'another person' inserted into Cannon's statement avoided any Bruton violation. The redacted statement only implicates the statement's maker, and it does not limit the participants to three, which would have implicated the three defendants on trial. Further, the court gave the jury a limiting instruction. Therefore, we find the trial court properly allowed Cannon's redacted statement into evidence." Id. at 279, 170.

Applicant filed a Petition for Rehearing on September 27, 2012. By Order dated November 30, 2012, the Court of Appeals denied the Petition. Applicant then filed a Petition for Writ of Certiorari on March 1, 2013. The State made its Return on May 1, 2013.

On April 22, 2015 the Supreme Court of South Carolina held: "the court of appeals erred, for the jury would readily infer from the face of the codefendant's confession that it referred to and incriminated McDonald. We nevertheless affirm McDonald's conviction, for the error was harmless in the light of the overwhelming evidence of guilt." State v. McDonald, 412 S.C. 133, 135, 771 S.E.2d 840, 841 (2015). In holding, the Court found that the obvious indication of

deletion “refers directly to the existence of a non-testifying codefendant” and “facially incriminates through inference.” *Id.* at 140, 843. In this case specifically, “the jury was left with the inescapable conclusion that Cannon’s confession referred to McDonald and Whitehead, who were seated at counsel table. Under Bruton and its progeny, this is insufficient to satisfy the demands of the confrontation clause.” *Id.* at 141, 844. While the State argued that the Court remedied the issue by offering a limiting instruction, the Supreme Court rejected this argument, stating “there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure are so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.” *Id.* at 142, 844.

Despite the clear finding that McDonald’s constitutional right was violated, the Supreme Court found that the “overwhelming evidence of McDonald’s guilt renders the error harmless beyond a reasonable doubt.” *Id.* at 142, 844. In justifying their decision the Court listed several facts proven in the trial, most of which related to codefendants Cannon or Whitehead rather than McDonald. *Id.* Ultimately, the Court rested on the fact that “McDonald gave a confession that was entirely consistent with [his codefendant’s confession]” and, given that this confession was not challenged on appeal, the Bruton violation was harmless beyond a reasonable doubt. *Id.* at 143, 845.

The Remittitur was issued May 8, 2015. The Applicant filed his Application for post-conviction relief that same day. Counsel was thereafter appointed and filed an Amended Application for post-conviction relief on October 12, 2017 asserting the following grounds for relief:

- (a) Ineffective assistance of counsel for failure to object when the Court analyzed the factual determinations and reached a decision in the Jackson v. Denno hearing using an incorrect burden.
- (b) Ineffective assistance of counsel for failure to object when the Court

instructed the jury that they would be conducting a “search for the truth.”

(c) Ineffective assistance of counsel for failure to file or argue a Motion to Sever.

(d) Ineffective assistance of counsel for failure to present compelling argument regarding the photographs of Christopher Whitehead’s car which was already entered into evidence.

(e) Ineffective assistance of counsel for failure to properly preserve Crawford issues for appellate review during trial.

(f) Ineffective assistance of counsel for failure to sufficiently and effectively argue under Bruton that admission of the co-defendant’s statement violated the Applicant’s rights under the Confrontation Clause.

(g) Ineffective assistance of counsel for failure to ensure that the Court properly provided a limiting instruction under Bruton and failure to object when the insufficient instruction was given.

(h) Ineffective assistance of counsel for failure to object when the Court allowed the jury during deliberations to review the transcripts of testimony of three trial witnesses.

(i) Ineffective assistance of counsel for failing to ensure that the Applicant was present during all critical stages of trial.

(j) Ineffective assistance of counsel as counsel was ineffective for failing to present evidence before the jury.

(k) The cumulative effect of trial counsel’s errors constitute ineffective assistance of counsel.

During the evidentiary hearing counsel for the Applicant stated that allegation (d) would be withdrawn. The Applicant proceeded on the other allegations.

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 conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel due to multiple deficiencies by trial counsel which are laid out in the Amended Application and discussed in

detail in the upcoming paragraphs. In a PCR action, “[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing SCRCP 71.1(e)). Where the application alleges ineffective assistance of counsel as a ground for relief, 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 442, 334 S.E.2d at 814.

First, the applicant must show that counsel’s performance “fell below an objective standard of reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

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.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; see Strickland v. Washington, 466 U.S. 668, 688, 692, 104 S. Ct. 2052, 2065, 2067 (1984) (“[T]he defendant must show that counsel’s representation fell below an objective standard of reasonableness [and] . . . any deficiencies in counsel’s performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.”); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006) (“PCR applicant must prove: (1) that counsel failed to

render reasonably effective assistance under prevailing professional norms; and (2) that the deficient performance prejudiced the applicant's case.”).

This Court will now address each allegation of ineffective assistance of counsel as follows:

a. Failure to object when the Court reached a decision in the Jackson v. Denno hearing using an incorrect burden

A Jackson v. Denno hearing was held pre-trial to determine the admissibility of the defendants' statements to law enforcement. 378 U.S. 368 (1964). As to McDonald's statement, the transcript reflects that testimony was provided by Derrick McDonald, his mother, his brother, and three investigators for the State. Tr. 17-217. After all testimony was presented, counsel for each of the three Defendants presented legal argument, rebutted by the State, before the Judge issued an order. Tr. 224-251. The Court ruled on the issue and no objections were raised by any party regarding the substance or form of the ruling. Tr. 252-259.

McDonald asserts that the trial court erred and trial counsel failed to object when the Court used the incorrect burden in reaching a decision regarding the admissibility of McDonald's statements. “The trial judge must conduct an evidentiary hearing, outside the presence of the jury, where **the State must show** the statement was made voluntarily by a preponderance of the evidence.” State v. Arrowood, 375 S.C. 359, 365 (App. Ct. 2007) *citing Jackson v. Denno*, 378 U.S. 368 (1964) (emphasis added). “**The State bears the burden of showing the statement was voluntary.**” State v. Miller, 375 S.C. 370, 379 (App. Ct. 2007) *citing State v. Saltz*, 346 S.C. 114 (2001) (emphasis added).

“Where ‘the evidence conflicts as to whether a defendant's statement is voluntary, it is, in the first instance, the province of the trial court to determine this factual issue by a preponderance of the evidence.’” State v. Arrowood, 375 S.C. 359, 367 (App. Ct. 2007), *citing*

State v. Howard, 296 S.C. 481, 492-93 (1988). “If a suspect was advised of his *Miranda* rights but made a statement, the ‘burden is on the State to prove by a preponderance of the evidence that his rights were voluntarily waived.’” *State v. Miller*, 375 S.C. 370, 379 (App. Ct. 2007) citing *State v. Saltz*, 346 S.C. 114 (2001) (emphasis added).

It appears from the record that the Court was placing the burden on the Defense to prove a lack of waiver by a preponderance of the evidence, rather than requiring the State to prove a voluntary waiver by a preponderance of the evidence. As to whether or not the Defendants invoked their right to counsel, the Court says “I don’t find that there was an invocation,” “I don’t find a clear invocation by a preponderance of the evidence on behalf of either of the two defendants who gave statements,” and “I don’t find by a preponderance of the evidence a clear invocation of either Robert Cannon or Derrick McDonald.” Tr. 252 and 254. McDonald correctly argues that, the State has the burden of proof and the Court’s analysis seems to place the burden on the Defendants, which was improper.

Even more troubling is the Court’s determination regarding the voluntariness of the Defendants’ statements, whereupon the Court said:

But I don’t find again by a preponderance of the evidence that there were promises of leniency. Now, there is certainly conflicting testimony on this issue and it’s very – it’s somewhat troubling. But I still don’t believe I can find by a preponderance of the evidence that there was a promise of leniency which extracted the confessions. Tr. 255.

Later in his ruling the Judge stated:

And I can’t find that – although that may be what they believed, I can’t – I mean, based on the evidence that I have heard, I can’t find that by a preponderance of the evidence. Tr. 256

These statements show that during the Court’s factual analysis he was weighing the evidence presented and determining whether or not the Defendants proved their position by a

preponderance of the evidence. This is the incorrect burden. The Court should have evaluated whether or not the State was able to prove, by a preponderance of the evidence, that the statement was voluntarily made.

During the evidentiary hearing for the PCR, trial counsel testified that he did not realize that the Judge was using an incorrect burden at the time and that the court's ruling "went over his head." He testified that he should have objected to the Court's ruling and did not have a strategic reason for failing to object.

Trial counsel was ineffective in failing to object to the Court's burden shifting during the Denno hearing. If a proper objection had been raised, it is possible that the Court may have reconsidered his decision. Alternatively, the issue could have been raised on appeal. This Court finds that prejudice exists because it is likely that the appellate court would have found error as it appears the incorrect legal burden was used by the Court. There is a reasonable probability that, but for counsel's unprofessional errors, the result of the trial or appeal would have been different.

As further evidence of prejudice, this Court notes that in finding "harmless error" the Supreme Court relied to some degree on this statement of McDonald. It is likely that the harmless error analysis would have been affected if the statement had not been admitted at trial, or if the appellate court had additionally considered this legal issue regarding the admissibility of McDonald's statement. Accordingly, this Court finds that it is appropriate to grant the Applicant post-conviction relief on this ground.

b. Failure to object when the Court instructed the jury that they would be conducting a "search for the truth"

The Court's introductory statements to the jury included the following instruction: "The attorneys appearing before you are advocates for the parties they represent, but first and foremost

they are officers of this court sworn to uphold the integrity and fairness of our judicial system and to **help you in a search for the truth.**” Tr. 267 (emphasis added). Applicant argues that counsel was ineffective for failing to object when the Court instructed the jury in this way.

Our appellate courts have repeatedly cautioned trial courts against such language. “Jury instructions on reasonable doubt which charge the jury to ‘seek the truth’ are disfavored because they run the risk of unconstitutionally shifting the burden of proof to a defendant.” State v. Aleksey, 343 S.C. 20, 26, 538 S.E.2d 248, 251 (2000). Recently the Supreme Court reaffirmed this concept in State v. Beaty, 2016 WL 7474479 (*rehearing pending*).

It is true that jury instructions “should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error.” State v. Aleksey, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000), *internal citations omitted*. “The standard for review of an ambiguous jury instruction is whether or not there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the constitution.” Id.

In the Applicant’s case the Court’s statement was especially problematic because it was one of the first things said to the jurors about what their job would be prior to trial beginning. The instruction was emphasized when the Court later informed the jury that they would be determining “what the true facts are” on two separate occasions. Tr. 273, Tr. 274. While the Judge also references the State’s burden in these opening remarks, nothing is said that is inconsistent with the instruction to the jurors that they will be searching for true facts and for the truth. Therefore, it is likely the jurors proceeded into trial with the idea that it was their job to seek the truth when analyzing the facts.

After all testimony was presented, the juror's mission to "search for the truth" was confirmed and emphasized when the Court instructed the jurors that "your sole interest is to seek the truth from the evidence that's been presented to you in this case." Tr. 1462. This was one of the final instructions given to the jurors immediately prior to deliberations.

The jurors were introduced to the case with the idea that they were to search for the truth, and they were sent off to deliberate with the idea that they were to search for the truth. Given the time and context of these statements this Court finds there is a reasonable likelihood that the jury applied the challenged instruction in a way that unconstitutionally shifted the burden of proof.

Further, the potential error in the Court's statements was not reviewable on appeal because an objection was never raised. During the PCR evidentiary hearing trial counsel stated that he did not realize this language was objectionable at the time and did not have a strategic reason for failing to object. He also conceded that he should have objected when these statements were made.

Prejudice is apparent in this matter in two separate contexts. First, because the jury likely applied these instructions during deliberations, and second, because the appellate courts were not given an opportunity to rule on the propriety of these statements. As a result, this Court finds that counsel was ineffective in his representation and post-conviction relief is appropriate on this ground.

c. Ineffective assistance of counsel for failure to request a severance.

McDonald has argued that the Appellate record in this case clearly shows that the Supreme Court determined his rights under the Confrontation Clause were violated. He further argues that, had his trial been severed from the trials of his codefendants, he would have not suffered this constitutional violation.

“Criminal defendants who are jointly tried are not entitled to separate trials as a matter of right. A defendant who alleges he was improperly tried jointly must show prejudice before this Court will reverse his conviction.” Hughes v. State, 346 S.C.554, 558, 552 S.E.2d 315, 317 (2001). “If a defendant is able to demonstrate prejudice from such a joint trial, PCR would be warranted.” Id. at 561, 318. It is clear that prejudice did result from the joint trial in this case when McDonald’s constitutional rights were violated through the admission of his codefendant’s statement.

Trial counsel testified at the evidentiary hearing for the PCR that he made a mistake in not requesting a severance in this matter. Counsel testified that he was retained about 60 – 90 days prior to this Murder trial. Given the limited time he had to prepare for trial, counsel testified that he relied heavily on the decisions and advice of the attorneys representing the codefendants and admittedly that was a mistake. He testified that multiple decisions made in this case were joint decisions between himself and counsel for the other defendants, rather than decisions made in the best interest of McDonald. Trial counsel was unable to provide any other explanation, strategic reason, or legal basis as to why he did not request a severance in this matter.

Relying upon the Supreme Court decision, this Court finds that McDonald’s constitutional rights were violated by admission of the non-testifying codefendant’s statement incriminating McDonald. This would not have happened had the trials of the codefendants been severed. Trial counsel never bothered to request a severance and give the Court the opportunity to use its discretion in determining whether a severance was appropriate or not. Trial counsel did not have a valid strategic reason for this, and his reliance on the advice of counsel for the codefendants undermined the proper functioning of the adversarial process, such that the trial

cannot be relied upon as having produced a just result. Strickland v. Washington, 466 U.S. 668 (1984). PCR is warranted on this ground.

- d. Failure to present compelling argument regarding the photographs of Christopher Whitehead's car

The Applicant has stated that this issue is withdrawn.

- e. Ineffective assistance of counsel for failure to properly preserve Crawford issues for appellate review during trial.

Appellate counsel argued on appeal that the Court violated McDonald's right to confrontation pursuant to Crawford v. Washington, 541 U.S. 36 (2004) by allowing as evidence the statement of appellant's non-testifying codefendant (Robert Cannon), where Cannon gave his statement to law enforcement during the investigation of the crime, and McDonald never had the opportunity to confront and cross examine his codefendant. *See*, Final Brief of Appellant. The Court of Appeals held that, "[b]ecause the *Crawford* issue was not raised when Cannon's written statement was redacted and admitted, this issue is not preserved for our review." State v. Derrick McDonald, 400 S.C. 272, 280, 734 S.E.2d 167, 171 (App. Ct. 2012). The Supreme Court's opinion only addressed this matter in footnote 2, stating that "the court of appeals held that issue to be unpreserved" and "this court denied certiorari as to the *Crawford* issue." State v. Derrick McDonald, 412 S.C. 133, 771 S.E.2d 840 (2015).

It is clear from the record that trial counsel failed make a timely objection to the admissibility of the codefendant's statement using the Crawford v. Washington analysis. It is also clear that the Court of Appeals did not review this issue as it was determined to be unpreserved. Like Bruton, Crawford has its origin in protections guaranteed under the Confrontation Clause. It is clear there was a Crawford violation that was withheld from review due to lack of objection. Crawford addresses the ability of a defendant to cross-examine

witnesses who provides an incriminating statement, where Bruton more specifically involves admissibility or redaction of codefendant statements. While the issues are related, they are in fact different. The fact that McDonald was denied to challenge his constitutional right on this separate ground constitutes error by trial counsel for failing to object and preserve the issues at trial. Post-conviction relief is appropriate given this failure to object.

- f. Ineffective assistance of counsel for failure to sufficiently and effectively argue under Bruton that admission of the co-defendant's statement violated the Applicant's rights under the Confrontation Clause.

As stated previously, the Supreme Court previously determined that McDonald's rights under the Confrontation Clause were violated when the statement of his non-testifying codefendant was admitted. A review of the record reveals that trial counsel was ineffective in actively and vigorously seeking to prevent the codefendant's statement from being admitted into evidence and used against McDonald. Had trial counsel properly argued this issue during trial, there is a reasonable likelihood that prevented this violation from occurring in the first place.

The transcript reflects that counsel for McDonald did not submit any argument at all on this issue in trial, but rather allowed counsel for Cannon to argue the entirety of the Bruton issue at trial for both defendants. Tr. 621-646. The State argued that it was permissible to redact a confession by putting 'another person' in the spot rather than leaving a blank space, although the manner in which this was accomplished showed an "obvious indication of deletion." State v. McDonald, 412 S.C. 133 (2015). *See also* tr. 621-646. Counsel for Cannon, on behalf of all defendants, spent a substantial portion of his argument suggesting that the Court should allow a newly typed version of the statements editing all references to other people so that blank spaces, alternate phrases and names were not necessary. In contrast, counsel for the defendants, and specifically counsel for McDonald, should have argued that the statements could not be

sufficiently reacted in a way to satisfy the Confrontation Clause, and as a result, the State could not present the statements in a joint trial (i.e. the State would have to sever the cases in order to present the defendant statements as they existed). *See also*, subsection (c).

The statements were ultimately entered into evidence without a clear ruling as to why the Court believed the defendants' rights were sufficiently protected. Robert Cannon's statement was offered as a court's exhibit on page 744 of the transcript through witness Investigator Danny Catoe. The statement was offered as evidence and published to the jury. Tr. 747-754. Immediately after the statement was published the Solicitor asked the Investigator, "[w]hat happened next in the investigation? [w]hat did you do next?" and the Investigator responded, "[a]fter obtaining this statement, we then obtained an arrest warrant for Mr. Derrick McDonald." Tr. 754. Trial counsel failed to renew any objection or make a more specific objection regarding McDonald's Confrontation Clause rights at this point and failed to request a mistrial. As the Supreme Court points out in footnote 3 of their opinion, "the inescapable conclusion is that Cannon's statement inculpated McDonald." State v. Derrick McDonald, 412 S.C. 133 (2015). If trial counsel had properly raised an objection at this point in trial, it may have caused the Court use its discretion and reconsider the State's use of this statement.

