

VOLUME I of II

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Horry County
Honorable Kristi F. Curtis, Circuit Court Judge

S.C. SUPREME COURT

KEITH SHELDON LEVAN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-000863

APPENDIX

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF HORRY	)	2016-GS-26-01805
STATE OF SOUTH CAROLINA,	)	
Plaintiff,	)	Transcript of Record
	)	(Volume I of III)
vs.	)	
	)	February 13, 2017
KEITH SHELTON LEVAN,	)	
Defendant.	)	

B E F O R E:

Honorable Steven H. John
Horry County Courthouse
Conway, South Carolina

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VOIR DIRE

9

1 **(FEBRUARY 13, 2017 - DAY ONE.)**

2 (REPORTER'S NOTE: Jury Venire present in courtroom.)

3 VOIR DIRE:

4 THE COURT: This the matter of the State of South
5 Carolina v. Keith Sheldon Levan. Now, the State of South
6 Carolina has charged this Defendant with the crime of the
7 murder. Now, what I'm going to do is read to you the
8 information contained in the indictment. I will tell you that
9 the indictment is merely the charging document. The document
10 which brings the matter to court. It is not evidence, cannot
11 be considered by anybody as evidence in this case. The only
12 reason I'm reading it to you is to see if you, the potential
13 jurors for this case, have any information about this matter,
14 know anything about this case, need to bring something to the
15 Court's attention about this particular matter. So, the State
16 of South Carolina has charged that the Defendant Keith Sheldon
17 Levan did, in Horry County, on or about February 21st, 2015,
18 willfully, feloniously and intentionally kill the victim Barry
19 Selmon with malice aforethought, either expressed or implied,
20 by means of shooting, and the victim did die as a proximate
21 result thereof on or about February 21, 2015 in Horry County
22 in violation of the Code of Laws of the State of South
23 Carolina, 1976, as amended.

24 Is there any member of the jury panel that knows anything
25 about this particular case, has any information about this

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VOIR DIRE

10

1 particular matter or anything that they need to bring to the
2 Court's attention at this time? If so, please stand.

3 (REPORTER'S NOTE: No response.)

4 THE COURT: All right. I'm gonna read to you a list of
5 possible or potential witnesses in this case. Just because I
6 read this does not mean that everyone named will be called but
7 the potential is that all of these names will be called and
8 then I'm gonna ask if you know them or have any contact with
9 them in any way. Investigator James Kerns -- and I'm just --
10 there's gonna be several names with Myrtle Beach Police
11 Department. So, until I tell you otherwise, all these names
12 that I'm gonna say right now are employed by the Myrtle Beach
13 Police Department: Investigator James Kerns, K-E-R-N-S; CSS,
14 Crime Scene Specialist William Stair; CSS Tony Humes; CSS O.
15 Cozene, C-O-Z-E-N-E; Officer Justin Vasquez; CSS Scott
16 Williamson; Investigator Jeremiah Beam; all of the Myrtle
17 Beach Police Department. Is anybody related, close personal
18 friends, family member, acquaintance, know any of these
19 individuals? If so, please stand.

20 All right. Yes, ma'am. Your name and juror number,
21 please, ma'am.

22 JUROR 383: Shelley Smith.

23 THE COURT: All right. And you are Juror Number 383?

24 JUROR 383: Yes, sir.

25 THE COURT: All right. And who is that you might know,

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VOIR DIRE

11

1 please, ma'am?

2 JUROR 383: Justin Vasquez.

3 THE COURT: All right. The fact that you may know a
4 potential witness, my question to you is -- this is the
5 qualification question -- Can you give to the State of South
6 Carolina and to the Defendant a fair and impartial trial; can
7 you be a fair and impartial juror in this case?

8 JUROR 383: Yes, sir.

9 THE COURT: Thank you very much.

10 Anybody else?

11 (REPORTER'S NOTE: No response.)

12 THE COURT: All right. Dr. Edward Proctor, Grand Strand
13 Regional Medical Center; Matt Parsons, apparently employed at
14 Costco; Detective Greg Lent, Horry County Police Department;
15 Investigator Brad Townsend of the Solicitor's office; Will
16 Kitelinger; Tamara -- is that Williams?

17 COURT REPORTER: Willard.

18 THE COURT: Willard, okay -- Willard, the Coroner's
19 office; Penny Hubbard; Keith Levan. Is there any member of
20 the jury panel that's related by blood or marriage, close
21 personal friends, acquaintances of, knows any of these
22 possible or potential witnesses that the Court has named? If
23 so, please stand.

24 (REPORTER'S NOTE: No response.)

25 THE COURT: Very good.

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VOIR DIRE

12

1 All right. Is there any member of the jury panel, either
2 you yourself or a member of your immediate family ever had any
3 matters of any kind handled, touched, worked on, spoke to
4 members of the Fifteenth Circuit Solicitor's office? That is
5 the prosecuting office that covers Horry and Georgetown
6 Counties. If so, please stand.

7 (REPORTER'S NOTE: No response.)

8 THE COURT: Is there any member of the jury panel that
9 you're related by blood or marriage, close personal friends,
10 acquaintances of anybody employed at the Fifteenth Circuit
11 Public Defender's office -- I'm sorry, Fifteenth Circuit
12 Solicitor's office, the prosecuting office, either in Horry or
13 Georgetown Counties? If so, please stand.

14 Yes, ma'am.

15 JUROR 216: My husband works for Highway Patrol.

16 THE COURT: All right. Well, that's gonna -- that's
17 actually gonna be a question in just a little bit that'll
18 cover that.

19 JUROR 216: Okay.

20 THE COURT: But I appreciate it. Thank you, ma'am.

21 All right. Solicitors, if you would stand and identify
22 yourself to the jury panel, please.

23 MR. HIXSON: Thank you, Your Honor. Ladies and
24 gentlemen, I am Scott Hixson. I'm the Chief Deputy Solicitor
25 for the Fifteenth Judicial Circuit.

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VOIR DIRE

13

1 MR. TERRELL: Tom Terrell, I'm an Assistant Solicitor
2 with the Fifteenth Circuit.

3 THE COURT: All right. And for the Defense, Mr.
4 Filiberto?

5 MR. FILIBERTO: My name is Larry Filiberto. I represent
6 Keith Levan in this matter.

7 THE COURT: All right. Very good.

8 Is there any member of the jury panel that's related by
9 blood or marriage, close personal friends, acquaintances of
10 these attorneys that have stood up and identified themselves
11 to you? And in relation to Mr. Filiberto, regarding his
12 private practice of law, have you ever been a client of his
13 either currently or in the past? If any of that applies to
14 you, please stand.

15 (REPORTER'S NOTE: No response.)

16 THE COURT: Very good.

17 All right. Is there any member of the jury panel that
18 you believe due to your personal, political, religious,
19 philosophical beliefs that you believe it would prevent you
20 from being a fair and impartial juror in this case? If so,
21 please stand.

22 (REPORTER'S NOTE: No response.)

23 THE COURT: Is there any member of the jury panel that
24 you yourself were a former law enforcement officer or you have
25 a family member who is now in law enforcement or was in the

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VOIR DIRE

14

1 past in law enforcement? If any of that applies to you,
2 please stand.

3 Yes, ma'am. Your name and juror number now?

4 JUROR 216: Dara Johnson, 216.

5 THE COURT: Yes, ma'am. And again, in responding to this
6 question, since I've asked the question, you have to tell me
7 the relationship.

8 JUROR 216: My husband. He is a Highway Patrol here in
9 Horry County.

10 THE COURT: All right. Very good. Can you give to the
11 State of South Carolina and the Defendant a fair and impartial
12 trial; can you be a fair and impartial juror in this case?

13 JUROR 216: Yes, sir.

14 THE COURT: Thank you very much.

15 All right. In the middle; yes, sir?

16 JUROR 72: Number 72, George Cast.

17 THE COURT: Yes, sir?

18 JUROR 72: Retired police detective, New York Police
19 Department. My three sons are active police officers within
20 the County and my daughter married a Highway State Trooper.

21 THE COURT: All right. Very good. Can you give to the
22 State of South Carolina and to the Defendant a fair and
23 impartial trial? Can you be a fair and impartial juror in
24 this case?

25 JUROR 72: Judge, I would give advantage to the ---

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VOIR DIRE

15

1 THE COURT: All right. Tell me yes or no.

2 JUROR 72: Probably not, sir.

3 THE COURT: All right, sir. Come up and talk to me for
4 just one second.

5 Counsel?

6 (REPORTER'S NOTE: A bench conference was held off the record
7 in the presence of but out of hearing of the Jury. Juror 72
8 excused.)

9 THE COURT: All right. Yes, sir. Your name and juror
10 number, please, sir.

11 JUROR 86: James Cooke, 86.

12 THE COURT: Yes, sir.

13 JUROR 86: First cousin, retired police officer, New York
14 City.

15 THE COURT: All right, sir. Can you give to the State of
16 South Carolina and to the Defendant a fair and impartial
17 trial; can you be a fair and impartial juror in this case?

18 JUROR 86: Yes, sir, I can.

19 THE COURT: Thank you very much.

20 Anybody else?

21 (REPORTER'S NOTE: No response.)

22 THE COURT: All right. Is there any member of the jury
23 panel that either you yourself or a member of your immediate
24 family is a member of any kind of victim's rights or law
25 enforcement support organization? Let me give you a couple of

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VOIR DIRE

16

1 examples. It's not an exhaustive list of any kind, I'm just
2 trying to give you a couple of examples here: Citizens
3 Against Violent Crime; Mothers Against Drunk Driving; the
4 South Carolina Law Enforcement Officer's Association; South
5 Carolina Sheriff's Association; just some kind of victim's
6 rights or law enforcement support organization either you
7 yourself or a member of your immediate family a member? If
8 so, please stand.

9 Yes, sir. Your name and juror number, please.

10 JUROR 60: 60, Robert Caesar.

11 THE COURT: Yes, sir?

12 JUROR 60: I'm on the Sheriff's Association.

13 THE COURT: All right, sir. Very good.

14 Can you give to the State of South Carolina and to the
15 Defendant a fair and impartial trial; can you be a fair and
16 impartial juror in this case?

17 JUROR 60: Yes, sir.

18 THE COURT: Thank you very much.

19 All right. The next question I'm gonna ask, ladies and
20 gentlemen, is whether or not you yourself or a member of your
21 immediate family has ever been the victim of a crime. Now, I
22 am not going to ask you what occurred. I do not want you to
23 volunteer any information to me about what occurred. The
24 question will be straightforward. Was it yourself or a family
25 member and then I'll ask the qualification question. So, is

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VOIR DIRE

17

1 there any member of the jury panel either you yourself or a
2 member of your immediate family has ever been the victim of a
3 crime? If so please stand.

4 All right. Yes, ma'am. Your name and juror number,
5 please, ma'am.

6 JUROR 194: Nicole Hoskin, 194.

7 THE COURT: And was it yourself or family member?

8 JUROR 194: Family member.

9 THE COURT: Can you give to the State of South Carolina
10 and to the Defendant a fair and impartial trial; can you be a
11 fair and impartial juror in this case?

12 JUROR 194: Yes.

13 THE COURT: Thank you very much, ma'am.

14 Yes, ma'am. Your name and juror number, please.

15 JUROR 127: Sharon Fortner, 127.

16 THE COURT: Yourself or a family member?

17 JUROR 127: Family member.

18 THE COURT: Can you give to the State of South Carolina
19 and to the Defendant a fair and impartial trial; can you be a
20 fair and impartial juror in this case?

21 JUROR 127: Yes, sir.

22 THE COURT: Thank you very much, ma'am.

23 All right. Yes, sir. Your name and juror number,
24 please.

25 JUROR 251: Gary Lowe, 251.

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VOIR DIRE

18

1 THE COURT: All right, sir. And it's yourself or a
2 family member?

3 JUROR 251: Self.

4 THE COURT: Can you give to the State of South Carolina
5 and to the Defendant a fair and impartial trial; can you be a
6 fair and impartial juror in this case?

7 JUROR 251: I can.

8 THE COURT: Thank you very much.

9 All right. Yes, ma'am, right behind him.

10 JUROR 388: Juror 388, Amber Speranza.

11 THE COURT: And was it yourself or a family member?

12 JUROR 388: Myself.

13 THE COURT: Can you give to the State of South Carolina
14 and to the Defendant a fair and impartial trial; can you be a
15 fair and impartial juror in this case?

16 JUROR 388: Yes.

17 THE COURT: Thank you very much.

18 And, yes, ma'am, to her side?

19 JUROR 278: Rebecca McCurry, 278.

20 THE COURT: And yourself or a family member?

21 JUROR 278: Both.

22 THE COURT: Can you give to the State of South Carolina
23 and to the Defendant a fair and impartial trial; can you be a
24 fair and impartial juror in this case?

25 JUROR 278: Yes, sir.

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VOIR DIRE

19

1 THE COURT: Thank you very much, ma'am.

2 Yes, sir?

3 JUROR 83: 83, Eric Cleveland, both.

4 THE COURT: Can you give to the State of South Carolina
5 and to the Defendant a fair and impartial trial; can you be a
6 fair and impartial juror in this case?

7 JUROR 83: Yes.

8 THE COURT: Thank you very much, sir.

9 All right, ladies and gentlemen, I'm gonna ask you what I
10 classify as my general or catchall question. Do you know of
11 any reason, have any question in your mind, any doubt in your
12 mind that you believe you cannot give to the State of South
13 Carolina and to the Defendant a fair and impartial trial?
14 That is for any reason whatsoever you believe you cannot be a
15 fair and impartial juror in this case. If so, please stand.
16 (REPORTER'S NOTE: No response.)

17 THE COURT: Further questions from the State?

18 MR. HIXSON: Not from the State, Your Honor.

19 THE COURT: Further questions from the Defense?

20 MR. FILIBERTO: No, Your Honor.

21 THE COURT: Very good.

22 All right, ladies and gentlemen, what's gonna happen now
23 is the Clerk of Court -- you have been placed on a sheet in a
24 random order. The order in which you have been assigned
25 basically was done through a computer program. So, the Clerk

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JURY SELECTION

20

1 is gonna call the names. If and when your name is called, you
2 will stand up, you will come around, and you will come to a
3 place basically right here in front of Ms. Dixie, the Court
4 Reporter. And you'll stand and you'll face and turn to the
5 back of the courtroom. At that point in time, the Clerk's
6 representative will inquire of the State to present or excuse
7 the juror. Based upon that response, the Clerk will ask the
8 Defense to seat or excuse the juror. If you are presented by
9 the State and seated by the Defense, the Clerk will instruct
10 you to go to jury box and have a seat in the jury box. If you
11 are excused either by the State or the Defense you go back and
12 have a seat from whence you came. If you have a personal
13 item, you have a purse, book, whatever the item is, if your
14 name is called, please bring it along with you in case you are
15 seated, you can go directly to the jury box.

16 Madam Clerk?

17 JURY SELECTION:

18 CLERK: Juror Number 383, Shelley Smith.

19 What say the State?

20 MR. HIXSON: Please present Ms. Smith.

21 CLERK: Defense?

22 MR. FILIBERTO: Please excuse Ms. Smith.

23 CLERK: You are excused from this particular case.

24 267, Lauren Maxwell.

25 What say the State?

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JURY SELECTION

21

1 MR. HIXSON: Please present Ms. Maxwell.
2 CLERK: Defense?
3 MR. FILIBERTO: Please present Ms. Maxwell.
4 CLERK: Please be seated in the jury box.
5 253, Kimberly Lubore.
6 What say the State?
7 MR. HIXSON: Please present Ms. Lubore.
8 CLERK: Defense?
9 MR. FILIBERTO: Please excuse Ms. Lubore from this trial.
10 CLERK: You are excused from this particular case.
11 157, James Gunnell.
12 What say the State?
13 MR. HIXSON: Please present Mr. Gunnell.
14 CLERK: Defense?
15 MR. FILIBERTO: Please present the juror, Your Honor.
16 CLERK: Please be seated in the jury box.
17 60, Robert Caesar.
18 What say the State?
19 MR. HIXSON: Please present Mr. Caesar.
20 CLERK: Defense?
21 MR. FILIBERTO: Please present Mr. Caesar.
22 CLERK: Please be seated in the jury box.
23 86, James Cooke.
24 What say the State?
25 MR. HIXSON: Please present Mr. Cooke.

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JURY SELECTION

22

1 CLERK: Defense?

2 MR. FILIBERTO: Please present Mr. Cooke.

3 CLERK: Please be seated in the jury box.

4 142, Diane Faxlanger.

5 What say the State?

6 MR. HIXSON: Ms. Faxlanger? Please present Ms.

7 Faxlanger.

8 CLERK: Defense?

9 MR. FILIBERTO: Please excuse Ms. Faxlanger.

10 CLERK: You're excused from this particular case.

11 209, James Jackson.

12 What say the State?

13 MR. HIXSON: Please present Mr. Jackson.

14 CLERK: Defense?

15 MR. FILIBERTO: Please seat Mr. Jackson.

16 CLERK: Please be seated in the jury box.

17 13, Felipe Diego.

18 What say the State?

19 MR. HIXSON: Please present Mr. Andres Diego.

20 MR. FILIBERTO: Please seat the juror.

21 CLERK: Please be seated in the jury box.

22 229, Michael Kiser.

23 What say the State?

24 MR. HIXSON: Court's indulgence just one moment.

25 Please seat Mr. Kiser.

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JURY SELECTION

23

1 CLERK: Defense?
2 MR. FILIBERTO: Please seat the juror.
3 CLERK: Please be seated in the jury box.
4 251, Gary Lowe.
5 What say the State?
6 MR. HIXSON: Please present Mr. Lowe.
7 CLERK: Defense?
8 MR. FILIBERTO: Please present the juror.
9 CLERK: Please be seated in the jury box.
10 166, Jill Hardin.
11 What say the State?
12 MR. HIXSON: Please present Ms. Hardin.
13 CLERK: Defense?
14 MR. FILIBERTO: Please excuse this juror.
15 CLERK: You are excused from this particular case.
16 434, Joseph White.
17 What say the State?
18 MR. HIXSON: Please present Mr. White.
19 CLERK: Defense?
20 MR. FILIBERTO: Please seat the juror.
21 CLERK: Please be seated in the jury box.
22 83, Eric Cleveland.
23 What say the State?
24 MR. HIXSON: Please present Mr. Cleveland.
25 CLERK: Defense?

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JURY SELECTION

24

1 MR. FILIBERTO: Please seat the juror.
2 CLERK: Please be seated in the jury box.
3 417, Tiandra Tidwell.
4 What say the State?
5 MR. HIXSON: Please present Ms. Tidwell.
6 CLERK: Defense?
7 MR. FILIBERTO: Please seat the juror.
8 CLERK: Please be seated in the jury box.
9 367, Margie Scott.
10 What say the State?
11 MR. HIXSON: Please present Ms. Scott.
12 CLERK: Defense?
13 MR. FILIBERTO: Please seat the juror.
14 CLERK: Please be seated in the jury box.
15 THE COURT: All right, gentlemen, we're gonna have two
16 alternates. It will be one and two on each alternate, please.
17 Thank you.
18 CLERK: 388, Amber Speranza.
19 What say the State?
20 MR. HIXSON: Please present Ms. Speranza.
21 CLERK: Defense?
22 MR. FILIBERTO: Please seat the juror.
23 CLERK: Please be seated in the jury box.
24 THE COURT: All right, ma'am. You are an alternate in
25 this particular case.

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BY THE COURT

25

1 CLERK: 393, Sandra Stevens.

2 What say the State?

3 MR. HIXSON: Please present Ms. Stevens.

4 CLERK: Defense?

5 MR. FILIBERTO: Please seat the juror.

6 CLERK: Please be seated in the jury box.

7 THE COURT: All right, ma'am. You are also an alternate
8 in this particular case. Thank you.

9 BY THE COURT:

10 THE COURT: Any objections to the jury as empaneled by
11 the State?

12 MR. HIXSON: No, sir.

13 THE COURT: Any objection to the jury as empaneled by the
14 Defense?

15 MR. FILIBERTO: No, Your Honor.

16 THE COURT: Very good. I find the jury has been properly
17 empaneled pursuant to *Batson v. Kentucky*, and *JEB v. Alabama*.

18 All right, ladies and gentlemen, in this particular case
19 you have been seated to be the jury in the case of the State
20 of South Carolina v. Keith Sheldon Levan regarding the crime
21 of murder. The very first thing that I'm gonna have you do is
22 to choose your foreperson for this particular jury. So, let
23 me tell you what the foreperson's duties and responsibilities
24 are. If we are here in the courtroom and the jury needs
25 attention to some matter, the witness needs to speak up or the

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BY THE COURT

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1 lawyers or whatever the issue is, the foreperson will raise
2 their hand and gets the Court's attention, we'll handle that
3 matter whatever it might be. If you are back in the jury room
4 and some issue or matter comes up, you will take the pad and
5 pen provided to you, you will write out a note, sign it, give
6 it to the Bailiff, it'll come to me and again we'll handle
7 that matter whatever it may be. When we have gone through the
8 evidentiary portion of the trial, we have heard all of the
9 witnesses in this matter, received any kind of physical or
10 documentary or other kind of evidence that might be received
11 in this particular matter, and then you've heard the closing
12 arguments of the attorneys in this particular matter, and then
13 I will give you the charge on the law, the law that you will
14 apply to the facts and evidence you collectively find to be
15 true in this particular case. At that point in time, I will
16 submit the case to you, send you back to the jury room for
17 your unanimous decision in this particular matter. In that
18 discussion period, before you reach a unanimous decision in
19 this matter, the foreperson's duties and responsibilities are
20 such that the foreperson, if necessary, guides the
21 discussions. An important duty and responsibility that the
22 foreperson has is to make sure that everybody that wants to
23 has an opportunity to be heard. Everybody's voice has an
24 opportunity to be heard. Now, the foreperson's voice and vote
25 carries no more weight than any other member of the jury.

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1 Everybody is on an equal plane in that regard but somebody
2 does need to remain in charge. Again, if there's some issue
3 or matter, write out that note, sign it, give it to the
4 Bailiff and it'll come to me and we'll handle that matter
5 whatever it is.

6 The final duty and responsibility of the foreperson is
7 once the jury has well and truly deliberated, you have reached
8 your unanimous decision in this particular matter, the
9 foreperson will take the verdict form that the Court will
10 provide to you and thereby check the appropriate block or
11 write out the appropriate word, thereafter sign your name as
12 the foreperson indicating this indeed is the unanimous verdict
13 of each and every member of the jury in this particular case.
14 So, understanding the duties and responsibilities of the
15 foreperson -- now, Ms. Speranza and Ms. Stevens, as -- is that
16 correct -- the two alternates, yes. The two of you are
17 alternates; therefore, cannot be the foreperson in this
18 particular case. You can vote on who the foreperson is but
19 being the alternate, you cannot be the foreperson. Everybody
20 else is eligible then to be the foreperson

21 Please retire to the jury room with the Bailiff, select
22 your foreperson, knock on the door and let the Bailiff know
23 who the foreperson is, please.

24 Thank you very much.

25 (REPORTER'S NOTE: Jury exits courtroom.)

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BY THE COURT

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1 THE COURT: All right. Ladies and gentlemen of the jury
2 panel that were not selected for this particular case, I think
3 I told you before, Judge Culbertson is picking a jury in civil
4 court at 2:00 P.M., at 2:00 P.M. downstairs in the jury room.
5 Now, please remember, Judge Hyman's jury is on -- when you're
6 looking at the panel, like I was looking at them, they're on
7 my right side, they're on your left side. Don't get in there
8 with that group; that's Judge Hyman's group. You be on what I
9 -- to me is the left side, your right side of that juror room
10 downstairs. Be back there at 2:00 o'clock. Judge Culbertson
11 will pick his jury at that point in time.

12 Thank you very much. You are now excused.

13 (REPORTER'S NOTE: Jury Venire exits courtroom. The following
14 takes place outside the presence of the Jury.)

15 THE COURT: All right. Mr. Filiberto, I assume you've
16 given a copy of your motions to the State?

17 MR. FILIBERTO: Yes, Your Honor.

18 THE COURT: All right. So, we'll -- your best
19 estimation, because I'm gonna have to excuse this jury panel
20 to come back some time. What's your best estimation as to how
21 long it will take us to resolve those motions that you have
22 filed?

23 MR. FILIBERTO: Your Honor, I don't believe very long at
24 all, maybe 20 minutes.

25 THE COURT: All right. Other motions besides the ones

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BY THE COURT

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1 filed by the Defense from the State?

2 MR. HIXSON: Your Honor, I do not have any copies of
3 motions, so -- I'll get with Mr. Filiberto on the break.

4 MR. FILIBERTO: I did, Your Honor, I did drop them off at
5 the Solicitor's office and asked them to give them to Mr.
6 Hixson.

7 MR. HIXSON: All right.

8 THE COURT: Okay. All right. Well, if you don't, I've
9 got a copy. You could take them a run a copy off and bring me
10 back mine; I'll be glad for you to do that.

11 MR. HIXSON: That's fine. My understanding, we're
12 prepared to go forward with the *Jackson v. Denno*. I
13 anticipated that -- most certainly, we intend to use one of
14 the statements of Mr. Levan.

15 THE COURT: Okay.

16 MR. HIXSON: That's a video-taped statement. The video
17 tape alone is less than five minutes.

18 THE COURT: Okay.

19 MR. HIXSON: And the testimony supporting that, so that -
20 - that would be the State's showing on that. I didn't see
21 what -- the other motions are for challenges to the
22 admissibility of other things. I anticipated that and I have
23 my witnesses available for that.

24 THE COURT: Okay.

25 MR. HIXSON: I'm not sure what they are.

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BY THE COURT

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1 THE COURT: All right. All right. My Clerk is gonna go
2 get those.

3 MR. HIXSON: Scheduling-wise, Your Honor, the only issue
4 that we haven't relayed to your Law Clerk is that Dr.
5 Proctor's wife is going to Duke Medical Center and he called
6 me last week and said that he can't make it this week. And I
7 asked him, please, please, please, and he said I can be here
8 at 4 o'clock on Monday, and I told him that I would, if
9 necessary, take his testimony out of order to get him so he
10 can go with his wife to Duke on Tuesday. But that is the only
11 -- other than that ---

12 THE COURT: All right. So, it may be that we're taking
13 that witness out of order. Any problem with that, Mr.
14 Filiberto?

