

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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S.C. SUPREME COURT

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Certiorari to Lexington County

R. Keith Kelly, Circuit Court Judge

\_\_\_\_\_  
WILLIAM BROCKMEYER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-000695

\_\_\_\_\_  
APPENDIX  
\_\_\_\_\_

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1 A I did.

2 Q What day was that?

3 A July 13, 2010.

4 Q 2010. And who did you turn it back to?

5 A Back to the evidence department.

6 Q Beth Harmon?

7 A Yes, sir.

8 Q With evidence?

9 A Yes, sir.

10 Q Thank you.

11 MR. HUBBARD: That's all I have, Your Honor.

12 MR. MADSEN: No questions.

13 THE COURT: You may come down. Thank you.

14 (Witness leaves the witness stand.)

15 MR. GRAHAM: The States calls Mike Phipps to  
16 the stand.

17 MICHAEL PHIPPS, being  
18 first duly sworn, testifies as follows:

19 CLERK: State your full name, spelling it on  
20 the record, please.

21 THE WITNESS: My name is Michael Phipps,  
22 P-H-I-P-P-S.

23 DIRECT EXAMINATION

24 BY MR. GRAHAM:

25 Q Mr. Phipps, where are you employed, sir?

- 1 A Lexington County Sheriff's Department.
- 2 Q How long have you been in law enforcement?
- 3 A Thirteen years.
- 4 Q How long have you worked for Sheriff Metts?
- 5 A The same amount. He was the first sheriff I worked
- 6 for.
- 7 Q Currently you are a crime scene investigator?
- 8 A Yes, sir.
- 9 Q How long have you been a crime scene investigator?
- 10 A Approximately eight years.
- 11 Q As part of your job as a crime scene investigator,
- 12 do you have access to the crime scene laboratory?
- 13 A Yes, sir, I do.
- 14 Q Is that a badge access facility?
- 15 A Yes, sir. We have what we call a prox card that
- 16 gives us access.
- 17 Q I know that you touched one item in this case.
- 18 This is the State versus William Brockmeyer. Other
- 19 than that item, did you touch, change, alter,
- 20 manipulate any of the items in this case or in any
- 21 case that you weren't involved in?
- 22 A No, sir.
- 23 Q If you went in at any time, you have gone and
- 24 escorted someone else in to the laboratory?
- 25 A Yes. We have visitors and we also put on certain

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1 functions where we tour people through our  
2 facility.

3 Q During those times do people make sure that those  
4 guests that come in are not altering, changing,  
5 manipulating evidence?

6 A That is correct. If there is evidence out, we are  
7 with whoever we are escorting all the time.

8 Q Do you remember -- and I know you do a lot of  
9 this -- but do you remember executing a search  
10 warrant for the contents of a Motorola phone  
11 related to this case?

12 A Yes, sir, I did.

13 Q Detective Grant gave you that phone, I believe, on  
14 July the 12th. At that time what was your job?  
15 What were you supposed to do and what did you do?

16 A He turned the phone over to me, along with a search  
17 warrant that he had obtained. At that point I read  
18 the search warrant and determine what I am looking  
19 for on the phone and then use various methods to  
20 try to extract the information requested in the  
21 search warrant.

22 Q And do you have a machine or a computer program  
23 called Celebrex?

24 A We have a device. We call it Cellebrite.

25 Q Cellebrite.

1 A That's the manufacturer's name, Cellebrite. The  
2 technical name for their device is Universal  
3 Forensic Extraction Device or U.F.E.D. Cellebrite  
4 is the manufacturer.

5 Q So in addition to using the Cellebrite product, do  
6 you also do a physical examination of the contents  
7 of the phone?

8 A Correct.

9 Q What kind of things are you looking for?

10 A It depends on what the search warrant requests, but  
11 most commonly are text messages; call logs showing  
12 recent calls, incoming and outgoing; photographs;  
13 multimedia type files that may be on the phone.

14 Q Let me show you a photograph and ask if you  
15 recognize this photograph?

16 A Yes, sir, I do.

17 Q Is that a photograph that you got off of the  
18 Motorola boost phone involved in this case?

19 A Yes, sir, it is.

20 Q There is also some writing at the top. What does  
21 that writing represent?

22 A The printing at the top of this image is the file  
23 name that was given to the image, along with some  
24 other information that prints when the image is  
25 printed. The product I was using at the time was

1           Photoshop!

2   Q   When you talk about a file name, what does that  
3       mean? Computers and phones, something you save on  
4       some device? What does that mean?

5   A   Of course, everything has to be given some type of  
6       unique identification. When you take a photo with  
7       your camera, it usually just assigns a sequential  
8       number or some reference to make that image or  
9       item unique.

10                In this case the file name has been changed  
11       to a text that someone would use when they would  
12       want to identify the image without having to open  
13       it up.

14   Q   So the device would normally assign a name to the  
15       file or in this case, a picture. But in this case  
16       someone went in and actually labeled it themselves?

17   A   That is correct.

18                MR. GRAHAM: Your Honor, at this time the  
19       State would move this photograph into evidence.

20                MR. MADSEN: Judge, I would object under  
21       hearsay. I would also object under 401, 402, and 403.

22                THE COURT: I will admit it based on the  
23       testimony thus far. I do conclude that the photograph  
24       will enable the jury in their determination of whose gun  
25       was whose. I will admit it.

1 (State's Exhibit Number 56 is received into  
2 evidence.)

3 MR. GRAHAM: Your Honor, I would ask  
4 investigator Phipps to step down as I publish this to  
5 the jury.

6 THE COURT: You may.

7 (Witness leaves the witness stand.)

8 BY MR. GRAHAM:

9 Q I will do this twice, once down here and once  
10 further down. Referring to State's Number 56,  
11 would you explain to the jury what we have here?

12 A It's a color photo that was originally on the cell  
13 phone, probably in a section of the phone that was  
14 multimedia files that you normally save. As I  
15 recall, the phone was a camera phone; so it was  
16 capable of take images itself.

17 At the top there is a text label assigned to  
18 that image, and it reads, "Will's gun on left and  
19 my gun on right," dot J.P.G. or J.P.G., which is  
20 the type of image that it is.

21 Following that is an "at" symbol 100 percent  
22 R.G.B. slash 8 with the pound symbol. Those are  
23 artifacts that are put there when Photoshop prints.  
24 In addition to giving you the file name, it was  
25 assigned to the image at printing.

1           It's telling you that you are printing at  
2           100 percent for the image size. R.G.B. stands for  
3           red, green, blue, color image, and 8 is the bits,  
4           an 8-bit image that it prints.

5   Q   Step down this way.

6   A   (Witness complies.)

7           THE COURT: You may, if you desire, publish  
8           the picture and have the foreman pass it around.

9   BY MR. GRAHAM:

10   Q   Thank you. Have a seat.

11   A   (Witness resumes the witness stand.)

12           MR. GRAHAM: Your Honor, that's all the  
13           questions I have for this witness.

14           THE COURT: Counsel for the defense?

15                           **CROSS EXAMINATION**

16   BY MR. MADSEN:

17   Q   Mr. Phipps, there were actually -- when you end up  
18           doing this -- apparently there is a lot of  
19           information that is on the phone; correct?

20   A   Yes, sir.

21   Q   That wasn't the only photo on the phone; was it?

22   A   No, sir.

23   Q   And you got all that information off of the phone  
24           and I guess transferred it to a computer?

25   A   Yes, sir.

1 Q So if I have got photos on my phone that I can't  
2 figure out how to put on my computer, you are kind  
3 of the man to see?

4 A I have been known to do that, yes, sir.

5 Q And ultimately you not only download everything on  
6 there, but you take some photographs of the phone  
7 itself and some images on the phone; isn't that  
8 correct?

9 A Correct. We had difficulty downloading some  
10 images. So in addition to actually downloading, I  
11 will photograph what the image appeared on the  
12 screen of the phone itself just to corroborate the  
13 two.

14 Q And there was a boatload of photographs on this  
15 phone; wasn't there?

16 A Yes, sir.

17 Q There were some family photos?

18 A (Witness nods.) (Indicating affirmative response.)

19 Q There were some photos of Nick?

20 A I don't know specific people. I wasn't involved in  
21 this case to that extent, but there were multiple  
22 photos.

23 Q There were some off-color kind of photographs maybe  
24 showing people in states of undress?

25 A Yes, sir.

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1 Q When you get this photo through the search warrant,  
2 it's your understanding that this is Nick's phone;  
3 correct?

4 A I would have to reread the search warrant. When I  
5 initially look at the search warrant under the item  
6 that they are searching, I verify that it's  
7 consistent. If it says Motorola, I make sure the  
8 phone says Motorola.

9 As I recall in this case, it was an actual  
10 direct connect number referencing the phone. So I  
11 go into the phone to make sure that those numbers  
12 are all consistent just to be sure what I am  
13 searching is what was authorized in the search  
14 warrant.

15 Q Basically under the search warrant, it indicates  
16 that this is the victim's cellular phone, but it  
17 was found on Will; correct?

18 A Yes. It says it's the victim's cell phone.

19 Q And ultimately I think you said that there is some  
20 problem downloading some of the photographs. So  
21 you end up having to take a camera and  
22 photographing some, I guess, pictures off the  
23 screen; isn't that correct?

24 A Yes, sir. Initially, of course, the best case  
25 scenario is to use our device which does everything

1 automatically. In this case it wasn't capable of  
2 taking the photos off of the cell phone.

3 So at that point I revert back to the most  
4 common method, which is to scroll through each  
5 image individually and photograph the screen of the  
6 cell phone.

7 Later on in an attempt to get a fuller size  
8 resolution image, we determined that those images  
9 could be transferred off using a method with a  
10 bluetooth connection.

11 Q Let me show you that. Do you recognize that as one  
12 of the photographs that you took off that phone?

13 A Yes, sir.

14 Q That is one of the photographs that you took off?

15 A Yes, sir.

16 Q And that fairly and accurately represents another  
17 one of the photos on the screen of that phone?

18 A Yes, sir.

19 Q And it has a file name associated with that?

20 A Yes, sir, it does.

21 MR. MADSEN: Your Honor, at this point in  
22 time, we would move this into evidence.

23 MR. GRAHAM: If I could see it, Your Honor.

24 (Pause.)

25 MR. GRAHAM: No objection.

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1 THE COURT: It's entered without objection.  
2 May I look at it too, please.  
3 (Hands to Court.)  
4 THE COURT: Thank you.  
5 (Defendant's Exhibit Number 1 is received into  
6 evidence.)  
7 BY MR. MADSEN:  
8 Q Defense Exhibit Number 1 is a photograph that you  
9 took off of that Motorola boost phone; correct?  
10 A Yes, sir, it is.  
11 Q And it has a file name associated with it; doesn't  
12 it?  
13 A Yes, sir, it does.  
14 Q And that photograph or that file name is, "I love  
15 this gun;" isn't that correct?  
16 A Yes, sir.  
17 Q An individual is holding that gun in their left  
18 hand; is that correct?  
19 A I wasn't looking at the image that close at the  
20 time. Yes, sir, they are.  
21 Q And they have -- it looks like a silver watch -- on  
22 that left hand?  
23 A Yes, sir.  
24 Q Additionally, they do not have any tattoos on this  
25 area (indicating) of their hand -- do they -- that

1           you see in that photograph?

2   A       Not that I can see.

3   Q       And clearly if someone has tattoos right here  
4           (indicating), that would be visible on this  
5           photograph; would it not?

6   A       As long as the watch doesn't cover it, yes, sir,  
7           you are correct.

8   Q       If it's bigger than the watch, certainly?

9   A       Right. Yes, sir.

10   Q       Let me ask you to take a look at State's Exhibit  
11           Number 48. That is a firearm; is it not?

12   A       Yes, sir, it is.

13   Q       If you look at this firearm, this area right here  
14           (indicating) where the hole is, what is that  
15           called?

16   A       The ejection port.

17   Q       And you would agree with me that the ejection port  
18           on that firearm is the same as the firearm in the  
19           picture?

20   A       Yes, sir. It has the same shape.

21   Q       It appears to -- the gun has the same shape; does  
22           it not?

23   A       Yes, sir, it appears to have the same shape.

24   Q       And let me show you what has been marked as State's  
25           Exhibit Number 51. That has been marked as items

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1 that were taken off of Nick Rae at the autopsy, and  
2 up in the corner is a silverish watch; is there  
3 not?

4 A Yes, sir, there is.

5 MR. MADSEN: Beg the Court's indulgence.

6 (Pause.)

7 MR. MADSEN: That's all the questions I have,  
8 Your Honor.

9 THE COURT: Anything further?

10 MR. GRAHAM: No, Your Honor.

11 THE COURT: You may come down.

12 THE WITNESS: Thank you, Judge.

13 (Witness leaves the witness stand.)

14 MR. GRAHAM: The State would recall David Day  
15 to the stand.

16 DAVID DAY, having been  
17 previously duly sworn, resumes the witness stand and  
18 testifies as follows:

19 CLERK: Still under oath, Your Honor?

20 THE COURT: Yes. I remind you, sir, that you  
21 are still under oath.

22 THE WITNESS: Yes, sir.

23 DIRECT EXAMINATION

24 BY MR. GRAHAM:

25 Q Investigator Day, how are you this morning?

1 A I'm fine, sir. Thank you.

2 Q If you will pull that microphone a little bit  
3 closer to you.

4 A Yes, sir.

5 Q At the request of the pathologist, did you take  
6 some additional photographs of the murder weapon?

7 A I did.

8 Q Let me show you several documents and ask if you  
9 recognize them?

10 THE COURT: Have these documents be shown to  
11 defense counsel?

12 MR. GRAHAM: They have not been shown. They  
13 have been previously provided, Your Honor.

14 THE COURT: Sir?

15 MR. GRAHAM: They have not been shown at this  
16 moment, but they have been previously provided to them.  
17 I will show them to them before I move to introduce  
18 them, Your Honor.

19 THE COURT: But they have been previously  
20 provided?

21 MR. GRAHAM: They have been.

22 THE COURT: That's what I need to know.

23 THE WITNESS: Yes.

24 BY MR. GRAHAM:

25 Q Those are images or items that you created?

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1 A Yes.

2 (Pause.)

3 MR. MADSEN: Judge, I have no objection.

4 THE COURT: All right, sir. Without

5 objection.

6 (State's Exhibits Number 57-64 are received  
7 into evidence.)

8 BY MR. GRAHAM:

9 Q Investigator Day, looking at State's 48, do you  
10 recognize that?

11 A I do.

12 Q That is the Ceska .380 firearm you found in this  
13 case; is that correct?

14 A Correct.

15 Q At my request for the pathologists in this case,  
16 did you take that item out of evidence and  
17 photograph it?

18 A I did.

19 Q Let me show on the projector some items and  
20 photographs that you took and let's talk about  
21 that. What is State's Number 63?

22 A It's a picture of the gun on one side.

23 Q Above the gun what is that item?

24 A It is a ruler.

25 Q Is this item to scale or not to scale?

1 A That one is not to scale.

2 Q But this ruler lets you actually you see the  
3 measurements. It has both inches and centimeters;  
4 is that correct?

5 A Correct.

6 Q Item 64, what is that?

7 A It's showing the other side of the gun.

8 Q Again, with the ruler above it?

9 A Correct.

10 Q State's 57?

11 A It is a picture, up-close picture, of the barrel  
12 end of the gun with a ruler next to it.

13 Q Is that picture to scale?

14 A No, it is not.

15 Q There are marks on the outside of the barrel. Do  
16 you know what those are?

17 A I do not.

18 Q Did you put them there?

19 A No, I did not.

20 Q Were they like that when you collected it?

21 A When I checked it out of evidence?

22 Q Yes.

23 A Yes.

24 Q State's Number 58, what is that?

25 A That is a scaled image of the barrel end of the

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- 1 gun.
- 2 Q So when we talk about 57, 57 was an unscaled image?
- 3 A Correct.
- 4 Q When you say scaled image on 58, and it's written  
5 on there, "scaled image," what does that mean?
- 6 A That means that it is a true-to-life, one-to-one  
7 picture. If you would hold a scale up against the  
8 scale in the ruler in the photo, it would match,  
9 showing that it is the actual size.
- 10 Q State's 59, what is the difference between 59 and  
11 58?
- 12 A That's the ruler and basically the background that  
13 I cropped out basically just so you can see the  
14 barrel in the bottom of the frame.
- 15 Q It says scaled and cropped image. Is that an  
16 accurate statement of what this picture represents?
- 17 A That is correct.
- 18 Q State's Number 60, how does that compare to 59?
- 19 A It is still a scaled photo, still cropped, but I  
20 lightened the image.
- 21 Q Once you lightened the image, what did you do?
- 22 A I printed the photograph out and took it to a  
23 copier machine, and I copied that image onto a  
24 transparency.
- 25 Q Let me show you State's Exhibit 62 and ask if you

1 recognize that?

2 A Yes, that is the transparency that I made from that  
3 photograph.

4 Q So we now have a scaled overlay of the barrel of  
5 the gun?

6 A That is correct.

7 Q Let me show you State's Exhibit Number 54 and ask  
8 if you recognize this picture?

9 A I do.

10 Q Is that a picture of the wound from the autopsy of  
11 Nick Rae.

12 A Correct.

13 Q Referring to State's 61, how does State's 61 relate  
14 to State's 54?

15 A That is a scaled image.

16 Q So you took a photograph from the autopsy, and just  
17 like the gun previously, you scaled the wound as  
18 well?

19 A Correct.

20 Q In addition to taking and preparing these items,  
21 did you also do an examination on a pair of K-Swiss  
22 shoes?

23 A I did.

24 Q Let me show you State's Number 11 and ask if you  
25 recognize it?

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1 A I do.

2 Q Are those items that you got out of evidence  
3 related to this case?

4 A It is.

5 Q And when you first got the items out, what did you  
6 do?

7 A When I first had the items, I took it to the lab,  
8 and I swabbed it for any possible blood.

9 Q Did you see anything when you looked at them?

10 A Visual observation, no, I didn't see anything.

11 Q Now, did you do any other tests to look for blood?

12 A I did. I took some swabs and I swabbed the shoe,  
13 and I used a presumptive blood test called  
14 phenolphthalein, which came back negative for  
15 blood.

16 Q Can you explain that process?

17 A Basically the phenolphthalein will show a color.  
18 If it shows positive for blood, it won't tell you  
19 if it's human or animal blood, but it will react to  
20 the blood itself and immediately turn pink.

21 Q And the tests on these shoes on both sides were  
22 negative?

23 A Were negative.

24 Q Referring to State's 24 on the projector overhead,  
25 do you recognize that?

1 A I do.

2 Q Earlier when you testified, what did you tell the  
3 jury that those placards -- what does that  
4 generally represent?

5 A Those placards are representing some footwear that  
6 are leading toward the fence line and back.

7 Q Now, I think on -- each one of these placards  
8 represent -- what do they represent?

9 A Just direction of travel. I didn't mark every  
10 single foot because some areas, you can tell there  
11 is sand and a little bit of hard dirt where you can  
12 just pick up very partial details. I basically put  
13 just a relation to the movement going towards the  
14 fence and coming back.

15 Q Of all the footprints that you saw out that morning  
16 when you were processing the scene, why did you  
17 photograph these?

18 A In this photograph here?

19 Q Why did you put placards down and pay attention to  
20 those prints?

21 A Because I was told to look for a pair of shoes that  
22 had a diamond-type pattern on them, and those shoes  
23 had that pattern.

24 Q Did you see any other diamond-patterned shoe  
25 prints?

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- 1 A I did not.
- 2 Q Did you measure how far the last print that you  
3 were able to see was away from the fence?
- 4 A No, I did not.
- 5 Q Do you know whether the footprints stopped there or  
6 did they continue and you just couldn't find them?
- 7 A I wasn't able to find them. You have got like  
8 grass and some straw as you get closer to the  
9 fence. So I don't know if it continued to the  
10 fence or if it stopped about where the last placard  
11 is at.
- 12 Q Where the last placard is up there to where you  
13 collected the .380 gun and the magazine, do you  
14 have an opinion as to whether the gun could have  
15 been thrown from that location?
- 16 A Yes.
- 17 Q Or might have been thrown from that location?
- 18 A Yes, it could have.
- 19 Q Did you actually take -- we see the trail and we  
20 see that you have marked them. What, if anything,  
21 did you do about collecting, preserving the best  
22 footprints you could find?
- 23 A Well, I literally looked at each foot impression in  
24 the dirt and determined that I was only able to  
25 find two that were even closely able to have a

1 comparison done on them. Those were the two that I  
2 took comparison-type photos with, using a scale and  
3 a tripod.

4 Q Do you have those photographs with you?

5 A Yes.

6 MR. GRAHAM: Your Honor, at this time the  
7 State would move these two photographs into evidence.

8 MR. MADSEN: No objection.

9 (State's Exhibits Number 65-66 are received  
10 into evidence.)

11 BY MR. GRAHAM:

12 Q Investigator Day, this is State's Number 66. What  
13 are we looking at?

14 A It's a partial foot impression. You can see the  
15 diamond-shaped pattern in the heel area, and it  
16 kind of carries up over to around the toe area.

17 Q Now, is this a scaled photo or a non-scaled photo?

18 A That is a scaled photo.

19 Q So on the ruler here an inch is an inch in real  
20 life?

21 A Correct.

22 Q I see a ruler here and part of it is cut off. What  
23 is that letter?

24 A That is the letter M.

25 Q How does that relate to -- is that the M. that is

- 1 on here?
- 2 A Correct.
- 3 Q So the M. on State's 24, that's this footprint  
4 (indicating)?
- 5 A Correct.
- 6 Q Was that going to the fence or coming back from the  
7 fence?
- 8 A Coming back.
- 9 Q Looking at this photograph, are you able to  
10 determine whether it's a left or a right?
- 11 A After doing examination I was able to determine it  
12 was a left.
- 13 Q Looking at State's 65, what is that?
- 14 A It's a foot impression in the sand.
- 15 Q It's again to scale?
- 16 A Correct.
- 17 Q The O. on the placard there, does that correlate to  
18 the photograph M., N., O.?
- 19 A Yes.
- 20 Q So it would be another footprint coming back?
- 21 A Yes.
- 22 Q Were you able to determine whether it was the left  
23 or right foot?
- 24 A It was the left.
- 25 Q Let's talk a little bit about your educational

1 background. What law enforcement training do you  
2 have that is relevant to either collecting  
3 footprints, as in photography, or other methods of  
4 collecting it and actually examining them?

5 A I have an Associate's degree in criminal justice.  
6 I am a graduate from the South Carolina Police  
7 Academy. I have been in crime scene for four  
8 years.

9 I have attended a class called Crime Scene  
10 101, which is just a basic general crime scene  
11 investigation class. In that class we were taught  
12 how to locate and recover different types of shoe  
13 impressions, either being in dust or blood.  
14 There's different processes that you can enhance  
15 with.

16 I also followed up with another class, part  
17 two, which was Crime Scene 201, which dealt with  
18 photography. In that class we were taught how to  
19 take comparison photographs, and we actually  
20 physically would photograph footwear using a scale  
21 tripod and different lighting techniques.

22 Q At some point did you ever assist a trained  
23 footwear examiner at the Lexington County Sheriff's  
24 Department?

25 A Yes. I got interested in the comparison part of

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1 the crime scene; so I trained under a qualified  
2 footwear examiner by the name of Jim Hickman. He  
3 was one of our senior crime scene investigators.  
4 He had already testified many times as an expert,  
5 and I probably assisted him with comparing about a  
6 dozen shoe impressions.

7 Q In addition to working with Mr. Hickman,  
8 Investigator Hickman, have you also attended any  
9 classes related to the detection or recovery or  
10 examination of footwear?

11 A I have. I attended a week-long seminar that was  
12 taught by William Bosdiak, who is a world-renowned  
13 shoe expert. He has testified as an expert all  
14 over the world.

15 In that week-long class, it was a 20 percent  
16 lecture and an 80 percent hands-on. In this class  
17 we actually compared up to -- I believe it was 50  
18 shoe comparisons, using an overlay, an unknown  
19 photograph of shoe prints.

20 Everybody in that class was assigned at least  
21 one. We had to work them all, but everybody was  
22 assigned at least one case study that you had to  
23 present in front of the class and be critiqued by  
24 the instructor.

25 Also, the next week I got to go Mr. Bozdiak's

1           tire tread and tire wear week-long seminar. It was  
2           the same thing. Comparing tire wear and footwear  
3           is the same discipline.

4           It's the same method. It's different verbiage  
5           where we are dealing with the tire tread from the  
6           outsole of a shoe. It was the same thing. It was  
7           a little bit of lecture, hands-on, photographing  
8           and comparing.

9           I have also been to a one-day seminar that was  
10          a combination of both. It was -- because they are  
11          so related in the method -- it was a shoe print and  
12          tire tread training class, where, again, it was  
13          hands-on on comparing and photographing.

14        Q    In addition to the classes you attended, have you  
15          read any books on the subject?

16        A    I have. Mr. Bosdiak has two books out; both on  
17          shoe wear impression evidence and the tire track  
18          and tire wear. I have read his books.

19        Q    Are there any organizations that you are a member  
20          of that relate to footwear, tire tread collection,  
21          and identification?

22        A    I am a member of the International Association for  
23          Identification. That deals, again, with  
24          fingerprints, footwear, and tire wire. I also  
25          follow a website called "Swig Trek," and that is an

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1 acronym for Scientific Working Group for Footprint  
2 and Tire Tread Evidence.

3 In this website it has many articles, case  
4 studies, and there is even a forum where you can  
5 get on there and speak with other examiners from  
6 all over the nation.

7 Q And how many comparisons on shoes and shoe prints  
8 have you done?

9 A I estimate hundreds.

10 MR. GRAHAM: Your Honor, at this time the  
11 State would offer Investigator David Day as an expert in  
12 footwear impression and tire tread and tire track  
13 recovery, detection, and examination.

14 THE COURT: Prior to making a ruling, do you  
15 desire to examine on his expertise in this area?

16 MR. MADSEN: No, Your Honor.

17 THE COURT: I declare that he is an expert in  
18 this area based on training.

19 MR. GRAHAM: Thank you, Your Honor.

20 BY MR. GRAHAM:

21 Q Investigator Day, what is the process when you are  
22 examining prints and shoes?

23 A Basically a comparison is you're comparing a known  
24 shoe to an unknown impression.

25 Q What was your unknown impression? Are those the

1 photographs that we have got?

2 A Yes.

3 Q And we have already shown that you collected those?

4 A Correct.

5 Q These are the two best samples that you found?

6 A Yes.

7 Q When you go to compare it, once you take the known  
8 shoe and go to compare it to the unknown, what is  
9 the process? How does that work?

10 A There is basically four steps in comparing. Even  
11 though I am going to list them, it doesn't  
12 necessarily follow one, two, three, four. The  
13 first thing that you can do or that I do is do a  
14 visual of the outsole of the shoe.

15 The outsole of the shoe is basically the part  
16 of the shoe that comes in contact with the ground  
17 and has the tread pattern. You look at the tread  
18 pattern of the shoe and of the unknown impression,  
19 and then you compare it to see if it corresponds.

20 Q That's for the outsole design?

21 A It is.

22 Q When we say outsole, what are we talking about?

23 A The bottom part of the shoe.

24 Q Is that the part that comes in contact with the  
25 ground?

1 A That is correct.

2 Q After you look at the outsole, what is the next  
3 step you can take?

4 A The next step you do is you look at the physical  
5 shape and size of the shoe. You are not comparing  
6 a manufactured size. In this case this shoe was a  
7 9 and a half, extra wide.

8 You are comparing the physical size of this  
9 shoe. So you would look at the shoe, and then you  
10 would look at the impression. To kind of give you  
11 a visual aid, it would be like if I had a cowboy  
12 boot in my hand right now. The cowboy boot has a  
13 separate heel. The toe is narrow. It comes to a  
14 point. You can see that that would not have made  
15 that impression.

16 You are looking at the physical shape. Then  
17 you are looking at the physical size. When you are  
18 dealing with the size of the shoe, again, I am not  
19 dealing with the manufacturer's size.

20 In order to do that, you use an overlay.  
21 Basically an overlay is you ink the bottom of shoe  
22 and actually wear the shoe, and then you step on  
23 something. I like to step on a sheet of paper  
24 because if you try to step directly on the overlay,  
25 you can have slippage or smudges.

1           I will step on a sheet of paper and then let  
2           it dry and photocopy it onto the transparency. The  
3           transparency is then used as an overlay. You  
4           overlay it to see if the physical size of the shoe  
5           and shape correspond with the impression.

6    Q       After looking at the physical size and shape and  
7           the outsole design, what are one of the other steps  
8           in the process?

9    A       Then you would go into the wear. Shoes may or may  
10           not contain wear. Some do contain more than  
11           others. Everybody walks differently, but then,  
12           again, you can still have wear in the same area.  
13           It just helps you narrow the field down. You would  
14           look to see how much wear is on the shoe.

15           I didn't find very much wear. These are  
16           fairly new shoes. There is some wear in it, but  
17           because the photographs were -- sand is a terrible  
18           substrate. It is terrible soil to step on because  
19           when you step in the soil, it doesn't retain a lot  
20           of the detail.

21           Sand falls in on itself. It has movement. So  
22           in this situation I wasn't able to see a lot of  
23           wear in the photographs, but that is part of what  
24           you look at.

25    Q       In general the final step in the process is looking

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1 for individual characteristics; is that correct?

2 A That is correct.

3 Q What does that mean?

4 A Individual identifying characteristics is basically  
5 something that was randomly placed on the shoe,  
6 either on purpose or by accident -- that is  
7 including cuts, gouges, scratches. It could be a  
8 piece of gum. It could be a tack -- that is  
9 specific to the shoe and that you would try to find  
10 in the impression.

11 Again, that is what the overlay is for. As  
12 you step on the paper, you try to collect the  
13 detail and try to pick up the characteristics and  
14 try to overlay it onto the unknown impression.

15 Q Applying that process that you just discussed to  
16 this particular case, we have got a known pair of  
17 shoes that you have in your hands up there and also  
18 have some scaled photographs that you took?

19 A (Witness nods.) (Indicating affirmative response.)

20 Q Can you explain to the jury what you did in  
21 determining -- in comparing and examining the known  
22 shoe versus the unknown footprint?

23 A Yes, sir. We basically, like on this photo here --  
24 as I say, even though I gave it an order, you can  
25 see that there is not a lot of tread detail in this

1 shoe. So you would basically move on to step two,  
2 which is the physical shape and size.

3 I can see that the shape corresponds with the  
4 shape of the shoe. The size, again, like I said,  
5 was the overlay. It is the overlay of the test  
6 impression of the unknown and it corresponded.

7 As you can see, being in sand you really  
8 cannot see whether it's movement or wear. So I  
9 cannot try to match any wear up. Then, again, the  
10 individual identifying characteristics, there was  
11 none that I could see that was picked up in this  
12 impression.

13 Q Did you prepare an overlay to be used for this  
14 photograph?

15 A I did.

16 Q What is an overlay and how did you make it in this  
17 case?

18 A I inked the bottom of the shoe. I then put the  
19 shoe on and stepped heel to toe onto a sheet of  
20 paper. After the ink dried, I photocopied it onto  
21 the transparency.

22 Q Do you actually have that overlay with you?

23 A I do.

24 MR. GRAHAM: Your Honor, the State would move  
25 the overlay into evidence at this time.

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1 THE COURT: You may do so.

2 (State's Exhibit Number 67-68 are received  
3 into evidence.)

4 MR. GRAHAM: Your Honor, if I can have  
5 Investigator Day step down from the stand?

6 THE COURT: You may do so and you gentlemen  
7 may come forward.

8 BY MR. GRAHAM:

9 Q If you could bring the left K-Swiss sneaker with  
10 you as well.

11 A (Witness leaves the witness stand.)

12 Q I have two overlays. Can you describe what State's  
13 Number 68 is and how it was created?

14 A This is the left shoe overlay that I made using  
15 ink, stepped on the paper, and then photocopied it  
16 onto a transparency. On the sheet of paper, I  
17 write the left so that way when it comes out being  
18 a transparent overlay, I will know that this is the  
19 left shoe. If you turn it over, the letters are  
20 backwards.

21 Q You can step down here, and we will do the same  
22 thing with State's Number 67.

23 A The same process, again, inking the shoe, inking  
24 the bottom of the shoe, wearing the shoe, stepping  
25 onto the sheet of paper, allowing the paper to dry,

1 and photocopying it. Then, again, writing right  
2 shoe so that way I can orient.

3 Q I notice there is some writing on the shoe. What  
4 is that writing on the sole of the shoe?

5 A My initials and when I first started my comparison.

6 Q If you would come to the overhead with me and show  
7 me your examination of State's 65, what you did and  
8 what you found.

9 A Again, the overlay is a tool that we use for  
10 showing the physical shape and size and also the  
11 design. Even though you can visually see that the  
12 design corresponds with the design on the shoe, it  
13 also helps to see if the design, the patterns, also  
14 line up with the patterns on the impression.

15 In this case basically it's just looking at  
16 the physical shape and size, and it shows me that  
17 it corresponds with the physical shape and size of  
18 the shoe.

19 Q So using the process that you discussed earlier  
20 about the outsole design, the physical size and  
21 shape, the wear, the individual characteristics on  
22 this photograph that you collected of the footprint  
23 in the sand, what kind of opinion do you have  
24 comparing that unknown to the known shoe, the  
25 K-Swiss sneaker?

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1 A In my opinion it corresponds with the physical  
2 shape and size.

3 Q Were you able go any further in an opinion on that?

4 A No.

5 Q Why is that?

6 A Because of the limited detail obtained in the  
7 impression.

8 Q Let's look at another photo, State's 66 that you  
9 labeled M. on your placard. Do you recognize  
10 that?

11 A I do.

12 Q And that's a scaled photo?

13 A It is.

14 Q Applying the method that you described, would you  
15 explain to the jury your findings and what your  
16 opinion is.

17 A I will have to turn the photo. Again, looking at  
18 the photograph, you can see that the diamond  
19 pattern corresponds with the diamond pattern on the  
20 overlay, which is a known test copy of the original  
21 shoe.

22 The overlay assists on physical shape and  
23 size, and here is where the overlay also lets you  
24 see if the tread pattern also corresponds with the  
25 size of the tread pattern on the testing of the

1 unknown impression.

2 As you can see, the heel corresponds with the  
3 size. You can see the diamond pattern also  
4 corresponds with the unknown as it overlays on top  
5 of the diamond pattern from the overlay and of the  
6 unknown.

7 Coming up to the toe area, you've got the  
8 outer perimeter of the shoe here (indicating).  
9 Coming around here (indicating), you can see right  
10 in here (indicating), it overlays.

11 The good thing about overlays is you can  
12 actually see detail that you normally might not see  
13 just looking at the photo. You can start seeing  
14 some diamond patterns here (indicating), and that  
15 actually overlays on the diamond pattern with the  
16 unknown.

17 Q Thank you, Investigator Day. If you will have a  
18 seat.

19 A (Witness resumes the witness stand.)

20 Q So overall as an opinion as an expert in the field  
21 of footwear examination, what, if any, opinion do  
22 you have regarding these known shoes and those  
23 unknown prints?

24 A In my opinion it corresponds in physical shape,  
25 size, and tread or sole design of the unknown

1 impression.

2 Q Thank you. Please answer any questions the defense  
3 has.

4 **CROSS EXAMINATION**

5 BY MR. MADSEN:

6 Q So in the end if we get down to it, you can't say  
7 that this shoe is the one that made these  
8 impressions; correct?

9 A I can only say that that shoe corresponds in  
10 physical shape, size, and design.

11 Q But this doesn't have specific wear patterns that  
12 let you do that; correct?

13 A Correct.

14 Q You have taken Mr. Bosdiak's class, who is the, I  
15 guess, renowned expert?

16 A Yes, he is.

17 Q I think he worked on the O.J. case; didn't he?

18 A I don't know if he testified in O.J. He did on the  
19 civil trial. I know that.

20 Q And ultimately the best thing to do would be  
21 attempts to try to take a mold because that can  
22 give you, better than just photographs, an  
23 individual wear pattern; correct?

24 A No, not necessarily.

25 Q And when we talk about wear pattern, I am someone

1 who is flat-footed; so I have a tendency to kind of  
2 walk on my toes. I might not have as much of a  
3 wear pattern on my heel as someone who walks  
4 normal?

5 A Correct.

6 Q Or isn't a tiptoe walker. That's what you mean by  
7 wear pattern?

8 A Correct.

9 Q Some people might pronate where they walk on their  
10 inside. So maybe the bottom of their shoe might  
11 rub differently than someone else's?

12 A Yes, everybody steps differently.

13 Q And ultimately when you are looking, you are only  
14 told to look for a pattern, a diamond pattern;  
15 correct?

16 A That is correct.

17 Q You don't find a diamond pattern anywhere else  
18 except for these that you photographed?

19 A That is correct.

20 Q Ultimately there is a bunch of footprints out  
21 there; is there not?

22 A There is.

23 Q But you are told just to focus on this one to the  
24 exclusion of all other ones?

25 A That's correct.

- 1 Q So you don't take any other photographs of any  
2 other shoe prints?
- 3 A No, I do not.
- 4 Q And there is no blood on the shoes?
- 5 A No, sir, there is not.
- 6 Q No idea when those footprints that you made were  
7 taken?
- 8 A I'm sorry?
- 9 Q The footprints that you photographed, you have no  
10 idea when those occurred?
- 11 A No, I do not.
- 12 Q Now, let me step back a second. You ultimately,  
13 when you get out there and you process the scene  
14 and you process Nick, he has got a wrist watch on  
15 his left hand; does he not?
- 16 A I do not recall.
- 17 Q Do you recall whether or not he had any tattoos on  
18 the inside of his wrist?
- 19 A No, sir, I do not.
- 20 Q Let me show you State's Exhibit Number 51. Does  
21 that look like a -- that has been marked and states  
22 that it was items that were taken off of Nick at  
23 the autopsy. Is that a wrist watch there?
- 24 A It is.
- 25 MR. MADSEN: Beg the Court's indulgence for

1 just a second.

2 (Pause.)

3 BY MR. MADSEN:

4 Q Is that a photograph that you had taken or a few of  
5 the photographs you had taken?

6 A It is.

7 Q There is a wrist watch on Nick's left hand; is  
8 there not?

9 A There is.

10 Q You also took a photograph of Will's hands; did you  
11 not?

12 A I did.

13 Q Let me show you: Is that a photograph that you  
14 took of Will's hands?

15 A It is.

16 Q And in that photograph on his left hand on the  
17 inside of it, he has got tattoos?

18 A Yes.

19 Q That come up right to the tip; don't they? And  
20 then kind of go back? Do you want to see it again?

21 A Please, yes.

22 Q And that's basically the same kind of tattoos as  
23 right here that you took in that photograph?

24 A It looks about the same.

25 MR. MADSEN: That's all the questions I have.

1 THE COURT: Anything further?

2 MR. GRAHAM: No, Your Honor. Thank you.

3 THE COURT: Mr. Foreman, ladies and gentlemen,  
4 you will remember that at the beginning of this  
5 testimony, I declared this witness to be an expert in  
6 his particular field.

7 Our system of law permits an individual, based  
8 on his training and education, to be qualified as an  
9 expert, and I have concluded that based on his training  
10 and experience, he is entitled to testify in this field.

11 I tell you, however, that with reference to  
12 his testimony, you may in your discretion accept in  
13 whole or in part his testimony based on your  
14 consideration of the matter.

15 You may be excused.

16 THE WITNESS: Thank you, Judge.

17 (Witness leaves the witness stand.)

18 THE COURT: Any further explanation required  
19 as to that issue, Mr. Madsen?

20 MR. MADSEN: No, Your Honor.

21 THE COURT: Call your next witness.

22 MR. HUBBARD: May we approach?

23 THE COURT: Yes.

24 (Whereupon there is a bench conference off the  
25 record in the presence of the jury but out of the

1 hearing of the jury.)

2 THE COURT: I will let you go to the jury room  
3 for just a minute. I will be calling you back.

4 (The jury retires to the jury room.)

5 (Whereupon there is a bench conference off the  
6 record.)

7 THE COURT: Bring the jury back.

8 (The jury returns to the courtroom.)

9 THE COURT: Mr. Foreman, ladies and gentlemen,  
10 for scheduling purposes ordinarily we break at  
11 1:00 o'clock. But for those same scheduling purposes,  
12 we are going to break now at 12:30. That will give you  
13 an extra hour for lunch. Please be back in your jury  
14 room at 2:30. You are now excused for lunch. Thank  
15 you.

16 (The jury is excused for lunch at 12:30 p.m.)

17 THE COURT: Anything further from the State?

18 MR. GRAHAM: No, Your Honor. Thank you.

19 THE COURT: From the defense?

20 MR. MADSEN: No, Your Honor.

21 THE COURT: That will give both sides the  
22 opportunity to deal with those matters we discussed at  
23 the bench. See you back at 2:30.

24 (Whereupon there is a luncheon recess.)

25 THE COURT: Is the State ready?

1 MR. HUBBARD: The State is ready.

2 THE COURT: Have you got your witnesses all  
3 lined up?

4 MR. HUBBARD: Yes, sir.

5 THE COURT: Defense ready?

6 MR. MADSEN: Yes, sir, Judge. I just wanted  
7 to mention to you that you had said something about you  
8 do know that the Lexington bar has got that function  
9 tonight at 5:30 for judges, judges' appreciation. I  
10 don't know if they told you that with you being here.  
11 They do it with the judges and magistrates yearly.

12 THE COURT: Where is that held?

13 MR. MADSEN: Right across the street at Town  
14 Hall. They do it for all the judges and members of the  
15 bar. When I went back to the office, someone had sent  
16 an e-mail. I think it's free food.

17 THE COURT: Well, we will try and work it in  
18 and see where we are. Bring the jury in, please.

19 (The jury returns to the courtroom at  
20 2:40 p.m.)

21 THE COURT: Good afternoon, ladies and  
22 gentlemen.

23 The jury is present. Call your witness.

24 MR. HUBBARD: The State calls Amy Stephens.

25 AMY STEPHENS, being

1 first duly sworn, testifies as follows:

2 CLERK: State your full name spelling your  
3 last on the record, please.

4 THE WITNESS: Amy Stephens, S-T-E-P-H-E-N-S?

5 DIRECT EXAMINATION

6 BY MR. HUBBARD:

7 Q Amy, where do you work?

8 A I am employed with the South Carolina Law  
9 Enforcement Division, also known as S.L.E.D.

10 Q How long have you worked there?

11 A I have been employed with S.L.E.D. since March 2nd  
12 of 2006.

13 Q What part of S.L.E.D. do you work in?

14 A I'm a forensic technician in the evidence control  
15 department.

16 Q What is evidence control?

17 A We control all the evidence that comes into our  
18 laboratory and leaves our laboratory.

19 Q Amy, you are probably a great person to ask this  
20 question. What is chain of custody?

21 A A chain of custody documents the movement of the  
22 evidence. We provide and have an electronic chain  
23 of custody, which basically documents every  
24 location and person that handles or touches that  
25 evidence.

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- 1 Q What is the purpose of documenting and controlling  
2 and keeping track of who touches evidence?
- 3 A To provide the integrity of the evidence.
- 4 Q So to make sure nobody tampers with it?
- 5 A Correct.
- 6 Q And that at the end of the day, the evidence is  
7 what it is?
- 8 A That's correct.
- 9 Q In your duties in evidence control, specifically  
10 what do you do on a day-to-day basis?
- 11 A Our job responsibilities are to log-in, package,  
12 and transfer evidence for forensic analysis in  
13 criminal cases.
- 14 Q Do law enforcement members bring evidence to you  
15 and you take it in?
- 16 A That's correct.
- 17 Q And then what do you do with it?
- 18 A When a submitting officer arrives to S.L.E.D. to  
19 log into evidence, we will call the officer back to  
20 our office. We will enter the case information  
21 into our computer system, which generates a unique  
22 lab number for that case.
- 23 We then will package the evidence  
24 appropriately, such as biological materials, such  
25 as swabs or a tube of blood will be placed in a

1 heat-sealed pouch. Clothing will be placed in a  
2 box. G.S.R. kits or fingerprint cards will be  
3 placed in a envelope.

4 Once the packaging has been finished, we will  
5 have the officer initial and date the S.L.E.D. seal  
6 tape or initial and date the heat-seal pouch. Then  
7 we will transfer that evidence to our intake  
8 location in our evidence room or to another  
9 forensic scientist or technician.

10 Q In this case did you generate a number for all the  
11 evidence that was submitted to you in the case of  
12 William Brockmeyer?

13 A Yes, our computer system did.

14 Q What is that number?

15 A It's L-10-07793.

16 Q Do you have a form, a printed form, of your printed  
17 chain of custody?

18 A Yes, I do.

19 Q Referring to that, I want to show you some items,  
20 and hopefully I won't confuse myself. If I do I  
21 will let you help me out. I want to look at your  
22 item 1.

23 A Item 1 was located in this envelope, which is  
24 labeled container A. This envelope also contained  
25 S.L.E.D. items 1, S.L.E.D. item 10, S.L.E.D. item

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- 1 11, and S.L.E.D. item 17.
- 2 Q And if you would, could you read what S.L.E.D. item
- 3 1 is.
- 4 A S.L.E.D. item 1 is a fired bullet described as a
- 5 fired projectile and jacket.
- 6 Q And is that consistent with State's evidence 53?
- 7 A It appears to have L-10-7793, item 1, and the
- 8 initials of M.E., and that corresponds with the
- 9 chain of custody.
- 10 Q And what is the next item?
- 11 A S.L.E.D. item 10.
- 12 Q I will try to catch up with you. What is S.L.E.D.
- 13 item 10?
- 14 A S.L.E.D. item 10 is described as Aguila .380 auto
- 15 casing.
- 16 Q And looking at State's Exhibit Number 28, what do
- 17 you see?
- 18 A It appears to have a L-10-7793, item 10, with the
- 19 initials of M.E., which corresponds with my chain
- 20 of custody.
- 21 Q And the next item in this packet that came to you?
- 22 A S.L.E.D. item number 11, which is unfired
- 23 cartridges and shot shells described as two Aguila
- 24 .380 bullets.
- 25 Q State's Exhibit Number 42, what number does that

1 have on it?

2 A It appears to have L-10-7793, item 11, with the  
3 initials M.E., which corresponds with my chain of  
4 custody.

5 Q What's the last item that came in this packet?

6 A S.L.E.D. item 17, which is State's Exhibit 49, is  
7 unfired cartridges and shot shells described as  
8 Aguila .380 caliber bullets. The package appears  
9 to have L-10-7793, item 17, with the initials of  
10 M.E., which corresponds with my chain of custody.

11 Q Let me ask you this: Going through these items, do  
12 all of these have the same chain of these items?

13 A Yes, they do.

14 Q Would you please read for us who brought these  
15 items to you, from what agency, and then read what  
16 hands they passed through at your agency until it  
17 made it back to the Sheriff's Department in  
18 Lexington.

19 MR. MADSEN: Judge, I would renew my objection  
20 to hearsay. I would also include an objection as to  
21 Crawford versus Washington. I think Your Honor had  
22 already ruled on some other ones that it was a business  
23 record exception, but I think we are required to renew  
24 our objection.

25 THE COURT: I conclude that this is a record

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1 kept in the course of everyday business by the South  
2 Carolina S.L.E.D., and I think it is appropriate that  
3 she use those records to testify. Your objection is  
4 respectfully overruled.

5 MR. MADSEN: Thank you, Your Honor.

6 BY MR. HUBBARD:

7 Q Starting with item 1 -- and, again, it goes to all  
8 of the items, and that is item 1 to?

9 A It's S.L.E.D. items 1, 10, 11, and 17.

10 Q Okay. Would you please read the chain on those  
11 items.

12 A On July 14, 2010, at 10:19 I accepted the evidence  
13 from David Day of the Lexington County Sheriff's  
14 Department. I then transferred the evidence on  
15 July 14, 2010, at 10:19 to the firearms evidence  
16 intake storage.

17 On July 20, 2010, at 3:59 p.m. forensic  
18 technician Doris Yarborough retrieved that evidence  
19 from firearms intake and transferred that evidence  
20 as 3:59 p.m. on July 20, 2010, to forensic  
21 scientist Michelle Eichenmiller.

22 Q Would you spell her name for the court reporter,  
23 please, her last name.

24 A Sure. It's E-I-C-H-E-N-M-I-L-L-E-R. On August 13,  
25 2010, at 3:37 p.m. Doris Yarborough received that

1 evidence from forensic scientist Michelle  
2 Eichenmiller.

3 Also, on August 13, 2010, at 3:39 p.m.  
4 forensic technician Doris Yarborough transferred  
5 that evidence to our evidence room on shelf 3-C.  
6 On September 1st, 2010, at 10:40 a.m. I transferred  
7 that evidence to Candy Kyzer with the Lexington  
8 County Sheriff's Department.

9 Q Now, I want to, since this is the first one we have  
10 gone through, I want to talk a little bit about  
11 what you as a forensic technician do and people in  
12 evidence control. Do y'all open evidence?

13 A No. When evidence is brought to S.L.E.D., we work  
14 on a said-to-contain policy, which basically means  
15 that we go off on what is written on the log-in  
16 sheet or inventory sheets. We do not open packages  
17 and we do not inventory the evidence.

18 Q The items that we just read off and you just went  
19 through, were these packaged when they came to you  
20 and were given to you by David Day.

21 A Yes, they were.

22 Q And then you generated the number and put the seal  
23 tape on it according to your protocol?

24 A Yes. Our computer system will generate the unique  
25 lab number, and then I would have placed these

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1 items into this envelope and placed the S.L.E.D.  
2 evidence tape on the seal.

3 Q You mentioned a storage bin. When you work in  
4 evidence control and you take evidence, where do  
5 you take that evidence to after you receive it?

6 A We will transfer that evidence to our evidence  
7 room. Each department has an intake location that  
8 we will transfer the incoming evidence to. Once  
9 the evidence has been analyzed, we then will also  
10 return the evidence to our evidence room for return  
11 to the agencies.

12 Q In your evidence room, you mentioned different  
13 departments. Would that include like firearms,  
14 toxicology, D.N.A., trace?

15 A That's correct.

16 Q Each section -- you have a section for each of  
17 those departments?

18 A That's correct.

19 Q And when they want to analyze something, what do  
20 they do?

21 A A forensic scientist or a forensic technician from  
22 that department will come down to evidence control  
23 and request the evidence.

24 Q Do you or anybody in your department at any time  
25 open these packages before it goes to these

1 departments?

2 A Sometimes when an agency comes in, we will have to  
3 open a package to separate the evidence according  
4 to departments, but usually we will seal the  
5 evidence and transfer that evidence to our evidence  
6 room without opening anything.

7 Q When an officer like David Day from the Sheriff's  
8 Department brings evidence to you, before you even  
9 transfer it and you are generating a number and you  
10 are giving the stickers and all, what does he do in  
11 your presence?

12 A He will initial and date the seal on all packages  
13 that are sealed. Once the evidence is logged in,  
14 he will also sign the electronic signature pad that  
15 we have to document his signature as bringing the  
16 evidence to S.L.E.D.

17 Q And once you send it on its way and it goes to its  
18 proper department and its tested, you mentioned in  
19 this case it came back to you?

20 A That's correct.

21 Q Is that how it works?

22 A Yes. Once evidence is analyzed and the analyst has  
23 completed their analysis, they will then transfer  
24 the evidence back to evidence control so we can  
25 return that evidence to the submitting agency.

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1 Q And the names you were reading off and the times,  
2 all that is in your computer and you can print that  
3 out?

4 A That's correct.

5 Q So y'all can audit what you did with your evidence  
6 that was given to you?

7 A That's correct.

8 Q You mentioned Michelle Eichenmiller. Who is she?

9 A She is a forensic scientist in the firearms  
10 department.

11 Q So the items we just discussed went to firearms?

12 A That's correct.

13 Q I will show you some additional items -- and I tell  
14 you what. Let me move these out of your way. Can  
15 you identify these items?

16 A This heat-sealed pouch contains a label with  
17 L-10-07793, container D., which contains S.L.E.D.  
18 item number 12 and S.L.E.D. item number 15.  
19 S.L.E.D. item number 12 is described as the swab of  
20 the suspect's right palm.

21 Q Is that State's evidence 41?

22 A Yes, it is.

23 Q Okay. What about item 15?

24 A S.L.E.D. item 15, which is State's Exhibit  
25 Number 31, is described as a swab from a pistol

1 magazine.

2 Q Do you see State's evidence 31?

3 A Yes, I do.

4 Q Let me ask you this: You mentioned an item and you  
5 have an item number. Who generates those numbers?

6 A Once we type it into our computer system, the  
7 system keeps track of the item numbers.

8 Q And the chain on those items, is it the same?

9 MR. MADSEN: Judge, I think items 12 and 15, I  
10 know that 12 we had previously entered a stipulation.  
11 We would enter one to 15 also. I just was conferring  
12 with the solicitor.

13 MR. HUBBARD: Twelve and 15?

14 MR. MADSEN: Fifteen is the swab from the  
15 magazine; correct?

16 MR. HUBBARD: Yes.

17 MR. MADSEN: Yes, sir.

18 BY MR. HUBBARD:

19 Q There's a stipulation; so you don't need to read  
20 those. I show you another box and see if you can  
21 identify this. I will get this stiff out of your  
22 way.

23 A This box has S.L.E.D. lab number L-10-07793, item  
24 number 9 on it.

25 Q Excuse me. What was item 9?

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1 A Item 9 was a white short-sleeve shirt with Sean  
2 John written on it, size large, suspect's.

3 MR. HUBBARD: And I believe there is a  
4 stipulation on item 9?

5 MR. MADSEN: No.

6 MR. HUBBARD: There is no stipulation on item  
7 9.

8 BY MR. HUBBARD:

9 Q All right. Let's go through the chain on item 9.

10 A S.L.E.D. item number 9, State's Exhibit 25 --

11 MR. MADSEN: Judge, we would just renew the  
12 objection that we had under hearsay and also under  
13 Crawford versus Washington.

14 THE COURT: All right, sir. My ruling will  
15 stand as to those issues. Go ahead.

16 MR. MADSEN: Thank you, Your Honor.

17 A On July 14, 2010, I received S.L.E.D. item number 9  
18 from David Day with the Lexington County Sheriff's  
19 Department. I transferred that evidence on  
20 July 14, 2009, at 10:22 a.m. to the trace evidence  
21 intake storage.

22 On July 15, 2010, at 9:08 a.m. forensic  
23 technician Selena Kinard retrieved that evidence  
24 from trace intake storage and transferred that  
25 evidence to Lisa --

1 COURT REPORTER: I'm sorry. Lisa who?

2 BY MR. HUBBARD:

3 Q You might need to spell that for the court reporter  
4 too?

5 A W-A-A-N-A-N-E-N.

6 Q Go ahead.

7 A Lisa Waananen received that evidence on July 15,  
8 2010, at 9:09 a.m. from Selena Kinard. On July 15,  
9 2010, at 2:30 p.m. forensic scientist Ila Simmons  
10 received the evidence from forensic technician Lisa  
11 Waananen.

12 On August 11, 2010, at 11:05 a.m. Lisa  
13 Waananen received the evidence from Ila Simmons.  
14 On August 11, 2010, at 11:09 a.m. Patricia H.  
15 Crooks, forensic technician, received the evidence  
16 from Lisa Waananen.

17 On August 11, 2010, at 11:13 a.m. Patricia  
18 Crooks transferred the evidence to evidence room  
19 intake, E.P. intake shelf 61. On October 20, 2010,  
20 at 12:21 p.m. forensic technician Doris Yarborough  
21 received that evidence from the intake shelf and  
22 transferred it to the forensic technician Betty  
23 Butler.

24 On October 25, 2010, at 3:37 p.m. Nikki Perry  
25 Hughes received the evidence from forensic

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1 technician Betty Butler and transferred that  
2 evidence to evidence room shelf 12-E on October 25,  
3 2010, at 3:38.

4 On December 1st, 2010, at 12:11 p.m. Patricia  
5 H. Crooks transferred that evidence to Candy Kyzer  
6 with the Lexington County Sheriff's Department at  
7 12:15 p.m.

8 On July 8, 2011, at 1:35 p.m. Nikki Perry  
9 Hughes received the evidence from David Day with  
10 the Lexington County Sheriff's Department. Nikki  
11 Perry Hughes transferred the evidence to forensic  
12 scientist Melissa Skipper Wallace on July 8, 2011,  
13 at 1:41 p.m.

14 On July 21, 2011, at 11:20 a.m. Melissa  
15 Skipper Wallace transferred the evidence to latent  
16 evidence return holding. On July 21, 2011, at  
17 1:54 p.m. Lisa Chapman received that evidence from  
18 latent return holding and transferred it to  
19 Patricia Crooks on July 21, 2011 at 2:02 p.m.  
20 Patricia Crooks transferred that evidence to  
21 evidence room shelf 16-E on July 21, 2011 --

22 THE COURT: Wait one minute. Counsel, other  
23 than using the records of S.L.E.D. in reference to who  
24 handled this, what is your other objection?

25 MR. MADSEN: As far as under Crawford versus

1 Washington or just hearsay?

2 THE COURT: No, sir. I have ruled that she is  
3 entitled to use these records. What other -- what other  
4 objection? As an example, she has used about 15 names.  
5 Are you suggesting the State needs to call in every one  
6 of those witnesses?

7 MR. MADSEN: No, sir. Judge, I would think  
8 that the chain of custody would be complete for our  
9 purposes as to the last person who tests it. I think  
10 she has been testifying as to stuff beyond that once  
11 they are done with it.

12 THE COURT: I didn't hear a stipulation to  
13 that. What her records are reflecting is for the jury  
14 to consider.

15 MR. MADSEN: I don't have a problem if they  
16 stop with whatever forensic scientist in the end that  
17 they plan on calling to testify.

18 MR. HUBBARD: All right.

19 THE COURT: Does that satisfy that?

20 MR. HUBBARD: That satisfies us.

21 THE COURT: Obviously I wasn't going to bring  
22 15 witnesses and take this jury's time for the next two  
23 days.

24 MR. HUBBARD: Yes, sir.

25 THE COURT: She is entitled to use the

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1 records, but that takes care of it. Proceed.

2 MR. HUBBARD: Yes, sir.

3 THE COURT: He is interested in the final  
4 part.

5 MR. HUBBARD: Yes, sir. On 9.1 is there a  
6 stipulation on that?

7 MR. MADSEN: No, not 9.1, 2, 3, or 4.

8 MR. HUBBARD: Nine point one is the G.S.R.

9 MR. MADSEN: Oh, the G.S.R., yes.

10 BY MR. HUBBARD:

11 Q There is a stipulation as to 9.1. Would you please  
12 read to us where item 9.1 is.

13 A S.L.E.D. item 9.1 is particle lifts collected from  
14 shirt of suspect.

15 Q As to 9.2 through 9.6, can you tell us what those  
16 items are?

17 A S.L.E.D. item 9.2 is a cutting described as from  
18 short sleeve T-shirt. S.L.E.D. item 9.3 is a  
19 cutting described as from short sleeve T-shirt.  
20 S.L.E.D. item 9.4 is a swab described as from short  
21 sleeve T-shirt.

22 S.L.E.D. item 9.5 is a swab described as one  
23 swab from the left front shoulder of item Number 9,  
24 and S.L.E.D. item 9.6 is one swab from the front  
25 lower inside edge of item 9.

1 Q Is the chain the same on all of those to the point  
2 of testing? I believe it goes to D.N.A. That's  
3 why I am asking. You can look just to the point of  
4 testing, and I believe that is good.

5 A S.L.E.D. item 9.2, 9.3, and 9.4 have the same chain  
6 of custody.

7 Q Okay.

8 A S.L.E.D. item 9.5 and 9.6 have the same chain of  
9 custody.

10 Q As to 9.2 through 9.5, would you please read us the  
11 name, until it went to forensic scientist Paul  
12 Meeh.

13 A On October 20, 2010, at 4:05 p.m. forensic  
14 technician Betty Butler created item 9.2. On  
15 October 20, 2010, at 4:06 p.m. she transferred that  
16 item into a container.

17 On October 22, 2010, at 11:37 a.m. Betty  
18 Butler transferred this evidence to the D.N.A.  
19 department storage drawer 5-E. On January 19,  
20 2011, at 2:33 p.m. Paul Meeh received that evidence  
21 from the storage drawer.

22 Q Can you spell Paul Meeh's last name for the court  
23 reporter.

24 A M-E-E-H.

25 Q What are Paul Meeh's duties at S.L.E.D.?

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- 1 A He is a forensic scientist in the D.N.A.  
2 department.
- 3 Q Thank you. As to 9.5 and 9.6, I believe you said  
4 those items have the same chain as well?
- 5 A Item 9.5 and 9.6 have the same chain. They are  
6 different than the other three sub items.
- 7 Q Would you please read those chains, I guess again,  
8 up to Paul Meeh.
- 9 A Item 9.5 on July 12, 2011, at 10:38 a.m. was  
10 created by forensic scientist Melissa Skipper  
11 Wallace. Also, on July 12, 2011, at 10:41 a.m. she  
12 transferred item 9.5 into a container labeled J.
- 13 On July 12, 2011, at 12:11 p.m. Nikki Perry  
14 Hughes received that evidence from Melissa Skipper  
15 Wallace and transferred that evidence at 12:40 p.m.  
16 to the D.N.A. intake shelf 60.
- 17 On July 19, 2011, at 10:48 a.m. I received  
18 that evidence from the D.N.A. intake shelf and  
19 transferred it to forensic scientist Paul Meeh at  
20 10:48 a.m.
- 21 Q Just because I can't remember who did it, would you  
22 please tell us what item 9.5 and 9.6 are.
- 23 A S.L.E.D. item 9.5 is one swab from the left front  
24 shoulder of item 9, and item 9.6 is one swab from  
25 the front lower inside edge of item 9.

1 Q Thank you. Let me get this stuff out of your way  
2 before I show you something else. Amy, if you  
3 would I just handed you a gold envelope with two  
4 bags inside. Could you please identify that.

5 A This envelope has a label L-10-07793, container E.,  
6 which contains item 13 and item 14 which are the  
7 S.L.E.D. item numbers.

8 Q And S.L.E.D. item 13, which is State's Exhibit 14,  
9 can you please tell us what that is.

10 A S.L.E.D. item 13 is a G.S.R. kit from Nicholas Rae.

11 Q And I believe S.L.E.D. item 14, which is --

12 A State's Exhibit 13.

13 Q -- what is that?

14 A Item 14 is the G.S.R. kit from William Brockmeyer.

15 MR. HUBBARD: Your Honor, I believe there is a  
16 stipulation as to those items.

17 MR. MADSEN: There is, Your Honor.

18 THE COURT: All right, sir.

19 BY MR. HUBBARD:

20 Q What is this?

21 A This gun box has label L-10-07793, item Number 16.  
22 S.L.E.D. item Number 16 was a handgun described as  
23 a black Ceska Zbrojovka.

24 THE WITNESS: Would you like me to spell that  
25 for you?

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1 COURT REPORTER: Please.

2 THE WITNESS: Z-B-R-O-J-O-V-K-A.

3 A A.S.V. Prague .380 pistol, serial number  
4 E-7-star-38 C.E.T., 195776.

5 Q And I believe the box is labeled State's evidence  
6 48?

7 A Forty-eight.

8 Q Just making sure we are on the same page.

9 MR. HUBBARD: There is no stipulation as to  
10 this?

11 MR. MADSEN: No.

12 BY MR. HUBBARD:

13 Q If you would, Amy, please read until it gets to  
14 Michelle Eichenmiller.

15 A On July 14, 2010, at 10:19 a.m. I received the  
16 evidence from David Day with the Lexington County  
17 Sheriff's Department. On July 14, 2010, at  
18 2:42 p.m. I transferred that evidence to our  
19 evidence room on the evidence processing firearms  
20 intake area.

21 On July 23, 2010, at 10:17 a.m. Nikki Perry  
22 Hughes received that evidence from the intake area  
23 and transferred that evidence to forensic  
24 technician Betty Butler. On July 23, 2010, at  
25 11:42 a.m. forensic scientist Michelle Eichenmiller

1 received that evidence from Betty Butler.

2 Q Thank you. Now, item 16.1 and 16.2, what are those  
3 items?

4 A Sixteen point one and 16.2 are both swabs from the  
5 handgun.

6 Q Do they have the same chains on those?

7 A Yes, they do.

8 Q Would you please read them up until you get to Paul  
9 Meeh.

10 A On July 23, 2010, at 11:32 a.m. item 16.1 and item  
11 16.2 were created by Betty Butler. On July 23,  
12 2010, at 11:32 a.m. she transferred both items to  
13 container F.

14 On July 23, 2010 at 4:38 p.m. Betty Butler  
15 transferred the evidence to the D.N.A. department,  
16 D.N.A. storage drawer 5-E. On October 7, 2010, at  
17 2:14 p.m. forensic scientist Paul Meeh received  
18 that evidence from the storage drawer.

19 Q Amy, I am going to show you a box, State's Exhibit  
20 Number 9, and see if you can identify the items in  
21 this box.

22 A This box has label L-10-07793, container I., which  
23 contains S.L.E.D. items 20, 21, and 22.

24 Q I am getting on the same page with you. S.L.E.D.  
25 items what again?

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1 A Twenty, 21, and 22.

2 MR. MADSEN: Your Honor, we would stipulate to  
3 those. I believe those are the shorts and socks.

4 MR. HUBBARD: I will have her identify them.

5 BY MR. HUBBARD:

6 Q Twenty is what?

7 A S.L.E.D. 20 is a pair of gray underwear from  
8 Brockmeyer.

9 Q Twenty-one?

10 A S.L.E.D. item 21 is socks described as a pair of  
11 socks from Brockmeyer. S.L.E.D. item 22 is a pair  
12 of shorts from Brockmeyer.

13 MR. MADSEN: We do stipulate.

14 MR. HUBBARD: Very good. Thank you.

15 THE COURT: Thank you.

16 BY MR. HUBBARD:

17 Q I think I have got just two other items. Items  
18 23.1 and 23.2, can you identify those?

19 A According to my chain of custody, S.L.E.D. item  
20 23.1 is two swabs from the earpiece of item 23, and  
21 item 23 was a bluetooth head set.

22 MR. HUBBARD: Is there a stipulation as to  
23 those?

24 MR. MADSEN: There is, Judge. We stipulated  
25 to 23, 23.1, and 23.2.

1 THE COURT: There is an agreement as to those  
2 issues by stipulation.

3 MR. HUBBARD: Thank you, Your Honor.

4 BY MR. HUBBARD:

5 Q Ms. Stephens, all the items that you just went over  
6 were sent to you or brought to you by who?

7 A David Day of the Lexington County Sheriff's  
8 Department.

9 Q Were all of these items properly sealed when you  
10 received them?

11 A Yes, they were.

12 Q At any time did you open any of these items?

13 A No, I did not.

14 Q When you received them, were they properly sealed?  
15 When they came back from testing, were they  
16 properly sealed?

17 A Yes, they were.

18 Q Do you remember who delivered back them to?

19 A Candy Kyzer with the Lexington County Sheriff's  
20 Department.

21 Q Thank you. Please answer any questions of the  
22 defense.

23 CROSS EXAMINATION

24 BY MR. MADSEN:

25 Q Ms. Stephens, these lists that you have been

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1 reading off, your job as the forensic intake is not  
2 to generate these lists; correct?

3 A Our computer system keeps the record.

4 Q And ultimately you are not typing in all these  
5 names on this list?

6 A No, sir, it's all electronic.

7 Q And you had testified on some of the chain of  
8 custody that something that had gone from you to, I  
9 believe, a Doris Yarborough; correct?

10 A Not directly. I transferred the evidence to an  
11 intake location, and she retrieved it from that  
12 intake location.

13 Q So you don't actually see her take custody of these  
14 items?

15 A No, sir.

16 Q In fact, quite a bit of what you were reading, you  
17 don't actually see the people physically take  
18 custody of those with your own eyes; do you?

19 A No, I did not.

20 Q You are just basically reading off what has been  
21 inputted into a computer?

22 A That's correct.

23 MR. MADSEN: No other questions.

24 THE COURT: You may come down.

25 (Witness leaves the witness stand.)

1 MR. HUBBARD: Thank you, Your Honor. The  
2 State calls Brandon Landrum.

3 BRANDON JAMAL LANDRUM, being  
4 first duly sworn, testifies as follows:

5 CLERK: State your full name, spelling your  
6 last, please.

7 THE WITNESS: Brandon Jamal Landrum,  
8 L-A-N-D-R-U-M.

9 **DIRECT EXAMINATION**

10 BY MR. HUBBARD:

11 Q Agent Landrum, where do you work?

12 A South Carolina Law Enforcement Division, also known  
13 as S.L.E.D.

14 Q How long have you been at S.L.E.D.?

15 A Seven years.

16 Q Last year were you working in the toxicology  
17 department?

18 A I was, yes.

19 Q What is toxicology?

20 A Toxicology is basically the study of alcohol,  
21 drugs, and poisons and how they affect the human  
22 body. What a forensic toxicologist does is we  
23 apply science to law.

24 We analyze biological and non-biological  
25 samples for the presence or absence of alcohol,

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1 poisons, and drugs to quantity the concentration  
2 and also to provide interpretations of what the  
3 effects would be on somebody for courts of law, for  
4 coroners, and for law enforcement.

5 Q What is your educational background?

6 A I have a B.S. in biology with a minor in chemistry  
7 from Winthrop University. I am certified as a  
8 medical technologist from Carolina's College of  
9 Health Sciences --

10 MR. MADSEN: Judge, we would stipulate to his  
11 qualifications as an expert in forensic toxicology.

12 MR. HUBBARD: That's fine.

13 THE COURT: I declare him as an expert based  
14 on that admission. His education and experience clearly  
15 qualifies him as an expert.