Not only was trial counsel ineffective in presenting argument and objections to the Court regarding McDonald's confrontation clause rights, trial counsel actually had a hand in ensuring the jury knew the identities of the redacted names in Cannon's statement. Counsel for McDonald asked Investigator Catoe whether or not Cannon said he "had seen Whitehead that night" and then asked whether or not Cannon "told you he had gone to Wal-Mart with Mrs. McDonald, Derrick McDonald and Mr. Whitehead?" Tr. 827. Even if the State's redactions had been sufficient to protect the Applicant's Confrontation Clause rights, Counsel for

McDonald completely undermined and ruined any attempt the State and Court had made in protecting McDonald from having Cannon's statement used against him at trial.

During the evidentiary hearing for the PCR, trial counsel explained that the Bruton issues were discussed at the "committee meeting" he had with the codefendants' attorneys and he thought the entire argument regarding redaction was a waste of time. He testified that he believed the jury would know Cannon's statement was referring to McDonald regardless of what redactions were used because it was so obvious. Therefore, rather than asserting a more complete objection, he decided it wasn't worth his time to worry about avoiding saying McDonald's name in the cross-examination about the statement because the jury would know the statement referred to McDonald anyway. This Court finds this entire line of testimony to be an unreasonable position for trial counsel to assert.

This Court is mindful of the fact that the Supreme Court has already ruled on the existence of a Bruton violation and found harmless error. However, this Court is convinced that significant deprivations in representation existed at the time of trial to the extent that it would have been possible to fix this legal error and prevent the Bruton violation from ever occurring if counsel had acted and argued appropriately. Further, this Court is concerned by counsel's essential waiver of McDonald's Bruton rights when the questions he asked nullified the prior attempt by the Court and State at redaction of the statements and protection of the defendants.

"To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability that the result at trial would have been different...A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Hughes v. State, 346 S.C. 554, 558, S.E.2d 315, 317 (2001), *citing*

Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). This Court finds that the errors of trial counsel clearly undermine confidence in the outcome of McDonald's trial, and as a result, post-conviction relief is appropriate on this ground.

- g. Ineffective assistance of counsel for failure to ensure that the Court properly provided a limiting instruction under Bruton and failure to object when the insufficient instruction was given.

When the defendants' statements were admitted in front of the jury, the trial court did not provide a limiting instruction immediately after publication. The only limiting instruction ever provided regarding statements of codefendants was in the middle of the lengthy instructions to the jury on the law at the end of trial. The Judge instructed the jury that "some of the evidence ... may have been admitted solely because of its relationship to one of the defendants" and that "evidence cannot be considered in the case of any of the other defendants." Tr. 1449. No objection or request for a limiting instruction was made at any time by any party.

McDonald argues that the limiting instruction provided was insufficient, and Court should have instructed the jury specifically after publication of each statement that the jury may not consider a non-testifying defendant's confession against a codefendant. *State v. Jackson*, 410 S.C. 584, 603, 765, S.E.2d 841, 851 (Ct. App. 2014), citing *United States v. Gayekpar*, 678 F.3d 629, 636 (8th Cir. 2012). If preserved for appellate review, the Court may have found that failure to give a limiting instruction at the time the statements were admitted was an error by the Court. *Id.* This Court finds counsel ineffective in this regard and post-conviction relief is appropriate.

- h. Failing to object when the Court allowed the jury to review the transcript testimony of three trial witnesses during their deliberations

The trial transcript reflects that during deliberations the jury requested transcripts of the testimony of Detective Cato (210 pages), Phillip Crawford (22 pages) and Michael Jenkins (39

pages). Tr. 1465-1472. Counsel for McDonald waived his client's presence when this matter was discussed on the record. *Id.* Without objection from any defendant, the Court agreed to have transcripts created for the testimony of each of the three witnesses and provide them to the jurors to review in deliberations. *Id.* Notably, the testimony of each of these three witnesses was directly related to the alleged statements made by each of the three Defendants.

During the evidentiary hearing, McDonald testified that if he had been consulted he would have asked his lawyer to object to allowing the transcripts to go back to the jury room during deliberations. McDonald argued that it unduly emphasized this particular evidence over other evidence offered previously in trial. McDonald further argued that the duplicative presentation of the testimony in transcript form was especially concerning because the jurors had the ability to look for specific portions of the transcript and did not necessarily receive a reminder of what the evidence showed in totality. Finally, McDonald argued that allowance of the transcripts during deliberations ruined the defense's trial strategy not to present evidence, as they no longer had the benefit of the "last word" for the jury to consider. In this context, the State witnesses actually had the "last word."

A trial judge, "in his discretion, may permit the jury at their request to review, in the defendant's presence, testimony after beginning their deliberations. The extent of such review is within the discretion of the trial judge to be exercised in the light of the jury's request. The court is not required to submit evidence to the jury for review beyond that specifically requested but may, in its discretion, have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested." State v. Plyler, 275 S.C. 291, 298, 270 S.E.2d 126, 129 (1980).

In State v. Gulledge an audio tape of communication between two highway patrolmen was entered into evidence and published to the jury. 277 S.C 368, 287 S.E.2d 488 (1982). In reviewing this matter our Supreme Court held that the judge abused his discretion when he allowed the jury to take a transcript of that audio tape into the jury room because it unduly emphasized that evidence. Id.

A judge has discretion regarding what to allow, but in this case the judge was not given the opportunity to exercise discretion because no objection was raised. *See also*, subsection (i). Trial counsel should have objected to providing the transcripts to the jury because they prejudiced McDonald by unduly emphasizing the evidence and undermining his trial strategy. If a transcript of audio evidence introduced in trial unduly emphasized evidence in the Gulledge case, then certainly by comparison, a transcript of testimony evidence introduced at trial would unduly emphasize that evidence as well. Trial counsel had a reasonable objection to make to prevent the transcripts from going to the jury during deliberations failed to make it. Trial counsel was ineffective in his representation of McDonald for failing to make that objection and as a result McDonald was prejudiced. His trial strategy was undermined and the State witnesses had the last word. Accordingly, post-conviction relief is appropriate.

i. Failing to ensure the Applicant was present during all critical stages of trial

Counsel for the Applicant waived the Applicant's presence for the conference with the Court regarding how to proceed when the jurors requested transcripts of testimony. Tr. 1467. It is clear from the transcript that he did this without consulting with the Applicant first. Additionally, both McDonald and trial counsel testified during the evidentiary hearing that trial counsel decided to waive McDonald's presence for this hearing without consulting him first.

Both parties also testified that McDonald was still in the building at this time and could have been brought to the courtroom if requested.

“A defendant has a constitutional right to be present at every stage of the criminal proceeding against him. Although the right to be present is a substantial one, no presumption of prejudice arises from the defendant’s exclusion.” State v. Whaley, 290 S.C. 463 (1986). Therefore, the Applicant must allege and prove prejudice resulting from his exclusion. “Due process requires the defendant to be allowed to be present if his or her presence would contribute to the fairness of the procedure.” State v. Lopez, 306 S.C. 362 (1991). For example, such a constitutional right has been found to apply when “a trial judge conducts voir dire during the course of the trial to determine the jury’s continued impartiality,” because the defendant was deprived “of the means to challenge the sufficiency of the trial judge’s inquiry before the determination of impartiality.” State v. Rivers, 294 S.C. 123 (1987).

McDonald testified during the evidentiary hearing that his presence would have contributed to the fairness of the procedure. He testified that, had he been consulted during this hearing, he would have asked his lawyer to object to allowing the transcripts to go back to the jury room. McDonald testified that he understood their trial strategy to include not putting up any evidence or witnesses so that they could get the last word with the jury, and he would have asked his lawyer to object on the basis that it would undermine that trial strategy.

It is clear from the record that trial counsel did not object to the jury’s request for transcripts. McDonald testified that he would have asked his lawyer to object if he had been present. If counsel had ensured McDonald’s presence at the hearing, McDonald could have advised his counsel of his desire to object to the jury’s request, and trial counsel could have asked the Court to exercise discretion in this matter and not allow the transcripts. *See also*,

subsection (h). Trial counsel was unreasonable in proceeding without his client's presence, and as result McDonald was prejudiced in not having his argument presented to the Court. Post-conviction relief is appropriate.

j. Ineffective for failing to present evidence in defense of the Applicant before the jury

As discussed previously, a Jackson v. Denno hearing was held pre-trial to address the admissibility and voluntary nature of the defendants' statements. During this hearing McDonald testified challenging the voluntariness of his statement. Ultimately the Court determined that the admissibility burden had been met and the State could present the statements to the jury. Even though the Court found the statements admissible, the Judge noted the troubling nature of the circumstances around the inducement of the statements. Tr. 255.

In his opening statement before the jury, trial counsel told the jury that McDonald gave a statement to law enforcement because he was offered the option of being a witness instead of a defendant in a death penalty trial. Tr. 305. However, trial counsel never offered any evidence to prove this before the jury and never offered any evidence to challenge McDonald's statement. Even though McDonald, an articulate and intelligent young man with no prior record for impeachment, was willing to testify in trial as he did in his pre-trial hearing, trial counsel never offered any evidence to prove the statement was coerced. As a result, the jury was never given any reason not to believe McDonald's statement.

"If [a] statement is found to have been given voluntarily, it is then submitted to the jury, where its voluntariness must be established beyond a reasonable doubt." State v. Arrowood, 375 S.C. 359, 366 (App. Ct. 2007) *citing State v. Washington*, 296 S.C. 54 (1988). "A jury must consider the totality of the circumstances under which a statement was given to determine

whether it was voluntarily made.” State v. Miller, 375 S.C. 370, 379 (App. Ct. 2007) *citing State v. Vang*, 353 S.C. 78 (Ct. App. 2003).

The jury in this case was not presented with the totality of the circumstances under which the statement was made because trial counsel did not present any evidence to this effect. The statement was presented to the jury uncontested. If McDonald had testified in front of the jury in accordance with how he testified in the pre-trial hearing, the jury would have had some reason to question the voluntary nature and accuracy of the statement he purportedly gave.

During the PCR evidentiary hearing, trial counsel testified that he only had this case for about 60-90 days prior to trial and he was pressed for time to prepare. McDonald was a high school student at the time and trial counsel admittedly did not take the time to discuss strategy with him as much as he should have. Trial counsel testified that, had he understood what a smart and well-spoken person McDonald was prior to trial, his entire trial strategy might have been different. Trial counsel admittedly did not take the necessary time to talk to and consult with his client in preparing a trial strategy that would be in McDonald’s best interest.

McDonald testified at the evidentiary hearing that he wanted to testify before the jury but his attorney told him that the State did not prove guilt and it would be in his best interest to let trial counsel get the last word in front of the jury through last closings. McDonald stated that he relied on his attorney to make that decision. Similarly, trial counsel testified that both he and McDonald wanted to present McDonald’s testimony to the jury. However, trial counsel testified that he had made an agreement with counsel for the codefendants to work together and the other attorneys did not want to present witnesses before the jury, in part because their clients were not as reliable as McDonald. Trial counsel testified that he decided to act in accordance with his agreement with the codefendants and chose not to present evidence so that they could receive the

“last word” in front of the jury. Trial counsel testified that he immediately regretted it and knew that it was the wrong strategy for his client.

It is notable that trial counsel also testified that the jury deliberated on this case for two and a half days and during that time requested the transcripts of the witnesses who testified about the defendants’ statements. It appears that the jurors were carefully considering the evidence regarding the defendants’ statements, and for a period of time was deadlocked to the point that an Allen charge was necessary. Tr. 1494-1500. Trial counsel testified that he believes the jury would have reached a different verdict had he challenged the statement and presented McDonald to testify regarding the statement in front of the jury.

This Court finds trial counsel’s performance fell below an objective standard for reasonableness in this regard. Trial counsel should have put the best interest of his client above any agreement with other attorneys. Further, if the reasonable strategic basis for failing to present evidence was for the benefit of receiving the “last word” in final closing arguments, that benefit was completely nullified when trial counsel failed to object when the jury requested to review transcripts of multiple State witnesses after closing arguments are presented. *See*, Tr. 1465-1472. *See also*, subsections (h) and (i). This Court finds that counsel’s deficient performance in this instance prejudiced the defendant’s case, and post-conviction relief is appropriate.

k. The cumulative effect of trial counsel’s errors constitute ineffective assistance of counsel.

McDonald argues that the cumulative effect of trial counsel’s errors in this particular case undermined the proper functioning of the adversarial process to the extent that the trial cannot be relied upon as having produced a just result.

This specific post-conviction relief case is unique in that it begins with the acknowledgement of a constitutional deprivation during the trial in the Supreme Court’s opinion.

The Supreme Court was, of course, limited to the record before it and the issues properly preserved for appellate review and argued before the Court. The Supreme Court would not have considered other potential issues not presented within the appellate briefs, such as the admissibility of McDonald's statement. Within the context in which the Supreme Court was required to review this case, the Court found the State's evidence against McDonald in the form of his non-testifying codefendant's statement was insufficient to satisfy the demands of the Confrontation Clause under Bruton and its progeny. Yet, the Supreme Court also found harmless error given the "evidence of guilt" including the "confession" given by McDonald. State v. McDonald, 412 S.C. 133, 143, 771 S.E. 2d 840, 845 (2015).

Given the unique circumstance of this case, this Court is faced with the task of not only determining what deprivations could have resulted in a different outcome at trial, but also determining whether or not the Supreme Court would have still found harmless error had trial counsel proceeded differently on several issues. This Court finds that, given the deprivations existing in this case, there is a reasonable likelihood that one or both outcomes would have had a different result.

In Green v. State, the Supreme Court noted "[w]hile it is unsettled law whether individual errors, which may not be independently prejudicial, may be prejudicial when taken as a whole, we recognize the threshold to asking the cumulative prejudicial question is to first find multiple errors." 351 S.C. 184, 197, 569 S.E.2d 318, 325 (2002). This Court finds that multiple errors do exist in this case and that independently these errors have a prejudicial effect sufficient to grant post-conviction relief.

The culmination of these errors however create a more substantial prejudicial effect. Accordingly, post-conviction relief is appropriate.

CONCLUSION

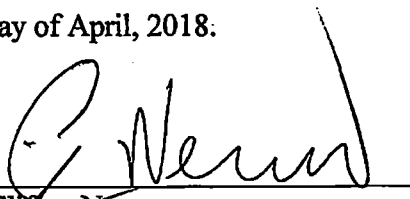
Based on the foregoing, this Court finds and concludes Applicant has established constitutional violations and deprivations during his trial. Counsel was deficient in his representation of the Applicant and the Applicant was prejudiced by counsel's representation. Therefore, this PCR application is granted and the Applicant's charges are remanded to General Sessions Court.

This Court advises Respondent that a notice of intent to appeal must be filed within thirty (30) days from the receipt of this Order in order to secure appropriate appellate review. If no such Notice is filed, the conviction will be overturned and remanded to General Sessions Court. If Notice of Appeal is filed by the State within thirty days, then the Applicant's convictions shall be remanded to General Sessions Court at that time.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be granted and the Applicant's convictions overturned and remanded to General Sessions Court; and
2. That Applicant be remanded to the custody of Kershaw County.

AND IT IS SO ORDERED this 2nd day of April, 2018.


Clifton Newman
Presiding Judge

Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF KERSHAW	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
Derrick McDonald, SCDC No. 328344,	)	Case No. 2015-CP-28-0443
	)	
Applicant,	)	RESPONDENT'S MOTION TO
	)	RECONSIDER, ALTER, OR AMEND
v.	)	PURSUANT TO RULE 59(e), SCRC
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

This matter comes before this Court by way of an application for post-conviction relief filed on May 8, 2015, and amended October 11, 2017, by Derrick McDonald ("Applicant"). A hearing on this application was held on December 12, 2017, before the Honorable Clifton Newman, circuit court judge. Applicant was present and represented by Kristy Goldberg, Esquire. The State was represented by Assistant Attorney General Jessica Kinard of the South Carolina Attorney General's Office. Following the hearing, the Court took the matter under advisement and requested proposed orders from both parties. Thereafter, on April 2, 2018, the Court issued an order granting post-conviction. This order was filed on April 5, 2018, and received by Respondent on April 6, 2018.

Respondent, by and through undersigned counsel, making its Motion to Reconsider, Alter, or Amend, pursuant to Rule 59(e), SCRC, would respectfully show unto the Court:

PROCEDURAL HISTORY

On Tuesday, December 12, 2006, the victim, Joshua Zoch, was murdered in his home. On the same day, Kershaw County Sheriff's Deputies obtained an arrest warrant for Applicant for Zoch's murder. During its February 2007 term, the Kershaw County Grand Jury indicted Applicant for murder (2007-GS-28-0015) and first-degree burglary (2007-GS-28-0016).

Applicant was represented by J. Marcus Whitlark, Esquire, and Nathan J. Sheldon, Esquire. The case was prosecuted by Deputy Solicitor John Meadors and Assistant Solicitors Joanna McDuffie and Ron Moak from the Fifth Circuit Solicitor's Office.

On May 6, 2008, Applicant appeared in the Kershaw County Court of General Sessions before the Honorable G. Thomas Cooper, Jr., circuit court judge, and proceeded to a joint jury trial with co-defendants Christopher Whitehead and Robert Cannon. On May 13, 2008, the jury convicted as indicted. The trial court sentenced Applicant to thirty-five years' imprisonment for each conviction, with the sentences to be served concurrently.