15 MR. FILIBERTO: No, Your Honor.

16 THE COURT: All right. So, we will -- we will
17 accommodate it such that, you know, he can present his
18 testimony this afternoon.

19 Let's be back at -- let's be back at 2:15. Be back at
20 2:15. We'll start arguing the motions. I'm gonna tell the --
21 hold on one second. There's a motion to exclude privileged
22 spousal communications, a motion to prohibit reference to the
23 weapon as an assault rifle, motion to exclude statements to
24 law enforcement, notice of motion to suppress any
25 incriminating statements or alleged confessions, notice of

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1 motion to suppress evidence, notice of motion to exclude SLED
2 drug analysis reports. So, Solicitor, let me give you these.
3 I want you ---

4 MR. FILIBERTO: Your Honor, I was just gonna say, I
5 thought that was ---

6 THE COURT: There are two different ones. We've --
7 they've given -- those aren't the ones; sorry. You've just
8 filed two, three motions. The motion to exclude privileged
9 spousal communications, motion to prohibit reference to weapon
10 as assault rifle, and motion to exclude statements to law
11 enforcement. So, let me give you these, Solicitor, you make
12 copies of them.

13 MR. HIXSON: We can do them right now.

14 THE COURT: And then you can give them right back to me.

15 MR. HIXSON: Thank you.

16 THE COURT: Okay? I'm gonna tell the jury panel to be
17 back at 3:15. So, hopefully, that'll -- you know, we're gonna
18 be back at 2:15 and hopefully that'll give us plenty of time
19 and give them plenty of time. All right?

20 See y'all back at 2:15.

21 *****OFF THE RECORD*****

22 (On the record.)

23 (REPORTER'S NOTE: The following takes place outside the
24 presence of the Jury.)

25 THE COURT: We'll start off with the *Jackson v. Denno*

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JUSTIN VASQUEZ - DIRECT BY HIXSON

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1 Hearing.

2 All right, Solicitor, you ready with the *Jackson v. Denno*
3 Hearing.

4 MR. HIXSON: I am, Your Honor.

5 THE COURT: All right, sir. When you'd like to proceed.

6 MR. HIXSON: At this time, the State would call Justin
7 Vasquez with the Myrtle Beach Police Department.

8 THE COURT: Please come around and be sworn. Just meet
9 the Clerk right here at the corner.

10 CLERK: Please raise your right hand and place your left
11 hand on the Bible.

12 JUSTIN VASQUEZ, HAVING BEEN SWORN
13 TESTIFIES AS FOLLOWS:

14 CLERK: Please state your full name and spell your last.

15 MR. VASQUEZ: My name is Justin Vasquez. Last name is
16 spelled V-A-S-Q-U-E-Z.

17 THE COURT: Go ahead, Solicitor.

18 DIRECT EXAMINATION OF JUSTIN VASQUEZ BY MR. HIXSON:

19 Q: Good afternoon, sir, how are you doing?

20 A: I'm doing good. How are you?

21 Q: Please tell this Court what you do for a living.

22 A: I'm a police officer for City of Myrtle Beach.

23 Q: And how long have you performed that role, been in that
24 capacity?

25 A: Approximately three years.

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1 Q: Okay. So, let me ask you, were you working around the
2 date of February 21st of 2015?

3 A: Yes, sir.

4 Q: And what is your current -- what was your role or
5 responsibilities for the Myrtle Beach Police Department back
6 then?

7 A: I was a patrol officer.

8 Q: Okay. Did you have an occasion to be in the City of
9 Myrtle Beach at the 10th Avenue or the Main Police Station in
10 the afternoon hours of December 22nd or it would have been
11 December 21st, 2015?

12 A: Yes, sir.

13 Q: Okay. And did you have an opportunity to come in contact
14 with the Defendant in this case, Mr. Keith Levan?

15 A: Yes, sir, I did.

16 Q: Tell us about how it happened.

17 A: We got a call saying that a complainant had come in for a
18 harassment call, it was a walk-in in, which he came into the
19 PD, and went back to the work bay, which is where we do all of
20 our paperwork and we take various walk-ins for different
21 cases.

22 Q: Okay. When you say work bay, can you describe that to
23 the Court? Is that a detention facility, what is that?

24 A: No, sir, it's actually just an area where we walk our
25 people back there and they end up just telling us exactly what

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1 the case or what their complaint is, and it's where various
2 computers and paperwork is done for our complainants.

3 Q: So, if I were to walk in and I would say hey, somebody --
4 I want to talk to a police officer, somebody stole my bicycle,
5 would they take -- what would -- where would I go?

6 A: We would end up going to the work bay.

7 Q: Okay. And there are other police officers or other
8 victims of cases in that location?

9 A: Yeah, yes, sir.

10 Q: Okay. So the day in question, let me ask you, were you
11 equipped with a body camera during that time, February 22nd of
12 2015?

13 A: I was.

14 Q: Was it operational?

15 A: Yes, sir.

16 Q: And did it record any of the incidents we're talking
17 about?

18 A: Yes, sir, it did.

19 Q: Were any other police officers present in the work bay
20 with you during that period of time?

21 A: Yes, sir.

22 Q: And do you recall -- recognize the name of an officer
23 Chad Paul?

24 A: Yes, sir, I do.

25 Q: And what was his responsibility, if you recall, that day?

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1 A: He was taking the complaint and he was the one who was
2 sitting down with the Defendant.

3 Q: Okay. Were you present during the course of the
4 Defendant's conversation?

5 A: Yes, sir, I was.

6 Q: Did you overhear or could hear the discussion back and
7 forth?

8 A: Yes, sir, I did.

9 Q: And was your body camera recording that information?

10 A: Yes, sir.

11 Q: Was anybody with Mr. Levan during that period of time
12 besides Officer Paul and yourself?

13 A: Yes, sir.

14 Q: Who was that?

15 A: There was a Ms. Hubbard.

16 Q: Okay. Did they arrive together?

17 A: Yes, sir, they did.

18 Q: Okay. Do you know -- did they drive to the police
19 department to make this statement?

20 A: Yes, sir, they did.

21 Q: Are you aware, let me ask you this, does the police
22 department have video surveillance equipment in the parking
23 lot that shows what's going on in the parking lot?

24 A: Yes, sir, we do.

25 Q: Have you ever seen any photographs or did you -- do you

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1 know how they arrived at the police station?

2 A: Yes, sir, I do.

3 Q: Describe that to the Court?

4 A: She ended up driving him to the police station around
5 that time where they made that complaint.

6 STATE'S EXHIBIT NUMBER 32

7 MARKED FOR IDENTIFICATION

8 Q: Okay. Okay. Let me show you what's been marked as
9 State's Exhibit 32, this is for Court's purposes only. I
10 guess we haven't got into the trial yet. See if you recognize
11 that?

12 A: Yes, sir, I do.

13 Q: What is that?

14 A: That's body cam footage for Mr. -- Officer Paul.

15 Q: Have you had an opportunity to review that?

16 A: Yes, sir.

17 Q: And what's contained on this disc, is that a fair and
18 accurate representation of the scene that you saw and the
19 conversation between yourself and Officer Paul as well as the
20 Defendant on May 21st of 2015?

21 A: Yes, sir, it is.

22 Q: Okay. Let me ask you an additional question. Are you --
23 do you know whether or not that conversation has been
24 transcribed into writing?

25 A: Yes, sir, it has.

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1 Q: Have you had an opportunity to review the transcript of
2 that?

3 A: Yes, I have multiple times.

4 Q: Okay. Let me show you -- and Dixie, I had this marked
5 and now I can't find it.

6 COURT REPORTER: 33.

7 MR. HIXSON: It's 33, but I don't see a sticker.

8 COURT REPORTER: Yes.

9 MR. HIXSON: This is an exact copy and I have a copy for
10 the Court as well.

11 BY MR. HIXSON:

12 Q: Take a look at that and see if you recognize that.

13 A: Yes, sir, I do.

14 Q: What is that?

15 A: This is the transcription of the statement made by Keith
16 Levan.

17 MR. SHELTON: Okay. Your Honor, the State's previously
18 provided a copy of the transcript in discovery to counsel. I
19 have a copy for counsel here as well as a copy for the Court,
20 also.

21 BY MR. HIXSON:

22 Q: Will you take a look at that briefly, Officer Vasquez,
23 and see if that's the same copy?

24 A: Yes, sir, it is.

25 Q: All right. How about that one?

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1 A: Yes, sir, it is.

2 MR. HIXSON: And Your Honor, may I had this to the Court?

3 THE COURT: Yes, sir.

4 MR. HIXSON: I have a copy for counsel in addition. Your
5 Honor, I'd like to mark the transcript as Court's Exhibit if
6 we can?

7 THE COURT: All right, sir.

8 MR. FILIBERTO: No objection, Your Honor.

9 THE COURT: Thank you.

10 MR. HIXSON: Your Honor, at this time, we'd like to
11 publish State's 32 to the Court?

12 THE COURT: Did the transcript get marked?

13 COURT REPORTER: You want to mark it, we'll go ahead and
14 mark it as ---

15 MR. HIXSON: It's in my pile.

16 COURT REPORTER: --- 33 for ID.

17 THE COURT: 33 for ID. Okay. Very good.

18 STATE'S EXHIBIT NUMBER 33

19 MARKED FOR IDENTIFICATION

20 MR. HIXSON: Your Honor, can you see the TV screen okay,
21 Your Honor.

22 THE COURT: Yes, sir.

23 COURT REPORTER: Judge, the transcribed statement is 33;
24 the DVD is 32 for ID.

25 THE COURT: Okay. Thank you.

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1 *****OFF THE RECORD*****

2 (REPORTER'S NOTE: State's Exhibit 32 published for the
3 Court.)

4 (On the Record.)

5 MR. HIXSON: Thank you, Your Honor.

6 BY MR. HIXSON:

7 Q: So at the time the Defendant, Mr. Levan, walked into the
8 -- he voluntarily walked into the police station?

9 A: Yes, sir.

10 Q: Was he in custody at that time?

11 A: No, sir; he was not.

12 Q: At some point in time during this discussion, did he --
13 did -- was Mr. Levan taken into custody?

14 A: Yes, sir.

15 Q: Is that the time we see captured, that you witnessed
16 captured on -- I see that you were in that video as well when
17 he was placed in handcuffs?

18 A: Yes, sir, he was.

19 Q: And from that point forward, was he advised of -- are you
20 aware of whether or not he was advised of his rights after the
21 fact?

22 A: I'm not sure.

23 Q: Okay. Beg the Court's indulgence, Your Honor.

24 THE COURT: Yes, sir.

25 MR. HIXSON: I have no further questions, Your Honor.

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JUSTIN VASQUEZ - CROSS BY FILIBERTO

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1 THE COURT: Okay. Cross examination?

2 MR. FILIBERTO: Thank you, Your Honor.

3 CROSS EXAMINATION OF JUSTIN VASQUEZ BY MR. FILIBERTO:

4 Q: Officer, just briefly, that recording, is that the entire
5 conversation that went on between my client and yourselves?

6 A: Yes, sir, it was.

7 Q: So, there was no portion of that that wasn't recorded,
8 not a portion where he asked if he was being recorded?

9 A: No, sir.

10 Q: Okay. There was -- anytime where you felt that he was
11 confused or making statements that seemed a little irrational
12 to you?

13 A: No, sir, I did not.

14 Q: Did he seem calm as a cucumber?

15 A: He seemed calm. A little shaken up from whatever
16 incident that occurred during that time but at that time we
17 had no idea what it was that he was talking about.

18 MR. FILIBERTO: Nothing further, Your Honor.

19 THE COURT: Any redirect?

20 MR. HIXSON: Briefly, just to clear something up.

21 REDIRECT EXAMINATION OF JUSTIN VASQUEZ BY MR. HIXSON:

22 Q: So, do you -- are you aware of what happened to Mr. Levan
23 after he was taken into custody? Was he subsequently
24 interviewed by detectives in an interview room at the police
25 department?

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JUSTIN VASQUEZ - CROSS BY FILIBERTO

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1 A: Yes, sir, he was.

2 Q: And for our purposes, he invoked his right to counsel in
3 that interview; is that correct?

4 A: Yes, sir. Uh-huh (affirmative response). Yes, sir, he
5 was.

6 Q: I just want to clarify that. There is a subsequent
7 interview, but it's not a body cam, the initial discussion.
8 No further questions.

9 THE COURT: Anything on those questions, Mr. Filiberto?

10 MR. FILIBERTO: Nothing, Your Honor.

11 THE COURT: All right, sir, you may step down.

12 All right, Solicitor, any other -- any other witnesses?

13 MR. HIXSON: Just argument -- just an argument on that
14 point.

15 THE COURT: All right, sir. Very good. All right.

16 I'll be glad to hear from you, sir.

17 MR. HIXSON: Your Honor, the Defendant, that was not in
18 custody, voluntarily showed up in the Myrtle Beach Police
19 Department in an effort to make a complaint against Barry
20 Selmon of all things. He voluntarily drove there, Penny
21 Hubbard drove the vehicle there. They walked into the police
22 department on their own accord. They waited until an officer
23 could take the report. During the course -- they were put in
24 a work bay situation. They weren't put in custody; they
25 weren't in jail. He was free to leave at any time. It was

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JUSTIN VASQUEZ - CROSS BY FILIBERTO

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1 only until the point in time where the officer realizes that
2 he was admitting the shooting a vehicle that -- that -- that
3 doesn't argue at that point in time. When you see them put
4 handcuffs on the individual, he's in custody at that point in
5 time as Your Honor saw. As it relates to where the weapon is
6 located, that's *United States v. Quarles*. It's a public
7 safety question that even if he was in custody at that time,
8 it's appropriate to ask where is the weapon when a shooting is
9 involved to make sure that some citizen or someone doesn't
10 acquire a weapon and accidentally hurt themselves. *Quarles* is
11 directly on point. We have a case where, Your Honor, even
12 though he was in custody at the time, that public safety
13 question is appropriate under *Quarles* and that's why we did
14 redact the tape of inadmissible conversations after the fact.
15 We didn't redact it; we cut it off after he was asking other
16 questions concerning counsel for those reasons. *Miranda*
17 Warnings are not required; it's a voluntary interaction. We'd
18 ask the Court deny the Defendant's motion.

19 THE COURT: All right. Mr. Filiberto?

20 MR. FILIBERTO: Your Honor, with respect to this first
21 portion of the statements that were included, we believe that
22 -- we would ask the Court to understand the fact that my
23 client voluntarily went down there and was very shaken up
24 because of what had happened to him and he was seeking some,
25 some direction and we'd also make a motion to clearly exclude

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1 the comment about where the weapon was located, particularly
2 the language that was used there. Once he was arrested, he
3 was entitled to Miranda, and we would ask the Court to exclude
4 that portion of the statement.

5 THE COURT: All right. Solicitor, let me have the case
6 that you are relying on, please.

7 MR. HIXSON: It's *U.S. v. Quarles*, Your Honor.

8 THE COURT: All right. Thank you.

9 All right. Mr. Filiberto, are you aware of that U.S.
10 Supreme Court Case, *New York v. Quarles*?

11 MR. FILIBERTO: Your Honor, I have reviewed it, yes.

12 THE COURT: All right, sir. Are you aware of any
13 negative treatment that United States Supreme Court has had on
14 the ruling in that case since it was announced in 1984?

15 MR. FILIBERTO: Your Honor, my research didn't find
16 anything specifically on point.

17 RULING OF THE COURT:

18 THE COURT: All right, sir. First, regarding the
19 statement, and I'll deal specifically with the question about
20 the weapon in just a second. But, first, it's clear that the
21 meeting between the Defendant and the police officer was
22 completely voluntary. He came of his own accord to the police
23 station, asked to speak to police, he was not forced, coerced,
24 tricked in any way in coming to the police department to make
25 a statement. He asked to make a statement. He was given that

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1 opportunity to make a statement to the police, make a
2 complaint, tell them whatever it was that he came to the
3 police station to tell them. The police were completely
4 unaware of any illegal activity or the potential of any
5 illegal activity having occurred or occurring in the future.
6 The information relayed by the Defendant was completely of his
7 own volition and of his own accord without any type of
8 influence of any kind by police officers.

9 In this particular matter, the statements by Mr. Levan to
10 the police up to the time that he is being placed under arrest
11 were again, free and completely voluntary statements of the
12 Defendant. Miranda Warnings were not required in any fashion
13 for those statements and the requirements of Miranda did not
14 come into play.

15 The question then is, as to the question about the
16 weapon, clearly the Defendant is then under arrest. He has
17 been placed in handcuffs. He is in detention and that is
18 when, certainly this particular fact situation, the Miranda
19 requirements would normally come into play. The United States
20 Supreme Court in *New York v. Quarles* found that 467 U.S. 649,
21 1984 has stated that there is a public safety exception to the
22 requirement that Miranda Warnings be given before a suspect's
23 answers may be admitted into evidence, and that the
24 availability of that exception does not depend on the
25 motivation of the individual officers involved in asking the

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1 question.

2 As in that case, the police in this case, in the very act
3 of apprehending the suspect, were confronted with the
4 immediate necessity of ascertaining the whereabouts of a
5 weapon. Its actual whereabouts were unknown to the police,
6 and it obviously then posed a danger to the public that it
7 could be used by some other individual either purposely or
8 accidentally and cause harm. Therefore, the Court finds that
9 the question posed by the police officers, no matter their
10 motivation, whatever it might be, is proper. So the question
11 where's -- where's your weapon located, and the answer, the
12 weapon I -- I got scared and -- and I stashed it behind my
13 stepfather-in-law's house behind the shed in a bag is allowed
14 in this particular matter as the statement of the Defendant
15 under this public safety exception to the Miranda Warning.

16 All right. Any further matters regarding *Jackson v.*
17 *Denno*?

18 MR. HIXSON: No, Your Honor.

19 THE COURT: All right. All right.

20 All right. So, that would be the State's motions; is
21 that correct?

22 MOTIONS:

23 MR. HIXSON: Your Honor, that's our response to -- also
24 motion to exclude statements to law enforcement by Mr.
25 Filiberto, we think that ---

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1 THE COURT: Well, I was gonna ask him, you know, it, it
2 doesn't specifically indicate what it is that he is trying to
3 exclude, so I was gonna turn now to Mr. Filiberto and ask him.

4 Mr. Filiberto, you have a motion to exclude statements to
5 law enforcement. It does appear that the State does not
6 intend to use any statement that the Defendant may or may not
7 have made to the detectives after he was arrested per this
8 video we just saw. So, that's not an issue.

9 MR. FILIBERTO: Yes, sir.

10 THE COURT: So what -- of course, barring the testimony
11 of the Defendant and then a further motion by the State to use
12 it, which obviously we'd hear outside the presence of the
13 jury. But, what other matters are contained, if any, in this
14 motion to exclude statements to law enforcement?

15 MR. FILIBERTO: None, Your Honor.

16 THE COURT: All right. Very good.

17 All right. How about the -- what's the deal with this
18 one before we get to the spousal communication. The motion to
19 prohibit reference to a weapon as an assault rifle, first, is
20 that the intention of the State?

21 MR. HIXSON: No, Your Honor. The intention of the State
22 is to introduce the weapon itself, which is an Air-15 Carbine,
23 that's -- that's a term of art as it relates to assault
24 weapon. I intend to discuss this, the rifle that was used,
25 but I would reserve the ability to use language like that in

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1 closing argument, if appropriate. I don't intend to, but that
2 would be the argument, certain military-style weapons is
3 appropriate.

4 THE COURT: Well, let's -- all right, sir. AR, as I
5 understand it, and y'all may correct me if I'm wrong, but as I
6 understand AR-15, AR stands for automatic rifle.

7 MR. HIXSON: That's correct, Your Honor. In addition to
8 that, that's the weapon -- that's the instrumentality that the
9 Defendant used. He chose the instrumentality and as a result,
10 we think that it's appropriate to address it not on the -- but
11 the way it's identified, but we'll obviously abide by the way
12 Your Honor rules.

13 RULING OF THE COURT:

14 THE COURT: In your direct presentation of evidence, I am
15 not going to allow you to refer to it as an assault rifle. I
16 will allow you to describe it in the terms that it is known to
17 the public and law enforcement, the community, as far as its
18 nomenclature, but we will not refer to it as an assault rifle
19 during the direct presentation of evidence.

20 I will have you -- if you wish to prohibit the State from
21 doing so in the closing argument, we'll have to have a further
22 argument about that once all the evidence is received in this
23 matter, Mr. Filiberto. I'm only prohibiting the State from
24 doing it in the direct presentation of the State's evidence.

25 All right?

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1 MR. FILIBERTO: Thank you, Your Honor.

2 MOTIONS:

3 THE COURT: All right. So let's get to the issue or the
4 motion to exclude privileged spousal communications. What
5 spousal communications or potential spousal communication
6 would be present in the evidence that the State intends to
7 use, Solicitor?

8 MR. HIXSON: Your Honor, just a little background on it.
9 Ms. Hubbard is charged with this crime. Also, she is charged
10 with accessory before the fact, a felony, and those charges
11 are pending.

12 THE COURT: Okay.

13 MR. HIXSON: So, she certainly has a Fifth Amendment
14 right that I can't call her to testify. So, that's clear.

15 THE COURT: All right.

16 MR. HIXSON: As a result, I can't have her compelled at
17 all testimonially. There can be no testimonial information
18 given, and we believe that's what the privilege communication
19 doctrine protects is compelling her to testify against her
20 spouse, and I can't do it. So, that question is easy because
21 I couldn't if I wanted to.

22 There are telephone text messages, there are business
23 records that are non-testimonial by Barry Selmon, the victim,
24 and Kenny Hubbard, but the Defendant's cell phone was acquired
25 by law enforcement at the time he was taken into custody at

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1 the police station. The Myrtle Beach Police executed a lawful
2 search warrant and obtained Mr. Levan's cell phone. That was
3 -- a second search warrant was taken to Cellebrite to dump
4 that information out of it, and the Cellebrite report shows
5 historical text messages back and forth between Ms. Hubbard
6 and Mr. Levan. In those text messages, it becomes clear that
7 there's been an ongoing affairs potentially back and forth
8 between each other. There's long discussions about I'm
9 leaving and discussions about Mr. Levan knowing about Barry
10 Selmon 10 to 11 days prior to this event happening. It's
11 probative in that sense because it shows that it's not heat of
12 passion killing, it's a planned event that's been going on for
13 11-plus days. The State's contention, of course, is that the,
14 the privileged communication is a testimonial privilege.
15 Otherwise, you could never prosecute a loved one for organized
16 crime, even, if information discussions between the two -- it
17 protects against compelled communication. It doesn't protect
18 against lawfully executed search warrants that have non-
19 testimonial information in the Cellebrite report. So, the
20 communication we're referring to would be text messages
21 between the two of them, all of that was obtained by a lawful
22 search warrant, Your Honor.

23 THE COURT: All right. Let me hear you, Mr. Filiberto?

24 MR. FILIBERTO: Yes, Your Honor. In this world of
25 general technology where most people will text rather than a

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1 phone call, I would argue that the communications between my
2 client and Ms. Hubbard should be privileged as spousal
3 communications. The fact that there was an electronic record
4 because of the search warrant served by the State I don't
5 think it should override that, that privilege.

6 THE COURT: I think it's going to require a more
7 complete examination of what it is exactly the State intends
8 to produce. The statute in question, 19-11-30, says in part,
9 that in any trial or inquiry, for any person having by law or
10 consent of the parties, authority to examine witnesses or hear
11 evidence, no husband or wife may be required to disclose any
12 confidential, and it says or in a criminal proceeding, any
13 communication made by one to the other during their marriage.
14 So, it depends upon what it is that is alleged to have been
15 communicated or said, first, and then to see whether or not
16 this statute pertains. So, do we have -- I don't suppose you
17 -- I mean, do we have copies of these documents?

18 MR. HIXSON: Yes, I have the Cellebrite report printout,
19 sir, that our witness is -- if I can have just a brief
20 discussion on the statute just for a second?

21 THE COURT: Yes, sir.

22 MR. HIXSON: That information was acquired by law
23 enforcement during the investigation of the case, and of
24 course under proffer, it's nontestimonial by its nature. In
25 other words, it's a state of mind exception, it's a business

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1 record exception; it would be no different than accounting
2 records or discussions or data compilations back and forth
3 between spouses in a, say a spousal embezzlement case. I
4 cannot -- I would argue the statute does not imply the
5 testimony privilege. Having that witness compelled by the
6 State of South Carolina to bear witness against her husband in
7 court in a hearing or a trial, but it doesn't apply data
8 compilations pursuant to a search warrant. Otherwise the --
9 everyone would be immune from prosecution between a husband-
10 and-wife situation for information developed through the
11 course of the investigation. In other words, we think the
12 proffer idea is the most compatible argument in that it is non
13 testimonial by nature and the privileges of testimonial
14 solution. The fact of the marriage doesn't bar the collection
15 of evidence in the criminal enterprise, I just can't compel
16 her under a threat of contempt of court to not comply and not
17 testify. I can't do that; that's spousal privilege.

18 THE COURT: All right, sir, and to your point, the title
19 of the statute lends credence to your argument. It says
20 competency of husband or wife of a party as a witness. So,
21 that lends credence to your argument, but I still want to see
22 what it is that you intend to produce?

23 MR. HIXSON: Yes, sir. I'll show you that. If I can add
24 to the background, Your Honor, for the Court. There are
25 three cell phones in question. There is a victim cell phone;

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1 that victim's cell phone was recovered in the vehicle at the
2 time during the crime scene investigation of when he was found
3 deceased in his vehicle. In addition to that ---

4 THE COURT: Well, let's deal with that first. Any
5 information contained on the victim's cell phone, you would
6 not be claiming the protection of 19-11-30 to anything on the
7 Defendant's, I mean on the victim's cell phone, are you?

8 MR. FILIBERTO: No, Your Honor.

9 THE COURT: All right. So, that's not an issue. All
10 right.

11 So, what you have handed to me is what, Solicitor?

12 MR. HIXSON: Your Honor, that is a copy of the Cellebrite
13 extraction report. The offering witness for that would be
14 Orian Cozene, who is a Crime Scene Supervisor for Myrtle Beach
15 Police Department. He is trained in download -- he actually
16 has the physical cell phone and does a data extraction using
17 the Cellebrite device that prints out call history, call logs,
18 everybody in the entire -- everybody that's used that phone
19 that hasn't deleted it. He can also -- that's about a
20 thousand pages, Your Honor. From there is a refined search
21 that you can just search by the cell phone number that called
22 to limit because it's a -- it's a Rule 1006 summary, Your
23 Honor, we're presenting to the Court. In that, the only
24 conversation back and forth between Mr. Levan's cell phone,
25 that was obtained by a lawful search warrant, and Ms.