16 BY MR. HUBBARD:

17 Q Agent Landrum, I know you didn't even get to your  
18 experience, but you have had training at S.L.E.D.  
19 since you have been at S.L.E.D. in this area as  
20 well?

21 A That's correct.

22 Q We won't go into all that since they are agreeing  
23 to it. Were you asked to do something on this  
24 case, the case of William Brockmeyer -- or excuse  
25 me -- yes, William Brockmeyer and S.L.E.D. lab

1 number L-10-07793?

2 A That's correct. I performed alcohol analyses on  
3 blood and ocular fluid.

4 Q And when you do an analysis, how do you do an  
5 analysis?

6 A Pretty much what we do is we take the samples. We  
7 make sure that they haven't been tampered with. We  
8 perform our analysis. We take 200 microliters of  
9 blood and put it into what is called G.C. vials  
10 because we use a gas chromatography by head space.  
11 That's the method that we use to determine alcohol  
12 analysis in liquids.

13 So I used 200 microliters of blood, put it in  
14 the vial. I did that twice into two separate vials  
15 so that we can make sure that the results are  
16 correct and then also took 200 microliters of  
17 ocular fluid. Ocular fluid is basically the fluid  
18 inside the eye.

19 I took 200 microliters of that and put it in a  
20 vial and took 200 microliters from the vial again,  
21 from the original vial, and put it into another  
22 G.C. vial, capped them, sealed them, and put them  
23 on the instrument and let them run and then took  
24 the data, the results, and put them into a report.

25 Q And that's generally what you do on every case when

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- 1           you are a toxicologist and you are running these  
2           tests?
- 3    A       That's correct.
- 4    Q       In this case I believe it's item 3, which is ocular  
5           fluid, and item 4, iliac vein blood?
- 6    A       That's correct.
- 7    Q       Is that I-L-I-A-C.?
- 8    A       I-L-I-A-C vein blood, yes.
- 9    Q       Where is that vein located generally?
- 10   A       You have the interior iliac vein which comes up  
11           from the pelvic area, which then feeds into the  
12           exterior iliac vein, which is right in the lower  
13           abdomen area. That's where those veins are located  
14           at.
- 15   Q       Then ocular fluid comes from where?
- 16   A       It's the fluid inside the eye.
- 17   Q       The items you received in this case, were they  
18           properly sealed?
- 19   A       Yes, they were.
- 20   Q       And you opened these items in order to test these  
21           items?
- 22   A       That's correct.
- 23   Q       And you mentioned what you do on a general daily  
24           basis when you are testing things. Did you do that  
25           in this case?

1 A That's correct.

2 Q Did you generate a report?

3 A I provided the results and then the peer reviewer  
4 or the analyst in charge of the case actually typed  
5 up the report and signed the report.

6 Q Would that be Toni Broome?

7 A That's correct.

8 Q You talked about peer review. Is that somebody  
9 always checks behind you?

10 A Yes. She verifies the quality control. Pretty  
11 much when we run samples, we also run what we call  
12 standards. That's certified standards from an  
13 outside company that are 0.08 percent standards  
14 that we run, that we bracket our samples with so we  
15 know that the instrument is running properly and  
16 that everything was piped out right.

17 The 0.08 percent standard is supposed to read  
18 0.08 plus or minus 5 percent, which is like  
19 0.074 -- 0.076 to 0.084 is the range -- just so  
20 that we know that everything is working properly,  
21 and the calibration on the instrument is correct.  
22 Our peer reviewer or whoever signs off on the  
23 reports goes back to make sure that everything fell  
24 within the quality control of the run.

25 Q When you tested the ocular fluid of this person and

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1 it's listed as John Doe; is that correct?

2 A Correct. John Doe FA10-478.

3 MR. HUBBARD: I would ask at this time: Is  
4 there a stipulation that this is the victim?

5 MR. MADSEN: Yes, Your Honor.

6 MR. HUBBARD: Nicholas Rae. Thank you.

7 THE COURT: The stipulation is noted. Go  
8 ahead.

9 BY MR. HUBBARD:

10 Q The ocular fluid of this individual who we now know  
11 is Nicholas Rae, what was his alcohol level in this  
12 ocular fluid?

13 A In death cases we test for five different types of  
14 alcohol. Ethanol is your drinking alcohol. Then  
15 you have methanol, which is wood alcohol. Acetone  
16 and isopropanol, which is rubbing alcohol. In this  
17 case we found 0.227 percent weight per volume  
18 ethanol, which is drinking alcohol, in the ocular  
19 fluid.

20 Q Did you find any other forms of alcohol in his  
21 body?

22 A No, there wasn't.

23 Q Just the drinking alcohol?

24 A Just the drinking alcohol.

25 Q As to item 4, the iliac vein blood, did you find

1 anything -- what were you testing for there?

2 A Just like the ocular fluid, we look for ethanol,  
3 methanol, acetone, and isopropanol. In this case  
4 we only found 0.200 percent ethanol.

5 Q So in the iliac vein, which you say is down in the  
6 abdomen, you found .20?

7 A Correct, .20.

8 Q Ocular fluid was .227?

9 A That's correct, .227.

10 Q Based on your training -- now, you have been  
11 trained about the effects of alcohol; is that  
12 correct?

13 A That's correct.

14 Q And how it affects the human body?

15 A That's correct, yes.

16 Q How a person acts?

17 A Yes.

18 Q And behaves. At what level would you say a person  
19 drinking alcohol starts getting tired or sleepy?

20 A About a .15 percent. Around .15 is usually when  
21 you start seeing the drowsiness. Some of your  
22 slurred speech starts getting more pronounced after  
23 .15. As you get higher, around .20 to .25, you  
24 actually start getting more of sleepiness, your  
25 stupor.

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1           Once you get to about .30, .35 and on up, you  
2           start falling into your coma. And then, of course,  
3           at .45 you are pretty much -- most people actually  
4           are dead at .45 alcohol concentration.

5   Q       If I gave you a hypothetical, that a person who had  
6           a .20 was believed to be passing out, would that be  
7           consistent with a reading of a .20?

8   A       That would be, yes. That would be what I expect to  
9           see for someone at .20.

10   Q       Would somebody at .20 or higher be what you would  
11           consider fairly incapacitated?

12   A       Yes, they would definitely be under the influence  
13           of ethanol at that level.

14   Q       Now, you have two different readings. Is there any  
15           conclusion you can draw from the higher ocular  
16           fluid level of alcohol and the iliac vein fluid  
17           level?

18   A       We know that the ocular fluid, there's parts of the  
19           metabolism or the way that the body processes  
20           things that come into the body and go out. You  
21           have absorption, distribution, metabolism, and  
22           elimination.

23           We know that the ocular fluid lags behind all  
24           these compared to the blood; so that your blood  
25           alcohol level would peak before your ocular fluid.

1           Then once you start getting to the elimination  
2           phase, your blood level starts to drop first. And  
3           then your ocular fluid, as it tails behind, it  
4           peaks, and then it starts coming back down after  
5           it.

6                        So with this reading it would show that the  
7           person was in the elimination phase of the  
8           metabolism process, and that the ocular fluid was  
9           higher than the blood.

10   Q       And even though they are in the elimination phase,  
11           due to the high reading of .20 of the iliac vein  
12           blood, the alcohol in the iliac vein, would it  
13           still be possible for a person with a reading like  
14           that to be passing out?

15   A       Yes, it's still possible.

16   Q       Would it be possible for a person to actually pass  
17           out and be asleep?

18   A       Yes.

19   Q       Now, there is one final thing --

20                        MR. HUBBARD: And I do believe there is a  
21           stipulation as to the drugs?

22                        MR. MADSEN: Yes, Your Honor.

23   BY MR. HUBBARD:

24   Q       Did you find any illicit substances -- or any  
25           illicit substances, other than just alcohol, which

- 1 is not an illicit substance, but any illicit  
2 substances found in the body of Nicholas Rae?
- 3 A We tested for amphetamine, benzodiazepines,  
4 methamphetamine, oxycodone, cannabinoids, which is  
5 a component of marijuana, cocaine metabolite, and  
6 opiates. All those came back negative.
- 7 Q So no drugs?
- 8 A None of those drugs were present.
- 9 Q And as to the alcohol, the levels that we have  
10 talked about, are those levels consistent with  
11 someone who has thrown up and stopped drinking?
- 12 A You can actually -- you would expect to see some  
13 nausea or vomiting at those type of levels, yes.  
14 That would be consistent with that type of level.
- 15 Q And that type of behavior preceding passing out?
- 16 A Yes.
- 17 Q Thank you. Please answer any questions the defense  
18 might have.

**CROSS EXAMINATION**

19  
20 BY MR. MADSEN:

- 21 Q Mr. Landrum, how are you doing this afternoon?
- 22 A Doing good. How about you?
- 23 Q Good. Good to see you again. Alcohol, ethanol  
24 alcohol --
- 25 A Yes, sir.

1 Q -- is a depressive, is it not, as far as --

2 A It's a central nervous system depressant.

3 Q And ultimately it can affect someone's decision  
4 making?

5 A That's correct, yes.

6 Q It can affect their coordination?

7 A Yes.

8 Q I would imagine that in your job you test blood  
9 sometimes, not only in cases like this, but I would  
10 think quite a bit comes to you on D.U.I. type of  
11 cases?

12 A That's correct. We get more D.U.I. -- well, a lot  
13 of D.U.I. cases that come in.

14 Q When someone has been driving and for some reason  
15 blood is taken, that blood is tested by y'all?

16 A That's correct, yes.

17 Q What is the highest level that you have got with  
18 someone driving a car?

19 A I couldn't tell you off the top of my head. I know  
20 I have had some that have been in the .2 range. I  
21 couldn't tell you exactly how much, what the  
22 highest level is.

23 Q And ultimately how much or how often you drink can  
24 sometimes affect those levels; can they not?

25 A What can affect the levels is how -- I guess how

1 fast you drink it. It can cause you to peak a  
2 little bit quicker than if you drink it over a  
3 course of time, if I understand your question  
4 right.

5 Q Well, if someone like me who very rarely drinks, if  
6 I go out and have six beers, that might affect me  
7 more than someone who basically has six beers every  
8 single night?

9 A Correct. You have what we call novice versus your  
10 chronic or your experienced drinkers who pretty  
11 much, if you take someone who is first time  
12 drinking and you take someone who is a chronic  
13 alcoholic who drinks all the time, you get them  
14 both to about a .15 blood alcohol level, put them  
15 in a seat, the new drinker, inexperienced drinker  
16 might be falling out of the seat whereas the  
17 experienced drinker is sitting in a seat and  
18 carrying on a conversation.

19 Then if you put them into scenarios where you  
20 have them do multiple divided attention tasks or  
21 multiple tasks, you will see that they are both  
22 impaired to the same level. It's just that the  
23 experienced drinker has learned some behavioral  
24 ways to sort of -- like leaning against a bar,  
25 talking a little bit slower to keep from seeming

1       Like he is slurring his speech. It's a way that  
2       they sort of mask the impairment that is actually  
3       going on inside the brain.

4   Q     That is kind of basically someone's tolerance?

5   A     That what's we are talking about, behavioral  
6       tolerance, yes.

7   Q     You had testified, I guess, that based on the  
8       difference in the blood vein and based on the  
9       difference of the ocular, he was in the  
10      elimination?

11  A     That's correct, yes.

12  Q     So his blood alcohol is coming down instead of  
13      going up?

14  A     That's correct. It's on its way down.

15               MR. MADSEN: That's all the questions I have.

16               MR. HUBBARD: A quick follow up.

17                               **REDIRECT EXAMINATION**

18  BY MR. HUBBARD:

19  Q     On impairment you talked about a novice versus  
20      somebody who drinks a lot, but the impairment is  
21      the same if I heard you correctly?

22  A     That's correct. It's still the same. It's just  
23      with the experienced drinker you have your  
24      behavioral tolerance is what we refer to it as.  
25      You lean against the bar to keep from looking like

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1           swaying, talk a little bit slower to keep from  
2           slurring your words as obvious or it seems like you  
3           are talking a little bit more clear, those type of  
4           things, whereas the inexperienced drinker doesn't  
5           really realize the whole swaying part and the  
6           standing there not leaning against the bar and sort  
7           of swaying all over the place.

8   Q    Regardless of whether you are experienced or not, a  
9           .20 or above, it would not be unusual for somebody  
10          to be passing out?

11   A    That's correct, yes.

12   Q    Thank you.

13           MR. HUBBARD: Your Honor, I have no further  
14          questions.

15           THE COURT: You may come down. Thank you.

16           (Witness leaves the witness stand.)

17           THE COURT: Next witness.

18           MR. HUBBARD: Your Honor, the State calls Ila  
19          Simmons.

20    ILA SIMMONS, being  
21          first duly sworn, testifies as follows:

22           CLERK: State your full name, spelling your  
23          last, please.

24           THE WITNESS: My name is Ila Simmons,  
25          S-I-M-M-O-N-S.

## 1 DIRECT EXAMINATION

2 BY MR. HUBBARD:

3 Q Ms. Simmons, where do you work?

4 A At the South Carolina Law Enforcement Division in  
5 the forensics laboratory, trace evidence  
6 department.

7 Q What do you mean by trace evidence?

8 A Trace evidence encompasses several areas of  
9 forensics. We analyze gunshot residue, gun powder  
10 residue. We perform fiber and paint comparisons as  
11 well as analyze arson and explosives.12 Q How long have you worked at S.L.E.D. in this  
13 department?

14 A Twelve years.

15 Q Have you worked in S.L.E.D. in any other department  
16 before this one?

17 A No, sir.

18 Q So your entire time has been in trace?

19 A Yes, sir.

20 Q What's your educational background?

21 A I have a Bachelor of Science degree in chemistry.  
22 After completing that I came to work at S.L.E.D.  
23 where I worked with a court-qualified,  
24 S.L.E.D.-certified trace evidence examiner who  
25 taught me how to collect and analyze trace

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1 evidence.

2 During that time I had to take written and  
3 practical examinations and complete them with  
4 100 percent efficiency. After completing that I  
5 was then certified by S.L.E.D. as a trace evidence  
6 examiner.

7 MR. HUBBARD: Your Honor, I offer her as an  
8 expert in trace evidence examination.

9 MR. MADSEN: No objection.

10 THE COURT: I so qualify her as an expert in  
11 that field. She has testified in my court on many  
12 occasions. Glad to have you. Proceed.

13 BY MR. HUBBARD:

14 Q Agent Simmons, were you asked to do anything in  
15 this case?

16 A Yes, I was.

17 Q The casing involving William Brockmeyer?

18 A Yes, sir, I was.

19 Q And what items were you asked to review?

20 A I was asked to analyze a white T-shirt and also two  
21 gunshot residue kits.

22 Q Let me see if I can locate them. Do you recognize  
23 what I have given you, which is State's Exhibit 25?

24 A Yes, sir, I do. It is marked with my laboratory  
25 identification number, the item number, and my

1       initials, as well as the date that I performed the  
2       analysis. It is the white T-shirt.

3   Q    When you received this box, was it sealed?

4   A    Yes, sir, it was.

5   Q    Were you the one who opened it up?

6   A    Yes, sir.

7   Q    And what type of analysis did you do on the  
8       T-shirt?

9   A    I collected samples to see if gunshot residue was  
10       present on the T-shirt.

11   Q    What is gunshot residue?

12   A    Gunshot residue is a mixture of microscopic  
13       chemicals that come out of the gun when it's fired.  
14       It comes out in a cone-shaped plume. It can get on  
15       anything in proximity to the gun within about --  
16       with handguns it's within about five feet.

17   Q    In this case did you find any gunshot residue?

18   A    No, sir, I did not.

19   Q    And did you also examine some other items, I  
20       believe you mentioned?

21   A    Yes, sir, I did.

22   Q    If you can identify those items.

23   A    Yes, sir. They are also marked with our laboratory  
24       identification number, the item number for each  
25       piece of evidence, my initials, and the date that

ILA SIMMONS -- DIRECT -- MR. HUBBARD

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- 1           it was opened for analysis.
- 2   Q       As to item 13, what is that?
- 3   A       State's Exhibit 13 is a gunshot residue kit labeled
- 4           as being collected from William Brockmeyer.
- 5   Q       What about item 13?
- 6   A       Fourteen? That was 13.
- 7   Q       These are the ones that we have got opposite
- 8           numbers. Our evidence numbers are opposite of
- 9           yours. I didn't prepare you for that. If you
- 10          would look at item 13.
- 11  A       My item 13?
- 12  Q       Which is State's 14.
- 13  A       State's Exhibit 14 is a gunshot residue kit
- 14          collected from Nicholas Rae.
- 15  Q       Is he listed as the victim in this case?
- 16  A       Yes, sir, in my paperwork he is.
- 17  Q       And what test is this?
- 18  A       This is a test for the presence of gunshot residue
- 19          on the hands.
- 20  Q       And what, if anything, did you find?
- 21  A       I did not find gunshot residue on the samples from
- 22          this kit.
- 23  Q       Now, as to item 14 --
- 24  A       Yes, sir.
- 25  Q       -- with William Brockmeyer?

1 A Yes, sir.

2 Q Which is State's 13.

3 A Yes, sir.

4 Q Did you test that one as well?

5 A I did.

6 Q What, if anything, did you find?

7 A I did not find gunshot residue either.

8 Q Let me ask you this: If you are dealing with a  
9 small firearm, like a .380, how much G.S.R. would  
10 you expect to find from a small handgun versus like  
11 a .45-caliber, a big handgun?

12 A There will be much more gunshot residue produced by  
13 a .45 or a larger caliber handgun than will from a  
14 smaller caliber handgun.

15 Q So a small caliber firearm produces much less?

16 A Yes.

17 Q If you have a contact wound, say, hypothetically a  
18 small handgun, a .380, held to a neck or against a  
19 body and it's fired, how much G.S.R. would you  
20 expect to find on the hand holding the gun?

21 A Gunshot residue when expelled from a gun,  
22 98 percent of it comes out of the muzzle of the  
23 gun, the same area where the bullet comes out of.  
24 So a very small amount would be able to come back  
25 if a contact wound is made because it's going to be

ILA SIMMONS -- DIRECT -- MR. HUBBARD

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1           pressed directly into the skin and all the gunshot  
2           residue is going to be going into the skin. I  
3           wouldn't expect to find gunshot residue on the hand  
4           of someone who is pushing hard into a contact  
5           wound.

6    Q    So it's not unusual at all?

7    A    No, sir. We see it quite often in cases where it's  
8           believed to be a suicide where someone has a hard  
9           contact wound when there is no gunshot residue  
10          found, and no one else is suspected of shooting the  
11          firearm except the victim.

12   Q    If someone were to fire a weapon and then several  
13          hours go by before their hands are tested and the  
14          they are hot and sweaty and they wipe their hands,  
15          would you expect to see -- what would you expect to  
16          see?

17   A    Gunshot residue has a consistency of salt. So if  
18          you get it on your hands and you were to wipe your  
19          hands on your pants or you would begin sweating or  
20          were to wash your hands in any way that your hands  
21          became wet, this would all remove gunshot residue.  
22          It's very easily removed.

23                So in that case if someone were sweating or if  
24                someone were to be putting their hands in and out  
25                of their pocket or something of that sort, I

1           wouldn't expect to find gunshot residue two hours  
2           later.

3    Q    So if someone is hot and sweaty or nervous and had  
4           sweaty hands, if they even wiped them on their  
5           pants or on the ground or on anything, they could  
6           wipe that gunshot residue off?

7    A    Yes, sir. The very act of sweating itself can  
8           remove it even without wiping.

9    Q    I guess that leads to the next question. Is  
10           gunshot residue something that you can easily wash  
11           off your hands?

12   A    Yes, sir.

13   Q    I want to show you another item and see if you  
14           recognize this.

15   A    Yes, sir, I do.

16   Q    What is that item?

17   A    These are the particle lifts that were collected  
18           from the white T-shirt we spoke about earlier. It  
19           is the device we use to try and determine if  
20           gunshot residue is present.

21   Q    And your results from that, reviewing those lists  
22           was what?

23   A    No gunshot residue was found.

24           MR. HUBBARD: Your Honor, I would offer this  
25           into evidence at this time. It has not been entered

1 yet.

2 MR. MADSEN: No objection.

3 THE COURT: Without objection.

4 (State's Exhibit Number 69 is received into  
5 evidence.)

6 BY MR. HUBBARD:

7 Q Ms. Simmons, I believe that's all I have for you.  
8 Thank you very much and please answer any questions  
9 of the defense.

10 **CROSS EXAMINATION**

11 BY MR. MADSEN:

12 Q Ms. Simmons, how are you doing?

13 A I'm doing well. Thank you.

14 Q Now, you said with gunshot residue, 98 percent of  
15 it ends up coming out of the barrel; correct?

16 A Yes, sir.

17 Q Is there a difference between the amount that comes  
18 out with, say, a revolver as compared to a  
19 semiautomatic pistol?

20 A Yes, sir. With a revolver where you have a turning  
21 chamber, it isn't as tight of a system as a  
22 semiautomatic, and a little bit more will come out  
23 around the cylinder gap.

24 So maybe 1 percent would come around the  
25 cylinder gap, where in a semiautomatic only a very

1 small amount, probably less than 1 percent, would  
2 come out of the ejector port.

3 Q But there is an amount that can come out of an  
4 ejector port; correct?

5 A Yes, sir.

6 Q And ultimately I think you said G.S.R. can come off  
7 pretty easily. So if someone had G.S.R. on their  
8 hands and they are being moved around, that can  
9 affect finding G.S.R. on their hands?

10 A Yes, sir, if the hands are being made contact.

11 Q And say the hands end up in some blood, that could  
12 wash off G.S.R.?

13 A Yes, it can.

14 Q And a lot of times when we talk about G.S.R., they  
15 can also come from the back of someone's hands when  
16 they are holding a gun; correct?

17 A Yes, sir. The G.S.R. kits are taken with samples  
18 from the palm and a sample from the back of each  
19 hand.

20 Q A lot of times with G.S.R. you are more likely to  
21 get it from a back of a hand than you will a palm?

22 A If one is shooting, yes, sir.

23 Q Ultimately if you are rubbing down here  
24 (indicating), not a lot of people rub like that; do  
25 they?

ILA SIMMONS -- CROSS -- MR. MADSEN

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- 1 A No, sir, I wouldn't think so.
- 2 Q And even though G.S.R. can kind of get on your  
3 hands, it's not something that if I fired a weapon  
4 necessarily, I can look down -- you can't see  
5 necessarily black specks all over it; can you?
- 6 A No, sir, it's microscopic.
- 7 Q That's why you have these little things that are  
8 just kind of -- because someone can't see that it's  
9 on there?
- 10 A That's correct.
- 11 Q But you could still find it?
- 12 A Yes, sir.
- 13 Q And there is a period of time that you can test for  
14 G.S.R. Is there a time frame that is kind of like  
15 a drop-dead date?
- 16 A We have done different testing in the laboratory  
17 where we have had our chemists shoot a gun and then  
18 we take gunshot residue kits from them. We know  
19 they fired a gun. We know all of the conditions  
20 have been controlled.
- 21 We have determined that six hours after  
22 shooting, there will be no gunshot residue left on  
23 the hands even if hands weren't washed or cleaned  
24 in any way. So six hours is our time where we will  
25 not collect and have a G.S.R. kit analyzed.

1 Q But you can collect it anywhere inside of that six  
2 hours?

3 A Yes, sir.

4 Q Ultimately you can also do or get G.S.R. off of  
5 clothing?

6 A Yes, sir.

7 Q I guess you do it the same with the little --

8 A Yes, sir.

9 Q -- particle lifts. I believe it was State's  
10 Exhibit 25, which is a white Sean John T-shirt?

11 A Yes, sir, I analyzed that.

12 Q You analyzed that and no G.S.R. on that?

13 A No, sir, I did not find G.S.R. on that item. On  
14 clothing it is an inanimate object; so it's not  
15 like skin. So gunshot residue may remain  
16 indefinitely on clothing.

17 Q So that doesn't have like that six-hour window?

18 A No, sir.

19 Q And obviously if someone takes their shirt and  
20 throws it in the washer?

21 A Absolutely it would be washed away, yes, sir.

22 MR. MADSEN: That's all the questions I have.

23 MR. HUBBARD: No follow up.

24 THE COURT: You may come down. Thank you.

25 (Witness leaves the witness stand.)

BETTY BUTLER -- DIRECT -- MR. GRAHAM

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1 MR. GRAHAM: The State calls Betty Butler.

2 THE COURT: Mr. Foreman, and ladies and  
3 gentlemen, it's about a quarter till 4:00. Would you  
4 like to take the afternoon break at this time?

5 It's okay with the jury right now. Let's  
6 take the next witness, and then we will take a short  
7 break.

8 BETTY WALKER BUTLER, being  
9 first duly sworn, testifies as follows:

10 CLERK: State your full name, spelling your  
11 last name on the record, please, ma'am.

12 THE WITNESS: Betty Walker Butler,  
13 B-U-T-L-E-R.

14 DIRECT EXAMINATION

15 BY MR. GRAHAM:

16 Q Ms. Butler, where are you employed, ma'am?

17 A I am employed with the South Carolina Law  
18 Enforcement Division, also known as S.L.E.D.

19 Q How long have you worked for S.L.E.D.?

20 A I have been employed there approximately 15 years.

21 Q And what do you do for S.L.E.D.?

22 A I'm a forensic technician in the evidence  
23 processing unit in the D.N.A. department.

24 Q What does that mean?

25 A A forensic technician is a person that gets

1 evidence from a submitting agency where we do  
2 presumptive tests for blood, semen. We look for  
3 fibers, body fluids or sometimes skin cells or  
4 anything that will be of value to a particular  
5 case.

6 Q Ms. Butler, did you have a chance to do some  
7 processing on the case involving William  
8 Brockmeyer? That is S.L.E.D. lab number  
9 L-10-07793?

10 A Yes, I did.

11 Q Let me show you an item and ask if you recognize  
12 it. This will be State's Exhibit Number 25.

13 A May I have some gloves?

14 Q Yes.

15 A (Pause.) Yes, I do.

16 Q What is that?

17 A State's Exhibit 25 is our item 9.0.

18 Q And what is the description of that, ma'am?

19 A Item 9.0 is a short-sleeve T-shirt.

20 Q When you got that container and that shirt, was the  
21 container properly sealed?

22 A Yes, it was.

23 Q Had it been tampered with?

24 A No, it wasn't.

25 Q Would you have known it if it had been?

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1 A Yes, I would have.

2 Q What was your purpose in having that shirt sent to  
3 you, ma'am?

4 A The purpose of this particular shirt was to do  
5 tests for possible blood or skin cells.

6 Q When you got that shirt, what did you do? How did  
7 you analyze it?

8 A When I received this particular shirt, first we do  
9 a visual test looking for possible blood. Once we  
10 see a spot that could be possible blood, we do a  
11 chemical test that we use clean swabs on. If it's  
12 a possibility that it's blood, it will turn  
13 purple -- I'm sorry -- it will turn pink.

14 Q And did you perform that test on that shirt?

15 A Yes, I did.

16 Q What did you find?

17 A On this particular shirt, I had took two cuttings  
18 of it --

19 MR. MADSEN: Judge, I would renew my objection  
20 under Crawford versus Washington, chain, and foundation.

21 THE COURT: Well, she is here for you to cross  
22 examine her.

23 MR. MADSEN: Yes, sir. I'm talking about  
24 prior to that, just renewing my objection.

25 THE COURT: The ruling will stand. Go ahead.

1 BY MR. GRAHAM:

2 Q Continue, ma'am.

3 A I did a visual test. I looked for -- we do  
4 representative samples of blood. We don't  
5 necessarily have to take all the samples; so I  
6 looked for the best samples.

7 I did one cutting at the front, which was 9.2,  
8 and at the back I did another cutting, which is  
9 item 9.3. They were positive for presumptive tests  
10 for blood.

11 Q How are you so sure that 9.2 was taken from the  
12 center of the chest and 9.3 was taken from the  
13 back?

14 A Every cutting has to have an item number. We mark  
15 it on the -- once we do the cutting, we do 9.2 on  
16 the shirt, and then we do 9.2 on the cutting. That  
17 way we can match the cutting back up to the spot.

18 Q So if I understand correctly, through visual  
19 examination and presumptive testing with  
20 phenolphthalein, you collected two cuttings that  
21 contained representative samples of what you found?

22 A That's correct.

23 Q That's 9.2 and 9.3?

24 A That's correct.

25 Q You also created 9.4; is that right?

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- 1 A Yes, I did.
- 2 Q What is that?
- 3 A Item 9.4 was -- they wanted to know who actually  
4 wore this particular shirt. What we do is we go on  
5 the inside of the collar of a shirt. What we do is  
6 we scrape down the inside where your neck perhaps  
7 rubs against the shirt. We scrape it down and we  
8 have a clean swab where we swab the scrapings, and  
9 we let it dry and we send that up for further  
10 testing. That was 9.4.
- 11 Q Let me show you a bag and its contents and ask if  
12 you recognize it, ma'am.
- 13 A Yes, sir, I do.
- 14 Q What are those?
- 15 A Item 9.2 is a cutting from the shirt, 9.3 is a  
16 cutting from the shirt, and 9.4 is a swab from the  
17 shirt.
- 18 Q Ms. Butler, when you cut 9.2 out -- and you are  
19 going to send it on to D.N.A. for analysis;  
20 correct?
- 21 A That's correct.
- 22 Q So once you cut it -- and you are using gloves and  
23 not cross contaminating it or anything?
- 24 A That's correct.
- 25 Q Once you cut it, do you put it inside this

1 envelope?

2 A Yes, I do. We put it into this envelope because  
3 every item has to -- everything has to have an item  
4 number for tracking. We put 9.2 and put the lab  
5 Number, L-10-7793.

6 We put exactly where it's from on the shirt.  
7 We check off "cutting." Once we put it in here, we  
8 close it up. We put our initials and the date that  
9 we are processing it.

10 Q Do you know the date that you sealed these?

11 A Let me double-check. It says 9/20/10. I looked on  
12 my chain. It also says 9/20/10.

13 Q That's sealed with tape and written across to make  
14 sure nobody tampers with it; correct?

15 A That's correct.

16 Q As to the next one, do you know -- that was the one  
17 from the center of the shirt -- is that correct --  
18 9.2?

19 A Nine point two, yes, it was.

20 Q Do your notes reflect what you saw and  
21 presumptively found to be blood, was that on the  
22 inside or the outside? Or could you tell?

23 A Nine point two was a cutting from the outside.

24 Q Nine point three was the cutting from the bottom of  
25 the shirt; is that correct?

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1 A That's correct.

2 Q Were you able to determine from your examination  
3 whether that was on the inside of the shirt or the  
4 outside?

5 A It was from the outside of the shirt.

6 Q Let me hand you another item and ask if you  
7 recognize that envelope?

8 A Yes, I do.

9 Q Is that the item that you put 9.3 into and sealed,  
10 initialed, and dated?

11 A That's correct.

12 Q Let me hand you another item, 9.4, and ask if you  
13 recognize that?

14 A Yes, I do.

15 Q Is that the swab that you took after making  
16 scrapings from the collar?

17 A Yes, it is.

18 Q And you put that swab inside that envelope and  
19 sealed it and labeled it?

20 A Yes, I did.

21 Q There is also a plastic bag up there. What is  
22 that?

23 A This plastic bag, once we do the cuttings and the  
24 swabs, we have to seal this plastic bag, which we  
25 call a heat-seal pouch. We put these swabs into a

1 bag. Once we seal it, we have to put our initials  
2 on it and the date that we seal it.

3 Q So you were pointing to like a black sharpie  
4 writing on there. What were you pointing to?

5 A Those are my initials, B.W.B., and the date that I  
6 sealed it, 10/20/10.

7 Q Now, if somebody else goes into the bag later at  
8 S.L.E.D., the policy is to do what?

9 A They'll seal it back and they will notate it. They  
10 have their initials on it.

11 Q They don't cut through your seal though; do they?

12 A No, sir, they don't.

13 MR. GRAHAM: Your Honor, at this time the  
14 State offers these three envelopes and the bag into  
15 evidence.

16 MR. MADSEN: Judge, we would renew our  
17 objection under foundation, chain of custody, and  
18 Crawford versus Washington.

19 THE COURT: I will admit it. The previous  
20 order will stand with reference to that issue.

21 (State's Exhibits Number 70-73 are received  
22 into evidence.)

23 BY MR. GRAHAM:

24 Q Ms. Butler, once you put all those items in there  
25 and sealed it, what do you do with it?

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- 1 A That particular 9.2, 3, and 4, once I put it all in  
2 there, on this particular item I put -- we have a  
3 secure room in the D.N.A. area that we go and we  
4 put that particular heat-sealed pouch into a folder  
5 where we have to use our key to get into it. We  
6 put it into a file and we close it.
- 7 Q Once you made your cuttings, the original box that  
8 the shirt was in, what would you have done with  
9 that?
- 10 A Once we make the cutting of the shirt, we seal --  
11 this is what we do to process. We seal it back up.  
12 We put the item number, our initials, the date, and  
13 the lab number. We seal it up, put it back into  
14 the box. We have to seal the box, and then I take  
15 it back to the evidence control department.
- 16 Q So just like those themselves when you are done  
17 with the shirt, you put it back in here, seal it,  
18 tape it, initial it and send it back on its way?
- 19 A That's correct.
- 20 Q Ms. Butler, in addition to processing the shirt and  
21 making the cuttings, did you also look at a handgun  
22 in this case?
- 23 A Yes, I did.
- 24 Q Let me show you State's Exhibit Number 48 and ask  
25 if you recognize this item?

1 A Yes, I do. This is item 6.0.

2 Q Sixteen maybe?

3 A I'm sorry. Sixteen point zero.

4 Q S.L.E.D. item 16 is a .380 handgun?

5 A That's correct.

6 Q What were you asked to do on that item?

7 A This particular item was supposed to be for the  
8 presence of touch or ownership. What we do here is  
9 we go to the area where most people touch the gun,  
10 which is the trigger area here (indicating) and the  
11 handle. We do that first with one swab, and after  
12 we swabbed this, we go back and we swab the whole  
13 entire gun.

14 Q When you received that box, State's Exhibit  
15 Number 48, was it properly sealed and secured?

16 A Yes, it was.

17 Q And you cut into it, removed that item, and then  
18 you processed it. How did you process that? When  
19 you swabbed it, what do you create from doing that?

20 A Once I get this particular item, every item has to  
21 have a different item number. The item number was  
22 16.1 of the trigger and handle, and the other item  
23 number for the whole body of the gun was 16.2.

24 Q Let me show you another plastic bag with two gold  
25 small envelopes inside and ask if you recognize

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1 that.

2 A Yes, I do.

3 Q Are those, in fact, the items that you created, the  
4 two swabs that you were just discussing, 16.1 and  
5 16.2?

6 A Yes, it was.

7 MR. GRAHAM: Your Honor, at this time the  
8 State would introduce those into evidence.

9 MR. MADSEN: No objection.

10 THE COURT: Without objection.

11 (State's Exhibit Number 74 is received into  
12 evidence.)

13 BY MR. GRAHAM:

14 Q Ms. Butler, looking at State's Exhibit Number 74,  
15 what is that?

16 A State's Exhibit 74 is our item 16.1 and 16.2, the  
17 swabs from the handle and the trigger and the swab  
18 from the body area.

19 Q Is it true then that just as we discussed before,  
20 you made those swabs, you put the swabs in the  
21 envelope, you sealed it, put your initials and date  
22 on it? You put one in the other one, you put your  
23 initials, sealed it, and then you eventually put  
24 that inside a heat-seal bag?

25 A That's correct.

1 Q And you passed it on?

2 A And I passed it on.

3 Q Referring back to State's 48, the gun. When you  
4 were done processing and taking these swabs, what  
5 did you do with this box?

6 A That particular box right there, I sealed it up, as  
7 before with the white paper, put the item number,  
8 which is 16.0, the handgun, my initials, the date.  
9 That particular item had to go straight to Michelle  
10 in our firearms department.

11 Q Michelle Eichenmiller?

12 A Yes, sir.

13 Q And that's who you relinquished custody of this to?

14 A That's correct.

15 Q Thank you, Ms. Butler. Please answer any questions  
16 the defense has.

17 **CROSS EXAMINATION**

18 BY MR. MADSEN:

19 Q Ms. Butler, when evidence is submitted to the South  
20 Carolina Law Enforcement Division or S.L.E.D.,  
21 there can be a request made by law enforcement  
22 about what they want done to that piece of  
23 evidence; correct?

24 A That's correct.

25 Q And sometimes with a piece of evidence, there can

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1 be multiple requests for the same piece of  
2 evidence; can't there?

3 A That's correct.

4 Q They can make a request for D.N.A. They can make a  
5 request for latent prints. S.L.E.D. is just kind  
6 of all encompassing and can test for multiple  
7 things; correct?

8 A That's correct.

9 Q And in the firearm that you talked about, which was  
10 State's Exhibit Number 48, I believe the request  
11 was just for D.N.A., not for latents?

12 A On looking at the log-in sheet from my notes, it  
13 says blood, firearms, and touch.

14 Q So just --

15 A Those were the three requests.

16 Q Blood, firearm, and touch, not latents?

17 A No, it didn't say latents. It said blood, firearm,  
18 and touch.

19 Q And one thing that you said that kind of confused  
20 me. On State's Exhibit Number 9, which was the  
21 T-shirt, when you end up doing swabs of areas, is  
22 it just potential D.N.A. that comes off of it or in  
23 9.2 and 9.3 is it definitely -- you said something  
24 about a presumptive test for blood or is it just  
25 potential D.N.A. in that area that you swab and

1           then send on?

2   A    Item 9.2 and 9.3 was for the presumptive testing of  
3       blood. Item 9.4 was the potential for the skin  
4       cells.

5   Q    Ultimately, since the jury doesn't see inside of  
6       those, there is not a boatload of blood on those  
7       when you swab them; is there?

8   A    On my notes it says, "Representative samples  
9       collected." So that means there was some more  
10      areas where there was the possibility of blood on  
11      the shirt.

12   Q    I'm just talking about 9.3. In other words, it's  
13      not saturated or anything like that; is it?

14   A    Right now I don't remember. I would have to look  
15      at the cutting to see if it was saturated or not.

16   Q    And there is no way that when you take those  
17      cuttings that you can determine how that blood had  
18      gotten on that shirt; can you?

19   A    No, I cannot.

20   Q    You can't tell if it was on the ground or someone  
21      stepped on it or -- there is just no way for you to  
22      tell how it gets on there?

23   A    That's correct.

24   Q    No way to necessarily tell when it gets on there,  
25      except for sometime prior to when you do the swab;

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1 correct?

2 A That's correct.

3 Q And if someone was given something that had blood  
4 on it and they handled it or touched their shirt,  
5 that could end up being blood that ends up on that  
6 shirt transferring from something else; couldn't  
7 it?

8 A That's a possibility.

9 MR. MADSEN: That's all the questions I have.

10 THE COURT: Can this witness come down?

11 MR. GRAHAM: Yes, Your Honor.

12 Thank you, Ms. Butler.

13 (Witness leaves the witness stand.)

14 THE COURT: Mr. Foreman, and ladies and  
15 gentlemen, we will take a very short break. Please let  
16 the bailiff know when you are ready to come back out.  
17 Subject to the call of the Court, this will be a short  
18 break.

19 (The jury retires to the jury room.)

20 (Whereupon there is a recess.)

21 THE COURT: Is the State ready to proceed?

22 MR. HUBBARD: Yes, sir.

23 THE COURT: Is the defense ready?

24 MR. MAULDIN: Yes, Your Honor.

25 THE COURT: Bring the jury in, please.

1 (The jury returns to the courtroom.)

2 THE COURT: Call your witness, please.

3 MR. HUBBARD: Yes, sir. The State calls  
4 Michelle Eichenmiller.

5 MICHELLE EICHENMILLER, being  
6 first duly sworn, testifies as follows:

7 CLERK: State your full name, spelling your  
8 last on the record, please.

9 THE WITNESS: My name is Michelle  
10 Eichenmiller, E-I-C-H-E-N-M-I-L-L-E-R.

11 DIRECT EXAMINATION

12 BY MR. HUBBARD:

13 Q Agent Eichenmiller, where do you work?

14 A I work for the South Carolina Law Enforcement  
15 Division, commonly known as S.L.E.D.

16 Q How long have you worked there?

17 A Approximately five and a half years.

18 Q What department do you work in?

19 A I work in the firearms department in the forensic  
20 lab.

21 Q When you say firearms department, what takes place  
22 in the firearms department?

23 A Firearms analysis is a forensic science that deals  
24 with firearms and anything that might have come out  
25 of a firearm. There is also other little

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1 examinations that we do relating to that, such as  
2 general rifling characteristics or serial number  
3 restorations.

4 Q What education and training do you have to work in  
5 that department?

6 A I have a Bachelor's degree in biology and  
7 psychology, and then I have a Master of Science in  
8 forensic science.

9 MR. MADSEN: Judge, we would stipulate to her  
10 qualifications.

11 MR. HUBBARD: I offer her as an expert, Your  
12 Honor, in firearms examination.

13 THE COURT: So qualified as an expert.

14 MR. HUBBARD: Thank you, Your Honor.

15 BY MR. HUBBARD:

16 Q Agent Eichenmiller, will you please tell us, when  
17 you are given evidence in a case, say, a pistol or  
18 some bullets or spent shells, what do you do?

19 A I retrieve the evidence from log in. It will be in  
20 sealed containers. Then I will take pictures  
21 overall of what the packaging looks like. Then I  
22 will open it and take pictures of any evidence that  
23 is in there and then any markings that are on any  
24 firearms or cartridge cases or anything close up;  
25 so that I have complete documentation.

1           Then we have forms that we have to fill out --  
2           writing that all down -- so we have it for later.  
3           Then I will test the function, make sure it's a  
4           safe gun to operate, see if it has any safeties,  
5           see if it has anything wrong with it before I test  
6           fire it.

7           Then I will take it into our bullet recovery  
8           room where we have a water tank that's two stories  
9           deep. It goes from the second floor of the  
10          building to the first. I will shoot the gun into  
11          the water, and then I will retrieve the bullets and  
12          cartridge cases.

13          We shoot into water so that the markings that  
14          are put on the bullet or the firearm aren't impeded  
15          by anything else. Water doesn't make or take away  
16          any markings; so that's why we shoot into water.

17          I bring the test fires back to my office, and  
18          if there is anything from the scene, such as  
19          bullets or cartridge cases, I will put my test  
20          fires up on my comparison microscope. Then I will  
21          put the evidence against it and see if I can  
22          determine if they were fired by one firearm.

23          Q       So you look at the evidence that comes in, any  
24          markings on a bullet that might have been fired at  
25          a crime scene. Then you take whatever weapon is

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- 1 given to you that is found as well, and you fire  
2 that with clean ammo into a water tank?
- 3 A Correct.
- 4 Q This water tank, is it one of those several stories  
5 high? You are up on what floor?
- 6 A We are on the second floor, and the water tank goes  
7 down to the first floor; so it's two stories high.
- 8 Q Is that just to break down the speed of the bullet?
- 9 A Correct.
- 10 Q So it's pristine?
- 11 A Right.
- 12 Q And I take by your testimony, you were saying that  
13 all the markings on that bullet, you would conclude  
14 came from the gun?
- 15 A Right. Because I did the test firing, I know for  
16 certain it came from that gun and not from another  
17 gun.
- 18 Q Now, in this case, in the case of William  
19 Brockmeyer, were you asked to review some items?
- 20 A Yes, I was.
- 21 Q I will show you what has been marked State's  
22 Exhibit 48 and see if you recognize that.
- 23 A Every time I get a piece of evidence, I mark it  
24 with the case number, the item number, and my  
25 initials. That's what I am looking for, and I see

1           it on here. So this is the same gun that I looked  
2           at.

3    Q       When that gun was delivered to you, was it sealed  
4           and taped and packaged?

5    A       Yes.

6    Q       And then you opened it?

7    A       Yes.

8    Q       Let me see if you can identify some other pieces of  
9           evidence that were presented, State's 28, State's  
10          53, 49, and 42.

11   A       The same thing, with fired evidence or anything  
12          else that I receive in a case, I will write with an  
13          electric pencil so it's on there permanently the  
14          lab number, the item number, and my initials.

15                 State's Exhibit 28 was a fired cartridge case  
16          that I examined. State's Exhibit 53 is a fired  
17          bullet that I looked at. State's Exhibit 42 and 49  
18          are unfired cartridges that I looked at.

19   Q       Did you examine all of those items?

20   A       I did.

21   Q       And did you do it in accordance, as you explained,  
22          what you typically do with firearm evidence?

23   A       Correct.

24   Q       What conclusions, if any, did you come to?

25   A       After looking at this bullet underneath the

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1 microscope with the test fires, I determined that  
2 that bullet was fired by that pistol that was  
3 submitted, and the cartridge case was also fired by  
4 that gun.

5 MR. MADSEN: Judge, I would simply renew my  
6 previous objections under the chain of custody.

7 THE COURT: With reference to this issues, let  
8 me hear your specific objection.

9 MR. MADSEN: Under the chain of custody, under  
10 the proper foundation, and then also under Crawford  
11 versus Washington.

12 THE COURT: Where is it that you allege is a  
13 deficiency in the chain of custody?

14 MR. MADSEN: I think it was prior to this, but  
15 I think I am required to renew my objection at this  
16 point in time.

17 THE COURT: I want to hear with specificity  
18 what is your objection to this particular testimony?

19 MR. MADSEN: Just the laying of the foundation  
20 and the chain of custody on the items that she is  
21 testifying to.

22 THE COURT: You keep referring to the chain of  
23 custody. Where is it in your opinion deficit?

24 MR. MADSEN: Judge, the same things I  
25 testified [sic] to as to hearsay and the business

1 records exception that Your Honor had ruled upon  
2 previously. I believe I am required to renew it at this  
3 point in time.

4 THE COURT: On the business only. Okay. My  
5 ruling on that speaks for the record.

6 MR. MADSEN: Thank you, Your Honor.

7 BY MR. HUBBARD:

8 Q Agent Eichenmiller, State's 28 is a what?

9 A It's a fired cartridge case and a .380 auto  
10 caliber.

11 Q What is a cartridge case?

12 A It's a part of a cartridge. A cartridge is three  
13 parts. It has gun powder. It will have a primer.  
14 It will have a bullet. Then the case holds it  
15 altogether like a package.

16 When it's fired the bullet, of course, will  
17 come out of the barrel, the gun powder burns up,  
18 and then the cartridge case also will get marks on  
19 it from the firearm.

20 Q Is that what we often refer to as the brass?

21 A Yes.

22 Q So it's got a gold color?

23 A Most of them are gold. Some of them are silver.  
24 Some could be gray.

25 Q And in this case are they brass?

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1 A Yes.

2 Q Let me ask you this: The unfired bullets, were  
3 they of the same make as the casing or the brass?

4 A Yes. They were all the same head stamp, which led  
5 me to believe it was the same manufacturer.

6 Q What was that manufacturer?

7 A It's Aguila.

8 Q Aguila and it's a .380?

9 A Correct.

10 Q And .380 is a caliber of a pistol?

11 A Yes, of this pistol.

12 Q Of this particular pistol.

13 MR. HUBBARD: Your Honor, may I pick the  
14 pistol up out of the box? It's got a safety on it for  
15 the record, Your Honor.

16 THE COURT: It's unloaded?

17 MR. HUBBARD: Yes, it is unloaded.

18 BY MR. HUBBARD:

19 Q Agent Eichenmiller, we have a projectile, State's  
20 53, from the autopsy delivered to you for testing?

21 A Correct.

22 Q By your testimony you are saying this projectile  
23 was fired by this pistol, which is State's 48? Is  
24 that your testimony?

25 A Correct.

1 Q Now, this pistol, this is kind of -- I've never  
2 heard of a pistol like this. Where is this pistol  
3 from?

4 A It's from Czechoslovakia.

5 Q Is this a particularly old model?

6 A This one is. It's a model 1924. So it was made  
7 either during 1924 or shortly after, but it was a  
8 short run too.

9 Q Does it have any safety features on it?

10 A It actually has a couple of different safeties. It  
11 has --

12 Q And if you would, if you don't mind, just pick it  
13 up so you can show the jury since you verified it  
14 is unloaded and there is a lock on it.

15 A Right. It has a safety right here (indicating).  
16 It's a thumb safety. To engage the safety, the  
17 only way you can actually put the safety on is when  
18 the hammer is down or cocked. So that means it's  
19 ready to fire.

20 But if you put the safety on, then it won't.  
21 You will hear that click. That means it's on and  
22 won't shoot. Then to release the safety, there is  
23 a little button underneath. Now it's ready to go  
24 again.

25 There is also a magazine safety. This gun

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1 won't operate without the magazine in it. The  
2 disconnect for that is way in the magazine well.  
3 You actually have to have something in there for it  
4 to engage the magazine safety. Otherwise, it won't  
5 fire.

6 Q Let me ask you a few other follow-up questions on  
7 that. So like most pistols, this has safety  
8 mechanisms?

9 A Correct.

10 Q In order to fire this pistol, when you pull the  
11 trigger and for it to fire, must there be a round  
12 or a bullet already in this chamber?

13 A Yes.

14 Q How do you get a round in the chamber?

15 A In the operation of a firearm?

16 Q Yes.

17 A You know a magazine is the little box that holds  
18 ammunition. You put the magazine up into the gun,  
19 and there is nothing in the chamber right now. But  
20 when you pull the slide back -- this is a  
21 semiautomatic pistol -- when you pull the slide  
22 back, it will take the first cartridge off the top  
23 of the magazine and put it in the chamber.

24 Now the gun is loaded. So then you can put  
25 the safety on if you want or you can shoot. You

1 are ready to shoot. During the action of the gun,  
2 a semiautomatic pistol will use part of the recoil  
3 in order to operate the slide.

4 After the gun powder ignites and there is a  
5 little explosion, the bullet comes out the front.  
6 Meanwhile, the slide is pulling to the rear. The  
7 cartridge case will come ejecting out.

8 When the slide comes forward again, it will  
9 take the next cartridge off the top of the  
10 magazine, and the gun is ready to go again. That's  
11 semiautomatic operation. It will keep going as  
12 long as you pull the trigger and there's cartridges  
13 in the magazine.

14 Q If there is one in the round and the magazine is in  
15 the bottom, properly inserted, and the safety is  
16 off, you pull the trigger and it will fire; is that  
17 correct?

18 A Correct.

19 Q The safety on, it will not fire?

20 A No.

21 Q If you have a round in the chamber up here  
22 (indicating) ready to go, but you take this  
23 magazine out, will this pistol fire?

24 A This one will not.

25 Q So basically you have two ways to keep this pistol

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1 from firing, other than not pulling the trigger?

2 A Yes.

3 Q The safety and taking the magazine out?

4 A Right.

5 Q If you want to fire it, you've got to load it up,  
6 pull the slide back, put one in the chamber, and  
7 take the safety off?

8 A Correct.

9 Q In test firing this pistol, did it work and operate  
10 with any difficulty or did it operate okay?

11 A With the exception of the fact that I didn't  
12 receive a magazine with this pistol, it operated  
13 just fine. After we had to manually disengage the  
14 safety, it fired just fine.

15 Q So with the magazine engaged in the pistol, it  
16 operates just fine?

17 A Correct.

18 Q Trigger pull, what do we mean by the word trigger  
19 pull?

20 A The trigger pull is the weight it takes to pull the  
21 trigger to the rear to get the gun to fire. All  
22 guns are different. They could have all the way  
23 from a 2-pound trigger pull, which is considered  
24 light, to 12 or 15 for some revolvers.

25 This gun in particular had a 6-pound trigger

1 pull, which is about six cans of coke, but think  
2 about it as one finger, six cans of coke, pulling  
3 the trigger to the rear. That's how much force it  
4 takes to get this gun to fire.

5 Q So it's like lifting a six-pack with one finger?

6 A Correct.

7 Q I want to show you State's Exhibit 45 and 46. Are  
8 these photos of the same pistol or do they appear  
9 to be?

10 A Yes, it appears to be the same pistol.

11 Q In these photos, in 45 and 46, what would you refer  
12 to the situation that we have here when you find a  
13 pistol as it appears in these photos?

14 A That would be what we call a jam.

15 Q What could cause a jam like this?

16 A It could be any number of a variety of reasons. It  
17 could be something that interfered with the slide  
18 movement of taking that cartridge off the top of  
19 the magazine and putting it into the chamber.

20 It could be a user error. It could be  
21 something that the operator did. It could be  
22 something on the ammunition, say, there was a  
23 little burr or something on the ammunition that got  
24 it stuck.

25 It could be that the magazine -- the next one

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1 in the magazine -- pushed the cartridge out of the  
2 way or something. It could be that somebody tried  
3 clearing it and didn't get it all the way open. It  
4 could be it was dropped. It could be any number of  
5 things that could have made that happen.

6 Q If it were pressed against something, could that  
7 cause a jam?

8 A It might.

9 Q So the weapon would initially fire?

10 A Correct.

11 Q But when that slide goes to refeed, it's  
12 obstructed? Is that what I'm hearing?

13 A Correct.

14 Q And that could cause the jam that we see in those  
15 photos?

16 A It might. It would have to be something really  
17 shoved up there to get it to jam.

18 Q Thank you. Please answer any questions the defense  
19 has.

20 **CROSS EXAMINATION**

21 BY MR. MADSEN:

22 Q Ms. Eichenmiller, you tested the gun for the  
23 trigger pull; correct?

24 A Correct.

25 Q And I think if we look in that, things can affect a

- 1 trigger. I think you said that on a handgun, you  
2 can go from 2-pounds of pressure, which would --  
3 would that be kind of what they classify as a hair  
4 trigger?
- 5 A With firearms in general, they could have a 2-pound  
6 trigger pull or all the way up to 15.
- 7 Q So all the way up to 15. This one ended up having  
8 a 6-pound trigger pull?
- 9 A Correct.
- 10 Q If the gun had been in some rain and there was some  
11 rust, that can affect pounds per pressure as far as  
12 the trigger pull; correct?
- 13 A It might but it would have to be there for a while.
- 14 Q When did you end up testing the gun?
- 15 A I'm sorry?
- 16 Q The date that you ended up doing your tests?
- 17 A If I can refer to my notes.
- 18 Q Would it have been August 11, 2010?
- 19 A No, I had finished the case by then. It was  
20 sometime between August 5 and August 9.
- 21 Q Of 2010?
- 22 A Correct.
- 23 Q You generated the report on the 11th?
- 24 A Oh, yeah.
- 25 Q Then ultimately if I understand how you said the

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- 1 gun works, on a semiautomatic pistol like this,  
2 once it's fired, the slide comes back and the  
3 cartridge casing is ejected?
- 4 A Correct.
- 5 Q And if I understand the way a bullet -- is it  
6 called a projectile? Would I call the unspent,  
7 would that just be a bullet?
- 8 A The unfired cartridge.
- 9 Q The unfired cartridge. If I understand kind of the  
10 way an unfired cartridge works, a hammer comes  
11 down, strikes a primer in the back of a bullet.  
12 There is powder within that casing and then the  
13 actual projectile that comes out is on the other  
14 side of that; correct?
- 15 A Correct.
- 16 Q So once the primer ignites the powder, the bullet  
17 goes down the gun barrel?
- 18 A Correct. The pressure from the gun powder, the  
19 combustion of the gun powder, causes the bullet to  
20 go out the front end.
- 21 Q Kind of ultimately what we talk about G.S.R. is  
22 that kind of black powder?
- 23 A You are referring to what comes out of the gun?
- 24 Q Correct.
- 25 A Correct.

1 Q And so ultimately, if I understand correctly, on a  
2 gun like this, then once that is ignited, the  
3 powder -- the bullet goes out and the casing will  
4 end up coming out of the gun somewhere?

5 A Correct.

6 Q And if I take a gun and I get it ready to fire and  
7 pull back the slide and leave one in the chamber  
8 and turn the safety off then, whether I decide to  
9 fire it a minute from now or five hours from now,  
10 once I end up putting it in that position, it's  
11 ready to fire unless I do something to change that  
12 safety?

13 A Correct.

14 Q Or as in this case, I guess you could end up taking  
15 out a magazine and it has what is called a magazine  
16 safety?

17 A Correct.

18 Q The photographs that they have shown you in this,  
19 it is a possibility that a gun is dropped and  
20 that's how it ends up with the jam?

21 A It could be.

22 MR. MADSEN: That's all the questions I have.

23 MR. HUBBARD: Nothing further.

24 THE COURT: You may come down.

25 (Witness leaves the witness stand.)

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1 MR. GRAHAM: The State calls Melissa Skipper  
2 Wallace.

3 MELISSA SKIPPER WALLACE,  
4 being first duly sworn, testifies as follows:

5 CLERK: State your full name, spelling your  
6 last on the record, please.

7 THE WITNESS: My name is Melissa Skipper  
8 Wallace.

9 DIRECT EXAMINATION

10 BY MR. GRAHAM:

11 Q Ms. Wallace, where are you employed, ma'am?

12 A I am employed by the South Carolina Law Enforcement  
13 Division, commonly known as S.L.E.D.

14 Q And how long have you worked for S.L.E.D.?

15 A Just over six years.

16 Q And how long have you had any law enforcement  
17 experience at all?

18 A I've been a police officer in South Carolina for  
19 ten years.

20 Q In your career at S.L.E.D., what have you done?

21 A I am currently assigned to the latent print and  
22 crime scene department at S.L.E.D.

23 Q And how long have you been with the latent print  
24 and crime scene department?

25 A Six years.

1 Q What is your educational background?

2 A I have a Bachelor of Science degree in mathematics  
3 from the University of South Carolina. I am a  
4 certified police officer in the State of South  
5 Carolina.

6 I have also successfully completed courses in  
7 blood stain pattern analysis, advanced blood stain  
8 pattern analysis, crime scene reconstruction and  
9 processing violent crime scenes.

10 I have also successfully completed the  
11 S.L.E.D. latent print crime scene department's two  
12 year in-house training program under  
13 court-qualified senior examiners.

14 Q Have you ever been qualified as an expert in blood  
15 stain pattern analysis before?

16 A Yes, I have, approximately five times.

17 MR. GRAHAM: Your Honor, at this time the  
18 State would offer Ms. Wallace as an expert in the area  
19 of blood stain pattern analysis.

20 MR. MADSEN: No objection.

21 THE COURT: I find her so qualified and her  
22 qualifications are without objection.

23 MR. GRAHAM: Thank you, Your Honor.

24 BY MR. GRAHAM:

25 Q Ms. Wallace, did you have an opportunity to review

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- 1 and process some items related to S.L.E.D. lab  
2 number L-10-07793?
- 3 A I did.
- 4 Q What were you asked to do?
- 5 A If I can refer to my notes?
- 6 Q Please do.
- 7 A I was asked to examine a shirt, a pair of  
8 underwear, a pair of socks, a pair of shorts, a  
9 bluetooth device, and some photographs for blood  
10 stain pattern analysis.
- 11 Q Let me show you some items and ask if you recognize  
12 them. State's Exhibit Number 12?
- 13 A Yes. State's Exhibit 12 is the bluetooth device  
14 that I examined.
- 15 Q Let me show you State's Exhibit Number 9.
- 16 A State's Exhibit 9 are the underwear, socks, and  
17 shorts that I examined.
- 18 Q And let me also show you State's 71 and 73 and ask  
19 if you recognize those?
- 20 A Yes. State's 71 is a cutting from a T-shirt and  
21 State's Exhibit 73 is a swab from a T-shirt.
- 22 Q Let me switch with you and show you State's 72.
- 23 A Okay. State's Exhibit 72 is also a cutting from a  
24 T-shirt.
- 25 Q Did you look at and visually examine those two

1 cuttings?

2 A I did.

3 Q And let me show you State's 25 and ask if you  
4 recognize that? There's some gloves if you need  
5 them.

6 A Thank you. State's Exhibit 25 is the T-shirt that  
7 I examined.

8 Q All those items that we just discussed -- the  
9 bluetooth, the two cuttings from the shirt, and the  
10 shirt itself -- did all those come to you properly  
11 sealed?

12 A Yes, they did.

13 Q Any evidence when they came to you that they had  
14 been tampered with?

15 A No.

16 Q As part of the request made to you for blood stain  
17 pattern analysis, did you process some of those  
18 items? Specifically did you do anything with the  
19 bluetooth?

20 A Yes. The bluetooth, blood was observed on two  
21 sides of the bluetooth. It was photographed and  
22 then swabs were collected from the bluetooth.

23 Q And how many swabs did you create from the  
24 bluetooth?

25 A One for blood and one was collected from the

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- 1 earpiece itself for touch D.N.A.
- 2 Q Those are what became items 23.1 and 23.2?
- 3 A Yes.
- 4 Q Additionally, did you go back and look at the shirt  
5 again, State's Exhibit Number 25?
- 6 A Yes, I did.
- 7 Q And did you take additional swabs from that shirt?
- 8 A I did.
- 9 Q Let me show you a bag containing four gold  
10 envelopes and ask if you recognize it?
- 11 A Yes, I do.
- 12 Q And are those the items that we just discussed?  
13 That would be the bag or envelope containing 23.2?  
14 Another envelope containing 23.1? If you need to  
15 cut into the bag you can.
- 16 A Please. Yes, these are the swabs that I collected  
17 from the bluetooth device and the T-shirt.
- 18 Q Once you created those, you put them in the  
19 envelope, sealed it, signed across it, and secured  
20 it; is that correct?
- 21 A That's correct.
- 22 Q Then you took those four envelopes and put them  
23 inside that plastic bag that you just cut?
- 24 A That's correct.
- 25 Q And you sealed it and initialed it and sent it on

1 its way to D.N.A.; right?

2 A That's correct.

3 MR. GRAHAM: Your Honor, at this time the  
4 State would offer the envelope and bag into evidence.  
5 He has stipulated to the bluetooth. I don't believe he  
6 has stipulated to the cuttings or swabs from the shirt.

7 MR. MADSEN: Right. Judge, I would just renew  
8 my objection. Like he said, I think there is a couple  
9 of swabs that I stipulated to, a couple that I didn't,  
10 but they are introducing them all as one exhibit.

11 MR. GRAHAM: We can do it separately, Your  
12 Honor.

13 THE COURT: For the record let's do it  
14 separately so there will be no question about it.

15 MR. MADSEN: Obviously, Judge, the ones I  
16 object to was under the same thing that I had previously  
17 done --

18 THE COURT: I understand.

19 MR. MADSEN: -- as to chain of custody.

20 THE COURT: I will respectfully overrule your  
21 objection. For the record let's do it separately.

22 MR. MADSEN: And Crawford versus Washington,  
23 the foundation. The bluetooth ones, I think I had  
24 stipulated to previously.

25 THE COURT: Other than bluetooth, which ones

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1 are you talking about?

2 COURT REPORTER: Let me mark them, Judge, and  
3 it might be easier.

4 MR. GRAHAM: For the record the defense is  
5 stipulating to 78 and 79, which are the swabs from the  
6 bluetooth. They are objecting to 76 and 77.

7 THE COURT: The record will reflect and note  
8 his objection and my ruling thereupon.

9 (State's Exhibits Number 76-79 are received  
10 into evidence.)

11 BY MR. GRAHAM:

12 Q Ms. Wallace, what is blood stain pattern analysis?

13 A The examination of a crime scene or evidence using  
14 the physical properties of blood possibly to  
15 determine a manner of deposition or origin of those  
16 blood stains.

17 Q When you looked at what was S.L.E.D. item Number 9,  
18 which is State's 25, the Sean John shirt and the  
19 cuttings that Betty Butler had taken from the shirt  
20 previously, when you viewed that shirt and the  
21 cuttings, what was your impression of the blood  
22 that was on there?

23 A There were small multiple stains all over the  
24 shirt. It was unable to be determined if there was  
25 any type of specific pattern type or how those

1 blood stains were deposited on the shirt.

2 Q Hypothetically, assuming the two swabs that you  
3 took later by D.N.A. proved to be blood and the two  
4 cuttings that Ms. Butler had created were blood,  
5 how many other places, besides those four places,  
6 was there blood on the shirt? And can you describe  
7 the various locations of all the blood that you  
8 saw?

9 A Blood that I collected was from the front left  
10 shoulder and inside the lower front edge of the  
11 shirt. There was also, the cuttings were taken --  
12 I think one was taken off the front of the shirt.  
13 I'm not sure about the other one. The blood, it  
14 wasn't all concentrated in one area. It was spread  
15 throughout the shirt.

16 Q Were there also other places that you did  
17 presumptive tests for but didn't collect?

18 A Yes, I did.

19 Q How many of those did you find?

20 A There were two spots that I tested for possible  
21 blood stains: one on the back of the shirt and  
22 one on the front right arm of the shirt.

23 Q And besides those we have described, was there  
24 anything else that you believed to be blood on that  
25 shirt?

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1 A No.

2 Q We had briefly discussed earlier that you had  
3 looked at underwear, socks, and shorts. Did you  
4 find anything on those?

5 A I did not.

6 Q Of value?

7 A I did not.

8 Q The bluetooth headset device was the first thing I  
9 handed you in an envelope behind you. What did you  
10 find when you looked at that?

11 A There were two separate blood stains on the  
12 bluetooth. One stain was a larger volume of blood,  
13 which the blood -- there was enough volume there  
14 that it allowed it to flow.

15 The second stain appeared to be some type of  
16 transfer stain, which is just in this case a  
17 non-bloody item coming into contact with a bloody  
18 item. I wasn't able to determine where that could  
19 have come from or what type of pattern that was.  
20 It looked like a transfer stain.

21 MR. GRAHAM: Your Honor, if I can ask the  
22 witness to come down and bring that piece of evidence to  
23 show the jury?

24 THE COURT: You may do so and defense counsel  
25 are invited to come too.

1 (Witness leaves the witness stand.)

2 BY MR. GRAHAM:

3 Q This is the bluetooth headset that we have been  
4 talking about. Do you remember where on here the  
5 blood was?

6 A Yes.

7 Q Would you show the jury where it was.

8 A The transfer stain which I was referring to is up  
9 on the upper corner. That is actually still  
10 visible. The other stain was along the opposite  
11 side, and that was the larger stain that allowed  
12 the blood to actually flow.

13 Q There is not actually visible blood on there  
14 anymore. Why is that?

15 A There actually is. The transfer stain is still  
16 there.

17 Q The volume stain was taken with the swab that you  
18 created?

19 A It was.

20 Q Where is the transfer stain on here?

21 A Right there (indicating) on the back corner.

22 Q On the chrome part?

23 A Yes.

24 Q So a transfer stain is what?

25 A It's either when a bloody item comes into contact

- 1 with a non-bloody item or a non-bloody item comes  
2 into contact with a bloody item. Two items come in  
3 contact and blood was transferred from one to  
4 another.
- 5 Q Are you able to give an opinion of which item was  
6 originally bloody and which wasn't? Does this tell  
7 you whether this one originally had the blood on it  
8 or can you tell?
- 9 A That appeared it received the blood.
- 10 Q So it received the blood from another item?
- 11 A It looks that way.
- 12 Q You can have a seat. Thank you.
- 13 A (Witness resumes the witness stand.)
- 14 Q The second stain that was there, you talked about a  
15 volume of blood. What do you mean by that?
- 16 A In order for blood to actually flow on an object,  
17 it has to have more than, for instance, one blood  
18 stain. It has to come in contact with more than  
19 that to where gravity will actually cause it to  
20 run. That's what I mean by flow.
- 21 Q Would that be consistent with the bluetooth headset  
22 falling into a pool of blood?
- 23 A Yes, it could be.
- 24 Q And then there was no transfer from that stain to  
25 anything else; is that correct?

1 A It doesn't appear that there was. I can't say for  
2 sure.

3 Q So how many total locations on the shirt did you --  
4 we have two cuttings that were sent to D.N.A.;  
5 correct?

6 A That's correct.

7 Q And you created two swabs from different locations  
8 on the shirt and sent them to D.N.A.?

9 A That's correct.

10 Q And then you tested positive for phenolphthalein  
11 for how many other places?

12 A On the shirt?

13 Q Yes, ma'am.

14 A No other places.

15 Q No other places?

16 A No.

17 Q But looking at the shirt and the bluetooth, were  
18 you able to reach any conclusions as far as the  
19 pattern or transfer between the two?

20 A I wasn't able to come to any conclusion in  
21 reference to the shirt. In terms of the bluetooth,  
22 one of the witness statements that was provided to  
23 me, it's consistent with that statement that she  
24 picked it up from the pool of blood, and that could  
25 have been the manner of the blood being deposited

1 on that item.

2 Q And on the transfer stain on the bluetooth, it's  
3 your opinion that that item was transferred -- the  
4 blood was transferred onto the bluetooth; is that  
5 correct?

6 A For that transfer stain, yes.

7 Q Thank you. Please answer any questions the defense  
8 has.

9 **CROSS EXAMINATION**

10 BY MR. MADSEN:

11 Q Ms. Wallace, when you looked at the T-shirt, I  
12 believe you said that there was -- besides the  
13 cuttings -- that you had gotten some blood off of a  
14 left shoulder; is that correct?

15 A Yes, the front left shoulder.

16 Q The front left shoulder?

17 A Yes.

18 Q You had also said, I believe, on an inside edge?

19 A Yes, it was on the inside edge of the front of the  
20 shirt.

21 Q So kind of -- if a shirt hangs down, underneath the  
22 flap if you don't have the shirt tucked in?

23 A Yes.

24 Q And ultimately you can't say when or how those  
25 stains got on that shirt?

1 A That's correct.

2 Q And with your blood pattern analysis, I believe  
3 that there is something called high velocity blood  
4 spatter?

5 A Those terms aren't used anymore.

6 Q Well, what terms are used now in reference to that?

7 A Most terms used now are describing the stain  
8 themselves, not the manner in which they were  
9 deposited. The terms now just describe the stains  
10 themselves.