A timely notice of appeal was filed on Applicant's behalf and an appeal was perfected by Chief Appellate Defender Robert M. Dudek, Esquire, of the South Carolina Commission on Indigent Defense-Office of Appellate Defense. On appeal, Applicant argued trial court erred in admitting the statement of his non-testifying co-defendant Robert Cannon, given to a law enforcement officer during the course of the investigation, without adequately redacting portions of Cannon's statement implicating Applicant because it denied him of his right to confront and cross-examine Cannon. State v. McDonald, 400 S.C. 272, 273, 734 S.E.2d 167, 167 (Ct. App. 2012), *aff'd as modified*, 412 S.C. 133, 771 S.E.2d 840 (2015)

Following briefing and oral argument, the South Carolina Court of Appeals affirmed Applicant's convictions, finding "that the neutral phrase 'another person' inserted into Cannon's statement avoided any Bruton violation. The redacted statement only implicates the statement's maker, and it does not limit the participants to three, which would implicate the three defendants on trial. Further, the court gave the jury a limiting instruction. Therefore, we find the trial court properly allowed Cannon's redacted statement into evidence." Id. at 279, 734 S.E.2d at 170. Applicant filed a petition for rehearing on September 27, 2012. By order dated November 30,

2012, the Court of Appeals denied the petition for rehearing.

Applicant then filed a petition for writ of certiorari, which the South Carolina Supreme Court granted. Following briefing and oral argument, the Supreme Court affirmed Applicant's convictions, finding the admission of co-defendant Cannon's statement using the phrase "another person" to refer to co-defendant and two other male individuals violated Applicant's rights under the Confrontation Clause, but the error was harmless beyond a reasonable doubt. State v. McDonald, 412 S.C. 133, 771 S.E.2d 840 (2015). In reaching this decision, the Supreme Court found:

[W]e find that the overwhelming evidence of McDonald's guilt renders the error harmless beyond a reasonable doubt.

We first note the presence of strong evidence of guilt, apart from the erroneous admission of Cannon's confession. On the evening of the murder, Whitehead informed a co-worker that he intended to go over to Victim's home to fight him. Later that evening, around 10:00 p.m., Defendants arrived at the Sonic, with Cannon donning a ski mask. The shift manager told the Defendants to leave. An on-duty employee then observed Defendants leave together. That employee testified that Whitehead drove a four-door sedan with a noticeably loud muffler sound. Investigators obtained a receipt from the Wal-Mart on Two Notch Road in Columbia, which confirmed that a ski mask and purple latex gloves were purchased at 10:43 p.m. on the night of the murder. At approximately 11:30 p.m., near the time of Victim's murder, Victim's neighbor took his dog outside and heard "a lot of knocking noise[s], loud, like somebody kicking something or slamming doors." About ten minutes later, the neighbor heard "a lot of noise" and "a lot of people getting excited." He then heard a loud muffler sound and observed headlights in the road. A short time later, at about 1:30 a.m., McDonald showed up at a co-worker's house and was visibly upset. The co-worker testified that, although McDonald did stay at his house from time to time, this was the first time McDonald had showed up so late. In addition, the morning after the murder, Whitehead showed up to work at the Sonic with a scratch under one of his eyes and a limp. He began acting strange and lied to his manager about the source of the injuries, claiming that he fell at work. Several days later, he walked out of work during a shift and told his manager that he's "got problems" and was "about to move

to Aiken.” We find this evidence of guilt, independent of Cannon’s confession, compelling.

Beyond the independent evidence of guilt, McDonald gave a confession that was entirely consistent with Cannon’s confession. McDonald’s confession detailed going to the restaurant with Whitehead and Cannon, purchasing a ski mask and gloves from Wal-Mart, arriving at Victim’s home, kicking in the door, hitting Victim repeatedly in the body and head with a baseball bat, and stealing various items from Victim’s home. The properly admitted evidence at trial aligns with the details McDonald provided in his confession. In addition to the corroboration of the purchase at Wal-Mart, part of a purple latex glove was found at the crime scene. Victim’s girlfriend further testified that Victim kept a baseball bat at his home, which investigators also found at the crime scene.

Id. at 142–43, 771 S.E.2d at 844–45 (emphasis added). The Supreme Court concluded, “Given the extensive evidence of guilt, we conclude that the Bruton violation was harmless beyond a reasonable doubt.” Id. at 143, 771 S.E.2d at 845. The Remittitur was issued on May 8, 2015.

Thereafter, on May 8, 2015, Applicant filed the instant post-conviction relief application subject to this action.

ALLEGATIONS RAISED ON POST-CONVICTION RELIEF

In his amended application, Applicant alleged he was being held in custody unlawfully based on the following allegations:

- a) Ineffective assistance of counsel for failure to object when the Court analyzed the factual determinations and reached a decision in the Jackson v. Denno hearing using an incorrect burden.
- b) Ineffective assistance of counsel for failure to object when the Court instructed the jury that they would be conducting a “search for the truth.”
- c) Ineffective assistance of counsel for failure to file or argue a Motion to Sever.
- d) Ineffective assistance of counsel for failure to present compelling argument regarding the photographs of Christopher Whitehead’s car which was already entered into evidence.

- e) Ineffective assistance of counsel for failure to properly preserve Crawford issues for appellate review during trial.
- f) Ineffective assistance of counsel for failure to sufficiently and effectively argue under Bruton that admission of the co-defendant's statement violated the Applicant's rights under the Confrontation Clause.
- g) Ineffective assistance of counsel for failure to ensure that the Court properly provided a limiting instruction under Bruton and failure to object when the insufficient instruction was given.
- h) Ineffective assistance of counsel for failure to object when the Court allowed the jury during deliberations to review the transcripts of testimony of three trial witnesses.
- i) Ineffective assistance of counsel for failing to ensure that the Applicant was present during all critical stages of trial.
- j) Ineffective assistance of counsel as counsel was ineffective for failing to present evidence before the jury.
- k) The cumulative effect of trial counsel's errors constitute ineffective assistance of counsel.

At the evidentiary hearing, Applicant expressly withdrew allegation (d), but proceeded forward on all other allegations. This Court granted relief on all ten allegations.

ARGUMENT IN SUPPORT OF RECONSIDERATION

Respondent moves this Court to reverse its earlier decision and deny post-conviction relief where Applicant failed to meet his burden as set forth in Strickland v. Washington, 466 U.S. 668 (1984).

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland, 466 U.S. 668; Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her 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 [it] cannot be relied upon as having produced a just result.” Strickland, 466 U.S. 668; Butler, 286 S.C. at 442, 334 S.E.2d at 814. In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, an applicant must prove that counsel’s performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. 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.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

In its Order Granting Post-Conviction relief, this Court granted relief as to all of Applicant’s allegations, finding counsel was constitutionally deficient in each instance and that each of these individual deficiencies were of such an egregious nature that the result of Applicant’s trial would have been different, i.e., that Applicant would have been acquitted but

for these individual deficiencies. Despite these individual findings of deficiency and prejudice as to each of Applicant's allegations, this Court inexplicably also found that the cumulative effect of these deficiencies warranted a new trial, a finding that is inconsistent with the rest of its findings.

Respondent respectfully asserts this Court's order is based on numerous legal and factual errors and that this Court's grant of post-conviction relief should be reconsidered and denied. Respondent outlines these errors below:

This Court's order lacks specific findings of prejudice

As an initial matter, Respondent respectfully notes this Court's order is devoid of the specific prejudice findings necessary to grant Applicant post-conviction relief.

Recently, in Smalls v. State, our Supreme Court reaffirmed the necessity of the PCR to make specific findings on prejudice that are tied to the particular deficiencies alleged. Smalls v. State, Op. No. 27764 (S.C. Sup. Ct. filed Feb. 7, 2018) (Shearouse Adv. Sh. No. 6 at 43), reh'g denied (Mar. 29, 2018) ("As we have explained, the strength of the evidence must be considered along with the specific impact of counsel's errors."). "In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial. In addition, the PCR court should consider the strength of the State's case in light of all the evidence presented to the jury. In general, the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice. Id. (internal citations omitted).

In the present case, many of the individual findings on each allegation simply state that there is a reasonable probability that the result of the trial or appeal would have been different, but fail to state exactly how the proceeding would have been impacted by these errors.

Respondent respectfully requests this Court make specific determinations as to how each of trial counsel's purported errors affected the outcome of his case, and if the Court is unable to determine the specific prejudice Applicant suffered from these alleged errors, reverse its finding that counsel was constitutionally ineffective.

Moreover, Respondent respectfully urges this Court to reconsider its finding that the cumulative effect of counsel's purported errors resulted in prejudice, as it is incongruent with the status of the law in this state that requires Applicant to show both deficiency and prejudice as to each individual allegation raised.

This Court's Order Disregards Prior Findings by the South Carolina Supreme Court

In its order granting post-conviction relief, this Court's order appears to largely disregard the findings of the South Carolina Supreme Court in its decision affirming Applicant's convictions and sentences. On certiorari, the Supreme Court held the trial court's redaction of co-defendant Cannon's statement with the phrase "another person" was "insufficient to satisfy the demands of the Confrontation Clause" under Bruton and its progeny. McDonald, 412 S.C. at 141, 771 S.E.2d at 844. Moreover, the Supreme Court held, "[t]he presence of a limiting instruction is not curative here, as it was not in Bruton, for 'there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.'" McDonald, 412 S.C. at 142, 771 S.E.2d at 844. Despite finding Applicant's constitutional rights were violated by the trial court's redaction of his non-testifying co-defendant's statement, the Supreme Court held, "the overwhelming evidence of McDonald's guilt renders the error harmless beyond a reasonable doubt." Id. In reaching this determination,

the Supreme Court noted the “independent evidence of guilt” aside from Cannon’s statement or McDonald’s confession, was compelling:

On the evening of the murder, Whitehead informed a co-worker that he intended to go over to Victim’s home to fight him. Later that evening, around 10:00 p.m., Defendants arrived at the Sonic, with Cannon donning a ski mask. The shift manager told the Defendants to leave. An on-duty employee then observed Defendants leave together. That employee testified that Whitehead drove a four-door sedan with a noticeably loud muffler sound. Investigators obtained a receipt from the Wal-Mart on Two Notch Road in Columbia, which confirmed that a ski mask and purple latex gloves were purchased at 10:43 p.m. on the night of the murder. At approximately 11:30 p.m., near the time of Victim’s murder, Victim’s neighbor took his dog outside and heard “a lot of knocking noise[s], loud, like somebody kicking something or slamming doors.” About ten minutes later, the neighbor heard “a lot of noise” and “a lot of people getting excited.” He then heard a loud muffler sound and observed headlights in the road. A short time later, at about 1:30 a.m., McDonald showed up at a co-worker’s house and was visibly upset. The co-worker testified that, although McDonald did stay at his house from time to time, this was the first time McDonald had showed up so late. In addition, the morning after the murder, Whitehead showed up to work at the Sonic with a scratch under one of his eyes and a limp. He began acting strange and lied to his manager about the source of the injuries, claiming that he fell at work. Several days later, he walked out of work during a shift and told his manager that he’s “got problems” and was “about to move to Aiken.”

Id. at 142–43, 771 S.E.2d at 844–45. The Supreme Court found “this evidence of guilt, independent of Cannon’s confession, **compelling**.” Id. (emphasis added).

Despite these findings, this Court made several findings that are incongruent with these findings. This Court repeatedly disregards the Supreme Court’s findings that although Applicant suffered a constitutional violation from the admission of Cannon’s statement with the redaction “another person,” the error was harmless in light of the compelling evidence of Applicant’s guilt

independent of Cannon's statement and Applicant's confession. Such examples of this blatant disregard from the Supreme Court's findings are as follows:

- In finding counsel was ineffective for failing to request a severance, this Court found "McDonald's constitutional rights were violated by the admission of the non-testifying co-defendant's statements incriminating McDonald," but yet finds this prejudiced Applicant, a finding that is in direct contradiction with the Supreme Court's holding that this very error was harmless in light of the overwhelming independent evidence of Applicant's guilt.
- In finding counsel was ineffective for failing to properly preserve Crawford issued for appellate review, this Court found Applicant was denied the right to challenge Cannon's statement on an additional ground, but again, finds this prejudiced Applicant, a finding that is in direct contradiction with the Supreme Court's holding that any error in the admission of Cannon's statement was harmless in light of the overwhelming independent evidence of Applicant's guilt.
- In finding counsel was ineffective for failing to sufficiently and effectively argue under Bruton that admission of the co-defendant's statement violated the Applicant's rights under the Confrontation Clause, this Court found trial counsel was "ineffective in actively and vigorously seeking to prevent the codefendant's statement from being admitted into evidence and used against McDonald. Had trial counsel properly argued this issue during trial, there is a reasonable likelihood that prevented this violation from occurring in the first place," a finding that is in direct contradiction with the Supreme Court's holding that this

very error was harmless in light of the overwhelming independent evidence of Applicant's guilt.

- In finding counsel was ineffective for failing to ensure the trial court properly provided a limiting instruction under Bruton and failing to object when an insufficient instruction was given, this Court found that "[i]f preserved for appellate review, the Court may have found that failure to give a limiting instruction at the time the statements were admitted was an error by the Court," which is in direct contradiction with the Supreme Court's finding that no limiting instruction would have cured the constitutional error in admitting Cannon's statement but the error was nonetheless harmless in light of the compelling independent evidence of Applicant's guilt.

These findings are wholly inconsistent with the Supreme Court's holdings in McDonald.

"Harmless error review looks to the basis on which the jury actually rested its verdict." Lowry v. State, 376 S.C. 499, 508, 657 S.E.2d 760, 765 (2008) (citing Sullivan v. Louisiana, 508 U.S. 275, 279 (1993)). "From this perspective, in order to conclude that the error did not contribute to the verdict, the Court must 'find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.'" Id. (citing Yates v. Evatt, 500 U.S. 391, 403 (1991))

Because the Supreme Court already determined the constitutional violation of the admission of Cannon's statement was harmless error not contributing to the verdict, this Court's findings that the result of Applicant's trial would be different (i.e., prejudice pursuant to Strickland) on those same grounds constitute an error of law. See Arnold v. State/Plath v. State, 309 S.C. 157, 165, 420 S.E.2d 834, 838 (1992) (noting that the requirement that a constitutional

error be harmless beyond a reasonable doubt “embodies a standard requiring reversal ‘if there is a reasonable possibility that the evidence complained of might have contributed to the conviction’ ” (quoting Yates, 500 U.S. at 403)); see also Clark v. Groose, 16 F.3d 960, 964 (8th Cir. 1994) (concluding even if evidence is erroneously admitted but it constitutes at most harmless error, no ineffective performance is shown); LePage v. Idaho, 851 F.2d 251, 257 (9th Cir. 1988) (concluding that since admission of statements obtained in violation of Massiah was harmless error beyond a reasonable doubt, LePage suffered no prejudice from his counsel’s failure to object to the statements).

This Court’s finding that counsel was ineffective for failing to object to the trial court’s use of the incorrect standard during the Jackson v. Denno hearing is erroneous

Applicant gave a detailed confession to the crime. Like Cannon’s statement, his statement was also redacted before introduction. (State’s Exhibit 104). The statement referenced going to the local Wal-Mart and buying a ski mask and a box of purple gloves; one of them called “Zach” to see if someone was home; all of them kicked in a sturdy back door; one person “picked up a glass bowl with flower petals in it, picked it up over his head and hit Josh in the head with it while Josh was asleep on the couch”; another person dragged victim off the couch; he repeatedly hit victim with his fists then hit him in the back of the head using the victim’s bat; they were searching for drugs and money; another person kicked and stomped the victim, and, eventually, someone pulled a Christmas tree over on him. He also claimed someone else left the house with “plastic bags of stuff” and gave him some “DVD’s and stuff.” (Tr. p. 773, line 15 - p. 775, line 21). In particular, as to the beating, Applicant confessed as follows (again, as reflected in the redacted statement read at trial):

I first grabbed a bat that was against the wall and I started hitting Josh in the body. Then another person tried to stop me to ask Josh a question about where the money and dope was, and I couldn’t

stop the bat. I couldn't stop the bat and I hit Josh in the back of the head. I also think I hit him one time in the temple area of his head. Josh then started bleeding more and I got scared. That's when another person and another person started kicking and stomping Josh. ... The last thing I saw another person pushing the tree over on Josh...

(Tr. p. 775, lines 2-9). Further, at the time of his arrest, when driving to the sheriff's department and before giving his detailed statement, Applicant volunteered to officers, "This is the way we came that night." (Tr. p. 954, line 4 - p. 955, line 3).

Prior to the admission of Applicant's statement, the trial court conducted a hearing pursuant to Jackson v. Denno to determine the admissibility of Applicant's statement to law enforcement. During the Denno hearing, the trial court heard testimony from three law enforcement investigators, Applicant, Applicant's mother, and Applicant's brother. The trial court was also presented with Applicant's signed waiver of rights. After hearing all testimony and evidence presented and listening to argument from counsel, the trial court noted it had considered everything presented by the State, including the State's evidence of waiver, as well as everything presented by the defense, and found Applicant was fully advise of his rights and knowingly and voluntarily waived those rights to give a statement to law enforcement. See Tr. 252-59. The record shows the trial court employed the correct standard and did not employ the wrong standard or impermissible shift the burden onto Applicant.

Despite these clear findings in the record, this Court found the trial court improperly "plac[ed] the burden on the Defense to prove a lack of waiver by the preponderance of the evidence, rather than requiring the State to prove a voluntary waiver by a preponderance of the evidence." This Court further found,

If a proper objection had been raised, it is possible that the Court may have reconsidered his decision. Alternatively, the issue could have been raised on appeal. This Court finds that prejudice exists

because it is likely that the appellate court would have found error as it appears the incorrect legal burden was used by the Court. There is a reasonable probability that, but for counsel's unprofessional errors, the result of the trial or appeal would have been different.

As further evidence of prejudice, this Court notes that in finding "harmless error" the Supreme Court relied to some degree on this statement of McDonald. It is likely that the harmless error analysis would have been affected if the statement had not been admitted at trial, or if the appellate court had additionally considered this legal issue regarding the admissibility of McDonald's statement. Accordingly, this Court finds that it is appropriate to grant the Applicant post-conviction relief on this ground.

(Order granting relief p. 8). In support of this ruling, this Court appears to have cherry-picked select passages from the Denno hearing and failed to consider the record as a whole as required. Respondent respectfully submit this Court's findings that the trial court applied the wrong standard during the Denno hearing is erroneous and is not supported by the record as a whole.