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1 Hubbard's cell phone. And the Cellebrite -- because Ms.
2 Hubbard, his common law wife, is in the contact number; it
3 shows up to and from Penny, because you're reading Levan's
4 cell phone data. And so it starts from the oldest to the
5 newest of somewhat relative information because it's a lot of
6 information. It's just whittled down to about two pages.

7 THE COURT: All right. So what I need to look for are
8 the ones, the SMS messages on Page 2 starting with, To Penny?

9 MR. HIXSON: Your Honor, if you go all the way to the
10 last page, the very final page, it's the oldest message, and
11 it starts up to the date of death, which is the 21st.

12 THE COURT: All right.

13 MR. HIXSON: You see the very last page? Those are
14 conversations back and forth texting to Penny -- if it says to
15 Penny, it means the Defendant sent it. If it says from Penny,
16 it means Penny sent it to him. Now, what we intended to put
17 in front of the jury is about three pages to cut so much of
18 the extraneous stuff. Now, the rule of completeness, if Mr.
19 Filiberto can move it in if he wants, but our intention was to
20 put about three pages in around the time that the event
21 happened, not, not all of soap opera type discussions that are
22 contained that that Cellebrite report.

23 Can I mark this?

24 COURT REPORTER: Next State's Exhibit?

25 MR. HIXSON: Yeah. And, Your Honor, I'm handing

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1 this up. This is the smaller extraction that we actually
2 intended to use in Court instead of the 15 pages.

3 THE COURT: All right.

4 MR. HIXSON: I mean, there are discussions about physical
5 ailments and their children and the things in there that ---
6 I'm handing the Court what's been marked as State's Exhibit
7 64. This is actually what we proposed to do. It's been
8 whittled down from those 16 pages.

9 THE COURT: All right.

10 COURT REPORTER: You want that marked for ID?

11 STATE'S EXHIBIT NUMBER 64

12 MARKED FOR IDENTIFICATION

13 THE COURT: State's Exhibit -- have you seen State's
14 Exhibit 64 that -- a copy of that, Mr. ---

15 MR. FILIBERTO: I have not.

16 THE COURT: Sir?

17 MR. HIXSON: He has not seen that summary. He's seen the
18 master, but not the summary.

19 THE COURT: Okay. How about show that. If you'd show
20 that to him, please. Do you have another copy of it?

21 MR. HIXSON: I do. I'll just ---

22 THE COURT: Can you make another copy and give it to Mr.
23 Filiberto and let him -- how about let me have the exhibit
24 back. You look at that and then we'll take a short break for
25 five minutes. You look through it and see what objections you

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1 have, if any, to what's contained in State's 64, Mr.
2 Filiberto?

3 MR. FILIBERTO: Yes, sir.

4 THE COURT: All right. Thank you. We'll take a short
5 break. Thank you.

6 *****OFF THE RECORD*****

7 (On the Record.)

8 THE COURT: Thank you very much. You may be seated.
9 Thank you.

10 All right. Mr. Filiberto, you had a chance to look at
11 64, State's 64?

12 MR. FILIBERTO: I have, Your Honor.

13 THE COURT: And do you maintain your objection or is
14 there any change to it?

15 MR. FILIBERTO: No, Your Honor, my objection stands.

16 THE COURT: I'm sorry, I didn't hear that. You maintain
17 your objection?

18 MR. FILIBERTO: Yes, sir.

19 THE COURT: Okay. Very good. I just wanted to be clear
20 about that.

21 All right. Regarding -- is there anything further from
22 the State?

23 MR. HIXSON: No, Your Honor, other than I believe that
24 the holder of the privilege also is Ms. Hubbard, not Mr.
25 Levan. So, she's the one that holds the privilege and has to

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1 be here to invoke it. I don't know if Mr. Levan has standing
2 to try to invoke a testimony privilege because any criminal
3 event doesn't always invoke it. It's -- the testimonial
4 privilege is not his.

5 THE COURT: All right. That's not gonna be the basis for
6 the Court's ruling.

7 Anything else, Mr. Filiberto?

8 MR. FILIBERTO: Nothing, Your Honor.

9 THE COURT: All right. Very good.

10 RULING OF THE COURT:

11 THE COURT: All right. Regarding this spousal immunity
12 or sometimes more common parlance called the pillow talk
13 exception, this statute apparently came into being, it looks
14 like from what I could tell of the history, at least it's been
15 in existence since 1866, the first statutory reference that I
16 see. And it's been carried forward and amended numerous times
17 up until its present reading in the Code of Laws of the State
18 of South Carolina, 1976, as amended. The caption or the
19 heading of the statute says competency of husband or wife of
20 party as witness. I think that's the essence of what the
21 legislature intended by this law and what's been interpreted
22 by our courts.

23 Now, obviously, there was no understanding of current
24 electronic communications when this statute first came into
25 being, but was what in existence at that point in time, were

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1 letter communications, a letter between a husband and a wife
2 or a wife and a husband. I have found no case law that gave
3 the protection of what's now 19-11-30 to those written
4 communications. I think it is apropos to equate the text
5 messages to our prior communication or communication by
6 letter, not the spoken word. The purpose of the statute is to
7 give protection to a husband or wife being called into court,
8 placed under oath and compelled to give testimony which may
9 harm the interest of their spouse. I do not find that
10 protection extends to the type of electronic communication the
11 State intends to use in this case. And, therefore, I will not
12 extend the privilege spousal communication statute or pillow
13 talk statute to the electronic communications as set forth by
14 the State in this particular case. Therefore, the motion is
15 denied.

16 MR. FILIBERTO: Yes, sir.

17 THE COURT: All right. Just so that, not that it
18 honestly had any bearing on the Court's ruling, but my Clerk
19 did find, just for your own reading and reference in the
20 future, a South Carolina Law Review Article written in the
21 winter of 2006, 58 S.C. Law Review 275, that talked about the
22 applicability of marital communications privilege to
23 electronic mail. There's a fairly extensive article on that
24 particular issue. I just give that to you for whatever use
25 you may have of it in the future and, again, I can't say that

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1 I used it to give my ruling, but it's there.

2 All right. Further motions on behalf of the defense?

3 MR. FILIBERTO: Nothing, Your Honor.

4 THE COURT: And from the State, anything else?

5 MR. HIXSON: No, Your Honor.

6 BY THE COURT:

7 THE COURT: All right. So are we prepared to call the
8 jury in and swear them and begin the trial, Solicitor?

9 MR. HIXSON: Yes, sir.

10 THE COURT: Defense?

11 MR. FILIBERTO: Your Honor, may we approach the bench?

12 THE COURT: Sure. Absolutely.

13 (REPORTER'S NOTE: A bench conference was held off the
14 record.)

15 THE COURT: All right, Mr. Filiberto, be glad to hear
16 from you, sir.

17 MR. FILIBERTO: Your Honor, I just would ask the Court to
18 make inquiry for Mr. Levan with respect to his comfort with my
19 ability to continue as counsel of record.

20 Your Honor, Judge Hyman did hear a Motion to be Relieved.
21 I had went forth with the reasons for that motion with Judge
22 Hyman and he denied that motion. Predominantly, I believe
23 that Mr. Levan's testimony and just wanted to clarify for the
24 Court that he is comfortable going forward with me as counsel.

25 THE COURT: Is there anything you'd like to tell the

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1 Court about that, Mr. Levan?

2 MR. LEVAN: No, sir.

3 THE COURT: All right, sir. So may I understand the
4 matter was previously ruled on by Judge Hyman. You're not
5 asking at this point in time that Mr. Filiberto be relieved
6 are you, sir?

7 MR. LEVAN: No, sir. Stay as my counsel ---

8 THE COURT: All right, sir.

9 MR. LEVAN: Keep him as my counsel.

10 THE COURT: All right, sir, thank you very much. All
11 right. You can sit down.

12 Anything else, Mr. Filiberto?

13 MR. FILIBERTO: Yes, Your Honor, just to make a record
14 for the Court that prior Solicitor Grooms had at one point did
15 make an offer to my client related to a plea offer and a --
16 for a manslaughter plea and my client advised me that he
17 wanted to reject that and I just wanted to make that a record.

18 THE COURT: All right, sir. And is that -- I'm sorry,
19 Mr. Levan, is that correct what your attorney is saying about
20 that?

21 MR. LEVAN: He had -- he gave me very little information
22 over the

23 THE COURT: Well, sir, I guess first you need to decide
24 is there still a plea offer still in existence from the State
25 to the Defendant?

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1 MR. HIXSON: No, sir, I'm not aware that there was an
2 extension of the plea offer. I knew there was a discussion
3 between Mr. Grooms and Mr. Filiberto that Mr. Levan may, if
4 the offer was made, but I'm not aware the offer is extended
5 and there's certainly not an offer on the table now, has not
6 been. I'm not discounting what Mr. Filiberto said.

7 THE COURT: Well, I appreciate that, but if the, you
8 know, as we stand here today, there is no offer by the State
9 of South Carolina to the Defendant to do anything other than
10 plead to the charge for which he is indicted without
11 recommendation by the State. As I understand it, that would
12 be the State's position.

13 MR. HIXSON: That's correct, Your Honor.

14 THE COURT: So that's where it is. So I don't know that
15 we need to have any further discussions since there is no plea
16 offer and, as indicated by the State, I don't know that there
17 ever was an official plea offer by the State to the Defendant
18 other than discussions. All right?

19 Anything else, Mr. Filiberto?

20 MR. FILIBERTO: Your Honor, just for the Court did direct
21 me to contact Mr. Levan's bonds person and they have agreed to
22 stay on the bond.

23 THE COURT: All right. Very good. So, we'll cover this
24 now, Mr. Levan, just so that we'll make sure that we have done
25 so. Your bonding company is willing to stay on the bond.

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1 With that, I'm gonna allow you to stay out under the terms and
2 conditions of the bond with this added exception. In a
3 moment, we are going to swear the jury and start the trial.
4 Once it has started, then you understand should there be any
5 breaks, such as a recess for the evening, or lunch, or
6 whatever there may be, before the matter is given to the jury
7 for their deliberations that the fact that you do not show up
8 after a evening recess or a lunch recess, will not stop this
9 trial. Once it has been commenced, it will continue until its
10 conclusion. Obviously, it's in your best interest to be here
11 to protect your interest with your attorney, but that's your
12 choice. If you do not show up -- and I'm telling you, I'm
13 giving you a direct order that every time the Court recesses,
14 I will set forth a time and date for which everyone should
15 reappear. If you fail to do so, that would be a violation of
16 a direct order of this Court. Two things, a bench warrant
17 will be issued for your arrest; once the issue of the trial is
18 resolved, I will hold a contempt of court hearing as to
19 whether or not I should hold you in contempt of court if you
20 fail to appear. Do you understand me?

21 MR. LEVAN: Yes, sir.

22 THE COURT: Very good. Thank you. Have a seat. With
23 that, is the State ready for the jury?

24 MR. HIXSON: We are, Your Honor.

25 THE COURT: Yes. Just give that back. And the Defense

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1 is ready for the jury?

2 MR. FILIBERTO: Yes, Your Honor.

3 THE COURT: Ask the jury to come in, please.

4 (REPORTER'S NOTE: Jury enters courtroom.)

5 THE COURT: If there's an issue, it has to be done in
6 writing and, Mr. Forman, obviously there's an issue with one
7 of the members of your jury. Take the jury back to the jury
8 room, write out a note, sign it and give it to the Court.

9 Thank you very much.

10 (REPORTER'S NOTE: Jury exits courtroom.)

11 THE COURT: Be at ease until the jury gives us a note.

12 Thank you very much.

13 *****OFF THE RECORD*****

14 (On the Record.)

15 THE COURT: Thank you very much. You may be seated.

16 Counsel, please approach the bench.

17 (REPORTER'S NOTE: A bench conference was held off the
18 record.)

19 THE COURT: All right. Deputy, will you please ask Juror
20 Number 60, Juror Number 60, would you ask him to come in the
21 courtroom, please, sir?

22 (REPORTER'S NOTE: Juror Number 60 enters courtroom.)

23 THE COURT: Yes, sir, right there's good.

24 Sir, you're Juror Number 60, Mr. Robert Caesar; is that
25 correct, sir?

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1 JUROR 60: Yes, sir.

2 THE COURT: All right, sir. You've indicated to the
3 foreperson, who wrote the Court a note, that you now believe
4 you know something about this case; is that correct?

5 JUROR 60: Yes, sir.

6 THE COURT: And you have indicated that you've recognized
7 some of the people in the audience; is that correct?

8 JUROR 60: Yes, sir.

9 THE COURT: The victim in this matter is an individual by
10 the name of Barry Selmon, as the Court has told you; you
11 understand that?

12 JUROR 60: Yes, sir.

13 THE COURT: And you have also indicated that you now
14 recognize that you are -- that you go to church with the
15 daughter of the victim; is that correct?

16 JUROR 60: I believe that's it, yes, sir.

17 THE COURT: All right, sir. And when is it that you came
18 to this realization?

19 JUROR 60: I didn't know his name, but I saw her.

20 THE COURT: Okay. And because of that, you made the
21 connection?

22 JUROR 60: Yes, sir.

23 THE COURT: And that's when you came in the courtroom and
24 saw the people assembled in the courtroom; is that right?

25 JUROR 60: Yes, sir..

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1 THE COURT: All right. And you didn't know it earlier?

2 JUROR 60: No, sir, I didn't know his name.

3 THE COURT: Okay. All right, sir. Okay. With that,
4 obviously -- well, let me hear from the State. Is there any
5 reason or what's the -- as far as the removal of the juror
6 from this particular case; what's the State's position?

7 MR. HIXSON: I believe probably as a -- probably be
8 better if he's not on the jury and have an alternate placed.

9 THE COURT: Mr. Filiberto?

10 MR. FILIBERTO: I would move to have him excluded, Your
11 Honor.

12 THE COURT: All right, sir. Based upon the information
13 that you've given to me, Mr. Caesar that -- I'm not saying
14 anything about you in this, it's my job to make sure that all
15 trials are fair and impartial and there can't even be the
16 appearance of any kind of impropriety. And the fact that you
17 have some kind of social relationship with the daughter of the
18 victim, albeit at church, I think it's proper to, to release
19 you from your service in this particular case. Now that does
20 not release you from your jury service for this week.

21 THE COURT: Call back that juror information line tonight
22 after 6:00. If for some reason there's not a message on it,
23 call back first thing in the morning. Okay? And just follow
24 those instructions. It might very well be -- tell you to call
25 back later, you know like tomorrow after 12:00 noon or

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1 something, but call tonight and follow the instructions
2 whatever they may be. Okay?

3 JUROR 60: Yes, sir. I apologize, Judge.

4 THE COURT: That's not a problem, sir. I'm glad that you
5 let us know. You can just go with the deputy and go ahead and
6 give him your juror badge, please.

7 (REPORTER'S NOTE: Juror Number 60 excused and exits
8 courtroom.)

9 THE COURT: All right, gentlemen, as I indicated to you,
10 when we replace a juror -- Civil Court and Criminal Court are
11 different -- why that is, I have no idea. But, Civil Court
12 there is a Rule of Civil Procedure and it just says you
13 replace the juror in the order in which they are called. So,
14 it means the first person called as an alternate, that's who
15 gets to go in as the next person on the jury. Criminal Court
16 is different. Section 14-7-1340 says alternate jurors shall
17 replace jurors by the drawing of names. I have instructed the
18 Clerk of Court's representative to write both the alternate
19 juror's names on a separate piece of paper. I have further
20 instructed her to fold those pieces of paper up and place them
21 in a little cup.

22 Have you done so, ma'am?

23 CLERK: Yes, sir.

24 THE COURT: If you would, draw out one name and read to
25 the Court and the Court Reporter the name of the alternate

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BY THE COURT

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1 please.

2 CLERK: Juror Number 388, Amber Speranza.

3 THE COURT: All right. The Court will then substitute in
4 accordance with the statute Juror 388, Amber Speranza, as a
5 regular member of the jury.

6 All right. With that then is the State ready to proceed?

7 MR. HIXSON: Yes, sir.

8 THE COURT: Defense?

9 MR. FILIBERTO: Yes, Your Honor.

10 THE COURT: All right. Very good.

11 When -- just so that I -- we'll talk about it now, when
12 did you expect Dr. Proctor to arrive?

13 MR. HIXSON: He will probably be here by 4 o'clock, so
14 ---

15 THE COURT: Hopefully, he'll be here shortly.

16 MR. HIXSON: Our initial -- we have three witnesses we
17 can call, our initial kind of frame setting witnesses, so we
18 can -- we don't have to get them all in but we have ---

19 THE COURT: All right, sir. Well, I appreciate that,
20 but, you know, we also have to keep in mind, we have a captive
21 audience and I don't intend to keep them, if at all possible,
22 past 5 o'clock. So, keep that in mind.

23 Ask the jury to come in, please.

24 COURT'S EXHIBIT NUMBER 1

25 MARKED FOR IDENTIFICATION

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BY THE COURT

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1 (REPORTER'S NOTE: Jury enters courtroom.)

2 THE COURT: All right. Ms. Speranza, will you raise your
3 hand please, ma'am?

4 All right. If you would come down and occupy that empty
5 chair please, ma'am, if you would. And then, Ms. Stevens, if
6 you would go back and then occupy that one chair and they'll
7 take that extra one out now.

8 For reasons the Court found appropriate, I have removed
9 one of the jurors of this particular case and now Ms.
10 Speranza, you are now one of the regular members of the jury
11 in this particular matter. The remaining alternate is now
12 you, Ms. Stevens. All right.

13 So, Mr. Cleveland, the jury has selected you to be the
14 foreperson; is that correct?

15 JUROR 83: Correct.

16 THE COURT: You will always occupy that particular seat
17 when the jury comes back, and then Ms. Stevens, you'll always
18 occupy that seat as the alternate in this particular matter.
19 All right?

20 Now, with that, the rest of you coming in, just fill in
21 wherever it is you happen to be walking in the door. There
22 aren't any other assigned seats, the foreperson and alternate.
23 Other than that, y'all just sit wherever you want to sit. It
24 doesn't matter.

25 The very first thing we need to do to start the trial is

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COURT TO JURY

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1 for the Clerk's representative to administer your oath, so if
2 you all would please stand at this time.

3 (REPORTER'S NOTE: Jury is duly sworn.)

4 CLERK: If you agree with this statement, please be
5 seated.

6 COURT TO JURY:

7 THE COURT: Is there any member of the jury panel that
8 did not affirmatively take the oath as given by the Clerk? If
9 so, please raise your hand. No juror having raised their
10 hand, I do find the jury properly sworn in this particular
11 matter.

12 As I indicated to you, ladies and gentlemen, the State of
13 South Carolina has charged the Defendant, Keith Sheldon Levan,
14 with the crime of murder. To that charge, the Defendant has
15 pled not guilty. When the State issued the indictment, when
16 the matter was presented to the Court, he has pled not guilty.
17 Before I go any further, remember the indictment, I read that
18 information to you; that's not evidence and can't be
19 considered by you as evidence in the case. That will come
20 from the witnesses who testify under oath and any other type
21 of physical or documentary evidence that comes into this
22 Court. When the Defendant pled not guilty, that put the
23 burden of proof solely and completely on the State of South
24 Carolina to prove the Defendant guilty beyond a reasonable
25 doubt. The Defendant is presumed innocent, the Defendant is

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COURT TO JURY

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1 presumed innocent now. The Defendant is presumed innocent
2 unless and until you, the jury, based upon the evidence you
3 find to be true, find that the State has proved the Defendant
4 guilty beyond a reasonable doubt.

5 You are the judges of the facts of this particular case.
6 That is your job and your responsibility. You will judge the
7 facts of this case to see if the State can prove, if they can,
8 the Defendant guilty beyond a reasonable doubt of the crime
9 charged. It will be your job to evaluate, that is look at all
10 of the evidence, to judge the credibility of the witnesses
11 that come before you, credibility, believability of the
12 witnesses that come before you and testify under oath. You
13 might be thinking right now, how will I judge somebody's
14 credibility or believability. You do it every single day of
15 your life. When somebody tells you something, you are
16 automatically judging in your own mind whether or not you
17 believe them. How do you do that? You use your good common
18 sense, your good judgment that you use in conducting your own
19 affairs. You will do that, you will look at the evidence
20 presented in this matter and determine whether or not the
21 State has proven the Defendant guilty beyond a reasonable
22 doubt. That will be your sole job and responsibility to make
23 that decision.

24 How the case will proceed, when I get done with these
25 brief statements to you, we'll have the opening statements of

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COURT TO JURY

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1 the attorneys. The opening statements is their initial
2 introduction of what they believe is gonna be shown during the
3 course of the trial and maybe a request at the --
4 foreshadowing at the end, what they're gonna be asking you to
5 do as a result of your unanimous verdict, and that's an
6 important part of the case, but it is not evidence. It can't
7 be used as evidence in making your decision in this matter.
8 That evidence comes from the witnesses who come before you and
9 testify under oath. That evidence is any kind of documentary
10 or paper evidence or any other kind of physical type of
11 evidence that might be introduced in this case. That's what
12 you're looking at. That's what you're evaluating when you
13 make your decision; did the State prove the Defendant guilty
14 of the crime charged beyond a reasonable doubt.

15 When we get done with the evidentiary portion of the
16 trial, we'll have the closing arguments of the attorneys.
17 Again, they're important. They're each side's summation to
18 you of what they believe the evidence has shown to you during
19 the course of the trial, remembering of course that you are
20 the judge of the facts, you are the determiner of whether or
21 not the State has proven the Defendant guilty of the crime
22 charged beyond a reasonable doubt.

23 After that, I will give you the charge on the law,
24 explain the law to you and that will be the law that you will
25 use in conjunction with your examination of the facts to

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1 determine whether or not the State has proven the Defendant
2 guilty beyond a reasonable doubt. After that, I will submit
3 the case to you for your deliberations and your unanimous
4 decision in this particular matter.

5 During the course of the trial, the attorneys may raise
6 certain matters to the Court. As I told you, I'm not gonna
7 make any comments on the facts because it's your job to
8 evaluate the evidence and the facts in this matter, but the
9 attorneys may object to something being said or something
10 being shown to you. I will control whether or not that matter
11 is proper for you to see, proper for you to examine, proper
12 for you to use in your determination as to whether or not the
13 State has proved the Defendant guilty beyond a reasonable
14 doubt, but I'm not making any comments on it, just whether it
15 comes in or not, not anybody's credibility or believability
16 and that makes that again being your job and your
17 responsibility.

18 We understand we have asked of you an important task, to
19 make a decision, a unanimous decision, as to the verdict in
20 this matter. I know that you will conscientiously pay
21 attention to the facts and evidence in this matter. I do not
22 expect it to be a long case. Certainly, we'll done by
23 Wednesday at the latest with this particular matter.

24 And with that, I invite your attention to the attorneys
25 regarding their openings statements.

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OPENING STATEMENT BY TERRELL

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1 Solicitor?

2 MR. TERRELL: Thank you, Your Honor. Please the Court?

3 THE COURT: Yes, sir.

4 OPENING STATEMENT BY TERRELL:

5 MR. TERRELL: Tit-for-tat. That's the childish back and
6 forth retaliation that we're all familiar with. That's what
7 brings us into court here this afternoon. Tit-for-tat. When
8 all is said and done, that's what this case is gonna come down
9 to. Now the facts in this case are simple, they're basic and
10 largely undisputed. This Defendant, Keith Levan, shoots and
11 kills Barry Selmon on February 21st, 2015. He takes a high
12 powered rifle, an AR-15, discharges it, literally shoots out
13 his brains and Barry Selmon is dead. As simple as that, those
14 are the facts of the case. They're not disputed, but we're
15 here for a murder trial, which means something is in dispute.
16 What is it?

17 Murder in South Carolina is the killing of another with
18 malice aforethought -- killing of another with malice
19 aforethought. We'll talk about what all that means as we go
20 throughout the trial. But what's it gonna come down to in the
21 end is why. Why did that man at that table kill Barry Selmon
22 that morning? Was it out of self-defense? You'll have to
23 decide. Is shooting a fleeing, unarmed man in the back self-
24 defense? Was it -- was this Defendant so enraged by some
25 piece of news that he had just received that he was acting out

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OPENING STATEMENT BY TERRELL

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1 of some irresistible impulse to do violence, some sudden heat
2 of passion you might hear? Sudden, irresistible, impulsive,
3 think about these words. You know what these words mean.
4 It's like when you're watching a scary movie and somebody
5 jumps out from around the corner when everybody is all tense
6 and your reaction (indicating), automatic. You don't have
7 time to think about it. You don't have time to plan it. It's
8 sudden and it's immediate. You'll have to decide is that what
9 happened in this case. It's not.

10 So, what brings us here? Why? Tit-for-tat. We see it
11 every day. I've got two kids; I see it more than I prefer to
12 care. My kids are over playing, playing with their toys, one
13 of them takes a toy from the other, she takes exception having
14 her toy taken from her, so she goes and takes one of the toys
15 that her sister was playing with and it just -- it's the
16 cycle, it's back and forth. It's just tit-for-tat retaliation
17 in kind. It may be slightly escalated and sometimes it
18 becomes a push, but that's what we're talking about, tit-for-
19 tat.

20 The difference is my daughters are one and two,
21 respectfully. We all hope that we outgrow this tendency for
22 tit-for-tat as we grow up. But, as the facts in this case
23 will show, that wasn't the case for this Defendant in February
24 of 2015. The morning of February 21st, he took tit-for-tat to
25 an entirely different level. Something we don't often see.

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OPENING STATEMENT BY TERRELL

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1 His wife, Penny Hubbard, the co-defendant in this case is not
2 on trial; she'll get her day in court. His wife earlier in
3 February of 2015 had uncovered some extramarital engagements,
4 conversations that she didn't think he should be having. So,
5 what her response to it is, is tit-for-tat. She goes and she
6 finds some extramarital mysteries of her own and she uses the
7 threat of that, if not the actual act, as her revenge, as her
8 ammunition that she dangles in front of this Defendant.