11 If there is other evidence around it that you  
12 can determine how it was actually deposited, then  
13 you can use that, but now it's used to describe the  
14 stain itself.

15 Q And there's ways within your expertise that you can  
16 determine if someone had, say, like a big puddle  
17 jumped into it and it had kind of gone out;  
18 correct?

19 A Sometimes.

20 Q If something is shot and it hits some blood, there  
21 can be blow-back or things like that that cause a  
22 specific type of pattern?

23 A That's correct.

24 Q From, say, like a firearm or bullet?

25 A Yes.

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1 Q You can't draw any conclusions on the shirt on  
2 this; correct?

3 A That's correct.

4 Q And ultimately if someone is handed something that  
5 is bloody, if they get it on their hands, it could  
6 be transferred some other way?

7 A That's correct.

8 Q If someone, say, takes an item off and throws it  
9 down or that item is crumpled up, in and of itself,  
10 it can transfer from one part of a shirt to another  
11 part of a shirt; could it not?

12 A It would depend on the volume of blood but, yes.

13 Q And there is a transfer stain on the earpiece;  
14 correct?

15 A That's correct.

16 Q You don't find any blood whatsoever on the shorts?

17 A That's correct.

18 MR. MADSEN: That's all the questions I have,  
19 Your Honor.

20 MR. GRAHAM: Nothing else, Your Honor.

21 Thank you, Ms. Wallace.

22 THE COURT: You may come down.

23 (Witness leaves the witness stand.)

24 THE COURT: How many more witnesses do you  
25 have this afternoon? One?

1 MR. GRAHAM: Yes, sir.

2 THE COURT: Let's take that witness and we  
3 will break.

4 Mr. Foreman, ladies and gentlemen, at the  
5 break in discussion with counsel, it's very probable  
6 that we are going to be able to conclude this case  
7 tomorrow. I tell you that so you can arrange your  
8 schedule accordingly. We are going to make every effort  
9 to do that.

10 Call your next witness.

11 MR. GRAHAM: Thank you, Your Honor. The State  
12 calls Paul Meeh to the stand.

13 PAUL FRANKLIN MEEH, being  
14 first duly sworn, testifies as follows:

15 CLERK: State your full name, spelling your  
16 last on the record, please.

17 THE WITNESS: My name is Paul Franklin Meeh,  
18 M-E-E-H.

19 **DIRECT EXAMINATION**

20 BY MR. GRAHAM:

21 Q Mr. Meeh, where are you employed, sir?

22 A I work for S.L.E.D., which is the South Carolina  
23 Law Enforcement Division.

24 Q And how long have you been with S.L.E.D.?

25 A Three and a half years.

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1 Q What is your educational background?

2 A I got my Biology degree from the University of  
3 South Carolina. I got my Master's degree there as  
4 well in biomedical science. I am currently working  
5 to finish my Ph.D. in biomedical science.

6 Q Where have you worked?

7 A In the past I did cancer research for the  
8 University of South Carolina. That was from 2000  
9 until 2008, and then I was hired away from there to  
10 S.L.E.D. That was during my Ph.D. work that I was  
11 hired away from the cancer research. I didn't  
12 complete it, and I have just currently returned to  
13 that.

14 Q What kind of specifically education or training do  
15 you have in D.N.A. analysis and interpretation?

16 MR. MADSEN: Judge, I would stipulate to his  
17 qualifications in those areas.

18 THE COURT: In D.N.A. analysis?

19 MR. MADSEN: Yes, Your Honor.

20 THE COURT: I accept the stipulation and it is  
21 agreed that he is an expert in that field. I have  
22 previously told you and defined for you an expert,

23 MR. GRAHAM: Thank you, Your Honor.

24 BY MR. GRAHAM:

25 Q Mr. Meeh, what is D.N.A. analysis and

1 interpretation?

2 A Well, what happens is I get body fluids or cells  
3 into the lab, and I try to identify the people from  
4 which they come.

5 Q In general what is D.N.A.?

6 A D.N.A. is in every one of your cells except for  
7 your red blood cells. It's the blueprint that your  
8 body is made from. It's what defines your  
9 proteins, and then the proteins define your body.

10 Q What are some examples of things that leave D.N.A.  
11 behind?

12 A Skin cells, pretty much anything you can imagine.  
13 It's in saliva because there is D.N.A. in the  
14 saliva, as well as cells in the saliva. It's in  
15 all of your body fluids. Anything but a red blood  
16 cell will have it.

17 Q It's not in a red blood cell?

18 A No. They eject nuclei but there are so many white  
19 blood cells in blood. That's where you get the  
20 D.N.A. from. If someone leaves blood behind, it  
21 would be from lymphocytes or red blood cells.

22 Q Did you have an opportunity to do an analysis and  
23 interpretation on S.L.E.D. number L-10-07793?

24 A Yes, I did.

25 Q And we will go through the items that were

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1 submitted to you. You received what you have down  
2 as item number 8, which is a blood stain from our  
3 victim Nicholas Rae?

4 A That's correct.

5 MR. MADSEN: Judge, can I just renew my  
6 original objection as to foundation, chain of custody,  
7 and also under Crawford versus Washington, although I do  
8 believe that some of the items that they are going to  
9 talk about I have stipulated to.

10 THE COURT: Even as to those you have not  
11 stipulated to, your objection is respectfully overruled.

12 MR. MADSEN: Thank you, Your Honor.

13 THE COURT: I conclude it is proper that this  
14 information be held for the jury.

15 MR. GRAHAM: Thank you, Your Honor.

16 BY MR. GRAHAM:

17 Q Mr. Meeh, when things are brought to you in the lab  
18 at S.L.E.D., they are sealed; is that correct?

19 A Yes, that's correct. They are in a heat-sealed  
20 pouch. I don't know if there are any -- there you  
21 go. That's an example of a heat-sealed pouch that  
22 would come to me.

23 Q If something came to you that was not properly  
24 sealed, would you analyze it?

25 A No, I would not.

1 Q Item number 8 that came to you as the blood  
2 standard from Nicholas Rae, when it came to you, it  
3 was properly sealed?

4 A Yes, that's correct.

5 Q You cut it opened and you developed a profile; is  
6 that correct?

7 A That's correct.

8 Q Item 9.2 is a cutting from a T-shirt, a  
9 short-sleeve T-shirt; is that correct?

10 A Yes.

11 Q Again, with all these items, I'm not going to ask  
12 the question over and over, but everything came to  
13 you properly?

14 A That's correct.

15 Q All sealed and not tampered with?

16 A If I did an analysis on it, if I did D.N.A.  
17 analysis on it, it was packaged correctly.

18 Q So you also looked at 9.2, which is a cutting from  
19 a shirt, and 9.3 -- what was that item that you  
20 looked at and analyzed?

21 A It's also a cutting from a shirt, a T-shirt.

22 Q Item 9.4, what was that?

23 A That's a swab from a short-sleeve T-shirt collar.

24 Q Item 9.5?

25 A That's a swab from the left front shoulder of a

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- 1 T-shirt.
- 2 Q Item 9.6?
- 3 A That's a swab from the front lower inside edge of a  
4 T-shirt.
- 5 Q Item number 12?
- 6 A That is a swab from the right palm of William  
7 Brockmeyer.
- 8 Q Item 15?
- 9 A That is a swab from a pistol magazine.
- 10 Q Item 16.1?
- 11 A That is a swab from a handgun handle and trigger.
- 12 Q Item 16.2?
- 13 A That is a swab from the handgun body area.
- 14 Q Item 19?
- 15 A That is a buccal -- it's actually two buccal swabs  
16 from William Brockmeyer.
- 17 Q Referring to 19, what is that?
- 18 A There were two swabs collected. I just said two.  
19 The word swabs is plural there.
- 20 Q Item 23.1?
- 21 A Swabs from an earpiece.
- 22 Q And item 23.2?
- 23 A That is a swab from the back side of the same  
24 earpiece.
- 25 Q You analyzed each and every one of those pieces or

1 items?

2 A That's correct.

3 Q How do you develop a profile?

4 A First we take the D.N.A. out of the nuclei from the  
5 cells, and then we quantify it to make sure how  
6 much we have. Then we amplify it. You can't  
7 visualize it. It's very small. You can't see it  
8 even under a microscope. I mean, you can see it  
9 under a microscope, but you need a high  
10 magnification.

11 In order to do the testing that we do, we have  
12 to have amplify it many times. So we take a small  
13 amount of D.N.A. and put it into a reaction and a  
14 lot comes out. It comes out labeled with  
15 fluorescent markers. Each of those fluorescent  
16 markers tell us something about the D.N.A.

17 So the profile I developed is a series of  
18 sizes of D.N.A. Each person has a different set of  
19 those sizes, and they are labeled differently in  
20 this reaction.

21 We run them on an instrument that reads them  
22 and outputs these numbers for us. It's a code.  
23 It's like -- imagine a gym locker code. It would  
24 be the same thing because everybody has a different  
25 code.

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1 Q How many -- D.N.A. has been described as a chain;  
2 is that right?

3 A That's correct.

4 Q And how many identified places are there on the  
5 chain?

6 A There are 3 billion base pairs. The parts that we  
7 work with are short stretches of those. It's not  
8 just single base pairs. We work with a stretch.  
9 That is a set of soft repeats.

10 What happened was when they initially  
11 sequenced the entire human genome, they found these  
12 repeats that everyone had. They were common to  
13 people. They had different lengths of those.

14 They really didn't think there would be any  
15 use for them originally, and then later on it  
16 became obvious that these could be used to identify  
17 people as individuals.

18 Q For the purposes of your testing, how many places  
19 on the D.N.A. chain do you at S.L.E.D. work with?

20 A Sixteen.

21 Q And is there also something else that you take as  
22 well off the chain? The X.Y. column, is that part  
23 of --

24 A Yeah. We work -- what he is indicating is there is  
25 a sex chromosome too. Females have two X.

1 chromosomes as their sex chromosomes. Males have  
2 one Y. and one X. is what he is referring to.

3 Q. How many parts to a -- are these loci? Is that  
4 what they are called?

5 A That's correct.

6 Q How many number -- because you were talking about  
7 numbers -- make up a loci?

8 A Well, that depends. That's the diversity. So each  
9 one has a set of numbers. The way that was first  
10 elucidated was the F.B.I. sat down with those  
11 stretches and figured out in populations how many  
12 representative numbers there were for each of those  
13 locations.

14 So when we measure 16 locations, each of those  
15 locations could have a possible 20 numbers in  
16 there, but you only have two numbers in there if  
17 you are heterozygous and one number in the  
18 homozygous.

19 Q What do those two terms mean?

20 A Heterozygous would mean that you got one from your  
21 dad and one from your mom that are different.  
22 Homozygous would mean that you got one from your  
23 dad and one from your mom that were the same  
24 length. We can't tell things apart if they are the  
25 same length. That's just a single number to us.

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1 Q Let me show you a chart and ask if you recognize  
2 the chart?

3 A Yes.

4 Q Is that the chart that contains the results of your  
5 D.N.A. analysis and actually explains your  
6 interpretation.

7 A Yes, it does.

8 Q Would it assist you in explaining to the jury what  
9 you did and what you found?

10 A It could.

11 MR. GRAHAM: Your Honor, the State at this  
12 time would like to put this on the projector and  
13 continue his testimony.

14 THE COURT: Have you shared it with defense  
15 counsel?

16 MR. GRAHAM: Yes, Your Honor.

17 THE COURT: You may do so.

18 MR. MADSEN: Judge, the only thing that we  
19 would object to is hearsay on this. We think he can  
20 certainly testify to any of his findings. As far as  
21 anything to the report itself, we don't think that would  
22 be appropriate.

23 THE COURT: I haven't heard his testimony. If  
24 you see something that you perceive to be objectionable,  
25 please raise it.

1 MR. MADSEN: Well, I think that they  
2 anticipate putting the -- or showing the document that  
3 he has created.

4 THE COURT: Well, if he can identify the  
5 document -- hasn't he identified the document?

6 MR. GRAHAM: He just did, Your Honor.

7 THE COURT: Go back through that for me again.

8 BY MR. GRAHAM:

9 Q This piece of paper that I showed you is a chart;  
10 is that correct?

11 A Yes.

12 Q Is that a chart that you created based on your  
13 analysis to assist you in your interpretation?

14 A Yes. This is the chart I created. It is the same  
15 as in my report.

16 THE COURT: The objection is overruled. Go  
17 ahead.

18 BY MR. GRAHAM:

19 Q Sometimes you get to develop profiles and sometimes  
20 you don't? Is that fair?

21 A That's correct. It depends on the quantity, I  
22 guess.

23 Q Some of the items that we discussed, were you able  
24 to -- were there some items that you did not get a  
25 profile on?

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- 1 A Yes, some of the items I was not able to develop a  
2 profile from.
- 3 Q What was one of the items that you were not able to  
4 develop a profile?
- 5 A Item 15.
- 6 Q What was that?
- 7 A That was a swab from the pistol magazine.
- 8 Q What would be a reason that you weren't able to  
9 develop a profile?
- 10 A There was either too little D.N.A. there or it was  
11 degraded.
- 12 Q So in the chart that you have got here, it says  
13 table 1, Identifiler. What does that mean?
- 14 A Identifiler is the name of a kit that we use in the  
15 lab. It's got all of these reactions in a single  
16 tube. So whenever we develop this profile, for  
17 example, if you see item 8 at the top, it says  
18 Nicholas Rae. That series of numbers across there  
19 is his pattern. That's his and his alone. That  
20 Identifiler is the kit that we used to generate  
21 those numbers.
- 22 Q All these columns here (indicating), they have  
23 different labels on top. You don't have to go into  
24 each one, but what does that mean?
- 25 A That's a locus. Each individual one is called a

1 locus. That's a region on your genome that you are  
2 querying, and the name gives you some indication as  
3 to where it's located. For example, that one says  
4 D-8-S-1179. That means it's on chromosome 8.  
5 That's the 1179th position on chromosome 8.

6 Q So number 8 -- which you said was the standard for  
7 the victim in this case Nicholas Rae; correct?

8 A Correct.

9 Q And we have numbers all the way across here. So if  
10 we go to the first column, that loci, there is a 10  
11 and 12. What does that mean?

12 A That mean he has one repeat that is the length of  
13 10, and he has one repeat that is the length of 12.

14 Q And for him you were able to develop numbers all  
15 the way across?

16 A Yes, that's correct. It was a blood standard; so  
17 we had plenty of D.N.A. to work with, and we can  
18 get a full profile from that.

19 Q And the column where the highlighter is, there is a  
20 single number again. What does that mean?

21 A He is homozygous there. That means of the two arms  
22 of the chromosome, his are both the same length.  
23 The repeat is the same length at that locus. So he  
24 has two 11s.

25 Q Looking at number 19; we again have developed a

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1 full profile. That is the profile for the  
2 defendant in this case. You developed numbers for  
3 that as well; is that correct?

4 A Yes, that's correct.

5 Q When we start our analysis, let's start down at the  
6 bottom. Item 23.2 what is that?

7 A It's a partial D.N.A. profile developed from the  
8 back side of an earpiece.

9 Q When you say a partial profile, what do you mean?  
10 When we look across this chart, what does it say --

11 A You see that many of the locations are missing.  
12 Also, the ones that are in parentheses there, that  
13 means that there were -- those are on the verge.  
14 At the bottom left-hand side, there is a little  
15 legend for the chart.

16 It says alleles between 75 and 49 R.F.U. What  
17 that means is the brightness. So if you are trying  
18 to observe these alleles on that instrument, if  
19 they are not bright enough, you really can't -- you  
20 kind of get lost on the information.

21 You are not as confident in the information.  
22 So that example, that 10, you are really not  
23 confident that that 10 is a really good  
24 measurement, but that 12 you can be confident.

25 Q So even though we see a 10 in parentheses and a 12

1 here (indicating), and we go up on Mr. Brockmeyer  
2 we see an 11 and on Mr. Rae we see a 10 and a 12  
3 there. Is there any conclusion that you can reach  
4 as far as item 23.2?

5 A No, I couldn't make a conclusive statement.  
6 Because in order to have a matched statement, you  
7 need locations where someone matches the evidence  
8 or matches whatever is in question. In this  
9 example it was just too partial. That profile was  
10 too partial for me to use the database to try to  
11 match that up against there.

12 Q That's the same for 23.1 and 23.2. That is  
13 Nicholas Rae; is that right?

14 A That's correct.

15 Q What, if anything, were you able to determine  
16 about Mr. Brockmeyer, item 19, his D.N.A. profile?  
17 Is he -- can that be his blood on those?

18 A No, he was excluded from that. None of the alleles  
19 matched up for him.

20 Q When you say alleles, those are the actual numbers?

21 A Yes, those numbers are referred to as alleles.

22 Q So when you are excluding it, if we look in the  
23 first column, he has an 11, Mr. Brockmeyer has an  
24 11-11 really; right?

25 A Yes.

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1 Q We go down to the samples here, and we know in that  
2 one there is a 12, a solid 12, and there is no 11?

3 A Yes. So he didn't contribute to that locus.

4 Q And we had already talked about the pistol  
5 magazine. There was also a couple of other items,  
6 item 12, item 16.1, and 16.2. Item 12 was a swab  
7 from the right palm of Mr. Brockmeyer. I don't see  
8 it on the chart; so what does that mean?

9 A No human D.N.A. was detected on items 12, 16.1, and  
10 16.2.

11 Q So on the right palm of Mr. Brockmeyer, the swab  
12 from there, the swab from the gun, from the handle  
13 and trigger area, and the swab from the handgun  
14 body area, there was no human D.N.A. developed; is  
15 that correct?

16 A Yes, that's correct.

17 Q Moving on up the chart, 9.4 is the swab from the  
18 T-shirt. There's a lot of numbers going across  
19 there. What did you find when you analyzed 9.4?

20 A I can read the result. The D.N.A. profile  
21 developed from item 9.4 is a mixture of at least  
22 three individuals. William Brockmeyer cannot be  
23 excluded as a possible contributor to this mixture.

24 The probability of randomly selecting an  
25 unrelated individual who could have contributed to

1           this mixture is approximately 1 in 68. Nicholas  
2           Rae is excluded as a possible contributor to this  
3           mixture.

4   Q       So 9.4, the swab from the T-shirt, at least three  
5           people?

6   A       Yes.

7   Q       Nicholas Rae is not one of those three?

8   A       Correct. He is excluded.

9   Q       And Mr. Brockmeyer, you said he cannot be excluded  
10           and, in fact, you put a number on there. What was  
11           the number?

12   A       The number is 1 in 68. So what that means is if  
13           you went and randomly selected people that were not  
14           related to Mr. Brockmeyer, you would have to -- you  
15           would expect that when you tested 68 people, one of  
16           them could have possibly contributed to this  
17           profile, to this mixture.

18   Q       Is the reason that number is so low is because all  
19           of the numbers that are in there?

20   A       That is right. That's what makes the number  
21           smaller. The more alleles that are there, the more  
22           possibility that people could contribute to that  
23           mixture.

24   Q       So it could be Mr. Brockmeyer, but it could be a  
25           lot of other people as well?

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- 1 A It could theoretically be, yes.
- 2 Q Item 9.2 and 9.5, 9.2 is a cutting from a T-shirt;  
3 9.5 is a swab from the shoulder of a T-shirt. What  
4 are you able to tell the jury about that?
- 5 A The D.N.A. profiles developed from items 9.2 and  
6 9.5 are mixtures of at least two individuals. The  
7 D.N.A. profile of the major contributor to these  
8 mixtures matches the D.N.A. profile of Nicholas  
9 Rae.
- 10 The partial D.N.A. profiles of the minor  
11 contributors to these mixtures are insufficient for  
12 reliable interpretation. So the major  
13 contributor -- I don't know if you can tell from  
14 there, it is bold in those positions and Nicholas  
15 Rae matched at all those locations along the genome  
16 there.
- 17 Q So, for instance, when we look in the first column  
18 again, he has a 10 and a 12. And when we come down  
19 to 9.5, the 10 is bold and the 12 is bold?
- 20 A Correct.
- 21 Q Saying that he is the major contributor?
- 22 A Correct.
- 23 Q It is a mixture of at least two people, you said?
- 24 A Yeah. As you can see at location 1 on item 9.5,  
25 there are two extra alleles there. That would be

1 from the minor contributor to that mixture.

2 Q The minor contributors are the other numbers and  
3 the ones in parentheses; is that correct?

4 A Correct. They are either unbolded or in  
5 parentheses.

6 Q So on two locations the first column and that  
7 column (indicating), you have more than two  
8 numbers. That's where you are getting the partial  
9 profile?

10 A Correct.

11 Q Is there anything you can say about Mr. Brockmeyer  
12 in those?

13 A No, it's just insufficient for reliable  
14 interpretation. If there are that few alleles, you  
15 really can't say anything to exclude or include  
16 anybody. It gets to a point where you just can't  
17 -- you don't want to make a guess.

18 Q Lastly talking about 9.3, which is a cutting from a  
19 T-shirt, and 9.6, a swab from the lower inside edge  
20 of a T-shirt, what, if anything, did you find when  
21 you compared those to Mr. Rae?

22 A Items 9.3 and 9.6, the D.N.A. profile developed  
23 from them matches the D.N.A. profile of Nicholas  
24 Rae. The probability of randomly selecting an  
25 unrelated individual having a D.N.A. profile

1 matching this item is approximately 1 in 4.7  
2 quadrillion.

3 Q How many zeroes are in a quadrillion?

4 A A lot. It would be thousand, million, trillion,  
5 billion, quadrillion -- thousand, million, billion,  
6 trillion, quadrillion. It would be 15 zeroes for  
7 the number.

8 Q Would it be fair to say in your opinion those two  
9 samples are Nicholas Rae's blood?

10 A Yes, that's correct.

11 Q Thank you, Mr. Meeh.

12 **CROSS EXAMINATION**

13 BY MR. MADSEN:

14 Q If I understand correctly, Mr. Meeh, you don't get  
15 any D.N.A. whatsoever off the pistol magazine?

16 A Correct.

17 Q You don't get any --

18 A Excuse me. I couldn't develop a profile. There  
19 was a minimal quantity on the pistol magazine if  
20 that was item 15.

21 Q Yes, sir.

22 A It did have some D.N.A. in there. We just couldn't  
23 develop a profile.

24 Q Sixteen point one and 16.2, which were swabs from  
25 the pistol, had no D.N.A. on them?

1 A Correct.

2 Q Item number 12, which was from the palm of Will's  
3 hand, had no D.N.A. on it either?

4 A Correct.

5 Q Ultimately I think you testified that 9.4 -- what  
6 was that? That was a swab of what?

7 A Item 9.4 is a swab from a T-shirt, and it is  
8 described as a swab from a short-sleeve T-shirt  
9 collar.

10 Q So then there was a mixture of at least three  
11 people?

12 A Correct.

13 Q So that would indicate that at least three separate  
14 people had deposited some type of D.N.A. on that  
15 T-shirt collar?

16 A Correct.

17 Q And ultimately if a T-shirt had been washed or  
18 cleaned or something like that, would that have a  
19 detrimental effect to D.N.A.?

20 A It would. It would decrease how much you would get  
21 from it, yes, and the quality of it.

22 Q And then item 9.2 was a mixture and 9.5 was a  
23 mixture of at least two individuals?

24 A Correct.

25 Q So it could be more than two individuals?

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- 1 A Correct.
- 2 Q One of those individuals it appears matched the  
3 profile of Mr. Rae?
- 4 A Yes.
- 5 Q But then there is two -- at least another  
6 individual that we don't know?
- 7 A Correct.
- 8 Q But we know that that is not Mr. Brockmeyer?
- 9 A No, we don't know. I'm sorry. On those particular  
10 samples, we don't know who the minor contributors  
11 are. Those were the examples were it was just too  
12 small to make a guess. You just can't say anything  
13 definitive about who isn't or isn't there. There  
14 are so few alleles.
- 15 Q So that could end up being Mr. Brockmeyer? We just  
16 don't know who it is?
- 17 A Yes.
- 18 Q And then I think there was a couple that were  
19 Mr. Rae; correct?
- 20 A Item 9.3 and 9.6 matched the D.N.A. profile of  
21 Nicholas Rae if those are the ones you are  
22 referring to.
- 23 Q I think one of those is from kind of an inside  
24 portion of the T-shirt; is that correct?
- 25 A If it's not in my description, I might not know.

1 Betty Butler, I think, created this for me. So I  
2 would just have "cutting from a T-shirt" -- oh,  
3 wait. Nine point six, yes, in my description I  
4 have swab from lower inside edge of the T-shirt.

5 Q And as far as when D.N.A. is deposited on a shirt,  
6 there is no way for you to tell that?

7 A Correct, like -- I'm not sure I understand the  
8 question. Rephrase it.

9 Q Well, let me rephrase it this way. If a T-shirt  
10 has D.N.A. on it and it's crumpled up, it could end  
11 up causing that D.N.A. to be transferred to  
12 multiple places on that T-shirt?

13 A Yes, it could. That's correct.

14 Q If a T-shirt is thrown on the ground or a car or  
15 something like that and it comes in contact with  
16 D.N.A., it could come that way also; couldn't it?  
17 There is no way for you to be able to tell the  
18 difference?

19 A That's correct.

20 Q And because of the sensitive nature of D.N.A., when  
21 a request is made through S.L.E.D., generally y'all  
22 end up getting it before they do stuff like  
23 firearms testing; correct?

24 A Yes, that's correct.

25 Q Because if someone handles something like, say, a

1 firearm, they could get rid of D.N.A.? They could  
2 deposit they own D.N.A. on it?

3 A It's best to avoid any handling, yes.

4 Q But a lot of times you would get an item after  
5 someone attempts to do, say, something like  
6 latents?

7 A Yes. Sometimes I do, yes.

8 Q They would generally fingerprint first before they  
9 would send it to D.N.A. as compared to vice-versa  
10 because you are swabbing stuff or someone is  
11 swabbing?

12 A They are usually created for me. I don't know if  
13 they do it before or after they do the latent  
14 prints. I would assume they did it before, but I  
15 wouldn't know. They just create the swab and I  
16 just receive the swab in a package.

17 MR. MADSEN: That's all the questions I have,  
18 Your Honor.

19 **REDIRECT EXAMINATION**

20 BY MR. GRAHAM:

21 Q The more you handle it and the more tests that are  
22 done, like glue or gun powder or fingerprint  
23 powder, anything like that, what does that do to  
24 any D.N.A. that is left on it?

25 A It decreases the quantity and the quality of the

1 D.N.A. I mean, the more testing, the more  
2 handling. It's just falling off and degrading, all  
3 those things.

4 Q Thank you, Mr. Meeh.

5 MR. MADSEN: Judge, I just have one last  
6 question.

7 **RECROSS EXAMINATION**

8 BY MR. MADSEN:

9 Q Obviously when you handle evidence or other people  
10 handle evidence, y'all are taught how to take  
11 certain protocols to try to decrease the  
12 contamination of evidence; are you not?

13 A Yes, we are.

14 MR. MADSEN: That's all the questions I have.

15 THE COURT: You may come down.

16 (Witness leaves the witness stand.)

17 THE COURT: As I understand it, that's your  
18 last witness for the day?

19 MR. GRAHAM: That's correct, Your Honor.

20 THE COURT: Mr. Foreman, and ladies and  
21 gentlemen of the jury, remember my admonition. Don't  
22 discuss the case with anyone. Don't even discuss it  
23 among yourselves.

24 Return at 9:30 in the morning. I fully expect  
25 that we will conclude this case tomorrow. And if we do,

1 that will end your service for the week. We will make  
2 every effort to do that. See you at 9:30.

3 (The jury is excused for the day at 5:30 p.m.)

4 THE COURT: Anything further from the State?

5 MR. GRAHAM: No, Your Honor.

6 THE COURT: Anything further from the  
7 defendant?

8 MR. MAULDIN: No, Your Honor.

9 THE COURT: See you at 9:30 in the morning.

10 (Whereupon the proceedings are concluded for  
11 August 24, 2011.)

12 (The following proceedings are reported on  
13 August 25, 2011.)

14 THE COURT: Is the State ready to proceed?

15 MR. GRAHAM: Yes, Your Honor.

16 THE COURT: Is the defense ready?

17 MR. MAULDIN: Yes, Your Honor.

18 THE COURT: No matters we need to take up  
19 prior to bringing the jury in?

20 MR. GRAHAM: No, Your Honor.

21 THE COURT: Bring the jury in, please.

22 (The jury returns to the courtroom at  
23 9:37 a.m.)

24 THE COURT: Good morning, Mr. Foreman, ladies  
25 and gentlemen of the jury. I trust all of you had a

1 good evening. Again, I thank you and appreciate your  
2 presence here.

3 Call your next witness.

4 MR. GRAHAM: The State calls Dr. Bradley  
5 Marcus to the stand.

6 BRADLEY J. MARCUS, being  
7 first duly sworn, testifies as follows:

8 CLERK: State your full name, spelling your  
9 last on the record, please.

10 THE WITNESS: Dr. Bradley J. Marcus,  
11 M-A-R-C-U-S.

12 **DIRECT EXAMINATION**

13 BY MR. GRAHAM:

14 Q Dr. Marcus, would you tell the jury about your  
15 educational background.

16 A Yes --

17 MR. MADSEN: Judge, I would stipulate that he  
18 is a certified forensic pathologist, and he is an  
19 expert.

20 THE COURT: Yes. Dr. Marcus has testified in  
21 my court on many occasions, and he is an expert in this  
22 field.

23 MR. GRAHAM: Thank you, Your Honor.

24 BY MR. GRAHAM:

25 Q Briefly, Doctor, how many times have you testified

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1 as an expert in court on forensic pathology?

2 A Seventeen times.

3 Q And how many forensic autopsies have you conducted?

4 A I have conducted approximately 1,500 forensic  
5 autopsies.

6 Q When we say forensic pathology, forensic autopsy,  
7 what are we talking about?

8 A Okay. So the first thing we should define is  
9 pathology in general. Pathology is the cause --  
10 the study of diseases and what causes disease in  
11 the human body. Okay.

12 Then from pathology there are multiple  
13 subspecialties. Hemepath, looking at bone marrow.  
14 Surgical path looking at surgical slides, like  
15 people have their uterus removed, gallbladder. A  
16 pathologist looks at that.

17 Forensic pathology deals with autopsies,  
18 determining the cause and manner of death.  
19 Basically what happens is in forensic autopsies,  
20 forensic autopsies we determine the cause and  
21 manner of death.

22 Someone who suddenly and unexpectedly dies,  
23 either through natural causes or through an  
24 accident or through homicide, suicide, and so  
25 forth, we determine the cause and manner of death.

1           The cause of death by definition is the  
2           disease or injury that brings about death. For  
3           instance, a natural cause of death is complications  
4           of metastatic breast cancer.

5           The manner of death is the circumstance in  
6           which the person dies, and they are categorized in  
7           five categories: One is natural deaths exclusively  
8           due to disease, breast cancer for instance.

9           Second is accident, unintentional car wrecks  
10          and so forth. Third is suicide, the taking of your  
11          own life. Fourth is homicide, death at the hands  
12          of another person.

13          The fifth category, sometimes a body is found  
14          and you don't know the circumstances, how it got  
15          there, and those are undetermined. That runs about  
16          3 or 4 percent of the cases we do.

17    Q    When a body is brought to you for a forensic  
18          autopsy, in general would you describe the process  
19          of what you do?

20    A    Sure. In this State we have coroners. The coroner  
21          works in the county and he or she determines what  
22          cases go for autopsy. So in this case an autopsy  
23          was requested by the Lexington County Coroner and  
24          sent out to Newberry Pathology. I was working out  
25          at Newberry Pathology at that time.

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1           So what happens is the body comes in. The  
2 first thing we do is we photograph the body in the  
3 state that it's in with the clothes on, how it  
4 arrives to us.

5           From there we unclothe the body. We do an  
6 external exam looking for any type of injuries,  
7 markings, tattoos, old scars, and so forth. Any  
8 injuries, if there are any injuries, we document  
9 them.

10          Sometimes we have to take X-rays to look for  
11 any projectiles if somebody is shot and so forth  
12 like that. From there after an external exam is  
13 done with photographs, we go and we do an internal  
14 exam.

15          We actually look at every organ system,  
16 documenting everything, and make -- sometimes we do  
17 slides, microscopic slides, and look at them under  
18 the microscope. Other times we don't need to do  
19 them in certain cases.

20          Then we determine from all that -- we take  
21 blood for toxicology testing -- we come up with a  
22 cause and manner of death.

23 Q       Specifically in this case did you perform an  
24 autopsy on an individual identified as Nicholas  
25 Rae?

1 A I did.

2 Q And would you describe to the jury what you found  
3 when you began the autopsy process?

4 A Sure. The autopsy was requested by the Lexington  
5 County Coroner in this case, and I performed the  
6 autopsy on July 11, 2010, out at Newberry Pathology  
7 and Associates.

8 From this case immediately what I noticed  
9 immediately was he had a gunshot wound to his left  
10 neck region. And from that point onward, as soon  
11 as I noticed there was a gunshot wound, I took  
12 radiographs.

13 I could feel a bullet right in this area  
14 (indicating) of the body; so I really didn't have  
15 to do X-rays. I took them anyway to make sure  
16 there was a bullet there. From that point onward,  
17 then I examined the remainder of the body for any  
18 injuries.

19 From that point onward, then I went and  
20 proceeded to do a complete autopsy documenting this  
21 wound here (indicating) on the left side of the  
22 neck and any other natural diseases that I found,  
23 in which I don't believe there were any natural  
24 diseases.

25 Q Other than the bullet wound that you found on the

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1 left side of Nick's neck, was there anything else  
2 that you found during your forensic autopsy that  
3 could have caused the death?

4 A No, nothing. This cause, this gunshot wound to the  
5 neck, brought about his death. No question about  
6 it.

7 Q Let's describe then when you do an external  
8 examination of the bullet wound, what did you see?

9 A The external exam I started at the entrance wound.  
10 Since we had a bullet here, we knew if there was an  
11 exit, we have to first determine what is the  
12 entrance and what is the exit wound.

13 In this case there was a bullet just under the  
14 skin right here (indicating). I knew that there is  
15 only one. This is the entrance wound. No question  
16 about it. It was an entrance wound.

17 But also characteristic of the entrance wound,  
18 sometimes in cases you try to determine the range  
19 of the gun from the body. Sometimes you have  
20 contact range, which the gun is pushed up against  
21 the skin; hard contact range, which is really  
22 pushed up against the skin; intermediate range,  
23 which is like with the stippling pattern around the  
24 skin.

25 When you fire a weapon, unburned gun powder

1 sometimes comes out of the barrel and causes little  
2 abrasions, little scratches around the wound. That  
3 means a gun is about -- again, depending on the  
4 type of gun and the type of ammunition used -- you  
5 know, 6 to 18 inches away.

6 Again, the only way you can really determine  
7 is by test firing the gun with the same type of  
8 ammo. And a distant range shot is where you have  
9 no soot around the wound, no stippling pattern  
10 around the wound.

11 In this case there actually was soot around  
12 the wound and also there was a muzzle imprint  
13 around the wound. You could literally see the  
14 muzzle of a gun, the outline of a muzzle of a gun  
15 on the wound itself. So that tells me that this  
16 was contact, hard contact range, gunshot wound to  
17 the neck.

18 Q When you say a contact, what does that mean?

19 A That means the weapon was pushed against the skin.  
20 It wasn't held like this (indicating). It was  
21 pushed up against the skin.

22 Q Let's talk a little bit about the bullet pathway --

23 A Okay.

24 Q -- as the bullet traveled through Nick's neck and  
25 body.

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1 A The bullet pathway went through the subcutaneous  
2 tissue, which is the skin, this tissue here  
3 (indicating) of the left neck. It went through the  
4 neck musculature. You can feel -- everyone here  
5 feels this muscle here (indicating). It went  
6 through that muscle.

7 It went through your C-1 vertebral body, which  
8 is in the back of your neck here (indicating). It  
9 went through the upper cervical spinal cord. Then  
10 it went into the right neck musculature, went  
11 across into the right neck musculature.

12 Then that's where the wound track ended, and  
13 the bullet was recovered right here (indicating)  
14 just under the skin. I believe I made a small  
15 incision in there and just plucked the bullet out  
16 of the skin.

17 Q Doctor, if I understand, the bullet goes through  
18 the muscle on the left side of the neck?

19 A Yep.

20 Q Goes up -- when you said the C-1 vertebral body, we  
21 are talking about your neck bones?

22 A Yes, your neck bones, your cervical spinal cord  
23 area.

24 Q And it severed the spinal cord itself?

25 A Yes.

1 Q And then it ended up over the right neck  
2 musculature?

3 A Yes.

4 Q So the trajectory of that bullet would have been --  
5 how would you describe it as far as orientation  
6 purposes?

7 A The approximate trajectory of the bullet pathway,  
8 it went slightly backward, this way (indicating),  
9 slightly upward, and to the right.

10 Q Would you describe, in addition to the soft tissue  
11 and the vertebrae and the spinal cord, what that  
12 caused in Nick's body?

13 A Okay. It also -- also, the bullet also hit the  
14 left carotid vessels, which is your main artery  
15 going up to your head. That's an artery. You have  
16 blood pumping under high pressure. So immediately  
17 he is bleeding. He is bleeding out. It's coming  
18 out through the wound here (indicating).

19 Then, in addition, it actually severed his  
20 spinal cord. So literally it would make him a  
21 quadriplegic because it happened way up here  
22 (indicating) on C.1. That actually would also cut  
23 your diaphragm so you can't breathe. This wound is  
24 fatal. No question about it. It's a fatal wound.

25 Q How long would Nick have lived? Is there a time

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- 1           that you can estimate on that?
- 2    A    I would say, due to the -- he would become  
3           immediately paralyzed, immediately. And then from  
4           his blood pumping out, I would say 30 seconds to a  
5           minute where his heart just went into a fatal  
6           arrhythmia and died. He died, became -- death, just  
7           died.
- 8    Q    Did you notice anything else, other than the  
9           gunshot wound, that is relevant to this case?
- 10   A    There is one. There is a facial. On his forehead  
11           here (indicating), on his right forehead, there is  
12           a small abrasion right here (indicating), which  
13           could be from possibly falling down after he  
14           sustained a gunshot wound.
- 15           It's right up in this area (indicating), which  
16           we call marks of innocence. It's in the  
17           protuberant parts. That's where someone who even  
18           has a heart attack suddenly drops dead. They hit  
19           their head like that. That's a classic injury.
- 20   Q    Would that be consistent with somebody who is  
21           sitting in a chair, had this injury, then leaned  
22           forward, and fell out of the chair?
- 23   A    Absolutely consistent. No question about it.
- 24   Q    So the cause of death of Nick Rae is what?
- 25   A    I put the cause of death as a C-1 spinal cord

1 laceration with some subarachnoid hemorrhage.  
2 Also, there was some bleeding that went up into his  
3 brain because of the way the blood was -- the blood  
4 was pouring out here (indicating), and then it was  
5 coming up there.

6 And due to a single contact-range, penetrating  
7 gunshot wound to the left neck -- and I call it  
8 penetrating because I was able to recover the  
9 bullet. If it was perforated, I wouldn't be able  
10 to recover the bullet.

11 Q And the manner of death, what was your ultimate  
12 finding?

13 A The manner of death in this case, a homicide.

14 Q Let me show you some photographs and I ask if you  
15 recognize these photographs and the overlay?

16 A Some of these photographs were taken by crime scene  
17 investigators, and some of these photographs were  
18 taken by myself during the autopsy.

19 Q Would those assist you in explaining to the jury  
20 the wound and the abrasion and when you are  
21 discussing contact wound in this case?

22 A Yes, it would.

23 MR. GRAHAM: Your Honor, at this time the  
24 State would like to publish these to the jury and ask  
25 the doctor to step down.

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1 THE COURT: Let me see the picture. Have they  
2 been shared with defense counsel?

3 MR. GRAHAM: All those are all in evidence,  
4 Your Honor.

5 MR. MADSEN: I think they are already in  
6 evidence, Judge.

7 THE COURT: Would there be any objection?

8 MR. MADSEN: No, sir, I think he can come  
9 down.

10 THE COURT: Any objection to the introduction  
11 of these pictures?

12 MR. MADSEN: I think they are already in  
13 evidence, Judge. I think he got them in earlier, and he  
14 just wants to --

15 THE COURT: All right. You may publish.

16 MR. GRAHAM: Thank you, Your Honor.

17 THE WITNESS: Would you like me to step down?

18 MR. GRAHAM: Yes, Doctor.

19 (Witness leaves the witness stand.)

20 BY MR. GRAHAM:

21 Q In explaining the injury and the contact wound, let  
22 me show you State's Exhibit Number 63. What, if  
23 anything, about that did you find relevant?

24 A It's a handgun with a slide. With a slide it's a  
25 semiautomatic weapon. This wound was not caused by

1 a revolver-type weapon based on the injury that I  
2 saw, the entrance wound. So this semiautomatic  
3 weapon is very consistent with the wound found on  
4 the victim.

5 Q What, if anything, did you notice in this  
6 photograph that was relevant to you as far as the  
7 barrel itself and the slide and the frame of the  
8 weapon?

9 A So right now I can see here -- and I approximated  
10 here (indicating) -- you have the barrel here of  
11 this weapon. It sticks out from the slide  
12 approximately 3 millimeters, 3 millimeters from  
13 that. I can describe more when I see the front-on  
14 section of the weapon.

15 Q You had asked for some photographs from crime  
16 scene, and they took that gun and they made a  
17 scaled image. Now it's to size so that you can  
18 match it to the wound; is that correct?

19 A That's correct.

20 Q And then I believe ultimately you were hoping to  
21 get an overlay. So crime scene cropped it out  
22 eventually and went to a lighter image and  
23 eventually made this overlay. Are you familiar  
24 with State's 62?

25 A Yes, I am.

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1 Q When we look at State's 55, that is from your  
2 autopsy of Nick Rae. What are we seeing?

3 A Right here (indicating), we are looking at the left  
4 side of his neck area here. Clearly you can see we  
5 have his face right here (indicating). So we are  
6 talking about in general this area right here  
7 (indicating).

8 What we have here is -- this is a gunshot  
9 wound here (indicating). It's a little dark but  
10 this dark discoloration here (indicating) in the  
11 gunshot wound is soot, black carbonous material  
12 that comes out of the weapon when it is fired.  
13 Every weapon is going to have soot that comes out  
14 of it.

15 That is very, very telltale of a contact  
16 gunshot wound. That's one of the things we look  
17 for, but in this case -- sometimes all you get is  
18 soot -- but in this case we have something  
19 different.

20 We have also, in addition to that, we have  
21 soot. We have got a pattern here. You can see  
22 this circular abrasion/contusion (indicating).  
23 Then we another circular abrasion/contusion here  
24 (indicating).

25 This, this right here (indicating), tells me

1 that we have a contact/hard-contact gunshot wound  
2 to the neck, to the neck here (indicating). This  
3 means that this gun -- I know for a fact -- that  
4 this gun was pushed up against the neck.

5 Q This (indicating)?

6 A Here is just a more -- a closeup photo, again,  
7 showing the soot here (indicating). Here you can  
8 see it very, very well. It's very good soot around  
9 the wound. That would be exactly where the muzzle  
10 would be.

11 Then the slide would be around there  
12 (indicating) and so forth in this part. That would  
13 make these abrasions-slash-contusions that occur on  
14 this wound area. That's a good muzzle -- it's a  
15 textbook example of a muzzle imprint, a classic  
16 example.

17 Q Looking at State's Exhibit 61 -- this is a scaled  
18 photograph of the wound -- what, if anything, did  
19 you find when you took that photograph, which is  
20 State's Exhibit Number 61, and an overlay that was  
21 made by crime scene of the barrel, which is State's  
22 62?

23 A So the overlay as you can see there, the overlay,  
24 you can see it's an exact match. There is no  
25 question about this being an exact match. You can

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1 see it clearly matches the abrasion and the wound  
2 here (indicating). So in this case I have no  
3 question about it. That type of gun is what caused  
4 that injury.

5 Q Doctor, if I can get you to step over here to the  
6 middle. I want to ask you -- this is not a real  
7 gun, Doctor, but it's similar in size and shape to  
8 that one.

9 A Can you put up the one where I can see his face,  
10 please?

11 Q State's Exhibit 55. Hypothetically if Nick Rae was  
12 sitting in a chair and slumped forward and passed  
13 out, would you orient that gun as it was on Nick  
14 Rae when it was fired?

15 A Sure. Approximately just like this (indicating) in  
16 my opinion.

17 Q Thank you, Doctor. If you would take the stand  
18 again.

19 A (Witness resumes the witness stand.)

20 Q On a weapon, Doctor, the top part here (indicating)  
21 on a semiautomatic weapon is the slide?

22 A That's correct.

23 Q This part down here (indicating) is the frame?

24 A That's correct.

25 Q When we are talking about pattern that you referred

1 to over here --

2 A Uh-huh. (Indicating affirmative response.)

3 Q -- is that the slide or the frame?

4 A That appears to be the frame right there.

5 Q So that's the bottom part?

6 A That's the bottom part of the weapon.

7 Q So there was a contact wound. Is that a burn?

8 A No, that's not a burn. That's not a burn. That is  
9 more of an abrasion-slash-contusion due to some  
10 trauma to that area.

11 Q How does that occur?

12 A Okay. So when a gun is fired -- all right --  
13 gasses come out of the weapon, soot comes out, and  
14 the bullet comes out. But it's all about energy.  
15 When that weapon fires, there is a lot of energy, a  
16 lot of kinetic energy, coming out of that barrel  
17 with that projectile.

18 So what happens here is the bullet -- with the  
19 gun pushed up against the skin like this -- causes  
20 a kind of cavity, and it slaps back really, really  
21 hard. It's fast -- for just a second -- against  
22 the gun and causes that abrasion, that  
23 abrasion/contusion that you see.

24 The skin kind of slaps back real quick because  
25 of the energy involved in this. It's a gunshot.

1           It's a lot of energy. It's slaps back, and that's  
2           what causes that type of injury right there.

3   Q       For that injury to occur -- obviously when you fire  
4           a gun, you have a moment before you fire it and you  
5           have a moment as you are firing it and you have  
6           time after you are firing it. To get that kind of  
7           wound, which, if any of all three of those, had to  
8           happen as a contact pushed up against the skin for  
9           that bruising to occur?

10   A       It had to occur when the gun was fired.

11   Q       Thank you, Doctor. Please answer any questions the  
12           defense has.

13                                   **CROSS EXAMINATION**

14   BY MR. MADSEN:

15   Q       Doctor, you said that basically I think you had  
16           taken the gun and pointed it with someone having it  
17           in the right-hand and holding it back like this  
18           (indicating); is that correct? That's how you held  
19           it over there?

20   A       Let me see.

21   Q       With the right-hand --

22   A       I think it was like this.

23   Q       It was not like that.

24   A       Then it was my error in that part.

25   Q       Because it would have to be held like this

1 (indicating); wouldn't it? Because this gun, what  
2 is down here (indicating), that circle and that  
3 thing around, that's coming from this down here  
4 (indicating)?

5 A That's correct. That's correct. Yeah, that was an  
6 error on my part.

7 Q So it's not consistent with someone holding it in a  
8 right-hand and putting it like that (indicating).  
9 It would be consistent if I had it like this  
10 (indicating) in my left hand because this has to be  
11 facing downward instead of like this (indicating);  
12 correct? You held it like that. It couldn't be  
13 like that because that wouldn't be the way that it  
14 would be done; correct?

15 A Well, right. That's not the way it was -- that's  
16 not the way. Let me see this. This (indicating)  
17 is the way it was held. I held in error.

18 Q Right. You held it the opposite way.

19 A The gun has to be held like this (indicating),  
20 absolutely.

21 Q And if I have got it, it doesn't make a lot of  
22 sense that someone -- that they would end up doing  
23 that? That is kind of unnatural; isn't it? If I  
24 had it in my left hand and I had this gun like this  
25 (indicating), that is kind of how it would end up

1 going?

2 A It's possible, yes.

3 Q Not inconsistent with what you saw?

4 A It's possible, yes.

5 Q When you did the autopsy, Mr. Rae's body comes in  
6 and I guess it's clothed?

7 A Yes.

8 Q You end up getting a watch off of his left wrist;  
9 correct?

10 A I don't remember what wrist it was on. I wrote  
11 here watch, but I don't have -- I don't remember  
12 what wrist it was on. I would have to look at the  
13 photos.

14 Q You didn't keep your photographs? You don't have  
15 yours?

16 A I don't have them with me, no.

17 Q Ultimately -- while he is looking for that -- you  
18 end up retrieving a watch, and then it gets turned  
19 over to law enforcement; correct?

20 A From my understanding, yes. Let me check. Yes.

21 Q Let me show you what has been marked as State's  
22 Exhibit 51. This would be items that are turned  
23 over to law enforcement; correct?

24 A That's correct.

25 Q And that includes the watch?

1 A That's correct.

2 Q It's, I guess, a silver-ish colored watch?

3 A A gray metal I call it.

4 Q As far as his arm right in here (indicating), does  
5 he have any tattoos at all up on the wrist or the  
6 forearm?

7 A I need to see the photos. When people have  
8 multiple tattoos, I just kind of describe multiple  
9 tattoos over the body. I need to see the exact  
10 photos.

11 Q Let me show you -- I guess these are some photos  
12 you would have taken?

13 A Yes.

14 Q That shows what hand is the watch on?

15 A That's on the left wrist.

16 Q There is a tattoo on the upper arm there, but  
17 doesn't show the inner arm; does it?

18 A No, it doesn't.

19 Q No tattoos on the lower part of the arm?

20 A Not that I could tell.

21 Q Basically up around here (indicating)?

22 A Yes, up here (indicating).

23 Q Kind of a tribal -- or something like that that is,  
24 I guess, kind of popular nowadays.

25 MR. MADSEN: Begging the Court's indulgence a

1 moment.

2 (Pause.)

3 BY MR. MADSEN:

4 Q I am trying to find a photo so that you can talk  
5 about that. You requested a toxicology on him?

6 A That's correct.

7 Q And you got that back?

8 A Yes.

9 Q And I guess it was ocular fluid, .227; blood was  
10 .20?

11 A That's correct.

12 Q And that shows that he's kind of going through the  
13 elimination phase?

14 A That's correct.

15 Q And ultimately you would agree with me that alcohol  
16 can affect someone's motor skills?

17 A Absolutely.

18 Q Alcohol can affect someone's decision making?

19 A Absolutely.

20 Q And the angle is kind of going a little bit  
21 upwards?

22 A Slightly upward, yes.

23 Q And slightly backwards?

24 A Slightly backwards.

25 MR. MADSEN: Judge, beg the Court's

1 indulgence.. We are trying to find a photograph.

2 THE COURT: That's fine.

3 (Pause.)

4 BY MR. MADSEN:

5 Q I couldn't find an autopsy photo, but what we have  
6 got is the scene. That's holding the left hand  
7 that has a watch on it, and there's no tattoos  
8 there, although it does seem to have quite a bit of  
9 blood?

10 A Right, quite a bit of blood.

11 MR. MADSEN: That's all the questions I have,  
12 Judge.

13 MR. GRAHAM: Nothing else, Your Honor.

14 THE COURT: You may come down. Thank you.

15 (Witness leaves the witness stand.)

16 THE COURT: Can this witness be released from  
17 his subpoena?

18 MR. GRAHAM: Yes, Your Honor.

19 THE COURT: You are released and we thank you.

20 MR. GRAHAM: Thank you, Doctor.

21 Your Honor, that's the State's last witness.

22 With that the State will rest.

23 THE COURT: We will take a morning break at  
24 this time, and I will call you back very shortly. Thank  
25 you.

1 (The jury retires to the jury room.)

2 THE COURT: At this stage are there any  
3 motions on behalf of the defendant?

4 MR. MAULDIN: Yes, sir. At this time we  
5 would move on behalf of Mr. Brockmeyer for a motion for  
6 directed verdict for the charges of murder and  
7 possession of a firearm during a violent crime in that  
8 the State did not present evidence sufficient to provide  
9 the trier of fact to decide the case.

10 THE COURT: I would respectfully disagree with  
11 that and overrule your objection. There is certainly in  
12 my view for the jury's consideration ample evidence to  
13 go forward.

14 MR. MAULDIN: Yes, sir. And we renew all of  
15 our prior objections and motions.

16 THE COURT: I would note them for the record.  
17 Any other motions at this time?

18 MR. GRAHAM: Your Honor, the only thing at  
19 this time --

20 THE COURT: Wait. Let me conclude with the  
21 defendant first. Do you have any other motions?

22 MR. MAULDIN: No, sir.

23 THE COURT: What did you start to say?

24 MR. GRAHAM: Your Honor, the only thing that I  
25 think is appropriate at this time is we need to settle

1 the defendant's record and find out whether he is going  
2 to testify.

3 THE COURT: Yes, sir, I will do that next.

4 MR. GRAHAM: If he hasn't made up that  
5 decision, if he is still waffling there, we may have to  
6 do some Jackson v. Denno hearings as well.

7 THE COURT: My notes here are to make further  
8 inquiry as to that issue.

9 Gentlemen, my first issue is: Has he been  
10 fully advised that he has a right to present witnesses  
11 on his own behalf?

12 MR. MAULDIN: Yes, sir.

13 THE COURT: Has he been advised that he has  
14 the absolute right to testify?

15 MR. MAULDIN: Yes, Your Honor.

16 THE COURT: Then I would address him  
17 personally. Has he been advised that he has the  
18 absolute right not to testify?

19 MR. MAULDIN: Yes, sir.

20 THE COURT: At this stage are you in a  
21 position -- will there be evidence presented by the  
22 defendant -- not the defendant himself -- but on behalf  
23 of the defendant?

24 MR. MAULDIN: No, Your Honor.

25 THE COURT: Does the defendant himself desire

1 to testify?

2 MR. MAULDIN: In our decision on that, we need  
3 to review his prior record, Your Honor, and perhaps have  
4 the Jackson v. Denno hearing.

5 THE COURT: We can do that. How do you want  
6 to proceed reviewing his prior record? All of this is  
7 outside the presence of the jury. Am I hearing that you  
8 do not propose to present any other testimony, but you  
9 are at this stage undecided as to whether he will  
10 testify or not?

11 MR. MAULDIN: Yes, sir.

12 THE COURT: Let me deal with that issue now.

13 Mr. Defendant, we are the stage in the trial  
14 of this case where you have the opportunity to present  
15 any witnesses on your behalf that you choose to. Do you  
16 understand that?

17 THE DEFENDANT: Yes, sir, I do.

18 THE COURT: Sir?

19 THE DEFENDANT: Yes, sir, I do.

20 THE COURT: Talk a little louder so the court  
21 reporter can hear you. In the trial of this case, you  
22 have the absolute right to testify if you chose to. Do  
23 you understand that?

24 THE DEFENDANT: Yes, sir, I do.

25 THE COURT: Your lawyers have told you that?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Additionally, you have the  
3 absolute right to remain silent. Have your attorneys  
4 told you that?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: In the event -- and I say that in  
7 the event -- you decide not to testify, I will charge  
8 the jury that you are presumed innocent. You don't have  
9 to prove a thing. The burden is upon the State of South  
10 Carolina to prove you guilty beyond a reasonable doubt  
11 if they can.

12 I would further charge the jury that the fact  
13 that you did not testify could not in any way be used  
14 against you nor raise any adverse inferences. I would  
15 charge the jury that the fact that you did not testify  
16 could not even enter into their discussions in the jury  
17 room. Do you understand that?

18 THE DEFENDANT: Yes, sir, I do.

19 THE COURT: Now, obviously with such an  
20 important matter, you would discuss it with your  
21 attorneys, and I understand that. But you need to know  
22 this: The ultimate decision to testify or not to  
23 testify rests with you. Do you understand that?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: You cannot later be heard to say,

1 "Well, I wanted to do something else, but my lawyers  
2 insisted." It's not the lawyers' call. It is yours.  
3 Do you understand that?

4 THE DEFENDANT: Yes, sir, I understand.

5 THE COURT: Now, there has been raised some  
6 question -- and we will go into it in a minute -- about  
7 a prior record. I would tell you that if you have a  
8 prior record under certain circumstances and under our  
9 rules of court, they are entitled to inquire about that  
10 prior record. Do you understand?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: It would be at that time that I  
13 would charge the jury that your prior record is  
14 absolutely no evidence of any kind with reference to the  
15 case we are trying today.

16 I would charge the jury that they can, if they  
17 choose, use that as to your credibility and  
18 believability, but that's for them to decide. They can  
19 choose to use some part of it or none of it. But under  
20 no circumstances will your prior record be any indicia  
21 or inference of your guilt today. Do you understand  
22 that?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Counsel for the defense, any other  
25 inquiry on that issue that you would have me make?

1           MR. MAULDIN: No, Your Honor. And I think he  
2 understands that he would be subject to cross  
3 examination by the State if he testified.

4           THE COURT: You have explained to him that the  
5 final decision to testify rests with him and not with  
6 you?

7           MR. MAULDIN: That's correct. It is his  
8 decision.

9           THE COURT: After we go through these  
10 preliminaries as suggested, I will make one further  
11 inquiry for the record: Does he desire to testify or  
12 not? I will not ask this question. You haven't made  
13 that determination as I understand.

14          MR. MAULDIN: Yes, sir.

15          THE COURT: Let me ask you this,  
16 Mr. Defendant. You would not offend me now in any way  
17 if you have any questions about what I said to you. I  
18 want it to be clear. Do you have any questions?

19          THE DEFENDANT: No, sir, not at this time.

20          THE COURT: Thank you so much. How do you  
21 want to proceed with the prior record?

22          MR. GRAHAM: Your Honor, I have what I believe  
23 are convictions that would be able to be used against  
24 him in cross examination, and I can go through it and  
25 see if they agree or not.

1 THE COURT: Let's have them, please. They are  
2 within ten years?

3 MR. GRAHAM: Yes, Your Honor.

4 THE COURT: Involving probation or a sentence  
5 of more than one year?

6 MR. GRAHAM: Yes, Your Honor. April 24, 2003,  
7 in Lake County, Florida, he was convicted of conspiracy  
8 to commit burglary of a dwelling with a battery. He was  
9 also convicted of possession of burglary tools.  
10 February 4, 2004, in Lake County, Florida, he was  
11 convicted of petty larceny. In May --

12 THE COURT: Wait a minute. I'm not going to  
13 let a petty larceny charge in.

14 MR. GRAHAM: Your Honor, under the rules they  
15 come in as a crime involving dishonesty regardless --

16 THE COURT: That's right. They do. You are  
17 absolutely correct, dishonesty.

18 MR. GRAHAM: Those actually do not need a  
19 balancing test of whether the prejudicial value  
20 outweighs the probative effect for a crime involving  
21 dishonesty.

22 THE COURT: I am going to exclude that.

23 MR. GRAHAM: May 3, 2004, he was convicted of  
24 grand theft. August 10th of '05, he was convicted of a  
25 burglary involving a grand theft and another grand theft

1 at the same time. May 14, 2009, he was convicted of  
2 another petty larceny.

3 THE COURT: I am going to exclude the petty  
4 larcenies. You have got the others. I am going to  
5 exclude the two petty larcenies.

6 MR. GRAHAM: Your Honor, if I can have a  
7 minute to look at the rules very quickly?

8 THE COURT: I know what the rules are. As I  
9 remember the rule, even though it's a crime of  
10 dishonesty, I can say the prejudice outweighs the  
11 probative value; can't I?

12 MR. GRAHAM: No, Your Honor. On those you do  
13 not apply that balancing test. On crimes involving  
14 dishonesty, you don't do that. If I can have a moment,  
15 Your Honor, I will point you to the rule.

16 THE COURT: What does the defendant say?  
17 First, let me make inquiry. You read what they say his  
18 record is. What is your reply?

19 MR. MAULDIN: Well, Your Honor, I am having a  
20 little difficulty with the charge they say is from  
21 2003 -- the conspiracy, burglary of a dwelling, and  
22 possession of burglary tools.

23 They provided me with 90-some pages of Florida  
24 court documentation. The documentation from these  
25 charges, there are several documents regarding that with

1 many different disposition dates.

2 On one of these, it has these charges -- the  
3 conspiracy to commit burglary of a dwelling with battery  
4 and possession of burglary tools -- and it has a  
5 checkmark on guilty. The date is 5/21/99, which is over  
6 the ten years.

7 THE COURT: What do you say about that? Let's  
8 be careful now, Solicitor.

9 MR. GRAHAM: I'm not sure. Your Honor, I'm  
10 sorry. I'm not sure what he is looking at.

11 (Attorneys confer.)

12 THE COURT: If there is any question about it,  
13 leave it out because you have got some prior record.  
14 There is no question about it.

15 MR. MAULDIN: In going through the juvenile  
16 records, Your Honor, I found it very difficult to  
17 determine what happened. It doesn't say what charges  
18 are pled to.

19 THE COURT: I'm not going to let any prior  
20 juvenile record in.

21 MR. GRAHAM: Your Honor, juvenile convictions  
22 are admissible if they are admissible as an adult  
23 conviction.

24 THE COURT: Don't you have -- those you just  
25 mentioned, were they juvenile or adult? You didn't say.

1           MR. GRAHAM: The first two, Your Honor -- the  
2 conspiracy to commit a burglary of a dwelling and  
3 possession of burglary tools -- it was committed as a  
4 juvenile offense.

5           THE COURT: You didn't tell me that at the  
6 time. I think it's admissible.

7           MR. GRAHAM: I don't believe though that on  
8 those charges, Your Honor, that he -- I mean, there's  
9 documents showing that they are still dealing with those  
10 charges up until April of 2004.

11           THE COURT: What does April 2004 show?  
12 Gentlemen, this is a critical issue in the trial of this  
13 case. I don't want there to be any doubt that you are  
14 complying with the rule. If you are not, leave it out.  
15 I can't be any stronger on what I'm saying to you.

16           MR. GRAHAM: I hear you, Your Honor. Taking  
17 that into consideration, we will agree that the 2003  
18 conviction for the conspiracy to commit burglary of a  
19 dwelling and possession of burglary tools don't come  
20 in.

21           THE COURT: All right, sir. What other  
22 concerns do you have? He can get in, under the rule,  
23 two petty larcenies.

24           MR. GRAHAM: What that would leave us with,  
25 Your Honor, would be two petty larcenies, three grand

1 thefts, and another burglary.

2 THE COURT: Yes, sir. What do you say as to  
3 those, gentlemen? I tell you what. Let's take about a  
4 ten-minute break. It will give you an opportunity and I  
5 can take a break. It will give you a chance to look at  
6 that, and we will address that issue when we come back.

7 MR. GRAHAM: Thank you, Your Honor.

8 THE COURT: When we come back now, Counsel for  
9 the defense, I need to know whether or not the defendant  
10 desires to testify so I can address that issue with him  
11 on the record. Do you understand?

12 MR. MADSEN: I think, Judge, ultimately that  
13 decision is going to have to be after we figure out  
14 under the Jackson v. Denno stuff and the record. That's  
15 kind of got to go before.

16 THE COURT: Okay. Let's take a short break  
17 and then you tell me if you have any further objections  
18 to the prior record. And are you prepared for the  
19 Jackson v. Denno?

20 MR. HUBBARD: Yes, sir.

21 THE COURT: We will do that next.

22 MR. HUBBARD: Yes, sir.

23 THE COURT: I know my court reporter needs to  
24 take a break. You do too. Come back in about ten  
25 minutes.

1 (Whereupon there is a recess.)

2 THE COURT: In Jackson v. Denno, what are the  
3 issues, Solicitor?

4 MR. GRAHAM: Your Honor, if I could, just to  
5 make sure we are settled on the record, I would like to  
6 add one thing for the record.

7 THE COURT: Do what?

8 MR. GRAHAM: I would like to make one comment  
9 for the record regarding the defendant's prior record.  
10 There is a burglary, Your Honor. That is an August 2005  
11 conviction of a burglary.

12 For the record, Your Honor, that involved one  
13 of the grand thefts, the grand theft of the handgun. So  
14 under 609(2), both petty larcenies, all three grand  
15 thefts, and also the burglary would all be crimes of  
16 dishonesty that are admissible.

17 THE COURT: I understand the rule provides for  
18 that.

19 MR. GRAHAM: The State is ready to proceed on  
20 the Jackson v. Denno. We have two witnesses, Your  
21 Honor.

22 THE COURT: First, have we agreed on his  
23 record, Counsel for the defendant?

24 MR. MAULDIN: Yes, sir. I believe we have  
25 got -- I will review it one more time. February 4, '04,

1 a petty larceny; May 3, '04, grand theft; August 10,  
2 '05, burglary and two counts of grand theft; and May 15,  
3 '09, a petty larceny.

4 MR. GRAHAM: I'm sorry. The May 3rd of '04,  
5 you read that off as a what?

6 MR. MAULDIN: Grand theft.

7 MR. GRAHAM: That is correct, Your Honor.

8 THE COURT: We agree as to his prior record.

9 Counsel for the defense, can you tell me what  
10 the issue is in the Jackson v. Denno? What we are  
11 talking about, is it voluntariness or should he have  
12 been Mirandized or what?

13 MR. MADSEN: He should have been Mirandized,  
14 Your Honor, and also I think there is a question as to  
15 voluntariness.

16 THE COURT: That's what I need to know. Are  
17 you ready?

18 MR. MADSEN: Depending on the testimony, we  
19 might have a discovery issue.

20 MR. HUBBARD: Judge, we are ready. For the  
21 record the first witness will be Shawn Grant. We are  
22 having a hearing, the Denno hearing, for the purpose of  
23 voluntariness.

24 THE COURT: How about being Mirandized?

25 MR. HUBBARD: Judge, we are going to concede

1 that Miranda should have been given, just to make it  
2 easy and to jump right into it.

3 THE COURT: As to everything he said?

4 MR. HUBBARD: Just as to statements to this  
5 officer. There is a completely different issue with the  
6 other officer.

7 THE COURT: I just want to make the record  
8 clear that you are not excluding all of his statements.

9 MR. HUBBARD: No, sir. No, sir. The State is  
10 ready at this time.

11 THE COURT: Have you told the defense counsel  
12 your position on Miranda?

13 MR. HUBBARD: Yes, sir. I believe at the  
14 beginning of the trial we talked about it.

15 THE COURT: Make sure you follow that very  
16 closely now. I don't want any testimony after he should  
17 have been Mirandized based on your statement to me, and  
18 I thank you for it.

19 MR. HUBBARD: Yes, sir. These are  
20 statements -- I will clear it up.

21 THE COURT: All right, sir.

22 MR. HUBBARD: The State calls Shawn Grant.

23 CLERK: Still under oath, Your Honor?

24 THE COURT: Yes, unless this is another issue.  
25 Let's swear him, please.

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1 CLERK: Yes, sir.

2 SHAWN GRANT, being  
3 first duly sworn, testifies as follows:

4 CLERK: State your name, please.

5 THE WITNESS: Shawn Grant.

6 IN CAMERA EXAMINATION

7 BY MR. HUBBARD:

8 Q Detective Grant, you have already testified that in  
9 the early morning hours of July 11, 2010, you went  
10 to Jager's bar?

11 A Correct.

12 Q And you came in contact with the defendant William  
13 Brockmeyer?

14 A Yes.

15 Q When you came in contact with him, was he under  
16 arrest at that time?

17 A No.

18 Q Was he handcuffed at that time?

19 A No.

20 Q At that point was law enforcement basically  
21 keeping all the patrons contained?

22 A Correct.

23 Q In order to conduct the investigation?

24 A Yes.

25 Q While this investigation was going on, were various

- 1 witnesses being taken back to the Sheriff's  
2 Department?
- 3 A Yes.
- 4 Q Was one of those people that you confronted to take  
5 back Mr. Brockmeyer?
- 6 A Yes.
- 7 Q Initially you testified when you first saw him, he  
8 had a very defensive posture?
- 9 A Defensive, somewhat agitated.
- 10 Q When you first approached him to talk to him, at  
11 this point were you planning on arresting him right  
12 there?
- 13 A No.
- 14 Q Did you talk to him at that point about coming back  
15 and talking to you at the Sheriff's Department?
- 16 A Yes.
- 17 Q What did you ask him?
- 18 A I asked him would he come back to the Sheriff's  
19 Department and talk to me.
- 20 Q So basically that was it?
- 21 A Yes, sir.
- 22 Q Did he choose to come back to the Sheriff's  
23 Department?
- 24 A He did.
- 25 Q Did you promise him or threaten him in any way to

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- 1 get him to get into a police car and ride back?
- 2 A I did not.
- 3 Q Did he ride with you?
- 4 A No.
- 5 Q Who did he ride with?
- 6 A Deputy Hallman.
- 7 Q Deputy Hallman?
- 8 A Yes.
- 9 Q Jacob Hallman?
- 10 A Jacob Hallman.
- 11 Q When you got back, where did you take
- 12 Mr. Brockmeyer?
- 13 A To one of our interview rooms.
- 14 Q Is that where y'all were taking others witnesses as
- 15 well?
- 16 A Yes.
- 17 Q At that point back at the Sheriff's Department, was
- 18 he under arrest?
- 19 A No.
- 20 Q Now, you already knew from one witness at the scene
- 21 that he was a suspect?
- 22 A Correct.
- 23 Q Were there any other suspects at this time?
- 24 A No, not at this time.
- 25 Q What was your determination of whether -- at that

- 1 time, whether right or wrong, what was your  
2 determination at that time whether you could make  
3 an arrest?
- 4 A I wanted to conduct a further investigation to make  
5 sure I had the right person.
- 6 Q Were you aware if there might be other suspects?
- 7 A No, sir.
- 8 Q What, if anything, did you ask Mr. Brockmeyer?
- 9 A I asked him what happened at the bar.
- 10 Q Just as simple as that, what happened?
- 11 A A general question, what happened at the bar?
- 12 Q You didn't ask him if he pulled the trigger?
- 13 A No, sir.
- 14 Q You didn't ask him if he threw the gun?
- 15 A No, sir.
- 16 Q "What happened at the bar?"
- 17 A "What happened at the bar?"
- 18 Q I have already talked to you about the judge's  
19 admonition, two words that he doesn't want you to  
20 use in this courtroom?
- 21 A Correct.
- 22 Q So with that warning please tell us the defendant's  
23 response to the question of, "What happened at the  
24 bar?"
- 25 A He said those F-ing N's did it.