"[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Miranda v. Arizona, 384 U.S. 436, 444 (1966). Prior to custodial interrogation, a suspect must be warned he has a right to remain silent, any of his statements may be used against him, he has a right to an attorney, and an attorney will be appointed to him prior to any questioning if he desires one and cannot afford one. Id. at 479. Once those warnings are given to a suspect and the suspect is afforded an opportunity to exercise his rights, the suspect may knowingly and intelligently waive those rights and make a statement. Id.

Significantly, if a defendant is advised of his constitutional rights and then chooses to make a statement, the burden is on the State to prove by a preponderance of the evidence the

defendant knowingly, intelligently, and voluntarily waived his rights. State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 246 (1990); see Berghuis v. Thompkins, 560 U.S. 370, 384 (2010) (instructing the prosecution must establish the accused understood his rights in order for the accused's waiver of those rights to be valid). In determining whether a valid waiver of rights occurred, the particular facts and circumstances surrounding the case must be examined, including the background, experience, and conduct of the accused. North Carolina v. Butler, 441 U.S. 369, 374-375 (1979). Importantly, a valid waiver of rights can be established through proof of express written or oral statements or can be inferred from the actions and words of the person interrogated. Id. at 373; see Berghuis, 560 U.S. at 384 ("An 'implicit waiver' of the 'right to remain silent' is sufficient to admit a suspect's statement into evidence." (citation omitted)); State v. Kennedy, 333 S.C. 426, 429, 510 S.E.2d 714, 715 (1998) ("An express waiver is unnecessary to support a finding that the defendant has waived the right to remain silent or the right to counsel guaranteed by Miranda.").

However, even if a defendant validly waives his rights and makes a statement, a confession or statement by a defendant is nonetheless not admissible unless voluntarily made. State v. Myers, 359 S.C. 40, 47, 596 S.E.2d 488, 492 (2004). The reason for the prohibition against the use of an involuntary confession is that "coerced confessions" have been recognized to be "inherently untrustworthy." Dickerson v. United States, 530 U.S. 428, 433 (2000); see also Jackson v. Denno, 378 U.S. 368, 385-386 (1964) ("[T]he Fourteenth Amendment forbids the use of involuntary confessions not only because of the probable unreliability of confessions that are obtained in a manner deemed coercive, but also because of the 'strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will,' and

because of 'the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.' " (citations omitted)).

Importantly, "[t]he process for ascertaining whether a statement is voluntary is bifurcated because the process involves determinations by both the trial judge and the jury." State v. Breeze, 379 S.C. 538, 543, 665 S.E.2d 247, 250 (Ct. App. 2008). Pursuant to the bifurcated process, the trial judge must first determine in an evidentiary hearing whether the State proved the statement was voluntarily made by a preponderance of the evidence and then, if the trial judge finds the State met its burden, the statement is submitted to the jury where its voluntariness must be proven beyond a reasonable doubt. Id. When considering the voluntariness and admissibility of a defendant's statements, the trial judge should examine the totality of the circumstances under which the statements were made, including the characteristics of the accused and the details of the interrogation, to determine whether the State has met its burden of proof. State v. Rabon, 275 S.C. 459, 461, 272 S.E.2d 634, 635 (1980). Factors to be considered in the totality of the circumstances analysis include: (1) the age of the accused; (2) the educational level and intelligence of the accused; (3) the accused's knowledge of his constitutional rights; (4) the length of the accused's detention; (5) the nature of the questioning and whether it was repeated and prolonged; and (6) the presence or absence of the use of punishment, including deprivation of food or sleep. Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973). Ultimately though, the "ultimate test" of voluntariness involves determining whether the confession was "the product of an essentially free and unconstrained choice by its maker" or was the product of an overborne will and critically-impaired capacity for self-determination. Id. at 225-226; see State v. Von Dohlen, 322 S.C. 234, 243, 471 S.E.2d 689, 695 (1996) ("The

question is whether the defendant's will was overborne when he confessed."); see also Miller v. Fenton, 796 F.2d 598, 604 (3rd Cir. 1986) ("We emphasize that the test for voluntariness is not a but-for test: we do not ask whether the confession would have been made in the absence of the interrogation. Few criminals feel impelled to confess to the police purely of their own accord, without any questioning at all.").

In the present case, the trial court made the following findings at the conclusion of the Denno hearing:

So based on that analysis of this case, I have carefully considered all the evidence that's been offered by the State and the defendants and am convinced by a preponderance of the evidence—and that's my standard, and I so find that before the alleged statements were obtained from the defendants—and this applies to both defendants—the defendants were fully advised of their rights under the Fifth and Sixth Amendments to the Constitution of the United States, and that the defendants were advised of the Constitutional safeguards required by Miranda vs. United States (sic) as follows :

The defendants were advised prior to any interrogation that they had the right to remain silent. The defendants were advised prior to any interrogation that if they waived their right to remain silent and made a statement such statement could and would be used against them in a court of law, that the defendants were advised prior to any interrogation that they had the right to employ or select an attorney of their own choice, that if they did not have the money, resources or funds to employ an attorney that the court would appoint and provide an attorney for them; and, if so, if they so desired, without cost or expense to them, and that they had the right to have their attorney present with them at all times during all interviews and interrogations, that the defendants were advised prior to any interrogation that they had the right to consult with their attorneys before interrogation, that they were advised prior to any interrogation they had a right to interrupt and terminate the interrogation at any time.

They had further the right to stop answering questions at any time during the interrogation, that they were advised prior to any

interrogation that even if during the interrogation they desired an attorney, the interrogation would cease until an attorney was provided for them and they were given the opportunity to consult with their attorney prior to further interrogation, that the defendants knowingly and intelligently waived their rights under the Fifth and Sixth Amendments to the Constitution of the United States and the Constitutional safeguards required by *Miranda vs. Arizona*, and that the alleged statements given by the defendants were freely and voluntarily given, without duress, without coercion, without undue influence, without reward, without promise or hope of reward, without threat of injury, and without compulsion or inducement of any kind; and that such alleged statements were the voluntary product of the free and unconstrained will of the defendants .

This Court finds all of the foregoing conclusions by a preponderance of the evidence; and I, therefore, find the statements are admissible into evidence. All right, counsel. Are you ready for the jury?

(Trial Tr. p. 257-259).

The trial court employed the correct standard for determining the admissibility of Applicant's statement and this Court's rulings to the contrary constitute an error of law. Therefore, as the trial court employed the proper standard, trial counsel cannot be deemed deficient for failing to object and this Court's finding to the contrary is erroneous.

Moreover, this Court's findings of prejudice based on the purported error of trial counsel for failing to object is also erroneous, as the Supreme Court already found there was compelling evidence of Applicant's guilt independent of his statement to law enforcement and Cannon's statement. McDonald, 412 S.C. at 143, 771 S.E.2d at 845. Therefore, there is no reasonable likelihood the result of the proceeding would have been different absent counsel's alleged deficiency for failing to object.

This Court's finding that counsel was ineffective for failing to object to the trial court's use of the phrase "search for the truth" is erroneous

In this Court's order granting relief, this Court found trial counsel was ineffective for failing to object to comments from the trial court to the jury that indicated their role was to seek the truth. This Court found counsel was deficient for failing to object to these comments because they "unconstitutionally shifted the burden of proof" and were not able to be reviewed on appeal. This Court further found, "Prejudice is apparent in this matter in two separate contexts. First, because the jury likely applied these instructions during deliberations, and second, because the appellate courts were not given an opportunity to rule on the propriety of these statements." (Order granting relief p. 10). Respondent respectfully asserts these findings are erroneous and should be reversed.

In State v. Aleksey, 343 S.C. 20, 538 S.E.2d. 248 (2000), the South Carolina Supreme Court held that jury instructions on reasonable doubt which also charge the jury to "search for the truth" run the risk of unconstitutionally shifting the burden of proof to the defendant, but nonetheless found there was no reversible error in the charge given there because the "seek the truth" language was given in conjunction with the credibility charge, and not with either the reasonable doubt or circumstantial evidence charge. State v. Beaty, Op. No. 27693 (S.C. Sup. Ct. filed Dec. 29, 2016) (Shearouse Adv. Sh. No. 1 at 13–14), reh'g granted Mar. 24, 2017).

Recently, the South Carolina Supreme Court again considered the use of "truth seeking" language by the trial court in State v. Beaty. Id. The Beaty Court concluded:

[A] trial court should refrain from informing the jury, whether through comments or through its charge, that its role is to search for the truth, or to find the true facts, or to render a just verdict. These phrases may be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict it believes best serves the jury's perception

of justice. We caution trial judges to avoid these terms and any other that may divert the jury from its obligation in a criminal case to determine, based solely on the evidence presented, whether the State has proven the defendant's guilt beyond a reasonable doubt. Although there was error here, our review of the entirety of the judge's opening comments and the entire trial record convinces us that appellant has not shown prejudice from this error sufficient to warrant reversal.

Id.

In both Aleksey and Beaty, the South Carolina Supreme Court determined that while the trial court's use of "truth seeking" language was improper, the error was not significant enough to warrant reversal of the convictions. The same holds true in Applicant's case. Initially, it is important to note that at the time of Applicant's trial in 2008, the jury instruction given by the trial court was widely-used by the bench and was similar to the approved charges as prepared by the Supreme Court and given to the bench for reference. Therefore, as this charge was commonly used and was proper at the time of Applicant's trial, trial counsel was not deficient for failing to object to this charge.

Moreover, when these "truth seeking" comments are viewed in conjunction with the record as a whole, the trial court properly advised the jury of the State's burden of proof and did not impermissibly shift the burden to Applicant. Because the jury instructions as a whole were proper, Applicant cannot establish any resulting prejudice and this Court's findings otherwise are improper. See Brown v. Stewart, 348 S.C. 33, 53, 557 S.E.2d 676, 686 (Ct. App. 2001) (internal citations omitted) ("In reviewing jury charges for error, we construe the court's charge as a whole in light of the evidence and issues presented at trial. If the instructions of the trial court, construed as a whole, correctly state the law, there is no reversible error. To entitle an appellant

to reversal, the trial court's instructions must be not only erroneous, but also prejudicial, and the enumeration of hypercritical exceptions will not suffice to overthrow a jury's verdict.")

Finally, this Court's findings of prejudice are erroneous, as Applicant cannot establish the result of his trial, or appeal, would have been different but for counsel's failure to object. As discussed more fully above, there was overwhelming and compelling evidence establishing Applicant was guilty of the charged offenses.

This Court's finding that counsel was ineffective for failing to request a severance is erroneous

In this Court's order granting relief, this Court found trial counsel was ineffective for failing to move for a severance of Applicant's trial from his co-defendants. In reaching this conclusion, this Court found, Applicant's "constitutional rights were violated by admission of the non-testifying codefendant's statement incriminating [Applicant]. This would not have happened had the trials of the codefendants been severed." This Court went on to note that trial counsel did not have a valid strategic reason for not moving for severance and "that the trial cannot be relied upon as having produced a just result." This Court's ruling makes no specific findings as to prejudice and wholly failed to reconcile its ruling with the Supreme Court's ruling in McDonald that although Applicant suffered a constitutional violation from the admission of Cannon's statement, this error was harmless in light of the compelling independent evidence of his guilt. This Court's findings are erroneous and not supported by the record.

This Court's finding that counsel was ineffective for failing to properly preserve Crawford issues is erroneous

In this Court's order granting relief, this Court found trial counsel was ineffective for failing to adequately argue that Cannon's statement was inadmissible pursuant to Crawford, thereby failing to preserve this issue for appellate review. This Court further finds, "[t]he fact

that McDonald was denied to challenge his constitutional right on this separate ground constitutes error by trial counsel for failing to object and preserve the issues at trial. Post-conviction relief is appropriate given this failure to object.” Again, this Court’s ruling makes no specific findings as to prejudice and wholly fails to reconcile its ruling with the Supreme Court’s ruling in McDonald that although Applicant suffered a constitutional violation from the admission of Cannon’s statement, this error was harmless in light of the compelling independent evidence of his guilt. While this finding is based on a purported Crawford violation rather than Bruton violation as addressed on appeal by the Supreme Court, the ultimate conclusion is the same—any constitutional violation stemming from the introduction of Cannon’s statement is harmless in light of the overwhelming evidence of Applicant’s guilt separate and apart from Cannon’s statement. This Court’s findings are erroneous and not supported by the record.

This Court’s finding that counsel was ineffective for failing to sufficiently and effectively argue that Cannon’s statement was inadmissible under Bruton

In this Court’s order granting relief, this Court found trial counsel was ineffective for failing to “actively and vigorously seek[] to prevent the codefendant’s statement from being admitted into evidence and used against McDonald.” The Court further found, “[h]ad trial counsel properly argued this issue during trial, there is a reasonable likelihood that [counsel] could have prevented his violation from occurring in the first place.” (Order granting relief p. 13). Again, this Court’s ruling makes no specific findings as to prejudice.

This Court attempts to reconcile its ruling with the Supreme Court’s ruling in McDonald that although Applicant suffered a constitutional violation from the admission of Cannon’s statement, this error was harmless in light of the compelling independent evidence of his guilt by noting:

This Court is mindful of the fact that the Supreme Court has already ruled on the existence of a Bruton violation and found harmless error. However, this Court is convinced that significant deprivations in representation existed at the time of trial to the extent that it would have been possible to fix this legal error and prevent the Bruton violation from ever occurring if counsel had acted and argued appropriately. Further, this Court is concerned by counsel's essential waiver of McDonald's Bruton rights when the questions he asked nullified the prior attempt by the Court and State at redaction of the statements and protection of the defendants.

(Order granting relief p. 15). This ruling is erroneous for several reasons.

Initially, this Court's comment that, "significant deprivations in representation existed at the time of trial to the extent that it would have been possible to fix this legal error and prevent the Bruton violation from ever occurring if counsel had acted and argued appropriately" is irrelevant to the issue at hand—whether the admission of Cannon's statement had sufficient impact on the jury's verdict to undermine confidence in the trial. The Supreme Court already reviewed and expressly rejected Applicant's assertions that it did, finding that "overwhelming evidence of McDonald's guilt renders the error harmless beyond a reasonable doubt." McDonald, 412 S.C. at 142, 771 S.E.2d at 844.

Moreover, this Court's "concern" over "counsel's essential waiver of McDonald's Bruton rights when the questions he asked nullified the prior attempt by the Court and State at redaction of the statements and protection of the defendants" with wholly without merit, as our appellate courts did not deem counsel's conduct to have constituted a "waiver" of Applicant's Bruton arguments and ruled on the merits of this claim, finding the constitutional error harmless in light of the compelling and overwhelming evidence of Applicant's guilt. This Court's findings are erroneous and not supported by the record.

This Court's finding that counsel was ineffective for failing to ensure the trial court properly provided a limiting instruction under Bruton are erroneous

In this Court's order granting relief, this Court found trial counsel was ineffective for failing to ensure the trial court properly gave limiting instructions immediately following the introduction of Cannon's statement, constituting deficient performance. Additionally, this Court found, "if preserved for appellate review, the [appellate c]ourt may have found that failure to give a limiting instruction at the time the statements were admitted was an error by the [trial c]ourt." (Order granting relief p. 16). Respondent respectfully submits this Court's ruling is incompatible with the Supreme Court's ruling in McDonald and applies the wrong standard for determining prejudice.

When addressing this very issue on appeal, the Supreme Court held, "[t]he presence of a limiting instruction is not curative here, as it was not in Bruton, for 'there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.'" McDonald, 412 S.C. at 142, 771 S.E.2d at 844.

Despite this clear ruling that any limiting instruction would not have been enough to cure this constitutional error, this Court's ruling erroneously determines counsel was ineffective for failing to properly request a limiting instruction and notes that a reviewing appellate court "may" have found this to be reversible error. This Court's ruling is in direct contradiction with the Supreme Court's finding that no limiting instruction would have cured the constitutional error in admitting Cannon's statement but the error was nonetheless harmless in light of the compelling independent evidence of Applicant's guilt.

This Court's finding that counsel was ineffective for failing to object to the Court's decision to review a transcript of the testimony of three trial witnesses is erroneous

During deliberation, the jury asked to hear additional testimony. After a discussion amongst all parties and the court, the court informed the jury that it would take several days to produce transcripts for these three witnesses. The jury responded, "We do not feel we can be fair and do justice to each defendant on each charge without these transcripts." (Trial Tr. p. 1471). Thereafter, the trial court decided to allow for a recess to allow the court reporter adequate time to prepare the transcripts. (Trial Tr. p. 1472). When the jury returned following the recess, the jury asked for the trial court to re-instruct them on the law and the court re-instructed the jury in full. (Trial Tr. 1472-93). The jury then continued deliberations with the use of the transcripts of the requested witnesses' testimony.

In this Court's order granting relief, this Court found trial counsel was ineffective for failing to object to the trial court's decision to allow the jury to review transcripts of the testimony of three witnesses. This Court found trial counsel was ineffective for failing to object to the trial court's decision to provide the jury with transcripts of the requested testimony, because the transcripts "unduly emphasized the evidence and under minded his trial strategy." (Order granting relief p. 18).

"The trial judge, in his discretion, may permit the jury at their request to review, in the defendant's presence, testimony after the beginning of deliberations." State v. Carlson, 363 S.C. 586, 601, 611 S.E.2d 283, 291 (Ct. App. 2005) (quoting State v. Plyler, 275 S.C. 291, 298, 270 S.E.2d 126, 129 (1980)). The extent of the review is within the trial judge's discretion, which is to be exercised in the light of the jury's request. Id.

In support of its decision, this Court cites to Plyer. In Plyer, the jury requested the testimony of a key witness be read back to them and “[t]he tape was replayed, and upon the conclusion of the direct testimony, the foreman informed the court that the jury had heard all they desired. The tape was stopped and the jury returned to their deliberations.” Id. at 298, 270 S.E.2d at 129. Defense counsel moved for the jury to be required to hear the cross-examination, which was denied by the trial court. Id. Our Supreme Court affirmed, holding: “The court is not required to submit evidence to the jury for review beyond that specifically requested but may, in its discretion, have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.” Id.