9 That morning it hit a new level and you'll see it all.
10 They had a surveillance system set up in their house. The
11 police were able to recover the surveillance system and you'll
12 see -- you'll see a video showing their living room. You'll
13 see where the computer is, you'll see their coffee table and
14 you'll see their couch. You'll see they had a conversation
15 back and forth. There's a time stamp on it. It's a little
16 after 4 o'clock in the morning. The Defendant walks out of
17 the shot, he comes back in. At one point, he's bringing a
18 hatchet with him. He goes and gets a handgun. He goes and
19 gets an AR-15 and gets spare magazines, extra magazines, and
20 stages it right there on the coffee table.

21 Not once does he lash out at his wife, not once. That's
22 how calm, how cool, how collected this whole planning process
23 is. So, by the time we get to the end and you've seen that,
24 you've seen all that evidence and you've heard everything,
25 you'll be asked to come up with the answer as to why, why

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OPENING STATEMENT BY FILIBERTO

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1 we're here. We'll ask you not to confuse this sudden, sudden
2 heat of passion with revenge, sudden heat of passion. It's
3 passion, it's red, it's immediate, it's right there. Revenge
4 as we've all heard is a dish best served cold. It's methodic,
5 it's planned, it's cold, it's calculated, and that's what
6 you'll see on this video.

7 So, at the end of the trial, after you've heard all the
8 evidence, you've seen the videos, we'll ask you to decide, was
9 it self-defense. We'll ask you to decide that it's not self-
10 defense, that is not an irresistible impulse to do violence,
11 it was simple tit-for-tat vengeance taken to a whole new
12 level. We'll ask you to find that man right there guilty of
13 murder.

14 Thank you.

15 THE COURT: All right, Mr. Filiberto?

16 MR. FILIBERTO: Thank you, Your Honor, if it please the
17 Court?

18 THE COURT: Yes, sir.

19 OPENING STATEMENT BY FILIBERTO:

20 MR. FILIBERTO: Ladies and gentlemen, on behalf of Mr.
21 Levan, I want to thank you for your service in this matter. I
22 have no doubt that jury duty never comes at a convenient time.
23 I would ask you only to honor Judge John's instruction, which
24 is that the evidence will happen from that stand and from the
25 exhibits, not from my arguments, not from the Solicitor's

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OPENING STATEMENT BY FILIBERTO

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1 argument. There are more facts that will be introduced in
2 this trial and I really would ask that you stay very focused
3 and keep an open mind as we go through the trial. I can't ask
4 for any more than that. Use your common sense. That is what
5 Solicitor Terrell talked about, what His Honor talked about,
6 and I would ask very much that you stay focused on that,
7 applying your common sense and your experience in life.

8 Mr. Levan is present here today because the State, the
9 prosecution sees facts in this case differently than we do,
10 and what we need so desperately is for you to sort through
11 those facts for us and help us to resolve that dispute. Many,
12 many times in cases on both sides, we are able to work things
13 out and resolve them. Sometimes, we need to so desperately
14 rely on the good common sense folks like yourselves. We'd ask
15 you to please stay focused and again, honor your oath and
16 please keep an open mind as we go through this trial.

17 I'll get another chance to talk to you in closing
18 arguments, and again I just ask you to honor your oath, keep
19 an open mind and at the end we'll talk again.

20 Thank you.

21 THE COURT: Gentlemen, could y'all come up and talk to
22 me for one second, please?

23 (REPORTER'S NOTE: A bench conference was held off the record
24 in the presence of but out of hearing of the Jury.)

25 THE COURT: All right, Solicitor, if you'd call your

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JAMES KERNS - DIRECT BY TERRELL

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1 first witness, please, sir?

2 MR. TERRELL: Yes, sir. The State calls Justin Kerns.

3 THE COURT: All right, sir, if you'd please come around
4 and meet the Clerk right at the corner there.

5 CLERK: Please raise your right hand and place your left
6 hand on the Bible.

7 JAMES KERNS, HAVING BEEN SWORN

8 TESTIFIES AS FOLLOWS:

9 CLERK: Please be seated. State your full name and spell
10 your last name.

11 MR. KERNS: Detective Corporal James Kerns, K-E-R-N-S,
12 Myrtle Beach Police Department.

13 THE COURT: Go ahead, Solicitor.

14 MR. TERRELL: Thank you, Your Honor.

15 DIRECT EXAMINATION OF JAMES KERNS BY MR. TERRELL:

16 Q: Detective Kerns, how long have you been employed at
17 Myrtle Beach Police Department?

18 A: Thirteen years, sir.

19 Q: How long have you been in your current position?

20 A: As a detective, about a year and a half.

21 Q: Before that, what was your position?

22 A: Before that I was the Nighttime Traffic Supervisor of the
23 Myrtle Beach Traffic Division.

24 Q: And is that what you doing on the morning of February
25 21st, 2015?

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1 A: Yes, sir.

2 Q: Describe the job duties of -- that you had at that time?

3 A: I actually was the Nighttime Traffic Supervisor and Motor
4 Officer, so I oversaw the Motorcycle Division, and also I was
5 the direct supervisor for the Traffic Division at night and
6 also served as a supervisor for any -- for the Patrol Division
7 or waterfront, wherever I was needed.

8 Q: So, your day-to-day duties, what kind of things did that
9 include?

10 A: I would oversee the, the Traffic Unit, oversee motor
11 vehicle collisions, oversee and review reports, respond to any
12 questions that any officers had, respond to any traffic scenes
13 and take charge of the scene and direct or fill in as a road
14 supervisor, if needed.

15 Q: So, the morning of February 21st, in that capacity, did
16 you have an occasion to respond out to the Home Depot in
17 Myrtle Beach?

18 A: Yes, sir, I did.

19 Q: How did that come about?

20 A: We received a call in reference to a motor vehicle
21 collision in the parking lot of the Home Depot, which is
22 located in the City of Myrtle Beach, South Carolina
23 jurisdiction, and it was in reference to a car that was
24 sitting on the median in the parking lot with no one around,
25 the engine was running. An employee was arriving on scene and

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1 called it in, but had not approached the vehicle.

2 Q: And that's in Horry County; is that right?

3 A: Yes, sir.

4 Q: Is it fair to say you're familiar with the area you were
5 called out to?

6 A: Yes, sir.

7 MR. TERRELL: May I approach with what's been marked as
8 State's Exhibit 1?

9 THE COURT: Yes, sir.

10 BY MR. TERRELL:

11 Q: Do you recognize this?

12 A: I do.

13 Q: What do you recognize it as?

14 A: I recognize the Costco parking lot and the Home Depot
15 parking lot, also hhgregg and Oak Forest Lane and Seaboard.

16 Q: Is that a fair and accurate representation of the area
17 this happened in?

18 A: Yes, sir.

19 MR. TERRELL: We'd ask that State's Exhibit 1 be moved
20 into evidence, Your Honor?

21 THE COURT: Any objection?

22 MR. FILIBERTO: Nothing, Your Honor.

23 THE COURT: All right, sir. It's in evidence without
24 objection.

25 STATE'S EXHIBIT NUMBER 1

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1 ADMITTED INTO EVIDENCE

2 BY MR. TERRELL:

3 Q: If you could, show the jury where you were referring to;
4 where is this Home Goods parking lot?

5 THE COURT: If you want him to stand -- do you want him
6 to stand down, come down there?

7 MR. TERRELL: If he could, that might be good.

8 THE COURT: All right. But make sure he stands right
9 next to the microphone right there. All right? Just keep
10 your voice up, sir.

11 A: Yes, sir.

12 BY MR. TERRELL:

13 Q: All right. So where are we talking about?

14 A: Oak Forest Lane right here, hhgregg and then over here is
15 the, the Home Depot Parking Lot. So, it's directly across
16 from each other. And then Costco is right next door.

17 Q: And the accident you were called out to, where, where was
18 the accident when you arrived?

19 A: It was in the parking lot up towards the store in the
20 medians that run in the parking lot of the store.

21 Q: Okay. Very good. Thank you. You may be seated.

22 I show you what's been marked as State's Exhibit 2. Do
23 you recognize this?

24 A: Yes, sir.

25 Q: In general, what is that?

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1 A: That's a map of U.S. 17 Bypass, Pine Island Road,
2 Harrelson Boulevard, 707, the roadway that runs directly from
3 the back gate all the way up to Pine Island where hhgregg and
4 Home Depot, Walmart and all that is.

5 Q: So, this also includes the scene of the accident?

6 A: Yes, sir, it does.

7 MR. TERRELL: We'd ask, Your Honor, that State's Exhibit
8 2 be moved into evidence.

9 THE COURT: Any objection?

10 MR. FILIBERTO: No objection, Your Honor.

11 THE COURT: In evidence without objection.

12 STATE'S EXHIBIT NUMBER 2

13 ADMITTED INTO EVIDENCE

14 BY MR. TERRELL:

15 Q: All right. If you could come down one more time, I
16 promise this is the last time I'm gonna do this to you. All
17 right. For a frame of reference, if you could point out where
18 -- where the same buildings you just showed us are on this
19 map?

20 A: Okay. 17 Bypass runs up through here (indicating) and
21 come to Harrelson Boulevard and then 501 Interchange. Right
22 over here in this area is where the, the accident was.

23 Q: Very good. Thank you so much.

24 And are you familiar with what county this is in?

25 A: Yes, sir, it's in Horry County.

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- 1 Q: Thank you. Did you respond out to the scene that morning
2 with anybody else?
- 3 A: I did, with Patrolman First Class Logan.
- 4 Q: Do you recall who it was that made the call to the
5 accident?
- 6 A: It was an employee of the Home Depot. The employee
7 didn't approach the vehicle, but had called in the collision.
- 8 Q: What did you see when you arrived?
- 9 A: Officer Logan and I both arrived at the same time and
10 when we pulled in the parking lot, we could see where it
11 appeared a vehicle had struck one set of median -- center
12 medians then continued after striking that median through the
13 parking lot you could see debris and then striking and coming
14 to rest on a second median where the vehicle was sitting on
15 partially on the median, engine still running, the windshield
16 wipers on. And our call was initially that no one was around
17 the vehicle when we were dispatched there.
- 18 Q: So, you get there and you see this, what's the first
19 thing that you do?
- 20 A: The first thing I did is I start calling in the
21 information when I pulled in behind the vehicle and then
22 Officer Logan went up to the vehicle to try to see if anyone
23 was in it. While I was calling in the information to
24 dispatch, he advised that there was someone in the vehicle.
- 25 Q: What position was this person in?

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1 A: The person was sitting in the driver's seat, but was
2 slumped over across the passenger seat.

3 Q: Did you notice any injuries?

4 A: Officer Logan, when I'm calling it in, said that someone
5 was in it and that he couldn't find a pulse. So, I
6 immediately exited my vehicle. I went up to the passenger
7 side of the vehicle where he was standing. I could see the
8 person slumped over. He said he couldn't find a pulse on him.
9 He also said he saw what appeared to be brain matter coming
10 out of the right side of the head, which I did also observe
11 myself. So, immediately I could see steam coming out of the
12 person's mouth and Officer Logan asked me if I wanted to do --
13 wanted him to begin CPR or modified compressions based on it
14 was possibly a head injury and so I said go ahead and begin
15 modified CPR compressions. He began the modified compressions
16 while I called dispatch and was updating dispatch to pass on
17 information to EMS.

18 Q: How long did those chest compressions last?

19 A: Approximately, a couple of minutes until the first
20 responder from Myrtle Beach Fire arrived on scene.

21 Q: What -- when he got there, what did he tell you?

22 A: The first responder stated -- and he was a paramedic, he
23 stated that the injuries were non-life sustainable, but when I
24 explained to him what that meant, as he explained that the
25 person was deceased and there was no reason to continue the

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1 chest compressions, but Officer Logan did that until the
2 paramedic did make that determination.

3 Q: So, while he's -- before the paramedic gets there, while
4 he's doing chest compressions, what are you doing?

5 A: I just continually updated dispatch to pass on the
6 information reference to the victim's condition so they could
7 pass that on to EMS as they're responding.

8 Q: At any point, did you try to gain access into the
9 driver's side of the vehicle?

10 A: Yes, sir. Officer Logan asked if I could go around to
11 the driver's side of the vehicle and attempt to turn it off.
12 And when I went up to the driver's side, the door was pinned
13 shut due to the collision damage from striking the medians, so
14 I was unable to get into the driver's side. So, Officer Logan
15 did reach across the passenger side and turn the vehicle
16 ignition off.

17 Q: After, after the first responders came and told you that
18 you could cease doing the CPR, what course of action did you
19 take after that?

20 A: After that, we began trying to determine how the vehicle
21 collision had happened. And at that time, Officer Logan told
22 me to come to the rear of the vehicle, that he observed bullet
23 -- what appeared to be bullet holes. I did go to the back of
24 the vehicle where I observed what appeared to be approximately
25 four bullet holes. The back window was totally shattered out

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1 also. Also, we could see the four flat tires, the rims were
2 bent from the collision damage. And at that time, we did
3 determine that it was not a motor vehicle collision and that
4 it had been some kind of an assault. So at that time, we
5 began securing the scene, and I contacted the Patrol
6 Supervisor and advised him that this was not a motor vehicle
7 collision, that this appeared to be a homicide.

8 Q: So, once, once you made that decision, what does securing
9 the scene do for you?

10 A: Basically what that does is it keeps everybody away from
11 it and it protects the integrity of the scene, which really
12 wasn't a problem based on that time of morning. The only
13 people in the parking lot was us, law enforcement and the fire
14 and EMS personnel. While we're doing that, calling additional
15 resources and other officers came to try to block off the area
16 to make sure people couldn't pull into the parking lot and
17 come down the street. Officer Logan actually advised me that
18 he was gonna try to walk the perimeter and see if he could
19 find any shell casings and find the direction that maybe the
20 vehicle had came. He did notify -- he did advise me that he
21 had located a couple of casings, which he had placed traffic
22 cones next to them to mark their location and secure it.

23 Q: And all of this was part of the secured the scene?

24 A: Yes, sir.

25 Q: About -- I'm sorry. About what time did you respond out

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JAMES KERNS - DIRECT BY TERRELL

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1 to the Home Depot?

2 A: We responded at approximately 04:53 or 4:53 A.M. on
3 February 21st, 2015.

4 Q: And once you set up the scene, you said nobody but law
5 enforcement had access?

6 A: And the EMS personnel that were on scene, yes, sir.

7 Q: Did, did anybody else go near the car?

8 A: No, sir.

9 Q: I'll show you a couple of pictures.

10 MR. FILIBERTO: Your Honor, I have a matter.

11 THE COURT: All right. Very good. Y'all come over here
12 for just a second.

13 (REPORTER'S NOTE: A bench conference was held off the record
14 in the presence of but out of hearing of the Jury.)

15 THE COURT: All right. All right. Come here, both of
16 y'all come here for a second.

17 (REPORTER'S NOTE: A bench conference was held off the record
18 in the presence of but out of hearing of the Jury.)

19 MR. FILIBERTO: Thank you, Your Honor.

20 THE COURT: Very good.

21 BY MR. TERRELL:

22 Q: Detective Kerns, if I could show you a couple of pictures
23 what is State's 3 and 4, could you take a look at those?

24 A: Yes, sir.

25 Q: Do you recognize those?

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1 A: Yes, sir, I do.

2 Q: Does each picture represent the way you found the scene
3 that morning?

4 A: Yes, sir.

5 Q: Are they both fair and accurate representations of what
6 you saw?

7 A: Yes, sir, they are.

8 MR. TERRELL: Your Honor, we ask that at this time
9 Exhibit 3 be moved into evidence.

10 THE COURT: Any objection to State's 3?

11 MR. FILIBERTO: No, Your Honor.

12 THE COURT: All right. So, it's in evidence without
13 objection.

14 STATE'S EXHIBIT NUMBER 3

15 ADMITTED INTO EVIDENCE

16 BY MR. TERRELL:

17 Q: If you'd take a look at that and just explain to the jury
18 what you see in that picture.

19 A: In the photo, I can see the, the deceased sitting in the
20 driver's seat, but slumped across, laying across the driver's
21 seat at an angle.

22 Q: What do you notice, if anything, about the windows?

23 A: They're both up or, actually, all of them are up.

24 Q: You said that when you arrived on scene, the doors were
25 closed as well?

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1 A: Yes, sir, all the doors were closed and the windows were
2 rolled up with the exception of the back glass, which was
3 broken out, shattered out.

4 Q: Turning to what's been marked as State's Exhibit 4, do
5 you recognize that?

6 A: Yes, sir, I do.

7 Q: Can you describe what you see in that picture?

8 A: Yes, sir, the decedent slumped over the passenger seat
9 and I can see what appears to be dried blood on the panel of
10 the passenger front door and also on the dashboard on the
11 passenger side where the glove box is, what appears to be red
12 in color matter; it appears to be blood. Also broken glass on
13 the passenger floorboard to the right by the door what appears
14 to be a red-in-color cooler sitting on the floorboard and
15 blood, what appears to be blood, red in color matter, on the
16 top of the deceased's head.

17 Q: And again, the windows corroborate what you just said?

18 A: Yes, sir, they do.

19 Q: They were up?

20 A: Yes, sir.

21 Q: Do you remember what time that Crime Scene arrived that
22 morning?

23 A: No, sir, I do not.

24 Q: About how long were you out there?

25 A: I was on scene until approximately 06:30 in the morning

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JAMES KERNS - DIRECT BY TERRELL

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1 or 6:30 A.M. on February 21st, 2015.

2 Q: And the crime scene was maintained that entire time?

3 A: Yes, sir, it was.

4 Q: Okay. I have no further questions. Please answer any
5 questions Mr. Filiberto has.

6 THE COURT: Cross examination?

7 MR. FILIBERTO: Nothing from this witness, Your Honor.

8 THE COURT: All right, sir. Very good.

9 You wish the witness to be excused?

10 MR. TERRELL: We do, Your Honor.

11 THE COURT: All right. Any objection to that?

12 MR. FILIBERTO: No objection, Your Honor.

13 THE COURT: All right, sir. You are released from your
14 subpoena and may go back to your regular duties.

15 A: Thank you, Your Honor.

16 THE COURT: Your next witness, Solicitor?

17 MR. TERRELL: The State calls Dr. Edward Proctor.

18 THE COURT: All right, sir, please come around to be
19 sworn, sir, if you'll meet the Clerk right up here at the
20 corner of the witness box.

21 CLERK: Please raise your right hand and place your left
22 hand on the Bible.

23 DR. EDWARD LEROY PROCTOR, JR., HAVING
24 BEEN SWORN TESTIFIES AS FOLLOWS:

25 CLERK: Please state your full name and spell your last.

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EDWARD LEROY PROCTOR - DIRECT BY TERRELL

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1 CLERK: Yes, ma'am. I am Edward Leroy Proctor, Jr. and
2 that's P-R-O-C-T-O-R.

3 THE COURT: Go ahead, Solicitor.

4 MR. TERRELL: Thank you, Your Honor.

5 DIRECT EXAMINATION OF EDWARD LEROY PROCTOR, JR. BY MR.

6 TERRELL:

7 Q: Dr. Proctor, what do you do?

8 A: I am a physician engaged in the practice of pathology.

9 Q: What does that mean?

10 A: Pathology is the study of cause and manner of disease,
11 cause and manner of death. In the area which I work,
12 particularly forensic pathology, which is medical/legal
13 investigation of death.

14 Q: As part of your duties, is one of your job duties to
15 perform autopsies?

16 A: Yes, sir.

17 Q: About how many autopsies have you performed?

18 A: Somewhere in the realm of 4 to 5,000 probably.

19 Q: What, what training does it take to be in your position?

20 A: I am a medical doctor, did a course of training in
21 anatomic and clinical pathology, and then special
22 certification in forensic pathology.

23 MR. FILIBERTO: Your Honor, if it helps, I -- we would
24 stipulate to Dr. Proctor's background as an expert in this
25 matter.

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EDWARD LEROY PROCTOR - DIRECT BY TERRELL

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1 THE COURT: All right. Do you wish to examine him
2 further?

3 MR. TERRELL: We would ask that he be qualified as an
4 expert in the field of forensic pathology, Your Honor.

5 THE COURT: All right. I will qualify Dr. Proctor to
6 testify in the field of forensic pathology, the qualifications
7 having been accepted by the Defense.

8 MR. FILIBERTO: Thank you, Your Honor.

9 BY MR. TERRELL:

10 Q: I'll show you what's been marked as State's 29; can I
11 approach, Your Honor?

12 THE COURT: Yes, sir, please.

13 Q: State's 29. What is that Dr. Proctor?

14 A: State's 29 is a copy of my autopsy examination, which is
15 copies, which I brought also.

16 MR. TERRELL: Your Honor, we'd ask that State's 29 be
17 moved into evidence.

18 THE COURT: Any objection to that?

19 MR. FILIBERTO: No, Your Honor.

20 THE COURT: All right. State's 29 is in evidence without
21 objection.

22 You may proceed.

23 STATE'S EXHIBIT NUMBER 29

24 ADMITTED INTO EVIDENCE

25 BY MR. TERRELL:

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EDWARD LEROY PROCTOR - DIRECT BY TERRELL

1 Q: Dr. Proctor, who is this an autopsy report for?

2 A: This is autopsy that I performed on one Barry Selmon.

3 Q: When did you perform this autopsy?

4 A: This autopsy was performed on the 21st of February, 2015.

5 Q: Do you remember performing that autopsy?

6 A: After review of autopsy, yes, I do.

7 Q: What, what did you note during the autopsy?

8 A: Okay. We -- I received a request to perform this
9 examination from the Deputy Coroner, Tamara Willard, and as
10 part of the autopsy, I did an external examination during
11 which time I noted a significant gunshot wound penetrating the
12 back of the head on the right side with an exit anteriorly
13 above the ear. There were a couple of grazing wounds and a
14 smaller grazing wound inferior and lateral to the main gunshot
15 wound.

16 Q: What is a -- what is a cause of death and what is a
17 manner of death?

18 A: Okay. Well, in this case, the cause of death was the
19 gunshot wound which penetrated the posterior right head
20 causing extensive traumatic injury to the brain. The manner
21 of death in this case is homicide, which by definition in the
22 forensic world is death at the hands of another.

23 Q: And how do you come to that conclusion?

24 A: Well, I came to that conclusion on the basis of this
25 examination, notation of the injury and the clinical

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EDWARD LEROY PROCTOR - DIRECT BY TERRELL

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1 historical information I was given by the coroner and the
2 investigating officers.

3 Q: So it's based on your examination as well as what the
4 detectives told you?

5 A: That's correct.

6 Q: And is part of your evaluation or your autopsy to get
7 bloodwork done on the victim?

8 A: Yes, it is.

9 Q: Did you do that in this case?

10 A: We did.

11 Q: Did that reveal anything in the victim's system?

12 A: A toxicological evaluation was performed and there was no
13 evidence of ethanol or any other drugs, particular drugs of
14 barbiturates, which would be marijuana, cocaine, opiate drugs,
15 benzodiazepine drugs, cocaine.

16 Q: So far as you could tell, he was clean and sober?

17 A: Based upon the testing we did, there were no drugs or
18 alcohol found.

19 Q: You said you were able to determine direction of travel;
20 is that right?

21 A: The, the direction of the projectile was posterior,
22 anterior and sort of a slight angle inferior to superior,
23 entered the back of the right head, just inferior to the ear,
24 exiting the frontal area, just above the ear, some five to ten
25 degrees.

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EDWARD LEROY PROCTOR - DIRECT BY TERRELL

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1 Q: And if you could for me, explain to me how you're able to
2 decide which direction it's going? How do we know it didn't
3 go the other way?

4 A: The trajectory of the bullet is determined by looking at
5 the entry and exit sites. When it penetrates bone, bullet as
6 it passes through bone, it does what we call bevel. In other
7 words, there's a bevel in the direction that the bullet
8 passes. So as a bullet passes through bone, it bevels inward
9 and when it comes out the other side of the bone, it bevels
10 out.

11 Q: With an injury like this to his head, how long would you
12 have expected him to have remained alive with that injury?

13 A: That's a fatal injury, not long at all.

14 Q: Were you able to determine how many other times -- how
15 many other grazing wounds you found?

16 A: There was the entrance wound, there were two grazing
17 wounds in the back; one which had a little piece of metallic
18 stuff in it, which may have been part of a bullet jacket,
19 where -- or part of the bullet as it penetrated and came loose
20 and there was another little wound inferior, up here, under
21 the exit site, which may have been pieces of the projectile as
22 it came apart.

23 Q: So at least four different injuries?

24 A: The main bullet wound here, two grazing wounds here and
25 the back, yeah, that's three, and sort of a grazing wound,

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EDWARD LEROY PROCTOR - CROSS BY FILIBERTO

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1 yes.

2 Q: So to a reasonable degree of medical certainty, what's
3 your -- what conclusion can you come to?

4 A: Based upon this examination and the information I had
5 from investigative authorities and the Coroner's office, the
6 cause of death is a gunshot wound to the head with extensive
7 cerebral or brain trauma, and the manner of death is homicide.

8 Q: Thank you very much.

9 No further questions for this witness, Your Honor.

10 THE COURT: All right. Cross examination?

11 MR. FILIBERTO: Thank you, Your Honor.

12 CROSS EXAMINATION OF DR. EDWARD LEROY PROCTOR, JR. BY MR.

13 FILIBERTO:

14 Q: Dr. Proctor, your testimony is that there was the one
15 gunshot wound that pierced the victim's head behind and then
16 some other grazing wounds. Were you able to scientifically
17 determine if those grazing wounds were potentially -- had to
18 be bullets or could have been something other than bullets?

19 A: The, the only wound that I can definitively tell you was
20 a bullet was the wound to the head. There was a small
21 fragment of metal, which may have been a piece of the bullet
22 that could account for one of the grazing wounds. The other
23 could have been pieces -- I don't know how it came through the
24 vehicle, but as it came through, anything that it hit as a
25 primary target, glass, metal or anything could have caused

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BY THE COURT

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1 that grazing wound.