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1 THE COURT: Those what?

2 THE WITNESS: Those F-ing N's did it.

3 MR. HUBBARD: Those F-ing N's. Your Honor, I  
4 don't know if I need to put on the record the actual  
5 word out of the presence of the jury?

6 THE COURT: Yes, out of the presence of the  
7 jury, but in their presence I want him to use the  
8 N-word.

9 MR. HUBBARD: As protocol, Your Honor, I can  
10 ask my witness or I can do it myself.

11 THE COURT: You may do it yourself.

12 BY MR. HUBBARD:

13 Q I will do it this way. Detective Grant, the word  
14 F-ing, is that what we often call the F-word?

15 A Yes.

16 Q With I-N-G?

17 A I-N-G.

18 Q Fucking?

19 A Yes.

20 Q The N-word, is that N-word referring to black  
21 people?

22 A Yes, it's a derogatory term referring to black  
23 people.

24 THE COURT: That's sufficient.

25 MR. HUBBARD: Thank you, Your Honor.

1 BY MR. HUBBARD:

2 Q So he said, "Those F-ing N's did it"?

3 A Yes, sir.

4 Q What else did he say?

5 A He said that --

6 THE COURT: In all your testimony, make sure  
7 you only go as far as the N-word.

8 THE WITNESS: Yes, sir.

9 THE COURT: The other word will not be used.  
10 It would be highly prejudicial.

11 MR. MAULDIN: Your Honor, if it's in front of  
12 the jury, we would object to the use of even the phrase  
13 N-word in that it's more prejudicial than probative. I  
14 think he can say black people. He can say the same  
15 meaning without it being prejudicial.

16 THE COURT: Why not let him use that word,  
17 black people?

18 MR. HUBBARD: That would be fine. Are they  
19 saying it's admissible then?

20 THE COURT: They didn't say that. They just  
21 asked the one question. I am going to let him use the  
22 N-word like that. I think it's probative more than  
23 prejudicial. I'm not going to let him use the rest of  
24 the word.

25 MR. HUBBARD: Yes, sir, that will be fine.

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1 THE COURT: That's what he said. I will let  
2 the jury determine whether he said it or not.

3 MR. HUBBARD: Thank you, Your Honor.

4 THE COURT: Given the total context of the  
5 conversation, it's appropriate that he repeat what he  
6 said.

7 MR. HUBBARD: Yes, sir. Thank you, Your  
8 Honor.

9 BY MR. HUBBARD:

10 Q What, if anything, followed immediately after,  
11 "Those F-ing N's did it"?

12 A I asked him to describe the black males he was  
13 talking about.

14 Q What was his answer?

15 A He said they all had dreadlocks, and one had a red  
16 and white -- a white and red bandanna.

17 Q So three black males with dreadlocks and one had a  
18 red and white bandanna?

19 A Yes.

20 Q What else did he say about those black males?

21 A He said they were all playing pool.

22 Q They were all playing pool at the bar?

23 A Yes, sir.

24 MR. HUBBARD: Your Honor, that's what we would  
25 introduce. I would ask -- well, let me ask some other

1 questions.

2 BY MR. HUBBARD:

3 Q When he was talking, was he cuffed?

4 A No, sir.

5 Q Did you make any threatening gestures towards him?

6 A No, sir, I didn't.

7 Q Did you tell him if he didn't talk to you, you were  
8 going to arrest him?

9 A No, sir.

10 Q Did you promise him anything if he would just talk  
11 to you?

12 A No, sir.

13 Q Did you do anything to get him to give you a  
14 response?

15 A No, sir.

16 Q Thank you.

17 THE COURT: You may cross examine. This is  
18 for the totality of the defendant's statement. Do you  
19 wish to get in -- Solicitor, is that the extent of his  
20 conversation that you wish to get in?

21 MR. HUBBARD: Yes, sir.

22 THE COURT: You may proceed.

23 IN CAMERA EXAMINATION

24 BY MR. MADSEN:

25 Q Detective Grant?

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- 1 A Yes, sir.
- 2 Q So you get him to the Sheriff's Department;  
3 correct?
- 4 A Voluntarily.
- 5 Q Do you video your interview with him?
- 6 A No, sir.
- 7 Q Certainly could have if you wanted to?
- 8 A Well, we don't have -- I don't have the equipment  
9 to do it. It's not standard procedure at our  
10 department during investigations.
- 11 Q No one in the Sheriff's Department has a video  
12 camera?
- 13 A I didn't say that. I said it's not a standard  
14 protocol.
- 15 Q How about audio in your questioning of him?
- 16 A Some people audio.
- 17 Q And you just decided not to?
- 18 A That's not one of my standard techniques, no.
- 19 Q You would agree that if you had audioed it, we  
20 could all sit here and listen to it and know  
21 exactly what was said; correct.
- 22 A I guess.
- 23 Q And I think before you asked him what happened at  
24 the bar, you got some background information from  
25 him on Nicholas Rae; correct?

- 1 A He gave me very general information on Nick's date  
2 of birth in reference to the month and year and  
3 possibly his mother's name. That was about it.
- 4 Q Who he was -- who his mother was and just general  
5 stuff like that; correct?
- 6 A Yes.
- 7 Q As soon as you got done with just that general  
8 stuff about Nick, then you asked him what happened  
9 at the bar?
- 10 A Correct.
- 11 Q And the first thing he said is, "The F-ing N's did  
12 it"?
- 13 A Yes.
- 14 Q He didn't talk anything about suicide?
- 15 A No.
- 16 Q Was anyone else in the room with you at that point  
17 in time?
- 18 A Detective Prestigiaco.
- 19 Q And besides you and Detective Prestigiaco, did  
20 anyone else come in that interview room with y'all?
- 21 A No, sir.
- 22 Q Was Detective Prestigiaco, was he in there the  
23 entire time?
- 24 A No, sir.
- 25 Q When you got Will to the Sheriff's Department, what

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- 1 time was it?
- 2 A It was roughly between 6:00 o'clock a.m. and  
3 7:00 o'clock a.m.
- 4 Q Six o'clock and 7:00 o'clock in the morning?
- 5 A Yes, sir.
- 6 Q You don't know the exact time?
- 7 A No, sir, I don't know the exact time.
- 8 Q Do you know how long he had been up at that point  
9 in time?
- 10 A No, sir.
- 11 Q You got to the bar at what point in time? About  
12 4:00 o'clock?
- 13 A Yes, sir.
- 14 Q He was already there?
- 15 A Yes, sir.
- 16 Q It wouldn't be unreasonable to think that he's  
17 coming close to 24 hours being up; would it?
- 18 A I'm not sure how long he had been up.
- 19 Q You didn't ask him though?
- 20 A No, sir.
- 21 Q Could you smell alcohol on him?
- 22 A No, sir.
- 23 Q You couldn't smell alcohol whatsoever?
- 24 A No, sir.
- 25 Q Know he is coming from a bar; correct?

- 1 A Yeah.
- 2 Q Was he acting intoxicated?
- 3 A No. He was acting agitated, not intoxicated.
- 4 Q Did you check to see if he had been refused service  
5 at the bar because he was too intoxicated?
- 6 A No, sir.
- 7 Q You didn't look or ask about that?
- 8 A That wasn't important at the time.
- 9 Q It would certainly be important if he was under the  
10 influence that he had been refused drinks because  
11 of his level of the intoxication; wouldn't it?
- 12 A When I came in contact with him, he wasn't under  
13 the influence.
- 14 Q But you didn't check into that; did you?
- 15 A I didn't see a need to do it. He didn't appear to  
16 me to be intoxicated.
- 17 Q You are the case agent on this case; correct?
- 18 A Yes.
- 19 Q You collected a statement later from the bar owner  
20 saying that they had refused to serve him alcohol  
21 because of his level of intoxication?
- 22 A I don't recall that.
- 23 Q Was that not a statement you took from Steve Lawson  
24 or someone took from Steve Lawson?
- 25 A I'm not sure.

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- 1 Q You wanted to talk with him right then though;  
2 correct?
- 3 A When you say right then, define what you mean,  
4 right then.
- 5 Q Right there in the morning. You didn't want him to  
6 come back at 7:00 o'clock that night after he had  
7 rested up; did you?
- 8 A I didn't want a lot of people to come back at  
9 7:00 o'clock that night. When we are conducting an  
10 investigation of an incident like that, it's best  
11 to get everybody who witnessed something, you know,  
12 right then.
- 13 Q And your testimony is not that when he was  
14 confronted with the accusations of a suicide story,  
15 at that point in time, that's when he said, "The  
16 F-ing N's did it"?
- 17 A No, it was before that.
- 18 Q That was before that?
- 19 A Yeah, that was before that.
- 20 Q And so he said it again later? You are saying that  
21 he said, "The F-ing N's did it." What about this  
22 suicide stuff?
- 23 A What do you mean?
- 24 Q Did he talk with you about that Nick might have  
25 committed suicide? I don't see that in your notes

1 anywhere.

2 A He didn't tell me that apparently.

3 Q We received a letter from the solicitor that says,  
4 "Pursuant to Rule 5 and Brady." Can you read what  
5 is under number 8?

6 THE COURT: Let me stop here. Do you have  
7 another witness as to that issue?

8 MR. HUBBARD: Not on this.

9 THE COURT: He said three times they didn't  
10 mention suicide to him. I don't want to sit here and  
11 wait 30 minutes.

12 MR. HUBBARD: No, sir. This is the only one  
13 as to these statements that I presented, Your Honor.

14 THE COURT: Unless you have got a statement  
15 where he said suicide in his presence, let's move on to  
16 something else.

17 MR. MADSEN: Judge, I've got a letter from the  
18 Solicitor's Office dated August 3, 2011. Under Number 8  
19 it says, "During the course of the interview by  
20 Detective Shawn Grant and Ed Prestigiaco, your client  
21 was confronted with the accusations that his story of  
22 suicide didn't --

23 THE COURT: He may have said something to Ed  
24 Prestigiaco. This witness has said three separate  
25 times --

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1 MR. MADSEN: Judge, it's got his name in it.  
2 It says Detective Shawn Grant. He is saying they are  
3 all there together.

4 THE COURT: Solicitor, how do you want to  
5 answer that?

6 MR. HUBBARD: Your Honor, we are referring to  
7 the defendant's statements of, "He shot himself." But I  
8 think this was -- I'm not sure exactly what time period  
9 Mr. Madsen -- I know the letter -- I'm not sure what  
10 time period he is talking about. Defense counsel  
11 frankly has me confused. I don't know when he is saying  
12 these conversations took place.

13 THE COURT: It should have been when he was  
14 Mirandized, but we are not letting that in any way.

15 MR. HUBBARD: Right.

16 MR. MADSEN: Judge, here is the problem I am  
17 having. He says he never mentioned suicide.

18 THE COURT: Yes, sir.

19 MR. MADSEN: I have got a letter from the  
20 Solicitor's Office saying that during the interview he  
21 mentioned to this detective suicide.

22 THE COURT: No, it didn't say that. He uses  
23 another detective's name there.

24 MR. MADSEN: No, sir. It says, "During the  
25 course of the interview --

1 THE COURT: You may cross examine in front of  
2 the jury on it. There is no need in beating it to  
3 death. He has told you three times it didn't happen.

4 MR. MADSEN: Okay.

5 THE COURT: I will let you cross examine on  
6 it.

7 MR. MADSEN: Judge, can we mark this letter as  
8 a Court's exhibit?

9 THE COURT: You may.

10 MR. MADSEN: Also, Judge, I think this  
11 potentially creates a problem. This letter is from the  
12 solicitor. If he denies that he has said this, then  
13 potentially I think solicitor might be a witness.

14 THE COURT: No, sir, we are not going to call  
15 the solicitor as a witness. That's not going to happen.

16 THE WITNESS: Your Honor, if I may. I think  
17 he is getting it confused.

18 THE COURT: How is that? This is outside the  
19 presence of the jury. Please go ahead and help me clear  
20 it up.

21 THE WITNESS: The defendant never mentioned  
22 anything about suicide. I confronted him about what I  
23 heard from talking to people at the bar.

24 I think that's where you are getting it  
25 confused.

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1 THE COURT: Apparently the suicide question  
2 came up after he should have been Mirandized. Isn't  
3 that true?

4 MR. HUBBARD: I am thinking that's what it is,  
5 Your Honor. It's not in this officer's notes or report,  
6 and that's what we have gone from. Now, at the scene I  
7 know that's where we heard all about, "He shot himself."  
8 That's what I am thinking.

9 THE COURT: There is no need in beating this  
10 horse to death. I am not going to put the solicitor on  
11 the witness stand. You know better than that.

12 MR. MADSEN: Judge, I just -- that's my  
13 problem is I worried that that was a Rule 5 violation.

14 THE COURT: It's not. I will let that letter  
15 be Court's Exhibit Number 1.

16 MR. MADSEN: I think it's Number 2.

17 COURT REPORTER: It's Court's Exhibit 4, Your  
18 Honor.

19 (Court's Exhibit Number 4 is marked for  
20 purposes of the record.)

21 THE COURT: I will let you cross examine on  
22 it, but he told you three times at least that he didn't  
23 hear that.

24 Solicitor, do you have any other witnesses on  
25 this issue?

1 MR. MADSEN: Judge, just a second. I may not  
2 be done.

3 THE COURT: I'm sorry. Excuse me.

4 MR. MADSEN: Let me take a look back through  
5 my notes.

6 THE COURT: Sure. You take all the time you  
7 want. I understand that.

8 (Pause.)

9 BY MR. MADSEN:

10 Q Ultimately you said he came to the Sheriff's  
11 Department voluntarily with you?

12 A Yes, sir.

13 Q And you told him he wasn't under arrest and he was  
14 free to leave?

15 A Yes.

16 Q Ultimately at some point in time, he did try to  
17 leave?

18 A Yes, sir.

19 Q At that point in time, you did place him under  
20 investigative detention and would not let him  
21 leave?

22 A Correct, but that was after he was Mirandized at  
23 that time.

24 Q And you did not -- at that point in time, you had  
25 pretty much been in the interview with him. Had

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1           you interviewed any other witnesses from anywhere  
2           else?

3   A    No, sir. Detective Prestigiaco was back and  
4           forth interviewing other witnesses that were there.  
5           We were somewhat conferring throughout the  
6           continuation of the interview process.

7           MR. MADSEN: That's all the questions I have,  
8   Your Honor.

9           MR. HUBBARD: I do have some follow up for the  
10          record, just to clear up for the record, Judge, if you  
11          don't mind.

12          THE COURT: No, no. I want it resolved.

13                           **IN CAMERA EXAMINATION**

14   BY MR. HUBBARD:

15   Q    When you were initially dispatched, as you  
16           testified the other day, what were you dispatched  
17           allegedly for?

18   A    Allegedly for a shooting incident in reference to a  
19           suicide.

20   Q    But when you got there, did you make a  
21           determination that you were looking at something  
22           other than a suicide?

23   A    Yes.

24   Q    The information of suicide, where was that coming  
25           from?

1 A That was coming from people who said that the  
2 defendant was saying he shot himself.

3 Q Okay.

4 THE COURT: That's not admissible. That would  
5 be hearsay, unless he wanted to bring it out.

6 MR. HUBBARD: Right, right. I won't get into  
7 that, just for the record.

8 THE COURT: I understand.

9 BY MR. HUBBARD:

10 Q When you confronted him and said, "What happened,"  
11 did you preface it -- and you might have told us  
12 that. That might account for the letter -- did you  
13 preface it, "I went there for this; so I asked him  
14 what happened"?

15 A That's right.

16 Q Did you let him know that you didn't think it was  
17 self-inflicted when you asked him what happened?

18 A Yes.

19 Q You did?

20 A What?

21 Q Did you ask him -- when you asked him what  
22 happened, did you say, "I don't think it was a  
23 suicide. Tell me what happened"?

24 A The initial question?

25 Q Yes.

1 A No.

2 Q When did that question come up?

3 A That was after he was Mirandized.

4 Q Let me ask you this: All the statements you have  
5 provided His Honor today in this hearing?

6 A Yes.

7 Q At what point did you Mirandize the defendant?

8 A That was right after he gave me a description of  
9 the three black males.

10 Q Okay. And that they were playing pool?

11 A Yes.

12 Q So all of the stuff you testified to came out and  
13 then you stopped and Mirandized him?

14 A Yes.

15 Q And then you heard -- you started talking to him  
16 about suicide?

17 A Yes.

18 MR. HUBBARD: Judge, we are not going into  
19 anything post Miranda either.

20 THE COURT: I understand. Do you have any  
21 other witnesses?

22 MR. HUBBARD: We have one on a different  
23 statement, but no more on this.

24 MR. MADSEN: Judge, can I just ask one other  
25 question of him?

1 THE COURT: Yes, sir.

2 IN CAMERA EXAMINATION

3 BY MR. MADSEN:

4 Q Can you show me in your report, Detective Grant,  
5 where you put anything in it about talking about an  
6 accidental shooting that you talked with him about  
7 or a suicide anywhere?

8 A (Pause.) No. Because after the point I advised  
9 him of that, that the witnesses seen him, he  
10 basically told -- that's when he basically told me  
11 to F-off.

12 Q But there is nothing in your report about what you  
13 just testified to at all? About the suicide or  
14 confronting him about the other stuff? The stuff  
15 that the solicitor just asked you.

16 THE COURT: He has not testified to anything  
17 about suicide said to him. He said he was called out  
18 there because somebody said it might be a suicide, but  
19 he hasn't said --

20 MR. MADSEN: I think the solicitor just asked  
21 him questions about that.

22 THE COURT: After he was Mirandized and all  
23 that is not coming in. We agreed to that -- unless you  
24 want to bring it in.

25 MR. MADSEN: No, sir. But there is nothing in

1 his report after he was -- put he was Mirandized about  
2 it either.

3 THE COURT: Well, he said he didn't discuss it  
4 with him. He has told you that now four times. Any  
5 response?

6 MR. HUBBARD: No, sir, Your Honor. For the  
7 record, if we misstated -- if there is an error in this  
8 letter, it is the solicitor's error. It is not  
9 something that this witness has told us that we've  
10 hidden. I just want that on the record. Your Honor, if  
11 we have missed --

12 THE COURT: I will let the jury decide --  
13 well, first, let me say I have listened to this very  
14 carefully, and I conclude that at the time he made the  
15 statement, he was certainly not under arrest. He was  
16 free to leave. I conclude that this limited statement  
17 is freely and voluntarily made without duress, threats,  
18 and that it is admissible.

19 MR. HUBBARD: Yes, sir.

20 THE COURT: Now, only as to that statement.

21 MR. HUBBARD: Yes, sir.

22 THE COURT: He said now four times he didn't  
23 discuss suicide with this individual. If counsel for  
24 the defense wants to bring it up on cross, he will have  
25 that opportunity.

1 MR. HUBBARD: Yes, sir.

2 THE COURT: The only reference he has made to  
3 suicide, as I understand it, was that was the original  
4 report that got him out there to start with. Isn't that  
5 true?

6 MR. HUBBARD: Yes, sir. Then I think he said  
7 after the Miranda was given.

8 THE COURT: He did but we are not going to let  
9 that in unless defense counsel wants to bring it in.

10 MR. HUBBARD: Exactly.

11 THE COURT: Mr. Madsen, if you wish to pursue  
12 that further, I will give you that opportunity.

13 MR. MADSEN: Yes, Your Honor.

14 THE COURT: Are we now ready to resume the  
15 trial?

16 MR. HUBBARD: We do have one more witness.

17 THE COURT: Get your witness. Let's move on.  
18 Detective, you may step down.

19 THE WITNESS: Thank you, Your Honor.

20 (Witness leaves the witness stand.)

21 THE COURT: You may remain in the courtroom.

22 THE WITNESS: Yes, sir.

23 MR. GRAHAM: The State calls David Day.

24 THE COURT: Gentlemen, there is no need to  
25 beating this horse to death. We have wasted 45 minutes

DAVID DAY -- IN CAMERA -- MR. GRAHAM

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1 on something that should have taken 10 minutes.

2 DAVID DAY, being  
3 first duly sworn, testifies as follows:

4 CLERK: Once you are seated, state your name  
5 on the record, please.

6 THE WITNESS: David Day, D-A-Y.

7 IN CAMERA EXAMINATION

8 BY MR. GRAHAM:

9 Q Investigator Day, you were the responding crime  
10 scene investigator to Jager's bar on July 11, 2010;  
11 correct?

12 A Correct.

13 Q At approximately 4:37 that morning, did you  
14 approach Mr. Brockmeyer for the purpose of  
15 collecting a G.S.R. kit?

16 A I did.

17 Q Was he in custody at that time?

18 A No, he was not.

19 Q Was he in handcuffs?

20 A No, he was not.

21 Q Was he being detained?

22 A No, he was not.

23 Q Was he voluntarily there of his own free will?

24 A Yes.

25 Q When you went and approached him, what, if

1 anything, did you ask him about whether he had been  
2 near Mr. Rae when the gun went off?

3 A There is information that I need to write for the  
4 analysis or the analyst when they do their tests.  
5 One of it is: What was the subject doing between  
6 the time of the shooting and the time of the  
7 collection?

8 So I asked Mr. Brockmeyer, I said, "Have you  
9 been near Mr. Rae when the gun went off?" And he  
10 replied no.

11 THE COURT: What?

12 THE WITNESS: I asked him was he near Mr. Rae  
13 when the gun went off, and he replied no.

14 BY MR. GRAHAM:

15 Q After he said no, what else did you ask him?

16 A I asked him if he had touched Mr. Rae after the  
17 shooting, and he replied, "No, they would not let  
18 me near my friend."

19 Q At the time he made those answers to your  
20 questions, did he make those freely and  
21 voluntarily?

22 A Yes.

23 Q Did you promise him anything?

24 A No, I did not.

25 Q Did you threatened him?

## DAVID DAY -- IN CAMERA -- MR. GRAHAM

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- 1 A No.
- 2 Q Did you coerce him?
- 3 A No.
- 4 Q Did he appear to you to be under the influence of  
5 alcohol or drugs?
- 6 A No.
- 7 Q Later on you went and took photographs, and then  
8 you came back to Mr. Brockmeyer. At that time when  
9 you came back to him, was he in custody?
- 10 A No.
- 11 Q Was he being detained?
- 12 A No.
- 13 Q Was he in handcuffs?
- 14 A He was not.
- 15 Q Again, he was voluntarily there?
- 16 A Correct.
- 17 Q What was your interaction with him at that time?
- 18 A Just photographed him.
- 19 Q At that point when you were photographing -- and  
20 this is in the next paragraph in your report -- did  
21 you ask him anything about the shirt?
- 22 A I did.
- 23 Q What did you ask him? It's in the third paragraph  
24 of your report.
- 25 A I asked him where his shirt was.

- 1 Q When you saw him, did he have any clothes on -- I  
2 mean, a shirt?
- 3 A No, he did not have a shirt on.
- 4 Q When you asked him where his shirt was, what did he  
5 say?
- 6 A He replied, "I don't remember."
- 7 Q When you had that conversation with him, did he  
8 appear to be under the influence of alcohol or  
9 drugs?
- 10 A No.
- 11 Q Did you make him any promises or threats?
- 12 A No.
- 13 Q Did you coerce him?
- 14 A No.
- 15 Q Was that conversation voluntary as well?
- 16 A Yes.
- 17 Q Thank you.
- 18 THE COURT: You may examine, gentlemen.
- 19 IN CAMERA EXAMINATION
- 20 BY MR. MADSEN:
- 21 Q The entire time you dealt with him or spoke with  
22 him, he was cooperative with you?
- 23 A Yes, sir.
- 24 Q You didn't smell any alcohol on his breath?
- 25 A I did.

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1 Q You did smell alcohol on his breath?

2 A Yes.

3 Q And you are outside? You are not in a contained,  
4 closed room; are you?

5 A Well, I have to -- when doing G.S.R. I am pretty  
6 close to him. So as far as speaking, I could smell  
7 something.

8 Q Give me an idea. What kind of time are we talking  
9 about that you are dealing with him?

10 A My first contact was at 4:37.

11 Q How about the second time?

12 A I'm not sure.

13 MR. MADSEN: That's all the questions I have.

14 THE COURT: Any further redirect?

15 MR. GRAHAM: No, Your Honor.

16 THE COURT: As to this testimony, I conclude  
17 that at that time he was not under arrest. Miranda was  
18 not necessary at that time. I further conclude that  
19 this comment is freely, intelligently, voluntarily made  
20 without threats, promise, or duress. I will admit it in  
21 the trial of this case.

22 If you would like for me to charge the  
23 issue -- the jury -- on the issue of the voluntariness,  
24 prepare me an appropriate charge and I will charge it.  
25 But I make it as a finding of law that it was

1 voluntarily and freely made without any threats or  
2 rewards.

3 MR. GRAHAM: Your Honor, if I could just for  
4 the record, would you ask the defense if they have any  
5 witnesses on this issue.

6 THE COURT: Yes, sir. Let me inquire first.  
7 Does the State have any further witnesses?

8 MR. HUBBARD: No, sir, Your Honor.

9 THE COURT: Does the defense have any  
10 witnesses you care to bring forward?

11 MR. MADSEN: No, Your Honor.

12 THE COURT: You may come down.

13 THE WITNESS: Thank you, sir.

14 (Witness leaves the witness stand.)

15 THE COURT: Now, are there any other issues we  
16 need to discuss, other than having inquiry as to whether  
17 or not the defendant desires to testify, Mr. Madsen?

18 MR. MADSEN: I think the only other thing,  
19 Your Honor, would be some 95 hours of jail phone calls  
20 they provided to us Monday at 5:00 p.m.

21 THE COURT: They are not being used in any  
22 way.

23 MR. MADSEN: As long as they are not being  
24 used in any way, then there is no issue.

25 THE COURT: Do you agree with that?

1 MR. HUBBARD: Yes, sir, we agree with that.

2 MR. MADSEN: No issue?

3 THE COURT: No, I will not permit that. I  
4 thank you for admitting that he should have been  
5 Mirandized subsequently but not at the time.

6 Would you like now for me to address the issue  
7 as to whether he proposes to testify or not?

8 MR. MADSEN: Judge, can we have a few minutes  
9 to discuss it with him and then bring him back in based  
10 on your rulings on this.

11 THE COURT: Yes, sir, I will certainly do  
12 that. Let me say this to you. We are going to get to  
13 charging and arguments here in just a few moments. Over  
14 the last 15, 20 years, it has been my policy to charge  
15 the jury even before final arguments.

16 Jurors have said to me on many occasions,  
17 "Judge, I wish I would have heard the law. I believe I  
18 could have followed the attorney's positions better." I  
19 propose to do that unless there be some objection by the  
20 State or the defendant. I have done it all over the  
21 State for the last 15 years.

22 MR. GRAHAM: The State has no objection, Your  
23 Honor.

24 THE COURT: So that you will know, after I  
25 charge them, I let the jury go out for any exceptions or

1 additions.

2 MR. MADSEN: We don't have an objection to  
3 that.

4 THE COURT: Sir?

5 MR. MADSEN: No objection.

6 THE COURT: Then I am going to charge -- some  
7 states, you know, charge even before the testimony. It  
8 just makes sense. I am going to do that. What we will  
9 do -- how long do you need to take a break?

10 MR. MADSEN: Less than ten minutes.

11 THE COURT: Let me know. Let me ask you this:  
12 Does the State have any proposed charges?

13 MR. HUBBARD: Judge, may we ask you what your  
14 reasonable doubt charge is.

15 THE COURT: I use State versus Grippon.

16 MR. HUBBARD: Is that -- I can't remember --  
17 does that include the Victor charge?

18 THE COURT: Yes. That's the reasonable doubt  
19 charge, but I didn't use -- I was the first one in  
20 Florence to use that in the State of South Carolina, and  
21 the Supreme Court affirmed me on it.

22 MR. HUBBARD: Yes, sir.

23 THE COURT: That will be my reasonable doubt  
24 charge. What other issues do you have? Obviously we  
25 are going to charge murder. We are going to charge

1 credibility of witnesses. I will charge the question of  
2 voluntariness of his statements if requested by the  
3 defendant.

4 MR. GRAHAM: Expert opinion testimony.

5 THE COURT: Expert opinions. I have already  
6 told them but I will recharge that.

7 MR. GRAHAM: Direct versus circumstantial  
8 evidence, Your Honor?

9 THE COURT: That's in there.

10 MR. GRAHAM: The rest of them are standard,  
11 Your Honor.

12 THE COURT: Prior record of the defendant?

13 MR. GRAHAM: If he testifies, yes, Your Honor.

14 THE COURT: Of course, prior record of  
15 witnesses who testified. It's basically just  
16 credibility only.

17 MR. HUBBARD: Your Honor, may we put on the  
18 record that we don't use the word, the N-word. Your  
19 Honor, I don't want to offend jurors either. So if Your  
20 Honor permits, I will ask the question and elicit the  
21 response F-ing N's. I will get the explanation without  
22 using either of those offensive words if Your Honor  
23 permits.

24 THE COURT: I will permit that. In fairness  
25 to the defendant, it would be so highly prejudicial.

1 MR. HUBBARD: I agree, Your Honor.

2 THE COURT: Beyond the murder charge and those  
3 things we discussed, do y'all have any other charges?

4 MR. MAULDIN: I guess it will depend on the  
5 defendant's decision.

6 THE COURT: I understand. Let's take a short  
7 break and address that issue. I am going to order food  
8 for the jury.

9 (Whereupon there was a recess.)

10 MR. HUBBARD: Judge, I have got the court  
11 reporter here. I just spoke to Mr. Mauldin. In  
12 thinking about this, we will just say black males,  
13 Judge, just so we don't -- I don't want this defendant  
14 to think, if he is considering this right he has, I  
15 don't want him to say that keeps him off the stand.

16 THE COURT: I got you. I prefer that you use  
17 black males.

18 MR. HUBBARD: We will do that, Judge.

19 THE COURT: Mr. Mauldin, do you agree with  
20 that?

21 MR. MAULDIN: Yes, sir.

22 THE COURT: Are we ready to resume?

23 MR. GRAHAM: The State is ready.

24 THE COURT: How about the defense?

25 MR. MAULDIN: Yes, sir, Your Honor.

1 THE COURT: What is the position of the  
2 defendant?

3 MR. MAULDIN: I believe Mr. Brockmeyer intends  
4 to testify, Your Honor.

5 THE COURT: Have him stand. Mr. Defendant, we  
6 have had a colloquy a while ago about your absolute  
7 right to testify. Do you understand that?

8 THE DEFENDANT: Yes, I do.

9 THE COURT: You have the absolute right not to  
10 testify. Do you understand that?

11 THE DEFENDANT: Yes, sir, I do.

12 THE COURT: Your counsel tells me that it is  
13 your decision to testify; is that correct?

14 THE DEFENDANT: Yes, sir, it is.

15 THE COURT: It's your decision, not somebody  
16 else's?

17 THE DEFENDANT: It's my decision.

18 THE COURT: As I indicated before, when a  
19 defendant testifies, they have the right under  
20 instructions of the Court, to examine you about your  
21 prior record. Do you understand that?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: All right, sir. Do you have any  
24 further questions about what I'm saying to you?

25 THE DEFENDANT: No, sir.

1 THE COURT: Thank you. I will bring the jury  
2 out in just a minute and we will start. What I will do,  
3 gentlemen, is hopefully finish the testimony and then  
4 charge the jury.

5 I will order lunch for you and the jury, and  
6 let you have your final summation after lunch. Is that  
7 suitable to everybody? I want to give you a chance to  
8 collect your thoughts.

9 MR. GRAHAM: Yes, Your Honor.

10 THE COURT: How about for defense?

11 MR. MAULDIN: That's fine, Your Honor.

12 THE COURT: I propose to take the testimony,  
13 charge the jury, break for lunch, and I am ordering  
14 food.

15 CLERK: Judge, I will run these menus in to  
16 them. It may take just a few minutes.

17 THE COURT: All right. We will stand by  
18 waiting for the jury.

19 (Whereupon there is a recess.)

20 THE COURT: Is the State ready to resume?

21 MR. HUBBARD: Yes, sir.

22 THE COURT: Defense ready?

23 MR. MAULDIN: Yes, Your Honor.

24 THE COURT: Have we resolved any other issues?  
25 Are there any out issues out there that we need to

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1 resolve before I bring the jury out?

2 MR. MADSEN: I don't think there are any.

3 THE COURT: Bring the jury in.

4 (The jury returns to the courtroom.)

5 THE COURT: Call your witness, please.

6 MR. MAULDIN: Thank you, Your Honor. The  
7 defense would call William Brockmeyer to the stand.

8 WILLIAM BROCKMEYER, being  
9 first duly sworn, testifies as follows:

10 CLERK: State your full name on the record,  
11 spelling your last.

12 THE WITNESS: William Brockmeyer,  
13 B-R-O-C-K-M-E-Y-E-R.

14 DIRECT EXAMINATION

15 BY MR. MAULDIN:

16 Q Now, Will, February 4, 2004, you were convicted of  
17 a petty larceny; right?

18 A Yes, sir, that's correct.

19 Q And May 3rd of 2004, you were convicted of a grand  
20 theft?

21 A Yes, sir.

22 Q And August 10, 2005, you were convicted of a  
23 burglary and two counts of grand theft?

24 A Yes, sir.

25 Q And May 15th of 2009, you were convicted of a petty

1           larceny?

2   A     Yes, sir, I was.

3           THE COURT: Mr. Foreman, ladies and gentlemen,  
4 the prior record of this defendant is being entered into  
5 the record. You may use his prior record, only if you  
6 choose, as to his credibility and believability and for  
7 no other purpose.

8           His prior record is absolutely no evidence of  
9 the charge he is facing today, nor can any adverse  
10 inferences be derived from that. You may -- and I  
11 emphasize may -- use his prior record to judge his  
12 credibility and believability and for no other reason.  
13 You may proceed.

14           MR. MAULDIN: Thank you, Your Honor.

15   BY MR. MAULDIN:

16   Q     William, how long have you known Nick Rae?

17   A     We have known each other quite a while. We didn't  
18 become friends until -- like really hanging, around  
19 17, 18 years old.

20   Q     And you reckon how long ago that was?

21   A     About seven years, eight years.

22   Q     And how did you meet Nick?

23   A     We were actually working together at the same tree  
24 company. We worked together and talked because we  
25 worked together, but we actually started talking

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1 one day at a lunch break.

2 My girlfriend brought me lunch and his  
3 girlfriend was there also, and we ended up -- had  
4 dated the same girl. So we ended up starting to  
5 talk about that, and it kind of went from there.

6 Q And what did y'all do?

7 A The fact that we worked together already was pretty  
8 much on a daily basis, but following that we  
9 started hanging out on the weekends, going to  
10 parties together, stuff like that.

11 Q And how long did you know him at the tree service  
12 company?

13 A A couple of months.

14 Q And did you ever see him sometime after that?

15 A Yes, sir.

16 Q Where was that?

17 A What I was arrested for, I ending up going to  
18 prison, and Nick ended up in prison with me.

19 Q And were y'all friends there too?

20 A Yes, sir. He was one of the few people I knew  
21 there from where I was from. We kind of stuck  
22 together and forming a pretty tight bond because  
23 it's a horrible situation to be in. It's good to  
24 have somebody you can trust.

25 Q And how would you characterize your relationship

- 1 that developed over that period of time?
- 2 A It just formed a lot stronger bond. I mean, if  
3 you've got somebody you can trust, it means a lot.
- 4 Q And how long were you there, Will?
- 5 A We were at a reception center a few months. Then a  
6 few months later we were transferred to another  
7 institutions, and we ended up at the same  
8 institution for about a year and a half.
- 9 Q Okay. And did you keep in touch with him after  
10 that?
- 11 A Yes. When I was transferred again, I corresponded  
12 through my sister. He would correspond through  
13 her. We would write each other to make sure and  
14 see what was going on.
- 15 Q And how would you describe your relationship? Like  
16 a friend? How would you describe it?
- 17 A I can't really explain it. It's just a bond. I  
18 guess it's probably like people that go to war  
19 together. They just form a bond, like you trust  
20 someone else with your life. I would consider him  
21 my brother.
- 22 Q It was dangerous in prison?
- 23 A Yes, sir.
- 24 Q You watched out for each other?
- 25 A Yes, sir.

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- 1 Q Now, you came up to South Carolina, I guess, around  
2 April of this year -- not this year -- 2010; is  
3 that right? April? May?
- 4 A Around June, the end of June, sir.
- 5 Q And so you had been here, I guess, roughly a month  
6 before this incident at Jager's; is that right?
- 7 A No, approximately a year.
- 8 Q Was there a period of time that you weren't in  
9 South Carolina?
- 10 A Yes, sir.
- 11 Q And did you see Nick again then?
- 12 A When I wasn't in South Carolina?
- 13 Q Yes.
- 14 A Yes.
- 15 Q Where was that?
- 16 A Are you talking about in Florida?
- 17 Q Yes, sir.
- 18 A In Florida.
- 19 Q Why did Nick come up here with you?
- 20 A Nick had recently been arrested for some petty  
21 theft charges, and he was using meth. He was using  
22 meth and would steal stuff to get money for meth.  
23 Well, the area we grew up, I mean, you are around  
24 the same people. You are going to do the same  
25 things again. I had moved up here to get away from

1 that environment basically, and I offered him to  
2 move up with me.

3 Q Did he do that?

4 A Yes, he ended up coming finally.

5 Q And how long was he up here with you before the  
6 night at Jager's?

7 A A few weeks, three weeks, around there.

8 Q What did y'all do during that period of time as far  
9 as hanging out?

10 A He lived with me and my girlfriend at that time.  
11 So we pretty much spent all our time together. I  
12 worked at a nightclub at the time. I was trying to  
13 get him a job at a -- I guess what you would call a  
14 sister nightclub -- owned by the same people and  
15 just that kind of stuff.

16 Q And y'all ended up living in a hotel; is that  
17 right?

18 A Yes. I ended up getting into an argument with the  
19 girlfriend I was with. I worked at Platinum Plus.  
20 It's a gentleman's club, a strip club, a lot of  
21 women. I had been involved with some other women  
22 there.

23 So it created controversy between me and my  
24 girlfriend that I presently had. We ended up  
25 getting into an argument. I moved out. I was

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1 staying in a motel. Nick was living with me; so he  
2 moved with me.

3 Q And how many girls do you think you were seeing  
4 around this period of time?

5 A A handful.

6 Q Five or less?

7 A Yes, four.

8 Q Did they all know about each other?

9 A Not in the beginning, no. But over a period of  
10 time, yes, they learned about each other.

11 Q Did that cause any problems?

12 A Between them, yes.

13 Q Now, you were living at the hotel on July 10, 2010;  
14 is that right?

15 A Yes, sir, I was.

16 Q And you ended up going to this party; is that  
17 right?

18 A Yes, sir.

19 Q Why did you go to that party?

20 A It was a party. A girl Mariko that I had talked  
21 with or hung out with, fooled around with,  
22 initially I took her to the girl, Megan Carrie's  
23 house. I was informed about the birthday party.

24 I was originally invited. She found out -- I  
25 told her a nickname. She found out my real name

1 and got mad at me and said she didn't want me to  
2 come.

3 Well, she had met Nick one time when she came  
4 to the motel room to see me. I didn't speak with  
5 her. Nick had told me he was invited, you know.  
6 And come that night he was like, "Man, I don't want  
7 to go by myself. I don't know anybody up here.  
8 Come with me." I agreed to go. He asked Mariko  
9 and Mariko said yes.

10 Q Now, when did you meet Mariko?

11 A Maybe approximately a week before Nick came up  
12 here.

13 Q And how many weeks was that before Jager's?

14 A Probably about four.

15 Q And when you met her, did you use the name Dea or  
16 Damien?

17 A Yes, sir, I did.

18 Q Tell us a little bit about that name Dea or Damien.  
19 What is behind that?

20 A When I was younger, I had an older brother that was  
21 approximately ten years older than me, and one of  
22 his friends was named Damien. I really looked up  
23 to him. He was athletic. He was cool. He was  
24 smooth in my eyes.

25 He ended up dying. I guess from paying

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- 1 attention to him so much, I picked up a lot of  
2 stuff he said, and I used to say it a lot. So I  
3 ended up with the name. They started calling me  
4 Damien. It got shortened to Dea over time. I  
5 would mimic him and act like him.
- 6 Q. Why would you use that name and not just say, "I'm  
7 Will Brockmeyer."
- 8 A. I initially met her at a house party at her house  
9 through one of my friends Corey. He knew me as Dea  
10 or Damien, which was always shortened to Dea, and I  
11 didn't really think about it. I just introduced  
12 myself as Dea.
- 13 Q. And how often had you seen her before y'all went to  
14 Jager's?
- 15 A. Maybe three or four times.
- 16 Q. Okay. What kind of relationship was it?
- 17 A. I'm not sure how to answer that.
- 18 Q. Were you in love with her?
- 19 A. No, sir.
- 20 Q. Did y'all take walks in the park and hold hands?  
21 What kind of relationship was it?
- 22 A. It was just kind of like just hanging out, having a  
23 couple of drinks, fooling around. It wasn't  
24 anything serious, just fooling around.
- 25 Q. And you were fooling around with several other

1 girls during the same period of time?

2 A Yes.

3 Q Now, you said you wanted to go to the party because  
4 Nick wanted you to go. He didn't know anybody  
5 there?

6 A Yes, sir.

7 Q And who did you go to the party with?

8 A Another waitress at the club that I worked at, a  
9 girl named Karmen Morgan. She was also another  
10 girl that I was talking to at the time.

11 Q And you went with Nick too; right?

12 A Yes, yes.

13 Q And that day did you start -- what time did you  
14 start drinking that day? Did you start drinking?

15 A Yes, probably about four or five in the afternoon.

16 Q And what were you having?

17 A Captain Morgan and Coke.

18 Q And what time do you think y'all left to go to the  
19 party?

20 A The party itself, maybe around 10:30 or 11:00  
21 o'clock at night.

22 Q How many drinks do you think you had before you  
23 went there?

24 A Before there? I was actually drinking out of a  
25 McDonald's cup, like a styrofoam tea cup. I'm not

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1. sure how many ounces it is but one of those. I put  
2 about three shots in there and then filled it up  
3 with Coke, probably about two or three of those.

4 Q Did you drive to the party?

5 A Yes.

6 Q Were you drunk?

7 A I mean, I was buzzing.

8 Q What did you drive to the party?

9 A We were in Carmen's trailblazer. We actually met  
10 at a store. I know it had a Burger King, and the  
11 Burger King had just closed. I got the lady to let  
12 me go in and get me something to eat there.

13 From there when I came back out, Karmen was in  
14 driver's seat, and Mariko and the girl Megan, whose  
15 birthday party it was, they were there to take us  
16 to where the party was because we didn't know where  
17 it was.

18 Q And originally what were your plans after that  
19 party was over?

20 A Me and Karmen were going to go back to the motel.  
21 I was also seeing another girl at the time that was  
22 a waitress at the club, and she was staying in the  
23 same motel room. So I was going to go back until  
24 she got off work and then make the other girl  
25 leave.

1 Q What did you do at this party at Amanda Dunn's  
2 house? You got out of the car and what did y'all  
3 do?

4 A We just kind of -- whenever we walked up,  
5 everybody, most of the people, were outside. It  
6 was like a front porch patio overhang or whatever,  
7 carport. There was a lot of coolers around with  
8 something -- I don't remember the name of the  
9 drink, but it was something with fruit in it.

10 A few of the girls that I knew -- or as a  
11 matter of fact, the only people that I knew there  
12 was a circle of friends that I had met one previous  
13 time at Mariko's house.

14 One of them confronted me about who I was,  
15 saying, you know, "What should we call you? Dea?  
16 Will? What do you want to go by?" I kind of  
17 laughed at them because to me it wasn't very  
18 important what you called me, and we just sat there  
19 and talked for a little while.

20 Q And did you run into any kind of problems with  
21 Karmen when you were at the party?

22 A Yes. When I had went to make another drink at the  
23 party, there was some people in front of us that  
24 were trying to leave. So I got in her car. I  
25 backed it up.

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1 I had just made a fresh drink, but I didn't  
2 put it in the cup holder. When I moved, I went  
3 down the block. I came and turned around, and I  
4 spilled the drink on both seats.

5 When I came back up, I pulled directly in the  
6 driveway. She came out and I was trying to clean  
7 it up, and she got pissed off -- excuse me -- she  
8 got angry and basically wanted to leave.

9 Q Now, did she leave right then or did she still hang  
10 out or what?

11 A She left a little bit after that.

12 Q Okay. When did the discussion with Jager's come  
13 up?

14 A While we were at the party, while we were at  
15 Megan's party, it was my assumption it was Megan  
16 Carrie's party. While we were there, Nick came up  
17 to me and said, "Hey, they are going to go to a  
18 private club. Let's go." It was kind of the same  
19 scenario. Nick doesn't know anybody. I didn't  
20 know anybody. So I agreed.

21 Q If Nick hadn't wanted you to go, where would you  
22 have gone?

23 A Back to the motel with Karmen, the girl I was with.

24 Q So how do you get to this Jager's club?

25 A We rode with Mariko.

- 1 Q And do you know who else was in the car?
- 2 A Me, Nick, Gina, I'm not sure the other girl, and  
3 Mariko.
- 4 Q And did there appear to be any kind of problems  
5 going on at that time between anybody?
- 6 A No, sir.
- 7 Q Were they still kind of ribbing you about not using  
8 your name?
- 9 A No, sir, not at that point.
- 10 Q So they didn't seem like they had any problem with  
11 you at that time?
- 12 A No.
- 13 Q All right. You get to the bar. Then where do  
14 y'all go?
- 15 A Get to the bar. Just get out, go inside. We ended  
16 up finding a table close to the dance floor. Sit  
17 down. The same cup that I had earlier, the  
18 McDonald tea cup, I walked in. I had it with me.  
19 I made a full drink, and we sat down at the table  
20 and started talking.
- 21 Q Did y'all stay at the same table most of the night  
22 or did people leave and come back?
- 23 A Around the same area, yes, where people were. I  
24 mean, whatever they wanted to do.
- 25 Q Did Nick go anywhere for a period of time?

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- 1 A Yes. Nick came up to me and said he wanted to go  
2 play pool. When we were previously at the party  
3 making drinks one time -- well, when I went to the  
4 back of the car, Nick had the gun out, which I  
5 didn't think was a big deal really because it was  
6 for protection.
- 7 So Karmen came up and seen the gun, and she  
8 kind of freaked out about it a little bit. So I  
9 gave it back to him and he put it up. When we got  
10 to the bar, he said he was going to play pool, and  
11 he asked me to hold the gun. So I got the gun from  
12 him.
- 13 Q Did you know that he had any kind of pellet gun?
- 14 A No, I never seen a pellet gun. Nick had a  
15 long-sleeved shirt on, kind of like a dress shirt,  
16 just with stripes on it; so I never saw it.
- 17 Q Did he have anything on underneath that?
- 18 A Yes, a black tank top.
- 19 Q So the gun that you are talking about is the .380?
- 20 A Yes, sir.
- 21 Q So he gave it to you when he went to go play pool?
- 22 A Yes, sir.
- 23 Q Did you go watch him play pool? What did you do?
- 24 A No, not at that point in time. I stayed there kind  
25 of talking with other girls. They were still

1 picking on me, you know, like, "How is your wife  
2 and kids," that kind of thing. I just kind of  
3 laughed. I was like, "They are fine," and just  
4 kind of tried to blow it off.

5 Q Were you trying to flirt with them at all?

6 A Yes, sir. I mean, I was feeling pretty good from  
7 the drinks. I was pretty much flirting with  
8 whoever was close to me.

9 Q What do you mean, whoever was close to you? Who do  
10 you mean by that?

11 A It was really the circle of friends that we went  
12 there with, the group of girls, the circle of  
13 friends with them. It was about four or five  
14 people.

15 Q And did Nick come back at some period of time?

16 A Yes.

17 Q What happened when he came back?

18 A Nick came back -- well, previously in the day when  
19 we were at the motel, Nick put on a pair of my  
20 pants. He left his money in his pants. We had  
21 went to a place called Knotty Headz. It's like a  
22 piercing tattoo shop. Karmen got her lip and her  
23 tongue pierced.

24 While we were there, Nick realized he didn't  
25 have any money. I gave him \$20. The earrings that

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1 he had on were the ones I bought. When we got to  
2 the club, he came up to me and said he needed money  
3 for drinks, and I gave him \$20.

4 Q That's when you got to the club?

5 A That was -- no, that was after he went and played  
6 pool.

7 Q Did you and he have any other kind of conversation  
8 after he came back from playing pool?

9 A He went back and played pool at that point in time,  
10 and then -- are you referring to when he was done  
11 playing pool?

12 Q No, I can't -- well, yes, when he was done playing  
13 pool. I mean, how long was he out there playing  
14 pool?

15 A I can't judge time really. I know he came back and  
16 he got \$20 from me twice. That's \$40. That's it.  
17 I can't judge the time. Whenever he was done  
18 playing, he came to me and was like, "Hey, I lost  
19 the money. Give me the gun back," and I gave him  
20 the gun back.

21 Q Why do you think he said that?

22 A That he had lost money?

23 Q Yes.

24 A I'm assuming that's what happened.

25 Q Why do you think he wanted the gun back?

1 A I would guess he was going to go try and get his  
2 money from the people. I mean, I wouldn't expect  
3 him to go put a gun to them and say, "Hey give me  
4 my money back." I mean, I assume he would have  
5 tried to talk to them and, you know, get his money.

6 Q Did anybody else see this that you know of?

7 A I'm not positive. I can't say for sure.

8 Q Now, were you trying to flirt with Mariko during  
9 this period of time?

10 A Yes.

11 Q Was she receptive or not receptive to you?

12 A She was just being real sarcastic to me and kind of  
13 like, you know, pushing me off, laughing at me,  
14 like "You are just a liar." I was like okay, you  
15 know. She was kind of like playful like, kind of  
16 like flirting while you are mad. You know what I'm  
17 saying?

18 Q Did that make you mad?

19 A No.

20 Q You had another girl at home or two?

21 A There was a few.

22 Q Did you start flirting with some of her other  
23 friends?

24 A Yes, I did.

25 Q Who in particular had you been flirting with?

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- 1 A I flirted with Gina and with Brittany.
- 2 Q Did you dance with any of them on the dance floor?
- 3 A Yes, I danced with both of them at different times.
- 4 Q Now, let's go back. You say Nick came back and got  
5 the gun from you; right?
- 6 A Yes, sir.
- 7 Q Where did he go from there?
- 8 A He walked back towards the pool tables, but he went  
9 back to the bathroom.
- 10 Q Then what happened?
- 11 A I watched to see what was going on, and he just  
12 came right back from the bathroom and sat down at  
13 our table. He never went back to the pool table.
- 14 Q What were you doing at the table then?
- 15 A The same, standing around, talking, conversating,  
16 listening to music, singing along with the music.
- 17 Q And at any point after that, did Nick leave the  
18 table?
- 19 A Yes. Nick started getting about like he was going  
20 to pass out at the table. He passed out putting  
21 his head down, you know, putting his hand on his  
22 head like he was tired. I mean, it's early in the  
23 morning.
- 24 I'm pretty sure Mariko said something to me  
25 like, "Hey, we are going to get kicked out. He's

1 going to get kicked out." I just hit his arm and  
2 said, "Hey, you are making us look bad. Get up."  
3 And a second after that, he got up and just walked  
4 real fast outside.

5 Q And then what happened?

6 A Other people from the table were getting up  
7 leaving. I don't know exactly where they went.  
8 They called last call over the -- the D.J. called  
9 last call, and I proceeded to go outside after  
10 that.

11 Q What did you do when you were going outside?

12 A I started going outside, dancing with Brittany.  
13 She kind of -- I mean, I guess what you'd call we  
14 were grinding on each other, kind of like a sexual  
15 dance or whatever.

16 When I stopped at the door, she bumped into me  
17 there, and we started making out. We ended up  
18 making out, and we ended up in the outside room,  
19 the entrance room going towards outside.

20 Q Then what happened?

21 A Then Gina came up to us. I don't remember what she  
22 said, but I just remember kind of laughing at her,  
23 and then I continued to go outside.

24 Q Where did you go out there?

25 A When I went outside, it's like a ledge. I kind of

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1           stumbled on the ledge, but I ended up on -- there's  
2           a pole. I caught myself on the pole. Somebody was  
3           standing directly in front of me.

4                     I heard, "Gun." When I looked over, Nick was  
5           leaning in the chair. He had his head down, his  
6           hand in his lap. I didn't see a gun, period. He  
7           put his head up, and I could see in his lap. The  
8           light would let me see in his lap, and he was  
9           holding a gun.

10    Q    What happened next?

11    A    The chair he was sitting in, it's kind of sideways.  
12           So he was kind of trying to brace himself against  
13           the chair and the wall at the same time. He just  
14           looked like he was trying to brace himself with his  
15           arm, with his hand. And he just leaned up like  
16           just trying to put his hand behind his back, and I  
17           leaned in and I tried to grab the gun.

18    Q    Did you actually grab the gun?

19    A    I don't know if I touched it. I know I touched  
20           something, his hand or the end of the gun. I did  
21           and the gun went off. The gun dropped. The clip  
22           came out of the gun. I mean, it was a loud noise.  
23           My ears were ringing.

24                     I looked around. Nobody moved. Nobody did  
25           anything. Nobody screamed like they were shot or

1           somebody was hurt. So I picked the gun up, and I  
2           ran out to the parking lot, and I threw the gun in  
3           the woods.

4    Q       Why did you do that?

5    A       Because me and Nick both have been to prison. Once  
6           you been to prison, basically you're a convicted  
7           felon. If you get caught with a gun, then it's a  
8           more serious charge.

9    Q       Hadn't you put Gina's hand on the gun sometime  
10           before when you were on the dance floor?

11   A       Yes, I did.

12   Q       Did you show the gun to anybody else at that period  
13           of time?

14   A       No, sir.

15   Q       But you are not worried about Gina knowing you had  
16           some kind of gun on you. Why are you worried about  
17           the gun all of a sudden?

18   A       Gina, I don't remember seeing her at that time. I  
19           mean, there was a bunch of people I didn't know  
20           there. Gina had seen the gun earlier in the night  
21           when we were in the car. I already knew that she  
22           knew. I mean, I didn't think it would affect  
23           anything.

24   Q       So I don't understand. Why all of a sudden is it  
25           important that you get this gun out of sight?

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1 A Because there was other people around, people I  
2 don't know. I don't know if it's the police or a  
3 cop or -- I didn't want to get trouble. I didn't  
4 want either one of us to get trouble for the gun.

5 Q Why did you take the gun and go throw it over a  
6 fence?

7 A I just wanted to get rid of it. I didn't know  
8 where to go. Mariko's car was locked. I didn't  
9 know where to go put it. I didn't know.

10 Q Did you think anything was wrong with Nick when you  
11 did that?

12 A No. Nick didn't move. He was still sitting in the  
13 same position. Nobody moved. People kind of just  
14 looked around. That's all.

15 Q Why did you come back?

16 A I was coming back to the front of the bar. When I  
17 ran around the corner, Mariko -- I ran into Mariko  
18 and I just seen a bunch of people crowded by the  
19 front door. I was like, "What happened?"

20 She was like, "What are you talking about?  
21 You were out here. You know what happened." I'm  
22 like, "No, I don't." Then I looked over and I seen  
23 Nick laying on the ground. I didn't see any blood  
24 at the time.

25 Then when I leaned over, there was a little

1 bit of blood. I just thought maybe it was like a  
2 flesh wound or like a graze or something because he  
3 didn't -- when the gun went off, he didn't move.  
4 So I didn't think it was anything serious.

5 Q Why didn't you tell people what had happened at  
6 that time?

7 A Because I was scared. I was scared. I mean, I had  
8 come back and I realized Nick is shot. I just  
9 threw the gun. I just threw the gun he got shot  
10 with, and it wasn't -- I was scared.

11 Q Do you remember who you might have been talking to  
12 or what you said during that period of time?

13 A No. There was commotion. I mean, I just -- I  
14 couldn't wrap my mind around what had happened. I  
15 was shocked inside. There was a lot of people.

16 Q And after you came back and saw Nick was shot, why  
17 did you just stay there?

18 A Because he is my friend. I wanted to make sure he  
19 was going to be okay. What was I supposed to do?  
20 It was my friend. I wanted to make sure that he  
21 was okay.

22 Q When did you find out that Nick had not made it?

23 A I don't know how much time passed. I know there  
24 was a bunch of people I was talking to. I had  
25 originally told Mariko to, "Let's go." I was

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1 hysterical. I was emotional. I told her, "Let's  
2 go," I said, "to the F-ing hospital."

3 Then Gina walked up and I asked her, I'm like,  
4 "What hospital? What hospital are we going to?"  
5 She told me, "He is not going to the hospital." I  
6 looked at her like, "What do you mean?"

7 She told me he was dead. At that point it was  
8 just like my whole body went numb. I couldn't even  
9 think. I couldn't do nothing. I didn't want to --  
10 I couldn't accept it.

11 Q Do you remember the police showing up at any period  
12 of time?

13 A I remember being aware of their presence. I  
14 remember, yes.

15 Q And do you remember interacting with any of them?

16 A Yes.

17 Q Who do you remember interacting with?

18 A The guy that tested my hands for gunshot residue,  
19 and he said that I possibly had blood on my hand.  
20 I told him to test it.

21 Q Do you remember your discussion with him as far as  
22 what you told him or anything?

23 A Yes.

24 Q What do you remember telling him?

25 A He ask me if I was around Nick when the gun went

1 off, and I told him no. He asked me if I had  
2 touched Nick after he had got shot. I told him  
3 no.

4 I told him that they wouldn't let me by him.  
5 Somebody -- a guy that I was talking to just kind  
6 of grabbed me and was like, "Don't go nowhere.  
7 Just stay right here," and I don't remember saying  
8 anything else to him.

9 Q Well, if you were next to Nick when the gun fired,  
10 why didn't you tell the guy that was collecting the  
11 gunshot residue?

12 A Because I was scared. I was just -- I was still in  
13 shock. My whole body was numb. I was scared. I  
14 was scared I was going to get in worse trouble. I  
15 mean, I just tried to avoid a little bit of trouble  
16 and throw a gun so we wouldn't have it on us. Now  
17 Nick is shot and I was just scared.

18 Q Do you ever remember eventually going to the police  
19 station?

20 A Yes, I do.

21 Q And when you were there, did you have a  
22 conversation with Detective Grant?

23 A Yes, I did.

24 Q And what went on during that conversation?

25 A When I first got there, he just got general

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1 information from me: Where I was from, my name, my  
2 date of birth. He asked me if I knew who got shot.  
3 I told him yes. I told him his name. I told him  
4 his date of birth. I told him his mom's name and  
5 just general information.

6 Q Did you tell him anything in response to any kind  
7 of questions about what happened at the bar that  
8 night?

9 A Yes.

10 Q What did you tell him?

11 A I told him that the black guys he was playing pool  
12 with, I said that they did it. It was their fault.

13 Q Why did you say it was their fault or that they did  
14 it?

15 A Because that's the reason that he came back and got  
16 the gun from me. I feel like if he would have  
17 never had the gun, it would have never happened.

18 Q Why didn't you tell him what had really happened?

19 A I was still scared. I mean, I was -- I couldn't  
20 think. I just made a really poor decision.

21 Q Did you eventually just stop talking to them  
22 altogether?

23 A Yes.

24 Q And why was that?

25 A Because one of the investigators, a larger fellow,

1           came in. He offered me a bottle of water. I told  
2           him I didn't want it. He just kind of like leaned  
3           over the table on me, and I don't know if he was  
4           trying to intimidate me but he was saying, "Why did  
5           you shoot him? Why did you kill him? Did he show  
6           you a gun? Did he threaten you?"

7           And I was just thinking in my mind, "I mean,  
8           that's my best friend. How can you even judge me?  
9           And that's when I stopped. That's when I stopped  
10          talking to me. I was like, you know, "F.U." and I  
11          flicked them off.

12          I said, "I don't have nothing else to say to  
13          you," because I felt like he was trying to just put  
14          me on the spot and prove something that he didn't  
15          even know. It was just very -- it agitated me very  
16          bad.

17    Q       Still why didn't you bother to clear this up  
18           beforehand either with the people at the bar or  
19           with the police? Why didn't you do that?

20    A       I mean, it was just a poor decision. I was scared.  
21           I can't tell you anything else. I mean, I was just  
22           scared. I was in shock. Once I found out Nick was  
23           dead, I was just numb.

24           My whole body was -- I couldn't even -- I  
25           don't know how normal people react. I couldn't

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1 even function I couldn't even think straight. I  
2 wanted to be dead then I was just -- just numb,  
3 just numb.

4 MR. MAULDIN: I have no further questions.  
5 Please answer any the solicitor has.

6 THE COURT: You may examine, Solicitor.

7 MR. HUBBARD: Thank you, Your Honor.

8 **CROSS EXAMINATION**

9 BY MR. HUBBARD:

10 Q Did you swear to tell the truth, the whole truth,  
11 and nothing but the truth? Is that what I heard  
12 you say?

13 A Yes, sir.

14 Q Let's talk about the truth. Let's start with your  
15 name. It is Will or is it Damien?

16 A My real name is Will.

17 Q Speak up.

18 A My real name is Will.

19 Q Your real name is Will. So when you first met  
20 Mariko and you said it's Dea or Damien, was that a  
21 lie or was that the truth?

22 A It's my nickname. It was the truth.

23 Q A nickname you gave yourself?

24 A No, my friend gave it to me when I was younger.

25 Q I got that story wrong. I thought you adopted it

1 because you admired somebody else, my mistake. But  
2 don't you admit, it's also the name you gave  
3 someone on the scene that night after the shooting?

4 A Yes.

5 Q Yes. And when they said, "Who are you?" It wasn't  
6 Will. It was Dea?

7 A Yes.

8 Q Damien?

9 A Yes.

10 Q All right. I just wanted to get that straight.  
11 You are going to tell the truth today. Everything  
12 you said is the truth, right?

13 A Yes.

14 Q You would admit, if you lie, they ought to find you  
15 guilty?

16 A Correct.

17 Q Correct. So if you lie you don't have any problem  
18 with what these 12 people do?

19 A It's their decision anyway, sir.

20 Q Yes, sir, it is. Yes, sir. Let's talk about the  
21 truth, Mariko. Dea, you gave her that name; right?

22 A Yes.

23 Q Damien; correct?

24 A Yes.

25 Q You were driving around in a car and led her to

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- 1 believe you had a job as what, a personal trainer?
- 2 A Yes, I was a personal trainer.
- 3 Q Right. And you also said you were single?
- 4 A No, sir, I told her I had a girlfriend. I think
- 5 she testified to that.
- 6 Q Megan Bair; right?
- 7 A Yes.
- 8 Q Well, you are going to have to clear up Megan Bair
- 9 for me. You were living with her?
- 10 A Yes, sir.
- 11 Q You say you weren't married to her?
- 12 A No, sir.
- 13 Q Never married to her?
- 14 A At one point in time, we had gotten a marriage
- 15 license, yes, but it was never notarized.
- 16 Q Marriage is like being pregnant. You are either
- 17 are or you aren't; right?
- 18 A Correct.
- 19 Q And you are an honest guy. You are not going to
- 20 get up here and lie; right?
- 21 A No.
- 22 Q So if it was Megan Bair -- who you referred to as
- 23 Megan Brockmeyer on your job application?
- 24 A Yes.
- 25 Q That was a lie? She wasn't Megan Brockmeyer, was

1 she?

2 A No, not at the time.

3 Q Not at any time?

4 A Correct. Because after we got married, we never  
5 got the paper notarized.

6 Q After you got married, you never got it notarized.  
7 So you actually got married?

8 A At the courthouse. It's a marriage license, but  
9 you have to get it notarized and send it back in,  
10 which a few days after we actually got the license,  
11 she came and told me that she was pregnant and it  
12 wasn't mine. We had been apart for a few months.  
13 That's what stopped the paper from being notarized.

14 Q So it was her fault y'all didn't get married?

15 A I made the decision.

16 Q She made the mistake; you made the decision?

17 A Yes.

18 Q Then you move on. You work at Platinum Plus;  
19 right?

20 A Yes, sir.

21 Q Now, on Facebook though you were still saying you  
22 were engaged to Megan Bair?

23 A I never even monitored the Facebook; Megan did.

24 Q Megan did, not you. So if there is any  
25 misunderstanding, it's Megan's fault?

- 1 A I mean, she was the one that created the Facebook  
2 page in the beginning.
- 3 Q Okay. You had no input on that?
- 4 A Yes, I had input.
- 5 Q You work at Platinum Plus and you meet two girls.  
6 Deserae Camacho and who, Karmen Morgan?
- 7 A Yes.
- 8 Q And you start seeing them both at the same time;  
9 right?
- 10 A Yes.
- 11 Q And you lied to them. You make them think there is  
12 only one girl in your life; right?
- 13 A They knew about Megan.
- 14 Q They knew about Megan, but you were on the outs  
15 with Megan; right?
- 16 A Yes.
- 17 Q Right. So like Mariko you told them you were on  
18 the outs and you are available; right?
- 19 A I mean, we talked, yes.
- 20 Q So these girls all thought it was just you and them  
21 one-on-one?
- 22 A I don't know what they thought, sir. I can't tell  
23 you that.
- 24 Q Well, they thought whatever you led them to  
25 believe?

- 1 A Correct. And they knew I had a girlfriend; so...
- 2 Q So it was all right if you cheated on them if they  
3 know there is a girlfriend; right?
- 4 A I didn't say it was acceptable.
- 5 Q It was for you?
- 6 A Yes.
- 7 Q So you got two girls and they each think they have  
8 you. Let me ask you: When you got kicked out of  
9 Karmen Bair's [sic] house, you no longer had a car;  
10 did you?
- 11 A Out of whose house?
- 12 Q Megan Bair's. When you got kicked out of there,  
13 when y'all parted ways, you didn't have a car; did  
14 you?
- 15 A Correct.
- 16 Q You didn't have a place to stay; did you?
- 17 A Correct. I was living in a motel.
- 18 Q And then came along the Camacho girl, Deserae. She  
19 had a house? She lived with her momma?
- 20 A Yes.
- 21 Q And she had a car; right?
- 22 A Yes.
- 23 Q So you now had a set of wheels and a roof over your  
24 head; right?
- 25 A Correct.

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- 1 Q And Karmen had a car; right?
- 2 A Correct.
- 3 Q Two sets of wheels and two sets of women; right?
- 4 A Correct.
- 5 Q Now, Nick comes along. And by this time you have  
6 met Mariko; and you are interested in Mariko?
- 7 A Correct.
- 8 Q To make her yet one of your other women; right?
- 9 A Not necessarily intentionally on that, no. It  
10 started out as a friendship. We fooled around a  
11 couple of times, but it was a friendship.
- 12 Q A friendship with benefits? Is that what it's  
13 called?
- 14 A If you want to call it that, yes.
- 15 Q I don't know what to call it. I'll let you decide.  
16 So you've got all these women, and then Nick comes  
17 into play now, old Nick. And he just messes  
18 everything up for you; doesn't he?
- 19 A No.
- 20 Q He's the one that got you kicked out of Deserae's  
21 house?
- 22 A No.
- 23 Q No memory of that? No memory of him ratting you  
24 out to Deserae about you using her car to take  
25 other women to a hotel to have sex with them while.

1 she is sitting there working at night and coming  
2 home and living in the house with you; right?

3 A No, that's incorrect.

4 Q That is just incorrect. So it's incorrect when her  
5 momma kicked you out but said, Nick, Nick gets to  
6 stay; right?

7 A Karmen and Deserae were at work the same night that  
8 they find out that I was seeing other women, that I  
9 was seeing both of them at the same time. I texted  
10 them the same text message.

11 I wrote it once and I forwarded it to both of  
12 them, and they compared the text messages, and both  
13 left that night without saying anything to me,  
14 pissed off, upset.

15 Q You were so angry with Nick that you two had a  
16 falling out, but Nick came back to you and moved in  
17 the hotel with you; didn't he?

18 A Yes.

19 Q Yes. And Karmen was in the picture at this point;  
20 right?

21 A Yes.

22 Q And he messed that up too; didn't he?

23 A No.

24 Q No. So when he told Karmen, "You are too sweet for  
25 Will," that didn't mess you up? That didn't make

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- 1           you mad?
- 2   A       I've never heard that, sir.
- 3   Q       Never heard it. Gosh. And then Mariko?
- 4   A       Where is this information coming from?
- 5   Q       You tell me. Mariko, let's talk about Mariko.
- 6           Nick messed that up too; didn't he?
- 7   A       No.
- 8   Q       You are living in a motel with another girl and
- 9           Nick, and Mariko calls you and Nick answers the
- 10          phone. It's his phone; isn't it?
- 11   A       Yes.
- 12   Q       It's his phone because Megan Bair took her phone
- 13          away from you; right?
- 14   A       She had my line terminated, yes.
- 15   Q       So you had someone to provide you a car, a house,
- 16          and a phone?
- 17   A       Once I paid for them, yes.
- 18   Q       Nick messed it up by letting the cat out of the bag
- 19          that your name was really Will; right?
- 20   A       No. The car, the house, and the phone was through
- 21          Megan.
- 22   Q       I am asking you about Nick letting the cat out of
- 23          the bag with Mariko?
- 24   A       No, it was actually a text message that was sent to
- 25          her. It was never a phone call. It was a text

1 message saying, "Are we still on for tonight?" And  
2 she texted back and was like, "Who is this?" It  
3 was a different number.