This Court’s reliance on Plyer is misplaced, as there is no evidence in the record that the jury was only presented with the direct examination of these three witnesses. Rather, the record reveals the trial court provided the jury with the full testimony of the witnesses, including cross-examination.

Additionally, this Court’s reliance on State v. Gulledge, 277 S.C. 368, 287 S.E.2d 488 (1982), is misplaced because Gulledge is not akin to the fact here. In Gulledge, “the State presented testimony that Patrolman Murphy returned to his patrol car and radioed patrol headquarters that he’d been shot and needed help.” Id. at 371, 287 S.E.2d at 490. “The radio communication was recorded and transcribed. Donald Ray Lane, the highway patrolman who received the call, testified about the conversation, as did the Highway Department telecommunications supervisor.” Id. “The tape was also played in court.” Id. On appeal, the Supreme Court reversed, holding “the judge abused his discretion in allowing the jury to take the transcript of the tape into the jury room because it unduly emphasized that evidence.” Id. at 371–72, 287 S.E.2d at 490. In

contrast, the present case involved the jury requesting to rehear testimony from witnesses who testified and were subject to cross-examination, not the transcript of an out-of-court statement.

The trial court did not abuse his broad discretion in providing the jury with transcripts of the full testimony of three witnesses when the jury informed the court, “We do not feel we can be fair and do justice to each defendant on each charge without these transcripts.” (Trial Tr. p. 1471). As the trial court properly provided these transcripts, trial counsel’s purported failure to object cannot be deemed deficient and this Court’s finding otherwise is not supported by the record or case law.

Moreover, this Court’s finding that Applicant was prejudiced by this purported deficient performance is not supported by the record in light of the overwhelming and compelling evidence of Applicant’s guilt. See McDonald, 412 S.C. at 143, 771 S.E.2d at 845.

This Court’s finding that counsel was ineffective for failing to ensure Applicant was present at all critical stages of trial is erroneous

Similar to the allegation addressed directly prior, this Court found trial counsel was ineffective for failing to ensure Applicant was present in the courtroom when the court was determining how to respond to the jury’s request to re-hear the testimony of three witnesses. This Court finds, “[t]rial counsel was unreasonable in proceeding without his client’s presence, and as result McDonald was prejudiced in not having his argument presented to the Court.” This Court’s ruling is based on an error of law. Additionally, this Court’s ruling makes no specific findings as to prejudice

“A criminal defendant has the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure. A defendant’s exclusion, or absence, will be reviewed in light of the whole record.” State v. Shuler,

344 S.C. 604, 624, 545 S.E.2d 805, 815 (2001) (internal citations omitted) (noting a Jackson v. Denno hearing on defendant's statements is critical, but defendant's presence would not have contributed to the fairness of the procedure). The South Carolina Supreme Court "has defined a critical stage as one at which procedural steps are taken or at which events transpire that are likely to prejudice the ensuing trial." State v. Hardy, 283 S.C. 590, 592, 325 S.E.2d 320, 322 (1985) (citing State v. Williams, 263 S.C. 290, 210 S.E.2d 298, 300 (1974)). However, even if a defendant is not present during a "critical stage of trial," this error is subject to a harmless error analysis. Shuler, 344 S.C. at 626, 545 S.E.2d at 816; Williams, 292 S.C. 231, 355 S.E.2d 861. Although the right to be present is a substantial right, **no presumption of prejudice arises from a defendant's exclusion.** Shuler, 344 S.C. at 626, 545 S.E.2d at 816.

In the present case, Applicant's rights were not infringed, as a conference outside the jury's presence as to how to respond to a jury question is not a "critical stage." Moreover, Applicant's presence would not have made a difference in the fairness of the proceeding. This Court's findings that trial counsel's purported failure to ensure Applicant was present for a "critical stage" of trial is ineffective is not supported by the record or case law.

Moreover, this Court's finding that Applicant was prejudiced by this purported deficient performance is not supported by the record in light of the overwhelming and compelling evidence of Applicant's guilt. See McDonald, 412 S.C. at 143, 771 S.E.2d at 845.

This Court's finding that counsel was ineffective for failing to present a defense is erroneous

This Court found counsel was ineffective for failing to present a defense on Applicant's behalf. Specifically, this Court found counsel should have presented evidence to the jury that Applicant's statement to law enforcement was not given freely, knowingly, and voluntarily, much like the witnesses he presented at the Denno hearing including Applicant.

At the evidentiary hearing, both Applicant and trial counsel testified that in retrospect, they now wish Applicant had testified in his own defense. These hindsight reflections come nearly a decade after the trial and only upon the convictions of Applicant and sentence of thirty-five years imprisonment. However, counsel testified at the time of trial, he made a strategic decision not to present evidence, including the testimony of Applicant. Moreover, the record reveals Applicant made the decision not to testify on his behalf after engaging in a thorough colloquy with the trial court. See Trial Tr. 1292-94, 1315.

“The United States Supreme Court has cautioned that ‘every effort be made to eliminate the distorting effects of hindsight’ and evaluate counsel’s decisions at the time they were made.” Edwards v. State, 392 S.C. 449, 456–57, 710 S.E.2d 60, 64 (2011) (citing Strickland, 466 U.S. at 689). Accordingly, PCR courts must be wary of second-guessing trial counsel’s tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992). To achieve the goal of “eliminat[ing] the distorting effects of hindsight,” PCR courts must be wary of attorneys’ statements at an evidentiary hearing second-guessing earlier strategic decisions against calling witnesses and instead “focusing [its] attention on what [Applicant]’s counsel knew at the time he made his decisions.” Edwards, 392 S.C. at 458, 710 S.E.2d at 65.

Here, trial counsel testified as to his strategic decision not to present Applicant or any other witnesses during Applicant’s trial. This Court fails to give this testimony the adequate weight required and instead focuses entirely on counsel’s retrospective and regretful comments nearly ten years after the trial’s conclusion in an adverse result.

Moreover, this Court’s finding that Applicant was prejudiced by this purported deficient performance is not supported by the record in light of the overwhelming and compelling evidence of Applicant’s guilt. See McDonald, 412 S.C. at 143, 771 S.E.2d at 845.

This Court's finding that the cumulative effect of counsel's errors constitutes ineffective assistance of counsel is erroneous

Despite the individual findings of deficiency and prejudice as to each of Applicant's allegations, this Court inexplicably also found that the cumulative effect of these deficiencies warranted a new trial, a finding that is inconsistent with the rest of its findings.

"When counsel's deficiency is so pervasive as to render a particularized prejudice inquiry unnecessary, a defendant may be relieved of his burden to show prejudice." Simpson v. Moore, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006), abrogated on other grounds by Smalls v. State, Op. No. 27764 (S.C. Sup. Ct. filed Feb. 7, 2018) (Shearouse Adv. Sh. No. 6 at 43), reh'g denied (Mar. 29, 2018). "Whether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina." Id.

As discussed above, our Supreme Court recently stressed the importance of the PCR court's role in making specific findings on prejudice that are tied to the particular deficiencies alleged. Smalls v. State, Op. No. 27764 (S.C. Sup. Ct. filed Feb. 7, 2018) (Shearouse Adv. Sh. No. 6 at 43), reh'g denied (Mar. 29, 2018) ("As we have explained, the strength of the evidence must be considered along with the specific impact of counsel's errors."). "In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial. In addition, the PCR court should consider the strength of the State's case in light of all the evidence presented to the jury. In general, the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice. Id. (internal citations omitted).

As whether a cumulative error analysis is proper in South Carolina is an unsettled question of law and in light of the Supreme Court's recent decision in Small, Respondent respectfully asserts this Court's use of a cumulative error analysis is erroneous.

Moreover, Respondent notes such a finding is inconsistent with the Supreme Court's findings in McDonald outlining the overwhelming and compelling evidence of his guilt.

CONCLUSION

Based on all the foregoing, Respondent respectfully requests this Court reconsider its prior ruling and deny relief to Applicant based on the numerous error of law and erroneous findings of fact as outlined above. Respondent requests a hearing to fully argue this 59(e), SCRCF, motion and address each of the raised issues before this Court.

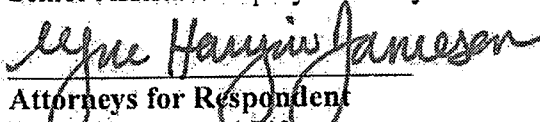
Respectfully submitted,

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By:


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April 16, 2018

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF KERSHAW	)	
	)	
	)	2015-CP-28-443
	)	
DERRICK MCDONALD, #328344,	)	
	)	
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 **State's Motion to Reconsider, Alter, or Amend pursuant to Rule 59(e)** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Kristy Grafton Goldberg, Esquire
 Law Office of Kristy Goldberg, LLC
 1720 Main Street, Suite 303
 Columbia, South Carolina 29201

DATED this the 16th day of April, 2018.


 Carmen Nord, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF KERSHAW	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
Derrick McDonald,	)	C.A. No. 2015-CP-28-443
S.C.D.C. No. 328344,	)	
	)	
Applicant,	)	APPLICANT'S RESPONSE
v.	)	TO STATE'S MOTION TO
	)	RECONSIDER, ALTER OR AMEND
State of South Carolina,	)	
	)	
Respondent.	)	

FILED FOR RECORD
2018 MAY -9 PM 2:44
JULIE C. HASTY
CLERK OF COURT
KERSHAW COUNTY, S.C.

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed May 8, 2015 and amended October 12, 2017. Respondent made its return on or about September 9, 2015. An evidentiary hearing was held on December 12, 2017 before the Honorable Clifton Newman. The Court issued an order granting post-conviction relief on April 2, 2018 after carefully considering proposed orders submitted by both parties. The State has since filed a Motion to Reconsider, Alter or Amend. The Applicant responds briefly herein.

As an initial matter, the Applicant contends that all issues in this matter were fully presented and argued by competent counsel for both sides during a full evidentiary hearing on December 12, 2017, and again in cross-proposed orders submitted to the Court after the hearing. The Applicant would argue that an additional hearing on this matter is not necessary, as Applicant has previously proven his burden under Strickland v. Washington as stated in the previously filed Order Granting Post-Conviction Relief. 466 U.S. 668 (1984). Nevertheless, the Applicant will respond briefly to the State's motion.

Specific Findings of Prejudice

The law in South Carolina is and always has been that the Applicant must demonstrate "there is a reasonable probability that, but for counsel's errors, the result of the trial would have

been different.” Smalls v. State, Op. No. 27764 (S.C. Sup. Ct. filed Feb. 7, 2018) (Shearouse ADv. Sh. No. 6 at 43), *citing* Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590 (2007) *also citing* Strickland v. Washington, 446 U.S. at 687, 104 S.Ct. at 2064). This standard is reiterated in the recent Supreme Court case cited by the Attorney General in their Motion.

The State alleges and complains that the existing Order repeatedly finds that “there is a reasonable probability that the result of the trial or appeal would have been different” but allegedly does not does not state exactly how the proceeding would have been impacted differently. Notwithstanding the obvious and implicit fact that a *different result at trial* would have been an acquittal, and a *different result at appeal* would have been a successful appeal, the State apparently seeks more specificity as to prejudice. The Applicant asserts that specific prejudice for each allegation has already been asserted and described in the current court Order wherein all allegations are fully described and discussed including the specific impact counsel’s error had on each specific issue alleged and the outcome of the trial.

Disregarding Prior Findings by the Supreme Court

The Applicant strongly disagrees with this assertion by the State which is made repeatedly in every section of the State’s motion. This Court was fully aware of the appellate history. The Applicant’s Supreme Court opinion was referenced repeatedly in the evidentiary hearing and in the resulting Order.

The State seems to repeatedly argue that because the Supreme Court found “overwhelming and compelling evidence of guilt” in their opinion that would require this Court make the same determination regarding the quality of evidence. If this were appropriate, no court could ever find sufficient prejudice for post-conviction relief after an opinion from a direct appeal using such language. All opportunity for post-conviction review would be null and void.

The State overlooks the fact that the Appellate court's consideration of this case was only limited to those issues preserved for appellate review. Any issue not preserved and challenged in the appeal was not considered to be challenged evidence that they could or should second-guess. For example, in finding "overwhelming evidence," it is clear that the appellate court put great weight on the alleged statement provided by the Applicant; however, the admissibility of this statement was challenged in the post-conviction relief case. For that matter any evidence that was admitted without objection is assumed to be competent evidence by the appellate court, as it should be, despite the fact that counsel may have been grossly deficient in not challenging that evidence.

The Supreme Court clearly found that the Applicant's constitutional rights were violated. The Applicant asserts that an individual is always prejudiced, by definition, if they suffer a violation of their constitutional rights. The appellate court was required to look at that prejudice and weigh it in the context of a case where they assumed all other evidence presented was competent and reliable. However, this Court had the benefit of additional testimony and argument regarding legal issues that were not previously preserved or challenged due to the ineffective representation of counsel. Accordingly, it is entirely reasonable that this Court could reach a different conclusion regarding the competency and weight of the evidence and the degree of the existing prejudice. The Applicant would ask this Court to disregard this repeated argument by the State.

As to all remaining issues

The Applicant asserts that these issues were fully addressed in the evidentiary hearing and the proposed orders and the resulting Order and that the State has not presented any new argument that needs to be addressed. The conclusion previously reached by this Court is based

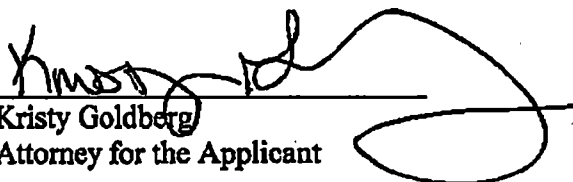
on the transcript and the testimony presented at the evidentiary hearing. The State is simply unhappy with the Court's order. Therefore, the Applicant would defer to the existing Order

CONCLUSION

Based on the foregoing, the Applicant respectfully asks that this Court deny the State's Motion to Reconsider, Alter or Amend.

Columbia South Carolina

May 8, 2018



Kristy Goldberg
Attorney for the Applicant

1 State of South Carolina Court of Common Pleas
2 County of Kershaw Fifth Judicial Circuit
3
4 Derrick McDonald,) Transcript of Record
5 Applicant,)
6 vs.) 2015-CP-28-00443
7 State of South Carolina,)
8 Defendant.)

9
10 May 17, 2018
11 Columbia, South Carolina

12 B E F O R E:

13 The Honorable Clifton Newman, Judge
14

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

16 Kristy G. Goldberg, Esquire
17 On behalf of the Applicant

18 Megan H. Jameson, Assistant Attorney General
19 On behalf of the State of South Carolina
20

21
22 Stacy S. Johnson
23 Circuit Court Reporter
24
25

I N D E XPAGE

Certificate of Reporter

47

E X H I B I T S

NO EXHIBITS WERE INTRODUCED

1 (The following proceedings were held May 17, 2018,
2 beginning at 11:18 AM.)

3 **THE COURT:** All right. This is a hearing on the
4 State's motion to reconsider my order granting PCR to
5 this Defendant, Derrick McDonald. Is that right.

6 **MS. JAMESON:** Yes, Your Honor. May it please the
7 Court?

8 **THE COURT:** Yes.

9 **MS. JAMESON:** Megan Jameson on behalf of the State
10 of South Carolina. This is Derrick McDonald versus the
11 State. It's a Kershaw County PCR. Docket Number
12 2015-CP-28-0443. This matter was heard by Your Honor on
13 December 12, 2017. At the conclusion of the hearing,
14 Your Honor requested proposed orders from both the State
15 and from Applicant's counsel, Kristy Goldberg, and
16 after both orders were submitted Your Honor granted
17 post-conviction relief on nine individual grounds and
18 then also found cumulative error warranted granting
19 post-conviction relief. That order was signed on April 2,
20 2018, and was filed in the Kershaw County clerk's office
21 on April 5th, and it was received by the State on
22 April 6th.

23 Thereafter, the State filed a motion to consider
24 all kind of those grounds, as well as two additional
25 arguments that were presented previously to the Court

1 that the order lacks specific prejudice findings and that
2 in light of the Supreme Court's opinion on the direct
3 appeal of this case that any prejudice findings were
4 not proper. Those grounds are set forth in the State's
5 31-page motion to reconsider. Thereafter, Ms. Goldberg
6 filled a response to the motion and we are here for a
7 hearing today on that motion.

8 The State's first argument to present to the Court --

9 **THE COURT:** Okay. Before you get into the State's
10 first argument, et cetera, if you can recap the facts of
11 his case for me and what happened which resulted in him
12 being in prison.

13 **MS. JAMESON:** Yes, Your Honor.

14 This case involved three different co-defendants that
15 were all tried together; Robert Cannon, Derrick McDonald
16 and Christopher Whitehead. They worked together with the
17 victim, Mr. Zoch, at a Sonic location, and there were some
18 allegations of a dispute between the three co-defendants
19 and Mr. Zoch, some allegations that perhaps he was a snitch
20 and working with law enforcement, and they all worked
21 together at the Sonic restaurant, including the victim, and
22 on the night in question the three co-defendants were
23 spending time together, they went by the Sonic location and
24 were kind of making a little bit of a scene and were asked
25 to leave by the manager since the three of them were

1 off-duty. They then went to a Wal-Mart where they
2 purchased latex gloves and a ski mask and then went over
3 to the victim's home in Kershaw County and the evidence
4 presented at trial showed that the three of them broke in
5 and proceeded to beat the victim to death with various
6 objects, including a baseball bat, a lamp, a heavy object,
7 and then kind of ransacked the home looking for money or
8 drugs and were not able to find any money or drugs, and
9 then left.

10 After that point the State presented evidence that
11 Mr. McDonald then went to another friend or, I believe
12 co-worker who worked at the Sonic as well, showed up at
13 his house very late at night and seemed very upset, and
14 then the next day another co-defendant, Mr. Whitehead,
15 came to the Sonic location, had a noticeable limp and a
16 scratch on his eyes and indicated that he was gonna be
17 leaving the area for a while.