2 Q: So, it could have been from a broken rear windshield?

3 A: Yes, sir, it could have been.

4 Q: Nothing further. Thank you, Doctor.

5 A: Yes, sir.

6 THE COURT: Any redirect?

7 MR. TERRELL: No, sir, Your Honor.

8 THE COURT: Any objection to the witness being excused?

9 MR. TERRELL: No, sir.

10 MR. FILIBERTO: None from the Defense.

11 THE COURT: All right, Doctor, you are excused and you go
12 back to your regular activities, sir.

13 A: Appreciate it.

14 THE COURT: Yes, sir. Just leave that right there and
15 we'll give it to the Court Reporter. Thank you, sir.

16 A: Yes, sir.

17 BY THE COURT:

18 THE COURT: All right. Gentlemen, come talk to me for
19 just one second.

20 (REPORTER'S NOTE: A bench conference was held off the record
21 in the presence of but out of hearing of the Jury.)

22 THE COURT: All right. Ladies and gentlemen, we're going
23 to stop for the evening. One in recognition of the fact that
24 we're kind of moved you around a little bit today, and also
25 that I recognize, you know, you have lives outside of this

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BY THE COURT

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1 courthouse. So, I want to give you -- I don't want to impinge
2 on that too much. But, I am gonna ask that you be back
3 tomorrow morning -- all right. I want you to back at 9:30. I
4 do have -- I'm -- matters -- I'm Administrative Judge for
5 criminal court, so I have some other duties. I have bond
6 hearing that I have to hear first thing in the morning. I
7 expect to be done with that shortly, but y'all be here at
8 9:30. I know that the Clerk's office will have something for
9 you in the jury room. The Bailiffs will bring you upstairs,
10 you'll enjoy that and by the time you've done that, I expect
11 I'll be done with the bond hearing on a totally unrelated
12 matter, and we will go forward at that point in time with the
13 remainder of the testimony and evidence in this case.

14 Now, I told you at the very beginning when y'all were
15 assembled downstairs. You are not investigators, you are not
16 researchers, you are not to look up anything, you must decide
17 this case solely and completely on the facts and the evidence
18 you hear in this courtroom and from no other source. You may
19 not go to the scene where this is alleged to have occurred
20 without permission of the Court. So, if you've got to go to
21 the Home Depot, you go to some other Home Depot. You go home,
22 you see your husband, wife, boyfriend, girlfriend, person down
23 the street, you cannot talk about this case. You may not
24 allow anyone to talk to you about this case. No one has an
25 opinion about the facts and evidence in this case except you

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1 and then only at the end of the case. I will ask that you do
2 not discuss this matter among yourselves until I give it to
3 you at the very end because I do not want you discussing it
4 until you've heard all of the evidence and you know the law to
5 apply to the facts and evidence you have heard. So don't look
6 at this matter in any way except here in the courtroom and
7 then when I give it to you in the jury room.

8 With that, I'll see you back tomorrow morning at 9:30.
9 Thank you very much.

10 (REPORTER'S NOTE: Jury exits courtroom.)

11 THE COURT: All right, gentlemen, as indicated to the
12 jury, I do have that bond hearing tomorrow morning. We'll --
13 I think it's set for 9:30.

14 All right. So ---

15 MR. HIXSON: We'll be here at 9:15 if not earlier than
16 that, sir.

17 THE COURT: All right, sir. We'll try and start it as
18 soon as we can, hopefully by 9:15 or as soon thereafter as
19 possible. So we'll try and resolve that as soon as we can and
20 then we'll resume this trial.

21 Mr. Levan, remember I'm leaving you out on bond and the
22 terms and conditions of bond with the additional charge to you
23 that I am requiring you to be here tomorrow morning by 9:30.
24 You fail to do so, as I indicated to you earlier, a bench
25 warrant will be issued for your arrest. After this trial is

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1 concluded, I will conduct a contempt of court hearing to see
2 if the Court will hold you in contempt of court, which I could
3 send you to the Department of Corrections for a period of one
4 year for failure to do what the Court told you to do despite
5 the outcome of the trial, whatever that might be. You
6 understand that?

7 MR. LEVAN: Yes, sir, I understand.

8 THE COURT: Very good. All right, gentlemen, tomorrow
9 morning.

10 Thank you very much.

11 MR. FILIBERTO: Thank you, Your Honor.

12 (RECESS.)

13 *****OFF THE RECORD*****

14 END OF DAY ONE.

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1 FEBRUARY 14, 2017 - DAY TWO

2 THE COURT: Counsel, can y'all approach, please?

3 (REPORTER'S NOTE: A bench conference was held off the
4 record.)

5 THE COURT: Ask the jury to come in, please.

6 (REPORTER'S NOTE: Jury enters courtroom.)

7 THE COURT: All right. Ms. Stevens, come down and occupy
8 that seat.

9 We are now proceeding, gentlemen, one of the jurors did
10 not show up. There have been numerous attempts to communicate
11 with that juror. We have no clue where she is or why she is
12 not here therefore substituting in the remaining alternate to
13 take that juror's place.

14 So, Ms. Stevens, you are now one of the regular members
15 of the jury in this case. Thank you, ma'am.

16 All right, Solicitor, is the state ready to proceed?

17 MR. HIXSON: Yes, sir, Your Honor.

18 THE COURT: All right. Call your next witness?

19 MR. HIXSON: The State would call Crime Scene Specialist
20 William Stair with Myrtle Beach Police Department.

21 THE COURT: Very good. Just come around, sir, and meet
22 the Clerk of Court's representative right there at the corner
23 please.

24 CLERK: Please raise your right hand and place your left
25 hand on the Bible.

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WILLIAM STAIR - DIRECT BY HIXSON

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1 WILLIAM STAIR, HAVING BEEN SWORN

2 TESTIFIES AS FOLLOWS:

3 CLERK: State your full name and spell your last?

4 MR. STAIR: William Stair, S-T-A-I-R.

5 THE COURT: Go ahead, sir.

6 DIRECT EXAMINATION OF WILLIAM STAIR BY MR. HIXSON:

7 Q: Good morning, sir, how are you?

8 A: Good.

9 Q: Can you please tell this Court and this jury what you do
10 for a living?

11 A: I'm a Corporal with Myrtle Beach Police Department.

12 Q: In what capacity do you serve Myrtle Beach Police
13 Department?

14 A: At this time, I'm a Corporal on the Nighttime Waterfront
15 Division.

16 Q: Okay. At the time -- let me ask you this, were you
17 working for Myrtle Beach Police Department February 21st of
18 2015?

19 A: Yes, I was.

20 Q: In what capacity were you working then?

21 A: At that time, I was assigned to the Crime Scene Unit.

22 Q: And what did the Crime Scene Unit -- what do you do on
23 the Crime Scene Unit?

24 A: We respond to any calls that we're called out to from
25 murder charges down to break-ins, burglaries, we document the

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WILLIAM STAIR - DIRECT BY HIXSON

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1 scene with photographs, collect any evidence, dust for
2 fingerprints, blood, DNA.

3 Q: Okay. Was this what you were working on the 21st of
4 February?

5 A: Yes, I was.

6 Q: And were you dispatched to the parking lot of Home Depot
7 on Seaboard Street here in Horry County in the City of Myrtle
8 Beach?

9 A: Yes, I was.

10 Q: Tell us about what you saw when you arrived?

11 A: I was called about 5:30 to respond to the scene by the
12 nightshift corporal, Corporal Walker. Upon my arrival, I met
13 with Corporal Walker and Corporal Kerns that advised me of a
14 shooting victim in a vehicle. Saw the vehicle parked in the
15 Home Depot parking lot. It had wrecked up into a curbed
16 island. The victim was still slumped over in the vehicle.
17 They also advised -- Corporal Kerns advised there was casings
18 across the street behind the hhgregg, and there was also
19 additional casings located in the roadway in front of Costco.
20 Q: Okay. So generally in all cases when you get called out,
21 is one of the first things you do, is that called a
22 walkthrough?

23 A: Yes, we typically walk through a scene just to have them
24 show -- initial officers will show us where and what they've
25 observed, and then we will walk through and see what we can

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WILLIAM STAIR - DIRECT BY HIXSON

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1 find and then take photos to document what's there at the time
2 when we arrive.

3 Q: And also could you explain the process of kind of working
4 a crime scene from the outside in and what that means to the
5 jury?

6 A: Well, we'll start on a wide perimeter around the area.
7 In this case we started exterior of all the parking lots, take
8 photos, walk through, as we basically walk furthest out just
9 to see if there's any evidence that could eventually be missed
10 that's out far away. In that case we found casings out in the
11 roadway that were actually further away from the scene, then
12 we work our way all the way back in to where the vehicle was
13 located.

14 Q: Okay. Let me show you a orienting shot. This is State's
15 1. I believe that's already been put into evidence. Let me
16 see if you recognize this. Let's get this where the Court
17 can see it and where the jury can see it.

18 THE COURT: That's all right.

19 Q: May I ask the witness to stand up?

20 THE COURT: Yes, sir.

21 Q: That green button is a laser -- green laser pointer.

22 Now, you been working in Myrtle Beach for a while, right?

23 A: Yes.

24 Q: So, you generally recognize this has already been
25 identified and in evidence as the Walmart, Home Depot,

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WILLIAM STAIR - DIRECT BY HIXSON

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1 hhgregg. Can you orient that for the jury?

2 A: Yes. The vehicle was located on the island right about
3 here and we located shell casings behind hhgregg, in the
4 loading dock right about there (indicating), as well as
5 additional casings over here at the entrance to the Costco.

6 Q: Okay. Let me show a couple of photographs. I tell you
7 the easiest way to do it, can you take a look at that briefly,
8 just look at all those and see if you recognize all those.
9 Let me ask you this, just briefly, not to talk about it and
10 just go quickly.

11 A: Okay.

12 Q: Did you take a substantial number of crime scene
13 photographs when you were down at that location?

14 A: Yes, I did.

15 Q: And you were personally familiar with that scene as you
16 observed it on the early morning hours of February 21st, 2015?

17 A: Yes, sir.

18 Q: I'm just gonna ask if you recognize all those items and
19 if all those are fair and accurate representation of the scene
20 that you saw that morning?

21 A: Yes, these are the photos I took that morning.

22 Q: Thank you. You can stay there just for a second.

23 A: Okay.

24 Q: You want to take another look at these?

25 MR. HIXSON: Your Honor, I would indicate to the Court

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WILLIAM STAIR - DIRECT BY HIXSON

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1 that I had previously shown these before court started to Mr.
2 Filiberto.

3 THE COURT: Okay.

4 BY MR. HIXSON:

5 Q: Please don't get them out of order.

6 A: Oh, I'm sorry.

7 MR. HIXSON: He indicated no objection to it and see if
8 that still stands.

9 THE COURT: All right. Can you tell me the numbers,
10 please?

11 MR. HIXSON: I will, Your Honor. Your Honor, I'm
12 referring to State's 5, State's 6, State's 7, State's 8,
13 State's 9, State's 10, State's 11, 12, 13, 14, 20, 21, 22, 23,
14 24, 25, 26, 27, and finally 28, Your Honor.

15 THE COURT: All right. So any objection to State's 5
16 through 14 or 20 through 28?

17 MR. FILIBERTO: Actually, Your Honor, when you get to
18 that last one, I haven't saw that one.

19 THE COURT: All right, sir. Make sure you've seen them
20 all then, please.

21 MR. FILIBERTO: Your Honor, without objection, with
22 everyone except for Exhibit 28.

23 THE COURT: All right. Up to 28. All right. So, 20 --
24 5 through 14 and 20 through 27 are in evidence without
25 objection. Let me see State's 28, please.

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WILLIAM STAIR - DIRECT BY HIXSON

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1 MR. HIXSON: Your Honor, I'll hold 28 out and have
2 arguments on it after.

3 THE COURT: All right. All right. That's very good.
4 All right. Very good.

5 STATE'S EXHIBITS NUMBERS 5 THROUGH 14 AND 20 THROUGH 27

6 ADMITTED INTO EVIDENCE

7 STATE'S EXHIBIT NUMBER TWENTY-EIGHT

8 MARKED FOR IDENTIFICATION

9 BY MR. HIXSON:

10 Q: All right. Your Honor, at this time, I'm showing what's
11 been marked as State's 5. Do you recognize that?

12 A: Yes, I do.

13 Q: And what is that?

14 A: That would be the loading dock area directly behind
15 hhgregg.

16 MR. HIXSON: All right. At this time, I'd like to
17 publish State's 5, Your Honor?

18 THE COURT: Not a problem.

19 MR. HIXSON: And that's photo number 3, please.

20 THE COURT: You may do so.

21 BY MR. HIXSON:

22 Q: It's a little bit of distance, but can you describe for
23 the jury what we're looking at?

24 A: It's standing directly behind the loading dock and aimed
25 in the direction of the Home Depot. The three traffic cones

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WILLIAM STAIR - DIRECT BY HIXSON

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1 you see at a distance, patrol placed those things to where the
2 casings are located.

3 COURT REPORTER: Can you go back to the witness stand.

4 MR. HIXSON: Yes, indeed.

5 BY MR. HIXSON:

6 Q: And if you can, if you use that corner, it's a little
7 further to see than I thought and a little harder, but
8 nonetheless, can you orient that photograph for us?

9 A: It's ---

10 Q: Okay. So you see the orange traffic cones?

11 A: Yeah, the three orange traffic cones are the three that
12 were placed by responding officers next to the casings.

13 Q: Okay. Just for now so we can orient this so we
14 understand, where on this would that picture be located, what
15 vantage point from there would that picture be located on
16 those?

17 A: At the loading dock right here (indicating), pointed in
18 the direction of Oak Forest Lane and Home Depot.

19 Q: Can y'all see that? So the witness pointed this
20 direction (indicating). I'm gonna set this right here so the
21 jury can see it. And what of significance did you recover
22 with those orange cones? And I'll show you State's Exhibit
23 6; do you recognize that?

24 A: Yes.

25 MR. HIXSON: May we publish 6, Your Honor?

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1 THE COURT: Yes, you may do so.

2 BY MR. HIXSON:

3 Q: That's photo 4. Okay. What's that?

4 A: Those would be the three casings. They are three
5 Remington .22 caliber casings.

6 Q: Those are the locations of shell casings you found?

7 A: Yes, sir, there's one next to each cone and I placed
8 photo evidence marker numbers 1, 2 and 3 next to the three
9 casings.

10 Q: Okay. Was there any other evidentiary significance, any
11 other artifacts or anything of what happened there?

12 A: Just beyond the cones in the picture is a large field of
13 broken glass. It extends right at the beginning of the
14 casings and goes down, trails all the way out to Forest Lane.

15 Q: Okay. Could you -- using the pointer, can you show on
16 that photograph with that green pointer where -- you can't
17 able to see it when it's on the screen, can you?

18 A: No.

19 Q: Yeah, it just disappears. All right. Well, where on the
20 photograph, can you point to that for the jury's purposes?

21 A: Directly behind these last two cones, extending to the
22 right and all the way down to the roadway.

23 Q: Pointed in this location? I'm gonna show you what's
24 State's 7, 8 and 9.

25 These are in evidence, Your Honor. May we publish these?

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1 THE COURT: Yes, sir, you may.

2 BY MR. HIXSON:

3 Q: These are 5, 6 and 7, can you describe what that is?

4 A: Those are close-up shots of the three spent casings that

5 are all Remington .223 caliber. It's each one -- I put photo

6 markers 1, 2 and 3 next to them as well as the cones.

7 Q: What's the next photograph?

8 A: Photos 1, 2 and 3 are the casings.

9 Q: I apologize. Thank you. And so that's Marker Number 2

10 and what's the next marker?

11 A: Marker Number 3.

12 Q: There we go. Now, did you in fact collect those casings?

13 A: I collected all three of the casings.

14 Q: Thank you. Let me show you three items that which have

15 been marked as State's 15, 16 and 17; take a look at those and

16 see if you recognize what those are?

17 A: Okay. These would be the three corresponding casings

18 marked for evidence markers 1, 2 and 3.

19 Q: Okay. So those are the actual ones that you recovered

20 from the parking lot at hhgregg on February 21st of 2015?

21 A: Yes, they are.

22 Q: And what did you do with them after you collected them?

23 A: After I collected them, I placed them in a box, put

24 evidence tape, sealed, and they were stored in our Property

25 and Evidence Department.

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1 Q: Okay. Can you explain to the jury what a head stamp is
2 on the back of a metallic cartridge case?

3 A: The head stamp is a unique area where the manufacturer
4 places the caliber, their brand name, and also when the firing
5 pin strikes it, it makes a unique mark on it.

6 Q: Did you in fact review the head stamp on these cartridge
7 casings?

8 A: Yes, I did.

9 Q: Would a manufacturer all have the same indicators so you
10 would know they all came from one source, the head stamp?

11 A: Yes.

12 Q: Well, did these all match?

13 A: These all matched.

14 Q: And what was the head stamp on there?

15 A: It was a Remington, it was R.P .223 caliber.

16 Q: Okay. Thank you.

17 MR. HIXSON: At this time, I'd move State's 15, 16, and
18 17 into evidence?

19 THE COURT: Any objection to that?

20 MR. FILIBERTO: Without objection.

21 THE COURT: All right, sir. 15, 16, and 17 are in
22 evidence without objection.

23 STATE'S EXHIBITS NUMBERS 15, 16, AND 17

24 ADMITTED INTO EVIDENCE

25 BY MR. HIXSON:

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1 Q: Let's continue on. You indicated a trail of glass
2 starting where the traffic cones were headed towards hhgregg;
3 is that correct?

4 A: Ending to Forest Lane.

5 Q: Home Depot, excuse me, I apologize. Let me show you
6 State's 10.

7 A: This would be a photograph of the, at the end of the
8 hhgregg loading dock area and the entrance to Oak Forest Lane
9 and Home Depot across the street.

10 MR. HIXSON: And that's -- may I publish that, Your
11 Honor.

12 THE COURT: Yes, you may.

13 BY MR. HIXSON:

14 Q: That's 8, please. That's an accurate -- that's what
15 you're looking, same thing?

16 A: Yes, it is.

17 Q: And of course you see the stop sign, stop barrier line
18 right there?

19 A: Yes.

20 Q: Is there anything towards Home Depot you can start to see
21 at this point in time?

22 A: You can see an area that's been disturbed in the grass
23 next to the stop sign where the vehicle had jumped the curb,
24 run across and came to rest in the distance in Home Depot's
25 parking lot.

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1 Q: Let me show the same picture.

2 COURT REPORTER: Can you both speak out, please?

3 MR. HIXSON: Yes.

4 BY MR. HIXSON:

5 Q: Let me show you State's 11.

6 MR. HIXSON: May I publish this, Your Honor?

7 THE COURT: Yes, sir, you may.

8 BY MR. HIXSON:

9 Q: Is that the same photograph you're looking at that's on
10 the screen?

11 A: Yes, it is.

12 Q: Okay. What are we looking at there, sir?

13 A: This would be the same intersection as the last
14 photograph at Oak Forest Lane at the entrance/exit to the back
15 of hhgregg pointed down Oak Forest Lane in a southwesterly
16 direction towards the entrance to Costco. There's cones in
17 the roadway there at the entrance next to the police cruiser.
18 That's where two more casings have been located.

19 Q: And I'm gonna show you State's 12 and can you describe
20 that?

21 MR. HIXSON: Your Honor, this is evidence also, can we
22 publish State's 10?

23 THE COURT: Yes, sir; you may.

24 BY MR. HIXSON:

25 Q: That's 10?

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1 A: This photograph would be a close-up of the -- or closer
2 view of the two casings that are in front of the Costco
3 parking lot.

4 Q: Okay. So, what we're seeing on the screen is a close-up
5 of what we see in the background of this photograph?

6 A: That's correct, with the cones, the cruiser, and there's
7 photo Evidence Markers 6 and 7 next to each of the casings.

8 Q: Okay. And if we can orient where those cones are on this
9 map. I believe this pointer will actually work on this one.
10 Can you show the jury on the overview map where that road
11 leads, where those casings were recovered. I'll hold this for
12 you. Now, point to what we've been talking about. Okay? So
13 this is hhgregg. You testified earlier that this is where the
14 shell casings were found?

15 A: Correct. The casings -- the original casings in the
16 photos and Markers 1, 2, and 3 were right here; 6 and 7 on the
17 photo on the screen is located right here at the entrance to
18 the Costco parking lot.

19 Q: Okay. So this Oak Forest Lane heading towards Socastee,
20 basically?

21 A: This is Oak Forest Lane heading in the direction of Pine
22 Island Road and Coastal Grande Mall and then heading south
23 towards Socastee.

24 Q: Okay. So 6 and 7 -- 1, 2, 3 were here and 6 and 7 are
25 here; is that right?

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1 A: That is correct.

2 Q: Can you take a look at that photograph you have in front
3 of you that has marker 6 on it and describe that to the jury?

4 A: This would a close-up view of the .223 caliber casing,
5 also Remington, that was Photo Marker 6 directly in front of
6 Costco.

7 MR. HIXSON: Your Honor, that's the same photograph we're
8 looking at on the screen, Your Honor. May I publish it?

9 THE COURT: Yes, sir; you may.

10 BY MR. HIXSON:

11 Q: This is the same photograph that's on the screen. Now,
12 what is that? I think you identified it, I apologize.

13 A: It's a Remington .223 caliber casing.

14 Q: Did you collect that?

15 A: It was actually collected by Crime Scene Officer Madison.

16 Q: Okay.

17 A: And then turned over to my possession.

18 Q: Okay. Let me show you what's been marked as State's
19 Exhibit 14 and that is Slide 12.

20 May I publish that, Your Honor?

21 THE COURT: Yes, sir.

22 A: That was the additional casing in the roadway next to
23 Marker 6 in front of Costco.

24 Q: And that was collected -- you took it into evidence; is
25 that correct?

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1 A: That is correct.

2 Q: You indicated that -- well, let me just do it this way.
3 Let me show you what's been marked as State's 18 and 19. Take
4 a look at those and tell me what those are?

5 A: It would be the two Remington .223 caliber casings that
6 were located in front of Costco.

7 Q: All right. Have you checked the hand stamps on those
8 casings as well?

9 A: They were also the same as the previous three, the
10 Remington seal with .223 caliber.

11 MR. HIXSON: Your Honor, at this time, we'd move State's
12 18 and 19 into evidence?

13 THE COURT: Any objection?

14 MR. FILIBERTO: No, Your Honor.

15 THE COURT: They're in evidence without objection.

16 STATE'S EXHIBITS NUMBERS 18 AND 19

17 ADMITTED INTO EVIDENCE

18 MR. HIXSON: Thank you, Your Honor.

19 BY MR. HIXSON:

20 Q: All right. Let's move on towards Home Depot. Take a
21 look at State's 20, and that is Slide 13.

22 May I publish that, Your Honor?

23 THE COURT: Yes, sir.

24 Q: 13, please, sir. What is that looking at?

25 A: This would be the entrance to the Home Depot from Oak

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1 Forest Lane directly across from hhgregg. It's the area where
2 the victim's vehicle traveled over the curb -- that's the
3 damage to the grass through the mulch -- and proceeded through
4 the curbed island in the parking lot in the middle of the
5 photograph before coming to rest in the background of the
6 photograph at another curbed island.

7 Q: All right. So, you see the area around the curb where
8 the vehicle struck the curb towards the contractor entrance,
9 just to the left of that bush. There's a vehicle back there.
10 Is that the -- is that the victim's vehicle?

11 A: Yes, it is.

12 Q: Okay. Let me show you State's 21. That is Slide 14.
13 Your Honor, may I publish that?

14 THE COURT: Yes, sir.

15 Q: And describe that also to the jury, please?

16 A: That would be the photograph of the first curb island in
17 the parking lot that the vehicle traveled over uprooting the
18 tree before heading to the second island.

19 Q: State's 22, and that's slide 15.
20 May I publish, Your Honor?

21 THE COURT: Yes, sir.

22 Q: Please describe that also?

23 A: That would be a photograph taken from standing at the
24 first curbed island showing the trail mark through the parking
25 lot as well as some debris from the car before it came to

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1 rest.

2 Q: So those are drag marks that we see the -- it appears he
3 drove through the planted median and ---

4 A: Yes, that would be the landscaping plus the damage that
5 was caused going over the curb, causing parts of the vehicle
6 to drag on pavement.

7 Q: Take a look at State's 23, and that's slide 16. Do you
8 recognize that, that's already in evidence, I believe?

9 A: Yes, I do.

10 Q: May I publish that, Your Honor?

11 THE COURT: Yes, sir.

12 Q: Describe that for us, please?

13 A: That would be a shot from the rear of the victim's
14 vehicle as it was at rest at the second curbed median directly
15 in front of the contractor entrance to Home Depot.

16 Q: Okay. Do you start to see of any significance, any
17 findings of significance on the rear trunk -- obviously, we
18 can see it. Describe the rear window and the rear truck lid
19 and spoiler and deck of that vehicle, please.

20 A: The rear of the vehicle, the rear window had been
21 shattered. I located nine impact marks from bullets on the
22 bumper, trunk, and the spoiler of the vehicle.

23 Q: Did you see on the driver's side window appears to be up
24 in that photograph, gapped open?

25 A: The driver's side window is, correct, approximately about

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1 one inch.

2 Q: The passenger side door, the window is up?

3 A: It is up.

4 Q: Let me show this to the jury so they know that we're
5 talking about the same photographs we're seeing on the screen.
6 What's that yellow stuff that you see all in the background
7 and all the way around that yellow tape?

8 A: That would be the crime scene tape that was put up to
9 secure the scene by the responding officers.

10 Q: Okay. And what's the purpose of the crime scene tape
11 surrounding this big scene?

12 A: To keep any -- as was getting ready to open a different
13 business, all the stores in there, they placed the crime scene
14 tape up to give the employees and as well as customers and
15 anyone else from entering the scene other than police and fire
16 personnel.

17 Q: Okay. So, is it safe to say the crime scene keeps folks
18 that aren't supposed to go in, out, and it keeps the evidence
19 in there?

20 A: That's correct; yes.

21 Q: Let me show you State's 24 that is in evidence and it is
22 Slide 17.

23 May we publish that, Your Honor?

24 THE COURT: Yes, sir.

25 Q: Is that the same as we're looking at on the screen?

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1 A: Yes, it is.

2 Q: Can you describe that in more detail for the jury,
3 please?

4 A: That would be a close-up shot of the back of the victim's
5 Dodge Neon to show the tag number as well as the bullet marks
6 in the trunk and the bumper, which in this picture shows 8 of
7 the 9 impact marks, two next to -- two right next to the tag,
8 there are three in the back of the bumper -- correction --
9 back of trunk and there are also three up on the -- above the
10 trunk and the spoiler.