4 This is immediately when my phone line got cut  
5 off. I put on there Will, and she texted back and  
6 was like, "I don't know Will." And I was like, "Oh  
7 man, I told her my name is Dea." I texted her back  
8 and I was like, I mean Dea. Then that's kind of  
9 where she came into play with that.

10 Q You admit you had a falling out with Nick over  
11 Deserae?

12 A No.

13 Q You didn't. You admit that you had a falling out  
14 with Nick over Mariko?

15 A That's incorrect.

16 Q We can trust you because you are here telling the  
17 truth today; right?

18 A Yes.

19 Q You were convicted of petty larceny in 2004; right?

20 A Yes.

21 Q You were also convicted of grand theft in 2004?

22 MR. MAULDIN: I object. This has been asked  
23 and answered, Your Honor.

24 THE COURT: Sir?

25 MR. MAULDIN: I object. This has been asked

1 and answered.

2 THE COURT: He is entitled -- this is his  
3 cross examination. He is entitled to ask that. You  
4 brought it up. Let him talk about it.

5 BY MR. HUBBARD:

6 Q Two convictions in 2004, grand theft and petty  
7 theft; correct?

8 A Yes, sir.

9 Q But we can trust you?

10 A Yes.

11 Q You are going to tell the truth?

12 A Yes, sir.

13 Q Isn't it true Mariko told you she wouldn't have  
14 even known your real name but for Nick? Isn't that  
15 the truth?

16 A Yes.

17 Q And this party July 10th, you say you decided to go  
18 because Nick wanted you to go?

19 A That's correct.

20 Q You weren't going because you wanted to see Mariko?

21 A I was already with a girl. It doesn't make sense  
22 to take another girl to see a different girl.

23 Q You went with the girl that had the car that could  
24 get you to the party; weren't you?

25 A Yes.

- 1 Q Right. You needed that girl to get you to the  
2 party; right?
- 3 A Not necessarily, no.
- 4 Q And by the way, it's Amanda Dunn's birthday party.  
5 You didn't know all those people?
- 6 A No.
- 7 Q And Nick, Nick was out there meeting everybody;  
8 wasn't he?
- 9 A I mean, we were both introduced to people, yes.
- 10 Q And isn't it true that you were sitting around out  
11 on the driveway sulking with Karmen?
- 12 A No, that's not true.
- 13 Q Meanwhile Nick, fun-loving Nick, is having drinks  
14 and sitting with Mariko; isn't that true?
- 15 A Yes, he was sitting next to Mariko.
- 16 Q And he was a having a good time?
- 17 A Yes, we were all.
- 18 Q Poor Will wasn't; were you?
- 19 A Yes, I was.
- 20 Q Everyone describes Nick as fun loving and sweet;  
21 don't they?
- 22 A Yes.
- 23 Q You, what are you? Damien?
- 24 A I don't understand your question.
- 25 Q That's not a nickname anyone ever gave you, sweet;

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- 1 is it?
- 2 A Yes, people called me sweet before.
- 3 Q Now, y'all go to Jager's and you are flirting with  
4 Mariko? Karmen is gone; right?
- 5 A Yes.
- 6 Q So you are riding in the back of Karmen's car  
7 [sic], and you were even playing with the back of  
8 her head a little bit, flirting?
- 9 A In Karmen's car?
- 10 Q Mariko, my mistake.
- 11 A Yes, I was in the back of the car.
- 12 Q Flirting with Mariko?
- 13 A No, I was on the opposite side, the passenger side.
- 14 Q You weren't sitting directly behind Mariko?
- 15 A No.
- 16 Q You get to this bar. You have never been to this  
17 bar before?
- 18 A No, sir.
- 19 Q Loud music, a lot of people. And what do you do?
- 20 A What do you mean?
- 21 Q You get to the bar. What do you do? When you go  
22 in, where do you go?
- 23 A We go to the tables next to the dance floor.
- 24 Q Nick is having a good time; isn't he?
- 25 A Yes, we all are.

- 1 Q Nick is sitting by Mariko?
- 2 A Yes.
- 3 Q Nick will get up and dance?
- 4 A Yes, we all do.
- 5 Q Nick was drinking?
- 6 A Yes, we all were.
- 7 Q You were frustrated because of Mariko; weren't you?
- 8 A That's incorrect.
- 9 Q So that's just an illusion? You were okay? You  
10 were happy that night?
- 11 A Yes, I had no reason to be unhappy.
- 12 Q That won't be my decision on that one. All right.  
13 You get to this bar and at some point Nick gets up  
14 and goes and plays pool?
- 15 A That's correct.
- 16 Q Yep. And Nick, he's not a bad pool player?
- 17 A No, he's the one actually taught me.
- 18 Q But Nick loses \$300?
- 19 A I couldn't tell you.
- 20 Q He lost a lot of money; right?
- 21 A I have no knowledge of that, no.
- 22 Q Well, it was coming out of your pocket?
- 23 A I gave Nick \$40 dollars. I mean, I didn't even  
24 have \$300.
- 25 Q But you were also saying you gave him money

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- 1 earlier? The only money he had was money you gave  
2 him?
- 3 A Okay.
- 4 Q So you are denying today to this jury that you  
5 settled that score, that debt for Nick?
- 6 A Yes, I am. Three hundred dollars? I didn't even  
7 have \$300 in my pocket. I didn't even have a job  
8 at that time.
- 9 Q All right. So the nickname is a mistake. That's a  
10 misunderstanding. The Damien/Dea thing, that's  
11 just a misunderstanding; right?
- 12 A Rephrase your question, please.
- 13 Q You weren't lying about being Dea or Damien? That  
14 is just a mistake that you can explain?
- 15 A It's a nickname.
- 16 Q And at the party if you appeared to be aloof or  
17 agitated, that's a mistake? You were having a good  
18 time; right?
- 19 A Yes.
- 20 Q And at the bar, if it appeared that you were  
21 sulking, that's a mistake because you are having a  
22 good time; right?
- 23 A I had a good time, yes, sir.
- 24 Q And at the bar when it appears that you are  
25 settling up for Nick, that's a mistake too?

1 A Excuse me?

2 Q Settling up a debt for Nick, that's just a mistake?

3 A I gave Nick \$40, whatever you want to call it.

4 Q And you have sworn to tell the truth?

5 A Yes, I have.

6 Q Let's talk about those pistols. You said -- I  
7 guess you are saying that this little pistol here  
8 is Nick's gun? Is that what you are saying?

9 A No, I purchased it.

10 Q You purchased this?

11 A Yes.

12 Q So this is yours?

13 A Yes.

14 Q Nick had the big gun; correct?

15 A That's what I found out later.

16 Q You didn't know?

17 A No. I never seen that gun that night, no.

18 Q Nick is walking around with it, for God and the  
19 world to see, a big old pistol in the back side of  
20 his pants, and you are the only one that didn't see  
21 it?

22 A He was wearing a black tank top after we got there  
23 When we got there, he had on a long-sleeve shirt.  
24 After we got there, it was a black tank top. From  
25 the pictures that I have seen, it's a black gun.

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- 1           It's inside of a club. I wasn't aware of it; so  
2           I'm not looking for it.
- 3    Q       Nick was your brother; wasn't he?
- 4    A       I would consider him that.
- 5    Q       Is that what you are saying?
- 6    A       Yes.
- 7    Q       About the money, if Nick had money already in his  
8           pockets, he wouldn't have come and syphoned money  
9           off of you to pay his debts; would he?
- 10   A       I wouldn't expect him to, no.
- 11   Q       So we agree on that. This pistol, you were the one  
12           carrying this pistol around that night; right?
- 13   A       I had it during the night, yes.
- 14   Q       You were wearing it right up here (indicating)?  
15           You say for protection?
- 16   A       Yes.
- 17   Q       At a birthday party?
- 18   A       Well, I'm not the one who brought it to the  
19           birthday party itself, I mean.
- 20   Q       So that wasn't your fault?
- 21   A       I don't know who got it there.
- 22   Q       The fact that gun came to your birthday party  
23           wasn't your fault? Is that what you are saying?
- 24   A       I didn't bring it there is what I'm saying.
- 25   Q       But at the bar you decide to sport the handgun

- 1 right here (indicating) in the front?
- 2 A I just put it in my waistline.
- 3 Q Because you needed protection from the birthday  
4 crowd that came to the bar?
- 5 A No. When I got the gun, Nick just asked me to hold  
6 it and said he was going to play pool. So I just  
7 held onto it until he was done playing.
- 8 Q You are saying Nick had this pistol? Is that what  
9 you are saying?
- 10 A Yes.
- 11 Q Nick didn't have the big black gun hanging out the  
12 backside of his pants?
- 13 A I didn't see that. He was wearing a long-sleeve  
14 shirt.
- 15 Q So you are saying the one that Nick had is just  
16 this little tiny pistol here?
- 17 A That's the only one I was aware of, yes.
- 18 Q If he did that, then what are you flashing around  
19 to everybody around the pool tables?
- 20 A I don't remember flashing anything. As far as when  
21 Nick went and played pool, I had that gun. I did  
22 walk over there. It was hot. If I was fanning  
23 myself and someone "see'd" it, it's possible.
- 24 Q But you just said that Nick gave it to you when he  
25 was playing pool?

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1 A Correct.

2 Q So you had it just then? You put it there --  
3 people didn't see the transfer? You got it there  
4 because he just gave it to you?

5 A Are you talking about at the pool table?

6 Q Yes.

7 A No, he gave it to me before he went to the pool  
8 table.

9 Q And you deny making a statement in the presence of  
10 the people who were beefing your partner out of  
11 money, lifting your shirt and saying, "This is how  
12 we do it"?

13 A Yes, I do.

14 Q That didn't happen?

15 A No, sir, it didn't.

16 Q According to William Brockmeyer, that didn't  
17 happen?

18 A No.

19 Q Nick got pretty drunk that night?

20 A Yes.

21 Q Nick got incredibly drunk that night; isn't that  
22 true?

23 A I'm not sure what you would describe as incredibly.  
24 That's a large word.

25 Q Incredibly, I guess, is a large word. He got real

1 drunk? That's a short word. He got real drunk;  
2 didn't he?

3 A To the point of passing out.

4 Q To the point of passing out, exactly. And at some  
5 point Mariko, who you kept trying to flirt with,  
6 tells you to take care of your friend; doesn't she?

7 A No. Those weren't her exact words, no. She said,  
8 "Hey, get him up or we are going to get kicked  
9 out."

10 Q So Nick goes outside. He is so drunk he is  
11 throwing up?

12 A I never seen him throw up.

13 Q He is so drunk when he is sitting in that chair,  
14 he's passing out?

15 A When I walked outside, he didn't appear to be  
16 passed out.

17 Q And you say you are dancing with these other girls?

18 A Correct.

19 Q Before all this happens. Now, Megan Bair, she is a  
20 pretty girl; isn't she?

21 A Yes, sir.

22 Q Deserae Camacho, she is a pretty girl too; wasn't  
23 she?

24 A Yes.

25 Q Karmen Morgan, a pretty girl?

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- 1 A Yes.
- 2 Q Mariko -- what did you see in Mariko by the way? I  
3 mean, she is attractive, I guess; right?
- 4 A Yes.
- 5 Q What did you see in Mariko?
- 6 A She was cool to talk to. I mean, we sat there and  
7 watched a movie. She had a good personality.
- 8 Q Wouldn't you agree Mariko is self-absorbed, stuck  
9 up, and only thinks of herself?
- 10 A I can't say that.
- 11 Q What did you see in her? Maybe I just answered my  
12 own question. So --
- 13 A Are you saying you answered it for me?
- 14 Q I don't have that question. I will take that one  
15 back.
- 16 A Okay.
- 17 Q So you are at the bar and Nick is drunk. He goes  
18 outside. He's sitting there. And now you are with  
19 another girl?
- 20 A Correct.
- 21 Q Now, this girl you didn't even know her name?
- 22 A Yes, I do.
- 23 Q You deny telling Mariko, "I know I was making out  
24 with your friend, but I don't even remember her  
25 name"?

- 1 A I couldn't remember at that time. I mean, I was  
2 sitting in jail, I know, the next day. I was in  
3 shock. I just couldn't remember. I couldn't  
4 remember at that time.
- 5 Q It was all because of shock?
- 6 A I can't say what it was because of.
- 7 Q But this girl you are making out with didn't look  
8 like all the other William Brockmeyer girls; did  
9 she?
- 10 A I'm not sure of your question. William Brockmeyer  
11 girls? I mean...
- 12 Q She didn't look like Megan; correct?
- 13 A Correct. None of them looked alike.
- 14 Q You know what I'm taking about. Is this difficult?
- 15 A If you are trying to get to the fact of her being  
16 large, then that's the facts.
- 17 Q Yeah, that is the fact. But it's not the typical  
18 girl you would have in your little group of girls;  
19 is it?
- 20 A It's not the typical girl I would take out, no.
- 21 Q But you would make out with her?
- 22 A Yes, sir.
- 23 Q And so you are in that little foyer area, and you  
24 keep opening this door. You try to prop it open;  
25 don't you?

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- 1 A No.
- 2 Q So that didn't happen either? That didn't happen  
3 either?
- 4 A I tried to prop the door open?
- 5 Q Yes.
- 6 A No.
- 7 Q That didn't happen. And while you are in there  
8 making out with this girl, when the door is open,  
9 you can look right in there and see Mariko; can't  
10 you?
- 11 A I don't recall seeing her, no.
- 12 Q The tables are right there; aren't they?
- 13 A It's pretty dark inside.
- 14 Q And right at the open door heading outside, you can  
15 see Nick; can't you?
- 16 A I didn't see him at that time, no.
- 17 Q Nick, the one who dined you out with Deserae?
- 18 A That's incorrect.
- 19 Q The one who dined you out with Karmen?
- 20 A That's incorrect.
- 21 Q The one who dined you out with Mariko?
- 22 A That's also incorrect.
- 23 Q And the one who lost 300 bucks that you had to pay;  
24 correct?
- 25 A Incorrect.

1 Q There he is. And you have this (indicating) on you  
2 at the time; don't you?

3 A At what time?

4 Q While you are making out with this girl in the  
5 foyer.

6 A No.

7 Q So that didn't happen either. Then you decide to  
8 walk out where Nick is, and you said something  
9 about you see Nick raising up a gun to his neck or  
10 something?

11 A No. When I first went out there, he was leaned  
12 over, and you couldn't see -- I mean, you couldn't  
13 see anything. It was black. Then whenever he sat  
14 back up, it was like he was trying to lean in the  
15 chair and just brace himself. He had the gun in  
16 his gun and stuffed happened.

17 Q So at this point happy-go-lucky, I'm-having-fun  
18 Nick decides to end it all?

19 A No. I don't believe he would kill himself, no.

20 Q So he is so drunk that he decides, "I'm not  
21 thinking rationally," or he is just not think  
22 rationally and just kills himself? Is that what  
23 you are saying?

24 A No, that's not what I'm saying.

25 Q Today is your day. What are you saying?

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- 1 A I'm saying when I tried to reach for the gun --
- 2 Q I'm not asking what you did at this point. What
- 3 was Nick doing?
- 4 A It appeared that he was trying to brace himself
- 5 against the chair and wall.
- 6 Q But he has a gun in his hand according to you?
- 7 What is he doing with the pistol?
- 8 A I don't know.
- 9 Q You are watching him?
- 10 A I just told you. It did appear that he was trying
- 11 to brace himself.
- 12 Q What does that mean, brace himself?
- 13 A Stop himself from leaning over in the chair. The
- 14 chair is sitting kind of sideways. He has got his
- 15 back and his shoulder against the chair, and it
- 16 looked like he tried to put his arm on the back of
- 17 the chair.
- 18 Q So he is bracing himself like this (indicating)?
- 19 A No.
- 20 Q I wasn't there. Today is your day. Explain it.
- 21 A When he was trying to brace himself, I can't see
- 22 exactly where the gun went. It just went behind
- 23 his head. It's dark out there. It just looked
- 24 like he was trying to lean to me, but he was not
- 25 putting down his head or anything like that.

1 Q So somehow the gun you had in the foyer area ends  
2 up in Nick's hand when he is bracing himself?

3 A I never had the gun in the foyer area.

4 Q Nick gave it to you when he was playing pool?

5 A And he got it back when he was done.

6 Q You left out a little detail. He got it back when  
7 he goes out there. So now he has got two pistols?

8 A I was never aware of a second pistol.

9 Q That's right. The big black one in his backside,  
10 you didn't see. Had you ever seen that big black  
11 pistol before?

12 A I can't recall, no.

13 Q All right. So Nick is bracing himself. And he's  
14 got a gun in his hand?

15 A Yes, he is trying to brace himself with his hand.

16 Q And you try to stop him from what?

17 A I just tried to grab the gun. I mean, the guy in  
18 front of me just said something about a gun, and he  
19 was looking at Nick.

20 Q And your first thought when the shot goes off --  
21 you know he is shot at that point; right?

22 A No, I did not.

23 Q You heard a gunshot?

24 A Yes.

25 Q And you didn't know he was shot?

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- 1 A No, I got right up. I looked. Nobody moved.  
2 Nobody made any sounds. No nothing. He didn't  
3 move.
- 4 Q So your brother --
- 5 A He just sat there.
- 6 Q Your brother, the one you have this bond with, like  
7 people who go to war have, your brother, you hear a  
8 gunshot and your first reaction isn't to go, "Nick,  
9 my God, are you all right? Nick, a gun just went  
10 off. My God, did you get shot?" You didn't do  
11 that; did you?
- 12 A Nick didn't move.
- 13 Q I am asking about you. You didn't do anything; did  
14 you?
- 15 A No, I didn't know Nick was hurt.
- 16 Q But the one thing you did, the first thing you did,  
17 was grab that pistol; didn't you?
- 18 A Yes, I did.
- 19 Q You grabbed this pistol. Because you were thinking  
20 of you? "I might get in trouble." Isn't that  
21 correct?
- 22 A I was thinking of both of us. We both are  
23 convicted felons.
- 24 Q You were thinking of Nick, who for all you knew had  
25 just been shot, and you grab the pistol and you

1 run? You did it for Nick?

2 A I just wanted to get rid of the gun. I mean, it  
3 just shot. I don't know where it shot. Nobody  
4 appeared to move or do anything different. If we  
5 get caught with a gun, we are both going to jail.

6 Q So why even carry one?

7 A For protection. I mean, I didn't know anybody  
8 there. I'm not from here.

9 Q So you think Mariko and all these young girls are  
10 going to take you into such a rough area that  
11 you've got to carry a gun?

12 A It wasn't me who brought it there.

13 Q That's right. That wasn't your fault. You throw  
14 that pistol, this pistol, over a fence; right?

15 A Yes, it was in two pieces. The clip had come out  
16 whenever the gun fell.

17 Q And the footprints we saw presented the other day,  
18 those were yours?

19 A Yes.

20 Q No question about it?

21 A No.

22 Q No question. And you come back. Did you go check  
23 on Nick?

24 A I mean, as soon as I come around the corner, I  
25 didn't know anybody was hurt. Mariko was standing

- 1           there and there was a bunch of people standing by  
2           the front door. I was like, "What's up?"
- 3    Q       And when you discovered Nick is lying down and  
4           shot, you don't do anything for your brother; do  
5           you?
- 6    A       I can't even get close to him. There's so many  
7           people around him trying to help him. All I can do  
8           is look.
- 9    Q       You didn't even use the phone in your pocket to  
10          call 9-1-1?
- 11   A       I didn't even remember I had the phone. It was in  
12          my back pocket.
- 13   Q       So a memory issue there. That explains that. And  
14          then the crowd keeps you from seeing your brother?
- 15   A       A guy grabbed me and just basically stopped me from  
16          moving forward any further.
- 17   Q       Your brother dies with his head cradled in the arms  
18          of a stranger, not his brother? Isn't that true?
- 19   A       Yes.
- 20   Q       You didn't offer so much as your shirt to plug the  
21          hole in your dying friend's neck; did you?
- 22   A       No, that's incorrect. The reason I took my shirt  
23          off is when I went around, somebody was screaming  
24          about getting something to apply pressure. When I  
25          took it off, I couldn't even get close.

1 I just got even more frustrated. Mariko was  
2 the one standing right beside me. I just threw it  
3 at her. I was just -- I didn't know what to do. I  
4 mean, I've never been around somebody that has been  
5 shot before.

6 Q But we can believe everything you are saying;  
7 right? Because you are telling the truth today;  
8 correct?

9 A Yes.

10 Q Back in August of 2005, you were convicted of  
11 burglary; correct?

12 A That's correct.

13 Q Two counts of grand theft?

14 MR. MAULDIN: Asked and answered, Your Honor.

15 MR. HUBBARD: I haven't asked it.

16 THE COURT: You may proceed.

17 BY MR. HUBBARD:

18 Q Burglary and two counts of grand theft. We can  
19 believe you though; right?

20 A Yes.

21 Q And the fellow who sits here today, having put his  
22 hand on the Bible and swears to God and the world  
23 that you are going to tell the truth is the same  
24 guy that was out on that scene? Isn't that true?

25 A Yes.

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1 Q The same guy that was out there that night is the  
2 same guy here in this courtroom today? Isn't that  
3 true?

4 A Yes.

5 Q The man everybody looked at that night, everybody  
6 asked what happened that night, is the same man who  
7 is standing in this courtroom today?

8 A Yes.

9 Q And you did nothing; right?

10 A There was no way for me to do anything.

11 Q And even when you were at the Sheriff's Department,  
12 you were thinking not of Nick but of Will  
13 Brockmeyer; weren't you?

14 A I was just scared.

15 Q Scared for you; right?

16 A Correct.

17 Q In fact, you are saying you are so scared though on  
18 that short ride from the bar to the Sheriff's  
19 Department, you fell asleep in the back of a patrol  
20 car; didn't you?

21 A I don't recall.

22 Q Don't recall? That would be something you would  
23 remember. You are so upset --

24 A I don't recall falling asleep is what I'm telling  
25 you. No, I don't remember falling asleep.

1 Q So you didn't fall asleep in the back or you don't  
2 remember or recall falling asleep in the back of  
3 Deputy Hallman's car?

4 A No, I don't.

5 Q And we can believe you? You were convicted of  
6 petty larceny May of '09?

7 A I think I have answered that, correct.

8 Q The first question I put to you, the first time,  
9 May of '09; petty larceny; correct?

10 A Yes.

11 Q When you were at the Sheriff's Department and you  
12 made that one phone call, it was to Mariko; right?

13 A Yes.

14 Q You didn't ask her once about Nick; did you?

15 A I don't understand.

16 Q I don't either. You didn't ask about Nick, did  
17 you?

18 A I mean, he was dead. What was I supposed to ask  
19 her? I mean...

20 Q You asked what everyone -- you asked her, "What is  
21 everyone saying?" Didn't you?

22 A I don't recall.

23 Q It's all about you; correct?

24 A No.

25 Q And all those people when you were out there that

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1 night and they were wondering what was going on,  
2 you didn't tell one person, not one, the story you  
3 have just told today?

4 A No, sir.

5 Q It's about William Brockmeyer and what he's got to  
6 say to protect himself; right?

7 A That is incorrect.

8 Q Because you are scared today; aren't you?

9 A No, I told the truth. I put it in God's hands.  
10 There is nothing else I can do.

11 Q I say if it's there, there is nothing else you can  
12 do. But what you did that night, that was how you  
13 did it; right?

14 A Rephrase that.

15 Q Everything you did was for you?

16 A No.

17 Q All of this is a tragic, terrible accident?

18 A Yes.

19 Q And a great big misunderstanding?

20 A Yes.

21 Q And today is the first time you have expressed  
22 that?

23 A No.

24 Q No one else there that night, none of those  
25 patrons, none of those people helping your brother

1 heard this story; did they?

2 A None of those people. As soon as I was arrested  
3 though, my friends and my lawyer knew.

4 Q And the comment to this officer, blaming it on  
5 three black guys, that was false; wasn't it?

6 A It was false.

7 Q You lied?

8 A Yes.

9 Q You lied. But today these jurors can trust you?

10 A Yes.

11 Q Because you have no reason to lie now, do you?

12 A No, I don't.

13 Q All right. We will let them figure that out.

14 THE COURT: Any redirect for the defense?

15 MR. MAULDIN: No, Your Honor.

16 THE COURT: You may come down.

17 (Witness leaves the witness stand.)

18 THE COURT: Any other witnesses for the  
19 defense?

20 MR. MAULDIN: Pardon, Your Honor?

21 THE COURT: Any other witnesses for the  
22 defense?

23 MR. MAULDIN: No, Your Honor.

24 THE COURT: Anything in reply for the State?

25 MR. GRAHAM: Yes, Your Honor. We have some

1 reply witnesses. We need to take a short break to  
2 organize them.

3 THE COURT: I will let you go to the jury  
4 room. What my plans are so that you will now is I  
5 ordered lunch for you around 1:00 o'clock. I want to  
6 finish all the testimony before lunch.

7 So I will let you take a quick break, and I  
8 will be calling you back. We will hear whatever  
9 witnesses they have and break for lunch. The lunch will  
10 be on Lexington County expense, not yours.

11 (The jury retires to the jury room.)

12 THE COURT: Who is your reply witness?

13 MR. GRAHAM: We have asked for four people. I  
14 have asked, during the course of the cross, I have asked  
15 four people to come here, Your Honor. I am sure some of  
16 them are here. I don't know which ones. We have a  
17 potential of four. If you can give me 15 minutes, I can  
18 figure out who we are going to call and be ready to go,  
19 Your Honor.

20 THE COURT: You heard what I told the jury.  
21 Let's conclude the testimony before lunch if we can. I  
22 can't believe you have got four witnesses in reply, but  
23 go ahead and see what you've got. I will sit here and  
24 wait on you.

25 MR. GRAHAM: Thank you, Your Honor.

1 (Whereupon there is a recess.)

2 THE COURT: Yes, sir. How many witnesses are  
3 you going to have?

4 MR. GRAHAM: We have two witnesses, Your  
5 Honor.

6 THE COURT: I think since the jury is here and  
7 the food is here for all of us, we are just going to  
8 recess at this time and take them after lunch. Is that  
9 okay with you?

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

11 THE COURT: Does that suit the defense?

12 MR. MAULDIN: Yes, sir.

13 THE COURT: We are in recess subject to the  
14 call of the Court. I am not going to take an hour and a  
15 half for lunch.

16 MR. GRAHAM: Yes, sir.

17 THE COURT: What I will do is tell the jury  
18 that when they conclude eating, let me know and we will  
19 ready to go.

20 Do you want me to call the jury out or are you  
21 comfortable with the bailiff telling them?

22 MR. MAULDIN: I am comfortable with the  
23 bailiff. I think there is one matter I wanted to put on  
24 the record.

25 THE COURT: What is it, please?

1           MR. MAULDIN: We had originally objected to  
2 State's Exhibit 8, the photo of the defendant, when it  
3 was introduced in the case in chief. We want the record  
4 to reflect that the solicitor did use it as a  
5 demonstrative aid when he was cross examining the  
6 defendant, and he showed it to the jury.

7           THE COURT: I understand that. I have ruled  
8 on it. Gentlemen, your lunch is here. Hope will have  
9 it for you.

10          MR. GRAHAM: Thank you, Your Honor.

11                   (Whereupon there is a luncheon recess.)

12          THE COURT: Is the State ready to proceed?

13          MR. GRAHAM: Yes, Your Honor.

14          THE COURT: Is the defense ready?

15          MR. MADSEN: Yes, Your Honor.

16          THE COURT: Bring the jury in, please.

17                   (The jury returns to the courtroom at  
18 1:48 p.m.)

19          THE COURT: I hope that your lunch was  
20 satisfactory.

21                   Call your witness, Solicitor.

22          MR. HUBBARD: Thank you, Your Honor. The  
23 State calls Deserae Camacho.

24                                   DESERAE CAMACHO, being  
25 first duly sworn, testified as follows:

1           CLERK: Please speak up loud and clear,  
2 stating your full name on the record, spelling your  
3 last, please.

4           THE WITNESS: Deserae Camacho, C-A-M-A-C-H-O.

5           COURT REPORTER: And your first name, please?

6           THE WITNESS: D-E-S-E-R-A-E.

7                               **DIRECT EXAMINATION**

8 BY MR. HUBBARD:

9 Q     Deserae, how much notice did you get to come to  
10       court today?

11 A     About five minutes.

12 Q     You have been up here before dressed for court?

13 A     Yes, sir.

14 Q     We caught you off guard today?

15 A     Yes, sir. I was actually at the bank whenever you  
16       called.

17 Q     Thank you for coming. I want to ask you this too.  
18       Let's go ahead and address this out front. You  
19       have a pending charge with the Attorney General's  
20       Office; don't you?

21 A     Yes, sir.

22 Q     A conspiracy charge?

23 A     Yes, sir.

24 Q     Our office once handled that charge or had that  
25       charge; right?

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1 A Yes, sir.

2 Q And we told you that we are sending it to the  
3 Attorney General's Office?

4 A Yes, sir.

5 Q You have also been informed that we can do nothing  
6 on that charge?

7 A Yes, sir.

8 Q That we don't have authority over that charge?

9 A Yes, sir.

10 COURT REPORTER: You will have to speak up for  
11 me, please.

12 BY MR. HUBBARD:

13 Q She's got to type down everything you say; so speak  
14 up for me. I know you are nervous.

15 THE COURT: And remember, these gentleman way  
16 over there need to hear you too. So talk loud enough  
17 where they can hear you.

18 THE WITNESS: Yes, sir.

19 BY MR. HUBBARD:

20 Q Deserae, there's another matter. You have a  
21 magistrate's court bench warrant on you right now;  
22 right?

23 A Yes, sir.

24 Q And you understand I can't protect you on that as  
25 well; right?

1 A Yes, sir.

2 Q So you understand coming up here today may mean you  
3 don't go home tonight?

4 A Yes, sir.

5 Q But you came up here anyway?

6 A Yes, sir.

7 Q Thank you. Deserae, I know you are upset, but I  
8 want to ask you: Do you know William Brockmeyer?

9 A Yes, sir.

10 Q How do you know William Brockmeyer?

11 A He was a coworker at the club that I worked at, and  
12 we started dating each other.

13 Q What club did you work at?

14 A Platinum Plus.

15 Q What was your job at Platinum Plus?

16 A I'm a cocktail waitress.

17 Q You weren't a dancer?

18 A No, sir.

19 Q What was Will's job?

20 A He was a bouncer.

21 Q How did -- y'all were working there. How did you  
22 kind of get to know Will?

23 A He was what we call a lot guy. He worked out in  
24 the parking lot. He walked the girls to and from  
25 their cars. He used to walk me to my car every

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1 night, and we would just kind of sit outside in my  
2 car and talk for 20, 30 minutes before I would go  
3 home.

4 Q At some point -- what was your understanding of his  
5 marital status?

6 A That he wore a wedding band to keep the dancers and  
7 waitresses from hitting on him and him losing his  
8 job and that he was with a girl named Megan but  
9 that he basically just lived with her because he  
10 didn't have a place to go and that he paid for the  
11 car. It was in her name but he paid for it, and he  
12 just lived there. They weren't actually together  
13 anymore.

14 Q And you believed that?

15 A Yes, sir.

16 Q At some point did y'all start dating?

17 A Yes, sir.

18 Q About when was that?

19 A It was like late May, early June. That's whenever  
20 I told him that if we were going to actually be  
21 together fully that he would have to leave Megan  
22 and bring all of his stuff and move in with me.

23 Q If he was going to be with you, he couldn't be  
24 seeing anyone else?

25 A Yes, sir.

1 Q And the home you were living in, whose home was it?

2 A My mother's.

3 Q Your momma's house?

4 A Yes, sir.

5 Q She was living in the house as well?

6 A Yes, sir.

7 Q And you said this was sometime late May, early  
8 June?

9 A Yes, sir.

10 Q Did someone else move into the home around that  
11 time?

12 A Yes, sir, Nick did.

13 Q Nick Rae?

14 A Yes, sir.

15 Q At some point did you and Will break up?

16 A We did. It was around like July the 2nd. Nick let  
17 me know that Will had been cheating on me with a  
18 young lady named Karmen Morgan. He basically was  
19 just like, "Will has been seeing Karmen. They have  
20 been sleeping together. You are a good person. I  
21 don't think you deserve this, and I thought I  
22 should let you know."

23 Q As a result of that conversation you had with Nick,  
24 what did you do?

25 A I confronted Will and asked him if he had been

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- 1 sleeping with Karmen, and he told me no, that it  
2 was all a lie and that he hadn't been seeing her.
- 3 Q And did you hear a conversation with Will and Nick  
4 as a result of this -- what Nick told you?
- 5 A I did. Will called and whenever he called Nick's  
6 phone, I asked him to put it on speakerphone, just  
7 being nosy. I wanted to hear what Will had to  
8 say.
- 9 That's whenever Will told Nick that they were  
10 no longer friends anymore. He didn't want anything  
11 to do with him. He was supposed to be his friend,  
12 not mine. He was supposed to cover his back and  
13 not come back and tell me anything that goes on,  
14 and they weren't going to be friends anymore.
- 15 Q And this is sometime after July 2nd?
- 16 A Uh-huh. (Indicating affirmative response.)
- 17 Q July 4th -- well, let me ask you this. As a result  
18 of all of this lot, who still lives in the house --  
19 who was living in the house with your mom at that  
20 time?
- 21 A Nick was, myself and nick.
- 22 Q So Will was kicked out?
- 23 A He was kicked out whenever I found out about him  
24 sleeping with Karmen and other girls.
- 25 Q But Nick got to stay?

1 A Nick stayed.

2 Q July 4th, did you go on a family outing?

3 A We did. We had a 4th of July barbecue, and I took  
4 Nick with me.

5 Q You didn't take Will?

6 A No, sir.

7 Q Several days later did all three of y'all kind of  
8 mend the fences so to speak?

9 A We did. Probably around about the 7th of July is  
10 whenever the three of us started talking again. We  
11 all got back together, and whenever I told my  
12 mother that I was speaking back with William, she  
13 told me that if I wanted to be with him --

14 MR. MADSEN: Judge, I will object to the  
15 hearsay.

16 MR. HUBBARD: That's fine.

17 THE COURT: I would sustain that.

18 MR. HUBBARD: Thank you, Your Honor.

19 BY MR. HUBBARD:

20 Q As a result of you getting back with Will, did you  
21 get to live with your momma anymore?

22 A No, sir, I was kicked out.

23 Q And where did you live?

24 A The three of us moved into a hotel room.

25 Q So you, Nick, and Will lived in a hotel?

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1 A Yes, sir.

2 Q At any time when you were living with these guys,  
3 did you ever see Will with a pistol?

4 A I did.

5 Q Can you describe it?

6 A It was a small, black-like handgun, like a small  
7 pistol that he would either keep like in his pants  
8 or under the seat in the car.

9 Q When you say small, what do you mean small?

10 A It was small, like a small handgun that he would --  
11 like you could hold in your hand, small, not really  
12 big.

13 Q Can you describe what type of gun -- let me ask you  
14 this: Was it a gun with one of the spinning  
15 wheels?

16 A No, sir, it was one with the top part you pull  
17 back.

18 Q Did you ever see Nick with a gun?

19 A I did. He had like a fake plastic B.B. gun. It  
20 was like a big black plastic gun.

21 Q Did Will, to your knowledge, know that Nick's gun  
22 was a fake plastic B.B. gun?

23 A Yes. We joked around about it plenty of times.

24 Q Deserae, thank you for coming in here today. I  
25 know it's very thoughtful. I want you to answer

1 any questions the defense has. Okay?

2 A Yes, sir.

3 **CROSS EXAMINATION**

4 BY MR. MADSEN:

5 Q At some point in time -- I guess Karmen worked at  
6 the club that you worked at also?

7 A Yes, sir.

8 Q At some point in time, y'all kind of compared notes  
9 on Will or text messages; didn't you?

10 A Yes, sir.

11 Q That was part of the problem that you had with  
12 Will?

13 A (Witness nods.) (Indicating affirmative response.)

14 Q It would be fair to kind of classify Will as a  
15 player with women?

16 A Yes, sir.

17 Q He had a lot of girlfriends. In fact, you  
18 obviously got upset with him because he was with  
19 some other girl? I guess that was Karmen; correct?

20 A Yes, sir.

21 Q But then at some point in time, you decided to get  
22 back with him. And at some point in time, you were  
23 pregnant and had a baby; didn't you?

24 A Yes, sir.

25 Q When you were pregnant, you told Will it was his

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- 1 baby -- didn't you -- at one point?
- 2 A Yes, sir.
- 3 Q It wasn't; was it?
- 4 A No. There was two different pregnancies. I  
5 actually had an abortion with his child and then  
6 was pregnant a month later.
- 7 Q And you have had a conspiracy charge pending with  
8 the Solicitor's Office since November of 2008;  
9 correct?
- 10 A Yes, sir.
- 11 Q It just got transferred July of 2011; last month,  
12 to the Attorney General's Office?
- 13 A (Witness nods.) (Indicating affirmative response.)
- 14 Q It had been pending that entire time; correct?
- 15 A Yes, sir.
- 16 Q And you met with the Solicitor's Office before  
17 this?
- 18 A Before it got transferred?
- 19 Q No, no, no. Let me back up. You met with the  
20 Solicitor's Office about this case prior than  
21 today; correct? You have come up here to see them?
- 22 A I came up here on Monday because they told me to be  
23 here for trial, but I didn't get to talk to  
24 anybody. They just sent me home. I sat here for  
25 like three hours and they sent me home.

1 Q You came up here and you had a bench warrant  
2 pending; didn't you?

3 A Yes, sir.

4 Q The bench warrant means you failed to show for  
5 court? If law enforcement gets you, they are  
6 supposed to arrest you; aren't they?

7 A Yes, sir.

8 Q But you come Monday and they turn a blind eye and  
9 just let you leave?

10 MR. HUBBARD: Objection, Your Honor. He is  
11 stating what law enforcement did. She has no knowledge  
12 of that, and that is an improper question.

13 THE COURT: I sustain that. And you cannot  
14 arrest somebody in the courthouse who was summoned for  
15 another proceeding.

16 BY MR. MADSEN:

17 Q Ultimately Nick and Will mended fences, moved back  
18 in together in a hotel room? Was it the Knights  
19 Inn or was that Cambridge?

20 A It was the Knights Inn. We went to the Cambridge  
21 for two nights, and then we went to the Knights Inn  
22 for two nights.

23 Q And Will has tattoos on his arm; correct?

24 A Yes, sir. He's got tattoos all over his body.

25 Q And tattoos, I guess, on the inside of his wrist;

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1 correct?

2 A Yes, sir.

3 Q And Nick does not. He has some tattoos but at  
4 least not on the inside of his arm; correct?

5 A I'm not really sure. I know that he has got like  
6 stars somewhere on his arms, I believe, like the  
7 Volcum stars.

8 Q Volcum?

9 A Yes, like a skateboarding thing.

10 Q Is that those kind of stars that I see where like  
11 part is filled and part is not that's kind of  
12 popular?

13 A Yes, like black and white.

14 Q Give me just a second. Nick would wear a wrist  
15 watch on his left hand; wouldn't he?

16 A I'm not sure.

17 Q Nick knew about the gun that Will had?

18 A Yes.

19 Q At some point in time, you saw Nick handle that  
20 gun; didn't you?

21 A Yes.

22 Q Let me show you this. Does that picture look  
23 familiar, Defense Exhibit Number 1?

24 A I have never seen the picture, no, sir.

25 Q Can you describe what it is?

1 A It's a pistol in somebody's hand.

2 Q And you would agree that there's no tattoos on that  
3 wrist?

4 A No, sir.

5 Q And there appears to be a wrist watch on the left  
6 hand?

7 A Yes, sir.

8 Q In fact, that is Will's gun; isn't it?

9 A It looks similar to it. I couldn't tell you if  
10 that is it or not.

11 Q But it does look like it?

12 A Yes, sir.

13 MR. MADSEN: That's all the questions I have.

14 MR. HUBBARD: No questions.

15 THE COURT: You may come down.

16 (Witness leaves the witness stand.)

17 MR. GRAHAM: Grady Howell.

18 GRADY ALLEN HOWELL, being

19 first duly sworn, testifies as follows:

20 CLERK: State your full name spelling your  
21 last on the record, please.

22 THE WITNESS: My name is Grady Allen Howell,  
23 H-O-W-E-L-L.

24 THE COURT: Mr. Howell, I will ask you to  
25 speak louder, please.

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1 THE WITNESS: My name is Grady Allen Howell,  
2 H-O-W-E-L-L.

3 DIRECT EXAMINATION

4 BY MR. GRAHAM:

5 Q Grady, would you pull that microphone a little bit  
6 closer to you. How old are you?

7 A Twenty-three.

8 Q And how long have you lived in Lexington?

9 A Since 1995.

10 Q And you know William Brockmeyer; don't you?

11 A Yes, sir.

12 Q How long have you known him?

13 A A little over a year.

14 Q Now, you have been convicted of distribution of  
15 marijuana? Isn't that true?

16 A Yes, sir.

17 Q How would you describe your relationship with Will  
18 if you had to characterize it?

19 A I met him through his place of work, and he dated  
20 my sister, Deserae Camacho.

21 Q At some point did you and Will talk about his  
22 charges?

23 A Yes, sir.

24 Q What did he initially tell you about the charges?

25 A That nothing had happened or that he was unaware of

- 1           what had happened. He was inside the bar.
- 2   Q       He told you that he was inside the bar, and he
- 3           didn't know what happened?
- 4   A       Yes, sir.
- 5   Q       How many times did he tell you that?
- 6   A       Several.
- 7   Q       At another date and time, did he actually tell you
- 8           something else?
- 9   A       Yes, sir.
- 10  Q       And what did he tell you that time?
- 11  A       That Nick had handed him the gun to go put it up
- 12           and that it accidentally went off and discharged into
- 13           his neck.
- 14  Q       So who had the gun originally?
- 15  A       Nick.
- 16  Q       And what did Nick do with the gun?
- 17  A       Turned it around and handed it to Will where it
- 18           discharged and hit Nick in the neck.
- 19  Q       Did he tell you about it or did he show you how it
- 20           happened?
- 21  A       I mean, he told me about it. But he said that Nick
- 22           was sitting down and had handed him the gun where
- 23           Nick was holding the barrel. When he handed it to
- 24           him, the trigger discharged and went off.
- 25  Q       Let me show you a fake gun. So if you are Nick,

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1           you are in a chair, which hand -- if he told you --  
2           which hand did Mr. Brockmeyer tell you that Nick  
3           was holding the gun?

4    A    The left.

5    Q    In his left hand. Where did Will say that he was?

6    A    Sitting with his back up against the wall.

7    Q    So Nick's in a chair with his back against the  
8           wall, and he has the gun in his hand, in his left  
9           hand, holding it by the barrel?

10   A    Uh-huh. (Indicating affirmative response.)

11   Q    What is William Brockmeyer doing?

12   A    Standing in front of him.

13   Q    And what happens? What does he tell you happened?

14   A    Whenever he reached for the gun from Nick, it went  
15           off and hit him in the neck.

16   Q    Which hand did Will Brockmeyer say that he reached  
17           with?

18   A    The right.

19   Q    So as he is reaching for it with his right hand,  
20           Nick is handing it by the left. Did Will

21           Brockmeyer tell you who pulled the trigger?

22   A    No. He said that as he grabbed the gun, it went  
23           off.

24   Q    Did he tell who his finger was on the trigger?

25   A    No, sir.

1 Q Did he ever say who shot Nick?

2 A No, sir. He said the gun discharged and hit him in  
3 the neck as he reached for the gun.

4 Q Thank you, Mr. Howell. Please answer any questions  
5 defense has.

6 THE COURT: Does that conclude your questions?

7 MR. GRAHAM: Yes, Your Honor.

8 CROSS EXAMINATION

9 BY MR. MADSEN:

10 Q Grady, you were in jail at that time; weren't you?

11 A Yes, sir.

12 Q And I think -- is Deserae like a half-sister?

13 A Yes, sir.

14 Q And you knew Will from being at the club?

15 A Yes, sir.

16 Q And you know that when you are in jail, the first  
17 thing your lawyer tells you is don't talk with  
18 anyone about your case?

19 A Yes, sir.

20 Q You asked him about it. He wouldn't say anything  
21 about his case for a long time; correct?

22 A Well, I mean, I didn't necessarily come up and ask  
23 him about it. It was just discussed.

24 Q He wouldn't say anything?

25 A Yeah.

- 1 Q At some point in time, he tells you it's an  
2 accident; doesn't he?
- 3 A Yes, sir.
- 4 Q Okay. That he didn't mean anything to happen to  
5 Nick?
- 6 A Yes, sir.
- 7 Q And you've got a conviction for distribution of  
8 marijuana?
- 9 A Yes, sir.
- 10 Q And was that prosecuted by this Solicitor's Office?
- 11 A I'm not actually sure.
- 12 Q Was it Lexington?
- 13 A Yes, sir.
- 14 Q And when was that?
- 15 A I went to trial on December 15th when I was  
16 released.
- 17 Q So you were in jail for that, and you disposed of  
18 it since then?
- 19 A Yes, sir. I'm still currently on probation for it.
- 20 Q And you ended up pleading guilty?
- 21 A Yes, sir.
- 22 Q And getting probation?
- 23 A Yes, sir.
- 24 Q And you came up here to resolve that at this  
25 courthouse?

1 A Yes, sir.

2 MR. MADSEN: That's all the questions I have.

3 **REDIRECT EXAMINATION**

4 BY MR. GRAHAM:

5 Q Grady, you came up and pled guilty on December 13th  
6 of last year; is that right?

7 A Yes, sir.

8 Q Prior to December 13th, had you ever talked to me?

9 A No, sir.

10 Q Had you ever told anybody in law enforcement or  
11 anybody prosecuting this case what you testified to  
12 today?

13 A No, sir.

14 Q Thank you.

15 THE COURT: You may come down. Thank you.

16 (Witness leaves the witness stand.)

17 THE COURT: Any other reply witnesses for the  
18 State?

19 MR. GRAHAM: Your Honor, that's all the  
20 State's reply witnesses.

21 THE COURT: That would conclude the testimony.  
22 I will let the jury go to the jury room. I will be  
23 calling you back very shortly.

24 (The jury retires to the jury room.)

25 THE COURT: That concludes all of the

1 testimony? Any motions at this time?

2 MR. MAULDIN: Yes, sir, Your Honor. I would  
3 renew the directed verdict motions I made previously.  
4 Taking the testimony and evidence in the light most  
5 favorable to the State, they have not presented a case  
6 to submit to the trier of fact. I also renew all my  
7 prior motions and objections at this time.

8 THE COURT: There is, in my view, sufficient  
9 evidence for the jury to consider as to whether or not  
10 this defendant committed the crime of murder. It will  
11 be for the jury's determination. I respectfully deny  
12 that motion. Anything further?

13 MR. MAULDIN: No further motions, Your Honor.

14 THE COURT: All right, sir. Now, among your  
15 motions were various motions related to the chain of  
16 title, and I'm going to refer you to State v. Hatcher,  
17 which is an exhaustive opinion recently given by the  
18 Supreme Court.

19 In that it said: Whether in the discretion of  
20 the trial judge, the State has established a chain of  
21 custody as far as practical. The State never needs to  
22 establish the identity of every person handling fungible  
23 evidence.

24 They went on to say: It is sufficient if the  
25 evidence demonstrates a reasonable assurance the

1 condition of the items remained the same from the time  
2 it was obtained until its introduction.

3 It lists the following factors: the nature of  
4 the article, the circumstances surrounding the  
5 preservation, and consider the likelihood of nobody  
6 temporary fooling with it.

7 I conclude the chain of title is somewhat  
8 exhaustive in this case -- and the chain of custody  
9 too -- so, again, I reaffirm my decisions as to that  
10 issue.

11 Now, for the State obviously we will be  
12 charging murder. I have told you the other charges.  
13 Are there any additional charges requested by the State  
14 at this time?

15 MR. GRAHAM: No, Your Honor.

16 THE COURT: What charges are requested, if  
17 any, by the defendant, other than murder?

18 MR. MAULDIN: Your Honor, we would ask for a  
19 charge of involuntary manslaughter and accident.

20 THE COURT: I decline to charge involuntary  
21 manslaughter under the facts in this case. I think I  
22 may charge accident. I wasn't going to charge it, but  
23 your reply witness made it a part of this case,  
24 Mr. Graham.

25 MR. GRAHAM: Actually Mr. Brockmeyer made it a

1 part of the case when he testified, Your Honor.

2 THE COURT: I understand. What is your -- I  
3 am going to charge accident. What is your position with  
4 reference to involuntary manslaughter?

5 MR. GRAHAM: I don't believe that -- we are  
6 fine with you charging it, Your Honor.

7 THE COURT: You are? We will do that.

8 MR. MAULDIN: Your Honor, I believe there is  
9 evidence in the record -- sorry.

10 THE COURT: Pardon?

11 MR. MAULDIN: I apologize, Your Honor.

12 MR. MADSEN: I told him don't argue with you.  
13 You are going to charge it.

14 THE COURT: As I understand, the State is  
15 agreeing to me charging involuntary manslaughter?

16 MR. GRAHAM: Yes, Your Honor.

17 THE COURT: It's a close question but we will  
18 do it. I will charge accident and involuntary  
19 manslaughter. I am not going to charge voluntary  
20 manslaughter. We will take a short break and then we  
21 will come back. Are there going to be two arguments on  
22 behalf of the State or one?

23 MR. GRAHAM: Just one, Your Honor.

24 THE COURT: So the defense will go first. Is  
25 that agreeable to the defense?

1 MR. MAULDIN: Yes, Your Honor.

2 THE COURT: You will go first and they will  
3 conclude. Let's take a very short break.

4 MR. MAULDIN: Your Honor, one more thing. If  
5 you are going to charge that malice is inferred from the  
6 use of deadly weapon, we would object to that under  
7 State versus Belcher.

8 THE COURT: I am not going to use the  
9 presumption of a deadly weapon in this case since we are  
10 talking about involuntary manslaughter or accident.

11 MR. MAULDIN: Yes, sir.

12 THE COURT: I decline to do that part of it.  
13 We will be starting back very shortly.

14 MR. GRAHAM: Thank you, Your Honor.

15 (Whereupon there is a recess.)

16 THE COURT: For the State, anything further  
17 before we begin to charge?

18 MR. GRAHAM: No, Your Honor.

19 THE COURT: What says the defense?

20 MR. MADSEN: Looking for my co-counsel.

21 THE COURT: Pardon me. I will wait on him.

22 MR. MADSEN: He is doing the closing, sir. We  
23 probably need him. Here he is.

24 THE COURT: Mr. Mauldin, for the defense,  
25 anything else we need to discuss prior to bringing the

1 jury in for charges on the law?

2 MR. MAULDIN: No, Your Honor.

3 THE COURT: Bring the jury in, please.

4 (The jury returns to the courtroom.)

5 (Whereupon the Court charges the jury as  
6 follows.)

7 THE COURT: Mr. Foreman, as you are well  
8 aware, we have now concluded all of the testimony in the  
9 case and thus remaining is the final arguments of  
10 counsel and my charge to you upon the law, after which I  
11 will give you the case this afternoon for your  
12 deliberations.

13 Ordinarily we have the charge on the law after  
14 distinguished counsel have made their closing arguments,  
15 but over the years many jurors have told me, "Judge, I  
16 wish you would have given us the law first. I believe I  
17 could have followed the lawyers' positions better and  
18 applied the facts as I found them to the law, and it  
19 would have helped me to know the law first so I could  
20 follow the lawyer's position."

21 That just simply makes sense to me. So it is  
22 for the last 15 years, by and with the consent of the  
23 State and the defendant, I have done that. With their  
24 consent I propose to do it at this time.

25 I will give the charge on the law, have you

1 take a short break. We will return and we will have  
2 first counsel for the defense's argument. We will take  
3 a very short break at that time.

4 Then we will have arguments from the State.  
5 At that time I will give any concluding remarks that may  
6 be appropriate or necessary, and you will have the case  
7 for your deliberation.

8 But at the outset let me express to you again  
9 my deepest appreciation for your services in the case.  
10 I'm sure counsel for the State and the defense joins me  
11 in that, in that we all have observed you in the last  
12 four days.

13 I noticed without exception your perception  
14 and interest has been intense. That is simply a sign of  
15 a good jury intent on doing their work. On behalf of  
16 all of us, we wish to thank you for that.

17 Now, this indictment, as you are well aware,  
18 charges this defendant with two separate charges. The  
19 first one is murder and the second one is possession of  
20 a deadly weapon during the commission of a violent  
21 crime. So you will be dealing with two separate  
22 indictments, and I will explain that to you further.

23 Now, I remind you that the fact that this  
24 defendant was arrested, charged, and indicted in this  
25 case is not any evidence in the case and cannot be

1 considered by you as evidence of guilt in the case, nor  
2 does this indictment create any presumptions or  
3 inferences of guilt.

4 This document that I hold in my hand -- both  
5 of them -- is simply the formal written instructions  
6 which contains the charges made against this defendant,  
7 to which he specifically pleads not guilty.

8 It is the formal document by which the case is  
9 brought. I emphasize to you that the allegations in the  
10 complaint are allegations only and are not in any way  
11 evidence.

12 Evidence comes from this witness stand of  
13 witnesses under oath and from such other matters as I  
14 have introduced in the trial of this case. With  
15 reference to that, all of these matters in evidence will  
16 be with you, Mr. Foreman, during your deliberations.

17 And in that regard, there will be pencil and  
18 paper provided for you. If you or any member of your  
19 distinguished jury has a question, please write that  
20 question down and let the bailiff know.

21 If at all possible, I can answer it for you,  
22 remembering that I and nobody else can answer a question  
23 of fact. You are the sole and only finders of the  
24 facts, but if you have a question, present it to me. If  
25 I can deal with it, I certainly will.

1           Now, the indictments in this case allege two  
2 different offenses against the defendant as I have  
3 indicated. The charges were, one, murder and, two,  
4 possession of a deadly weapon during the commission of a  
5 violent crime.

6           Each indictment charges a separate and  
7 distinct offense. You must decide each indictment  
8 separately based on the evidence as to that issue. As  
9 an example; your verdict may be the same as to each  
10 indictment, but it may be different as to each  
11 indictment, depending on your view of the facts as you  
12 apply those facts to the law of the case.

13           Now, I want to discuss with you the  
14 defendant's presumption of innocence and every  
15 defendant's presumption of innocence who comes into this  
16 courthouse.

17           The defendant has pled not guilty to these  
18 indictments, and those pleas put the burden on the State  
19 to prove the defendant guilty beyond a reasonable doubt.  
20 A person charged with committing a criminal offense in  
21 South Carolina is never, ever required to prove himself  
22 innocent.

23           I charge you that it is an important rule of  
24 law that the defendant in a criminal case, no matter  
25 what may be the seriousness of the charge, will always

1 be presumed innocent for the crime for which he stands  
2 indicted unless guilt has been proven by evidence  
3 satisfying you of that guilt beyond a reasonable doubt.

4 This presumption of innocence does not end  
5 when you begin your deliberations, but it accompanies  
6 this defendant throughout the trial until you  
7 unanimously reach a verdict of guilt based on evidence  
8 satisfying you that the guilt is beyond a reasonable  
9 doubt. I will discuss that with you in just a moment.

10 The presumption of innocence is said to be  
11 like a robe of righteousness placed about the shoulders  
12 of any defendant which remains with him throughout the  
13 trial until you the jury, if at all, has found him  
14 guilty beyond a reasonable doubt.

15 I charge you, Mr. Foreman, and ladies and  
16 gentlemen, the presumption of innocence is not merely  
17 legal theory. It is not just a legal phrase. It is a  
18 substantial right which every defendant is entitled to  
19 unless you the jury are satisfied from the evidence of  
20 the defendant's guilt beyond a reasonable doubt.

21 Now, what is a reasonable doubt? Let me quote  
22 to you the following opinion: The State has the burden  
23 of proving the defendant guilty beyond a reasonable  
24 doubt.

25 Some of you may have served as jurors in civil

1 cases where you were told that it is only necessary to  
2 prove that a fact is more likely true than not, such as  
3 the greater weight or the preponderance of the evidence.  
4 I charge you, however, the following: In criminal cases  
5 the State's proof must be more powerful than that. It  
6 must be beyond a reasonable doubt.

7           Now, ladies and gentlemen, proof beyond a  
8 reasonable doubt is proof that leaves you firmly  
9 convinced of the defendant's guilt. There are very few  
10 things in this wide world that we know with absolute  
11 certainty, and in criminal cases the law does not  
12 require such proof.

13           The law does not require proof that overcomes  
14 every reasonable doubt [sic]. If based on your  
15 consideration of the evidence, you are firmly convinced  
16 that the defendant is guilty of the crime or crimes  
17 charged, you must find the defendant guilty.

18           If, on the other hand, you think there is a  
19 real possibility that the defendant is not guilty, you  
20 must give the defendant the benefit of that doubt and  
21 find him not guilty.

22           I want to reemphasize this -- I may have read  
23 it wrong, and I want to get it straight so there will be  
24 no question about it. Proof beyond a reasonable doubt  
25 is proof that leaves you firmly convinced of the

1 defendant's guilt.

2           There are very few things in this wide world  
3 that we know with absolute certainty, and in criminal  
4 cases the law does not require proof that overcomes  
5 every possible doubt.

6           I say to you again that if based on your  
7 consideration of the evidence you are firmly convinced  
8 that the defendant is guilty of the crimes charged, you  
9 must find the defendant guilty.

10           If, on the other hand, you think there is a  
11 real possibility that the defendant is not guilty of the  
12 crimes charged, you must give him the benefit of that  
13 doubt and find him not guilty.

14           Now, I remind you that during the trial, you  
15 and I both have certain duties to perform. As the trial  
16 judge, it is my responsibility to preside over the trial  
17 of this case, and I also have the duty to rule on the  
18 admissibility of the evidence offered during the trial.

19           You are to consider only the competent  
20 evidence before you. You must disregard anything from  
21 the outside that you may have heard or read. You are to  
22 consider the testimony and evidence presented and heard  
23 in this courtroom in this case this week. That would  
24 include the various exhibits that you will have with  
25 you.

1           Now, I have the additional duty to charge you,  
2 ladies and gentlemen, the law applicable to these two  
3 cases. As the presiding judge, I am the sole judge of  
4 the law of this case. I tell you now it is your duty to  
5 accept the law as I give it to you and apply the facts  
6 as you find them to be.

7           With regards to the law as I charge it to you,  
8 it may be that you or I might disagree with what the law  
9 is or ought to be, but if that be the case, there is  
10 some other tribunal to decide that issue.

11           I charge you that for the purposes of this  
12 case, please accept the law as I give it to you as being  
13 the correct law, remembering at all times that you are  
14 the finders of the facts. You take the facts as you  
15 find them to be and thereafter apply the law.

16           Now, I wish to emphasize to you too during the  
17 trial of this case if any word or ruling might have  
18 indicated to you how I feel about any factual issue,  
19 please disregard that. It was certainly unintentional.

20           This judge is not entitled to a factual  
21 opinion, and I have none. You 12 and you alone remain  
22 the finders of the fact in this case. As I said on  
23 Monday morning and I would like to say it again, nobody  
24 in this wide world can tell you 12 what the facts are.  
25 You are the sole and only judges of the facts in this

1 case.

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

9           Circumstantial evidence is proof of a chain of  
10 facts and circumstances indicating the existence of a  
11 fact. It is evidence which immediately establishes  
12 collateral facts from which the main fact may be  
13 inferred. Circumstantial evidence is based on  
14 inferences and not on personal knowledge.

15           Now, I charge you that the law makes  
16 absolutely no distinction between the weight or value to  
17 be given to either direct or circumstantial evidence,  
18 nor is a greater degree of certainty required of  
19 circumstantial evidence than of direct evidence.

20           You should weigh all of the evidence in the  
21 case. After weighing all of the evidence, if you are  
22 not convinced of the guilt of the defendant beyond a  
23 reasonable doubt, you would find him not guilty.

24           Now, several witnesses have testified and  
25 during the examination, either by the State or the

1 defense, their prior record in certain situations came  
2 up.

3 I charge you with reference to that, you may  
4 may use it only as to their credibility and  
5 believability if you choose to. You, of course, are  
6 free not to do it either. That's in your discretion  
7 whether you want to believe some of it, none of it, or  
8 all of it.

9 But you are entitled to consider a prior  
10 record, only if you choose to, not as to the guilt of  
11 the defendant but as to the truth or falsity of that  
12 particular witness who has testified.

13 I charge you that a person who has a past  
14 criminal record is fully competent to testify during  
15 trial. A past record does not affect the ability of  
16 that witness to testify.

17 Again I say, the past record may also be  
18 considered by you in determining the witnesses'  
19 believability, remembering that you are the sole finders  
20 of the facts.

21 I charged you earlier and I remind you that  
22 during the trial of this case, several witnesses, who by  
23 training or experience, were qualified as an expert. In  
24 that regard I charge you that an expert is fully  
25 qualified to give you his opinions on a matter in his

1 particular field.

2 I charge you further, however, that you may  
3 accept or reject the testimony of an expert in whole or  
4 in part based upon your consideration of his testimony  
5 and all the other evidence and exhibits. That, of  
6 course, is for you to determine.

7 If you decide that the opinion of an expert  
8 witness is not based on sufficient education and  
9 experience or if you conclude that the reasons given in  
10 support of the opinion are not sound or the opinion  
11 outweighs other evidence, you may, if you choose to,  
12 disregard it entirely.

13 I charge you further that an expert witness'  
14 testimony is to be given no greater weight than that of  
15 other witnesses simply because the witness is an expert.  
16 Further, you are not required to accept an expert's  
17 opinion even though it is not contradicted. That is for  
18 you to decide as finders of the facts.

19 Now, in the trial there were statements by  
20 witnesses of alleged statements given by the defendant.  
21 In the connection I wish to discuss it with you. While  
22 this Court generally determines the admissibility of  
23 evidence, I instruct you that regards any alleged  
24 statements made by the defendant that you, the members  
25 of the jury, make the ultimate determination of whether

1 or not the defendant made such a statement; and if he  
2 did make the statement, whether the statement was made  
3 by the defendant voluntarily of his own free will and  
4 accord and finally just what weight, if any, should be  
5 given to any alleged statement.

6 I charge you that you must determine if the  
7 alleged statement was a product of an essentially free  
8 and unconstrained choice by its maker, meaning the  
9 defendant.

10 If you determine that it was -- and the burden  
11 is upon the State to prove this fact as all other facts  
12 beyond a reasonable doubt -- then you may give the  
13 statement such further consideration as you deem proper.

14 If you determine that the alleged statement  
15 was not the free and voluntary willful expression of the  
16 defendant, then you should not consider that statement  
17 at all.

18 In determining whether the defendant's will  
19 was overcome in obtaining such a statement, you should  
20 consider both the character of the accused, the details  
21 of the interrogation, which is referred to in the law as  
22 the totality of the circumstances.

23 Some of the factors that you are to consider  
24 are the age of the accused, his education or lack  
25 thereof, his mental ability or capacity, his I.Q. or

1 intelligence, his background and environment.

2           It is for you to determine whether or not the  
3 statements were voluntary and freely made without threat  
4 or duress. If you conclude that they were, you may give  
5 it such other thoughts as you deem appropriate. If you  
6 conclude it was not freely and voluntarily made, you  
7 would disregard it in its entirety.

8           Now, during the trial of the case, the prior  
9 record of this defendant was admitted in testimony. I  
10 want to discuss that you with a moment. You have heard  
11 evidence that this defendant was convicted of certain  
12 crimes or bad acts, other than the one for which he is  
13 on trial.

14           This evidence of prior acts or convictions may  
15 be considered by you, if you conclude it is true, only  
16 in deciding whether the defendant's testimony is  
17 believable and for no other reason.

18           You must not -- you must not -- consider the  
19 defendant's prior record as any evidence whatsoever of  
20 the defendant's guilt to the charge we are here trying  
21 today.

22           It can only be used then -- and it's in your  
23 discretion -- as to the believability or credibility of  
24 the defendant. That, again, is within your discretion  
25 as finders of the facts.

1           Now, as you are well aware, this defendant is  
2 charged upon this indictment with the offense of murder.  
3 Let me now define that for you. The defendant is  
4 charged with murder. The State must prove beyond a  
5 reasonable doubt that the defendant killed another  
6 person with malice aforethought.

7           Malice is hatred, ill will, or hostility  
8 towards another person. It is the intentional doing of  
9 a wrongful act without just cause or excuse and with  
10 intent to inflict or injure or under circumstances the  
11 law will take to be an evil intent.

12           Malice is a wicked heart fatally bent upon  
13 mischief. Malice aforethought does not require that  
14 malice exist for any particular time before the act is  
15 committed, but I charge you malice must exist in the  
16 mind of the defendant just before and at the time the  
17 alleged act is committed. Therefore, there must be a  
18 combination of the previous evil intent and the act.

19           Malice aforethought may be express or  
20 inferred. These terms express and inferred do not mean  
21 different kinds of malice but merely the manner in which  
22 the malice may be shown to exist; that is, either by  
23 direct evidence or by inference from the facts and  
24 circumstances which are proven beyond a reasonable  
25 doubt.

1           Express malice is shown when a person speaks  
2 words which express hatred or ill will for another or  
3 when the person prepared beforehand to do the act which  
4 was later accomplished; for example -- this is example  
5 only -- lying in wait for a person or conduct of that  
6 kind.

7           I tell you that malice may be inferred from  
8 conduct showing a total disregard for human life and  
9 bent on evil intent. Again, malice must be shown in a  
10 murder charge by evidence to your satisfaction beyond a  
11 reasonable doubt.

12           Now, I am going to charge you the law with  
13 reference to involuntary manslaughter. If you find that  
14 the State has failed to prove beyond a reasonable doubt  
15 that the defendant committed murder, you may consider  
16 whether the State has proven beyond a reasonable doubt  
17 that the defendant committed involuntary manslaughter.

18           Let's discuss that a moment. To prove  
19 involuntary manslaughter, the State must prove beyond a  
20 reasonable doubt that the defendant unintentionally  
21 killed the victim without malice but while engaged in an  
22 unlawful act not naturally tending to cause death or  
23 great bodily harm or that the defendant unintentionally  
24 killed the victim without malice while engaged in a  
25 lawful activity with reckless disregard for the safety

1 of others. It will be for you to make that  
2 determination as finders of the facts.

3 At this time I'm also going to charge you the  
4 law in reference to accident. Again, all of these  
5 things are for you to consider as finders of the facts.  
6 The defense has raised the defense of accident.

7 An act may be excused on the grounds of  
8 accident if it is shown that the act was unintentional,  
9 that the defendant was acting lawfully, and that  
10 reasonable care was used by the defendant in the  
11 handling of the weapon.

12 The burden is on the State to prove beyond a  
13 reasonable doubt that the act was not an accident. That  
14 burden is on the State. It's not a burden on the  
15 defendant to prove it was. The burden is on the State  
16 to prove that the homicide was not an accident.

17 In that connection I charge you as follows:  
18 If one imposes the defense of homicide by misadventure  
19 or accident, such a defense would not be an affirmative  
20 defense, and the burden is not on the defendant to prove  
21 a thing. The burden is on the State of South Carolina  
22 to prove that it was not an accident to your  
23 satisfaction unanimously beyond a reasonable doubt.

24 Now, as to that first indictment, I am going  
25 to prepare for you a verdict form. There is no

1 significance attached to the way in which I put them  
2 down. I could turn them around and do them the other  
3 way.

4 As to the murder charge, that will be: We  
5 find the defendant guilty of murder or we find the  
6 defendant guilty of involuntary manslaughter or we find  
7 the defendant not guilty by way of accident or we find  
8 the defendant not guilty.

9 Now, there is another indictment I am getting  
10 ready to charge you about. As to that indictment, there  
11 will be two simple matters: We find the defendant  
12 guilty or not guilty.

13 I remind you that I will call you back after  
14 summation for some short additional remarks. I am about  
15 through.

16 The defendant is charged with possession of a  
17 weapon during the commission or attempt to commit a  
18 violent crime. The State must prove beyond a reasonable  
19 doubt that the defendant was in possession of a firearm,  
20 such as a pistol, or visibly displayed what appeared to  
21 be a firearm during the commission of a violent crime.

22 Of course, firearms mean obviously machine  
23 gun, rifle, pistol, or weapons of that nature. In order  
24 to find the defendant guilty of possession of a weapon  
25 during the commission of a violent crime, you must first

1 find the defendant guilty of either committing a violent  
2 crime or attempting to commit a violent crime. I charge  
3 you that the offense of murder is a violent crime.

4 Now, Mr. Foreman, and ladies and gentlemen,  
5 you 12 have been selected by both the State and the  
6 defendant as fair and impartial jurors sworn to  
7 impartially try and determine the facts of this case.

8 And when you comply with your oath to do so,  
9 then no one will have a right to criticize your verdict,  
10 and you 12 would have fully discharged your duty as  
11 jurors.

12 You should not and must not be influenced by  
13 opinions or expressions of opinions, if any, which you  
14 may have heard on the outside, but you are to decide  
15 this case according to the testimony and evidence  
16 presented that you have heard from the lips of the sworn  
17 witnesses.