18 Mr. Cannon gave a statement to law enforcement
19 implicating himself in these crimes and then Mr. McDonald
20 also give a statement to law enforcement implicating
21 himself in these crimes.

22 And the main issue that was raised on the direct
23 appeal for Mr. McDonald and Co-Defendant Whitehead was the
24 introduction of Mr. Cannon's statement against them since
25 all three were tried together.

1 **THE COURT:** All right.

2 **MS. JAMESON:** The State's position is -- the main
3 issue that was address by the Court of Appeals and
4 ultimately the Supreme Court in this case was the
5 introduction of Mr. Cannon's statement against
6 Mr. McDonald and the Supreme Court found that there was
7 a severe constitutional violation in introducing
8 Mr. Cannon's statement against Mr. McDonald, but found
9 that despite that any error was deemed harmless in light
10 of the compelling and overwhelming evidence of guilt,
11 and that was independent from the introduction of
12 Mr. Cannon's statement, and the Supreme Court also starts
13 out by talking about all the evidence independent of
14 Mr. McDonald's statement.

15 So while the State disagrees and asks Your Honor to
16 reconsider any ruling regarding the admissibility of
17 Mr. McDonald's statement, the State would submit that
18 the Supreme Court's ruling shows there was overwhelming
19 and compelling evidence of his guilt independent of
20 Mr. McDonald's own statement and independent of
21 Mr. Canon's statement and based on the Supreme Court's
22 ruling the State would submit that three of the nine
23 issues directly relate to that; the severance issue, the
24 failing to argue pursuant to Crawford, the failing to
25 properly argue the Bruton issue and the failing to move

1 for an adequate limiting instruction were specifically
2 addressed in the Supreme Court's order dealing with the
3 constitutional violation pursuant to the confrontation
4 clause and so the State would submit that these four
5 rulings by the Court are incongruent and incompatible
6 with the Supreme Court's ruling in this case.

7 **THE COURT:** So you're not contending that the Supreme
8 Court -- or if an appeal is affirmed that that eliminates
9 a PCR consideration of the same issue?

10 **MS. JAMESON:** No, but it would be a very, very high
11 burden for the Applicant to overcome and it would be more
12 than we've shown here because the findings of deficiency
13 specifically relate to those statements coming in and the
14 Supreme Court already determined that yes, there was a
15 constitutional violation by trying these defendants
16 together and introducing Mr. Cannon's statement, but that
17 despite this serious constitutional violation any error
18 was deemed harmless in light the overwhelming and
19 compelling evidence of his guilt.

20 So, no, it's not a situation where an applicant would
21 be procedurally barred, but I think it would be a very,
22 very high burden and here Mr. McDonald has not met that
23 burden.

24 **THE COURT:** Okay. How does this most recent case,
25 State v. Smalls --

1 **MS. JAMESON:** Yes, Your Honor.

2 **THE COURT:** -- how does that factor into this
3 discussion, if it does?

4 **MS. JAMESON:** Well, one of the State's other
5 arguments is that Your Honor's order respectfully lacks
6 specific prejudice findings in regards to the nine
7 findings of ineffectiveness, and in light of Smalls,
8 specific prejudice findings need to be analyzed by the
9 Court and you can't merely say the result would have been
10 different, you need to look at the specific constitutional
11 deficiencies and compare it to the evidence presented at
12 trial to determine what the specific prejudice would be,
13 and so I think Smalls plays into this case in two ways. I
14 think the cumulative error analysis in lights of Smalls
15 isn't appropriate. Whether cumulative error is -- has
16 been adopted in South Carolina is silent. We don't have
17 any clear guidance from our appellate courts on that
18 issue, but the State would submit in light of Smalls it
19 shouldn't be adopted in South Carolina --

20 **THE COURT:** Well, it's not adopted in my order, is
21 it?

22 **MS. JAMESON:** Your Honor does find that in light of
23 the other errors presented that the cumulative effect
24 grants Mr. McDonald a new trial, which the State submit
25 is unnecessary because Your Honor did find prejudice in

1 regards to the nine specific instances, so there really
2 isn't any need for a cumulative error analysis, but in
3 the event that Your Honor finds one is, the State would
4 submit that that's not the appropriate finding and in
5 light of Smalls ask the Court not to adopt a cumulative
6 error analysis in this case.

7 **THE COURT:** All right. Well, in order for this to
8 move forward in a balanced way, let me hear something
9 from Ms. Goldberg and then we'll come back to you.

10 **MS. JAMESON:** Certainly, Your Honor.

11 **MS. GOLDBERG:** Thank you, Your Honor. May it please
12 the Court? And I'll just kind of go in the same order she
13 did. I do want to point out a couple of things since we
14 do have -- are making a record here, that I do have some
15 disagreements with some facts that she presented --

16 **THE COURT:** All right.

17 **MS. GOLDBERG:** -- one of which was that the victim
18 worked with the three co-defendants, which is not true.
19 The victim's girlfriend worked with the three
20 co-defendants. Mr. McDonald himself had never met the
21 victim.

22 **THE COURT:** The victim's --

23 **MS. GOLDBERG:** Girlfriend --

24 **THE COURT:** -- girlfriend worked --

25 **MS. GOLDBERG:** -- worked with the co-defendants.

1 **THE COURT:** -- with the co-defendants?

2 **MS. GOLDBERG:** Actually the evidence in this case,
3 you know, starts out with the discovery of the crime
4 having been committed. The friends and family and law
5 enforcement discovered that the victim had been beaten up,
6 died by blunt force trauma, the house had been ransacked,
7 no suspects at the time, and the police essentially just
8 began canvassing coworkers, friends, family, coworkers of
9 the girlfriend, coworkers of other family, and come up
10 with allegations of who might have had a beef with the
11 victim, who might not have, that led them to Christopher
12 Whitehead and not Mr. McDonald. There was some testimony
13 in the transcript that Mr. McDonald had been seen with
14 Mr. Whitehead earlier that night, but that's about it.

15 This case -- really there's no forensic evidence,
16 there's no fingerprints, there's no DNA, there's no
17 anything leading to any of the defendants. This case
18 did rest solely upon the statements of Robert Cannon and
19 Derrick McDonald, statements which are a part of our PCR,
20 and Mr. McDonald's statement was challenged, Mr. Cannon's
21 statement was challenged in the appeal. The Court has
22 already held that that statement should not have been
23 admitted against Mr. McDonald. We have further channeled
24 -- argued that Mr. McDonald's statement should not have
25 been presented without being challenged. Those statements

1 were made after law enforcement --

2 **THE COURT:** You mean the lawyer did not challenge
3 it or --

4 **MS. GOLDBERG:** Did not challenge it. Had a Denno
5 hearing, but didn't sufficiently challenge it, didn't
6 sufficiently challenge the judge's determination in that
7 Denno hearing, and then didn't present evidence to the
8 jury further challenging the admissibility or coercion --

9 **THE COURT:** And so I can have a clearer picture of
10 what we're talking about, the judge was Judge --

11 **MS. GOLDBERG:** Cooper. G. Thomas Cooper.

12 **THE COURT:** -- G. Thomas Cooper. And the lawyer was?

13 **MS. GOLDBERG:** Whitlark. Marcus Whitlark.

14 **THE COURT:** All right.

15 **MS. GOLDBERG:** You know, those statements were made
16 -- Mr. Cannon and McDonald testified in the Denno hearing
17 that those statements -- alleged statements were made
18 after law enforcement told them you will cooperate and
19 be a witness in this case or you will not give us a
20 statement and you will be a defendant in a death penalty
21 case.

22 **THE COURT:** Cooperate -- say it again.

23 **MS. GOLDBERG:** You will cooperate and give us a
24 statement and you will be a witness in a death penalty
25 case or if you don't cooperate, you will be a defendant

1 in a death penalty case.

2 Mr. Whitlark --

3 **THE COURT:** Remind me, a threat to give someone
4 the death penalty is automatically constitutionally
5 problematic.

6 **MS. GOLDBERG:** Correct. And the way that was weighed
7 during the Denno hearing was improper. That's already
8 been addressed in the order. Mr. Whitlark also testified
9 that he should have presented Mr. McDonald in front of the
10 jury to explain what had happened and that Mr. Whitlark
11 said he knew at the time he was making a mistake, but he
12 didn't want to rock the boat with his co-defendants'
13 attorneys and went ahead with the original plan not to
14 present a defense even though it was the wrong decision
15 for Mr. McDonald.

16 There's several issues here, but I do want to address
17 one thing. In the State's motion, they repeatedly do cite
18 to the fact that the appellate court found harmless error.
19 As Your Honor asked, I do think that that would be a
20 problematic policy decision in general to say that just
21 because the appellate court found this to be harmless
22 error, this PCR court should give some deference or to be
23 tied to that in any way. The appellate courts look at
24 only the preserved errors and they essentially look at all
25 the other unchallenged evidence as competent evidence.

1 That's their review. In this PCR court, we present
2 additional testimony, we present additional evidence.
3 This court has a completely different view of the State's
4 evidence and can make findings in accordance with that.
5 So I think this court can and should properly look at
6 whether or not the evidence is overwhelming in a different
7 light.

8 Also, in Mr. McDonald's case specifically, when we
9 walked through the door for our PCR hearing, we already
10 knew his constitutional rights had been violated, we
11 already knew an error was made, so if this Court finds
12 that any additional error is made that changes how things
13 are weighed in this case. And Smalls v. State does talk
14 to this. I think Smalls v. State is very helpful because
15 Smalls v. State says the Court should not just say
16 harmless error and not consider the weight of the actual
17 errors of trial counsel, they should weigh the specific
18 errors of trial counsel with the State's evidence and
19 make a specific determination. And I think in this case
20 the order -- all of the issues that are found to be
21 ineffective assistance of counsel, I think the prejudice
22 is clear from what the specific issue is in each
23 particular instance, and I think the order should stand.

24 **THE COURT:** Well, you know, I should -- counsel
25 started by saying I had you-all send proposed orders and

1 you both did and, of course, I never just sign off on a
2 proposed order. Typically I modify it and make it my
3 order, at least I think all judges should do that, but
4 the -- generally the format of the order would be one that
5 you submitted. So, in effect, the criticism is that your
6 order is not -- it's insufficient that you presented to
7 me.

8 Regarding the specifics or the allegations of
9 prejudice, kind recap that to me and give me a response
10 as well.

11 **MS. GOLDBERG:** Well, I think it's interesting that
12 in all the prior case law that talks about PCRs, it always
13 talks about how given the errors of trial counsel the
14 outcome would have been different, but these case laws
15 never say had this error not occurred, this defendant
16 would have been acquitted. It's not that specific. So it
17 may be that had the error in the Denno hearing not been
18 -- not happened, then Mr. McDonald's statement would have
19 not been admitted in front of the jury. It might be the
20 fact that had certain errors taken place in a trial, the
21 jury wouldn't have considered certain evidence in their
22 deliberations.

23 Another important premise in the burden in PCRs is
24 the courts, and Strickland even, say that the standard
25 is -- that the errors are such that they undermine the

1 proper functioning of the adversarial process such that
2 the trial cannot be relied upon as having a just result.
3 So if this Court thinks that things happened or things
4 that were considered by the jury that violated justice,
5 you know, that it was not a just trial, it was not a fair
6 trial, that is a reason to overturn a case on
7 post-conviction relief.

8 I don't think -- I think that the State wants this
9 Court to go down the path of actually saying well, if
10 this had happened, the Defendant would have been acquitted,
11 and I think that's too hard of a burden for any court to
12 have because, you know, typically these courts aren't
13 supposed to second guess the jury completely, but if this
14 Court finds that the way things happened justice wasn't
15 served, information was presented to the jury that
16 shouldn't have been, then I think that is enough for
17 post-conviction relief.

18 **THE COURT:** Now Mr. Whitlark was at that -- at the
19 hearing,~ correct?

20 **MS. GOLDBERG:** Yes, Your Honor.

21 **THE COURT:** And he's -- I mean, he's now a suspended
22 lawyer as I understand it, so he's not here today --

23 **MS. GOLDBERG:** Yes, Your Honor.

24 **THE COURT:** -- but he was there. And kind of recap
25 his performance. Again, I don't remember whether he fell

1 on his sword or claimed that he did a great job or -- just
2 recap that for me.

3 **MS. GOLDBERG:** There were several issues that he --
4 there were some issues that he said, you know, I think I
5 just missed that, I probably should have objected, I just
6 didn't see it. I think that's kind how he did with the
7 Denno, but I think some of the -- and it's kind of what I
8 talked about earlier. I thought the most compelling, most
9 problematic way -- two things that Mr. Whitlark did that
10 were extremely problematic. One was he testified that
11 even though Robert Cannon's statement was being admitted
12 against Mr. McDonald, redacted, the Court at the time
13 thought that protected him under Bruton even though it
14 didn't, Mr. Whitlark just didn't really believe in that
15 and didn't really think it would, again, really protect
16 his client, so he just gets up there in cross-examination
17 and brings out the fact that Mr. Cannon was actually
18 pointing the finger at his co-defendant. So he
19 completely --

20 **THE COURT:** If it's unredacted, what was redacted?

21 **MS. GOLDBERG:** Completely unredacted what was
22 redacted to begin with. I think that's telling of his
23 performance in general. Also the fact that he testified
24 that he never really talked to Mr. McDonald that much
25 about trial strategy or about what his plans were prior to

1 trial because he thought Mr. McDonald was a teenager and
2 he wouldn't have that much to add during this six months
3 he represented him prior to the murder trial, but then
4 once Mr. McDonald got on that witness stand during the
5 Denno hearing and did such a fantastic job, Mr. Whitlark
6 said oh, no, he's actually a really good witness and
7 really stands up for himself and really comes across
8 believable, I should probably call him as a witness,
9 struggled with that decision, ultimately said -- I think
10 his quote was he would just go with what the committee
11 had decided, referring to his co-defendants' attorneys,
12 and instead of rocking the boat stick with idea not to
13 present any evidence at all, including not challenging
14 that coerced confession -- or alleged confession, and I
15 think that's problematic.

16 And then, of course, another part of our issue is
17 that after this sole defense relied on getting that
18 last word, he then -- as the jury asked for transcript
19 testimony of the some of the witnesses, notably the
20 witnesses who testify about the statements, and he waives
21 his client's presence, doesn't object, says fine, they
22 can get it, so essentially now the State's witnesses now
23 have the last word.

24 **THE COURT:** I think that that was something that was
25 particularly troubling for me. The -- if you can remind

1 me. I'm sorry, I'm -- being in the middle of general
2 sections, we've done a hundred cases this week and I'm
3 trying to zone in on this one for the purposes of this
4 hearing, the transcript going to the jury versus --
5 explain that to me one more time.

6 **MS. GOLDBERG:** Yes, Your Honor.

7 So the jury comes back and says we want the statement
8 -- we want to see a transcript of the testimony of three
9 witnesses and they were the three witnesses that testified
10 to the alleged statements from the three co-defendants.
11 Mr. Meadors, the Solicitor, says Your Honor, don't we need
12 to bring the defendants in here to discuss whether we
13 should do this and Whitlark and his other co-counsel say
14 no, we're fine, we'll just agree to it, we'll waive our
15 clients' presence, they don't need to come in here, and
16 we'll just agree to let the jury have that.

17 **THE COURT:** So the transcript went to the jury --

18 **MS. GOLDBERG:** Yes.

19 **THE COURT:** -- and all this was done outside of the
20 defendants -- Mr. McDonald's presence?

21 **MS. GOLDBERG:** Correct, without consulting
22 Mr. McDonald at all. And Mr. McDonald testified that
23 had he been alerted to this, he would have said hey, wait
24 up, I thought the whole point here is we were getting the
25 last word, so why are they gonna hear from the State's

1 witnesses again?

2 You know, the State in their motion to reconsider
3 talks about how the judge has the discretion to allow
4 these things back, and that is true. I don't disagree
5 with that.

6 **THE COURT:** Well, I don't know about -- I don't know
7 about that. I don't know that I accept that premise.
8 You're saying that if the jury during deliberations
9 they want more testimony, that it's fine to send them
10 a transcript as opposed to bringing them into the
11 courtroom?

12 **MS. GOLDBERG:** There are cases -- and there's one
13 case she cited where -- actually there is a case on point
14 where they received the transcript of a 9-1-1 call. It
15 says that the Court -- I think that one said that the
16 Court had the discretion to do that and then there's
17 another one that talks about replaying it back with the
18 defendant present and the judge has the discretion to do
19 that. So, generally, to the State's credit, the judge
20 may have discretion to weigh --

21 **THE COURT:** That's a South Carolina case?

22 **MS. GOLDBERG:** Yes, Your Honor. However, in this
23 case the judge did not act with discretion, he didn't
24 make the decision, he didn't weigh anything, he didn't
25 determine whether or not because there was no objection

1 made in this case.

2 **THE COURT:** Well, that would be at a critical stage
3 of the trial that the defendant would have a right to be
4 present for at least -- well, the jury wasn't brought --
5 the jury wasn't back into the courtroom.

6 **MS. GOLDBERG:** The jury was not brought back into
7 the courtroom.

8 **THE COURT:** They were just sent something to read,
9 the transcript?

10 **MS. GOLDBERG:** That's correct, Your Honor.

11 **THE COURT:** I think that was problematic to me in
12 addition to other things.

13 **MS. GOLDBERG:** So even assuming from the State's
14 perspective that the judge had the discretion to do that,
15 my argument is that counsel was ineffective because he
16 didn't ask the judge to act with any discretion, he didn't
17 make any argument in this regard, so I put that error on
18 counsel.

19 **THE COURT:** All right.

20 **MS. JAMESON:** Your Honor, if I could just briefly
21 respond, and I want to -- I want to correct a statement
22 because we are on the record. Ms. Goldberg said that
23 Applicant and the victim never worked together at Sonic --
24 and the victim never worked together at Sonic. I direct
25 the Court's attention to the Supreme Court opinion which

1 starts out by saying McDonald, Christopher Whitehead,
2 Robert Cannon and Joshua Zoch, the victim, worked together
3 at various times at a fast food restaurant in Columbia,
4 South Carolina, so I did want to correct that for the
5 record.