11 Q: Let me show you what's been marked as State's 25. And
12 that is Slide 18, Mr. Terrell.

13 May I publish that, Your Honor.

14 THE COURT: Yes, sir.

15 Q: Can you please describe -- is that the same photograph as
16 you look on the screen?

17 A: Yes, it is.

18 Q: Can you describe that in a little more detail?

19 A: That would be a shot of the top of the trunk and the back
20 window, which has been broken out. There is -- you'll see two
21 impact marks on the top of the trunk as well as marks on the
22 base right behind -- I guess the felt covering just in --
23 behind the back headrest where it looks like at least two
24 possibly three rounds have traveled through the window at the
25 base of the window and entering the vehicle.

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1 Q: I notice that there looks like there's a Kirkland pizza
2 box in that. Did you a search of that vehicle?

3 A: I searched the vehicle back in our crime lab. The boxes
4 in the backseat had bullet holes through them. We located in
5 the backseat, two bullet fragments as well as one bullet that
6 went down into those boxes damages all of the items inside
7 before coming to rest.

8 Q: Okay. So let me understand this. So, you take a cursory
9 look, an initial search of the vehicle while it's on location;
10 is that safe to say?

11 A: Yes.

12 Q: And then you transport the vehicle to a different
13 location?

14 A: Yes, once the scene has been secured and we've done our
15 photographs, collected what we can, we then take the vehicle,
16 have it towed and escorted by an officer back to our crime lab
17 at our office where it's parked in a secure bay and we can do
18 a longer search of the vehicle in a more controlled area. As
19 of this day, it actually became a weather -- it started
20 raining so we had to get in there so we'd have a controlled
21 environment.

22 Q: Okay. And so that search, this search involves a
23 substantial interior search of the vehicle that's conducted at
24 Myrtle Beach Police Department?

25 A: Yes.

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1 Q: Was there a gun found in that car?

2 A: No weapons were found in the vehicle.

3 Q: Was there a fired shell casing recovered in that vehicle?

4 A: No casings were found.

5 Q: Was there anything that be confused in looking like a
6 handgun in that vehicle?

7 A: No, sir.

8 Q: Let me show you what's been marked as State's 26 into
9 evidence. That is Slide 19. Can you describe that? Is that
10 the same slide and photograph you're looking at?

11 A: Yes, it is.

12 Q: Describe that for the jury. Officer, what are you
13 looking at?

14 A: That would be a picture of the rear trunk of the Dodge.
15 It's on the passenger side. It's showing the broken window
16 and another shot of the two impact marks; one on the spoiler
17 and one just to the right of the trunk as well as an
18 additional one in the trunk above the neon sign.

19 Q: So let's -- I'm gonna point or draw your attention to the
20 grazing mark on the spoiler right there. So, that doesn't go
21 through the spoiler, that's just on the passenger side graze
22 on that spoiler?

23 A: It appears to be -- it appears to be deflection through
24 the back window.

25 Q: And of course it penetrated from that, so it doesn't go

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1 through the spoiler, so the firing position on that spoiler
2 couldn't be from the driver's side; it has to be from the
3 passenger side. Is that safe to say?

4 A: Yes.

5 Q: Thank you. And finally let me show you what's been
6 marked as State's 27. That's in evidence and that is Slide
7 20, I believe. There's two numbers on here; let me make sure
8 that's -- that's right.

9 Can you rotate that, sir? I'm sorry, I'll just use this
10 if you can. I'll just this, Tom, don't worry about it.

11 Can you describe that for me?

12 A: That is a front view of the vehicle as it's parked on the
13 curb showing the -- resting right in front of a tree with both
14 the doors open.

15 Q: Okay. Can you -- what's behind that? Can you see the
16 path that the car went?

17 A: In the far distance, you see a stop sign; that was where
18 the initial -- where it -- the location where it jumped the
19 curb and just behind that at the back of another stop sign,
20 that is the back loading dock area of hhgregg.

21 Q: Okay. I apologize. I was trying to put the screen so
22 the jury could see both of them. So can you describe that
23 again, you can see the pathway that the car came from?

24 A: Yes, the island directly behind it with the streetlight.
25 That is the first island where it took out that tree.

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1 Q: Uh-huh (affirmative response).

2 A: Behind that is a stop sign, that's the one where it went
3 over the curb at the entrance to Home Depot.

4 Q: Okay.

5 A: And the back of the stop sign, the white sign behind that
6 stop sign, is the entrance to hhgregg.

7 Q: Now, did you find any exit -- exit holes in the front
8 windshield?

9 A: There is damage to the windshield directly in front of
10 the driver. It's showing up a few inches down from the roof
11 of the vehicle.

12 Q: Since the pointer doesn't work, I'm gonna try to this.
13 Is it in this location?

14 A: Yes, it is.

15 Q: That's a wound -- that's an exit from coming from a --
16 coming through the front windshield?

17 A: That was a -- it came through the back of the vehicle,
18 struck the windshield, it did not pierce it, it just hit it,
19 beveled the windshield out and apparently dropped down in and
20 went into under the hood somewhere. That round was never
21 located though.

22 Q: Is there any way of knowing if that went through the
23 victim's head?

24 A: No, the -- although it's directly in front of where the
25 headrest is.

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1 Q: So, we have not recovered a bullet from that hit in the
2 front windshield, not that you're aware of?

3 A: Not that I'm aware of. It dropped -- it was not located
4 in the vehicle. Based on where it hit the windshield, it
5 would have dropped into the dash, down to the either engine
6 compartment or dash compartment. It was not found on our
7 search of the vehicle without taking the entire vehicle apart.

8 Q: Were bullet fragments and shards of bullet found in that
9 vehicle?

10 A: We found two fragmented bullets and two small pieces of
11 bullets in the back of the vehicle.

12 Q: So, those pieces may be, we just don't know. Is that
13 safe to say?

14 A: Yes, due to going through the metal in the vehicle as
15 well as all the items in the backseat of the vehicle, the
16 bullets apparently fragmented.

17 MR. HIXSON: I beg the Court's indulgence for a moment,
18 Your Honor.

19 THE COURT: Yes, sir.

20 BY MR. HIXSON:

21 Q: Let me just reiterate a couple of points to you. The ---
22 when you arrived, that crime scene was secure; is that right?
23 In other words, law enforcement had already been on scene and
24 waiting for you to process the scene; is that safe to say?

25 A: Yes, sir, when I arrived there was still numerous law

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1 enforcement officers in there, in the scene, as well as the
2 crime scene tape wrapped around the entire parking lot as well
3 as across the street at hhgregg and at Costco.

4 Q: Okay. And I just want to reiterate, there's no firearms
5 or spent -- fired shell casings, any instrumentality recovered
6 in that vehicle; is that safe to say?

7 A: That is correct.

8 MR. HIXSON: No further questions, Your Honor?

9 THE COURT: Cross examination?

10 MR. FILIBERTO: Thank you, Your Honor.

11 CROSS EXAMINATION OF WILLIAM STAIR BY MR. FILIBERTO:

12 Q: Officer Stair, just a couple of questions. When you
13 inventoried the vehicle that Mr. Selmon was found in, did you
14 find any ammunition consistent with something other than the
15 shell casings you found?

16 A: Just there was unfired .9 millimeter ammunition in the
17 bottom of the center console.

18 Q: Okay. And were you the officer that went through Mr.
19 Selmon's wallet to help identify him?

20 A: Yes, I was.

21 Q: Okay. And in his wallet, you found a concealed weapons
22 permit?

23 A: Yes, I found his license as well as a concealed weapons
24 permit that expired in 2013.

25 Q: Okay. And again there was no physical evidence that Mr.

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WILLIAM STAIR - REDIRECT BY HIXSON

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1 Levan was ever in that vehicle; is that correct?

2 A: No.

3 Q: Nothing further. Thank you.

4 THE COURT: Anything on those questions?

5 MR. HIXSON: Yes, please, just for clarification.

6 REDIRECT EXAMINATION OF WILLIAM STAIR BY MR. HIXSON:

7 Q: In the bottom of the console, the .9 millimeter live
8 rounds you recovered were unfired rounds. They had never been
9 fired; is that right?

10 A: That is correct.

11 Q: And there's no gun for those to go in in the center
12 console, either?

13 A: That is correct; no guns were located.

14 Q: No further questions.

15 THE COURT: Anything else?

16 MR. FILIBERTO: Nothing, Your Honor.

17 THE COURT: All right, sir. Do you wish the witness to
18 be excused?

19 MR. HIXSON: Yes, sir.

20 THE COURT: Any objection?

21 MR. FILIBERTO: No objection.

22 THE COURT: All right, sir, you are released from your
23 subpoena and you may go back to your regular duties.

24 A: Thank you, sir.

25 THE COURT: All right, Solicitor, your next witness,

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1 please?

2 MR. HIXSON: Justin Vasquez from the Myrtle Beach Police
3 Department, sir.

4 THE COURT: All right, sir. If you'd come around and be
5 sworn. Meet the Clerk right here at the corner, please.

6 CLERK: Please raise your right hand and place your left
7 hand on the Bible.

8 JUSTIN VASQUEZ, HAVING BEEN SWORN
9 TESTIFIES AS FOLLOWS:

10 MR. HIXSON: Your Honor, may we approach on one quick
11 matter?

12 THE COURT: Yes, sir.

13 (REPORTER'S NOTE: A bench conference was held off the record
14 in the presence of but out of hearing of the Jury.)

15 MR. HIXSON: May I proceed, Your Honor?

16 THE COURT: Yes, sir, you may.

17 DIRECT EXAMINATION OF JUSTIN VASQUEZ BY MR. HIXSON:

18 Q: Good morning, sir. How are you?

19 A: Doing good.

20 Q: Tell us what you do for a living.

21 A: I'm a Patrol Officer for Myrtle Beach Police Department.

22 Q: Okay. And in that -- how long have you been involved in
23 that occupation?

24 A: Approximately, three years now.

25 Q: Okay. And so I guess you were working for the Myrtle

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1 Beach Police Department back February 21st, 2015?

2 A: Fright. Yes, I was.

3 Q: And what were your duties around the afternoon of the
4 21st?

5 A: I was a Patrol Officer for the Patrol Division.

6 Q: Okay. And what -- did you have an occasion to go to the
7 Home Depot parking lot on February 21st of 2015?

8 A: Right. Yes, I did.

9 Q: Tell us about that. What was your role there?

10 A: I was doing the crime scene log, which I had to place any
11 officers or anybody that goes into that crime scene. It's
12 just police officers and/or medical personnel.

13 Q: Okay. So, your role is basically to make sure that you
14 knew who came in and came out and that people who aren't
15 supposed to be in aren't in there and that the evidence that's
16 in there doesn't get out; is that safe to say?

17 A: Yes, sir.

18 Q: Okay. At some point, were you relieved of those
19 obligations and you back to the 10th Avenue, the main police
20 department?

21 A: Yes, sir, I did.

22 Q: Okay. And while you were there, did Penny Hubbard and
23 Keith Levan drive into the parking lot and come to the police
24 station?

25 A: Yes, sir, they did.

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1 Q: Are you aware of who was driving the vehicle and what
2 vehicle they were driving when they pulled in?

3 A: Yes, sir, it was.

4 Q: What's that?

5 A: It was Ms. Penny Hubbard and it was a Volvo, I believe.

6 Q: Okay. A black-in-color Volvo?

7 A: Yes, sir.

8 Q: Okay. Well, when did you come in contact with Mr. Levan
9 and Ms. Hubbard?

10 A: I came in contact with them when she came in for a public
11 assistance call, it was a harassment call, which we go to the
12 work bay to deal with any walk-in calls that we get during and
13 throughout the day.

14 Q: Okay. Just describe that in more detail. So, if a
15 private citizen has a problem or something or if they want to
16 come to the police department, how would -- what would they
17 do, how would they go about doing that?

18 A: They would come into the service desk, state their
19 complaint and we'd get all of their information, whether it be
20 harassment, assault, anything like that and we would come to
21 our work bay, which we do all our paperwork, and do the
22 statements for any of the victims of possible crimes that were
23 committed.

24 Q: Okay. So, did you know that Mr. Levan and Ms. Hubbard
25 were coming -- were gonna drive down to the police station

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- 1 that afternoon?
- 2 A: No, sir; I did not.
- 3 Q: Okay. You did know about the shooting early in the
4 morning because you were there, right?
- 5 A: Yes, sir; I did.
- 6 Q: Let me ask you this, at this time, as far as Myrtle Beach
7 Police Department was concerned, were they working an active
8 suspect, were they working any leads? Do you know where the
9 status of that investigation was?
- 10 A: No, sir; I did not.
- 11 Q: Okay. So, when you came in contact with Mr. Levan, tell
12 us about that a little bit more. They came in and what
13 happened then?
- 14 A: They came in and spoke to one of our officers that was on
15 scene, went to the work bay and started discussing about a
16 harassment that they were dealing with.
- 17 Q: Were you standing by to assist him during this complaint?
- 18 A: Yes, sir; I was.
- 19 Q: Okay. Was Myrtle Beach Police Department equipped with
20 body cameras?
- 21 A: Yes, sir; we are.
- 22 Q: Were you equipped with a body camera at that time?
- 23 A: Yes, sir; I was.
- 24 Q: Was the officer also, Mr. Chad Paul, was he equipped with
25 a body camera?

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1 A: Yes, sir; he was.

2 Q: Okay. Now, I guess briefly describe -- the jury doesn't
3 know what a body camera is. Please describe what that is.

4 A: Body camera is what we wear during any call, we activate
5 it just so we can have audio and visual of our, I guess, our
6 contact with the victim and/or offender.

7 Q: Are you wearing one right now?

8 A: Yes, sir, I am.

9 Q: Will you show the jury what you're wearing? Are we being
10 recorded right now?

11 A: No, sir; you're not.

12 Q: All right. Good. Okay. So, all you do is flip that on
13 and the audio and video transfer in real time if you have it
14 on; is that safe to say?

15 A: Yes, sir.

16 Q: Okay. Was your body cam working on February 21st, 2015
17 at the work bay of the Myrtle Beach Police Department?

18 A: Yes, sir, it was

19 Q: Okay. And during that time, did Mr. Levan make any
20 incriminating statements or any statements relating to the
21 shooting?

22 A: Yes, sir; he did.

23 Q: Okay. Let me show you what's been marked State's Exhibit
24 32.

25 We had pretrial hearings on this, Your Honor. I'm not

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1 sure if it's been moved into evidence, but we'll move it into
2 evidence at this time. It's the same that we played pretrial.

3 THE COURT: All right, sir. It's State's 32, is there
4 any objection to that?

5 MR. FILIBERTO: Your Honor, I'd just like to ---

6 THE COURT: Renew your objections?

7 MR. FILIBERTO: Renew my objections.

8 THE COURT: All right, sir. And the Court will allow it
9 into evidence over the objection of the defense.
10 You may proceed.

11 STATE'S EXHIBIT NUMBER THIRTY-TWO

12 ADMITTED INTO EVIDENCE

13 BY MR. HIXSON:

14 Q: Let me show you State's 32, it's in evidence, and see if
15 you recognize that.

16 A: Yes, sir; I do.

17 Q: Okay. And what is this?

18 A: This is body cam footage of Officer Paul.

19 Q: Okay. Now are you aware if that discussion, the
20 discussion that Mr. Levan had and Ms. Hubbard as well was
21 transcribed; are you aware of that?

22 A: Yes, I am.

23 Q: Okay. Let me show you what's been marked as State's 32
24 for identification at this time and see if you recognize that.

25 COURT REPORTER: 33.

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1 Q: 33, excuse me. Thanks.

2 A: Yes, sir; I do.

3 Q: What is that?

4 A: This is the transcript of Mr. Keith Levan's statement.

5 Q: Is that an accurate transcription of the audio that you
6 hear on this body cam footage?

7 A: Yes, sir; it is.

8 MR. HIXSON: At this time, we'd move State's 33 into
9 evidence?

10 THE COURT: Any objection to State's 33?

11 MR. FILIBERTO: Your Honor, I don't think there's been a
12 proper foundation laid.

13 THE COURT: All right. Y'all come talk to me for a
14 second.

15 (REPORTER'S NOTE: A bench conference was held off the record
16 in the presence of but out of hearing of the Jury.)

17 THE COURT: So, as to the motion of the State to allow 33
18 into evidence, at this point in time -- I'm not allowing it at
19 this point in time.

20 Thank you very much.

21 MR. HIXSON: Thank you, Your Honor. So State's 33 is
22 still marked for ID only?

23 THE COURT: Yes, sir.

24 STATE'S EXHIBIT NUMBER 33

25 MARKED FOR IDENTIFICATION

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1 BY MR. HIXSON:

2 Q: What I'd like to do is follow along with that, Officer
3 Vasquez. Have you reviewed that in the past?

4 A: Yes, sir; I have.

5 Q: Have you reviewed it and watched body cam footage and
6 listened to the audio as you've followed along with the
7 transcript in the past in preparation for Court?

8 A: Yes, sir; I have.

9 Q: Has that been an accurate transcript of what you hear on
10 the body cam?

11 A: Yes, sir; it was.

12 Q: Were there any omissions during the course of that from
13 playing real time until that transcript stops?

14 A: Yes, sir.

15 Q: So everything that's been played is reflected in the
16 transcript?

17 A: Yes, sir; it would.

18 MR. HIXSON: Okay. (To Mr. Terrell) Is the sound up yet?
19 May we publish State's 32 in evidence?

20 THE COURT: Yes, sir; you may.

21 (REPORTER'S NOTE: State's Exhibit Number 32 published.)

22 THE COURT: Is that maximum volume?

23 Thank you. Continue on.

24 MR. TERRELL: Start is over, Judge?

25 THE COURT: Yes. Start it over again, please.

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1 *****OFF THE RECORD*****

2 (REPORTER'S NOTE: State's Exhibit Number 32 published.)

3 (On the Record.)

4 BY MR. HIXSON:

5 Q: Is that what you recall having happened on February 21st
6 at Myrtle Beach Police Department?

7 A: Yes, sir; I do.

8 Q: Were there any deletions in that from what you recall --
9 are you able to delete any body cam footage or ---

10 A: No, sir; we are not.

11 Q: At that point in time, it appears that Mr. Levan was
12 taken into custody; is that correct?

13 A: Yes, sir; he was.

14 Q: Did you have any further involvement in this particular
15 case?

16 A: No, sir; I did not.

17 MR. HIXSON: Your Honor, I have no further questions of
18 this witness, just an argument after, if necessary, as it
19 relates to State's 33.

20 THE COURT: All right. Well, let's deal with that at
21 this point in time. Are you again offering State's 33 into
22 evidence?

23 MR. HIXSON: Yes, Your Honor, we believe we've laid the
24 proper foundation.

25 THE COURT: Is there any objection to that?

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JUSTIN VASQUEZ - CROSS BY FILIBERTO

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1 MR. FILIBERTO: Your Honor, I maintain my objection. I
2 think there are parts that I can't follow on that audio.
3 Also, I believe this transcript was started obviously while
4 the interview began, so, it's obviously selectively --
5 selectively put together.

6 MR. HIXSON: Your Honor, as it relates to that, there are
7 pretrial rulings pertaining to the admissibility of things ---

8 THE COURT: All right. I appreciate that.

9 MR. HIXSON: This is a complete ---

10 THE COURT: I understand that. Thank you, Solicitor. I
11 am going to remain with my ruling that the evidence is -- the
12 DVD, State's 32, and that will be the item that goes into
13 evidence with the jury in their deliberations.

14 Thank you very much.

15 MR. HIXSON: Thank you, Your Honor.

16 MR. FILIBERTO: Thank you, Your Honor.

17 MR. HIXSON: I have no further questions of Officer
18 Vasquez.

19 COURT REPORTER: I need that exhibit back, please.

20 THE COURT: Cross examination, please.

21 MR. FILIBERTO: Thank you, Your Honor.

22 CROSS EXAMINATION OF JUSTIN VASQUEZ BY MR. FILIBERTO:

23 Q: Just quickly, the audio we heard seemed to start after
24 conversation begun. Had you just come in the room at that
25 time?

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JUSTIN VASQUEZ - CROSS BY FILIBERTO

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1 A: Yes, and that was actually Officer Paul's body camera,
2 not mine..

3 Q: Okay. So, that wasn't your body camera?

4 A: No, sir, I was standing a little bit behind them.

5 Q: Okay. So, what that recording is just when you entered
6 the room?

7 A: I believe so, yes, sir.

8 Q: Okay. There's certainly other conversation that you
9 weren't privy to?

10 A: Possibly.

11 Q: Nothing further.

12 Thank you, Judge.

13 THE COURT: Anything else?

14 MR. HIXSON: No, Your Honor.

15 THE COURT: All right, sir. You may step down.

16 Do you wish this witness to be excused?

17 MR. HIXSON: I do, Your Honor.

18 THE COURT: Okay. Any objection?

19 MR. FILIBERTO: No objection.

20 THE COURT: All right. You're released from your
21 subpoena and you may go back to your regular duties.

22 All right. Next witness, Solicitor?

23 MR. HIXSON: Crime Scene Specialist, Tony Humes.

24 THE COURT: All right. If you'd come right up here and
25 be sworn into evidence, please.

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ANTHONY HUMES - DIRECT BY HIXSON

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1 CLERK: Raise your right hand and place your left hand on
2 the Bible.

3 ANTHONY HUMES, HAVING BEEN SWORN
4 TESTIFIES AS FOLLOWS:

5 CLERK: Have a seat and state your full name and spell
6 your last name.

7 MR. HUMES: Anthony Humes, H-U-M-E-S.

8 DIRECT EXAMINATION OF ANTHONY HUMES BY MR. HIXSON:

9 Q: Good afternoon, sir. how are you?

10 A: Good, sir.

11 Q: Please tell this jury what you do for a living.

12 A: I work for the City of Myrtle Beach Police Department.

13 Q: In what capacity?

14 A: I am assigned to the Crime Scene Unit.

15 Q: Okay. And were you performing that role back on February
16 21st of 2015?

17 A: Yes, sir.

18 Q: And did you have an opportunity to work on the matter of
19 State of South Carolina versus Keith Levan?

20 A: Yes, sir.

21 Q: Okay. Please tell us about what your involvement was
22 early on in the process?

23 A: On February 21st, I was called into work to -- by
24 Lieutenant Furlong and my immediate supervisor to respond to
25 Home Goods, hhgregg and Costco to obtain video surveillance

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ANTHONY HUMES - DIRECT BY HIXSON

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1 from those stores.

2 Q: Okay. Did you in fact perform that task?

3 A: Yes, sir.

4 Q: Were you successful in any of those locations getting
5 video surveillance?

6 A: Yes, sir, at Costco.

7 Q: Okay. Tell us about that process, what kind of setup
8 does Costco have at their -- that's a retail outlet, right?

9 A: Yes, sir, it's a large video surveillance system with
10 cameras throughout the store as well as over at the gas pumps
11 and exterior of the store.

12 Q: Okay. And as a result, did you meet with -- who was the
13 crime scene, excuse me, the loss prevention folks, is that the
14 purpose for surveillance camera footage?

15 A: Yes, sir. I met with Mr. Goodson and Mr. Forsy (spelled
16 phonetically).

17 Q: Okay. In addition to that, let me ask you this, does the
18 video surveillance cover aspects inside the store as well as
19 the outside or the curtilage of Costco?

20 A: Yes, sir.

21 Q: Okay. And did they have -- were the cameras operational
22 at that time?

23 A: Yes, sir.

24 Q: You confirmed that with the time stamps and things on the
25 video footage that you saw?

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1 A: That's correct.

2 Q: Okay. Did you in fact retrieve video footage from
3 surveillance cameras at Costco?

4 A: Yes, sir.

5 Q: Okay. And what did you do with it, did you place it on a
6 ---

7 A: It was placed on -- directly from the video surveillance
8 system to a USB thumb drive.

9 Q: Okay. And you did that yourself?

10 A: A Costco employee did that.

11 Q: Okay. And then you were there at the time and retrieved
12 it and brought it back to Myrtle Beach Police Department?

13 A: That's correct.

14 Q: Okay. Did you put that on a data disc of some type and
15 review that for coming to court in order to put it in front of
16 a jury?

17 A: Yes, sir.

18 Q: Let me show you what's been marked as State's 34 and see
19 if you recognize that.

20 A: Yes, that's the video.

21 Q: That's the Costco video that you retrieved from Costco?

22 A: Yes, sir.

23 MR. HIXSON: At this time, I'd move State's 34 into
24 evidence.

25 THE COURT: Any objection?

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ANTHONY HUMES - DIRECT BY HIXSON

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1 MR. FILIBERTO: None, Your Honor.

2 THE COURT: That's in evidence without objection.

3 STATE'S EXHIBIT NUMBER 34

4 ADMITTED INTO EVIDENCE

5 BY MR. HIXSON:

6 Q: Okay. I don't want to publish that quite yet.

7 Can you describe, before we get this on there, what is
8 the nature of that photograph -- what's the nature of the
9 video; what does it look like?

10 A: This video is from the gas pumps located at Costco.

11 Q: Okay.

12 A: And the particular camera, there's two cameras. One
13 looks towards Home Depot and Walmart, and the other one looks
14 the opposite direction towards Pine Island Road.

15 Q: Okay. I'm showing the witness what's been marked as
16 State's 1, it's -- orienting photograph.

17 Can you point -- we've already had a discussion about
18 this being Home Depot and this being Costco and this being
19 hhgregg?

20 A: Yes, sir.

21 Q: Can you kind of point to the vantage point of where the
22 camera would be taking video from?

23 A: Yes. It would have been the cameras mounted on the gas
24 pumps, which is right here, and it is looking -- we'll call it
25 east, this way (indicating).