18 Now, with regards to your deliberations, I  
19 continue to tell you that the State has the burden of  
20 proving beyond a reasonable doubt each fact necessary to  
21 constitute the crime of murder and the crime of a weapon  
22 during the commission of a violent crime.

23 I will emphasize it again when I make a short  
24 remark to you, but your decisions, of course, must be  
25 unanimous. It cannot be a verdict of the majority.

1 Obviously it would not be one of the minority. It must  
2 be the verdict of all of you.

3 I will prepare for you and have another  
4 explanation, Mr. Foreman, with regard to the verdict  
5 form. You have very patiently listened to my  
6 long-winded explanation. I will let you go to the jury  
7 room just a minute. When you return we will have the  
8 final arguments from the distinguished counsel for the  
9 defense.

10 (The jury retires to the jury room.)

11 THE COURT: From the State any exceptions or  
12 additions to the charge?

13 MR. GRAHAM: No exceptions or additions, Your  
14 Honor.

15 THE COURT: For the defense?

16 MR. MAULDIN: No, Your Honor.

17 THE COURT: The charge will stand. As I  
18 understand from prior conversations, the State elects  
19 not to open, and the defense agrees with that. Would  
20 you gentlemen like to take a short break before you  
21 begin your defense?

22 MR. MAULDIN: Yes, Your Honor.

23 THE COURT: I will permit that and you too,  
24 Coconut.

25 (Whereupon there was a recess.)

1           THE COURT: Bring the jury. Mr. Madsen, I  
2 will take a short break in between the two arguments. I  
3 think you requested that, Mr. Madsen, or somebody did.  
4 We will begin with the defendant. Bring the jury in.

5           (The jury returns to the courtroom.)

6           THE COURT: The jury is present. You may  
7 proceed for the defense.

8                           **CLOSING ARGUMENT**

9           MR. MAULDIN: Thank you, Your Honor.

10           Ladies and gentlemen of the jury, accidents  
11 happen. They happen for no reason, no purpose. And  
12 typically when we think of accidents, we are thinking  
13 of a car accident, someone tripping, things of that  
14 nature.

15           But when an accident involves a gun, you  
16 typically want to find a reason behind it because a gun  
17 is invented for a purpose. It has a reason. It has a  
18 purpose. It's to shoot people or to shoot animals. So  
19 when an accident involves a gun, people think that there  
20 must be a reason or a purpose behind it.

21           In this case the State is trying to force a  
22 reason and a purpose on the firing of this gun. This is  
23 not murder. It's not a killing with malice  
24 aforethought. The State in its opening said, "We don't  
25 have to prove a motive." That right there indicates

1 that's the weakness in their case.

2           They know it so they are setting you up at the  
3 beginning to warn you ahead of time, "We don't have  
4 this." It's true they don't have to prove motive, but  
5 motive goes a long way in order to establish malice or  
6 in order to make you believe that there is malice in a  
7 case.

8           Here they are not saying that this killing  
9 happened in the sudden heat of passion. He got real  
10 angry all of a sudden because he was provoked and he  
11 killed the man.

12           He is saying that gradually over time during  
13 this evening, he is getting more and more angry, more  
14 and more angry over this girl that is supposedly  
15 paying attention to this other guy and maybe a pool  
16 debt.

17           He is more and more angry, more and more  
18 angry, sits around, has some drinks, dances, goes  
19 outside, maybe makes out with a girl, and then goes, "Oh  
20 look, there is my friend Nick. I am going to walk up  
21 and kill him."

22           Look where this happened. It happened at a  
23 bar full of people, 30 to 60 people depending on which  
24 witness. People are in the bar. People are walking in  
25 and out of the bar. People are standing around outside

1 the bar smoking. People are sitting in chairs.

2 They would expect you to believe that he would  
3 be in some room with two people, making out with one and  
4 then another one is coming, and they are laughing,  
5 talking ha, ha, ha.

6 And he walks less than a minute with those  
7 people right there, not more than 10 or 15 feet, and  
8 kills a man right in front of them. And not only in  
9 front of them, but in front of two people sitting right  
10 there. That's not reasonable.

11 It's not reasonable to believe that Will would  
12 kill his friend in front of all those people. It's more  
13 reasonable to believe that something stupid happened:  
14 some sort of accident, some sort of behavior with this  
15 gun where it went off and Nick died.

16 It's not reasonable to believe that he would  
17 sit there just when those two people are right there,  
18 two people right there, people over here, walk up, sit  
19 down, and bam -- or bam, depending on which way the  
20 medical examiner wants to put the gun.

21 He kills his friend. They almost want to say  
22 that he has been flashing guns around all night, showing  
23 people guns. So he's going to do that and then kill  
24 somebody right there. He didn't even travel to that bar  
25 in his own car. He traveled with somebody else.

1           What kind of plan is that? What kind of --  
2 where is the function of that? That he is going to kill  
3 his friend over this girl or maybe \$300? And then what  
4 is he going to do?

5           Well, here is what he did. The gun went off.  
6 He's either reckless with it or it was an accident. He  
7 got rid of the gun. What does he do? If he was going  
8 to kill his friend, what was he going to do? Walk back?  
9 No, he was not going to walk back.

10           If he had killed his friend, especially if he  
11 knew he killed his friend in front of all those people,  
12 he would have got rid of that gun and kept going, kept  
13 going somewhere down the highway, but he came back.

14           The reason that he came back is because he  
15 didn't think there was anything wrong. He figured,  
16 "I'll come back. We will get in the car and we'll go."  
17 So he comes back and he stays.

18           He freaks out, doesn't act right, but he comes  
19 and he stays because that's his friend, and he wants to  
20 see how his friend is doing. If he had done something  
21 wrong or done something bad, he would have hightailed it  
22 out of there, and he didn't do that.

23           This is his friend, ladies and gentlemen. He  
24 knew him in prison. I've never been to prison and I've  
25 never been to war so I can't tell you what the

1 difference is or anything like that. But I imagine if  
2 you had somebody that you trusted like that, you would  
3 consider them very close to you, like a brother.

4 I don't think that any of the testimony really  
5 contradicts that. They may have had their disagreements  
6 here or there, but this is his buddy. He moved up from  
7 Florida to be with him.

8 They shared girls. He had dated a girl that  
9 Nick once dated. Nick joked with him about sleeping  
10 with Karmen. They are all living in the hotel with  
11 Deserae. They also shared guns unfortunately.

12 You saw that Will had tattoos on his hands.  
13 This is taken with Nick's picture. There's no tattoos  
14 on his hands. You understand that is holding the gun.  
15 It's very possible that Nick could have the gun, Will  
16 could have the gun, and they would pass it back and  
17 forth between one another.

18 I don't condone that behavior. I don't think  
19 it's right, but it does happen. This is his friend. He  
20 is not going to kill his friend over a girl, Mariko, or  
21 money. Let's talk about this girl Mariko.

22 Will only knew her for about somewhere between  
23 a week to three weeks, depending on who you believe. He  
24 cared so much for her he didn't tell her his real name.  
25 They didn't sleep together. She wasn't the love of his

1 life. He had three or four other girls going on at the  
2 same time.

3 Now, you hear the word player or something  
4 like that for the guy that doesn't really treat women  
5 right. He goes around and has a bunch of women at the  
6 same time, and he is probably lying to one or two of  
7 them. That's probably what is happening in this case.  
8 That doesn't make him a killer. That just makes him a  
9 bad man with women.

10 Now, because Mariko and her friends thought  
11 that he had done her wrong or he had lied about his name  
12 or he had not told her about the fiancée or he had a  
13 kid, they were viewing him in a negative way, and that's  
14 understandable.

15 You have an experience with somebody, and it's  
16 a negative experience or you hear from somebody else  
17 that somebody that you trust and they had a negative  
18 experience with a person, you look at every encounter  
19 that you have with them in a negative light.

20 They could be coming up to you being friendly,  
21 but you think maybe they want something. That's what  
22 happened in this case. They didn't know him but a  
23 handful of times. They didn't know him but -- a couple  
24 of them didn't even know him but one time before, but  
25 they are already telling you they know his emotions.

1           They know that he's laughing, that he doesn't  
2 really mean it. They know that he is fake crying. They  
3 know he is weeping. These are all not only negative  
4 opinions they have formed before that night but  
5 definitely since that night.

6           Gina had a negative opinion beforehand. She  
7 is talking with her friends. They are laughing or  
8 whatever, and she turns around and she sees the flash  
9 and the bang or whatever, and she doesn't know what to  
10 make of it.

11           She never really said that he did it with any  
12 kind of hostile intent or anything. She said he walked  
13 over from laughing. She sees him down there and she  
14 sees the gun go off and the shell fly.

15           But nobody has ever said that they had cross  
16 words between each other, any kind of animosity between  
17 them on this evening, none at all. It's not reasonable  
18 to believe that Will would have killed Nick over Mariko  
19 in a bar full of people in front of witnesses.

20           I think they may have realized that, but then  
21 all of a sudden they have this other motive. How do  
22 they have this? Oh, Keith Kabar gets in trouble.  
23 Originally they didn't see anything. They didn't see  
24 anybody standing there. They just heard a pop and  
25 nothing happened, nothing happened. They look and see

1 Will [sic] fall down.

2 But Keith gets in some trouble and lo and  
3 behold, he, his sister, and his sister's boyfriend all  
4 come trotting to the Solicitor office, and they are  
5 like, "Oh yeah, we saw this. Our story is changing now.  
6 We see a story that will help you out with your case."

7 The solicitor goes, "Okay. We will take that  
8 but we are going to transfer your case to the Attorney  
9 General's Office, but we are not going to have any  
10 control over it."

11 You don't think for any second that they are  
12 not going to be telling their lawyers, "I helped out  
13 Lexington with this murder case. See if we can get a  
14 deal with the Attorney General's Office." You've got  
15 another thing coming. That's exactly what they are  
16 doing, and that's exactly what they are trying to do.

17 Everybody's testimony in that regard about the  
18 demeanor of people, what is Nick's demeanor? What does  
19 everybody say? Laid back. Every single person, laid  
20 back, the same words, the same phrases. "He is laid  
21 back. We saw he had a gun but we didn't care. We  
22 didn't care that this guy had a gun because he is laid  
23 back."

24 "Will is aggressive. Oh, we worried about him  
25 having a gun because he is aggressive. Nick is laid

1 back. Will is aggressive." Over and over again: Laid  
2 back, aggressive; laid back, aggressive. That sounded  
3 somewhat rehearsed to me.

4 But they couldn't rehearse everything, and we  
5 have all heard differences in what happened as far as  
6 Will and the girl standing there, and they are having a  
7 hostile conversation.

8 Will and the girl are standing in the  
9 vestibule, and he is glaring at people. They are making  
10 out against this wall. They are making out against that  
11 wall. They are laughing. There is no hostile intent.

12 Will walks outside. He's got a gray tank top  
13 on. He has got his white shirt on. Nick was out there.  
14 A girl was helping him throw up. Nick was out there  
15 throwing up by himself and he walks back to the chair.

16 Will is standing right in front of Nick like  
17 this. Will is standing on the side of Nick just like  
18 this. Nick was there. He was slumped over. He fell  
19 over. Nick was there and he had his head back against  
20 the wall and then fell over. Nick was there and Will  
21 shoved him, and he fell over.

22 Will comes back. He's got no shirt on at all.  
23 Will comes back. He's got on a gray tank top. Will  
24 comes back. He has got his shirt on and he interacts  
25 with people, and then he decides to take off his shirt.

1 and throw it. These are just a few of them.

2 I'm sure you paid attention and listened to a  
3 lot of these inconsistencies throughout the trial.  
4 Obviously these people are at the bar. They have been  
5 drinking. They aren't really pay attention. They  
6 aren't thinking anything untoward is going to happen,  
7 and they are just not being accurate in what they saw.

8 The physical evidence in this case doesn't  
9 prove or disprove anything. Will testified that Nick  
10 had the gun up near his neck and by the neck, and he  
11 went to grab it. It could very well have been pressed  
12 into the neck.

13 It's hard to say. The doctor said he had his  
14 hand this way (indicating), but I guess they are saying  
15 that he had it up under this way. They didn't do  
16 another demonstration, I guess, to show whether or not  
17 that would work properly.

18 But the doctor did say that the way the barrel  
19 would be placed on the neck would be accurate with  
20 somebody that had their hand like that (indicating).  
21 The blood on his shirt, he could have gotten that from  
22 being there next to him when the gun went off.

23 Mariko testified that she had gotten his  
24 shirt, and she went and picked up his blutetooth out of  
25 the blood. Blood could have transferred from that.

1 There is blood on the inside of the shirt. Don't know  
2 how that got up there. The shirt was balled up and  
3 thrown.

4 The G.S.R., neither one of them had G.S.R.  
5 They are trying to say he went into the bar and washed  
6 his hands behind the sink. They got that in through the  
7 bar owner.

8 You've heard other witnesses testify that he  
9 stayed outside. He was out there mingling with them,  
10 and then he went and stayed by the car until the police  
11 came.

12 Why would he go in the bar to do that? How  
13 would he know there was a sink up behind there? There  
14 were bathrooms in the diagram off to the left or to the  
15 right from the entrance not very far. If he was going  
16 to do it, he would do it there.

17 Why did he wash his hands anyway when he's got  
18 something on his hands that they swabbed for D.N.A.? It  
19 didn't turn out to be anything. Obviously there is  
20 stuff still on his hands.

21 The firearms expert talked about the blockage.  
22 They want to say the blockage comes because of some sort  
23 of contact wound, but she also testified that the  
24 blockage could come from the gun dropping on the ground  
25 the way Will described.

1           Now, Will did not help matters any. His  
2 behavior was stupid. He was stupid for running and  
3 throwing that gun over the fence. He was stupid for  
4 coming back and not telling people what happened. He  
5 was stupid in his dealings with the police.

6           It might be out of fear. It might be because  
7 he doesn't trust the police. It might be because he is  
8 afraid he is going to get in more trouble, but his  
9 stupidity has created a very little bit of trouble into  
10 a whole lot of trouble. It would be a shame for him to  
11 be convicted of murder, not because he did it, but  
12 because he acted stupid afterwards.

13           The State's proof is beyond a reasonable  
14 doubt. The judge said it's not every doubt. But if  
15 there is a real possibility that Will is not guilty,  
16 that this happened through an accident or if it happened  
17 through recklessness and he is guilty of some kind of  
18 manslaughter charge, then you have to find that thing.

19           Because it's not reasonable, again, that he  
20 would kill his best friend less than a minute of walking  
21 away from people, people right there. It doesn't make  
22 sense. They are going to say it's a senseless killing,  
23 but it's just not reasonable to believe that, that it  
24 would happen in that fashion over this girl or this  
25 supposed pool debt money.

1           This was either an accident or he handled the  
2 firearm recklessly. We hope you find him not guilty of  
3 murder.

4           THE COURT: You may proceed.

5                           **CLOSING ARGUMENT**

6           MR. GRAHAM: What kind of man is William Mark  
7 Brockmeyer? What kind of a man takes a gun loaded to a  
8 bar? An evil man, a man bent on mischief. What kind of  
9 a man displays a gun in a bar? An evil man.

10           What kind of man racks a round in a bar? A  
11 man whose heart is bent on mischief. What kind of man  
12 would not stay and check on his brother when a gunshot  
13 is fired? A murderer, a killer, William Mark  
14 Brockmeyer.

15           He didn't stay and check on his friend because  
16 he wanted him dead. His testimony was that the shot was  
17 fired and he didn't know, and he panicked and he ran and  
18 hid the gun.

19           What did Justin Ainsworth tell you? He's the  
20 one that worked for the company that installed the  
21 A.T.M. safes. He told you that he heard a noise, a  
22 popping noise, and he looked. He saw the defendant walk  
23 or run or hurry by him.

24           I think right then and there he says the  
25 killer said, "He shot himself." So why is Mr. Ainsworth

1 lying? He's not. He is a liar and a killer. He  
2 knew his friend was shot because he pulled the  
3 trigger.

4           What kind of man would run and throw the gun  
5 away when his friend had been shot? What guns get  
6 thrown away? Do the guns of an accident get thrown  
7 away?

8           Do guns in self-defense get thrown away? The  
9 only gun that ever gets thrown away is a murder weapon,  
10 not an accident, not a mishandling of a gun, but a  
11 murder weapon.

12           This gun, his gun -- his gun. And how sad is  
13 it that Nick Rae, his brother, on his own cell phone  
14 identified the murder weapon? Will's gun on right --  
15 excuse me -- Will's gun on left; my gun on right.

16           His gun, a pellet gun, that multiple people  
17 told you he had in the back of his pants when he was  
18 shooting pool. He never handed that gun to him. He is  
19 the leader.

20           He's the one passing out 20s according to him.  
21 He's the one that brought his friend who needed help up  
22 to South Carolina so he could help him. He's the  
23 leader.

24           The leader is the man in charge. He's the man  
25 with the gun, the man with the power, the man with the

1 money. Nick Rae was not the leader. Nick Rae didn't  
2 carry that gun. That's Will's gun. You can believe it  
3 never left his side.

4           What kind of man would not offer his shirt to  
5 his brother who was bleeding? What kind of man? An  
6 evil man, a man who committed murder. He didn't want  
7 Nick to live. He wouldn't have shot him. He wanted to  
8 kill him.

9           He's not going to get blood on his shirt.  
10 He's not going to offer to help. He's not going to pull  
11 poor Nick's phone out of his pocket and call 9-1-1. He  
12 needed to get rid of the murder weapon. What kind of  
13 man would watch his brother die and do nothing? The man  
14 who wanted him dead.

15           Let's talk about motive to lie and let's talk  
16 about an evolution of a lie because that's really what  
17 we have been here this entire week for. It starts off  
18 with Justin Ainsworth and other people in the crowd, "He  
19 shot himself." That's what the defendant first said,  
20 "He shot himself."

21           The people are like, "Where is the gun? Where  
22 is the gun?" He knew that story isn't working. "I've  
23 got to come up with something else. What do I say?"  
24 When Mariko comes out and Mariko says, "What happened?  
25 What happened," supposedly he asked her, "What happened?"

1 What happened?"

2 She is like, "What are you asking me for? You  
3 were out here. What happened?" He said he was asking  
4 for the gun to do a robbery. She is like, "What?" And  
5 he said nothing. I don't know.

6 So Nick wasn't asking for a gun to do a  
7 robbery. That story didn't fit either. Is that what  
8 you heard out of his mouth today? So is Mariko making  
9 that up and lying? Why did that get said? What motive  
10 does Mariko have to lie? What does she gain?

11 We know his motive to lie. He is charged with  
12 murder, and he will say anything to get away. What is  
13 her motive to lie? Why did she make that up? She  
14 didn't because it's the truth.

15 What else did he say? "Somebody else did it.  
16 It must have been somebody else." He even told Shawn  
17 Grant that maybe three black guys did it, but nobody is  
18 buying his story because it's a lie. They are all lies.  
19 He's got to come up with something better.

20 Leslie Lawson, that's the lady who owned the  
21 bar. She was the one who was standing next to him. She  
22 was trying to console him because she knew that his  
23 friend had been shot. She said, "Who? Who could have  
24 done this?"

25 Did he tell her it was an accident? Did he

1 tell her there was a struggle over the gun? Do you know  
2 what he did? He hung his head. She said, "Who did it?"  
3 And he hung his head. Because the answer was he did it  
4 and he meant to, and it was murder.

5 David Day, the crime scene investigator, the  
6 one with the shoes that we talked about, the defendant  
7 admitted he walked there, but we had to put the  
8 testimony up anyway.

9 There was a lot of objections to chain of  
10 custody, but he gets up on the stand and says it's an  
11 accident, the first time ever. He tells him he is not  
12 near the gun when it's fired. Why did he need to lie  
13 about that? He didn't need to lie about that unless he  
14 is the killer.

15 He asked him should he have gotten blood on  
16 him? Would he have been near him? "No, I wasn't around  
17 him. I shouldn't have any blood." We know that is not  
18 true.

19 How many people came in here from S.L.E.D. and  
20 told you the victim's blood, Nick's blood, his dying  
21 blood, was on this shirt, not one place, not in two  
22 places, not in three places, but four different places.

23 Why did he lie about that? Would it have  
24 mattered if he had blood from helping his friend or is  
25 it because he didn't want the police to know he is the

1 killer?

2           The bluetooth, maybe the blood got transferred  
3 from the bluetooth. That's not what the expert said.  
4 The expert said the transfer stain, the smear stain that  
5 was on the bluetooth, came from something else onto it,  
6 not from that onto something else.

7           William Brockmeyer had to come up with a story  
8 that would fit. He shot himself isn't working.  
9 Somebody else did it. Three black guys did it. I don't  
10 know who did it. I don't know what happened. Maybe he  
11 wanted it for a robbery. I don't know. Nobody is  
12 buying the story because they are lies and they are not  
13 true.

14           So he is in jail with Grady Howell, and they  
15 are talking. He tells Grady, "I didn't do it. I didn't  
16 do it. I didn't do it. I was somewhere else. I was  
17 inside. I didn't do it."

18           Finally he says, "Let me tell you the truth  
19 today. The truth is that Nick was in the chair -- and  
20 that's true. We have all kind of witnesses to say that.  
21 He said Nick was handing him a gun -- this gun-- and he  
22 Nick handed it to him barrel first and that William  
23 Brockmeyer grabbed with it his right hand, and the gun  
24 went off and he shot him in the neck.

25           That's not the story he told y'all today. So

1 why is Grady Howell lying? What did Grady Howell have  
2 to gain by coming in here today? He's on probation. He  
3 didn't come to talk to us until after he pled. We  
4 didn't even know he existed.

5           What motive does he have to come and lie and  
6 make up the story? Because that is not the same story  
7 that he told you today, and he wants you to believe it  
8 was an accident. That's different. We've got different  
9 people handling guns at different times. That's not the  
10 way he said it today.

11           Does that explain the contact wound? No, it  
12 doesn't. And that's why the story changed because it  
13 became a contact wound, the wound with a gun pressed up  
14 against here (indicating) like the pathologist said,  
15 hard enough to leave the bruising on Nick's neck.  
16 That's not the story he told Grady Howell. That didn't  
17 match up with the facts; so he changed his story.

18           Ladies and gentlemen, if you believe it's a  
19 terrible accident and if you believe that's it all a  
20 sad, sad accident, you let him go home. It's your power  
21 to send him home and to set him free.

22           Let's talk a little bit about a motive. I  
23 want you to remember some words that Mr. Brockmeyer said  
24 today on the stand. Maybe it didn't seem important  
25 then, but it does now.

1           He was talking about the marriage license with  
2 Megan Brockmeyer, Megan Bair, who was his wife or wasn't  
3 his wife depending on who you talk to. But he said the  
4 reason that it didn't get carried through, that the  
5 paperwork didn't get filed. "She made the mistake, but  
6 I made the decision." He made the decision not to be  
7 married.

8           I want you to think about it in this case and  
9 how it applies here because that's who he is. It's not  
10 his fault; it somebody else's. It's not William Mark  
11 Brockmeyer's fault; it's Nick Rae's fault. But it's his  
12 decision.

13           So what kind of faults did Nick Rae do? Well,  
14 you heard from Deserae. That's the girl who testified  
15 today. She came up here today knowing that she was  
16 probably going to be arrested on bench warrants, and she  
17 still came to tell the truth. You ask yourself what  
18 motive she has to lie. Why would she come up here and  
19 make up stories?

20           She told you that Will had a gun, and I  
21 believe the defense counsel maybe even showed her a  
22 picture -- I don't remember -- a small gun like that,  
23 could fit in a pocket.

24           She said that Will knew that this was Nick's  
25 gun, a pellet gun or a B.B. gun as she called it. She

1 said that Will knew that. That's not what he told you  
2 on the stand. He said he didn't know about that gun.  
3 He didn't know Nick had that gun.

4           But what else did she tell you? She told you  
5 that Nick Rae told her that he was cheating on her, and  
6 she confronted him with it and said, "Nick told me," and  
7 that Will got mad at Nick and they broke their  
8 friendship off for a while. That's not what he said up  
9 there today though; is it? So is he lying? If you lie  
10 about little things, you lie about big things. Why  
11 would she lie?

12           Let's talk about Mariko. That wasn't the  
13 first time that Nick had gotten away with that. He got  
14 Deserae, now onto Mariko. It's the exact same thing,  
15 "Hey, Mariko. I'm Dea. I'm Damien. Good to meet you.  
16 I've got a car. I've got a job. I got a girlfriend but  
17 we are on the outs."

18           What did Nick do? "No, he's lying. His name  
19 is not Dea. It's not Damien. This is Will." What did  
20 they do with that information? They had Damien  
21 Brockmeyer. Now they've got Will Brockmeyer. They go  
22 on the internet, "Oh, he's engaged and he's got a kid  
23 maybe." He lied.

24           So she breaks it off with him, and she doesn't  
25 call him anymore, doesn't return his phone calls. The

1 testimony is that he is upset and he's trying to contact  
2 her.

3 Mariko invites Nick to the party. Nick gets  
4 Will there. Mariko says, "It's okay. He can come," but  
5 she didn't want him to come at the beginning. He didn't  
6 go to keep Nick company. He went after Mariko.

7 And how bold is he? He brings a girlfriend  
8 with him, picks a fight with her, not paying attention  
9 to Mariko at the party, but once the girlfriend leaves,  
10 the coast is clear. So it's back on with Mariko at the  
11 bar, but Nick had dined him out again.

12 You heard testimony that William Brockmeyer  
13 was upset for paying Nick's bar tab twice. Nick didn't  
14 have any money. He told you that. At the autopsy I  
15 think he had 25-, \$26 and some change. He didn't have  
16 any money. Even Mr. Brockmeyer told you that he gave  
17 him two 20s.

18 So he's mad and he complained about having to  
19 pay the bar tab. His friend Nick is getting drunk and  
20 he is passing out. They are telling him, "You've got to  
21 take care of your friend." He doesn't want to take care  
22 of his friend. He wants to take care of Mariko.

23 We've got this pool game. You've got Keith  
24 Kabar, Jamie Spencer, and Amera Kabar, pool hustler. Do  
25 you think people like that might not want to talk to the

1. police? Does it really surprise you that maybe she  
2. wouldn't say, "Hey, I was playing pool with him, and I  
3. hustled him for \$300. Take me away." Of course not.

4.           You think those are the kind of people that  
5. scoot out the back and get in cars? Yes. But did they  
6. come here and tell you all what really happened? They  
7. did. What motive did they really have?

8.           Keith Kabar has some charges that are at the  
9. Attorney General's Office. I can't dismiss them. I  
10. can't cut a deal with him. What did he really say? He  
11. said that he saw -- his main testimony was that he saw  
12. Will Brockmeyer crouched over right before the shooting.

13.           Did he really say that he saw -- he said he  
14. saw the gun inside, but did he really say anything else?  
15. If Keith Kabar was going to come in and lie, couldn't  
16. his story have been so much better? Maybe it wasn't  
17. because that's the truth.

18.           Is his sister really going to lie about  
19. hustling from him? They come in and talk about sitting  
20. next to him and seeing William Brockmeyer making out  
21. with a girl in the foyer, looking over her head and  
22. looking agitated.

23.           Is she going to make that up? Is she going to  
24. talk about him flashing a gun? She didn't have to come  
25. in. She didn't have to talk to the police. Is she

1 doing that for her brother? You give it wherever weight  
2 you think.

3           Jamie Spencer told you he had been shot  
4 before, been in prison before. He tells you that in the  
5 bar he sees that man bring out a small caliber gun and  
6 rack a round.

7           Let's talk about guns for a second while we  
8 are there because now we have got a live round in this  
9 gun. For it to fire, you have to have a live round in  
10 this gun. It can't be empty. You've got to have a  
11 magazine. You heard the expert say that. It's got to  
12 be in there.

13           I couldn't fire -- I could not fire it like  
14 this now with a bullet in the chamber. You've got  
15 safeties and you've got to push a button to click it  
16 off. You've got a safety and a button to click it off.

17           So to fire it, it has to be in this position  
18 (indicating). It's got to be cocked and unlocked. So  
19 is he carrying it around in his pants cocked and  
20 unlocked and ready to go? It sure was at the moment it  
21 got fired.

22           Who carries a loaded and un-safetied gun  
23 around? If you have got a gun and it's loaded and are  
24 going to carry it around like that, you better have a  
25 safety on, unless you are ready to use it.

1           If this was Nick's gun -- and he knew all  
2 about this gun -- do you think he would be carrying  
3 around a gun that was loaded, had a round in the  
4 chamber, and didn't have a safety on? If that makes  
5 sense with you, then you give it what weight you want.

6           Will Brockmeyer told you that Nick had no  
7 money. "I gave him a 20. I gave him another 20."  
8 Where did the \$300 come from? Amera Kabar told you she  
9 won \$300. He said Nick had no money. It was his money.

10           That's where she told you that he went. At  
11 least one time or maybe twice, she saw Nick go over to  
12 Will. Will Brockmeyer didn't get mad until he came over  
13 and he saw that he kept losing and losing.

14           That's when the gun came out, and that's when  
15 it got flashed, to intimidate Mariko -- excuse me --  
16 Amera. "This is how we do it." But maybe he wasn't  
17 talking to her. Maybe he was talking to Nick.

18           Let's talk about some of our witnesses. We  
19 talked about motive to lie. We all know he has got a  
20 motive to lie. We know he has lied. Gina, the very  
21 first witness that the State put up, the young girl who  
22 was crying up on the stand.

23           She talks about his behavior before. Will is  
24 agitated before. He is after Mariko. Mariko is playing  
25 hard to get. She doesn't know anything about the pool

1 game.

2 She knows that Nick comes back from pool and  
3 he's passing out and that Will doesn't want to take care  
4 of his brother or his friend because he's getting in the  
5 way of Mariko again. He lost \$300.

6 So Nick goes out, is helped out. She  
7 eventually follows out to find out what is going on, to  
8 check to see what was going on. She sees him throwing  
9 up, sees him getting into a chair, and sees him passing  
10 out, which is consistent with the toxicologist, the guy  
11 who came in from S.L.E.D. to talk to about the effects  
12 of alcohol on the body, and we had the .220 and .227.

13 That's a lot of alcohol and that is consistent  
14 with Gina's that he was throwing up, passing out. She  
15 says that when she sees him, his hands are down by his  
16 side, and his head is down, and he is sitting in that  
17 chair.

18 She said she sees the defendant making out  
19 with her friend Brittany. She sees -- she calls him on  
20 it. Supposedly everybody laughs. She is talking to  
21 Brittany for a second, and she goes back out.

22 She is going to check on the guys again she  
23 said. She sees William Brockmeyer crouched down with  
24 his hand up toward Nicks' neck in a shooting position.  
25 She said Nick is passed out with his hands by his side.

1           You can find him guilty on that and nothing  
2 else. Nobody said she was drunk and nobody has said why  
3 she would lie. Why would Gina lie? She has got his  
4 hands down here (indicating), passed out in the chair.

5           The hand never comes up. She didn't see a gun  
6 in Nick's hand. She doesn't see a transfer between the  
7 two. She doesn't see Nick falling back. Nobody has  
8 Nick falling back in that chair and having to catching  
9 himself, no other witness except him. His hands are by  
10 his side.

11           She sees a flash. She hears a noise and she  
12 sees a -- what is later determined to be -- she called  
13 it a gold thing flying through the air -- a shell casing  
14 flying through the air. You can find him guilty of  
15 murder on that alone. She has no reason to lie. He's  
16 got every reason in the world to lie.

17           You remember the Lesesnes? Mark was a big  
18 guy. He was the one supposedly holding Will Brockmeyer  
19 off when his wife Shandon, the nurse or the one who  
20 worked in the emergency room, was trying to put pressure  
21 on his neck.

22           What do we know about them? What did they  
23 say? And do they have any reason to lie? Just like  
24 everybody else, what motive do they have to lie? How  
25 did they describe his behavior, his actions?

1           He's screaming. He is out of control. "Help  
2 my brother. Save him. Do something." But he doesn't  
3 offer to help. Shandon tells you she is looking for  
4 shirts. She is asking, "Give me shirts. Give me  
5 shirts. Give me shirts."

6           We know he had two, and he sure didn't have  
7 them when the police got there. I wonder why. He  
8 didn't give them to a nurse who is asking for shirts or  
9 towels to stop the flow of his brother's blood, but he  
10 wasn't wearing them either.

11           The undershirt, nobody found. The wife beater  
12 that everybody described that he had on at one time,  
13 nobody knows where that went. The white Sean John shirt  
14 is the one with the blood on it. Maybe that's why he  
15 didn't have it on.

16           But how did she describe his behavior? How  
17 did she describe Will Brockmeyer's behavior? This is a  
18 man who he tells you -- and you saw him testify up  
19 there. His face is red and tears -- is that how she  
20 described him to you?

21           He wants to tell you that he was numb. His  
22 friend had, according to him, just shot himself,  
23 accidentally shot himself, dying in somebody's lap dead,  
24 and she is like, "He is not acting right."

25           And that's what he was doing, he was acting

1 and he wasn't very good at it. He was not acting like  
2 somebody whose brother had just been shot, and I think  
3 those are her words.

4           What do we know about Lesley Lawson? That's  
5 the lady who owned the bar. It was on her family land.  
6 They had the acres. They built it and they started  
7 running it in September of that year. What motive does  
8 she have to lie about anything?

9           What has she got against William Mark  
10 Brockmeyer other than the truth? She tells you that the  
11 music is loud that night, and that's important. What  
12 else did she tell you? He is propping the door open  
13 right before the shooting in the foyer.

14           Hip hop music, loud music. A gunshot? That's  
15 not a bad combination if you are trying to hide a  
16 murder. He is trying to prop the door open several  
17 times, so much that she sends her husband to go tell him  
18 to cut it out.

19           She uses that door to keep track of who is  
20 coming in; so that door stays closed. He admitted he  
21 was propping the door open. He never said why. But it  
22 wasn't just holding the door open, she said he was  
23 trying to prop it open with the news stand. There is a  
24 picture of that in there.

25           He wants the music to come out. He's in the

1 foyer and he is agitated. He may be with Brittany but  
2 he is using Brittany. Brittany is not his type of girl.  
3 Brittany doesn't serve drinks in a bar or dance, but it  
4 gives him an excuse to be in the foyer where he can look  
5 and keep his eyes on his victim Nick Rae.

6           You know he is upset and agitated the whole  
7 night because of Mariko, because of the money. What  
8 else does Leslie tell you? She goes outside afterwards,  
9 and she goes to console him like a mother and tell him  
10 how sorry she is about his loss.

11           And he says something like, "Dog, my friend  
12 has just been shot. My brother has just been shot."  
13 She asks the question that everybody wants to know, "Who  
14 could have done it?"

15           Did he tell her the story that you all heard  
16 today? Because that's what it is, a story. No. Did he  
17 tell the truth? No. He didn't tell her that he killed  
18 him. He hung his head and didn't answer.

19           Does this look like a man whose friend had  
20 just been shot? Does that look even -- as he testified  
21 today -- somebody who is numb? Or does that look like  
22 anger and defiance? You are looking at a killer.

23           At the beginning of the trial, the defense  
24 attorney told you that there was going to be a boatload  
25 of reasonable doubt, a ton of reasonable doubt. We have

1 chased chain of custody all through this case, and we  
2 brought everybody from S.L.E.D.

3 We tried to be as close to T.V. as we can and  
4 check everything. You heard people from gunshot  
5 residue, but if it's an accident, that doesn't really  
6 matter. You heard people from toxicology. You heard  
7 from people from firearms telling you that the bullet  
8 that was recovered from Nick's body was this one.

9 Keep your eye on the facts. Keep your eyes on  
10 what is important. Don't be distracted by stories that  
11 don't make sense. Don't take a detour. Focus on the  
12 evidence and the testimony and the credibility of the  
13 people who testified.

14 We had a shoe examiner take a look at the  
15 shoe. He told you that was his feet, and he did go  
16 there to throw the gun. Because he was more worried --  
17 in his words -- he needed to get rid of that gun.

18 Why did he need to get rid of that gun? If  
19 the police would have come and found the gun in Nick's  
20 hands, what would he have been in trouble for? He is a  
21 convicted felon. He told you that he bought this gun.  
22 Do you really believe this gun is registered anywhere to  
23 him? Do you think there is any proof that was his gun?

24 You can talk about this picture. That says  
25 it. But who had the phone on him? He did. It was in

1 his pocket. So now he wants to tell you he threw the  
2 gun away because he is a felon.

3 If you believe it was a tragic accident and he  
4 ran and threw that gun away and left his bleeding friend  
5 to go cover for himself and that he was numb, find him  
6 not guilty and let him go.

7 We had blood stain experts come and talk to  
8 you, talk about the stains on the shirt, the stains on  
9 the bluetooth. We had a firearm expert come to you and  
10 explain about the workings of the gun and matching the  
11 fired projectile to that gun.

12 You saw the picture where when Investigator  
13 Day found that gun, it was partially opened. The  
14 magazine was in one spot; the gun in the other. She  
15 said it could have come from being pressed up against  
16 something. Could it have come from being thrown? She  
17 said maybe, but it could have come from being pressed  
18 against something too.

19 Let's talk about the pathologist. That was  
20 the doctor who had done 1500 autopsies. He told you  
21 that it was a contact wound. That didn't fit with Grady  
22 Howell's story that he handed the gun off and puts the  
23 gun away.

24 It means that the gun -- and he showed you --  
25 was pushed up against the skin, up against Nick's neck

1 and his muscle, the muscle in his neck. What would be a  
2 reason to take a gun and push it hard against something,  
3 hard enough to leave a bruise? If you think that came  
4 from an accident, give it what weight you think it is.  
5 It you think it's enough, turn him loose.

6 But just like propping the door open with the  
7 wire to look out and keep your eyes on your prey,  
8 pushing a gun hard enough to leave a bruise, pulling the  
9 trigger, and that gas coming back to push up against  
10 that barrel to leave a bruise. It could be to muffle  
11 the noise, just like the loud music coming out.

12 What kind of man is William Mark Brockmeyer?  
13 He is an evil man, a man whose heart was filled with  
14 malice when he took that gun, put it to his friend's  
15 neck and pulled the trigger, when he killed him and he  
16 ran away and let him bleed to death.

17 His robe of righteousness has been torn off.  
18 He sits before you guilty of murder. Damien's mask,  
19 Dea's mask has been taken from his face, and you see the  
20 real William Mark Brockmeyer. He is a killer. He is an  
21 evil man. William Mark Brockmeyer is a murderer. Thank  
22 you.

23 THE COURT: Thank you, counsel for the State,  
24 and thank you, counsel for the defense.

25 Mr. Foreman, ladies and gentlemen, you have

1 now heard all of the evidence in the case through  
2 testimony and numerous exhibits. You have heard the  
3 final arguments by the distinguished counsel for the  
4 State and of the defense. It is now your job to begin  
5 your deliberations.

6           Again, with reference to the gun charge, on  
7 the back of this indictment is the word verdict. You  
8 will either write not guilty or guilty. Whatever your  
9 verdict is, it has got to be the unanimous verdict of  
10 all 12 of you.

11           Now on the indictment for murder, I have  
12 prepared the following verdict. Again, there is no  
13 reason or rhyme why they are this way. I could turn  
14 them around and read them the other way just as well.

15           This indictment, this jury verdict reads as  
16 follows: We the jury unanimously find the following  
17 verdict in the above-entitled case. One, guilty of  
18 murder. If that be your verdict, you would so signify,  
19 turn and write it on the back under the word verdict and  
20 sign your name.

21           Two, guilty of involuntary manslaughter. If  
22 that be your verdict, again, turn over to the back of  
23 the indictment and write it under the word verdict and  
24 sign your name. The same thing with not guilty by  
25 reason of accident or not guilty.

1           So your verdict is: Guilty of murder, guilty  
2 of involuntary manslaughter, not guilty by reason of  
3 accident or not guilty. Sign your name. I will let you  
4 go to the jury room. Do not begin your deliberations  
5 until I send all the evidence in to you.

6           When this indictment comes in, you may begin  
7 your deliberations. The alternates will stay with me.  
8 Thank you. With reference to notes now, they are for  
9 your guidance and not the jury's guidance. They are to  
10 refresh your memory of the testimony.

11           (The jury retires to the jury room.)

12           THE COURT: Hope, where do you put the  
13 alternates?

14           CLERK: I'm thinking. We can put the  
15 alternates down on the third floor.

16           THE COURT: Under our rules the alternates are  
17 not permitted to begin the deliberations. I wish they  
18 were. I want you to be available in case somebody gets  
19 sick or something.

20           It doesn't look like it, but I have happen  
21 that before one time in Charleston. As soon as I let  
22 the alternate go, one of the jurors had an epileptic  
23 attack. In Florence I was trying a murder case and  
24 about 30 minutes into the deliberations, somebody  
25 informed us that one of the jurors' children was

1 seriously injured in a wreck. So things happen.

2 Take the alternates to a secure place and make  
3 sure they are comfortable. You may step out.

4 (The alternate jurors leave the courtroom.)

5 THE COURT: Gentlemen, do you care to come  
6 forward and look at the form of verdicts?

7 MR. GRAHAM: No, Your Honor.

8 THE COURT: Anything else? Any additions or  
9 exceptions to the charge? What say the State?

10 MR. GRAHAM: No, Your Honor.

11 THE COURT: Anything further, including  
12 exceptions or additions to the charge? What say the  
13 defense?

14 MR. MAULDIN: Nothing as to the charge, Your  
15 Honor. But, again, for the record the State used  
16 State's Number 8 as a demonstrative aid during their  
17 closing. We had objected to that during that trial.  
18 You had overruled our objection. For the record we are  
19 noting it again.

20 THE COURT: You are protected on the record.

21 Gentlemen, come forward and let's agree on  
22 what is in evidence and what goes in. I was trying a  
23 case in Charleston one time, and they found some  
24 marijuana in the defendant's jacket.

25 (Pause.)

1           (The jury commences its deliberation at  
2 4:40 p.m.)

3           (The following occurred at 6:00 p.m.)

4           THE COURT: Gentleman, the foreman of the jury  
5 inquired of the bailiff two things: One, could they  
6 turn the air conditioning up? And they can't because  
7 it's handled in Atlanta.

8           The second inquiry is are we going to provide  
9 dinner for them? As I told all of you in my chambers a  
10 moment ago, I propose to call the jury out and tell them  
11 to continue deliberating until 7:30 p.m. And if they  
12 have not reached a verdict to let me know, and they will  
13 be instructed to come back at 9:30 in the morning. What  
14 says the State?

15           MR. GRAHAM: No objection from the State, Your  
16 Honor.

17           THE COURT: From the defense?

18           MR. MADSEN: No objection.

19           THE COURT: Bring the jury in and bring the  
20 alternates too.

21           (The jury returns to the courtroom at  
22 6:43 p.m.)

23           THE COURT: Mr. Foreman, one of the bailiffs  
24 advised me that you made two inquiries of him. One is,  
25 how about turning on the air conditioning? That's an

1 appropriate inquiry, but unfortunately in this building  
2 the air conditioning cuts off at 6:30 because its  
3 controlled from Atlanta.

4 I am told it would take an act of Congress to  
5 get it started back again. They have to call the  
6 maintenance people to come in, and they put in some kind  
7 of computer code and it may or may not work. I don't  
8 think I can get your air conditioning working.

9 The second inquiry was: Are we going to  
10 provide dinner for you tonight? The answer is no, for  
11 this reason. It is getting late and you have already  
12 been away from your families and your pursuits.

13 It's quarter till seven. I am going to ask  
14 that you continue your deliberations until 7:30. If you  
15 have not reached an agreement at that time, let me know.  
16 I will call you back out and release you to come back at  
17 9:30 in the morning with some further instructions.

18 But go ahead and return. You will have 45  
19 minutes, and maybe we can see some progress one way or  
20 the other. You may return to your jury room. The  
21 alternates will return to their place of abode. Thank  
22 you.

23 (The jury retires to continue its deliberation  
24 at 6:57 p.m.)

25 THE COURT: For the State any objection to

1 those instructions?

2 MR. GRAHAM: No, Your Honor.

3 THE COURT: For the defense?

4 MR. MAULDIN: No, Your Honor.

5 THE COURT: All right. Stick around close.

6 (Whereupon there was a recess.)

7 (The following occurred at 7:30 p.m.)

8 THE COURT: Bring the jury, please, and the  
9 alternates.

10 (The jury returns to the courtroom.)

11 THE COURT: Mr. Foreman, I am advised that you  
12 have indicated to the bailiff, which is very proper,  
13 that your distinguished jury desires to retire for the  
14 evening and to return in the morning at 9:30. Is that  
15 correct?

16 FOREMAN: That is correct.

17 THE COURT: Okay. Now, please remember my  
18 admonitions. Do not discuss this case with anyone.  
19 Permit no one to discuss it with you. Do not even  
20 discuss it with your spouse.

21 If your spouse is like mine, she will want  
22 to talk to you, and you will have to handle it in the  
23 best way you can, but that would be a violation of your  
24 oath.

25 In addition to that -- there may not be

1 anything in the paper, but there may be -- if it is  
2 disregard it. Do not search the internet for any  
3 information. I don't think it's there.

4 But I keep emphasizing to you and I know you  
5 understand that whatever your verdict is, it must be  
6 based on the law and evidence heard in this courtroom  
7 and from no other source.

8 Now, this case has lasted four days and there  
9 was a plethora of exhibits and witnesses. You are  
10 having to examine all those exhibits. It's not unusual  
11 for you to take a half a day or a day or several days.  
12 There are a lot of exhibits you need to examine.

13 In that regard I will be here all day tomorrow  
14 handling other matters. I will be available for this  
15 jury at any time. And if necessary, we can return  
16 Saturday and resolve this case.

17 This case needs to be resolved, and I  
18 understand with the number of exhibits and the four  
19 days, it can't be resolved in the three or four hours  
20 you have had this afternoon. I fully understand that.

21 When you return at 9:30, do not begin your  
22 deliberations until I bring you out for further  
23 instructions. Obviously I have instructed you with  
24 regards to the law; so I don't want you researching on  
25 your computer other law.

1           You take the law as I gave it to you. Try to  
2 stay off the computer, and you will have to deal with  
3 your spouse the best you can. I am going to excuse you  
4 now under these strict admonitions and ask that you be  
5 back in the jury room at 9:30. But do not begin  
6 deliberations until I bring you back out and the  
7 alternates.

8           Everybody looks healthy but sometimes things  
9 happen, and I will have to bring you back too. When you  
10 report tomorrow, you will be assigned to -- do you know  
11 which room you are in on the third floor?

12           JUROR: Yes, Your Honor.

13           THE COURT: I want you to report there, and I  
14 will bring you back when I talk to the jury for a few  
15 minutes before they begin deliberations. It is always  
16 my policy when discussing any issue with the jury to  
17 have the alternates present participating in that  
18 discussion so that if you are called to serve, you would  
19 have the same information that your fellow jurors had.

20           You are now excused. I will see you at  
21 9:30 in the morning. We will be here all day tomorrow  
22 and Saturday too if need be. Thank you.

23           (The jury is excused for the day at 7:40 p.m.)

24           THE COURT: Any exceptions or additions to  
25 that charge? What says the State?

1 MR. GRAHAM: No, Your Honor.

2 THE COURT: Defense?

3 MR. MAULDIN: No, Your Honor.

4 THE COURT: We will see y'all at 9:30 in the  
5 morning.

6 (Whereupon the proceedings are concluded for  
7 August 25, 2011.)

8 (Court Reporter's Note: Further proceedings  
9 were reported by court reporter Hilda Jordan.)

10 \*\*\* END OF REQUESTED TRANSCRIPT OF RECORD \*\*\*

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C E R T I F I C A T E

I, the undersigned L. Coconut Pantsari, Official 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 trial of the captioned cause, relative to appeal, in the Criminal Court for Lexington County, South Carolina on the 22nd through 25th days of August, 2011.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

November 7, 2011

*L Coconut Pantsari*

Court Reporter

STATE OF SOUTH CAROLINA ) IN THE COURT OF GENERAL SESSIONS  
COUNTY OF LEXINGTON ) ELEVENTH JUDICIAL CIRCUIT

11-GS-40-01255;01257

State of South Carolina, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 William Mark Brockmeyer )  
 )  
 Defendant. )  
 )  
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 )

Transcript of Record

JURY VERDICT

August 26, 2011  
Lexington, South Carolina

B E F O R E:

The Honorable Edward B. Cottingham, Judge, and a jury.

A P P E A R A N C E S:

Shawn Graham, Esquire  
Attorneys for the State

David M. Mauldin, Esquire  
Attorney for the Defendant

Hilda M. Jordan, CVR  
Circuit Court Reporter

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I N D E X

WITNESS/DESCRIPTION

PAGE NO.

Jury in Deliberation

Verdict

EXHIBITS:

Court's Exhibit No. 5, note from jury ..... 8

Court's Exhibit No. 5, note from jury ..... 8

Sentence of the Court ..... 20

Certificate of Court Reporter ..... 22

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1 (Court in session at a.m.)

2 THE COURT: All right. Let's come to order, please.

3 I'm going to bring the jury out and tell them as soon  
4 as the evidence comes back in the room, they can begin  
5 deliberations.

6 Prior to that, is there anything from the state at this  
7 time?

8 MR. GRAHAM: No, Your Honor.

9 THE COURT: From the defense?

10 MR. MAULDIN: No, Your Honor.

11 THE COURT: All right. Bring the jury in with  
12 alternates.

13 THE BAILIFF: Yes, sir, Your Honor.

14 THE CLERK: Your Honor, I do have the live ammunition.  
15 with me. I did not put it in with the evidence to be taken  
16 back.

17 THE COURT: I understand.

18 THE CLERK: I still have it out --

19 THE COURT: Where is the evidence now?

20 THE CLERK: Right here, Your Honor, along with their  
21 note pads and the verdict forms. I have it all ready for  
22 them.

23 THE COURT: The rest of the evidence was secured last  
24 night and was secured during the fire drill this morning.

25 (Jury in at 9:30 a.m.)

1 THE COURT: Let the record reflect that here at 9:30 on  
2 a Friday morning, the jury and the alternates are present  
3 and in the jury box.

4 Good morning, Mr. Foreman. Good morning, ladies and  
5 gentlemen.

6 You see all these people out there. I don't want to  
7 scare you. They are not connected in any way with this case  
8 that we've been trying. These are individuals that I'm  
9 going to be dealing with while y'all are deliberating.

10 The evidence will go into the jury room at just a  
11 moment, and at that time, you may begin your deliberations.  
12 As I indicated yesterday, of course, there's pencils and  
13 paper, and if you or any member of your distinguished jury  
14 has any questions you write that down and let the bailiff  
15 know, and to the extent permissible under our rules, I'll be  
16 glad to answer.

17 So you may now go in and begin your deliberations. You  
18 do need to know that all the evidence is going in, but with  
19 reference to the weapon I'm leaving the ammunition out here.  
20 I jokingly said yesterday, when a pistol comes into my  
21 courtroom, I always tell them to point it towards the  
22 lawyers. I say that jokingly, of course.

23 So you may retire and begin your deliberations and  
24 we'll be here all day.

25 (Jury out at 9:35 a.m.)

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5

1 (Court in recess for jury deliberation.)

2 (Court in session at 9:43 a.m.)

3 THE COURT: All right. Let's come to order. Bring the  
4 jury in please.

5 THE BAILIFF: Yes, sir, Your Honor.

6 THE COURT: Bring the alternates in, too.

7 THE BAILIFF: That's what we're waiting on. They're  
8 bringing them down the hallway.

9 (Jury in at 9:43 a.m.)

10 THE COURT: Mr. Foreman and ladies and gentlemen, I've  
11 received your notation and it is very proper and in exact  
12 accordance with what I asked you to do, and that is if the  
13 jury had any questions, write it down and let me know.

14 First: Please provide testimony transcripts of all of  
15 these witnesses.

16 I tell you that transcripts are not available in the  
17 Court's of South Carolina nor most states in this country.  
18 You see that on TV most of the time. Transcripts are not  
19 available, however, every witness who testified was  
20 recorded, and that recorded testimony is available. If you  
21 heard, and you're welcome to do that if you chose to. If  
22 you heard the recorded testimony of every witness who  
23 testified over four days, we're going to be here for four  
24 days, and that's fine. I suggest a better method is that if  
25 you have some concern about a specific portion of a

1 witnesses testimony, you let us know, and the court reporter  
2 will go to that particular recording and play it for you.  
3 Saves a lot of time.

4           However, I empathize to you, that if you want the  
5 complete recording or any witness or every witness I'll make  
6 it available to you. There's no question about that. The  
7 better thing, I suggest, though, for time constraints, is  
8 that if you're interested in a particular portion of a  
9 witnesses testimony, let me know, and I'll let her find it,  
10 and we'll play it for you. You understand that. I regret  
11 that we don't have transcripts, but that's something very  
12 seldom done.

13           Now, I have shared your request with counsel for the  
14 state and defense, and you say: May we please have the  
15 official definition of murder, involuntary manslaughter,  
16 accident, and then you say if possible may we have a copy of  
17 the transcript I gave, giving you the law. With the consent  
18 of counsel for the state and the defendant, they have agreed  
19 that I will provide to you a full and complete copy of my  
20 instructions to you given yesterday. Obviously, within  
21 those instructions you will have the definition of murder.  
22 You will have the definition of involuntary manslaughter,  
23 which you request, and you'll have the definition of  
24 accident. Now, if reviewing those transcripts and those  
25 particular issues you have any further questions that I can

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7

1 answer just write me a note. There's no need for me wasting  
2 your time giving you these instructions orally when I'm  
3 going to give them to you in writing in just a few minutes.  
4 I hope you understand that.

5 You may go back, resume your deliberations. My law  
6 clerk is preparing copies for everybody. I'll give you one  
7 copy, give counsel for the state and defendant a copy. I  
8 may provide an extra copy for you, the jury.

9 You may begin your deliberations and I'll send that in  
10 just as soon as I make appropriate copies, okay.

11 Thank you so much. Now, be assured that there will be  
12 no question about it, while transcripts are not available,  
13 the copies of the testimony are available orally. I'll be  
14 glad to play any or all of that for you. I do suggest if  
15 you have a certain concern about a portion, we will play  
16 that portion. But it's your call. I'll do whatever you  
17 say.

18 You can begin deliberations.

19 (Jury out at 9:50 a.m.)

20 THE COURT: Let the record reflect that I have received  
21 both notes from the foreman, shown counsel for the state and  
22 the defense, and I now make it a part of the record.

23 THE COURT: Now, any exceptions from the state?

24 MR. GRAHAM: No, Your Honor.

25 THE COURT: What says defense?

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8

1 MR. MAULDIN: No, Your Honor.

2 THE COURT: I'm going to provide several copies to the  
3 jury, a copy to the state, a copy to defense. I'm not going  
4 to provide 12 copies. I don't think we need that, but I'll  
5 provide sufficient copies. And so nobody has any objections  
6 or additions to the charge that I just made?

7 MR. GRAHAM: No, Your Honor.

8 MR. MAULDIN: No, Your Honor.

9 THE COURT: All right. Thank you.

10 Those communications from the jury will be identified  
11 in the record as Court's Exhibits Nos. 6 and 7.

12 All right, now, we can resume our plea negotiations.

13 COURT REPORTER: Judge, I was using Coconut's exhibit  
14 stickers, and I mis-spoke. It's Court's five and six.

15 THE COURT: Court's Exhibit Nos. 5 and 6. No problem.

16 (Court's Exhibit No. 5, jury note,  
17 was marked and entered.)

18 (Court's Exhibit No. 6, jury note,  
19 was marked and entered.)

20 (Court at recess for jury deliberation.)

21 (Court in session for verdict 11:58 a.m.)

22 THE COURT: I understand we have a verdict?

23 THE CLERK: Yes, sir. I went to knock on the door with  
24 the lunch menus, and they knocked back before I could.

25 THE COURT: Bring in the jury and the alternates, too,

State v. Brockmeyer 8/26/11

9

1 please.

2 Have the defendant brought in under appropriate  
3 security, please.

4 (Defendant brought into courtroom.)

5 THE COURT: Ladies and gentlemen, I have been told that  
6 the jury has a verdict. We will proceed in just a moment.  
7 I want the record to reflect the attorneys for the state and  
8 the defendant are here, and the defendant is in the  
9 courtroom.

10 The alternates, as you know, during the course of the  
11 trial have been kept at all times, separate and apart from  
12 the jury. I'm going to let them sit with the jury at the  
13 rendition of the verdict.

14 Any objection to the from the state?

15 MR. GRAHAM: No, Your Honor.

16 THE COURT: From the defense?

17 MR. MAULDIN: No, Your Honor.

18 THE COURT: All right. Where are the alternates?

19 THE BAILIFF: I've got them right here.

20 THE COURT: All right. Bring the jury and let the  
21 alternates in. They've been very patient with us and  
22 they're entitled to hear the verdict.

23 THE BAILIFF: Yes, sir, Your Honor.

24 (Jury in at 11:59 a.m.)

25 THE COURT: Mr. Foreman, I've been advised that the jury

1 has reached a unanimous verdict; is that true?

2 THE FOREMAN: Yes, Your Honor.

3 THE COURT: If this verdict be the unanimous verdict of  
4 all 12, please signify by raising your right hands.

5 The jury has so signified.

6 Hope, please accept the verdict form and hand it to me.

7 THE CLERK: Yes, sir.

8 THE COURT: What is today's date?

9 THE CLERK: The 26th.

10 THE COURT: Please take this back, so they can date it.  
11 The date -- inadvertently put the 25th, and it's the 26th.

12 THE FOREMAN: Your Honor, at around 7:00 o'clock last  
13 night we did --

14 THE COURT: Well, date it today, if you will.

15 THE FOREMAN: Yes, sir.

16 THE COURT: That's the rendition of the verdict.

17 THE CLERK: If you'll just change it, sir. And put your  
18 initials beside it.

19 (Jury foreman corrects date with clerk.)

20 THE CLERK: Thank you, sir.

21 THE COURT: You have written the verdict of the back of  
22 both indictments, as I indicated. On this sheet you only  
23 indicated one verdict.

24 THE CLERK: Judge --

25 (Bench conference with the clerk and the Court.)

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11

1 THE COURT: Okay. In an abundance of caution, though,  
2 have him do this, too. It conforms with --

3 THE CLERK: I'll have to write it on there, Judge.

4 THE COURT: No, ma'am. No, no. I want him to check it  
5 or not check it, based on their verdict.

6 THE CLERK: But it's not on here, Judge. That is  
7 strictly the instructions on murder.

8 THE COURT: Oh, I understand. You're right.

9 THE CLERK: Yes, sir.

10 THE COURT: There never was not a verdict sheet --

11 THE CLERK: Correct.

12 THE COURT: -- the foreman was exactly correct.

13 THE CLERK: Correct.

14 THE COURT: All right. As to these two indictments,  
15 there being a verdict as to each one. Please publish the  
16 verdict for me.

17 THE CLERK: Yes, sir.

18 Indictment 2011-GS-32-1255, the State verses William  
19 Mark Brockmeyer, indicted for murder. The jury unanimously  
20 finds this defendant guilty of murder, and it is so signed.

21 Indictment 2001-GS-32-1257, the State verses William  
22 Mark Brockmeyer, indicted for possession of a weapon during  
23 a violent crime, the jury unanimously finds the defendant  
24 guilty as charged, and it is so signed by the foreperson;  
25 both verdicts, Your Honor.

1 THE COURT: Do you desire the jury polled? They had  
2 indicated by raising their right hand it was a unanimous  
3 verdict, but I'll do what you want.

4 MR. MAULDIN: Yes, sir, Your Honor.

5 THE COURT: Poll the jury.

6 THE CLERK: Yes, sir.

7 As I call your name, if you'll hold your hand up where  
8 I can recognize you, please. I will ask you, as to the  
9 verdict were these your verdict and are they still your  
10 verdicts. At that time, please respond.

11 Christopher Hunter. As to the verdicts, were these  
12 your verdicts and are they still your verdicts?

13 MR. HUNTER: Yes, ma'am.

14 THE CLERK: Viola Leaphart. As to the verdicts, were  
15 these your verdicts and are they still your verdicts?

16 MS. LEAPHART: Yes, ma'am.

17 THE CLERK: Clifton Rogers. As to the verdicts, were  
18 these your verdicts and are they still your verdicts?

19 MR. ROGERS: Yes, ma'am.

20 THE CLERK: Jennifer Jeffries. As to the verdicts, were  
21 these your verdicts and are they still your verdicts?

22 MS. JEFFRIES: Yes, ma'am.

23 THE CLERK: Debra Holton. As to the verdicts, were  
24 these your verdicts and are they still your verdicts?

25 MS. HOLTON: Yes, ma'am.

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1 THE CLERK: Andrew Howell. As to the verdicts, were  
2 these your verdicts and are they still your verdicts?

3 MR. HOWELL: Yes, ma'am.

4 THE CLERK: Sarah Gillespie. As to the verdicts, were  
5 these your verdicts and are they still your verdicts?

6 MS. GILLESPIE: Yes, ma'am.

7 THE CLERK: Cary Erick (sp). As to the verdicts, were  
8 these your verdicts and are they still your verdicts?

9 MS. ERICK: Yes, ma'am.

10 THE CLERK: Mary Bower. As to the verdicts, were these  
11 your verdicts and are they still your verdicts?

12 MS. BOWER: Yes, ma'am, they are.

13 THE CLERK: Vivian Baxter. As to the verdicts, were  
14 these your verdicts and are they still your verdicts?

15 MS. BAXTER: Yes, ma'am.

16 THE CLERK: Michael Law. As to the verdicts, were these  
17 your verdicts and are they still your verdicts?

18 MR. LAW: Yes, ma'am.

19 THE CLERK: Cynthia Ermus (sp). As to the verdicts,  
20 were these your verdicts and are they still your verdicts?

21 MS. ERMUS: Yes, ma'am.

22 THE CLERK: All jurors are polled, Your Honor.

23 THE COURT: Is there anything further required prior to  
24 my discharging this jury?

25 MR. GRAHAM: No, Your Honor.

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1 THE COURT: From the defendant?

2 MR. MAULDIN: No, Your Honor.

3 THE COURT: Mr. Foreman, ladies and gentlemen, none of  
4 you asked to come to court on Monday morning. And certainly  
5 none of you asked to be on this particular significant  
6 trial, but having been selected by attorneys for both sides,  
7 you have done your duty under your oath, and certainly I  
8 appreciate it, but the State of South Carolina and the  
9 County of Lexington, too, appreciates your service.

10 You were the finders of the facts, and you made your  
11 judgment appropriate. The only comment I would have is that  
12 in my view there was sufficient evidence to support the  
13 finding that you made of guilty. It was your call, and it  
14 was obvious from the length of your deliberations that you  
15 were very dedicated in your duty.

16 Now, I'm going to have the defendant come forward for  
17 sentencing. You may stay thereto or you may leave. In that  
18 regard, let me say this to you. You don't have to discuss  
19 this case with anybody including this judge. Now, if you  
20 care to you may do so with no penalty at this time. If at  
21 any time somebody persists and you don't want to talk about  
22 it, and they persist, you let me know and I'll deal with  
23 hit. So the option is yours. If you want to discuss it, do  
24 so. If you don't, don't discuss it.

25 All right. Anybody who cares to leave at this time may

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15

1 do so.

2 (Several jurors leave.)

3 THE COURT: All right. Have the defendant come forward.

4 MR. MAULDIN: Your Honor.

5 THE COURT: Yes, sir.

6 MR. MAULDIN: At this time, on behalf of Mr. Brockmeyer,  
7 I would make a motion for a new trial, and I would base that  
8 on all our prior motions and objections.

9 THE COURT: Yes, sir. I, again, would respectfully  
10 overrule that motion. The evidence here was substantial.  
11 And if found by the jury, which they did, is certainly  
12 sufficient to go forward in that issue. In my view there  
13 was substantial evidence pointing unerringly to the guilt of  
14 this defendant of the two charges for which the jury found  
15 the verdict of guilty.

16 MR. MAULDIN: I understand, Your Honor. I'm also basing  
17 my motion on all our legal objections during the trial.

18 THE COURT: I understand. And my record will reflect my  
19 prior rulings, and with regard to the chain of -- scene of  
20 evidence. I will again refer you to the recent case of  
21 State v. Hatcher, where I was affirmed in a similar case by  
22 the Supreme Court in Marlboro County. I think that's come  
23 out in the last two or three months. But your objections  
24 are noted.

25 I would say, for the record, that the case was very

1 professionally tried, not only by the solicitor's office,  
2 but my distinguished members of the Public Defender's  
3 Office.

4 You know, the wonderful thing about our system of  
5 justice -- there's several things, but one I like. Is that  
6 the individual, no matter how serious the charge, cannot  
7 afford an attorney, the State of South Carolina, at no  
8 expense to him will appoint two distinguished attorneys like  
9 you. That bodes well for our system of justice and more  
10 importantly, our system of fairness to all parties.

11 Anything further.

12 MR. MAULDIN: No, Your Honor.

13 THE COURT: Can I hear from the state?

14 MR. GRAHAM: Yes, Your Honor. I do have some victim  
15 impact letters to pass up for Your Honor's review, and I'll  
16 provide a copy for the defense at this time.

17 The mother of Nicholas Rae is present in the courtroom.  
18 His grandmother. I don't know if they'd like to say  
19 anything. I know his mother has a letter.

20 You are aware of Mr. Brockmeyer's prior record, Your  
21 Honor, but for the record, he has an April 2003, conviction  
22 for conspiracy to commit burglary in a dwelling with a  
23 battery. Possession of burglary tools at the same times.  
24 Another February, 2004, petit larceny. May of 2004, grand  
25 theft. August of '05, burglary, grand theft of a handgun.

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1 Grand theft of a vehicle. In May of 2009, petit larceny.

2 On behalf of the victim, Your Honor, the state would  
3 request that you give a sentence that fits the crime.

4 THE COURT: Wait, that last comment -- what?

5 MR. GRAHAM: That you give a sentence that fits the  
6 crime.

7 THE COURT: Sir?

8 MR. GRAHAM: That you give a sentence, impose a sentence  
9 that fits the crime.

10 THE COURT: All right.

11 Anything further from the defense?

12 MR. MAULDIN: Yes, Your Honor.

13 Mr. Brockmeyer standing before you is 25 years old. He  
14 was born in Leesburg, Florida and grew up there. He has  
15 lived in other locations in the country. As he said during  
16 the trial, he had come to South Carolina some time last year  
17 and then went back to Florida earlier -- not last year, the  
18 year before -- went back to Florida and left in April of  
19 2010 to take care of a legal matter and then came back here  
20 for a period of time. He moved up here, basically, to get  
21 away from Florida and the problems that he had had down  
22 there.

23 He is a graduate of high school. He has a certificate  
24 and his project coordinator from construction work from  
25 Florida Atlantic University. He also has a certificate as a

1 personal trainer from a place called AM FPT.

2 In Florida, he had done fast food work. He had worked  
3 in tree service and some construction firms. When he was  
4 here in Columbia, he worked at Gold's Gym over in the  
5 Richland Northeast area, Sandhills Mall, and then after  
6 that, he worked at a bouncer at Platinum Plus, before his  
7 arrest.

8 He does have a son down in Florida who is seven years  
9 old. Most all of his family is down in Florida. And Your  
10 Honor, when I go to see him at the jail he meets with a  
11 minister called Rich Weaver. I've spoken with Mr. Weaver on  
12 several occasions. He's attended the trial here. He has  
13 been very supportive of Mr. Brockmeyer, as well.

14 Obviously, murder carries between 30 years and life.  
15 Mr. Brockmeyer has been in jail since the date of his  
16 arrest, July 11, 2010. He's 25. Thirty years would be a  
17 day-for-day for 30 years.

18 We would hope that Your Honor would consider sentencing  
19 him to the minimum in this case.

20 THE COURT: Have Mr. Brockmeyer come around.

21 MR. WEAVER: Judge, If I might, say a few words?

22 THE COURT: Sure.

23 MR. WEAVER: Judge, I met Will about three weeks ago,  
24 now. I'd like to say that the entire time I've talked with  
25 him and Mr. Mauldin, he's always been nice and respectful.

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19

1 Asked appropriate questions.

2 He's certainly, and I think he would admit this, has  
3 made some poor decisions in his life. A lot of that being  
4 some of the record that Your Honor had heard about. One of  
5 the interesting things that happened during the trial, is at  
6 some point in time one of the witnesses was testifying and  
7 talked about them being in college, Will leaned over to me  
8 and said, you know, that's really where I should be.

9 No truer statement has been said in this courtroom that  
10 that should have been the path that he ultimately chose.

11 Judge, I would echo Mr. Mauldin's request and ask that  
12 Your Honor consider giving him the 30 year day-for-day  
13 sentence.

14 Thank Your Honor.

15 THE COURT: Mr. Defendant. Of course, you've got a  
16 significant prior record and that record shows a total  
17 disregard for life. It was for the jury to determine and  
18 the evidence in this case, for whatever reason you decided  
19 to do you went over there and put that gun to your friend's  
20 neck and killed him. Why you did that is between you and  
21 God, but the evidence clearly supports the verdict of the  
22 jury and obviously it supports the gun charge.

23 Over the years, and I've been on the bench 27 years.  
24 Sometimes I'm reluctant to impose life in prison without  
25 possibility of parole because that simply makes that

1 individual incorrigible, and just difficult for the rest of  
2 the state. So I sometimes think that the better part of  
3 valor is to give him a series of years. That at least gives  
4 him some hope, some day, of getting out of jail, if he  
5 behaves himself. If you give somebody life in prison  
6 without the possibility of parole there's no reason for them  
7 to ever behave themselves, and our records show that they  
8 are a constant problem to the officers.