6 I'd also like to address Ms. Goldberg's statement
7 that really this was just the statements of McDonald
8 and Cannon, and that's simply not the case. The Supreme
9 Court goes into a thorough analysis talking about -- it
10 starts on Page 5 of the opinion. We first note the
11 presence of strong evidence of guilt apart from the
12 erroneous admission of Cannon's confession, and then
13 goes on in a rather lengthy paragraph to outline all of
14 the evidence independent of Mr. Cannon's statement or
15 Mr. McDonald's statement. So the contention that this
16 is just merely two statements from two co-defendants and
17 there wasn't any other evidence, the State would strong
18 refute that contention.

19 **THE COURT:** Okay. If you can repeat that all of that
20 for me. My law clerk wasn't --

21 **MS. JAMESON:** Yes, Your Honor.

22 I just wanted to correct Ms. Goldberg's statement
23 that -- or contention that this is -- this was a case of
24 just two co-defendants giving statements and there wasn't
25 any other evidence. Yes, there weren't any fingerprints,

1 there wasn't any DNA. That's because the Applicant and
2 his co-defendants took the time to go to Wal-Mart and
3 purchase gloves, conceal DNA and fingerprints. They --
4 they premeditated and planned this attack on the victim
5 and there is evidence to support these convictions that
6 the Supreme Court said was compelling and overwhelming
7 independent of the statement of Mr. Cannon and independent
8 of the statement of Mr. McDonald, so I did want to clarify
9 the State's position on that for Your Honor.

10 Additionally, I don't want to rehash everything in
11 our 31-page motion for Your Honor, but I did want to
12 address, Your Honor --

13 **THE COURT:** Well, that's kind of -- you brought the
14 31 pages with you and I'm listening to the arguments in a
15 motion for reconsideration without having the benefit of
16 reading this in anticipation and so I'm trying to get as
17 much as I can to make sure I'm following. I'll have a
18 better focus when I read the 31 pages after the hearing.

19 **MS. JAMESON:** Certainly, Your Honor.

20 I did -- I did want to address quickly Your Honor's
21 comment that it was particularly troublesome the
22 transcript being transcribed and the Applicant not being
23 in the courtroom for that. This wasn't a situation where
24 the transcripts were available and were readily handed
25 right back. I believe there was a two to three-day break

1 where they had to be transcribed by the court reporter;
2 sufficient time for that to be discussed with clients.
3 It wasn't something that happened quickly.

4 **THE COURT:** So what happened to the jury in those
5 two or three days?

6 **MS. JAMESON:** They were sent home. I think it might
7 have possibly been over a long weekend.

8 **MS. GOLDBERG:** I think it was over a holiday.

9 **MS. JAMESON:** Yes. So they were -- they were sent
10 home to give the court reporter time to transcribe and
11 that was something that was discussed with the Court and
12 all the counselors present and they asked the foreman of
13 the jury do you think you can go on deliberating without
14 the transcript and the jury responded we do not feel we
15 can be fair and do justice to each of the defendants on
16 each charge without those transcripts.

17 So the State's position is that it was in the
18 Court's discretion to allow those transcripts to be
19 transcribed and sent back to the jury as opposed to having
20 the testimony played again in the courtroom and I think
21 we'd be in a situation if the Court hadn't given those
22 transcripts where Mr. McDonald would be in here arguing
23 that the transcripts should have been transcribed and sent
24 back because the jury specifically said they could not be
25 fair and impartial on each charge without.

1 **THE COURT:** Give me the law on that again because,
2 you know, I've been doing this for eighteen years and I
3 have yet to send a transcript to a jury room. Now the
4 jury hears testimony in court and then I tell them well,
5 we don't have transcripts; if you want to rehear testimony,
6 you can come back into the court and it will be replayed
7 for you. You know, it's just kind of unheard of to me to
8 say well, we'll take a long break over the weekend so it
9 can be typed up and we'll send it back to you. And, of
10 course, in this case, especially where there's no evidence
11 that the Defendant was a part of that -- well, all that,
12 that the Defendant's impact and influence was waived by
13 the lawyer apparently.

14 **MS. JAMESON:** Yes, Your Honor. The two cases that
15 the State cites in our motion to reconsider, and I believe
16 one of them might have been cited in Your Honor's order as
17 well, is State v. Plyler, and --

18 **THE COURT:** Plyler?

19 **MS. JAMESON:** P-L-Y-L-E-R, Your Honor.

20 **THE COURT:** All right.

21 **MS. JAMESON:** And in Plyler, the jury requested
22 testimony of a key witness be read back to them and so
23 the Court replayed that tape and on conclusion of the
24 direct testimony before the playing of the
25 cross-examination, the foreman informed the Court that

1 it had heard all it wanted and it didn't want to hear
2 the cross-examination.

3 **THE COURT:** Now I've done that a lot. I mean,
4 they hear as much as they want and they give the judge a
5 signal that they've heard enough.

6 **MS. JAMESON:** Yes. And in that situation the issue
7 that was raised, though not directly on point, was
8 whether it was proper for the Court -- whether the
9 Court had abused its discretion in not replaying the
10 cross-examination, the defendant's opportunity to question
11 that witness --

12 **THE COURT:** Well, that's an easy one.

13 **MS. JAMESON:** Yes.

14 **THE COURT:** You know, they -- they know what they
15 want to listen to and once they hear it they -- you know,
16 they can be one hour into six hours and they've heard
17 enough and they want to stop and then the judge stops it,
18 the other side objects and -- but that's not what the
19 jury wanted to hear, so.

20 **MS. JAMESON:** Certainly, Your Honor. And the State
21 would note that in this situation full transcripts were
22 presented to the jury, so it wasn't the situation in
23 Plyler where it was just the direct examination without
24 the cross-examination, so I think that goes to any sort
25 of prejudice analysis that Your Honor undertakes. The

1 cross-examination was likely the last thing that the jury
2 read, it wasn't the State's argument.

3 And then, additionally, the other case cited by the
4 State is State v. Gullede, which is a South Carolina
5 case from 1982, and in this case the State presented
6 testimony of a patrolman who returned to his parole car
7 and radioed headquarters that he needed help and the
8 jury asked for a transcript of that extrinsic -- not the
9 testimony from in the courtroom and the court played the
10 tape in the court again and gave a transcript of the tape
11 into the jury room and the Court reversed holding the
12 judge abused his discretion by allowing the jury to take
13 a transcript of the tape into the courtroom because it
14 unduly emphasized the evidence. The State would submit
15 that's different than here because it wasn't intrinsic
16 evidence, it was a full cross and direct of witnesses.

17 **THE COURT:** All right. I'm not saying it's
18 determinative and I'm not disputing if that's what the
19 court has ruled. Of course, law is kind of evolving and
20 maybe fifteen, twenty years ago a court might have said
21 in a particular case that something in particular was
22 fine, and I'm studying it all in the context of this case
23 and this defendant and the testimony, particularly of the
24 lawyer in which he conceded so many things that -- that
25 he did --

1 **MS. JAMESON:** And, Your Honor, to address the
2 accompanying --

3 **THE COURT:** -- and he wasn't competent.

4 **MS. JAMESON:** -- issue to that if counsel was
5 ineffective for failing to call Mr. McDonald back into the
6 courtroom because it was a critical stage of the trial,
7 the State would submit it's not a critical stage and even
8 if Your Honor was to find that it was a critical stage,
9 that it's still subject -- it does not automatically
10 assume prejudice, that's still subject to a harmless
11 error.

12 **THE COURT:** Well, I understand that cases may say
13 it's not a critical stage isolated, but that -- but in
14 the context of all of the issues before me, and I'm
15 looking at -- this is from the State's proposed order, a
16 criminal defendant has a right to be present at any stage
17 of the proceedings that is critical to its outcome if
18 his presence would contribute to the fairness of the
19 procedure. A defendant's exclusion or absence would be
20 viewed in light of the whole record. And in the Jackson
21 v. Denno hearing it says the defendant's presence would
22 not have contributed to the fairness of the procedure.
23 That's a Jackson v. Denno hearing. And certainly a
24 conference outside the presence of the jury about how to
25 conduct deliberations would not be critical, nor would

1 Applicant's presence have made a difference in the
2 fairness of the proceeding. For these reasons, the
3 allegations is denied and dismissed.

4 You know, this is -- you know, Judge Cooper, he and
5 I were elected the same day, we're like twins on the
6 bench, so I have a great deal of respect for him and so
7 it is not necessary for me to critique him allowing the
8 transcript to go into the jury room and give them the
9 weekend to prepare it as opposed to coming into court to
10 view it. Just from my perspective, I've never -- I mean,
11 I tell the jury if you want to hear -- we don't generate
12 transcripts that go to the jury, you come in and you
13 listen to whatever you want to listen to and maybe stop it
14 when you want to stop it, if you want to stop it, but the
15 problem I think as raised by the defense here is that the
16 Applicant here -- is Mr. McDonald wasn't consulted and
17 that's contrary to the entire strategy that they were
18 supposedly developing of him getting the last word or
19 something to that effect.

20 And, you know, conceiving of submitting someone's
21 testimony to the jury, I mean, we deal with that all the
22 time with depositions in a trial -- some of the trials
23 and you play the depositions and all and the jury often
24 requests can I get a copy of that deposition and to send
25 the transcript in there and highlight one person's

1 testimony over the other testimony, I don't know that that
2 contributes at all to the fairness of the trial, and so I.
3 -- I -- now that I -- I can't say I'm critical of what
4 the judge did, but this is about what the lawyer did in
5 not seeking to preserve that part of it on the Defendant's
6 behalf, and that's just part of the greater picture as was
7 expressed in this opinion.

8 All right. Go right ahead.

9 **MS. JAMESON:** The last issue that I do want to touch
10 on because obviously I don't think we need to go over
11 all ten issues unless Your Honor would like to, but
12 Ms. Goldberg did discuss the confession issues and the
13 performance at the Denno hearing and I did want to note
14 for the record that in the Denno hearing three witnesses
15 were called -- there were three witnesses called by the
16 State, three law enforcement witnesses. The Applicant
17 was also called and he also presented two different family
18 members. And the argument of the threat of the death
19 penalty or you can be a witness, that was all I believe
20 fleshed out in front of Judge Cooper and after hearing all
21 three of those witnesses and listening to argument from
22 Mr. Whitlark, Judge Cooper properly employed the right
23 standard and denied the motion to suppress the statement
24 and, respectfully, the State submits that the two passages
25 that are highlighted in the order granting post-conviction

1 relief just kind of cherry-picked ten or so odd pages of
2 Judge Cooper's ruling and if you look specifically at the
3 end of Judge Cooper's ruling on pages -- I believe it's
4 57 through 59, he specifically goes over the standard that
5 is employed and employed the correct standard for Jackson
6 v. Denno, and I'd like to --

7 **THE COURT:** Well, let me ask you this before you do
8 it. Now you're saying that it's conceded that the police
9 said if you -- if you do not confess, you're gonna get the
10 death penalty?

11 **MS. JAMESON:** Certainly not, Your Honor. I'm not
12 conceding -- I'm not conceding that at all.

13 **THE COURT:** Tell me how that colloquy went then from
14 your perspective.

15 **MS. JAMESON:** I believe the law enforcement officers
16 denied ever making those comments --

17 **THE COURT:** Okay.

18 **MS. JAMESON:** -- but Mr. McDonald and then presented
19 family members saying that they did threaten and say you
20 can either be a defendant in a death penalty case or you
21 can be a witness, so you need to give us a statement, we
22 already have a statement from your other co-defendants,
23 and that was already fleshed out by Judge Cooper in the --
24 in the very thorough Jackson v. Denno hearing and after
25 hearing all of that Judge Cooper thoroughly reviews the

1 standard on the record and determines that Mr. McDonald
2 had been advised of his rights properly by law enforcement
3 and had knowingly and voluntarily waived these rights and
4 gave a statement and any contention that -- that Judge
5 Cooper didn't employ the right standard and that counsel
6 was ineffective for failing to object to Judge Cooper
7 employing the right standard just isn't correct and
8 supported by the record.

9 If Your Honor would look at Page 257 to 259 of the
10 trial transcript, that's when Judge Cooper is giving his
11 ruling.

12 **THE COURT:** And where -- where can I find that if
13 you want me to look at it?

14 **MS. JAMESON:** Your Honor, if I may approach, this is
15 Volume I of IV of the trial transcript and it's also --
16 the passage that I'm referring to is also cited in the
17 State's motion.

18 The State would submit that in those pages,
19 particularly 257 to 259, Judge Cooper employs the correct
20 standard and he starts out by saying I've carefully
21 considered all the evidence that's been offered by the
22 State and the Defendants, and then a little bit -- about
23 a line down, the Defendants were fully advised of their
24 rights under the Fifth and Sixth amendments to the
25 constitutional of the United States, they were advised

1 of the constitutional safeguards required by Miranda, and
2 then he goes on to discuss those rights that they were
3 advised of, and then he finds that the Defendants
4 knowingly and intelligently waived their rights under
5 the Fifth and Sixth amendments of the constitution of the
6 United States, and the constitutional safeguards required
7 by Miranda v. Arizona and that the alleged statements
8 given by the Defendants were freely and voluntarily given
9 without duress, without coercion, without undue influence,
10 without reward, without promise or hope of reward, without
11 threat of injury and without compulsion or inducement of
12 any kind and that such alleged statements were voluntary
13 products of the free and unconstrained will of the
14 Defendants.

15 So the State submits that Judge Cooper did employ the
16 correct standard in the Jackson v. Denno hearing and any
17 finding otherwise is not supported by the record.

18 **THE COURT:** Was there another question at some
19 point about -- that the judge mistaking as to who had the
20 burden?

21 **MS. GOLDBERG:** Your Honor, the order of the Court on
22 the Denno issue actually starts on Page 252 and it goes
23 -- and those sections are in between 252 and 257.

24 **THE COURT:** 252.

25 **MS. GOLDBERG:** And that, Your Honor, is the issue.

1 He clearly says on multiple occasions that I don't find
2 by a preponderance of the evidence basically what the
3 Defendants are trying to show. He's saying that the
4 Defendants haven't shown me by a preponderance of the
5 evidence that this was coerced or that there was an
6 invocation of rights. Those are the two issues that the
7 Defendants testified regarding.

8 **THE COURT:** So there was sort of an issue of
9 burden-shifting on -- in Jackson v. Denno, so it's your
10 contention -- or you concede that he -- I mean, is that a
11 fact or are you saying he clarified it later? Or tell me
12 about it.

13 **MS. JAMESON:** Yes, Your Honor. The State's position
14 is you have to look at the ruling in whole and this ruling
15 does take almost ten pages, it is a lengthy one after a
16 very lengthy Jackson v. Denno hearing. This is the
17 Jackson v. Denno hearing for both Defendant Cannon and
18 McDonald, who both presented multiple witnesses.

19 **THE COURT:** I think what was presented to me was the
20 shorter version where the judge appeared to say that the
21 Defendants had not proven that they were not coerced or
22 something.

23 **MS. JAMESON:** Yes, Your Honor. And that is the
24 State's position; that the specific sentences that were
25 -- I hate to use the word "cherry-picked", but kind of

1 cherry-picked out of the record aren't the full picture of
2 what happened here; that Judge Cooper clearly knows the
3 correct standard for a Jackson v. Denno hearing, and he
4 employed the correct standard here. He found that
5 Mr. McDonald was fully and thoroughly advised of his
6 rights and knowingly and voluntarily waived those rights
7 to give a statement to law enforcement. Mr. McDonald was
8 afforded the opportunity to present three witnesses on
9 that issue, the State presented three witnesses. It was
10 a factual dispute that Judge Cooper ruled on the State
11 submits that he employed the right standard and didn't
12 shift the burden at all.

13 **THE COURT:** Okay.

14 **MS. GOLDBERG:** Well, Your Honor, my response to that
15 would just be that, you know, what the State's trying to
16 say is that at the end of this 10-page order the judge
17 is summarizing his -- his findings; I don't find this, I
18 don't find that. But leading up to that summary, he
19 explains his thought process and his reasoning as to each
20 particular element and each particular issue he has to
21 consider, and he's very specific when he says he doesn't
22 think that the Defendants have proven certain things by
23 a preponderance of the evidence, so I don't think the
24 summary at the end states that.

25 **THE COURT:** All right. What else do you-all want to

1 tell me today?

2 **MS. JAMESON:** As to the other issues, the State
3 would rely on our lengthy motion to reconsider, which
4 that supports our arguments to all of those. If Your
5 Honor would like argument on any of the remaining issues,
6 I'm happy to provide it, but the State would rely on our
7 -- our motion to reconsider.

8 **THE COURT:** More reading. Another 31 pages and a
9 transcript that's 500 pages and --

10 **MS. JAMESON:** Your Honor, I believe the transcript
11 was previously provided. I can provide you with my copy
12 and I can also e-mail you a copy, if you'd like, but it
13 is a quite long trial.

14 **THE COURT:** All right. Which one do you want, her
15 copy?

16 Okay. We'll just crosscheck as to whether or not
17 we already have it, but you can e-mail it anyway and then
18 we know we have it.

19 **MS. JAMESON:** Yes. Certainly. I'll e-mail the
20 entire court packet.

21 **THE COURT:** That's just pushing a button, so you can
22 do that.

23 **MS. JAMESON:** Certainly.

24 **THE COURT:** And then Ms. Goldberg gets one more
25 chance and then you -- you are asking for the

1 reconsideration, so she get's one more chance.

2 So let me hear the highpoints of why the order
3 should stick.

4 **MS. GOLDBERG:** The order as a whole?

5 **THE COURT:** Yes, or the order with modifications.