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ANTHONY HUMES - DIRECT BY HIXSON

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1 Q: So the camera is in this angle ---
2 A: Yes, sir.
3 Q: --- capturing what's going on in this direction?
4 A: That's correct.
5 MR. HIXSON: Let me get this going.
6 Publish State's 34, Your Honor?
7 THE COURT: You may do so.
8 BY MR. HIXSON:
9 Q: So, before that starts playing, can you kind of describe
10 to the jury -- is it in black and white?
11 A: Yes, sir; it is.
12 Q: Is it at nighttime?
13 A: Yes, sir.
14 Q: Okay. Is it grainy?
15 A: Yes, sir.
16 Q: Can you see car headlights coming through this area? Can
17 you see much else besides that?
18 A: No.
19 Q: Okay.
20 A: You can see the parking lot and some trees and you can
21 see headlights in the distance.
22 Q: Okay. And as far as relates to the time stamps on the
23 video, do you know if those time stamps are exactly -- exactly
24 accurate or are they generally accurate? What are your
25 thoughts on the time stamp when you review the footage?

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- 1 A: They're generally accurate compared to -- depending on
2 who set up the system or maintains it.
- 3 Q: Okay. So, this isn't actual precision, but it's in the
4 range?
- 5 A: That's correct.
- 6 Q: And if you can, please describe to the jury, I'm just
7 gonna press play, if you don't mind, somewhat narrating to
8 orient when it initially starts. Okay?
- 9 A: Okay.
- 10 (REPORTER'S NOTE: State's Exhibit Number 34 published.)
- 11 A: Now what you're looking at right now is the drive-up to
12 the pumps, which would be at the lower portion of the screen.
- 13 Q: Okay. Where's Home Depot?
- 14 A: It would be to your right.
- 15 Q: Right there?
- 16 A: Yes, sir, that whole parking lot from your finger there
17 to the second pole light.
- 18 Q: Okay. What is up in this area right here?
- 19 A: That's Walmart.
- 20 Q: Walmart Garden Center?
- 21 A: Yes, sir.
- 22 Q: Okay. And then what road is this? Is that Oak Forest
23 Lane?
- 24 A: Yes, sir.
- 25 Q: And where's the Home -- hhgregg?

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- 1 A: Hhgregg would be on the left, yes.
- 2 Q: Right here?
- 3 A: Yes, sir.
- 4 Q: And the driveway behind hhgregg, is that in this area?
- 5 A: A little bit, yeah, right underneath the 2 and the 21.
- 6 Q: Right here (indicating)?
- 7 A: Yes, sir.
- 8 Q: All right. So that's not -- Okay. When do you first see
- 9 activity on the video?
- 10 A: At 4:20:12, I believe.
- 11 Q: Okay.
- 12 A: You'll see some headlights off in the distance and
- 13 they're kind of driving around.
- 14 Q: Right here?
- 15 A: Yes, sir.
- 16 Q: Are those two cars that you see?
- 17 A: It appears to be, yes. And those two cars will drive
- 18 onto Seaboard Street.
- 19 Q: This is Seaboard Street?
- 20 A: Yes, sir. And then when they will make a left, probably
- 21 right around now, onto Oak Forest. And then they will go out
- 22 of view where the parking pole light is.
- 23 Q: Right there?
- 24 A: Yes, sir, that sign.
- 25 Q: Now, what is right there?

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1 A: That's a parking pole, pole light.
2 Q: Okay.
3 A: And then the two vehicles go out of view.
4 Q: Was that a right-hand turn into hhgregg parking lot?
5 A: Yes, sir. And then, I believe ---
6 Q: When is the next time we see activity?
7 A: 4:21:12, you will see some headlights between the two
8 trees?
9 Q: In here?
10 A: A little bit further up, but yeah.
11 Q: Okay.
12 A: That's 4:21:43, I believe, in this.
13 Q: Okay. So, where does this road lead in front of hhgregg?
14 Is that a loop that comes back around to the back?
15 A: Yes, sir.
16 Q: Past Home Goods?
17 A: Yes, sir. It's one whole long plaza and the service area
18 for all the stores is in the back. Right about now, you're
19 gonna see some headlights there by the trees.
20 Q: Right here?
21 A: Yes, sir.
22 Q: And then what happens next?
23 A: There's a vehicle that appears to go from that area
24 across the street -- the screen to the right and then it lays
25 rest in front of Home Depot.

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1 Q: Does the vehicle accelerated?

2 A: It was moving pretty fast cause it's bouncing up and
3 down; yes, sir. And that vehicle stops.

4 Q: Did another vehicle come out?

5 A: Yes, sir. And it makes a right hand turn on Oak Forest.

6 Q: Does it stop at that stop sign there?

7 A: No, sir. And it continues on Oak Forest Lane.

8 Q: Are you aware if that's the location that the shell
9 casings were recovered here as well? Are you aware of that?
10 Were you there at the initial collection?

11 A: No, sir.

12 Q: And now have you reviewed this video in its entirety?

13 A: Yes, sir.

14 Q: Okay. Does that car move again?

15 A: No, sir.

16 Q: About how long will we have to play this video before
17 another vehicle comes up next to that location?

18 A: I believe it's around 4:45:42. There's a vehicle that
19 drives in front of the gas pumps and just continues going and
20 then there's some vehicles off in the distance of the Home
21 Depot lot that's just parked. I don't know if they're
22 employees coming in or what not.

23 Q: Approximately, what time does it show up that law
24 enforcement arrives and starts investigating this vehicle
25 right here?

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ANTHONY HUMES - DIRECT BY HIXSON

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1 A: 5:04.

2 Q: 5:04 on the camera?

3 A: Yes, sir.

4 Q: Okay. So, the -- testimony is Officer Kerns, was 5:50,
5 4:53 he responded so that's about ten minutes off on the
6 camera; would that be safe to say?

7 A: Yes, sir.

8 Q: And so at any time from the time that we can run this
9 until law enforcement shows up in forty minutes, does anyone
10 come up near that vehicle?

11 A: There's a vehicle around 4:49 that drives kind of near
12 it, but it keeps going.

13 Q: Okay. Are you aware, watching this video in its
14 entirety, that anybody comes near the vehicle and gets inside
15 that vehicle or removes any items from that vehicle?

16 A: Not that I could tell, no.

17 MR. HIXSON: Your Honor, we can continue to play this,
18 but I think under Rule 403 on needless, cumulative evidence --
19 don't want to waste time and we'd just ask ---

20 THE COURT: Mr. Filiberto, do you wish the rest of the
21 video to be played?

22 MR. FILIBERTO: Your Honor, we won't object to ---

23 THE COURT: All right. You may stop it then.

24 MR. HIXSON: Thank you, Your Honor.

25 BY MR. HIXSON:

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- 1 Q: All right. Officer Humes?
- 2 A: Yes, sir.
- 3 Q: Subsequent to that, did you have any other involvement in
- 4 this case?
- 5 A: I processed a vehicle that was located in the rear crime
- 6 scene bay.
- 7 Q: Okay. And so that vehicle -- let's talk about that.
- 8 A: Okay.
- 9 Q: Was that vehicle a black Volvo station wagon vehicle?
- 10 A: Yes, sir.
- 11 Q: And how did you come in possession of that vehicle? Do
- 12 you know where -- was it parked in the parking lot of Myrtle
- 13 Beach Police Department?
- 14 A: I believe so. It was towed to the annex pending a search
- 15 warrant.
- 16 Q: Okay. And did you get a search warrant on that and
- 17 perform a search in the property bay of Myrtle Beach Police
- 18 Department?
- 19 A: Yes, sir.
- 20 Q: Okay. Let me show you a couple of photographs. I
- 21 believe Mr. Filiberto -- I want you to look at all these just
- 22 at once and see if you recognize all those.
- 23 A: Yes, sir.
- 24 Q: When you're done with them, just let me know if you
- 25 recognized those items.

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ANTHONY HUMES - DIRECT BY HIXSON

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1 A: No, sir.

2 Q: Okay.

3 At this time, Your Honor ---

4 Are these all fair and accurate representations of the
5 scenes that you saw or the photographs that you took?

6 A: Yes, sir.

7 Q: --- while performing -- executing a search warrant on
8 this vehicle?

9 A: Yes, sir.

10 MR. HIXSON: Your Honor, at this time, we'd move State's
11 35, 36, 37, 38, and 39 into evidence?

12 THE COURT: Any objection?

13 MR. FILIBERTO: No, Your Honor.

14 THE COURT: They're in evidence without objection.

15 STATE'S EXHIBIT NUMBERS 35 THROUGH 39

16 ADMITTED INTO EVIDENCE

17 MR. HIXSON: Thank you, Your Honor.

18 BY MR. HIXSON:

19 Q: So, who owns the vehicle that you're dealing with? We're
20 gonna take a look at State's 35 and see if you recognize that,
21 and that is Slide 22.

22 May I publish that, Your Honor?

23 THE COURT: Yes, sir.

24 A: That is a photograph of the vehicle registration that was
25 in the glove compartment registered to a Keith Sheldon Levan.

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ANTHONY HUMES - DIRECT BY HIXSON

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1 Q: Okay. And do you know who drives that on a daily basis
2 whether or not Ms. Hubbard drives it or Mr. Levan drives it?

3 A: No, sir.

4 Q: Okay. Let me show you what's been marked as State's 36
5 and see if you recognize that and that is Slide 23.

6 May I publish that, Your Honor?

7 THE COURT: Yes, sir.

8 A: That is the rear of the vehicle showing the license
9 plate.

10 BY MR. HIXSON:

11 Q: Okay. And that's the condition it was in when you
12 performed the search on it.

13 A: Initially, the vehicle doors were all closed. The -- we
14 didn't have any keys to the vehicle. I contacted Beach
15 Patrol, Crime Scene, Beach Patrol Officer, PFC Rhodes, he came
16 with a car unlock kit and opened the vehicle for us.

17 Q: Okay. I'm gonna show you State's 37. That is off of
18 Slide 24. Do you recognize that? That's in evidence.

19 A: Yes, sir, that's the driver's side of the same vehicle.

20 Q: Is that the same photograph we're looking at on the
21 screen?

22 A: Yes, sir.

23 Q: Can you describe that for us?

24 A: That's the driver's side of the vehicle showing the front
25 door, the rear door, and the cargo area.

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1 Q: Okay. The windows look darkly tinted in this vehicle; is
2 that safe to say?

3 A: Yes, sir.

4 Q: Difficult to see in those windows, especially at
5 nighttime?

6 A: Yes.

7 Q: Let me show you what's been marked -- that's in evidence
8 as State's 38, that's Slide 25. Once you got inside that
9 vehicle -- May I publish that?

10 THE COURT: Yes, sir.

11 Q: See if you recognize that.

12 A: Yes, sir.

13 Q: Did you find anything, of evidentiary significance inside
14 that vehicle when you performed the search warrant?

15 A: Yes, sir, that is the driver's side front door. The
16 small cavity would be like the handle to close the door here
17 on the inside.

18 Q: And what is that brass object that's inside that cavity
19 in the door?

20 A: It is a R&P Remington .223 cartridge casing.

21 Q: It's a rifle cartridge casing?

22 A: Yes, sir.

23 Q: Did you recover that?

24 A: Yes, sir.

25 Q: I'm giving you what's been marked as State's --

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1 I'm going to show you what's been marked as State's Exhibit 40
2 and also 41. See if you recognize that item, sir.

3 A: Yes, sir, that's the evidence box that I placed the
4 cartridge casing into.

5 Q: Also, I'm gonna show you what's State's 41?

6 A: Okay. That's the cartridge casing that was located in
7 the rear seat.

8 Q: Take a look back at 40 and see if you recognize what's
9 inside that box.

10 A: That is the cartridge casing from the driver's door.

11 Q: Take a look at 41.

12 A: Yes, sir. That's the cartridge casing that was located
13 in the rear seat behind the driver's seat.

14 Q: I'm gonna show you what's been marked as -- let me move
15 back around. So, State's 40, that's Remington cartridge
16 casing you recovered from the door panel of the vehicle?

17 A: Yes, sir, the front driver's door.

18 MR. HIXSON: I move State's 40 into evidence, Your Honor.

19 THE COURT: Any objection?

20 MR. FILIBERTO: No, Your Honor.

21 THE COURT: It's in evidence without objection.

22 MR. HIXSON: Thank you.

23 STATE'S EXHIBIT NUMBER 40

24 ADMITTED INTO EVIDENCE

25 BY MR. HIXSON:

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1 Q: I also show you, do you recognize this, 39, and that is
2 Slide 26.

3 May we publish that, Your Honor?

4 THE COURT: Yes, sir.

5 BY MR. HIXSON:

6 Q: Do you recognize that?

7 A: Yeah.

8 Q: That's the same as that slide?

9 A: Yes, sir.

10 Q: What is that?

11 A: That is the rear passenger or rear seat in the vehicle.
12 The seat closest to the bottom is the driver's side and the
13 opposite seat would be the passenger side.

14 Q: Okay.

15 A: That's a cartridge casing located on that seat cushion.

16 Q: And that's inside that black Volvo registered to Keith
17 Levan?

18 A: Yes, sir.

19 Q: Did you collect that shell casing?

20 A: Yes, sir.

21 Q: Let me show you State's 41. I think you already
22 authenticated it.

23 A: Yes, sir.

24 MR. HIXSON: If I can move that into evidence, State's
25 41?

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1 THE COURT: Any objection?

2 MR. FILIBERTO: None, Your Honor.

3 THE COURT: All right, sir, it's in evidence without
4 objection.

5 MR. HIXSON: Thank you.

6 STATE'S EXHIBIT NUMBER 41

7 ADMITTED INTO EVIDENCE

8 BY MR. HIXSON:

9 Q: All of these have Remington products head stamps RP .223
10 Remingtons?

11 A: Yes, sir. RP and then Remington .223.

12 Q: Now, is that the extent of your involvement as it relates
13 to this case?

14 A: Yes, sir.

15 MR. HIXSON: I beg the Court's indulgence for one moment,
16 Your Honor?

17 THE COURT: Yes, sir.

18 BY MR. HIXSON:

19 Q: Thank you Detective or thank you, Crime Scene Specialist,
20 no further questions. Answer any questions Mr. Filiberto has.

21 THE COURT: Cross examination?

22 MR. FILIBERTO: Thank you, Your Honor.

23 CROSS EXAMINATION OF ANTHONY HUMES BY MR. FILIBERTO:

24 Q: Just briefly.

25 A: Yes, sir.

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ANTHONY HUMES - CROSS BY FILIBERTO

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- 1 Q: Just a couple of questions. Let's start back with the
2 video from that Costco lot where we watched the two vehicles
3 come around the bin.
- 4 A: Yes, sir.
- 5 Q: Could you tell which vehicle -- before they went out of
6 sight, could you tell which vehicle was which?
- 7 A: No, sir.
- 8 Q: Okay.
- 9 A: You could just tell it was two cars.
- 10 Q: Right.
- 11 A: Or -- yeah.
- 12 Q: And then the car that Mr. Selmon was in was the one that
13 jumped the curb and went into the median?
- 14 A: Yes, sir.
- 15 Q: And then another car left, but you can't tell what car
16 that was?
- 17 A: That's correct.
- 18 Q: And the, the shell casings recovered from the Volvo
19 registered to Mr. Levan ---
- 20 A: Yeah.
- 21 Q: Any substantive evidence as to when or how they got
22 there? How old they could be or could they have been there
23 for years?
- 24 A: That I do not know.
- 25 Q: Okay. So, they just so happened to be in the car, just a

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BY THE COURT

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1 couple of things that were in the car?

2 A: Yeah, that's correct.

3 Q: Nothing further. Thank you.

4 THE COURT: Any other questions, Solicitor?

5 MR. HIXSON: No, sir.

6 THE COURT: You wish the witness to be excused?

7 MR. HIXSON: I do, Your Honor.

8 MR. FILIBERTO: No objection.

9 THE COURT: All right, sir, you are released from your
10 subpoena and may go back to your regular duties. Thank you.

11 A: Thank you, Your Honor.

12 BY THE COURT:

13 THE COURT: All right. Ladies and gentlemen, we're gonna
14 take a short break at this time. You need to go to the jury
15 room. Please remember, don't talk about the case. Don't,
16 obviously, allow anybody to talk to you about it. All
17 right. Thank you very much.

18 (REPORTER'S NOTE: Jury exits courtroom.)

19 THE COURT: All right. Solicitor and Mr. Filiberto,
20 we'll take a short break, about 10 minutes and be back at that
21 time.

22 All right. Thank you.

23 MR. HIXSON: Thank you.

24 MR. FILIBERTO: Thank you, Your Honor.

25 *****OFF THE RECORD*****

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1 (On the Record.)

2 THE COURT: All right. Solicitor, you ready for the
3 jury?

4 MR. HIXSON: I am, Your Honor.

5 THE COURT: And Defense?

6 MR. FILIBERTO: Yes, Your Honor.

7 THE COURT: Ask the jury to come in, please.

8 (REPORTER'S NOTE: Jury enters courtroom.)

9 THE COURT: All right, Solicitor, your next witness
10 please, sir.

11 MR. HIXSON: At this time we would call Investigator
12 Jeremiah Beam to the witness stand.

13 THE COURT: All right, sir.

14 CLERK: Please raise your right hand and place your left
15 hand on the Bible.

16 JEREMIAH BEAM, HAVING BEEN SWORN

17 TESTIFIES AS FOLLOWS:

18 CLERK: State your full name and spell your last name.

19 MR. BEAM: Yes, ma'am. It's Jeremiah Beam, B-E-A-M.

20 DIRECT EXAMINATION OF JEREMIAH BEAM BY MR. HIXSON:

21 Q: Please tell this jury what you do for a living.

22 A: Yes, sir. I'm employed with the City of Myrtle Beach
23 Police Department. I'm currently assigned to the Violent
24 Crime Investigation Section.

25 Q: Okay. So were you doing -- were you performing that role

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JEREMIAH BEAM - DIRECT BY HIXSON

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1 on February 21st of 2015?

2 A: Yes, sir.

3 Q: All right. Did you have an opportunity to respond to the
4 hhgregg down near Seaboard Street in the City of Myrtle Beach?

5 A: I did, yes, sir. We were notified by Lieutenant Furlong.
6 Typically, when we have a homicide or a major crime, multiple
7 detectives are called out depending on the nature and how many
8 resources we need. So, I was notified that morning of a
9 homicide.

10 Q: During that period of time, Crime Scene was dispatched
11 and the case investigation began; is that safe to say?

12 A: Yes, sir; that is correct.

13 Q: Okay. During the course of your initials assignments on
14 things to do, did you go about seeking out surveillance video
15 or still video or anything from any of the stores in the area
16 where Mr. Selmon's body was found?

17 A: Yes, sir, I did along with several other detectives,
18 trying to acquire any video from nearby businesses. In
19 particular, I did respond to the hhgregg. Initially, we had a
20 hard time getting a hold of the store manager. It took a
21 while to get somebody there, but eventually we finally got
22 somebody there and we did review in-store video from hhgregg.

23 Q: Okay. Were you able to watch in the store live action
24 moving pictures in the office surveillance system?

25 A: Yes, sir. We were able to view it inside the store.

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1 However, they could not burn it at that time, but I was able
2 to view it along with the store manager.

3 Q: Okay. When you say burn it, does that mean you were not
4 able to get a copy from the store system?

5 A: Right and burning -- burning can be either extracted or
6 burn it to a disc, but I was unable to take a hard copy via
7 any means at that time.

8 Q: Were you able to take still shots from the video and put
9 that into evidence?

10 A: Yes, sir, the manager was able to print out two still
11 shots from that video in the store.

12 Q: And it's just kind of a technological failure, just
13 difficult -- different system that you couldn't do it short of
14 taking the entire hhgregg system out and put into evidence?

15 A: Correct. Correct. And the manager indicated that he
16 would get with corporate and try to get somebody to help
17 extract that video first thing Monday morning.

18 Q: Okay. And let me ask you about, did you in fact see that
19 yourself and were given still photographs of the surveillance
20 video of hhgregg?

21 A: Yes, sir.

22 Q: Let me show you two photographs. They're still photos
23 marked State's 30 and State's 31, the Defense has seen these.
24 Do you recognize those?

25 A: Yes, sir.

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1 Q: What are those?

2 A: Those are the still photographs provided to me from
3 hhgregg.

4 Q: Okay.

5 A: Those aren't the exact ones, that's just a printout copy
6 there.

7 MR. HIXSON: At this time, I move State's 31 into
8 evidence.

9 THE COURT: Any objection?

10 BY MR. HIXSON:

11 Q: 30 and 31 into evidence, I apologize, Your Honor.

12 MR. FILIBERTO: No, Your Honor. No objection, Your
13 Honor.

14 THE COURT: All right. So 30 and 31 are in evidence
15 without objection.

16 STATE'S EXHIBITS 30 AND 31

17 ADMITTED INTO EVIDENCE

18 BY MR. HIXSON:

19 Q: Now, before I publish these, Your Honor, can I get an
20 orienting photograph -- I'll use State's 1.

21 And describe we're in front of hhgregg and the lines and
22 everything that we see on those photographs. If you'll point
23 to the jury like where that camera location would be and where
24 the Defendant ---

25 A: Where hhgregg is ---

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1 Q: Home Depot, Walmart, Oak Forest Lane, hhgregg, Home
2 Goods...

3 A: Right. So, hhgregg had two cameras. They one exterior
4 here on the front which is where you'll see there, and that's
5 where the still photographs come from. There was also one
6 here at the exterior. We found out through the investigation
7 that was not recording and was not operating correctly during
8 the time of this incident. So, the still photographs here ---

9 Q: You see the no parking things correlate is that ---

10 A: Yes, sir. So, it just runs along the front of this strip
11 mall.

12 Q: So it's the front of the store, not the back of the
13 store?

14 A: Correct. The rear was not recording. They did have a
15 camera there, but it was -- it was not working at the time.

16 Q: Okay. All right. Do these have the time stamps on them?

17 A: Yes, sir; they do.

18 Q: Let me show the jury and I'll give them back to you,
19 what's State's 30. And can you generally describe -- it's a
20 pixelated photograph -- what that car appears to be like in
21 State's 30?

22 A: Yeah, I mean due to the quality, initially, we had a hard
23 time getting the exact make or model. As you guys can see, it
24 wasn't very clear. We knew it to be dark in color. We
25 thought it to be a sedan or maybe an SUV, but based on the

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1 quality, initially of that, we were not able to make a
2 definite make or model at the, at the time.

3 Q: And does this photograph have a date stamp when that
4 image was taken -- I mean a date and time stamp when that
5 image was taken?

6 A: Yes, sir, that's gonna be February 21st, 2015 at 4:16:18.
7 So 4:18.

8 Q: So 4:16 and 18 seconds; is that right?

9 A: Yes, sir.

10 Q: Is that located right there?

11 A: Yes, sir.

12 Q: So, at 4:16 and 18 seconds, this dark looking sedan
13 drives in front of hhgregg?

14 A: Yes, sir.

15 Q: All right. Let's talk about State's 31 now. Let me ask
16 you one question. All right. Let me show you what's already
17 been put in evidence, and that's State's 36 and 37. Do you
18 recognize those?

19 A: Yes, sir.

20 Q: What are those?

21 A: That's the vehicle that was towed to the Myrtle Beach
22 Crime Scene after it was towed from the Myrtle Beach Police
23 Department parking lot.

24 Q: Is that the dark in color sedan?

25 A: Yes, sir.

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1 Q: So 4:16 and 18 seconds. Let's flip to State's 31.

2 Please describe that to the jury please.

3 A: Yes, sir, the second still photograph is a second
4 vehicle, it's smaller. We could tell that that was definitely
5 a sedan and appeared lighter in color. And the time on this
6 is February 21st, 2015 at 4:16 and 24 seconds.

7 Q: So, what was time was that again, sir?

8 A: Yes, sir. 4:16 and 24 seconds.

9 Q: So, 8 seconds after that car goes through, this one comes
10 through behind it?

11 A: Yes, sir.

12 MR. HIXSON: May I publish this, Your Honor?

13 THE COURT: Yes, sir, you may.

14 BY MR. HIXSON:

15 Q: I'm look -- these cameras were taken from the vantage
16 point, is that safe to say? You can see the no loading zone
17 parking in front of the building?

18 A: Yes, sir, same angle.

19 Q: So, at 4:16 and 18, 4:16 and 24, 8 seconds later, can u
20 tell -- does that look to be a Dodge Neon to you?

21 A: I couldn't tell from the quality of the photographs.
22 Again, it was just so pixelated that it was unable to make a
23 determination just based off those photographs.

24 Q: Let me show you what's State's 27 that's in evidence?

25 A: Yes, sir.

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1 Q: What is that?

2 A: That's gonna be the victim's car.

3 Q: Okay. What is that car?

4 A: That's gonna be a Dodge Neon.

5 Q: Okay. All right. So, after you extracted the still
6 photos, did you do any further investigation in this case?

7 Let me bring your -- I know you did a bunch, so I'll speed it
8 along. How is that?

9 A: Yes, sir.

10 Q: At some point in time, did it come to your attention that
11 Keith Levan came to the police station with her common law
12 wife, Penny Hubbard, to give a statement?

13 A: Yes, sir, it did. When we have a homicide, we typically
14 work it around the clock if we can. So, we have meetings
15 usually in the morning and then in the afternoon to brief the
16 oncoming shifts. It was around 4:30 P.M., we were having our
17 afternoon briefing to have the nighttime shift up to speed on
18 what we'd done and what needed to be done. That's when I got
19 a call from Corporal Whitmire, who was one of the Patrol
20 Supervisor's, and that's how we were notified that the
21 Defendant and Ms. Penny Hubbard were at the Myrtle Beach
22 Police Department.

23 Q: Okay. Did you -- do you have surveillance cameras in the
24 Myrtle Beach Police Department parking lot on the Tenth Avenue
25 location?

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1 A: We do. We have them throughout the police department,
2 throughout the city. We have close to 300 cameras now
3 throughout the city, but they're all throughout the public
4 buildings.

5 Q: Okay. So, the activities in the parking lot of the
6 police station would be recorded on video?

7 A: Yes, sir.

8 Q: Cars that come in and park or leave?

9 A: Yes, sir, you'd be amazed at the amount of crimes that
10 happen in a parking lot, believe or not, so ---

11 Q: Okay.

12 A: --- they're pretty beneficial.

13 Q: So, you can see who's driving the vehicle and who was
14 coming and going and what they're doing. Can you take still
15 photographs from that?

16 A: Yes, sir, you can.

17 Q: Okay. In this particular situation did Mr. -- Ms.

18 Hubbard and Mr. Levan come and drive the black Volvo to the
19 police department?

20 A: Yes, sir.

21 Q: Ms. Hubbard, was she driving that vehicle?

22 A: She was, yes, sir.

23 Q: Mr. Levan was a passenger in that vehicle?

24 A: He was, yes, sir.

25 Q: Let me show you State's 25, 26, and 27 and see if you

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1 recognize that.