9 In this case, you're 25 --

10 MR. BROCKMEYER: Yes, sir.

11 THE COURT: -- isn't that right?

12 MR. BROCKMEYER: Yes, sir.

13 THE COURT: I want you to get out of jail when you're  
14 65. I'm going to sentence you upon the charge of murder,  
15 35 years. And with reference to the gun charge, I'm going  
16 to sentence you to 5 years consecutive to that, giving you a  
17 total sentence of 40 years for the callous murder of your  
18 good friend. And if you behave yourself you're going to  
19 serve every day of it. And if you behave yourself you'll  
20 have the opportunity of getting out of prison some day.

21 That will be the judgment of the Court.

22 Now, I want you gentlemen to come forward, the  
23 attorneys before we leave.

24 (Off the record bench conference with counsel and the  
25 Court.)

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1 THE COURT: This is the initial verdict form on murder  
2 which we all agreed to. Pursuant to my instructions they  
3 wrote the verdict on the back of the indictment.

4 Does anybody have any questions about that.

5 MR. GRAHAM: No, Your Honor.

6 MR. MAULDIN: No, Your Honor.

7 THE COURT: All right.

8 Mr. Foreman, ladies and gentlemen, again, let me  
9 express my deepest appreciation. This case needed to be  
10 resolved not only for the defendant, but it was equally  
11 important for the victim.

12 You know, in our court system we say the defendant has  
13 all these various rights. Well, I want you to know, in my  
14 court the victims do, too.

15 You are now discharged. For the day and for the week.

16 We're going to take a short recess.

17 (This proceeding was concluded.)  
18  
19  
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22  
23  
24  
25

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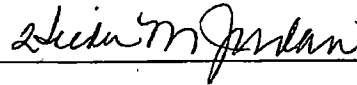
8/26/11

22

## CERTIFICATE

1  
2 I, THE UNDERSIGNED HILDA M. JORDAN, CVR, OFFICIAL COURT  
3 REPORTER FOR THE FIRST JUDICIAL CIRCUIT OF THE STATE OF  
4 SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A  
5 TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE  
6 PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING OF  
7 THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE CIRCUIT  
8 COURT FOR LEXINGTON COUNTY, SOUTH CAROLINA, ON THE 26TH DAY  
9 OF AUGUST, 2011.

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

12  
13  
14 

15 Hilda M. Jordan, CVR  
16  
17

18 COLUMBIA, SOUTH CAROLINA

19 OCTOBER 9, 2011  
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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY  
Court of General Sessions

Edward Cottingham, Circuit Court Judge

Case Nos. 2011-GS-32-1255  
2011-GS-32-1257

The State of South Carolina,..... Respondent,  
v.  
William Mark Brockmeyer,..... Appellant.

Appellate Case No. 2011-198266

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES

1. Did the Trial Court err by applying the wrong legal standard and denying the defendant's motion to enforce a subpoena where the information sought was clearly relevant, unavailable from other sources, and not otherwise protected?
2. Did the Trial Court err and violate the Confrontation Clause of the Sixth Amendment to the United States Constitution by permitting the State to establish the chain of custody of its evidence through the use a computer log read aloud by a witness rather than by live testimony from the parties handling the evidence?
3. Did the Trial Court err by permitting the State to introduce a photograph of the defendant where the State repeatedly used the photograph for the illicit purpose of implying that the defendant was guilty?
4. Did the Trial Court err by permitting the State to introduce hearsay testimony taken from the decedent's cell phone?

STATEMENT OF THE CASE

This appeal arises from the errors of law committed during the prosecution, conviction, and sentencing of William Mark Brockmeyer. On May 9, 2011, the State of South Carolina indicted Mr. Brockmeyer for murder and for possession of a weapon during the commission of a violent crime. (R. 826) The action was tried on August 22, 2011. The case was prosecuted by Mr. Samuel Hubbard and David Graham. Mr. Brockmeyer was represented by public defenders David Mauldin and Robert Madsen. During the five-day trial, the State relied on the testimony of 32 witnesses, including nine who were present on the night of the shooting as well as numerous law enforcement personnel. Most of the witnesses present at the scene were, at the time of the incident, under the influence of alcohol (R. 47:14-22, 89:9-10, 202:17-24; 218:9) and/or drugs (R. 156:20-25, 183:1-6). Not surprisingly, their testimony was in some respects conflicting. (*Compare* R. 63:4 *with* R. 99:3;<sup>1</sup> R. 59:17-18 *with* R. 149:2-11.<sup>2</sup>) Mr. Brockmeyer testified in his own defense but introduced no other witnesses or evidence.

At the close of the State's case and again at the close of all evidence, the trial court orally denied Mr. Brockmeyer's motions for directed verdict. (R. 631:4-17, 717:2-12.) The court instructed the jury on the elements of murder, involuntary manslaughter, and accident. (R. 734:3-736:16). After deliberating for only 5.5 hours (Supp. R. 1, R. 777-782), the jury returned a verdict finding Mr. Brockmeyer guilty of both charges. (R. 825; Verdict Form.) The trial court subsequently sentenced Mr. Brockmeyer to 35 years

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<sup>1</sup> Contradictory testimony as to whether Mr. Brockmeyer was wearing a long-sleeve t-shirt or a tank-top undershirt shortly after the incident.

<sup>2</sup> Contradictory testimony as to whether Mr. Brockmeyer shoved the decedent to the ground immediately after the sound of the shot or whether the deceased slumped to the ground of his own accord some time after the shot.

incarceration for the murder charge and a non-concurrent five years for the weapon charge. This appeal followed.

#### STATEMENT OF THE FACTS

Mr. Brockmeyer and the decedent, Nicholas Rae, were former co-workers and longtime friends. (R. 634:16-636:21.) During the summer of 2010, Mr. Rae moved to the Lexington, South Carolina area to reside with Mr. Brockmeyer. (R. 637:1-638:4.) On the evening of July 10, 2010, Mr. Brockmeyer, Mr. Rae, and another friend travelled together to a birthday party at the home of an acquaintance. (R. 39:3-4.) At the party, Mr. Brockmeyer was the object of some jesting regarding his use, at a prior party, of a lifelong nickname rather than his given name. (R. 40:16-22, 640:18-641:12.) The attendees had recently discovered his given name through conversations with Mr. Rae. (R. 68:3-5, 85:20-24.)

At around 1:00 a.m., most of the partygoers migrated to a private bar known as Jager's located in the Red Bank area of Lexington County. (R. 42:5-11, 47:25-48:2.) Mr. Brockmeyer and Mr. Rae accompanied this group. (R. 42:12-43:14.) Upon arriving at the bar, the two men sat down together with several of the women from the group. (R. 48:22-49:16, 91:1-24, 646:13-24.) Mr. Brockmeyer was in a flirtatious mood, although the primary recipient of his attentions was cool toward his advances. (R. 49:18-50:10, 91:25-92:24.)

At some point thereafter, Mr. Rae stepped away from the group to enjoy a game of billiards. (R. 49:24-50:2.) Ultimately, Mr. Rae played a total of four games, all of which he lost (R. 120:25-131:14), against an attractive and proficient opponent, Ms. Kabar, who intentionally kept the scores close so as to entice him into further matches (R.

126:19-20). The first game was a friendly match that ended in a narrow loss for Mr. Rae. (R. 121:2-5.) After losing the first game, Mr. Rae suggested a rematch accompanied by a wager. (R. 121:8-14.) During the course of that game, Ms. Kabar observed Mr. Rae handing a knife to Mr. Brockmeyer. (R. 122:12-18.) When she assured him there was no need for weapons, Mr. Rae commented that, in the event of a fracas, he would rely not on the knife but on a gun, which he then displayed tucked into the back of his pants. (R. 124:18-19.) Ms. Kabar won the game—and the illegal bet—by a narrow margin and suggested another game, ostensibly to allow Mr. Rae a chance to win his money back. (R. 126:21-25.) According to Ms. Kabar's testimony, Mr. Rae consulted with Mr. Brockmeyer prior to placing both of the wagers, which she speculated was to gain Mr. Brockmeyer's assistance in bankrolling the wagers.<sup>3</sup> (R. 123:11-13, 127:8-18.)

During the course of Mr. Rae's pool games, Mr. Brockmeyer was observed carrying a gun in the front waistband area of his pants, which was visible when he lifted up his shirt in an effort to cool himself. (R. 128:6-20.) Mr. Brockmeyer testified that Mr. Rae had handed him the weapon after entering the bar and had requested he hold it while Mr. Rae played pool. (R. 647:9-12.) He further testified that after losing the final game, Mr. Rae requested the return of the weapon. (R. 649:17-20.) Mr. Brockmeyer presumed that Mr. Rae intended to seek the return of his money from Ms. Kabar and her cohort (R. 649:25-650:5.), a presumption that comported with Mr. Rae's boast earlier in the evening that he had been robbing people for money (R. 107:24-108:1).

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<sup>3</sup> Mr. Brockmeyer conceded at trial that on two occasions while Mr. Rae was playing pool, he lent Mr. Rae \$20 to purchase drinks. (R. 649:15-16.) Mr. Brockmeyer denied, however, settling Mr. Rae's gambling debts, noting he was at that time unemployed and did not possess sufficient funds to have done so. (R. 674:23-675:8.)

After his fourth and final game of pool, Mr. Rae rejoined the others in his party at their table. (R. 51:9-10.) At some point later, Mr. Rae, presumably feeling the effects of intoxication, rapidly exited the bar. (R. 52:4-6.) One of the women in the group followed him out. (*Id.*) Shortly thereafter, Mr. Brockmeyer moved toward the exit accompanied by a woman named Brittany.<sup>4</sup> (R. 52:13-18.) They were in turn followed by Ms. Kabar (R. 133:22-134:3) and then Ms. Brakefield, another member of their party (R. 52:21-23). Mr. Brockmeyer and Brittany remained in the bar's foyer area.<sup>5</sup> (R. 54:12-17, 136:4-6.) Outside, Mr. Rae, after a bout of sickness, was seated in a chair on the bar's porch area near Ms. Kabar and her brother. (R. 53:17-54:10.)

The bar's porch was not well lit (R. 152:18-21) and the witnesses' testimony of the next few moments is conflicting. Mr. Brockmeyer testified that he observed Mr. Rae holding a gun in his lap. (R. 653:7-9.) Mr. Brockmeyer knelt briefly in front of Mr. Rae (R. 55:19-20, 189:21-25) and reached in to remove the gun (R. 653:16-17). A shot rang out. (R. 59:1, 138:22-23, 653:20-21.) The witnesses testified that Mr. Rae sat in the chair for some time before slowly slumping over, untouched. (R. 148:16-149:4, 199:8-15.) Ms. Brakefield disagreed, however, testifying that Mr. Brockmeyer shoved Mr. Rae to the ground. (R. 59:17-18, 77:20-78:2.) After the shot, Mr. Brockmeyer walked rapidly off into the darkness behind the bar. (R. 59:20, 138:24-25, 654:1-3.) Mr.

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<sup>4</sup> The record does not reveal Brittany's surname. She is identified throughout the record either by her first name (*see, e.g.*, R. 89:20, 268:3-5, 652:12) or by description (*see, e.g.*, R. 136:22, 167:20-21, 247:22-23).

<sup>5</sup> The testimony is somewhat inconsistent regarding the exact timing of these events. Ms. Kabar testified that, upon exiting the bar, she observed Mr. Brockmeyer and Brittany in the foyer. (R. 136:22-25.) Ms. Brakefield, however, acknowledged that Ms. Kabar preceded her outside, but testified that the foyer was empty when she exited the bar and that she observed Mr. Brockmeyer and Brittany in the foyer shortly thereafter. (R. 53:11-54:17.)

Brockmeyer explained at trial that he was unaware Mr. Rae had been injured by the accidental discharge, and that he had hurried to dispose of the gun for fear that Mr. Rae and himself—both of whom had prior convictions—would be found in possession of a firearm. (R. 654:4-8.)

A crowd gathered outside as people emerged from the bar. (R. 62:4-5.) Ms. Kabar and her associates hastily exited the bar's back door and left the scene. (R. 140:8-14.) The crowd initially speculated that Mr. Rae had suffered a self-inflicted wound (R. 248:16-18), a belief initially shared by most of the eyewitnesses in their statements to the police (R. 149:12-25, 196:23-25). Mr. Brockmeyer rejoined the crowd (R. 96:23-25), though he was precluded from assisting in efforts to save Mr. Rae's life (R. 229:9-14). Understandably, Mr. Brockmeyer was extremely upset. (R. 98:20-99:25, 223:11-13.)

The police arrived, hastily pegged Mr. Brockmeyer as the suspect, and transported him to the Sheriff's department for questioning. (R. 267:24-25.) The police developed no other suspects and a mere four hours after the fateful shot arrested Mr. Brockmeyer. (R. 285:14-15.)

#### STANDARD OF REVIEW

"In criminal cases, an appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). This appeal raises issues regarding the enforcement of a subpoena, the Confrontation Clause of the United States Constitution, and the admissibility of evidence at trial. Regarding the subpoena, no South Carolina court has previously ruled on the precise issue raised here, thus this court must

determine the proper legal standard as a matter of law.<sup>6</sup> As to the admissibility of evidence, it “is within the discretion of the trial court and will not be reversed absent an abuse of discretion.” *State v. Hatcher*, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)).

South Carolina courts have not explicitly established the standard of review applied to a Confrontation Clause challenge;<sup>7</sup> however, as a question of law implicating constitutional concerns, the appropriate standard is *de novo*. See *State v. Nance*, 393 S.C. 289, 712 S.E.2d 446 (2011) (engaging in analysis of Confrontation Clause under an “errors of law” standard); *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 583, 686 S.E.2d 176, 182-83 (2009) (explaining why constitutional issues warrant *de novo* review); see also *United States v. Williams*, 632 F.3d 129, 132 (4th Cir. 2011) (“This Court reviews evidentiary rulings implicating constitutional claims *de novo*.”) (citing *United States v. Abu Ali*, 528 F.3d 210, 253 (4th Cir. 2008)). The federal courts are in widespread agreement regarding the *de novo* review of a Confrontation Clause challenge. See, e.g., *United States v. Lighty*, 616 F.3d 321, 376 (4th Cir. 2010) (“We review alleged

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<sup>6</sup> As a general matter, the refusal to enforce a subpoena is reviewed for abuse of discretion. See *State v. McFarlane*, 279 S.C. 327, 306 S.E.2d 611 (1983). A trial court’s use of the wrong legal standard constitutes an abuse of discretion. See *Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008) (“An abuse of discretion occurs when the trial court’s ruling is based on an error of law or is not supported by the evidence.”); *State v. Smith*, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981) (“It is apparent here the sentencing judge did not exercise any discretion but based his ruling on an erroneous view of the law.”); *Fettler v. Gentner*, 396 S.C. 461, \_\_\_, 722 S.E.2d 26, 31 (Ct. App. 2012) (same).

<sup>7</sup> Appellant is aware of South Carolina cases in which a discussion of the Confrontation Clause is preceded by a perfunctory recitation of the ‘abuse of discretion’ standard. See, e.g., *State v. Bixby*, \_\_\_ S.C. \_\_\_, \_\_\_ S.E.2d \_\_\_, 2011 WL 3568541 (Ct. App. 2011); *State v. Garner*, 389 S.C. 61, 697 S.E.2d 615 (Ct. App. 2010); *State v. Whitner*, 380 S.C. 513, 670 S.E.2d 655 (Ct. App. 2008). However, neither these cases nor any other South Carolina cases appear to expressly consider the appropriate standard of review for a substantive analysis of the Sixth Amendment’s Confrontation Clause.

Confrontation Clause violations under the *de novo* standard of review.”) (citing *United States v. Rivera*, 412 F.3d 562, 566 (4th Cir. 2005)).<sup>8</sup>

#### ARGUMENT

**I. The Trial Court erred by denying the defense’s motion to enforce a subpoena where the information sought was clearly relevant, unavailable from other sources, and not otherwise protected.**

Prior to trial, Mr. Brockmeyer’s counsel served a subpoena on a local television station, WLTX, seeking information regarding a potential witness for the defense. (R. 2:5-17:18.) The defense sought information about the identity of someone who commented on a news story about Mr. Rae’s death posted on the station’s website, and indicating he had seen the incident and it was an accident. (R. 2:5-3:5.) This witness, identified online only as “AndTheTruth,” commented, “Were you there, did you see what happened? Did you see the tears on his young, confused face when he realized he had just accidentally killed his friend?” (R. 2:21-25.) The defense subpoenaed the station for information about this comment in hopes of locating the witness. (R. 3:6-9.) When the

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<sup>8</sup> See also *United States v. Mitchell-Hunter*, 663 F.3d 45, \_\_\_ (1st Cir. 2011) (“Confrontation Clause challenges raising questions of law also merit *de novo* review.”) (citing *United States v. Rodriguez-Duran*, 507 F.3d 749, 768 (1st Cir. 2007)); *United States v. Diaz*, 637 F.3d 592, 597 (5th Cir. 2011) (“We review alleged violations of the Confrontation Clause of the Sixth Amendment *de novo*, applying a harmless error analysis.”) (citing *United States v. Jimenez*, 464 F.3d 555, 558 (5th Cir. 2006)); *United States v. Gaytan*, 649 F.3d 573, 579 (7th Cir. 2011) (“On the Confrontation Clause claim, our review is *de novo*.”) (citing *United States v. Turner*, 591 F.3d 928, 932 (7th Cir. 2010)); *United States v. Yielding*, 657 F.3d 688, 699 (8th Cir. 2011) (“We review a district court’s evidentiary rulings for abuse of discretion, but Confrontation Clause objections are considered *de novo*.”) (citing *United States v. Watson*, 650 F.3d 1084 (8th Cir. 2011)); *United States v. Moore*, 651 F.3d 30, 70 (D.C. Cir. 2011) (“Our review of the district court’s legal conclusions regarding the Confrontation Clause is *de novo*, [ ] and subject to constitutional harmless error analysis.”) (citations omitted)); *United States v. Villavicencio-Burrueal*, 608 F.3d 556, 560 (9th Cir. 2010) (“We review alleged violations of the Confrontation Clause *de novo*.”) (citing *United States v. Tuyet Thi-Bach Nguyen*, 565 F.3d 668, 673 (9th Cir. 2009)).

news station expressed its intent to ignore the subpoena, the defense moved to enforce it. (R. 3:13-22.) The court denied the motion (R. 16:13-14), noting concerns with the privacy of the anonymous witness (R. 11:21-23, 13:24-25).

As an initial matter, this testimony would have been clearly relevant. At trial, the State repeatedly elicited statements from witnesses speculating as to the genuineness of Mr. Brockmeyer's grief and emphasizing the presence or absence of any tears. (*See* R. 64:17-18,<sup>9</sup> 209:15-16,<sup>10</sup> 224:23-24,<sup>11</sup> 237:7.<sup>12</sup>) In the State's closing argument, the prosecutor emphasized the purported lack of tears yet again. (R. 767:16-768:3, 769:19-22.) Furthermore, the trial court's denial of a relevant witness contravened the United States Constitution, the South Carolina constitution, and statutory law, all of which guarantee a defendant a "compulsory process" for obtaining favorable witnesses. *See* U.S. Const. amend. VI ("In all criminal prosecutions the accused shall . . . have compulsory process for obtaining witnesses in his favor."); S.C. Const. art. 1, § 14 ("Any person charged with an offense shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor."); S.C. Code Ann. § 19-7-60 ("In all criminal prosecutions the accused shall have compulsory process for obtaining witnesses in his favor."); *see also In Interest of Angela H.*, 287 S.C. 598, 600, 340 S.E.2d 544, 545 (1986) (holding the family court judge had erred by excusing a witness who had been subpoenaed by defendant). As explained more fully below, the denial of the motion to

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<sup>9</sup> Testimony that Mr. Brockmeyer "would pretend to cry, but he wouldn't shed a tear."

<sup>10</sup> Testimony that Mr. Brockmeyer "wasn't acting like his friend had just got shot."

<sup>11</sup> The prosecutor asked a witness, "Do you remember seeing any tears?"

<sup>12</sup> The prosecutor asked another witness, "Was he crying or he was just loud?"

enforce the subpoena was erroneous as a matter of law and warrants reversing and remanding for a new trial.

A. The appropriate test—if adopted by this court as a matter of first impression—requires production of the witness’ identifying information.

No South Carolina cases have previously addressed the question of when a provider of an online forum should be compelled to divulge identifying information regarding the identity of an anonymous or pseudonymous speaker on that forum. In denying the motion, the trial court relied on no particular authority and the parties cited no binding or analogous authority.<sup>13</sup> Several other jurisdictions, however, have addressed this issue. See *McVicker v. King*, 266 F.R.D. 92 (W.D. Pa. 2010); *Enterline v. Pocono Med. Ctr.*, 751 F. Supp. 2d 782 (M.D. Pa. 2008); *Doe v. 2TheMart.com*, 140 F. Supp. 2d 1088, 1095 (W.D. Wash. 2001). These cases advocate a four-part test:

“The Court will consider four factors in determining whether the subpoena should issue. These are whether: (1)

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<sup>13</sup> The cases cited by trial counsel addressed the distinguishable scenario where a party sought disclosure of the identity of internet users who were suspected of tortious conduct such as defamation or copyright violation. Numerous jurisdictions have considered that scenario. See, e.g., *Arista Records LLC v. Doe*, 551 F. Supp. 2d 1 (D.D.C. 2008) (compelling discovery of identities of internet users violating copyright laws); *Kimberlite Corp. v. Does*, No. C08-2147 THE, 2008 U.S. Dist. Lexis 43071 (N.D. Cal. June 2, 2008) (denying motion to quash subpoena compelling internet provider to identify users suspected of hacking); *Arista Records LLC v. Does 1-9*, No. 07-CV-00628-EWN, 2007 U.S. Dist. Lexis 25191 (D. Colo. Apr. 4, 2007) (granting in part motion seeking identity of internet users violating copyright laws); *Sony Music Entm’t Inc. v. Does 1-40*, 326 F. Supp. 2d 556 (S.D.N.Y. 2004) (same); *UMG Recordings, Inc. v. Does 1-4*, No. 06-0652 SBA, 2006 U.S. Dist. Lexis 32821 (N.D. Cal. Mar. 6, 2006) (same); *Alvis Coatings v. Does 1-10*, No. 3:04 CV 374-H, 2004 U.S. Dist. Lexis 30099 (W.D.N.C. Dec. 2, 2004) (compelling discovery of identity of anonymous internet poster); *La Societe Metro Cash & Carry France v. Time Warner Cable*, No. CV030197400S, 2003 Conn. Super. Lexis 3302 (Conn. Super. Ct. Dec. 2, 2003) (compelling discovery of the name and address of an anonymous sender of email); *In re Baxter*, No. 01-00026-M, 2001 U.S. Dist. Lexis 26001 (W.D. La. Dec. 19, 2001) (compelling discovery of identity of the anonymous author internet defamer); *Am. Online, Inc. v. Anon. Pub. Traded Co.*, 542 S.E.2d 377 (Va. 2001) (involving motion to quash subpoena to identify anonymous internet defamers).

the subpoena seeking the information was issued in good faith and not for any improper purpose, (2) the information sought relates to a core claim or defense, (3) the identifying information is directly and materially relevant to that claim or defense, and (4) information sufficient to establish or to disprove that claim or defense is unavailable from any other source.”

*Enterline*, 751 F. Supp. 2d at 787 (quoting *2TheMart.com*, 140 F. Supp. 2d at 1095).

When applied here, this test requires that the subpoena should have been enforced and the failure to do so was prejudicial, reversible error.

As to the first prong, there is no dispute here that the subpoena was issued in good faith and for a proper purpose. Second, as noted above, the information sought is highly relevant to Mr. Brockmeyer’s core defense—that the shooting was an accidental discharge and that he was genuinely and deeply grieved in its aftermath. Third, the information identifying this anonymous witness is directly and materially relevant to Mr. Brockmeyer’s defense. Finally, information necessary to support this claim is not available from other sources. In denying the motion to enforce the subpoena, the trial judge noted that the defense had access to the witnesses the State planned to call and had a copy of the bar’s largely illegible sign-in sheet. Neither of these sources were an adequate substitute for the anonymous witness and do not constitute reasonable alternative sources of the information. For one, few of the State’s witnesses actually witnessed the incident (R. 6:8-9), thus the information sought from the anonymous commenter was *not* reasonably available from them. Additionally, the bar’s sign-in sheet was essentially useless and—even assuming the genuineness of the prosecutor’s assurance that the State would diligently assist Mr. Brockmeyer in deciphering the mess—there was no guarantee it was a complete listing of all those present. In sum, the

information sought was not reasonably available from another source, and the trial court erred in denying Mr. Brockmeyer's motion to enforce the subpoena of WLTX.

B. Privacy and First Amendment concerns do not protect this otherwise relevant and obtainable information.

Contrary to the trial court's erroneous impression, the anonymous witness' identifying information is not protected by any First Amendment concerns regarding privacy. Although South Carolina courts recognize certain privacy rights, *see Sloan v. South Carolina Dep't of Pub. Safety*, 355 S.C. 321, 586 S.E.2d 108 (2003), those rights are not unlimited. One of the primary limitations on the right of privacy is that it does not inhere to matters of legitimate public concern. *Burton v. York Cnty Sheriff's Dept.*, 358 S.C. 339, 352, 594 S.E.2d 888, 895 (Ct. App. 2004). Thus, a primary inquiry in an assertion of privacy is "whether the occurrence is a matter of legitimate public or general interest." *Doe v. Berkeley Publishers*, 329 S.C. 412, 413, 496 S.E.2d 636, 636 (1998) (citing *Meetze v. Assoc. Press*, 230 S.C. 330, 95 S.E.2d 606 (1956)). As conceded by WLTX's counsel at the hearing (R. 9:14-18), the commission of a violent crime is a matter of public significance, *Berkeley Publishers*, 329 S.C. at 413, 496 S.E.2d at 636. Specifically, the South Carolina Supreme Court has held that "if a person, whether willingly or not, becomes an actor in an event of public or general interest, 'then the publication of his connection with such an occurrence is not an invasion of his right to privacy.'" *Id.* at 414, 496 S.E.2d at 637 (quoting *Meetze*, 230 S.C. at 337, 95 S.E.2d at 609).

In any event, the anonymous commenter had no reasonable expectation of privacy. The terms of service on the WLTX website inform users that "you grant us, and anyone authorized by us, the right to identify you as the author of any of your postings or

submissions by name, email address or screen name, as we deem appropriate.” See WLTX.com “Terms of Service,” located at <http://www.wltx.com/common/v5/pages/tos/default.aspx> (updated Jan. 21, 2011) (last visited Jan. 11, 2012).<sup>14</sup> Similarly, the website’s privacy notice informs users that their personal data may be shared with a variety of third parties, and includes an explicit notice “that we may occasionally release information about our visitors if required to do so by law or . . . to comply with legal process.” See WLTX.com “Privacy Notice,” located at <http://www.wltx.com/common/v5/pages/privacy/default.aspx> (updated Dec. 30, 2010) (last visited Jan. 11, 2012). Because the witness spoke to an issue of public concern and had no expectation of privacy, the trial court erred in relying on First Amendment and privacy concerns to deny the motion to enforce the subpoena.

C. The “Reporter’s Shield” law is inapplicable here.

Furthermore, the “Reporter’s Shield” law does not apply to the situation here and, even if it did, this scenario falls within that statute’s exception. The shield law provides that a journalist or news outlet “has a qualified privilege against disclosure of any information . . . obtained or prepared in the gathering or dissemination of news.” S.C. Code Ann. § 19-11-100(A). This qualified privilege does not attach to the information sought here, which was not a “obtained or prepared in the gathering or dissemination of news.” Rather, the information sought is an unsolicited comment made on a publicly-viewable comment section of a publicly-accessible website. Even assuming the anonymous witness’ comments constitute a journalistic “source,” the protection of a journalist’s sources is not unlimited. See *Matter of Decker*, 322 S.C. 215, 471 S.E.2d 462

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<sup>14</sup> Both the “Terms of Service” and the “Privacy Policy” were before the trial court. (R. 16:21-24.)

(1995) (holding, in part, that a news reporter could not rely on the First Amendment to withhold the source of information regarding an upcoming criminal trial). Here, Mr. Brockmeyer seeks not a source of a story in the press, but merely the identity of a potential witness who publicly commented on the story and articulated the very defense raised by Mr. Brockmeyer at trial.

Even if the privilege did apply here, the law provides an exception that would permit compelled disclosure of the information sought here. Specifically, the shield law allows the compelled disclosure of source information upon a showing that the privilege has been knowingly waived or that the production sought is “material and relevant,” “cannot be obtained by alternative means,” and “is necessary.” *Id.* § 19-11-100(B). As explained above, the information sought here is material and relevant, was unobtainable by other means, and was necessary to rebut the State’s arguments and to establish Mr. Brockmeyer’s defense.

**II. The Trial Court erred and violated the Confrontation Clause of the Sixth Amendment to the United States Constitution by permitting the State to establish the chain of custody of its evidence through a computer log.**

At trial, the State introduced numerous pieces of circumstantial evidence that were supposedly probative of Mr. Brockmeyer’s guilt. (*See, e.g.*, R. 298, 304, 312, 327, 368.<sup>15</sup>) The State labored to meet its obligation to “establish a complete chain of custody as far as practicable,” *see State v. Hatcher*, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting *State v. Sweet*, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007)), in large part by having two witnesses—one from the Lexington County Sheriff’s Department and another from the South Carolina Law Enforcement Division (“SLED”)—read aloud from

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<sup>15</sup> Respectively, a shirt worn by Mr. Brockmeyer, a shell casing, a pistol magazine, pistol, and a recovered bullet.

computer generated logs accounting for what law enforcement personnel had custody of the evidence at any given point. (R. 423-34, 490-508.) Defense counsel objected to both of these readings. (R. 423:20-24, 426:11-16, 490:19-24, 497:11-13.) Mr. Brockmeyer's objections to these recitations stemmed, in part, from the fact that various law enforcement personnel listed within the log as having custody of the evidence at some point did not appear at trial and he was thus denied the opportunity to cross-examine them.<sup>16</sup> (R. 490:19-24, 497:11-13.) The trial court overruled this objection. (R. 491:3-4, 497:14-15.) The admission of this evidence denied Mr. Brockmeyer his constitutionally-guaranteed right to confront these adverse witnesses.

The Sixth Amendment provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. In a landmark 2004 decision, *Crawford v. Washington*, the United States Supreme Court held that the Confrontation Clause was violated by the admission into evidence of a witness' statement to police where the witness did testify at trial. 541 U.S. 36, 59 (2004). Under the rule of *Crawford*, the Confrontation Clause allows the admission of "[t]estimonial statements of witnesses absent from trial . . . *only* where the declarant is unavailable, and *only* where the defendant has had a prior opportunity to cross-examine." *Id.* at 59 (emphasis added). This rule applies whenever "testimonial evidence is at issue," though *Crawford* "le[ft] for another day any effort to spell out a comprehensive definition of 'testimonial.'" *Id.* at 68.

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<sup>16</sup> For example, the chain of custody included periods of possession by Candy Kyzer, Nikki Perry Hughes, Pat Crooks, Doris Yarborough, Selena Kinard, and Lisa Waananen, *see* R. 423-34, 490-508, none of whom appeared at trial to verify or account for their handling of the evidence.

Subsequent cases by the High Court clarified the rule and application of *Crawford*. See, e.g., *Bullcoming v. New Mexico*, \_\_ U.S. \_\_, 131 S. Ct. 2705 (2011); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Davis v. Washington*, 547 U.S. 813 (2006). These cases leave no doubt that the protections of the Confrontation Clause apply to testimony used to establish a chain of custody. See *Melendez-Diaz*, 557 U.S. 305; see also *United States v. Summers*, No. 06-5009, 2011 U.S. App. Lexis 24982 (4th Cir. Dec. 16, 2011).<sup>17</sup> Admittedly, the Sixth Amendment does not require the government to introduce live testimony as to every step in the chain of custody. See *Melendez-Diaz*, 557 U.S. at 322 n.1; see also *Hatcher*, 392 S.C. at 91, 708 S.E.2d at 753. Where, however, the government elects to introduce testimony to establish the chain of custody, that testimony *must* be live:

It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; *but what testimony is introduced must (if the defendant objects) be introduced live.*

*Melendez-Diaz*, 557 U.S. at 322 n.1 (emphasis added).

Here, the State failed to call the witnesses whose testimony was contained in the computer log. This log purported to prove that each piece of evidence was untainted and properly transferred and handled. It was thus testimonial—“functionally identical to live, in-court testimony, doing ‘precisely what a witness does on direct examination.’” *Melendez-Diaz*, 557 U.S. at 321 (quoting *Davis*, 547 U.S. at 830). Because these individuals could have been called at trial and because there was no opportunity to cross-

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<sup>17</sup> In *Summers*, the Fourth Circuit considered an issue strikingly similar to the one raised in Mr. Brockmeyer’s appeal but with one key distinction—in *Summers*, the *defense*, not the prosecution, had introduced the evidence custody log. *Summers*, 2011 U.S. App. Lexis 24982 at \*17-18. The *Summers* court thus held *Melendez-Diaz*’s footnote was inapplicable and therefore there was no violation of the Confrontation Clause. *Id.*

examine them, *Crawford* and its progeny demand that Mr. Brockmeyer's conviction be overturned.

It is possible that the rule compelled by the Sixth Amendment and urged here by Mr. Brockmeyer would place an additional burden on the prosecution. This potential burden, however, is insufficient to outweigh the demands of the Constitution. For one, this possibility of an added burden is just that—an uncertain possibility. See *Melendez-Diaz*, 557 U.S. at 330 (explaining that the “dire predictions” of the burden imposed by the Court's holding were overblown). Furthermore, even if the burden were certain and weighty, it would not permit this court to ignore a constitutional requirement:

The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause—like those other constitutional provisions—is binding, and we may not disregard it at our convenience.

*Id.* Ultimately, the State failed to satisfy the evidentiary predicate of showing the chain of evidence so far as is practicable. *Hatcher*, 392 S.C. at 91, 708 S.E.2d at 753; see also *State v. Cribb*, 310 S.C. 518, 522, 426 S.E.2d 306, 309 (1992) (“Where the analyzed substance has passed through several hands, the evidence must not leave it to conjecture as to who had the substance and what was done with it between the taking and the analysis.”) (citation omitted); *State v. Williams*, 297 S.C. 290, 293, 376 S.E.2d 773, 774 (1989) (noting that proof of chain of custody “must establish a complete chain of evidence as far as practicable”).

Because the State improperly introduced the testimony of absent, un-cross-examined witnesses, Mr. Brockmeyer was denied his Sixth Amendment right to confront

the witnesses against him. Accordingly, his conviction should be overturned and a new trial ordered.

**III. The Trial Court erred by permitting the State to introduce a photograph of the defendant where the State used the photograph for the illicit purpose of implying that Mr. Brockmeyer was guilty.**

At trial, over the defense's objection, the State introduced a photo of Mr. Brockmeyer taken shortly after Mr. Rae's death. (R. 256:2-18.) The photo was admitted ostensibly to corroborate testimony that Mr. Brockmeyer was not wearing a shirt at that point and "to show how he was acting." (R. 256:15-16.) In fact, the photo, which depicted Mr. Brockmeyer at a time he was in a state of extreme shock (R. 657:7-10), was used to imply that he was cold, heartless, and, ultimately, guilty. The photograph was irrelevant, unnecessary, and prejudicial, and the trial court erred in admitting it.

"Photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions." *State v. Brazell*, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997) (citations omitted). A photograph is considered prejudicial if it creates "an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." *State v. Alexander*, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991).

Here, the photo was "not necessary to substantiate material facts." *Brazell*, 325 S.C. at 78, 480 S.E.2d at 72 (citations omitted). The fact that, at some point after the shooting, Mr. Brockmeyer removed his shirt had already been established by prior witnesses (R. 225:24, 237:15-16), and was conceded by Mr. Brockmeyer (R. 689:22-25). Rather, the State's true motivation in introducing the photograph was made plain by its

repeated use,<sup>18</sup> including in closing arguments (R. 769:19-22<sup>19</sup>), not to prove the point for which it was admitted but to imply Mr. Brockmeyer's guilt and to introduce an improper prejudice in the minds of the jury. Whatever minimal and redundant probative effect the photo may have had was outweighed by the danger of unfair prejudice.<sup>20</sup> Accordingly, the photograph was unnecessary and irrelevant and should have been excluded. *Brazell*, 325 S.C. at 78, 480 S.E.2d at 72 (citations omitted).

**IV. The Trial Court erred by permitting the State to introduce hearsay evidence taken from the decedent's telephone.**

At trial, over the defense's objections, the State introduced a photograph found stored on Mr. Rae's cell phone. (See R. 438:19-441:9, 446:14-449:4.) The photo depicted two pistols, the smaller of which resembled the weapon whose discharge killed Mr. Rae. The file name associated with the picture was "will gun on left my gun on righ.jpg." (R. 439:19-25, 448:18-19.) The State could not establish who took this photograph, when it was taken, or, most importantly, who titled it thus. The Trial Court

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<sup>18</sup>The defense specifically noted and objected to the prosecution's use of the photograph in cross-examining Mr. Brockmeyer. (R. 697:3-6.)

<sup>19</sup>"Does this look like a man whose friend had just been shot? Does that look even—as he testified today—somebody [sic] who is numb? Or does that look like anger and defiance? You are looking at a killer." The defense specifically noted the prosecution's use of the photograph in closing and renewed its objections to the photograph's illicit use. (R. 775:15-19.)

<sup>20</sup> Though Mr. Brockmeyer did not specifically identify Rule 403 as a basis for his objection, such specificity is unnecessary. See *State v. Jackson*, 364 S.C. 329, 333 n.3, 613 S.E.2d 374, 376 n.3 (2005) (noting that Rule 403 basis for objection was preserved although defendant had not cited the rule when objecting to admission of defendant's photograph).

thus permitted one of the central disputed issues in the case—the ownership of the fatal weapon—to be determined on the basis of hearsay evidence.<sup>21</sup>

It is beyond doubt that hearsay is not admissible except in certain enumerated situations. Rule 802, SCRE. The caption/file name of the photograph in question was hearsay—“a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Rule 801(c), SCRE. The photo’s title does not fall outside the scope of hearsay, *see* Rule 801(d), SCRE, nor does it fall within any of the categories of permissible hearsay, *see* Rule 803, SCRE. The erroneous admission of hearsay is reversible error. *See, e.g., State v. Byars*, 392 S.C. 438, 710 S.E.2d 55 (2011).

Here, the Trial Court overruled the objection and admitted the photograph, reasoning that the objects in the photograph were already in evidence. (R. 438:1-22.) This reasoning completely misses the fact that the objection was not based on what the photo depicted *but on the caption attached to the photo*. The fact that the photographed guns were already in evidence is irrelevant to the analysis of whether the prejudicial file name was or was not hearsay. Despite an explicit objection on hearsay grounds, the Trial Court offered no rationale as to why the rule prohibiting hearsay did not apply.

This was no insignificant error. The ownership of the weapon was a significant issue at trial. Additionally, the State exploited the court’s erroneous ruling in its closing argument, to argue that the weapon that killed Mr. Rae belonged to Mr. Brockmeyer. (R. 753:12-15.) Where the hearsay statement was “a crucial piece of evidence” linking the

---

<sup>21</sup> While Mr. Brockmeyer conceded under cross-examination that he had purchased the smaller pistol (R. 676:10-11), he continued to insist that Mr. Rae, not he, had brought the pistol that evening (R. 677:21-678:17).

defendant to the murder weapon, it “almost certainly affected the result of the trial and therefore could not be harmless.” *State v. Davis*, 371 S.C. 170, 182, 638 S.E.2d 57, 63 (2006). Because the title of the photograph was prejudicial, inadmissible hearsay admitted to prove the truth of a core issue in the case, its admission into evidence was error and warrants reversal.

**CONCLUSION**

In sum, the trial court erred by denying Mr. Brockmeyer the constitutionally guaranteed process for identifying witnesses in his favor, by permitting testamentary evidence regarding the chain of custody of evidence to be read into the record in violation of the Confrontation Clause, by admitting photographic evidence used for an improper and illicit purpose, and by admitting hearsay evidence concerning the ownership of the weapon. For the foregoing reasons, Appellant requests that this court reverse and remand for a new trial.

Respectfully submitted,

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Columbia, South Carolina  
 January 3, 2013

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

Appeal from Lexington County  
Edward B. Cottingham, Circuit Court Judge

THE STATE,

RESPONDENT,

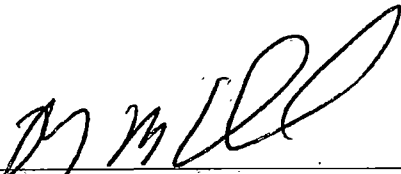
V.

WILLIAM MARK BROCKMEYER,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201, this 3rd day of January, 2013.

  
\_\_\_\_\_  
Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 3rd day of January, 2013.

 (L.S.)  
Notary Public for South Carolina

My Commission Expires: October 2, 2013.

**STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS**

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Appeal from Lexington County  
Edward Cottingham, Circuit Court Judge  
2011-GS-32-1255, 2011-GS-32-1257  
Appellate Case No. 2011- 198266

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THE STATE OF SOUTH CAROLINA,

Respondent,

v.

WILLIAM MARK BROCKMEYER,

Appellant.

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**FINAL BRIEF OF RESPONDENT**

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**APPELLANT'S STATEMENT OF ISSUE ON APPEAL**

1. Did the trial court err by applying the wrong legal standard and denying the defendant's motion to enforce a subpoena where the information was clearly relevant, unavailable from other sources, and not otherwise protected ?
2. Did the trial court err and violate the Confrontation Clause of the Sixth Amendment to the United States Constitution by permitting the State to establish the chain of custody of its evidence through the use of a computer log read aloud by a witness rather than by live testimony from the parties handling the evidence ?
3. Did the trial court err by permitting the State to introduce a photograph for the illicit purpose on implying that the defendant was guilty ?
4. Did the trial court err by permitting the State to introduce hearsay testimony taken from the decedent's cell phone ?

**STATEMENT OF THE CASE**

The Appellant, William Mark Brockmeyer is presently confined at the South Carolina Department of Corrections pursuant to orders of commitment from the Clerk of Court for Lexington County. The Appellant was indicted at the May 11, 2011 term of the Court of General Sessions for Lexington County for murder and possession of a weapon during the commission of a violent crime. 2011-GS-1255, 1257. ROA 826-29. The charges arose from the July 10, 2010 death of Nicholas Rae. A hearing was held on June 23, 2011. A pretrial hearing was held on August 3, 2011. The matter was called to trial before the Honorable Edward Cottingham on August 22, 2011. The Appellant was present and represented by Robert M. Madsen, Circuit Public Defender and Senior Assistant Public Defender David M. Mauldin of the 11<sup>th</sup> Circuit Public Defenders Office. The matter was prosecuted by Deputy Solicitor Samuel "Rick" Hubbard and Deputy Solicitor Shawn Graham of the 11<sup>th</sup> Circuit Solicitor's Office.

On August 26, 2011, the jury returned a verdict of guilty on each indictment. August 26, 2011 Verdict Tr. R. 777-782. Judge Cottingham sentenced Appellant to terms of imprisonment of thirty-five (35) years on murder and five (5) years consecutive on possession of a weapon during the commission of a violent crime for an aggregate sentence of forty (40) years. R.p. 793, Verdict Tr. p. 20, ll. 13-21. The

Appellant made a timely notice of appeal on August 31, 2011. This appeal follows.

### RESPONDENT'S STATEMENT OF THE FACTS

This case involves the early morning death of Nicholas Rae by William Brockmeyer on July 11, 2010. Brockmeyer and Rae were attending a birthday held at Jager's, a private bar in Lexington County that began on July 10. Rae and Brockmeyer had met each other while in prison and moved together and were living together in Lexington County. On that night, they arrived together to the bar - Brockmeyer armed with a small Ceska .380 pistol and Rae with a large pellet B.B. gun, allegedly for protection. Brockmeyer keeps his in his front waistline, while Rae keeps the large B.B. gun in his back waistline. Each gun was displayed at various times to the patrons of the club to the consternation of the members. The victim spent the evening drinking and playing pool- losing bets with a better pool player and borrowing money from Brockmeyer to pay his building pool debt. At one point, Brockmeyer comes up to the pool players beating Rae and pulls his gun out and displays it in an intimidating manner.

Rae, having become ill and further inebriated goes out to the porch. He becomes ill and is then seated outside the bar area. At some time, Brockmeyer after a period of making out with a patron, then goes to Rae, kneels down while Rae has his arms having by his side with his head down. Brockmeyer is seen placing his head next to the victim, with his hand in trigger position against the victim's neck. A pop is heard, a casing goes into the air, and Brockmeyer is next seen shoving the victim and briefly leaved the area headed off to the woods. The victim - shot in the neck - crumples over to the floor. His death likely occurred within 30 seconds of the shot.

Brockmeyer, having thrown the small Ceska pistol and a magazine into the woods, returns and gives a variety of stories and versions to the patrons. He later admits giving a false version to the police as well in his testimony.

Critical evidence to the issues presented are set out within the arguments.

## ARGUMENT

- I. **The trial judge did not err in denying a pre-trial discovery subpoena request to a news organization to compel the disclosure of an anonymous commenter on an internet news site concerning the crime where the court reasonably concluded under the circumstances that the identity of the commenter could be likely determined from other sources where the crime happened at a private club where the patrons had to sign in. A new trial is not warranted where the sought after information was cumulative to some evidence presented concerning the demeanor of the Appellant after the shooting.**

This issue concerns the disclosure of the identity of an anonymous comment to a story posted on the WLTX website. As set out below, WLTX opposed the disclosure of the identity to the defense based upon First Amendment and grounds of statutory report privilege. Where there was an alternative manner of seeking and verifying the identities of the attendees at the private bar, the trial judge properly concluded that disclosure by the news organization was protected.

### How The Issue Was Raised

On August 3, 2011 (about three weeks before the trial), a motion hearing was held before Judge Cottingham concerning a December 10, 2010 subpoena served by Brockmeyer's counsel on WLTX seeking information about a commenter on their website. In particular, the subpoena sought the production of

ANY AND ALL REGISTRATION INFORMATION FOR THE USERNAME  
**“AndTheTruth”** THAT REPLIED ON JULY 12, 2010 @ 1:36 AM EDT TO THE NEWS  
 ARTICLE REGARDING **WILLIAM MARK BROCKMEYER** BEING CHARGED WITH  
 THE SHOOTING DEATH OF **NICHOLAS ALTON RAE**.

Court Exhibit 1, p. 6., R. 800. The record reflects that on the comments to the website article of July 11, 2010 concerning the shooting of Rae and arrest of Brockmeyer, the particular comment:

AndTheTruth  
 1:36 AM on July 12, 2010

**Were you there, did you see what happened, did you see the tears on his young confused face when he realized he had just accidentally killed his friend....**

- God makes provision for an accidental or carelessly caused death. Judge not, and ye shall not be judged: condemn not, and ye shall not be condemned; forgive, and ye shall be forgiven

Corinthians 15:54-55:

So when this corruptible shall have put on incorruption, and this mortal shall have put on immortality, then shall be brought to pass the saying that is written, Death is swallowed up in victory.

O death, where is thy sting? O grave, where is thy victory?

- My Heart & Prayers go out to both families & all of my friends who had to see this happen, may God be with you all...

Court Exhibit 1, p. 4. R. 798. (emphasis added).

On January 7, 2011, WLTX, through counsel Jay Bender objected to the subpoena on the grounds that the information sought was constitutionally protected as anonymous internet comment and not subject to disclosure. *January 7, 2011 Letter - Bender to Mauldin, Court Exhibit 1*, p. 9. R. 803. On July 28, 2011, counsel for WLTX (Pacific and Southern Co., Inc.) made another written response additionally asserting the subpoena was not authorized by Rule 13 of the S.C. Rules of Criminal Procedure and that it was protected under S.C. Code Ann., § 10-11-100, described as the news media shield law. *Memorandum of Points and Authorities*, filed July 28, 2011. R. 811-17. In the memorandum, WLTX asserted that there was a constitutional protection for anonymous speech which extends to Internet speech, citing Reno v. ACLU, 521 U.S. 844 (1997). The company argued the sanctity of such speech was protected by Legislation requiring warrants for obtaining Internet communications, citing 18 U.S.C.A. § 2703. The company argues that before the subpoena can be enforced, that he should demonstrate the compelling governmental interest at play, that the interest will be irreparably injured if the speaker's identity is not divulged, the disclosure of the identity would serve the government interest and that no alternatives to disclosure exist. Memo., p. 4. R. 814.

In addition, the company contended that the information was privileged under § 19-11-100. This qualified privilege extended to information, documents, and items obtained in disseminating news. The company asserted that compelled disclosure was not required unless the seeker of the information establishes by clear and convincing evidence that the privilege has been waived or that the production sought:

- (1) is material and relevant to the controversy for which the testimony or production is sought;
- (2) **cannot be reasonably obtained by alternative means; and**
- (3) is necessary to the proper preparation or presentation of the case of a party seeking the information, document, or item.

S.C. Code Ann. § 19-11-100(B) (emphasis added). He concluded that a failure to make the showing bars the disclosure. The company relied upon a recent order in North Carolina, State of N.C. v. Mead where the disclosure of an internet poster was not compelled under a similar law where the burden had not been met. Memorandum, p. 6, Exhibit D. R. 816.

At the August 3, 2011 hearing, counsel Bender appeared on behalf of WLTX in opposition to the subpoena. Counsel Mauldin asserted that the defense sought the internet poster information so that they could potentially talk to them to see if they would be a potential defense witness. R.p. 3, ll. 1-5. The defense urged that they were entitled to the information under the Sixth and Fourteenth Amendments and S. C. Constitutional right to present a defense which should override the First Amendment right to anonymous internet comment of an internet poster. R. 15-17. He further claimed that under WLTX's terms of service the information could be released. R. 17.

Judge Cottingham noted that at an earlier conference he became aware that there was a plethora of witnesses available and known. He stated if the information exists it could be found by discovery without violation of any privacy rights. *Id.* Counsel Mauldin confirmed that there were around 20 witnesses at the bar and "I had an investigator that talked to practically all of them." He stated only one witness indicated that they may have seen the shooting and they did not indicate that it was an accident. He claimed that the internet poster claimed that it was an accident which was different than the witnesses they interviewed or that the State had spoken with. R.p. 6, ll. 12-16. He felt this information was different. R. 6.

Judge Cottingham questioned the credibility of the posting where none of the twenty witnesses had

not made a statement that it was an accident. R. 6-7.

Counsel Bender for WLTX asserted that there were three objections to the subpoena. He maintained that it was protected anonymous speech under the First and Fourteenth Amendments, that subpoena seek to expand Criminal Rule 13 for witnesses to be a discovery subpoena under Civil Rule 45 which is not authorized, and that the South Carolina Shield law protects news organizations from being compelled to provide information obtained in the gathering and dissemination. R. 8-9. Bender asserted the anonymous speech protection leads to the question of whether it is a comment on a matter of public interest. R. p. 9, ll. 12-13.

Bender asserted the Court in Doe v. Berkeley Publishers, 329 S.C. 412, 496 S.E.2d 636 (1998) indicated that the commission of a violent crime is as a matter of law a matter of public interest. Counsel Bender contended that with the 20 witnesses, if the information exists, it can be found by interviewing these witnesses. He maintained the fact that it cannot be found calls into question the veracity of the posting. R. 9. He concluded that what is asked is for a news organization to divulge the identity of someone who has posted on a matter of public interest when the information may not be credible, may not be helpful, and is available from other sources. R.p. 10, ll. 6-10. He asked the subpoena to be denied. Id. Counsel Mauldin asserted that the crime occurred at a bar. He said not everyone could have hung around, claiming people could have left. He urged there was no other way for the information. R.p. 11, ll. 6-10.

Judge Cottingham addressed the Solicitor's Office about his concerns. The judge stated that he would like the defense to get the information, even though he questioned the validity of an anonymous person saying they saw it as an accident. However, the judge also was concerned about it as a privacy issue. R.p. 11, ll. 16-23. The court then inquired about the number of witnesses.

Deputy Solicitor Hubbard responded that every witness that they had has been talked to and the defense was provided the names. He described that Jager's Bar had a sign-in list where the members and their guest would sign in. Hubbard stated that they gave them the list and the defense could talk to

everyone who signed in. R.p. 12, ll. 9-13. Counsel Mauldin confirmed that they had been provided the sign-in list. He complained that the signatures were illegible and did not include an address or phone number information. R.p. 12, ll. 16-21. The prosecution, when asked by the court if it could assist, the Solicitor stated it was inquiring if the Sheriff's Department had a computer at the scene to check drivers licenses and identification, but they were not aware if that was done here yet. R. 13.

Judge Cottingham stated that he wanted a legible hard copy made of everyone who signed in as a client that night. R.p. 13, ll. 20-22. The judge further declared he was concerned about the right to privacy and he was not compelled to grant it. His second concern was that the requested information, if it exists, can be determined by interviewing of the witnesses and other discovery. He concluded that the information sought is not necessary in the defense of the case, particularly where there is a sign-in list of everybody who was there. R.p. 13, l. 24 - p. 14, l. 10.

The prosecution confirmed that it would continue to work on the names, but some of them did not want to talk with law enforcement. In further tracking down people who had fled, all the names were given to the defense. Deputy Solicitor Hubbard agreed to talk to the owner (Leslie Lawson) again and contact law enforcement to see if they can pull data lists. R. 15. he stated he would have the answer to the defense and the court later that date.

Judge Cottingham opined that the witness was constitutionally protected. He concluded that given the nature of the case and number of witnesses, if the party exists, it can be determined appropriate discovery without violating the constitutional privileges of the station and the named individual. R. 15-16.<sup>1</sup>

A review of proceedings subsequent to the August 3, 2011 hearing reveals no further mention of

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<sup>1</sup> Judge Cottingham requested counsel Bender to prepare a proposed order in the matter. R. 16-17. A review of the records of the Clerk of Court for Lexington County reveals no written order is on file concerning the WLTX subpoena. Counsel for Respondent inquired of WLTX counsel Bender prior to preparation of this brief and was advised that he had no written order in his files on this matter.

this issue concerning the internet poster. There is no reference to any pretrial motion for a continuance and no mention of whether or not any additional witness was found or confirmed to the defense that they were the poster.

#### RECORD EVIDENCE OF TEARS AND LACK OF THEM

As stated, only one witness specifically confirmed she saw the shooting, Gina Brakefield. In the brief, the defense recognizes that there was inconsistent evidence presented concerning tears. The girl photographed with the Appellant who arrived at the bar with him, Mariko Clack, testified that she did not see the shooting, and stated when she saw the Appellant and stated she “saw him like weeping”, in response to an inquiry as to whether he was crying that night. R.p. 100, ll. 1-2. She said hours later he was claiming to her he did not do it, although others had said they saw him shoot Nick. R.p. 103, l. 22- p. 104, l. 25, p. 113, ll. 19-25.

Brakefield declared that Brockmeyer “pretended to cry, but would not shed a tear.” R.p. 64, ll. 17-20 (“no tears”); p. 79, ll. 2-13 (“wasn’t crying”, “no actual tears”). Marcus Lesesne stated he did not remember any tears. R.p. 224, ll. 23-24. Also, R.p. 237, ll. 7-9 (Shandon Lesesne) (not crying “it was just loud” screaming).

#### ANALYSIS

##### *The Issue Is Not Preserved*

At the outset, Respondents question whether this issue is preserved before this Court. At the conclusion of the August 3, 2011 hearing, other actions were going to be taken by the prosecution with the owner of the bar concerning the sign-in sheet and identification of others attending the party at Jager’s that evening and whether law enforcement had gathered additional identifying information. The record is void of any renewed request for the information at the outset of the trial. As stated above, one witness with connections to Appellant, Mariko Clark, testified about Appellant’s weeping after the crime. A reading of the internet comment reasonably was about the tears of Appellant after he realized that he accidentally

killed Rae, not that the commenter actually saw the accident. This is consistent with Mariko's testimony at trial concerning the Appellant running around "like weeping" frantic and holding his head screaming "my brother, my best friend." R. 102. However, no one asked her on the record if he had done the posting as "AndTheTruth." It should be noted that the January 10, 2011 subpoena was not for trial testimony, but was for discovery purposes. "It is well settled that a reviewing court may not consider error alleged in exclusion of testimony unless the record on appeal shows fairly what the rejected testimony would have been." State v. Roper, 274 S.C. 14, 20, 260 S.E.2d 705, 708 (1979); see also State v. Cabbagestalk, 281 S.C. 35, 314 S.E.2d 10 (1984) (failure to make an offer of proof prevents the appellate court from determining whether the exclusion of testimony is prejudicial and thus precludes the appellant from raising the issue on appeal). Here there was no offer of proof at the August 22, 2011 trial during the defense of the case. Tr.p. 736-739. In fact, defense counsel Madsen declared in response to the Court at the outset of the defense case that there were no issues "out there" that needed to be resolved before the defense presented its case, in response to Judge Cottingham's question. Tr.p. 738-739. The WLTX matter is not preserved as a matter of trial error.

*There Was No Compulsory Process Issue Presented.*

The Appellant in his brief makes an assertion about the right to compulsory process. Initial Brief of Appellant, p. 9. However, he did not seek to subpoena any particular witness to the Court for the August 22, 2011 trial, only to have pretrial disclosure for discovery purposes on the basis of the January 10, 2011 subpoena. "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). "This right is a fundamental element of due process of law." *Id.* State v. Inman, 395 S.C. 539, 561, 720 S.E.2d 31, 43 (2011).

The Supreme Court has explained, "more than mere absence of testimony is necessary to establish a violation of the right [to compulsory process]." United States v. Valenzuela-Bernal, 458 U.S. 858, 866,

102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982). “This language suggests that [a defendant] cannot establish a violation of his constitutional right to compulsory process merely by showing that [he was deprived of witnesses' testimony]. He must at least make some plausible showing of how their testimony would have been both material and favorable to his defense.” Valenzuela-Bernal, 458 U.S. at 867. Appellant has made no showing that WLTX could have offered any favorable, material, and noncumulative evidence in support of his defense. See Valenzuela-Bernal, 458 U.S. at 873 (defendant must show that the evidence “would have been material and favorable in ways not merely cumulative to the testimony of available witnesses.”). In light of Ms. Clack’s testimony, Brockmeyer has failed to make any showing of a compulsory process denial where the potential testimony, at most, would have been cumulative to her testimony. Further, there is no showing that the government impeded th disclosure in any manner. To the contrary, the prosecution agreed to seek the alternate ways to get the identity of all individuals who attended the party through the bar owner and law enforcement. As stated, it is not known whether the anonymous internet commentator actual testified on this record.

*The Poster’s Identity Was Reasonably Found to Be Protected*

Anonymous speech has played an important role in the history of this country. “Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy or of dissent.” McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 356, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995). This First Amendment protection has been extended to material on the internet as well. Reno v. Am. Civil Liberties Union, 521 U.S. 844, 870, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997) (“[O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to [the internet.]”). Unlike our Shield Law, this protection is a qualified privilege that requires the balancing of other rights against the right to anonymous speech, most commonly the right to seek redress for an injury. See, e.g., McIntyre, 514 U.S. at 353, 115 S.Ct. 1511 (balancing right to anonymity and right to protection from fraud).

The Appellant further claims that the anonymous poster had no right to privacy because of the comment about a crime. Our Supreme Court has defined the “right to privacy” as the right of an individual to be let alone and to live a life free from unwarranted publicity. Sloan v. South Carolina Dep't of Pub. Safety, 355 S.C. 321, 586 S.E.2d 108 (2003). However, “ ‘one of the primary limitations placed on the right of privacy is that it does not prohibit the publication of matter which is of legitimate public or general interest.’ ” Society of Prof'l Journalists v. Sexton, 283 S.C. 563, 566, 324 S.E.2d 313, 315 (1984) (quoting Meetze v. Associated Press, 230 S.C. 330, 95 S.E.2d 606 (1956)). Indeed, the Court has held that, as a matter of law, “if a person, whether willingly or not, becomes an actor in an event of public or general interest, ‘then the publication of his connection with such an occurrence is not an invasion of his right to privacy.’ ” Doe v. Berkeley Publishers, 329 S.C. 412, 414, 496 S.E.2d 636, 637 (1998) (quoting Meetze, 230 S.C. at 337, 95 S.E.2d at 609). The counsel for WLTX conceded that the commission of a violent crime is a matter of public significance.

It does not follow that disclosure of identity of mere commenters about a crime must occur because the comment was about a crime. As WLTX noted, it is the because the event was in the public interest so the speech was in the public interest. Therefore his anonymous speech identity is protected by the First Amendment.

The Appellant incorrectly contends that internet commenter had no expectation of privacy because of the WLTX terms of service, which authorized WLTX to identify the postings by name, email address or screen name , as we [WLTX] deem appropriate. WLTX.com Terms of Service, Court Exhibit 1. ROA \_\_. The website’s privacy notice informed the users that their personal data where it declared that they may disclose such content and materials if required to do so by law or if in their business judgment , such preservation or disclosure is reasonably necessary to “1) comply with legal process . . .” Court Exhibit 1, Terms of Service, p. 2. R. 805. Respondent submits that this term of service agreement does not remove the protections for the anonymous speech. It only stated the obvious, that it was up to WLTX to determine

whether to identify the posters in very limited circumstances. Like the situation in McVicker v. King with a similar argument being rejected, the terms of service policy created a reasonable expectation of privacy. His assertion in the Brief is without merit.

*Disclosure Was Not Required Under Section 19-11-100(B).*

At trial, WLTX argued that compelled pre-trial disclosure was not required unless the seeker of the information establishes by clear and convincing evidence that the privilege has been waived or that the production sought:

- (1) is material and relevant to the controversy for which the testimony or production is sought;
- (2) **cannot be reasonably obtained by alternative means; and**
- (3) is necessary to the proper preparation or presentation of the case of a party seeking the information, document, or item.

S.C. Code Ann. § 19-11-100(B) (emphasis added). He concluded that a failure to make the showing bars the disclosure. The trial court found this argument compelling in rejecting the disclosure.

The Appellant failed to show that the information sought - the identity of a person who declared on the website “[W]ere you there, did you see what happened, did you see the tears on his young confused face when he realized he had just accidentally killed his friend” - could not have been obtained from alternate sources other than disclosure of the WLTX anonymous internet speech material. At the pre-trial discovery motion hearing, it was presented that the club had a sign-in sheet with the names of the club members and guest who attended. The prosecution declared that they had provided the sign-in list of attendees that night to the defense and provided them with all of their interviews of the attendees. They also stated that they would contact the club owner to seek further assistance in identifying attendees as well as seeing if law enforcement acquired additional information at the scene. In addition, during the trial, the owner of Jager’s Bar, Leslie Lawson testified that the club was a member only club. R.p. 243-44. She stated that they had a sign-in list of everyone coming in and that the guest had to sign in with a member. She stated, it was the

same people day in and day out that came in. R.p. 244-45.

The Appellant complained that the proffered sources were inadequate because few of the state witnesses actually witnessed the incident so the information from the commenter was not reasonably available from them. His claim that the sign-in sheet was essentially useless (Initial Brief of Appellant, p. 11) is a feckless assertion in light of Leslie Lawson's testimony that the same people came into the bar day in and day out and that they had to be members or their identified guest. Certainly, the defense had the ability to inquire of her concerning her knowledge of the membership and the sign-in sheet as to the members and guest present that night. Certainly the pool of potential witnesses about Appellant's demeanor when he realized he had killed his friend, in response to other negative postings on the WLTX internet site, could have been potentially located. While it was no guarantee that it listed all who were present, under the bar's policy, it should have included the names all who attended the party.

The Appellant asserts that the South Carolina Shield Law did not apply to the situation because it provides the qualified privilege to a news outlet or journalist against the disclosure of any information obtained or prepared in the gathering or dissemination of the news." S.C. Code Ann. Section 19-11-100(A). However, WLTX reasonably noted that the information sought was obtained in the dissemination of news which provided web dissemination of its news reports and an opportunity for that public to comment on the stories, even through pseudonyms or anonymously. Looking at legislative intent, in enacting the privilege, the General Assembly found that "the threat of compelled testimony or production of information , documents , or items obtained . . . in . . . disseminating news to the public interferes with the free flow of information to the public." Act No. 138, Acts and Joint Resolutions of the General Assembly of South Carolina (1993).

The Appellant contends that the anonymous comment was unsolicited and made on a publicly viewable website. What the Appellant fails to recognize that the very essence of the anonymous source evident in the comment on the news website on matters of public concern is precisely what the Report's

Shield law is designed to protect. His argument otherwise must be denied.<sup>2</sup> Judge Cottingham did not abuse his discretion in denying the motion to compel disclosure in the of the available alternatives.

Alternately, the Appellant requests this Court to adopt a new test, based upon McVicker v. King, 266 F.R.D. 92 (W.D. Pa. 2010) and apply it to this case because South Carolina has not specifically addressed this issue before. The McVicker test is not much different that the Section 19-11-100 test stated above. In McVicker, the district court applied the following similar standard:

- (1) The subpoena seeking the information was issued in good faith and not for any improper purpose;
- (2) the information sought relates to a core claim or defense,
- (3) the identifying information is directly and materially relevant to that claim or defense, and
- (4) the information sufficient to establish or to disprove that claim or defense is unavailable from any other source.

Enterline v. Pocono Med. Ctr., 751 F.Supp 2d 782, at 787 (M.D. Pa. 2008) (quoting Doe v. 2TheMart.com Inc., 140 F.Supp.2d 1088, 1095 (W.D.Wash.2001)). Other courts have considered similar factors. See, e.g., Highfields Capital Management, L.P. v. Doe, 385 F.Supp.2d 969 (N.D.Cal.2005); 2TheMart.com, 140 F.Supp.2d at 1091-92, Mobilisa, Inc. v. Doe, 217 Ariz. 103, 170 P.3d 712, 721 (Ariz.App.Div.2007); Dendrite Int'l, Inc. v. John Doe No. 3, 342 N.J.Super. 134, 775 A.2d 756, 760–61 (App.Div.2001). In each of these standards, it includes an equivalent requirement that the information is unavailable from any other source. As set out above, critical to Judge Cottingham's denial was his conclusion that the information was

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<sup>2</sup>Similarly, in Colt v. Freedom Communications, Inc., 109 Cal.App.4th 1551, 1 Cal.Rptr.3d 245 (2003), the appellate court held the privilege applied to a newspaper's published articles and internet postings on its own Web site that "fairly described the nature of" a stock manipulation scheme detailed in an SEC complaint. ( *Id.* at pp. 1554–1555, 1559, 1 Cal.Rptr.3d 245.). "As news organizations have experimented with ways to encourage their readers to interact with their online news products, one of the most popular options has been to allow readers to post comments adjacent to a story." Jane E. Kirtley, *Mask, Shield, and Sword: Should the Journalist's Privilege Protect the Identity of Anonymous Posters to News Media Websites?*, 94 Minn. L.Rev. 1478, 1488 (2010). As many of these cases illustrate, news organizations that host websites recognize that permitting anonymous (or pseudonymous) postings encourages robust debate and helps promote the First Amendment interest of "protect[ing] unpopular individuals from retaliation--and their ideas from suppression." See McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995).

available from other sources. This conclusion is well supported by the record before this Court.

**II. The Confrontation Clause was not violated by the testimony of various witnesses concerning the chain of custody of numerous items. Crucial steps in the chain were testified by witnesses present at trial. Further, any alleged error was harmless where the Appellant testified about the fact of the shooting with the weapon which he disposed of in the woods.**

The State presented a series of witnesses to establish the chain of custody of various items recovered at the scene and tested by SLED forensics. The prosecution's presentation included the presences of the witnesses who participated in the chain and were crucial. Each of the witnesses testified about the fact of their own review of the items and whether they found them sealed properly from tampering. The only witnesses in the chain not called were incidental transfer witnesses within the evidence chain who either delivered or received the sealed item from a witness who testified. Although a log was used by the evidence custodians to report transfers, as a business record, the log was not introduced nor did it indicate any "testimonial" matter about whether the non-called witnesses reported the items sealed or the test results. Since no "testimonial" matter was presented, under Melendez-Dias v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527 (2009), there was no confrontation clause violation. The Appellant had the opportunity to examine each of the crucial witnesses in the chain who testified. The Constitution does not require more.

The Appellant contends that the trial court committed a violation of the Confrontation Clause in permitting the State to establish the chain of custody of five (5) items of evidence through the use of computer log by the SLED evidence custodian, rather than placing each witness in the chain on the witness stand. The trial court relied upon State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) to authorize the witness's reliance on the business record of the agency used to track evidence within each agency, the South Carolina Law Enforcement Division and Lexington County Sheriff's Department in denying each of the Appellant's objections to the evidence. R.p. 424, ll. 19-24, p. 499-501, 537, 542, 555, 585, 572, 717. Respondent submits that the trial court did not abuse its discretion in the admission of the evidence where the records that Lexington and SLED evidence custodians relied were kept in the regular course of business

for tracking the location of material within the agency, not for use essentially in court and that the prosecution presented the crucial witnesses to the chain of custody, consistent with the Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009). Further, as revealed below, any error in the admission of the exhibits chain of custody was harmless.