6 **MS. GOLDBERG:** Right. Your Honor, I -- and there may
7 be modifications, but I want to point out that, you know,
8 the State has referred back to this Supreme Court decision
9 that lays out why they think there is overwhelming
10 evidence. If when Your Honor goes back and reviews the
11 case and you look at that, that big paragraph, you know,
12 there's -- in any criminal trial, there's two issues.
13 One, did the crime happen or not and then, two, who did
14 it. The majority of the information that it list talks to
15 whether the crime happened or not, which I don't think it
16 was ever denied that it did. The victim was no longer
17 alive and his house was ransacked, and that's clear. The
18 question is whether Mr. McDonald did it or not and the
19 only evidence was that -- the only substantial evidence
20 was Mr. Cannon's statement, which should never have been
21 admissible against him, and Mr. McDonald's statement which
22 has issues of its own regarding coercion. If you take
23 those two things out, everything else is minimal and
24 circumstantial. Extremely minimal.

25 And I've already explained my arguments as to why

1 this Court has a different view on the evidence than the
2 appellate court, but there are several things -- like I
3 said earlier, when we started this case out we already
4 knew he had been -- his constitutional rights had been
5 violated, we already knew that the jury had deliberated
6 considering a co-defendant's statement that should have
7 never been considered against him, and then once we get
8 into here I think we've proven our case that Mr. McDonald's
9 alleged statement had issues and either, A, should not
10 have been admitted to begin with or, B, Mr. Whitlark could
11 have presented evidence challenging the accuracy of it,
12 the fact that it was coerced, the fact that it was written
13 by investigators, the fact that it was not reliable. None
14 of that was presented to the jury even though Mr. Whitlark
15 told the jury in opening statements that he was going to
16 show them all this, he never presented any evidence and
17 never brought it up.

18 The Bruton violation --

19 **THE COURT:** And who was available to do that?

20 **MS. GOLDBERG:** The same witnesses that he called in
21 the Denno hearing. I mean, he could have presented the
22 same information. It's just the jury never heard it.

23 **THE COURT:** Okay.

24 **MS. GOLDBERG:** The -- and so clearly we know those
25 witnesses were available and willing to testify because

1 they already did it once and the Court has a record of
2 that.

3 The Bruton issues and the Crow -- are similar to
4 Crawford issues, but, you know, our argument is that
5 at the end of the day the Supreme Court found that
6 Mr. McDonald's rights were -- his constitutional rights
7 were violated, but, you know, great, we've got a harmless
8 error decision on their part. That doesn't help him.
9 How a trial lawyer, how counsel can truly be effective, is
10 from preventing these things from happening in the first
11 place. And when he not only did not challenge Cannon's
12 statement sufficiently, but waived the redactions, that
13 was extremely ineffective.

14 Further, the -- what we haven't talked about is one
15 that -- it's a small portion, but it's an important
16 portion, is just the -- the search for the truth language.
17 We haven't touched on that.

18 **THE COURT:** All right. Well, let's touch on that.

19 **MS. GOLDBERG:** I will -- going back to the order,
20 there are three statements that are said by Judge Cooper;
21 two in the introductory statements and one in his final
22 instructions to the jury. Where are my notes? I
23 summarized them in my notes.

24 On several occasions he tells them that their job
25 is to seek the truth, to search for the truth. There are

1 other cases, the Aleksey case. There's a more recent case
2 that the State cited to in their motion to reconsider, but
3 in any of those cases I've seen there's like one passing
4 comment from the judge that mentions a search for the
5 truth and the appellate courts have said no, that's not
6 enough to overturn a case, it's not enough to prove
7 prejudice in light of everything else that's said.

8 The problem in this particular case is that one of
9 the first things the judge tells the jurors when they're
10 really listening, they've just got seated, they want to
11 know what they're supposed to do, and one of the first
12 things he says is your job is to seek the truth. He then
13 says it again, I think, twice in the opening statement,
14 and then at the very end of jury instructions right before
15 deliberations he says a similar statement again right as
16 they're leaving. So I think the way it's book-ending this
17 case, the jury easily was likely to have been misled as
18 to their job and their -- what they're supposed to do and
19 the State's burden.

20 And then, of course, we get into the whole issue
21 we've already discussed regarding the transcripts that
22 went back and the failure to present a defense and how
23 all those things interplay. I think it's especially --
24 you know, the State has cited that statement of the jury,
25 that they really felt like they needed this information

1 to make a fair decision in this case, but, again, those
2 witnesses that they really needed to hear from to make
3 decisions were the witnesses that testified as to
4 Cannon's statement, the witnesses that testified to
5 McDonald's statement and then a witness who testified as
6 to Mr. Whitehead's statement, which was just incriminating
7 as to himself. It actually doesn't affect the others, but
8 it's just -- that's what they thought they needed. They
9 needed to hear it, they needed to be reminded as to what
10 these defendants said, and those are -- that's the evidence
11 that's problematic in this case, are the statements
12 themselves, so I think that just helps to show the level
13 of prejudice we have from the jury getting those
14 transcripts that they're able to just browse through,
15 look at whatever they want, and it caused, you know,
16 substantial additional emphasis on that testimony after
17 the Defendant failed to put up a case.

18 But I'm happy to answer any other questions, Your
19 Honor.

20 **THE COURT:** All right. Thank you.

21 **MS. JAMESON:** Your Honor, I'll just touch on the --
22 the additional arguments that were raised on these
23 additional issues. Regarding the truth-seeking language,
24 this was standard language that was in the bench book at
25 the time of Applicant's trial, which the Supreme Court

1 noted in a footnote in Beaty, which just recently came, it
2 was -- re-hearing was granted on both sides and reargued
3 to the Supreme Court and the revised opinion in Beaty just
4 came down about a month or six weeks ago, but Beaty notes
5 in its footnote that that was a standard charge that was
6 in the bench book that was given to the bench at that time,
7 so the State would submit there can't be any deficiency
8 from that because that was the standard charge that courts
9 were instructed could be given at that time.

10 Also --

11 **THE COURT:** Well, there are a lot of reversals on
12 instructions that were given based on standard charges,
13 including the State v. Belcher, the self-defense -- I
14 mean, the malice being presumed through the use of a
15 deadly weapon where self-defense is a defense, but the
16 courts have not felt compelled to affirm anything based
17 on what's been in the standard charge. In fact, they've
18 removed the standard charge probably for that same
19 reason.

20 **MS. JAMESON:** Certainly, Your Honor, and my
21 argument --

22 **THE COURT:** They've removed it from the bench book
23 at
24 any rate now.

25 **MS. JAMESON:** -- and the argument to that is

1 counsel's not expected to be clairvoyant and these are
2 changes -- Beaty came down years -- almost a decade after
3 the trial in this case and so counsel's never expected
4 to be clairvoyant. Attorneys who even after Belcher has
5 come down on PCR are not found ineffective because they're
6 not required to be clairvoyant. At the time of the
7 trial that was standard language that the bench and our
8 appellate court had given and instructed to be given and
9 so at the time of Mr. McDonald's trial, the truth seeking
10 language, we didn't have Beaty. And I would disagree with
11 the contention that in Aleksey and in Beaty this was just
12 passing comment. It's not one passing comment in Beaty.
13 In Beaty the comment is made a few times and the Court
14 still determined even though Judge Young shouldn't have
15 used that language, it still was subject to a harmless
16 error analysis and they didn't reverse based on those
17 grounds. Beaty actually affirmed on both of the issues
18 there based on a harmless error analysis.

19 So the State would submit that counsel wasn't
20 deficient because that was the standard charge that was
21 give at the time of this trial, but even if the Court is
22 to find that counsel was deficient and that Mr. Whitlark
23 should have objected, there can't be any prejudice in
24 light of the overwhelming and compelling evidence of his
25 guilt that is separate and apart from that language being

1 given and would cite to both Beaty and Aleksey where the
2 Supreme Court found that there was no -- they affirmed
3 based on a harmless error.

4 **THE COURT:** And the overwhelming evidence basically
5 was the statements of the -- of this Defendant and his
6 co-defendant or what other overwhelming circumstances?

7 **MS. JAMESON:** The State, again, would rely on the
8 Supreme Court's thorough review of all of the evidence in
9 their opinion detailing all of the other evidence; kind of
10 their timeline of them being together, multiple witnesses
11 discussed they were together before, during, after. There
12 was a neighbor who -- one of the co-defendants had a very
13 noticeable muffler sound that all witnesses described and
14 a neighbor describes hearing kind of a commotion going on
15 in the victim's home and is outside, I think it was 11:30
16 or midnight, walking his son or daughter's dog, hears the
17 commotion and kind of alerted to that and then hears this
18 distinctive muffler sound leaving.

19 So the State submits there is overwhelming and
20 compelling evidence absent Mr. Cannon's statement and
21 absent Mr. McDonald's statement. The Supreme Court goes
22 over that in detail and so the State's contention is that
23 Applicant's framing of this case that it's just these two
24 statements and that's the only evidence just isn't accurate
25 and isn't supported by the record and I would rely on the

1 Supreme Court's opinion for a good summary of all that
2 testimony.

3 **THE COURT:** All right.

4 **MS. JAMESON:** And the State asks Your Honor to
5 reconsider and deny relief as to these ten issues -- or
6 any of the ten and our arguments are all set forth in our
7 motion.

8 If Your Honor has any questions on any of those
9 issues, I'd be happy to answer them. If not, we rely on
10 our motion and ask you to reverse your prior ruling.

11 **THE COURT:** All right. Any other comments?

12 **MS. GOLDBERG:** The only comments are that the search
13 for the truth, the first case that we both cited to,
14 Aleksey, is from 2000. That was almost a decade before
15 this, so counsel didn't have to be clairvoyant, he just
16 had to do research. And then, again, I would just point
17 the Court's attention to this listing of the facts in the
18 Supreme Court opinion lists all evidence that essentially
19 points to one of the co-defendants or if it points to
20 Mr. McDonald, it's circumstantial, is not overwhelming in
21 itself. It's the fact that they weighed his statement in
22 addition to that that makes it overwhelming in their
23 opinion, however, as we've addressed, this Court has
24 information and ability and authority to weigh the
25 evidence differently.

1 **THE COURT:** All right. Well, I just took a guilty
2 plea earlier this week to Steve Smalls, who was the
3 defendant in the case that the Supreme Court clarified the
4 standard of review for PCR courts and the conclusion --
5 and how to properly assess the strength of the State's
6 case in assessing Strickland's prejudice test and he had
7 done, I think, seventeen years and pled guilty to time
8 served through a negotiated plea earlier this week, so
9 this must be the week for some of these types of things.

10 And this is a tough job for all concerned because
11 you have -- as Ms. Goldberg says clearly someone was
12 killed and if that's established and if guilt should be
13 shown, the guilty should be punished, but then that person
14 has a right to a fair trial based on applying all the
15 constitutional protections, then the Court in PCRs are
16 called upon to look back at all this performance and this
17 was 2008 and now we're in 2018. So May 6th, 7th, 8th, 9th
18 and 13th of 2008, so we're roughly ten years later here
19 reviewing all of this for that trial.

20 I think in light of the State v. Smalls and how all
21 that may impact or be related to anything that might have
22 been written in this order that was -- that I generated
23 -- and I'm gonna give you-all an opportunity to just
24 comment in writing after this as to how Smalls -- how this
25 is impacted by Smalls or any other reflections you-all

1 might have having kind of argued the case here to me, but
2 I'm gonna take it under advisement so that I can review
3 everything, including reading that opinion and reviewing
4 the transcripts, proposed orders, et cetera, and the
5 correspondence that you-all will send with your commentary
6 of what you think are the strengths and weaknesses of what
7 each other have said, so I'll take it under advisement.

8 **MS. JAMESON:** Thank you, Your Honor.

9 **MS. GOLDBERG:** Thank you, Your Honor.

10 **THE COURT:** Thank you.

11 (Whereupon, the proceedings were concluded at
12 12:17 PM.)

C E R T I F I C A T E

I, Stacy S. Johnson, Official Court Reporter for the Eleventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the hearing of the captioned case in Circuit Court on the 17th day of May, 2018.

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I do further certify that I am neither of kin, counsel, nor have an interest to any party hereto.

April 10, 2019

Isl Stacy S. Johnson
STACY S. JOHNSON
CIRCUIT COURT REPORTER

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2018 JUN 15 AM 9:24

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF KERSHAW) FOR THE FIFTH JUDICIAL CIRCUIT

Derrick McDonald,)
S.C.D.C. No. 328344,)

JANET C. HASTY
CLERK OF COURT
KERSHAW COUNTY, S.C.

C.A. No. 2015-CP-28-443

) **APPLICANT'S SUPPLEMENTAL RESPONSE**
v.) **TO STATE'S MOTION TO**
) **RECONSIDER, ALTER OR AMEND**
State of South Carolina,)
)
Respondent.)

Pursuant to this Court's request at the Motion hearing May 17, 2018, the Applicant submits additional argument as follows:

In Smalls v. State, Supreme Court Opinion No. 27764, filed February 7, 2018 the Supreme Court took a closer look at the prejudice prong of Strickland v Washington in Post-Conviction Relief cases. The Court reaffirmed that, in proving prejudice, the Applicant must show "a reasonable probability that, but for counsel's errors, the result of the trial would have been different" and that the pertinent question is "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Id. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Id.

The Supreme Court found that the PCR court should consider the specific impact counsel's error had on the outcome of trial, and additionally consider the strength of the State's case in light of all of the evidence presented to the jury. Id. The Smalls case clearly established that the strength of the State's case "is one significant factor" the PCR court must consider in analyzing prejudice, but it must be considered "along with the specific impact of counsel's error

and other relevant considerations¹.” Id.

The Court found that it was insufficient and inappropriate for PCR courts to simply rely upon “overwhelming evidence of guilt” and preclude PCR relief. Rather, the Court must separately consider the impact of counsel’s errors. The Applicant would take this opportunity to note that the State’s Motion to Reconsider, Alter or Amend asks this Court to do exactly what Smalls warns against. The State’s Motion repeatedly relies on the argument of “overwhelming evidence” without fully considering the impact of the specific errors of counsel.

Overwhelming Evidence/Impact of Counsel’s Errors

For “overwhelming evidence” to categorically preclude a finding of prejudice, it must include something conclusive “such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong the *Strickland* standard of ‘a reasonable probability ... that the factfinder would have had a reasonable doubt’ cannot possibly be met.” Smalls v. State, Supreme Court Opinion No. 27764, filed February 7, 2018.

The Applicant’s case was devoid of physical evidence or DNA evidence identifying any particular suspect and consisted mostly of circumstantial evidence and statements of defendants. The Supreme Court has previously ruled that the statement of co-defendant Cannon should not have been admitted in trial against McDonald. In addition to this error, the admissibility of the alleged statement of McDonald is challenged as a ground in this Post-Conviction Relief matter. As this Court knows, the Applicant has challenged the standard used by the Court in the Denno hearing and argued that the Court placed an improper burden on the Defendant in determining whether the statement was admissible or not. This Court agreed with the Applicant in the original Order granting Post-Conviction Relief. If the Applicant had been tried before a jury

¹ The Court does not explain what these “other relevant considerations” might be, so assumedly, in determining prejudice, the PCR Court can consider anything it deems relevant and important.

without the admission of Cannon's statement, AND without the admission of McDonald's statement, there is a reasonable probability that the factfinder would have had a reasonable doubt respecting guilt sufficient to undermine confidence in the outcome of trial.

The Applicant has further challenged counsel's failure to present evidence regarding coercion and invocation of rights before the jury, resulting in the jury lacking important information in determining whether or not the statement was reliable. Again, if the jury trial had proceeded without the admission of Cannon's statement and WITH an evidentiary challenge to McDonald's statement, there is also a reasonable probability that the factfinder would have had a reasonable doubt respecting guilt sufficient to undermine confidence in the outcome of trial.

Accordingly, this court cannot find that "overwhelming evidence" exists in this case to the extent that it would categorically preclude a finding of prejudice. If the trial were to have occurred without admission of the defendants' statements and/or if McDonald's statement had been suppressed or sufficiently challenged before the jury, the State's evidence would have been considerably limited to circumstantial evidence only. This Court cannot say that it is impossible that the factfinder would have possibly had a reasonable doubt under these circumstances.

To the extent that the State alleges that the original Order granting Post-Conviction Relief may not sufficiently explain the specific impact of each of counsel's errors with specificity, the Applicant disagrees. All issues are described in detail in the Order granting Post-Conviction Relief and the affect each error had on the trial is clear.

Other Relevant Considerations

This Court was correct in finding that the cumulative effect of trial counsel's errors constituted ineffective assistance of counsel. As stated previously, McDonald's Post-Conviction Relief matter began already knowing that his constitutional rights were been violated by and

through the admission of his co-defendant's poorly redacted statement at trial. The Applicant would argue that this violation was more egregious than the Appellate Court understood, as the Appellate Court did not seem to realize counsel's waiver of the redactions in the trial transcript. *See*, Trial Tr. 827.

Regardless, Appellate Court found that the violation of the Applicant's constitutional rights under the confrontation clause was harmless error based on their view of the evidence. However, if the Court used an incorrect burden in determining admissibility of the Defendant's statement, the original confrontation clause violation can no longer constitute harmless error because it no longer stands alone as the sole error in this case. The prejudice associated with the Bruton violation must be re-evaluated in light of the fact that this Court may not feel it is appropriate to rely on McDonald's purported statement.

Further, this Court has found that the Applicant was deprived of effective assistance of counsel in several regards including the fact that the Applicant was advised not to testify or present evidence given his intention of preserving the right of last closing, and after the trial ended counsel agreed to give the jury transcripts of the State's witness' testimony without consulting with the Applicant. Counsel's actions during this chain of events fell far outside of reasonable professional norms. The prejudice for each of these errors is clearly highlighted when they errors are considered in conjunction with one another.

The Applicant would argue that, even if this Court found that each individual error was not egregiously prejudicial independently, this Court should not sit by and allow multiple errors and constitutional violations to occur without remedy or recourse. At some point enough is enough and a line is crossed when it is clear that justice has not been done. While the Appellate Court may not have found that line while reviewing the preserved issues for appeal, this Court