In his brief before this Court, the Appellant identified five (5) items that he is apparently challenging concerning the testimony of Margaret Harmon, the evidence custodian of Lexington Sheriff's Department, and Amy Simmons, the evidence custodian at SLED. In particular, he notes the admission of a white Sean John T-shirt (State Exhibit 25), a shell casing recovered at the Jager's Bar (State Exhibit 28), a pistol magazine (State Exhibit 30), a pistol [Ceska .380 pistol] (State Exhibit 48), and a bullet (recovered at the autopsy) (State Exhibit 53). Respondent submits that consistent with Melendez-Diaz, the crucial steps and witnesses to those steps were presented as to each item and they were presented live and subject to examination. At no time during the trial did the Appellant contend that any witness to a crucial step in the chain was not called - instead he asserted that every chain step witness had to be called. This is not required under state procedure (Hatcher) or the constitution (Melendez-Diaz).

In his argument before this Court, he complains that the State failed to call "witnesses whose testimony was contained in the log and stated the could have been called and been cross-examined. Tr. 16. While he states the unintroduced "log purported to prove each piece of evidence was untainted". He is in error because the log merely showed the existence of a transfer. The proof that it was not tainted was presented through the actual witnesses who testified at the trial. The Appellant suggests that because he objected that under Crawford v. Washington and Melendez-Diaz the prosecution had to present every witness. We disagree. As stated, the evidence presented must be presented live, not merely through a document. In this case, the crucial steps of each exhibit's custody was presented from receipt through the testing by live witnesses, just not every custodian. The Confrontation Clause does not demand it.

## STANDARD OF REVIEW

“The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion.” State v. Hatcher, 392 S.C. 86, 708 S.E.2d 750 (2011). State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” Id.

*Chain of Custody*

The issue before this court is not a claim that the chain of custody was not shown. It is only that the Confrontation Clause was violated. The trial judge relied upon State v. Hatcher, supra., concerning the chain. “[T]his Court has long held that a party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable.” State v. Hatcher, supra., citing State v. Sweet, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007). “Where the substance analyzed has passed through several hands the evidence must not leave it to conjecture as to who had it and what was done with it between the taking and the analysis.” Benton, 232 S.C. at 33–34, 100 S.E.2d at 537 (citation omitted). “Testimony from each custodian of fungible evidence, however, is not a prerequisite to establishing a chain of custody sufficient for admissibility.” Sweet, 374 S.C. at 7, 647 S.E.2d at 206 (citing State v. Taylor, 360 S.C. 18, 27, 598 S.E.2d 735, 739 (Ct.App.2004)). “Where other evidence establishes the identity of those who have handled the evidence and reasonably demonstrates the manner of handling of the evidence, our courts have been willing to fill gaps in the chain of custody due to an absent witness.” Id. “Proof of chain of custody need not negate all possibility of tampering so long as the chain of possession is complete.” State v. Carter, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001). “In applying this rule, we have found evidence inadmissible only where there is a missing link in the chain of possession *because the identity of those who handled the [substance] was not established at least as far as practicable.*” Id. (emphasis added). In Hatcher, the Court stated: “It is unnecessary ... that the police account for ‘every hand-to-hand transfer’ of the item; **it is sufficient if the evidence demonstrates a reasonable assurance the condition of the item**

remains the same from the time it was obtained until its introduction at trial.” State v. Hatcher, supra. 392 S.C. at 94, 708 S.E.2d at 754.(emphasis added). As stated therein,

The State need not establish the identity of every person handling fungible items in all circumstances; rather, the standard is whether, in the discretion of the trial judge, the State has established the chain of custody as far as practicable. This determination will necessarily depend on the unique factual circumstances of each case.

Hatcher, supra. “The trial judge’s exercise of discretion must be reviewed in the light of the following factors: ‘... the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it.’ ” Id. (citation omitted). “If upon the consideration of such factors the trial judge is satisfied that in reasonable probability the article has not been changed in important respects, he may permit its introduction in evidence.” Id, at 392 S.C. 94-95, 708 S.E.2d at 754-755. As the court concluded:

The State need not establish the identity of every person handling fungible items in all circumstances; rather, the standard is whether, in the discretion of the trial judge, the State has established the chain of custody as far as practicable. This determination will necessarily depend on the unique factual circumstances of each case.

Hatcher, id.

### CONFRONTATION CLAUSE ISSUE

In Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the United States Supreme Court held that the Confrontation Clause guarantees a defendant’s right to confront those “who ‘bear testimony’ ” against him. Id. at 51. A witness’s testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination. Id. at 54. The Crawford opinion described the class of testimonial statements covered by the Confrontation Clause as follows:

Various formulations of this core class of “testimonial” statements exist: “ ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,”;

“extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,”; “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[.]”

Id. at 51–52 (internal citations omitted). In Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527 (2009), the prosecution introduced affidavits reporting the results of forensic analysis, which confirmed that the substance seized by the police and connected to the defendant was cocaine. The Supreme Court held that the affidavits were testimonial in nature, as they had been created for the sole purpose of providing evidence against the defendant and were “functionally identical to live, in-court testimony.” Id. at 310-11. Thus, the affiants were witnesses subject to the defendant's right of confrontation, and without a showing that the analysts were unavailable to testify at trial and that the defendant had a prior opportunity to cross-examine them, the defendant was entitled to cross-examine the analysts at trial. The Court also rejected the claim that no Confrontation Clause violation had occurred because the defendant had the ability to subpoena the analysts:

Converting the prosecution's duty under the Confrontation Clause into the defendant's privilege under state law or the Compulsory Process Clause shifts the consequences of adverse-witness no-shows from the State to the accused. More fundamentally, the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court. Its value to the defendant is not replaced by a system in which the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiants if he chooses.

Melendez-Diaz, 557 U.S. at 324–25.

Justice Scalia, writing for the majority, made the point that not all documents produced by a business fall within the business records exception. He cited Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943) ( Palmer ) as a case that makes this distinction clear. In Palmer, a railroad employee wrote an accident report as part of his job. Justice Scalia noted that the accident report “did not qualify as a business record because, although kept in the regular course of the railroad's operations, it was ‘calculated for use essentially in the court, not in the business.’ [Citation.]” Melendez-Diaz, *supra*, 557 U.S.

at p. 321, 129 S.Ct. 2527.

In making this point, Justice Scalia noted that documents kept in the regular course of business may ordinarily be admitted under the business records hearsay exception, but “not ... if the regularly conducted business activity is the production of evidence for use at trial.” (Melendez-Diaz, supra, 557 U.S. at p. 321, 129 S.Ct. 2527.) This sentence should not be read to mean that if the nature of the business is producing forensic evidence, as in the case of a testing laboratory, none of its records can ever qualify as a business record. Close reading of Melendez-Diaz reveals this to be a misinterpretation. In relying on Palmer, supra, 318 U.S. 109, 63 S.Ct. 477, Justice Scalia drew a distinction between those routine documents and notations created as part of the business's direct operations, as opposed to documents written for the external purpose of defending a court case. Although the Palmer litigation report was written to serve the business's interest, it was not the kind of routine document encompassed by the business records exception. It was not a document created as part of the day-to-day running of the railroad. The application of the Palmer distinction, focusing on why a document was produced, foreshadowed the “primary purpose” analysis later employed in Sixth Amendment confrontation cases.

The Melendez-Diaz majority contrasted the railroad accident report in Palmer, supra, 318 U.S. 109, 63 S.Ct. 477, with records “prepared for the administration of an entity's affairs, and not for use in litigation,” citing as examples cases involving admission of a ship's muster book, a vestry book, and a prison logbook. (Melendez-Diaz, supra, 557 U.S. at p. 321, fn. 7, 129 S.Ct. 2527.)

The Melendez-Diaz majority explained that “[b]usiness and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because - having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial -they are not testimonial.” Melendez-Diaz, supra, 557 U.S. at p. 324, 129 S.Ct. 2527.

More particularly, the Court held that chain of custody documents alone does not implicate the

Confrontation Clause. See Melendez-Diaz v. Mass., 557 U.S. 305, 129 S.Ct. 2527, 2532 n. 1, 174 L.Ed.2d 314 (2009) (“[W]e do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case. While ... it is the obligation of the prosecution to establish the chain of custody, this does not mean that everyone who laid hands on the evidence must be called.... [G]aps in the chain of custody normally go to the weight of the evidence rather than its admissibility.”) (internal quotation marks and citations omitted).

In Melendez-Diaz, the Supreme Court cautioned that “[i]t is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony is introduced must (if the defendant objects) be introduced live.” 129 S.Ct. at 2532 n. 1. Accord, State v. Gomez, 226 Ariz. 165, 168, 244 P.3d 1163, 1166 (Ariz.,2010) The chain of custody testimony did not violate the Confrontation Clause simply because every technician who handled and processed the samples did not testify. See Melendez-Diaz, 129 S.Ct. at 2532 n. 1.

Jamerson v. State, 2012 WL 5333412, 4 (Tex.App.-Dallas) (Tex.App.-Dallas,2012). The Confrontation Clause does not mandate “anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case”); State, ex rel. Roseland v. Herauf, 819 N.W.2d 546, 556 (N.D., 2012) (cites Melendez chain of custody statement); State v. Nez, 148 N.M. 914, 918, 242 P.3d 481, 485 (N.M.App.,2010) (a person who draws a blood sample for a test whose results are introduced into evidence need not testify at trial).

While it is true the prosecution in this case had evidence custodian witnesses testify in reliance upon their chain of custody forms live, the actual forms were not introduced. Instead, it was the defense who repeatedly raised the chain of custody, noting there were numerous people who would have had access to

the evidence. Respondent submits that this court should hesitate to label this as the kind of case the Supreme Court was referencing when it noted that the prosecution may sometimes deem “the chain of custody crucial so as to require evidence.” *Id.*; see also United States v. Summers, 666 F.3d 192, 197–201 (4th Cir.2011) (distinguishing Bullcoming v. New Mexico, U.S. , 131 S.Ct. 2705, 2713–16, 180 L.Ed.2d 610 (2011)<sup>3</sup> and Melendez-Diaz, 129 S.Ct. at 2531–32, and find no Confrontation Clause violation where the witnesses who sealed placed the material from the scene into the hand of the custodian and the persons who unsealed the exhibits testified, and the prosecution did not put on each witness who handled the items of evidence. In State v. Cutro, 365 S.C. 366, 378, 618 S.E.2d 890, 896 (2005), the Court determined that the a public business record, very much like a business record, is not testimonial and its admission similarly does not violate the defendant's confrontation rights.

#### **Shell Casing at Scene (State Exhibit 28)**

The shell casing found at Jager’s Bar (State Exhibit 28) was photographed in State Exhibit 23. R. 304. Investigator Day testified that the spent cartridge was placed by him into a film canister then placed it in a brown bag. R. 305-06. He stated that he sealed the bag with security tape and then dated it and signed it. R. 306. He testified after he packaged it, he turned the item into the property room to the custodian, Margaret Harmon on July 12, 2010 at 14:33. R.p. 332, l. 4 - p. 333, l. 13.

Evidence custodian Harmon testified that she received the item sealed. R. 418. She stated she signed it in evidence at 16:43. She stated on July 14, 2010, evidence custodian Candy Kyzer released the item back to Investigator Day at 9:16. R.p. 431, ll. 5-7. Day released the item to SLED control technician Amy Stephens at 10:19. R.p. 431, ll. 8-10.

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<sup>3</sup>In Bullcoming v. New Mexico, U.S. , 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011), the Court held a scientific report could not be used as substantive evidence against a defendant unless the analyst who prepared and certified the report was subject to confrontation. The Court also reiterated that an analyst's certification prepared in connection with a criminal investigation or prosecution is testimonial and therefore within the compass of the Confrontation Clause. *Id.* at 2713–14.

Amy Stephens testified she received the item from Day. R.p. 489, ll. 10-20. She stated she accepted this item on July 14, 2010 at 10:19 from Day and transferred the item to the firearms evidence intake storage at the same time. R.p. 491, ll. 12-16. She testified that on July 20, 2010, at 3:59, forensic technician retrieved it from firearms intake and transferred it at 3:39 p.m. to forensic scientist Michelle Eichenmiller. (Testified). R.p. 491, ll. 17-24.

Michelle Eichenmiller testified that when she receives items from log in it will be in a sealed container. R.p. 551, ll. 16-25. She described that she would open it and view it and take pictures of the markings. R. 552. She states she will mark what she receives with the case number, item number and her initials. R. 553. She testified she examined State Exhibit 28. She opined that the cartridge casing was fired by the Ceska pistol. R. 554-55.

On August 13, 2010, the item was returned from Eichenmiller to evidence custodian Yarborough who transferred it to shelf 3-C at 3:39. R. 491-92. On September 1, 2010, Stephens (testified) transferred the item to Lexington County Sheriff's Department. R. 491-92, p. 431, ll. 10-13 (Harmon).

Stephens testified that they work on a "said to contain" policy and go on the documentation. They do not open packages and do not inventory the evidence. R.p. 492, ll. 13-17, p. 493, l. 24 - p. 494, l. 16. The officer will seal the items and sign the signature pad. She said her department does not open exhibit items, unless they have to open it to separate items for different departments. R. 494.

Stephens described the computer printout is created so the department can audit the evidence it has received. R.p. 495, ll. 1-7.

Respondent submits the critical steps were reported by live testimony and witnesses presence consisted with Crawford and Melendez-Diaz, the recovery and transfer by Day, transfer to Lexington, receipt by Harmon, receipt by Stephens and receipt and testing by Eichenmiller. The incidental transfers by Kyzer was to a witness (Day) and by forensic tech Yarborough was to witness Eichenmiller who tested

it. The confrontation concerns have been satisfied by the crucial witnesses testimony and presence.

#### **Sean John Shirt**

The chain of custody of Exhibit 25, the Sean John shirt worn by the Appellant was presented through witnesses at trial. Initially shown being worn by Appellant in State Exhibit 3 and 4, Investigator Day testifies about his discovery of the shirt on the car (R. 296) (State Exhibit 15). He described boxing and sealing the exhibit. R. 331-32. He stated that he handed it over to the custodian, Margaret Harmon. R.p. 332, l. 25. He stated this occurred on July 12, 2010 at 14:33. R.p. 333 ll. 1-13.

Ms. Harmon testified about her records of the chain of custody within the Sheriff's Department. R. 429-30. She testified she received from Day on July 11, 2010 at 4:30, provided to Day on July 14. R. 429. SLED evidence technician Amy Stephens testified she received it (consistent with Harmon's testimony) from Day on July 14, 2010. R. 496. She testified that Ila Simmons received the item July 15, 2010 at 2:30 p.m.

Ila Simmons testified that she received the sealed box with the T-shirt and opened it. R.p. 525, l. 6. She testified she performed gunshot residue analysis on the shirt. R.p. 526, ll. 1-18. She stated she did particle lifts from the shirt. R.p. 530, ll. 1-23.

Agent Stephens stated on August 11, Lisa Waananen received the evidence from Simmons. R.p. 498, ll. 12-13. [Note Simmons testified]. Agent Stephens testified further about the item being transferred from Waananen to Patricia Crooks who placed it on an intake shelf on August 11, 2010.

On October 20, 2010, forensic tech Doris Yarborough removed the item from the shelf and gave it to forensic technician Betty Butler (who testified). R.p. 498, ll. 17-23.

Agent Butler testified she received the t-shirt sealed and not tampered with in a container. R. 536-37. She testified that she took cuttings from the shirt (items 9.1, 9.2, 9.3, 9.4, 9.5, 9.6). R. 537-542. She described the sealing of the envelopes in the matter. R. 541-42. she described returning the sealed items

into the box and sealing the box and then returning it to the evidence control department. R.p. 543, ll. 10-19.

Amy Stephens testified that on October 25, 2010 at 3:37 Nikki Perry Hughes received the evidence from Betty Butler and transferred it to a shelf in the evidence control room at the same time. The shirt was transferred on Dec. 1, 2010 by Crooks to Candy Kyzer with the Sheriff's Department. Lexington custodian Harmon testified the items were returned on December 1, 2010. R.p. 430, ll. 5-6.

Harmon stated on July 8, 2011, she released the item to Investigator Day (who testified) who released it to Nikki Perry at SLED. R.p. 430, ll. 10-12. SLED Agent Simmons testified Perry received it on July 8, 2011 and on the same day provided it to Melissa Wallace (who testified). R.p. 499, ll. 8-13.

Melissa Skipper Wallace testified she received the shirt items and shirt cuttings. R. 569-70. She stated when she received them they were sealed and had not been tampered with. R.p. 570, ll. 8-15. She stated she made additional swabs from the shirt and sealed and sent them to DNA. R. 571-72, 578.

The cuttings from the shirt (items 9.2, 9.3, 9.4) were made by Betty Butler were transferred into a container on October 20, 2010 in DNA Dept. drawer. On January 19, 2011, DNA forensic scientist Paul Meeh received the evidence from the drawer. (Paul Meeh testified).

As to swabs 9.5 and 9.6 made by Melissa Skipper Wallace, she transferred 9.5 in container J gave it to Perry (evidence control) who transferred it to DNA intake shelf. On July 19, Stephens retrieved it and transferred it to Meeh. R.p. 503, ll. 9-20.

Paul Meeh testified that when he received the items for testing they were all sealed. Tr. 643-45.

#### **Pistol Magazine (State Exhibit 30)**

The pistol magazine was found by Investigator David Day the morning they were processing the scene. R. 307. He went over on the other side of the privacy fence to look for a weapon. He located the magazine which is shown in State Exhibit 29. R. 307-08. He testified that he placed the magazine in a bag

that was sealed shut with tamper proof tape. He testified that he examined it for fingerprints using low lighting without success. R. 310. Rather than dusting for fingerprints, Investigator Day made contact with Det. Grant and they decided to send it to SLED to have it tested for “touch DNA.” R. 310-11. In addition, Day testified that he swabbed the entire magazine, put it in a special container, then put it in a box and sealed it. R. 313. Day testified that when they found the magazine two live rounds were in the magazine. R. 320-21.

Evidence custodian Harmon testified that magazine was turned in by Day at 4:30, July 11, 2010 and had remained in custody until it was introduced in court. R. 431.

The two bullets from the magazine (item 21) (State Exhibit 42) was placed by Day in a canister and a bag and secured with tape. R. 321-23. Lexington custodian Harmon testified it was received from Day by her on July 12 at 16:43. It was then released by custodian Kyzer to Day on July 14, 2010. On July 14, 2010 at 10:19, Day released it to SLED evidence custodian Stephens. R. 432.

Stephens testifies that she received it sealed on July 14, 2010. The chain of custody at S.L.E.D. is the same as the shell casing recovered at the scene (State’s Exhibit 28) set forth above. Like that item, the crucial witnesses concerning the dealing of the exhibit were Day, Harmon, Stephens and Eichenmiller, each of whom testified in court. R. 554, 557.

The swab from the magazine by Day sealed in the canister and identified (State’s Exhibit 31) was introduced by stipulation. R.p. 495, l. 23 - p. 496, l. 12. *See also*, R.p. 432, ll. 10-24. (Harmon testimony concerning Lexington chain).

#### **Ceska .380 Pistol (Exhibits 45, 48)**

The Ceska .380 pistol, State’s Exhibit 48 was discovered by Investigator David Day on July 13, 2010. R. 323-24<sup>4</sup> and was located without a magazine, but with one live round. R. 328-29. Day stated the

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<sup>4</sup> Day stated that they had searched for the weapon in the woods on July 11<sup>th</sup>, but were unable to locate it. R. 319-20. They returned on July 13<sup>th</sup> after a rainstorm. R. 319.

weapon was still wet when recovered and started rusting. R. 331. He stated that it was photographed (State's Exhibits 45, 46, and 47). He stated that he placed the pistol inside a white box, sealed it with evidence tape, closed it, wrapped it and signed it. R.p. 331, ll. 20-24. Once packaged, he stated he delivered to Ms. Harmon at the Lexington Sheriff's Department on July 13, 2010 at 4:30. R. 332-33. He noted he had the items secured in a container, wrapped in tape, signed and dated. R. 333-34.

Evidence custodian Harmon testified that she received the sealed Ceska pistol on July 13, 2010 at 2:53 p.m. R.p. 421, l. 9 - p. 422, l. 25. Also, R.p. 433, ll. 3-6. She stated it was sealed when received and that they did not cut open the box. R. 422.

Harmon reported that on July 14<sup>th</sup>, evidence custodian Kyzer gave the exhibit to Day at 9:16 and reported Day released it to S.L.E.D. evidence control technician Amy Stephens on July 14, 2010 at 10:19. R.p. 433, ll. 3-11.

S.L.E.D. evidence technician Amy Stephens testified and confirmed receipt from Day on that date. R.p. 505, ll. 15-17. Stephens testified that she placed the evidence into the secured evidence processing intake area. She reported that on July 23, 2010, evidence tech Nikki Perry received from intake and transferred the item to forensic tech Betty Butler at 10:17. R.p. 505, ll. 21-24.

Forensic tech Betty Butler testified and confirmed she had received it. R. 543-44. She testified that when she received the box, it was properly sealed and secured. R.p. 544, ll. 14-16. She testified that she swabbed the pistol and created two items, 16.1 and 16.2 (State's Exhibit 74). That she placed in envelopes, sealed, and eventually placed in a heat-sealed bag. R. 545.

Butler also testified that after completing her processing of the pistol, she placed it into the same box, put the item number (16.0) on the handgun, her initials, and sealed it up and relinquished custody to Michelle Eichenmiller in S.L.E.D. firearms department. R.p. 546, ll. 1-13.

Amy Simmons reported that Butler relinquished custody to Eichenmiller on July 23, 2010 at 11:42

a.m. Tr. 563-64. Michelle Eichenmiller testified and confirmed receipt. R. 553-54. She described her processing of the evidence upon receipt. R. 551-52. She testified the weapon was delivered to her sealed, taped and packaged. R.p. 554, ll. 3-7. At that point, she opened it. R.p. 554, l. 7.

She reported on her testing and opined that a bullet recovered (State's 53) was fired by that pistol and the cartridge (State's Exhibit 28), had been fired by that pistol. R. 554-55, 557-58. She also opined that there was a 6 pound trigger pull on the weapon. R. 561-62. She further opined that the gun in the photo represented that it was jammed. R. 562-63.

Amy Stephens reported that the two swabs from the pistol created by Butler were transferred to the DNA department drawer on July 23, 2010 at 4:39 p.m. She reported that DNA forensic scientist Paul Meeh received the evidence on October 7, 2010 at 2:14 p.m. Paul Meeh testified at trial. R. 585. He stated that matters brought to him are in a heat-sealed pouch. R. 585. He stated all the items he received were all sealed and not tampered with, including the two swabs from the handgun. R.p. 586, ll. 11-15, p. 587, l. 10-13. He could not develop human DNA from the swabs. R.p. 597, ll. 4-10.

#### **Recovered Bullet from Autopsy (State's Exhibit 53)**

The recovered bullet from the victim at the autopsy (R. 364, 366, 368-69) was ultimately determined to be fired from the recovered Ceska pistol. (R. 557-58).

Respondent submits that the evidence of the chain of custody was presented through live witnesses of the crucial stages of recovery and transfer consistent with the Confrontation Clause. His suggestion of a requirement of witnesses who transferred the item to a witness who testified is not required under the Constitution.

The Pathologist, Dr. Bradley Marcus, testified that he located a bullet wound and felt the bullet under the victim's skin. R.p. 612, ll. 13-18. He recovered the bullet and plucked it out of skin. R.p. 615, ll. 12-16.

Lexington County Investigator Troy Crump attended the autopsy and collected items. Tr. 419. In particular, he collected the fired projectile from the pathologist. R.p. 365, l. 21 - p. 367, l. 17. This recovery of the item was reflected in photograph, Exhibit 52. Investigator Crump testified that he described the projectile being placed in a bottle and sealed and labeled by the pathologist and sealed. It was dated 7/11/10 (the day of the autopsy) and placed in a bag within a bag. The bag was heat sealed. R. 368-69. After the bag was heat sealed, Crump testified that he took the bag to the Sheriff's Department without tampering with it. R. 372-73. He stated that he placed it in his laboratory on Sunday, and Monday turned it over to the property evidence custodian. R. 373-74. It had not been tampered with when he had transferred it. [He noted at trial that the bag reflected it had subsequently been cut open.]. R. 374. He stated he turned the item over to Lexington evidence custodian Beth Harmon on July 12<sup>th</sup>. R.p. 374, l. 18 - p. 375, l. 7. It was in the same condition he had received it from the pathologist. R. 375.

Beth Harmon testified that she received the item (State's Exhibit 53) from investigator Crump and did not alter it. R.p. 415, l. 14 - p. 416, l. 7. Harmon reported that Crump had received the item at the Newberry Hospital on July 11, 2010 at around 11:09. R.p. 428, ll. 19-24. She testified that on July 12, 2010 around 9:47, the item was received by her from Crump and signed in. R.p. 428-29, l. 3. She stated on July 14, 2010, she transferred the item to Investigator Day. R.p. 429, ll. 3-8. Harmon reported that Day released the item to S.L.E.D. custodian Amy Stephens on July 14, 2010 at 10:19. R.p. 429, ll. 7-8.

S.L.E.D. evidence tech Amy Stephens testified and confirmed her receipt of the item. R.p. 488, l. 23 - p. 489, l. 10. Stephens declared she received the item at 10:19 on July 14, 2010 from Investigator Day and transferred it on July 14, 2010 at 10:19 to the firearms intake storage. Harmon reported on July 20, 2010 at 3:59 that custodian Doris Yarborough retrieved the item and transferred it to forensic firearms examiner Michelle Eichenmiller. R.p. 491, ll. 20-24.

Michelle Eichenmiller testified that she was delivered the projectile from the autopsy for testing.

R.p. 557, ll. 19-21. As with the earlier discussed casing (State's Exhibit 28), she described her processing of the items she received. R. 553-54. She opined the bullet was fired by the Ceska pistol. R. 554-55, p. 557, l. 19-25. It was reported by Stephens that State's Exhibit 53 was returned by Eichenmiller to evidence custodian Yarborough on August 13, 2010 at 3:37. R.p. 491, l. 22- p. 492, l. 2.<sup>5</sup>

As with the other items, chain of custody crucial witnesses were presented live, including Dr. Marcus, Investigator Crump, Lexington evidence custodian Harmon, Investigator Day, S.L.E.D. evidence custodian Stephens, and the forensic firearms examiner Eichenmiller. The non-crucial transfer witnesses - Doris Yarborough - was not crucial because the person she transferred it to Michelle Eichenmiller was available for examination and did testify.

Under Melendez-Diaz, the reliance by witness Stephens upon her documentation, a properly prepared business record, did not violate the Confrontation Clause where live testimony was presented concerning the critical stages and the critical stage witnesses testified. The opportunity to confront and cross-examine them was available, as required under Crawford. His claim must be denied.

#### HARMLESS ERROR

In any event, our inquiry into whether the government deemed the individual links of the chain of custody to be so crucial as to require evidence need not proceed any further because even if Appellant is able to convince this court that it was error, any alleged error was harmless. Confrontation Clause violations can be considered harmless. See United States v. Ignasiak, 667 F.3d 1217, 1235 (11th Cir.2012). "The test for determining whether a constitutional error is harmless is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 1235 (internal quotation marks omitted).

The Appellant's own testimony confirmed his possession and use of the gun at the time of the fatal

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<sup>5</sup> The remainder of the post-testing chain is set out in the testimony of Stephens, R.p. 492, ll. 3-8 and Harmon, R.p. 429, ll. 9-12, concerning its return to Lexington County.

injury to the Appellant. R. 653, 676, 686. He described the magazine coming out of the gun and being through by him with the gun over the fence. R. 653-54. He admitted that he threw them away because he feared that he would go to jail if caught in possession of the weapon. R. 688. Independent evidence showed that he was wearing the Sean John shirt. State Exhibit 3, State Exhibit 4. The admission of the testimony concerning the chain of custody did not seriously affect the fairness, integrity or public reputation of judicial proceedings. See U.S. v. Johnson, 688 F.3d 494, 505 -506 (8<sup>th</sup> Cir 2012) ( new trial not required where error in admission of lab report where defendant admitted that item on property was the drug); People v. Lopez, 147 Cal.Rptr.3d 559, 574 -575 (Cal.,2012) .<sup>6</sup> Any alleged error was harmless.

**III. The trial court properly used its discretion in admitting a Photograph of the Appellant to corroborate the testimony of the club owner about the Appellant’s appearance and demeanor after the shooting.**

The State introduced, among other photographs of the defendant that night [State Exhibits 3 & 4], State Exhibit 8 showing the Appellant shirtless with his arms crossed, and without tears. The challenged photograph was used by witness Leslie Lawson, the owner of Jager’s Private Bar, to describe the appearance and demeanor of the Appellant when she confronted him about the death of Nicholas Rae. Respondent submits the admission of the exhibit was within the court’s discretion. Brockmeyer’s demeanor after the crime was relevant where the words and actions of Brockmeyer were consistently inconsistent with the circumstances surrounding the death of his acquaintance, Nicholas Rae. The descriptions of the

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In Lopez, the California Court found other entries on the chain of custody logsheet are arguably more testimonial in character, specifically the notation that the sample was received in a sealed condition and the recordation of the specific blood-alcohol level of defendant's sample. These records are, arguably, created for later use at trial. If the notation of the sealed condition had been excluded, the prosecution would not have been able to establish that fact. However, such an omission would have gone to the weight of the evidence, not its admissibility. The expert witness would still have been able to lay sufficient foundation for the machine-generated graph and explain its significance. The sealed condition of the sample was never disputed. The California court concluded on the facts of this case, the admission of the sealed-condition notation was harmless.

Appellant's demeanor by Lawson were effectively shown through the use of the photograph. The use was also cumulative to other evidence describing his demeanor at the time. The probative value of the photograph was not substantially outweighed by any prejudicial effect.

In his brief, the Appellant contends that the trial court committed error in admitting the photograph of the Appellant, over objection, claiming it was irrelevant, unnecessary and prejudicial. He complains that it was used to imply that he was cold and heartless.<sup>7</sup> He further asserts that it was used "for the illicit purpose of implying that he was guilty." Initial Brief of Appellant, p. 18. Because the actual use of the photograph was used to corroborate the testimony of Lawson, its use in determining his guilt was appropriate.

#### **How The Issue Was Raised at Trial**

During the trial, the owner of Jager's Private Club, Leslie Lawson, testified about the events in her private club following the shooting of Nicholas Rae. In particular, she described the actions and demeanor of the Appellant after the shooting. Earlier, the Appellant had caught her attention when he kept opening the door to the private bar and tried to keep it open. Shortly after, there was panic in the bar with voices stating: "someone has been killed, someone actually shot themselves" and Lawson called 9-1-1. R. 248. Lawson attempted to keep people inside the bar, yet at one point the Appellant walked by her without his shirt on without responding to her request to not leave. R. 250-51. She stated she later saw Brockmeyer in the parking lot wearing plaid shorts and no shirt.

Lawson stated that she went over to Brockmeyer, knowing that his friend had been killed, and told him she was sorry and asked him what happened. R. 254. She stated Brockmeyer threw his hands down and said "my best friend was just shot and killed," and she put her arms around him. R.p. 254, ll. 9-11. After she asked him who [killed him] and if he was part of a gang and he just hung his head down, not

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<sup>7</sup>This is consistent with Lawson's testimony that "there was nothing inside him."

giving an answer.<sup>8</sup> She said Brockmeyer's eyes were focused on a girl he had been with earlier, on the Lexington County cars and what was going on. She thought his behavior was odd and described that there was "nothing there." R. 255-56.

At that point, Lawson was shown a photograph [State Exhibit 8] of the Appellant and confirmed it reasonably showed how he was dressed and his demeanor at that time. R.p. 256, ll. 2-12.

The defense objected to the relevance of State Exhibit 8. Tr. p. 309, l. 13. The prosecution stated: "[T]he relevance is it shows that he was not wearing a shirt and also how he was acting." R.p. 256, ll. 15-16. The photograph was received in as evidence.

The witness was asked what the particular photograph showed her. Similar to her prior testimony, she declared:

When I look at that photograph, I feel that there was a man that stood there. There was just nothing inside him. There was nothing that he could say to me. ...

R.p. 257, ll. 1-6.<sup>9</sup> On cross-examination, Lawson admitted that when she first saw Brockmeyer, he had on a white dress T-shirt. R. 259. However, when he came back in, he did not have a shirt on at all.

During cross-examination of Brockmeyer, the Appellant claimed he took his shirt off when someone was screaming about getting something to apply pressure, but he could not get close. R.p. 689, ll. 22-25. He claims he then threw it at her. R. 690. No contemporaneous objection is made during the examination concerning the use of State Exhibit 8 by the prosecution and the record does not specifically reflect when and how it may have been used.<sup>10</sup>

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<sup>8</sup>Lawson felt she asked this question because she was concerned that whoever shot the victim may return causing danger to the patrons. Id.

<sup>9</sup> The Appellant, in his brief, describes State Exhibit 8 as depicting Brockmeyer in a state of extreme shock (inconsistent with Lawson's characterization). Initial Brief of Appellant, p. 18.

<sup>10</sup> During the examination, the prosecutor asked whether the same person out there that night and everybody asked what happened was the person standing in the courtroom that day. R. p.

After a recess, the defense noted that they had earlier objected to the introduction of State Exhibit 8. R. 697. The defense asserted that they wanted the record to reflect the prosecutor used it as a demonstrative aid when he was examining the defendant and show it to the jury. R.p. 697, ll. 1-6. Judge Cottingham stated: "I understand that", and that he had ruled on it. R.p. 697, ll. 7-9.

In his brief, the Appellant points out the following portion of the State's closing argument:

Does this look like a man whose friend had just been shot? Does that look even - as he testified today - somebody [sic] who is numb? Or does that look like anger and defiance? You are looking at a killer.

R.p. 769, ll. 19-22.

Although no timely objection was made during the argument, the defense belatedly made an objection to the State's use of State Exhibit 8 as a demonstrative aid during their closing. R.p. 775, ll. 14-20.

Subsequent to the verdict, the defense made a motion for a new trial based upon "all our prior motions and objections." R.p. 788, Verdict Tr. p. 15, ll. 6-8, 16-17. The motion was denied. R.p. 788, Verdict Tr. p. 15, ll. 9-24.

#### STANDARD OF REVIEW

The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court. State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180 (1986); State v. Green 397 S.C. 268, 287, 724 S.E.2d 664, 673 (2012). "Evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." State v. Langley, 334 S.C. 643, 647, 515 S.E.2d 98, 101 (1999) (citing Rule 401, SCORE).<sup>11</sup> If the offered photograph serves to corroborate

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691, ll. 1-9.

<sup>11</sup>In Langley, the Court found the admission of a photograph of the victim, taken in his high school band uniform, was reversible error because it was not relevant in proving the guilt of the

testimony, it is not an abuse of discretion to admit it. State v. Todd, 290 S.C. 212, 349 S.E.2d 339 (1986); State v. Johnson, 338 S.C. 114, 122, 525 S.E.2d 519, 523 (2000) (citation omitted). Accord State v. Salley, 398 S.C. 160, 169, 727 S.E.2d 740, 745 (2012). “A photograph should be excluded if it is calculated to arouse the sympathy or prejudice of the jury or is irrelevant or unnecessary to substantiate facts.” *Id.* (citation omitted). “Photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are ... not necessary to substantiate material facts or conditions.” State v. Torres, 390 S.C. 618, 623, 703 S.E.2d 226, 228 (2010). “[A] court analyzing probative value considers the importance of the evidence and the significance of the issues to which the evidence relates.” State v. Collins, 398 S.C. 197, 727 S.E.2d 751, 754 (Ct.App. 2012).

#### ANALYSIS

The challenged exhibit was presented to corroborate the testimony of Leslie Lawson concerning her view of the demeanor of the Appellant after the shooting. The Appellant contends it was not necessary to present the photograph because evidence was already presented that he had removed his shirt and the Appellant subsequently confirmed it. Initial Brief of Appellant, citing R.p. 225, l. 24, p. 237, ll. 15-16, p. 689, ll. 22-25. What the Appellant fails to recognize is that Lawson declared the photograph, in contrast to the Appellant’s theory, corroborated to Lawson more than the mere fact that he was not wearing a shirt, but accurately showed Brockmeyer’s present demeanor that there was “just nothing inside him” and that he had nothing to say. This impression was that this was consistent with her testimony.

The relevance of the photograph was that it corroborated the evidence from her about the odd and inconsistent behavior of the Appellant. Simply put, different witnesses gave varying accounts of

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appellant in that case. *Id.* at 648, 515 S.E.2d at 100. In so finding, the Court discounted the State’s argument that the photograph was admitted to establish the identity of the victim because the identity of the victim was not an issue in that case. *Id.* at 648 n. 3, 515 S.E.2d at 100 n. 3. “[T]he only possible purpose of ... [the] introduction of the photograph was to distance the victim from the drug dealing ... and to neutralize testimony by the State’s witnesses regarding his drug use.” *Id.*

Appellant's demeanor at the time of the shooting. The reflections of remorse, fake crying, belligerence and the presence of or lack of tears were relevant to resolve the intent in the action of Brockmeyer. By his own accounts, he had declared at various times that the victim had shot himself,<sup>12</sup> that black guys did it and left<sup>13</sup>, somebody shot his brother<sup>14</sup>, that he did not know he had shot himself<sup>15</sup>, that he had denied the shooting although others had said he did it or that he may have shot the gun accidentally.<sup>16</sup> This evidence contrasted with the evidence of a witness viewing the Appellant with a trigger position to the victim's neck with the forensic evidence of a hard contact wound.

Contrary to the claim of Appellant, the photograph was admitted not only to show that he was without a shirt after the events, but also "how he was acting." R.p. 256, ll. 15-16. The trial judge did not abuse his discretion in the admission. The evidence did assist the jury in determining guilt.

The probative value was not limited to the fact that he had no shirt on in the photograph. Respondent would agree that there was other evidence in the record concerning the Appellant removing his shirt or having no shirt on. R. 62-63, 100, 108-09, 208-09, p. 225, l. 21 - p. 226, l. 2, p. 237, ll. 14-16. However, in addition to the lack of the shirt, the photograph corroborated Lawson's impression of Appellant's demeanor which was inconsistent with his friend being shot providing enhanced value to the jury to understand Lawson's description.

At trial, a series of photographs of the Appellant during the evening at Jager's Bar on July 11, 2010

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<sup>12</sup>Shot himself - R.p. 63, ll. 10-17 (Brakefield); R.p. 207, l. 25- p. 208, l. 1 (Ainsworth);

<sup>13</sup>Black guys did it - R.p. 63, l. 25 - p. 64, l. 6 (Brakefield); Tr.p. 659, ll. 11-17 (Brokington)(told Det. Grant that black guys he was playing pool with did it); p. 694, ll. 2-8 (Brokington) (admits lied to police about three black guys).

<sup>14</sup>R.p. 208, ll. 11-22 (Martin Lesesne);

<sup>15</sup>Did not know he shot himself -R.p. 98, l. 24 (Clack) (asked what happened); R. 655-56 (Brokington) ("what happened" "didn't think it was serious").

<sup>16</sup> R.p. 103, l. 22- p. 104, l. 4 (Clack); R.p. 113, ll. 21-25 (Clack).

were introduced. During the testimony of Gina Brakefield, she presented two photographs she took of the Appellant and Mariko earlier that evening at a table at Jagers. R. 61-62. State Exhibit 3 clearly shows the white “Sean John” shirt the Appellant wore that date. State Exhibit 4 shows the Appellant similarly with his eyes open, though the Sean John title is covered. She stated she re-took the photo because his eyes were closed in the first photo. R.p. 61, ll. 11-23. Brakefield stated that after she saw Appellant appear to be whispering in the victim’s ear with his hand up in a trigger finger position in the neck of the victim, she heard a loud pop, a flash, and a casing fly out. R. 59. She described Will standing up, grab the victim’s shoulder and give him a shove. R. 59.

Brakefield described the Appellant then turned and walked to the woods. Tr. 103. At a later point, Will returns to the porch, but wearing a grey wife-beater undershirt. R. 63, 78. She described him as acting “hysterical”, initially claiming that the victim had told him he was going to do it, meaning shoot himself. When questioned that if he shot himself, where was the gun, Brockmeyer declared “the black guys” shot him and left. R. 63-64. Brakefield described Appellant as really upset and belligerent. “He would pretend to cry, but he wouldn’t shed a tear.” R.p. 64, ll. 17-18. she described it a fake crying and screaming.

Mariko Clack described him initially wearing the white Sean John shirt.<sup>17</sup> She stated he took off the shirt when he came back from the woods after the shooting and tossed it to Mariko, wearing the wife-beater underneath. R. 100, 108. She said he later put the shirt around his neck and it ended up balled up on her car. R. 108-09. Clack noted that Appellant, after the shooting was, was acting frantically and “weeping.” R. 96-100, 102. Justin Ainsworth testified that Appellant was not acting like his friend had just got shot. R. 207-09. Martin Lesesne said that although Appellant had said somebody had shot his brother, Appellant did not appear to act like someone who had just lost a friend, seeming more aggravated or mad, than having sadness. Tr. 224-25. Lesesne did not remember any tears from the Appellant. R.p. 224, ll.

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<sup>17</sup>This is evident in Exhibit 3 and 4 showing Mariko and the Appellant.

23-24. Lesesne opined that before law enforcement got there, Appellant was “pretty hysterical.” R.p. 226, ll. 5-8. Shandon Lesesne similarly described Appellant’s demeanor after the shooting as not acting like someone whose friend had been shot, but more mad and oddly lacking any actual concern. R.p. 234, ll. 5-11. She also denied that he was crying, although he was screaming. R. . 240, ll. 16-23.

Investigator Grant described the Appellant’s demeanor as agitated, a very defensive appearance with his arms crossed. R.p. 269, ll. 4-14. The appearance is similar to that evidenced in State Exhibit 8.

### CONCLUSION

The trial court did not abuse its discretion in allowing the admission of the photograph used by witness Lawson to corroborate her testimony about the Appellant. Further, the photograph is cumulative to similar testimony presented by Investigator Grant in the manner that Appellant presented held himself that evening - arms crossed, defensive and agitated. The evidence of the photograph had probative value and slight prejudicial effect in light of the evidence presented by the numerous witnesses. The Appellant fails to point out a true prejudicial effect to the photograph, claiming merely that it was use to support his guilt. This claim of prejudice is a red herring because the admitted evidence was allowed to show guilt by reflecting his demeanor at the time of the event. There was no abuse of discretion in its introduction or its use after admission to refer to his contemporaneous demeanor as testified to by the witnesses.

**IV. Where Appellant admitted purchasing the .380 semiautomatic pistol and possessing it during the evening, any alleged error in the admission of a caption “Wills gun on left my gun on righ[t]” as hearsay was harmless. In light of his admission and numerous witnesses testimony, a new trial is not warranted.**

In his final claim, the Appellant asserts that the trial court erred in admitting State Exhibit 56, a photograph recovered from a cell phone in the Appellant’s possession at the time of his arrest which showed the murder weapon and the pellet gun together because it included a caption on the photograph. He claims in this appeal the caption “Wills gun on left my gun on right]” was inadmissible hearsay. Brockmeyer claims the caption was offered for the truth of the matter asserted and therefore was

inadmissible hearsay. He contends the admission was reversible error because “the ownership of the weapon was significant issue at trial.” Initial Brief of Appellant, p. 20.

Contrary to assertion of Appellant, “ownership of the weapon” was not a significant factor. However, “possession” of the weapon was a significant factor at the trial. As set forth more fully below, the admission of the photograph with the caption was not reversible error where:

1. Evidence revealed the Victim showed the photograph of the guns from a cell phone on the way to bar that night. R. 44.
2. Appellant admitted that he had purchased the .380 semiautomatic pistol, not the victim. R.p. 676, ll. 6-11.
3. Appellant admitted that he was in actual possession of the .380 pistol at the bar. R. 647-51.
4. Appellant admitted taking the gun and throwing it over the privacy fence. R. 654-55.
5. Numerous people saw the Appellant in possession of the .380 during the evening.
6. The victim was found in possession of the pellet gun after he was shot. R. 300.

Where the actual ownership of the .380 was not a significant issue at trial and the fact of his possession of the .380 during the night was admitted by Appellant, any error in the admission of the caption, if error, was harmless error because it had no effect on the outcome of the trial, particularly where Appellant admitted he had purchased the weapon.

#### **STANDARD OF REVIEW**

The admission of evidence is based upon whether the trial judge abused his discretion. Hearsay is “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Rule 801 ( c), SCRE. Hearsay is inadmissible except as provided by the South Carolina Rules of Evidence, by other court rule, or by statute. Rule 802, SCRE.

“Improper admission of hearsay testimony constitutes reversible error only when the admission causes prejudice.” State v. Garner, 389 S.C. 61, 67, 697 S.E.2d 615, 618 (Ct.App. 2010). Such error is

deemed harmless when it could not have reasonably affected the result of trial, and an appellate court will not set aside a conviction for such insubstantial errors. *Id.* Improperly admitted hearsay which is merely cumulative to other evidence may be viewed as harmless. State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978). See State v. Simmons, 384 S.C. 145, 171–72, 682 S.E.2d 19, 33 (Ct.App. 2009) (holding any error in admitting eye witness testimony was harmless because it was cumulative to other overwhelming evidence that established defendant's guilt); State v. Lindsey, 394 S.C. 354, 362, 714 S.E.2d 554, 558 (S.C.App. 2011)(the investigator's improperly admitted notes of the interview were merely cumulative to the investigator's own testimony, the defendant's statement, and another investigator's testimony); State v. Sims, 387 S.C. 557, 564, 694 S.E.2d 9, 13 (2010) ( An insubstantial error not affecting the result of the trial is harmless where guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached).

#### **How The Issue Was Raised At Trial**

At trial, the State sought to introduce State Exhibit 56. The prosecution described the photograph as a photograph and file name downloaded from the Motorola Boost cell phone which had been introduced as State Exhibit 10, the cell phone found on the Appellant. R.p. 438, l. 19 - p. 439, l. 1. Deputy Solicitor Graham asserted that the photograph showed two guns and it was the State's contention that the gun on the left was the .380 murder weapon and the gun on the right was the black pellet pistol (found on the victim). R.p. 439, ll. 4-16. Deputy Solicitor Graham stated that the file name associated with the photograph was labeled: "Wills Gun on Left My Gun on Righ.jpg @ 100% (RGB/8#)\*." R.p. 439, ll. 19-25. State Exhibit 56. ROA\_\_\_. It was noted that both of the guns and the cell phone were already admitted into evidence. R.p. 440, ll. 1-7.

The defense objected to the admission of the photographic exhibit. R.p. 440, ll. 8-11. The objection was since "there's writing on the top of the that picture that identifies one as Wills gun and the

other assumably being Rae's gun" it is hearsay.

The prosecution responded that the picture was on Appellant's phone (in his possession, but belonging to the victim) and the file name is an indication of which gun belonged to which individual. R. p. 440, ll. 15-18.

Judge Cottingham concluded that the guns are in evidence and that he would admit the picture. R. p. 440, ll. 19-21. The prosecution re-affirmed that it felt hearsay did not apply because the file name was typed in on the [Appellant's] phone and named the picture with the phone. Judge Cottingham responded that he saw nothing wrong with the picture since both guns were in evidence. R.p. 441, ll. 2-8. Judge Cottingham further stated:

I note the language on the top, but there is evidence all over the courthouse as to which gun belonged to who... Let the record reflect that the issue will be of help to the jury in comparison.

R.p. 441, ll. 10-15.

Detective Shawn Grant then testified that the retrieved State Exhibit 10, the Black Motorola Boost cell phone from the evidence custodian on July 12, 2010. R.p. 442, ll. 5-19. He stated he delivered it to Crime Scene Investigator Mike Phipps of the Lexington County Sheriff's Department. R. 442-43. He stated on July 13, 2010, he retrieved the exhibit from Phipps and returned it to Evidence Custodian Beth Harmon. R. 443.

C.S.I. Investigator Phipps testified that he executed a search warrant for the contents of State Exhibit 10, the black Motorola cell phone on July 12, 2010 after he received the cell phone from Det. Grant. He used the CelleBrite "Uniform Forensic Extraction Device" to extract material from the cell phone including text messages, call logs, photographs, and multi-media files. R. 446. He identified State Exhibit 56 as a photograph he retrieved from the cell phone.

The printing at the top of this image is the file name that was given to the image, along with some other information that prints

when the image is printed....

R.p. 446, ll. 22-25. He stated that the file name on the photograph was changed to text because someone had actually labeled it, rather than the device. R. 447.

Upon a motion to introduce the item, the defense objected under hearsay and S.C. Rules of Evidence 401, 402, and 403. R. 447. The trial judge again admitted it stating the photograph will assist the jury in their determination of whose gun was whose. R.p. 447, ll. 22-25.

After the admission, Investigator Phipps describes State Exhibit 56 as a color photograph saved on the camera phone with a text label that reads “Wills gun on left and my gun on right” and other artifacts assigned to the image at printing.<sup>18</sup>

On cross-examination, Investigator Phipps acknowledged that there were a number of photographic images on the phone, including family photographs or some off color photos. He stated that the cell phone was identified in the search warrant as the victim’s cell phone, but it found on Brockmeyer at the arrest. R.p. 451, ll. 1-18. Investigator Phipps also identified Defense Exhibit 1, another photograph taken off the cell phone with a file name “I love this gun” showing an individual holding a gun in their left hand with a silver watch. R. 453. He noted that no tattoos were evident in the photograph.<sup>19</sup> He further noted that the ejection port in the Defense Exhibit 1 photo has the same shape as the gun in State Exhibit 48. Further, a photograph of the items recovered from the victim at the autopsy included a silverish watch. R. 454-55.

### **1. How the Ownership and Possession of the Murder Weapon Was Addressed by Brockmeyer at Trial**

In his direct testimony, Appellant testified that on the night of the incident, he saw the victim with

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<sup>18</sup> He stated the “jpg” reflected the type of image. He stated that “R.G.B. 18#” meant it was printed at 100% of image size with red, blue, green color image at 8 bits. R. 448-49.

<sup>19</sup>The Appellant was trying to assert that the person holding the gun in the defense Exhibit 1 photograph was the victim rather than Appellant because of the watch and the lack of tattoos, thus asserting the use of this caption reflecting the victim’s feelings about the gun.

the gun out at the back of the car, which he did not think was a big deal because it was for protection. R. p. 647, ll. 4-6. He noted that Karmen freaked out when she saw it so Brockmeyer gave it back to the victim and he put it up. Brockmeyer stated that when they got to the bar, the victim asked him to hold the gun while the victim played pool. R.p. 647, ll. 7-12. Brockmeyer denied that he knew whether the victim had a pellet gun, stating the victim had on a long sleeve shirt. He stated the gun that the victim gave his was a .380. R.p. 647, ll. 14-20. Brockmeyer claimed that the victim had come to him twice for money. He stated that after the victim stopped playing he told Brockmeyer that he lost the money and then asked for his gun back. R. 649-50.

In his testimony, Brockmeyer speculated that the victim wanted the gun back to try to get his money from the people. R.p. 650, ll. 1-15. Brockmeyer stated that after the victim got the gun back, the victim walked back to the pool tables and then into the bathroom, then returned and sat down at their table. R. 651. The victim later left the table, acting like he was going to pass out. R. 651. The victim got up and walked fast outside and Brockmeyer heard last call.

Brockmeyer claims he went outside and stumbled on the ledge, catching himself on a pole. He asserted that he heard someone say "gun" and saw the victim leaning in a chair with his head down. Brockmeyer stated he did not see a gun at first, but claimed when he put the victim's head up, he saw the victim was holding a gun in his lap. Brockmeyer stated that he leaned in and tried to grab the gun. R.p. 653, ll. 11-18. Brockmeyer stated that he could not recall if he touched it, but the gun went off, dropped, and the clip fell out. R. 653. Brockmeyer said he picked the gun up, ran out into the parking lot and threw the gun into the woods. R. 653-54. Brockmeyer admitted that earlier that evening he put Gina's hand on the gun before they went on the dance floor and when there were in the car. R.p. 654, ll. 9-23.

Brockmeyer stated that he took the gun and threw it over the fence to get rid of it. R.p. 655, ll. 7-9, p. 656, ll. 9-10.

On cross-examination, Brockmeyer admitted that he had purchased the little gun (.380), not the victim. R.p. 676, ll. 6-11. Brockmeyer claimed that he had never seen the big gun (the pellet gun) on the victim that night, even though the victim was wearing a black tank top. R.p. 676, ll. 14-25.

Brockmeyer admitted that he had the smaller pistol that night and was wearing it "for protection." R. 677. However, he claimed he did not bring it to the birthday party, but admitted that once there, he had put it in his waistline. R. 677-78. He stated again that he only held the pistol for the victim while the victim was playing pool and denied any knowledge of the victim's big black pellet gun. R. 678.

Brockmeyer denied that he was flashing the gun in the bar. He denied making a statement "this is how we do it" pulling up his shirt and showing the gun to the people who were beating the victim out of money in pool. R. 679.

Brockmeyer stated that he grabbed the pistol, after the shot, because they were both convicted felons and then ran and tried to get rid of the gun. R. 688. He stated he did not know where it had shot and knew if they got caught with a gun they were both going to jail. R. 688.

On reply, Deserae Camacho, the Appellant's former girlfriend, testified that she had seen Brockmeyer with a small handgun that you could hold in your hand, with a top part that you pull back. R. 705. She stated that she had seen the victim with a big fake plastic B.B. gun. She said that Brockmeyer was aware of the victim's B.B. gun and joked about it "plenty of times." R. 705.<sup>20</sup>

Grady Howell, Ms. Camacho's brother, testified that Brockmeyer had initially told him that he was unaware of what happened, claiming he was inside the bar. R. 711-12. However, at another time Brockmeyer told him that the victim initially had the gun and turned it around and handed it to Brockmeyer where it discharged and hit the victim in the neck. R. 712. He told Howell that the victim was sitting down and had

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<sup>20</sup> On cross-examination, Ms. Camacho testified that the Appellant had tattoos all over his body and that the victim had some tattoos, but not on the inside of his arms. R. 708-09. She admitted that she had seen the victim handle the Petitioner's gun. R. 709.

handed him the gun where the victim was holding the barrel. Brockmeyer claimed that when the victim handed it to him, the trigger discharged. R. 712-13.

**2. How the Evidence of Brockmeyer's Possession of the Murder Weapon Was Presented by the State at Trial Through the Witnesses.**

In the State's case, Gina Brakefield was describing the ride to Jager's bar with Mariko Clack, Jennifer McFarland, the Appellant and Nick Rae. R. 43. Gina described seeing Nick pull out a black gun wrapped in a black shirt tucked from under the seat. R. 43-44. She stated that Nick also showed her pictures from a cell phone with a big gun and a small gun. R.p. 44, ll. 9-17.

Later while dancing with the Appellant, someone said something about Will's dancing and Appellant stated "it was hard to dance with a pistol in his pants." R.p. 50, ll. 22-25. At that point, Gina said she reached behind him for a gun, but there wasn't one there. She described Appellant taking her hand and moving it to the front of his pants, where she felt a small gun. R.p. 51, ll. 1-8.

Mariko Clack testified that after the incident, she saw Brockmeyer coming from the parking lot and asked him what happened. She said he told her that Nick asked for the gun back so he could rob somebody and the Appellant then appeared to begin shaking. Mariko stated that she saw him "like weeping" and acting frantic. R. 99-100, 102.<sup>21</sup>

Amera Kabar who was playing pool with Nick described noticing a gun in the small of his back during the first game. R. 122. She stated that Nick wasn't concealing it. She said when he passed a knife that fell earlier, that he showed her the gun, although she had noticed it before. R. 122-24. She thought he was sweet and that she did not feel threatened by it. R. 124.

Amera testified that her impression of Brockmeyer was different. She described Brockmeyer also

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<sup>21</sup> On cross-examination, Mariko testified that the victim told her that he had been robbing people to get money. She said that the victim had asked her if he could put his gun in her car and she told him no, before he had gotten sick. R. 107-08. She was not aware he had a gun when they drove over.

having a gun and appearing hostile the entire night, acting like he was the “big man in the bar.” She stated they were not discreet about showing the guns and that Brockmeyer picked up his shirt showing that his gun was in the front. R.p. 128, ll. 14-24. Amera stated that she did not like Brockmeyer. She stated Brockmeyer came up to the table yelling: “[T]his is how we do it”, with one hand down on the gun, that she perceived as a threat based upon her pool playing success. R. 130, 133. After seeing the display of the gun by Brockmeyer, Amera wanted to leave the bar. R. 133.

Amera confirmed that in her statement, she had stated that after the shot, she noticed the victim’s gun in the back of his pants and assumed he shot himself. R. 149. However, she knew her initial thought was not the case when she saw a girl freaking out. R. 149. Her initial thought was based upon the fact that she had seen the gun stuffed in the back of his pants while they were playing pool. Id.

Amera’s boyfriend, Jamie Spencer, similarly described seeing the big gun in the back of Rae’s pants, which looked like a .40 or .45. R. 159. Spencer stated that Nick was not acting like a threat. R. 160. In contrast, Spencer described the Appellant as acting like a “hot head.” He stated that after Rae’s second loss, Brockmeyer came up and pulled out his gun, cocked it and said “[T]his is how we do it”, and then stuck it back in his pants. R.p. 163, ll. 7-14, p. 164, ll. 10-11. He felt he was trying to intimidate Amera. R.p. 163, ll. 15-18.

Spencer described later walking over to table trying to ease the tension with Appellant and telling them that we are good people here and don’t need guns. R. 165. Later he saw the victim in a breeze way leaning against a wall and throwing up. R. 167. Spencer saw the Appellant with a bigger girl appearing angry. He then saw Brockmeyer trying to pull his gun out and the girl was trying to hold her hands on the gun. R. 169-70. Spencer said he returned inside the bar and then heard the “pop.” R. 171.

Spencer described the gun that Brockmeyer had as a smaller gun, like a .380 and when he cocked it his hands were covering it. It was not as big as Nick’s. R.p. 174, l. 19.

On cross-examination, Spencer confirmed that he saw Brockmeyer in the breeze way trying to pull

out a gun and then he went inside and never saw Brockmeyer again. R. 179.

Amera's brother, "Keith" Bassam Kabar, stated that as soon as he got to the bar "I had people coming up to me explaining about these boys had guns" and he told them to not bother them. R. 184. Keith described the victim's clothes with a pistol hanging out his back. R. 184-85. He described Brockmeyer acting rowdy. R. 185. He described Brockmeyer standing by the pool table with his shirt pulled up and he had a black firearm in the front of his pants. R. 186. Keith stated that there were two guns and opined the victim's was a large caliber big gun stuck in his back in the middle. R. 187. He described Brockmeyer as a small semiautomatic. R. 187. Keith described seeing the victim sitting in a chair and Appellant knelt down with his hand on the shoulder, hearing a pop, and then seeing Brockmeyer exit around the building. R. 189-90, 192. He said he could not see if he had a gun in his hand or not. R. 192. He stated that Nick sat there for about 10 seconds after the pop and then started to lean over and fall. R. 194. At that point they realized he was shot. Keith testified that after the victim he saw a gun in the victim's waistband. R. 196.

Justin Ainsworth also described Brockmeyer and Rae arriving at the bar with Mariko with pistols in their waistline. R. 205. He stated the victim in the black shirt had a big gun not hidden at all sticking out of his waistline. R. 203-04. He stated they confronted him (the victim) about having the gun and told him to put it up. R. 204. Ainsworth described the Appellant as wearing a white shirt and it was pointed out to him that he had a gun covered by his shirt, but he could tell it was a pistol. R. 205.

Marcus Lesesne testified that he saw the victim wearing a black tank top with a larger size pistol in his back waistband. R. 219. Lesesne stated he asked the victim to put the gun away, but seemed OK with that. R. 219. Lesesne did not see any weapons on the Appellant. R. 220.

Shandon Lesesne testified after the shooting, she stated she saw the person on the floor with a hole in his neck and attempted to provide aid. She stated that Brockmeyer was screaming for someone to save his brother. R. 237. She said Brockmeyer appeared more mad, rather than concerned. R. 238. She described it more as screaming than crying. R. 240. Shandon Stated that she did not noticed any gun

around. R. 240-41.

Investigator Shawn Grant testified that when he arrested Appellant later that morning, he took a cell phone, State Exhibit 10, that he had on his possession. R. 272-73.

Investigator David Day testified that when he rolled the victim over looking for injuries, he located a pellet gun tucked in the back of his pants. R.p. 300, ll. 9-11. See State Exhibit 17. The pellet gun recovered from the victim was introduced as State Exhibit 26. Investigator Day further stated that he located a pistol magazine (State Exhibit 30) on the other side of a privacy fence. R. 307-08. State Exhibit 29. Day testified on the 13<sup>th</sup>, they located the pistol, State Exhibit 48, depicted in Exhibit 47. The gun is a Ceska .380 semiautomatic. Tr. 383. When it was recovered, it did not have a magazine, but had one live round. R. 329. Investigator Shelby Derrick testified that she participated in the search for the weapon and saw it when the trees were moved. R. 389-391.

It was determined that the bullet was fired by the pistol and the cartridge case (found at the scene) was fired by the same weapon. R.p. 555, l. 5 - p. 556, l. 8.

Dr. Bradley Marcus, the forensic pathologist, testified that the semiautomatic pistol was consistent with the fatal wound on the neck of the victim. R. 620-25. He stated that the soot on the wound reflected a hard-contact gunshot wound. He declared that he knew for a fact that the gun was pushed up against the neck. R.p. 622, ll. 1-14. See Exhibits 55-61.<sup>22</sup>

#### ANALYSIS

The trial court admitted the photograph of the two weapons captured from the telephone found in the Appellant's possession at his arrest concluding that the guns were already in evidence and there was already evidence showing which gun belonged to who and that it would help the jury in comparison. R.

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<sup>22</sup>This hard contact wound is completely inconsistent with the Appellant's version of the gun's location when he may have touched it. R. 653-54. In fact, Brockmeyer once claimed that he did not think the injury to the victim was even serious. R. 655-56. The pathologist testimony is consistent with the testimony of Gail Brakefield. R. 55-59.

441. The caption: “Wills gun on left my gun on right” was presumably placed there by someone other than the defendant (Will) and probably the victim. Since it appears the caption could be read to show the ownership of the pellet gun belonged to someone other than Will, that would appear to be for the truth of the matter asserted. Though not squarely addressed by state courts in South Carolina, other courts have found captions of photographs to be subject to hearsay rules. See, Allen v. State, 925 N.E.2d 469 (Indiana 2010) (error, if any in admitting photographs with captions, was harmless); State v. O’Leary, 25 N.J. 104, 135 A.2d 321 (1957) (in dicta. caption on photograph properly removed due to hearsay character); cf Redinburg v. State, 315 Ga.App. 413, 727 S.E.2d 201 (2012) (undated photographs downloaded from website after killing not relevant to show their gun ownership); Black v. State, 358 S.W.3d 823 (Texas Ct. App. 2012) (context of text messages found on cell phone hearsay, but admission was harmless). But see, State v. Franklin, 280 Kan. 337, 121 P.3d 447 (Kan. 2005) (text message admitted as hearsay exception).

Assuming arguendo that the “caption” was improperly admitted, any error in the admission is harmless. Most importantly, the Appellant testified that he had purchased the gun identified as Wills in the photograph. R.p. 676, ll. 6-11. Therefore, there can be no prejudice from the caption in the photograph of “Wills gun on left.” Contrary to the assertion of Appellant, “ownership” of the gun was not a significant issue at trial.

As the trial judge correctly noted, in addition to the actual admission of the .380 pistol and the pellet gun numerous witnesses identified appellant as being in possession of a small pistol while in the bar. Further, Brockmeyer admitted that he was in possession of the .380 pistol while in the bar, albeit at the request of the victim. Plainly, the claim of “ownership” did not dictate exclusive possession of the .380 pistol. Further, Brockmeyer admitted that he was the last person in possession of the pistol and cartridge, as he threw it over the fence after the shooting.

The photograph from the cell phone was relevant evidence. At the outset of the trial, testimony was presented that on the way to the bar that evening, the victim had show pictures from a cell phone showing

the two guns. R.p. 44, ll. 9-17. Further, evidence was presented that Brockmeyer had been seen with the smaller pistol prior to the day of the incident. R. 705. Contrary to Brockmeyer's claim of knowledge of the victim's pellet gun, testimony was presented that Brockmeyer was aware that the victim had a plastic B.B. gun. R. 705. Where the pellet gun was seen in the victim's waistband during the evening and removed from him after his death, any error in the admission of the caption related to Rae's ownership of a black pellet gun was similarly harmless.

### CONCLUSION

For all the foregoing reasons, the appeal and judgment must be affirmed.

Respectfully Submitted,

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By: 

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**ATTORNEYS FOR RESPONDENT**

December 28, 2012

**STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS**

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Appeal from Lexington County  
Edward Cottingham, Circuit Court Judge  
2011-GS-32-1255, 2011-GS-32-1257  
Appellate Case No. 2011- 198266

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THE STATE OF SOUTH CAROLINA,

Respondent,

v.

WILLIAM MARK BROCKMEYER,

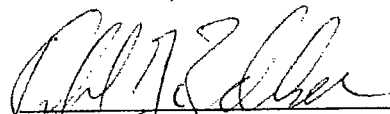
Appellant.

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**CERTIFICATE OF COMPLIANCE**

---

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007 Order of the South Carolina Supreme Court entitled “Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.”

  
\_\_\_\_\_  
DONALD J. ZELENKA  
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December 28, 2012.

**CERTIFICATE OF SERVICE**

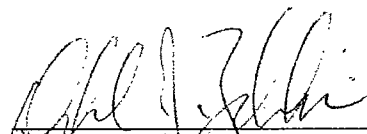
I, **Donald J. Zelenka**, hereby certify that I have served the *Final Brief of Respondent* in the foregoing action by depositing copies in the United States Mail, postage prepaid to:

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This 28<sup>th</sup> day of December, 2012.

  
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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY  
Court of General Sessions

Edward Cottingham, Circuit Court Judge

Case Nos. 2011-GS-32-1255  
2011-GS-32-1257

The State of South Carolina,..... Respondent,  
v.  
William Mark Brockmeyer,..... Appellant.

Appellate Case No. 2011-198266

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## INTRODUCTION

Appellant's initial brief challenged numerous errors of law that occurred during the prosecution and conviction of William Mark Brockmeyer. The State's responsive brief, filed on November 8, 2012, does little to dispel these concerns or to justify the errors committed by the trial court. This reply brief rebuts the State's arguments and clarifies the legal issues and governing authorities.

## CLARIFICATION OF THE FACTS<sup>1</sup>

As an initial matter, several factual errors in the State's brief demand correction. The State's recitation of facts attempts to portray Mr. Brockmeyer as a dangerous fellow in an erroneous and thinly veiled attempt to imply his guilt. First, the State incorrectly asserts that Mr. Brockmeyer and the decedent, Mr. Rae, "had met each other while in prison." Resp. Brief at 2. This is simply incorrect. Mr. Brockmeyer and Mr. Rae met as coworkers. (R. 634.) In any event, the fact that Mr. Brockmeyer has a prior record for petty larceny and theft cannot be used to imply his guilt here, nor does it excuse the fact that he was denied a fair trial.

Second, the State asserts that Mr. Brockmeyer arrived at Jager's bar on the night in question armed with a pistol. Resp. Brief at 2. Yet again, this assertion goes beyond what is contained the record. Mr. Brockmeyer—the only person with knowledge of his accoutrements on that night and the only person to testify on the issue—stated that it was *Mr. Rae* who brought that weapon to the bar and later asked Mr. Brockmeyer to hold it. (R. 647:7-12.) Any speculation to the contrary is only that—speculation, not fact.

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<sup>1</sup> A full recitation of the facts is contained in Mr. Brockmeyer's initial brief and will not be repeated here.

Finally, the State asserts that Mr. Brockmeyer was seen “shoving the victim” shortly after the weapon discharged. Resp. Brief at 2. The State fails to mention, however, that this is a disputed fact, and that the majority of witnesses agree that Mr. Brockmeyer did *not* touch the decedent after the weapon discharged. (*See, e.g.*, R. 149:5-9, 199:8-15). In sum, these factual assertions all deviate from the Record in an unsupported attempt to paint Mr. Brockmeyer in a negative light.

#### PROPER STANDARD OF REVIEW

This appeal raises issues regarding the enforcement of a subpoena, the Confrontation Clause of the United States Constitution, and the admissibility of evidence. On most of the issues, the State agrees with the standards of review set out in Mr. Brockmeyer’s initial brief.<sup>2</sup> On the issue of the Confrontation Clause, however, the State is mistaken as to the appropriate standard. Specifically, the State conflates this constitutional issue with the mere admission of evidence and thus argues that the issue is reviewed merely for abuse of discretion. *See* Resp. Brief at 17. This is incorrect. As explained in Mr. Brockmeyer’s initial brief, the appropriate standard of review for this issue is *de novo*. *See* Initial Brief of App. at 7-8 and n.8 (citing cases from South Carolina and the federal courts of the 1st, 4th, 5th, 8th, 9th, and D.C. Circuits). Other states’ courts agree that the standard is *de novo*, not some more deferential standard.<sup>3</sup>

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<sup>2</sup> Regarding the subpoena, Mr. Brockmeyer’s initial brief noted that if the trial court had relied on incorrect analysis, reasoning, and authority, this would constitute a reversible error. Likewise, regarding the two evidentiary issues, both parties agree the rulings are reviewed for an abuse of discretion.

<sup>3</sup> *See, e.g., Hughes v. State*, \_\_ S.W.3d \_\_, 2012 Ark. App. Lexis 710 (Ark. Ct. App. 2012) (“Constitutional issues, such as those concerning the Confrontation Clause, are reviewed under a *de novo* standard.”); *People v. Burney*, 963 N.E.2d 430, 440 (Ill. Ct. App. 2011) (“A claim alleging a violation of the confrontation clause involves a question of law that is reviewed *de novo*.”) (citing *People v. Williams*, 939 N.E.2d 268, 277, 345