2 My apologies, Your Honor, 65 ---

3 THE COURT: 65?

4 Q: --- 66 and 67, I apologize.

5 THE COURT: Okay. All right.

6 A: I do recognize those, sir.

7 Q: What are they?

8 A: Those are still photographs from the City cameras. It's
9 called the Milestone system. But, that appears to be still
10 images from the Milestone system.

11 Q: Okay. And that is the parking lot of the Myrtle Beach
12 Police Department?

13 A: Yes, sir.

14 Q: Okay. Can you identify the individuals that are on that
15 still photo?

16 A: Yes, sir, that's the Defendant and Ms. Penny Hubbard, and
17 they're walking what we call as our breezeway area. It's the
18 main entrance into our police department.

19 Q: Okay. And that was taken the afternoon of the 21st?

20 A: Yes, sir.

21 Q: February 21st.

22 At this time, may I publish these to the jury, Your
23 Honor, 25, 26, 27?

24 THE COURT: All right, sir. You said 25?

25 MR. HIXSON: 65, 66 and 67, I apologize.

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1 THE COURT: All right. So, is there any objection to
2 those?

3 MR. FILIBERTO: No, Your Honor.

4 THE COURT: All right. So, they're in evidence and you
5 may publish them to the jury.

6 STATE'S NUMBERS 65, 66 AND 67

7 ADMITTED INTO EVIDENCE

8 REPORTER'S NOTE: (State's Exhibits 65, 66 and 67 published to
9 the jury).

10 BY MR. HIXSON:

11 Q: Now, this one, 66, is rather pixelated, but what does
12 that 66 photograph depict?

13 A: That's where the vehicle parked, sir, and that's in our
14 front parking lot there.

15 Q: You see the driver, Ms. Hubbard, getting out of the
16 vehicle; can you tell that?

17 A: Yes, sir.

18 Q: And finally, 67?

19 A: And that shows the breezeway section.

20 Q: And that depicts Mr. Levan and Ms. Hubbard walking into
21 the police station prior to giving a statement?

22 A: Yes, sir.

23 Q: Now, subsequent to reviewing the video, did you have any
24 other involvement relating to this case, specifically I'll
25 draw your attention, did you come to do any background

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1 information on the victim in this case?

2 A: Yes, sir, we did an initial victimology, started
3 background -- doing some background check on the victim once
4 he was identified.

5 Q: And did you in fact determine during the course of your
6 investigation that Ms. Hubbard knew the victim, Mr. Selmon?

7 A: Yes, sir, they had previously worked together at a
8 healthcare center.

9 Q: Okay. About how far back prior to this incident
10 occurring, do you know for sure when that initial -- did they
11 know each other during that period of time?

12 A: I do not know, sir.

13 Q: Was it days prior, was it months prior, do you have any
14 general idea?

15 A: I don't think he worked there anymore, so I think it was
16 prior.

17 Q: Yeah, or -- you say don't know if it was one month or one
18 year?

19 A: No, sir; I do not.

20 MR. FILIBERTO: Your Honor, asked and answered, sir.

21 THE COURT: I'm gonna allow it, but let's not rehash.
22 Thank you, sir.

23 MR. HIXSON: Yes, Your Honor.

24 BY MR. HIXSON:

25 Q: Now, it's your understanding that after the Defendant was

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1 taken into custody and we see that on the body cam footage,
2 the property he had on his person was taken at that time?

3 A: That's correct.

4 Q: And that includes his clothes he was wearing as well as
5 his cell phone, Ms. Hubbard's cell phone, all those were
6 taken?

7 A: Yes, sir. Search warrants were obtained for the cell
8 phones that were taken from Ms. Hubbard and the Defendant.

9 Q: Okay. And it's your understanding that from there, that
10 that phone was taken into evidence and secured, is it your
11 practice that a subsequent cell phone be -- subsequent search
12 warrant would be given to find the contents of those phones?

13 A: Yes, sir, to extract the data off of the cell phone, yes,
14 sir.

15 Q: In addition, it's your understanding that the victim's
16 cell phone was also recovered from the vehicle that he was
17 found deceased in; is that true?

18 A: Yes, sir, and a search warrant was also obtained for the
19 data off of that.

20 Q: So, all told, the victim, Barry Selmon's cell phone was
21 in evidence at Myrtle Beach Police, Defendant Levan's cell
22 phone was in evidence at Myrtle Beach Police, and Ms.
23 Hubbard's cell phone was in evidence at Myrtle Beach Police;
24 is that correct?

25 A: That is correct. They were seized; yes, sir.

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1 Q: Do you have an individual that works for Myrtle Beach
2 Police Department that does cell records, cell phone
3 extractions?

4 A: We have several that are certified in that system to
5 extract the data off the cell phones.

6 Q: Okay. And do you -- to your knowledge, was that
7 extraction -- did that extraction take place and was cell
8 phone information recovered from all three of these
9 individuals' cell phones?

10 A: Yes, sir; data was extracted.

11 Q: Does that include call log history as well as text
12 messages between anybody back and forth?

13 A: Yes, sir; it includes all kind of stuff.

14 Q: And did that happen in this case?

15 A: Yes, sir.

16 Q: Okay. Let me ask you this. Briefly, just to lay a
17 foundation also for another matter, were you at the -- you
18 went down to hhgregg and the Home Depot parking lot and saw
19 the victim when the victim was in the vehicle?

20 A: I did; yes, sir.

21 MR. HIXSON: Okay. And so there are some arguments
22 relating to the 21 and 24, Your Honor, I just want to make
23 sure this witness can lay a foundation for those also, but I
24 don't want to take those up in the presence of the jury.

25 THE COURT: Well, you can ask the questions, we'll just

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1 deal with admissibility later.

2 MR. HIXSON: Okay.

3 THE COURT: You can ask your questions.

4 BY MR. HIXSON:

5 Q: Let me show you what's been marked as State's 28. Don't
6 show that to anybody but yourself and the Court.

7 A: Yes, sir.

8 Q: What are you looking at?

9 A: That's the victim inside of his car, sir.

10 Q: Okay. Can you generally describe that? In other words,
11 do you see broken glass in the floorboard of the vehicle?

12 A: Yes, sir; I do.

13 Q: Do you see the wound to the victim's head?

14 A: I see the wound to the head. He's slumped over from the
15 driver's side into the passenger side front seat.

16 Q: Is he laying over top of the center console in that
17 photograph?

18 MR. FILIBERTO: I have to object here to publishing it at
19 this time.

20 MR. HIXSON: Yes, sir.

21 THE COURT: All right. Let's -- just go to whether or
22 not it accurately reflects what he saw.

23 BY MR. HIXSON:

24 Q: Is that a fair and accurate representation of the scene
25 that you saw when you went down there on February 21st of

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1 2015?

2 A: Yes, sir; it is.

3 Q: There is a State's 21 that I'm trying to find, Judge,
4 that's been shuffled. It's a very similarly situated
5 photograph.

6 This has been marked for identification as State's 4.
7 See if you recognize that also.

8 A: Yes, sir; that accurately depicts the scene that morning.

9 Q: Okay. I have no further questions. Let me ask you this.
10 In the photograph, are any weapons seen in the victim's hands?

11 A: No, sir.

12 MR. HIXSON: I have no further questions on that matter,
13 Your Honor.

14 THE COURT: All right, sir.

15 Okay. As to those photographs? You still have further
16 questions?

17 MR. HIXSON: Just one more brief ---

18 THE COURT: All right, sir.

19 BY MR. HIXSON:

20 Q: So, based on the statement that you understood per -- as
21 to the location of the weapon that was used in this case, did
22 the information come to you through the body camera footage on
23 whether the Defendant claims that he disposed of this weapon?

24 A: Through the investigation, it was learned that it was in
25 a wooded -- behind a residence where I guess family members

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1 used to live.

2 Q: Okay. And based on that, did you act on that
3 information?

4 A: I was tied up with another task, but officers and crime
5 scene were sent to that secondary location to retrieve the
6 weapon.

7 Q: Okay. And to your knowledge, was a weapon recovered?

8 A: A weapon was recovered, yes, sir.

9 MR. HIXSON: I have no further questions, Your Honor.

10 THE COURT: All right, sir.

11 Cross examination?

12 MR. FILIBERTO: Thank you, Your Honor.

13 CROSS EXAMINATION OF JEREMIAH BEAM BY MR. FILIBERTO:

14 Q: Investigator Beam, I won't be very long with you; just a
15 couple of questions. The video -- let's start with the two
16 photographs. Again, I understand that they were hard to --
17 they were pixelated, I believe is the word you used. But, the
18 first one appeared to be more of a wagon or a -- a SUV type
19 vehicle; is that correct?

20 A: That is correct, yes, sir.

21 Q: And that is the first vehicle -- from the time stamp,
22 that would be the first vehicle that passed?

23 A: That is correct.

24 Q: And not the vehicle that ultimately Mr. Selmon was found
25 in?

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1 A: That would be the second vehicle, or what appears to be
2 the second vehicle; yes, sir.

3 Q: So, it could be fair to say that Mr. Selmon was following
4 the vehicle in front of him?

5 A: Yeah, the second vehicle was following the first vehicle;
6 yes, sir.

7 Q: Okay. With respect to -- it sounded like there was only
8 a few seconds between the two photographs. Would that be in
9 fairly close proximity to each other?

10 A: You could tell they were both together. They both pulled
11 into the shopping center one after the other.

12 Q: Okay. And again, one -- that earlier video, I mean, it
13 looked like they were coming in pretty quickly. You were here
14 for that?

15 A: I couldn't tell the speed based on the -- you know, they
16 both pulled in.

17 Q: Thank you. Nothing further.

18 THE COURT: All right. Any redirect?

19 MR. HIXSON: No, sir.

20 THE COURT: All right. Do you wish the witness to be
21 excused?

22 MR. HIXSON: Yes, sir.

23 THE COURT: All right. Any objection?

24 MR. FILIBERTO: No objection.

25 THE COURT: All right. You may step down, sir, and go

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1 back to your regular activities.

2 All right. Solicitor, Mr. Filiberto, y'all come talk to
3 me one second please.

4 (REPORTER'S NOTE: A bench conference was held off the record
5 in the presence of but out of hearing of the Jury.)

6 THE COURT: All right. Very good.

7 All right. Ladies and gentlemen, we are going to stop
8 for lunch at this time. I would ask that you be back in your
9 jury room at 1:30, please. Back in the jury room at 1:30.

10 Please remember, do not talk about the case; don't allow
11 anybody to talk to you about it. See you then.

12 Thank you.

13 (REPORTER'S NOTE: Jury exits courtroom.)

14 THE COURT: All right. Mr. Levan, you remain under terms
15 and conditions of your bond and the Court's order to you
16 yesterday. The Court is resuming at 1:30. You, again, are
17 ordered to be present at that time.

18 Thank you.

19 MR. HIXSON: Your Honor?

20 THE COURT: Yes, sir.

21 MR. HIXSON: Briefly, I just thought maybe this is an
22 appropriate time to take up the two photograph issues just to
23 put them to be one way or another.

24 THE COURT: Well, I mean, I'll be glad to do that. Is
25 there any other testimony that you intended to elicit

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1 regarding 21 -- I mean, I'm sorry -- 28 and 4?

2 MR. HIXSON: No, the argument based on the items that are
3 displayed in the photograph. In other words ---

4 THE COURT: Could I have those in front of me, please?

5 MR. HIXSON: Your Honor, we just have this case law,
6 *State v. Collins* just for our position whenever the
7 appropriate time.

8 THE COURT: Yes, sir; I've got that.

9 All right. So, Mr. Filiberto, let me hear from you,
10 please, sir.

11 MR. FILIBERTO: Your Honor, I would just object to their
12 admission based on them being overly prejudicial. The
13 probative value of knowing that Mr. Selmon's body was found in
14 the vehicle, that evidence has been clearly and refutably
15 [sic] put into evidence as well as Dr. Proctor's medical exam
16 report indicated where the wounds were. I believe these
17 photos can only be used to inflame the jury and would be
18 overly prejudicial as compared to their probative value.

19 THE COURT: All right, sir.

20 MR. HIXSON: Your Honor, we're fine with -- I think 4 is
21 the one that we're the most concerned with ---

22 THE COURT: Yes.

23 MR. HIXSON: --- which is the extended shot. And, we'll
24 withdraw the ---

25 THE COURT: 28?

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1 MR. HIXSON: 28.

2 THE COURT: All right. Thank you.

3 MR. HIXSON: Let me make sure I've got the numbers right.

4 THE COURT: Yes, sir.

5 MR. HIXSON: Yes, sir.

6 THE COURT: All right. So, all right -- so, the State's
7 withdrawing Number 28. It'll stay for identification but not
8 go to the jury. State's Number 4, in looking at this under
9 Rule 403, South Carolina Rules of Evidence, the question is
10 whether there is a danger of unfair prejudice that
11 substantially outweighs the probative value of the evidence.
12 In this particular matter, in balancing that, obviously this
13 is the reality of the scene. I find that the jury needs
14 State's Exhibit 4 to fully and accurately understand the
15 testimony that has been provided by the investigating officers
16 and Dr. Proctor. I do not find it to be overly gruesome or in
17 any way -- the photograph actually shows, you know, what the
18 officers found at the scene. It is also illustrative of how
19 the State portrays the attack as having happened, that being
20 the glass that is in the floorboard and the -- the presence of
21 the victim and how he is situated. Again, weighing the
22 probative value and the unfair prejudice to the Defendant,
23 weighing that, I do find that it is properly -- proper for the
24 State to use this photograph. I'm going to allow it into
25 evidence. I find that, again, that the jury needs the

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1 photograph to accurately interpret the spoken facts that have
2 been relayed to them by the various witnesses.

3 Thank you very much.

4 STATE'S EXHIBIT NUMBER 4

5 ADMITTED INTO EVIDENCE

6 MR. FILIBERTO: Thank you, Your Honor.

7 MR. HIXSON: Thank you, Your Honor.

8 THE COURT: All right. So 1:30, gentlemen, I'll see
9 y'all back at 1:30.

10 (RECESS.)

11 *****OFF THE RECORD*****

12 (On the Record.)

13 (REPORTER'S NOTE: The following takes place outside the
14 presence of the Jury.)

15 BY THE COURT:

16 THE COURT: All right. Solicitor and, excuse me, Mr.
17 Filiberto, the -- we told you earlier that we had a juror that
18 did not report this morning and, as a result, the Court was
19 forced to substitute in the remaining alternate. I've heard
20 some further information and I'm gonna have to deal with that
21 situation now. And so if -- I'm gonna go over the situation
22 the Court had or the Clerk of Court staff had communication
23 with the juror. After that, if you have any questions, I'll
24 be glad to entertain those. All right.

25 Thank you.

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1 All right. Let me make sure I've got her correct juror
2 number. Juror number 417, Ms. Tiandra L. Tidwell in this
3 matter of the State of South Carolina versus Keith Sheldon
4 Levan, 2016-GS-26-1805. We selected a jury yesterday and Ms.
5 Tidwell was made a part and parcel of the jury panel in this
6 matter. This morning or yesterday evening when we recessed
7 for the evening, I told all the jurors to report back this
8 morning at 9:30. At the appointed time all jurors were
9 present including the one remaining alternate except for Ms.
10 Tidwell. I then asked the Clerk of Court's staff -- they had
11 already been trying to call her and received no answer to the
12 phone calls and asked them to continue to try and locate her
13 and also asked for the assistance of the Sheriff's office.

14 While that was going on, apparently certain, either by, I
15 understand by a phone call and I'll find that out in just a
16 second, the juror communicated with them. So, Ms. Bridget
17 Williamson from the Clerk of Court's Office -- you're present
18 here today?

19 MS. WILLIAMSON: Yes, sir.

20 THE COURT: All right. If you'd come around and take the
21 witness chair.

22 Madam Clerk's representative, if you would place her
23 under oath, please.

24 CLERK: Please raise your right hand and place your left
25 hand on the Bible.

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BRIDGET WILLIAMSON - BY THE COURT

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1 BRIDGET WILLIAMSON, HAVING BEEN SWORN

2 TESTIFIES AS FOLLOWS:

3 CLERK: State your full name and spell your last.

4 MS. WILLIAMSON: Bridget Williamson, W-I-L-L-I-A-M-S-O-N.

5 THE COURT: Hold on one second.

6 Ms. Williamson, can you tell me by whom you're employed,
7 please, ma'am?

8 MS. WILLIAMSON: Horry County Clerk Court's office.

9 THE COURT: And what are your basic duties and
10 responsibilities?

11 MS. WILLIAMSON: I'm the supervisor over Common Pleas.
12 I'm over all of the jury transactions, new cases that are
13 filed, anything that is basically done in the Common Pleas
14 Department.

15 THE COURT: All right. Involved in this case, State of
16 South Carolina versus Keith Sheldon Levan and the jurors that
17 were picked for that particular case, did you have an
18 opportunity today to have some communication with a juror by
19 the name of Tiandra L. Tidwell?

20 MS. WILLIAMSON: Yes, sir.

21 THE COURT: All right. And how did that come about?

22 MS. WILLIAMSON: She called in our office and Tara Turner
23 actually spoke with her at first. She told that she overslept
24 and that she was supposed to be here this morning, so she was
25 calling in to see what she needed to do. I was actually in

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BRIDGET WILLIAMSON - BY THE COURT

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1 the copy room and Tara came to me and told me that. So, I
2 told her to let me get in touch with the Court and see what
3 you wanted me to have her to do and that we would call her
4 back. So, I emailed Heather, the Clerk, in this court and let
5 her know that she called and what you advised us to do.

6 THE COURT: All right. Let me show you what's been
7 marked as Court's Exhibit 2 and see if you can look through
8 that first. When you get done looking at it, let me know.

9 COURT'S EXHIBIT NUMBER 2

10 MARKED FOR IDENTIFICATION

11 MS. WILLIAMSON: Yes, sir.

12 THE COURT: Does that reflect the series of emails you
13 had regarding the juror and your request of the Court as to
14 what to do?

15 MS. WILLIAMSON: Yes, sir.

16 THE COURT: All right. As a result of that, did you have
17 some further communication with the -- with the juror?

18 MS. WILLIAMSON: Yes, sir.

19 THE COURT: And can you tell me about that?

20 MS. WILLIAMSON: Yes, sir. Tara actually called her back
21 and -- so, I was in my office. Tara called and said she said
22 that she could not come in at 2 o'clock because she had to
23 pick up her goddaughter at 3 o'clock. So, I told her I would
24 go down there to her office. So, I went and got on the phone.
25 I let her know who I was and asked her what was going on, and

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1 she said that she could not come in or be here at 2 o'clock
2 because she didn't have anyone to pick up her daughter or her
3 goddaughter at 3 o'clock. And I explained to her that the
4 instructions from the Court was for her to be here at 2
5 o'clock, and that if she knew she had a conflict then why
6 didn't she advise the Court of that conflict yesterday during
7 the qualification. She stated that she didn't realize that it
8 was for the whole week, that she thought just for the one day.
9 I advised her that the summons says that she is to report for
10 the week of February the 13th and that she had plenty of
11 opportunity during the juror qualification to speak to the
12 Judge or say why she couldn't serve or what her complications
13 was or inconvenience was. And, she said that she was not
14 given that opportunity, that you only read from a piece of
15 paper what the options were and that was not one of her
16 options. So, I advised her that when she got selected as a
17 juror for this panel that why did she not notify the Bailiff
18 or someone in there at that time to go ahead and let them know
19 that there was a problem, and she said that she had been --
20 that we had already wasted her whole day being in -- or that
21 we had wasted her whole damned day being up here and not doing
22 anything. And, I said, well, ma'am, I do apologize, but the
23 Court's instructions were for you to be up here at 2 o'clock.
24 And she asked me -- I said so you are refusing to come in, and
25 she said, no, I'm telling you that I cannot come in. And I

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1 said, well, all I can do is -- she said well, can you give the
2 message to the Judge, and I said I can let the Judge know. I
3 said, but he wants to -- I said, he's not gonna call you. She
4 wanted you to call her. I said, he is not gonna call you. He
5 wants you to appear in this courtroom at 2 o'clock. And then
6 she, you know, was saying how ridiculous it was and kind of
7 screaming on the phone. And, so I went to ask her what, you
8 know, was she not coming in, what I needed to tell you, and
9 then she hung up on me at that time.

10 THE COURT: All right. Were you present at the jury
11 qualification Monday morning?

12 MS. WILLIAMSON: Yes, sir.

13 THE COURT: All right. And as a result of the questions
14 that the Court asked of the panel as a whole and request of
15 the panel themselves, did the Court excuse a large number of
16 jurors or transferred them to another term of Court?

17 MS. WILLIAMSON: Yes, sir.

18 THE COURT: Do you remember approximately how many that
19 was?

20 MS. WILLIAMSON: It was at least ten if not a little
21 more.

22 THE COURT: All right. Thank you, ma'am. All right.
23 Any questions from the State?

24 MR. HIXSON: No. We would defer to the Court, Your
25 Honor.

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1 THE COURT: Any questions from the Defense, Mr.
2 Filiberto?

3 MR. FILIBERTO: No, Your Honor. We defer to the Court.

4 BY THE COURT:

5 THE COURT: All right. Thank you.

6 All right. Thank you, ma'am, you may step down.

7 Based upon the information presented to the Court and the
8 apparent blatant disregard of the juror to the juror summons
9 and the duties as a juror in particular -- in this particular
10 case, the Court has no option but to issue a bench warrant for
11 her arrest.

12 What I'm going to do is sign an order for her arrest. I
13 will give it to the Sheriff's office for execution. They will
14 be instructed to serve her with a copy of the bench warrant
15 and instruct her that she is to report on her own tomorrow
16 morning at 9:00 A.M. in this courtroom. They are further to
17 instruct her that if she fails to do so, they will go back out
18 and arrest her and take her to the J. Reuben Long Detention
19 Center where she will stay until she is called for by the
20 Court.

21 Thank you very much.

22 All right. Going back to this matter of the State of
23 South Carolina versus Keith Sheldon Levan, to -- there's some
24 matters that you wanted to take up outside the presence of the
25 jury?

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1 MR. HIXSON: Yes, Your Honor. We're prepared -- two
2 points, we're getting into the pretrial motion concerning the
3 spousal communication, the part that we talked about.

4 THE COURT: All right.

5 MR. HIXSON: The next witness will be Crime Scene
6 Specialist Supervisor Cozene, who is the Cellebrite individual
7 that -- that will introduce or our intention is to introduce
8 what's been marked as State's 64 pretrial that Your Honor
9 ruled on previously.

10 THE COURT: All right.

11 MR. HIXSON: We also have a series of photographs that we
12 showed Mr. Filiberto. At that point, it prompted his
13 objection to I think the entire line of questioning because
14 the photographs were screen shots of -- I'll show Your Honor,
15 the Court the photos.

16 THE COURT: Okay.

17 MR. HIXSON: There are some scrivener's -- there are some
18 questions, not scrivener's error, I bring to the Court's
19 attention. I showed Mr. Filiberto. May I approach?

20 THE COURT: Yes, sir.

21 MR. HIXSON: Your Honor, what I've done is substituted
22 the back page, or one page. When I was looking at it, I
23 realized that's the marked exhibit. If you look in the middle
24 of the page, there are -- conversation, Line 6, it's in the
25 middle of the page.

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BY THE COURT

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1 THE COURT: Yes, sir.

2 MR. HIXSON: I realized that that is the last one. It's
3 kind of misleading. That should be up here. It's in time and
4 so this copy, I changed and put 6 at the very top so it would
5 lead chronologically and I just wanted to replace the exhibit
6 sticker bit I didn't want to do that because the Court had
7 already looked at that.

8 THE COURT: Well, let's deal with that particular issue,
9 not that there's any objections as to what's contained in
10 potential State's Exhibit but as to the replacement of State's
11 Exhibit 64 to indicate a correct time or chronological
12 sequence.

13 Do you have any problem with that, Mr. Filiberto?

14 MR. FILIBERTO: For that purpose, not at all, Judge.

15 THE COURT: All right. So, I'm gonna allow the
16 substitution of -- now, Solicitor, y'all have highlighted some
17 things on this one, so we can't do that.

18 MR. HIXSON: Yes, I have an unhighlighted copy.

19 THE COURT: Okay. So, let's have one that's not -- that
20 must be your copy. Let's have one that's not highlighted.

21 All right. So, if you would hand that one to the Court
22 Reporter and we'll hand her State's Exhibit 64. And if you'll
23 just make that now State's Exhibit 64, the one handed to you,
24 and remove the other one.

25 MR. HIXSON: Thank you, Your Honor.

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1 THE COURT: Thank you. So, just hold on a second while
2 she does it.

3 MR. HIXSON: I believe we're corrected that. 64 is
4 marked and ---

5 THE COURT: Okay. I'm sorry. Let's make sure that the
6 Court Reporter's done.

7 COURT REPORTER: I'm ready.

8 THE COURT: All right. Very good.

9 Go ahead, sir.

10 MR. HIXSON: These are the photographs that are screen
11 shots of the telephone that correspond with the Cellebrite.
12 I'll show Your Honor those.

13 THE COURT: All right, sir.

14 MR. HIXSON: What these are, are the actual photographs
15 of the same content that's in 64.

16 THE COURT: All right. All right.

17 MR. HIXSON: Because the -- because he had put in the
18 Cellebrite her phone. It was out of -- out of date. So, he
19 had to take photographs of it.

20 THE COURT: All right. And these came from what phone,
21 these State's Exhibits?

22 MR. HIXSON: Those are screen shots of Penny Hubbard's
23 phone.

24 THE COURT: All right, sir. So, State's Exhibits 42
25 through 53?

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1 MR. HIXSON: That's correct, Your Honor.

2 THE COURT: All right. Very good.

3 All right. So as to State's Exhibit 64, we had a
4 pretrial hearing on that. Are there any other issues besides
5 the ones we dealt with at the pretrial hearing on State's
6 Exhibit 64, Mr. Filiberto?

7 MR. FILIBERTO: I apologize. If I might see that?

8 THE COURT: It's right there. It's right there in front
9 of the Court Reporter, 64, yes, sir?

10 MR. FILIBERTO: I have no objection.

11 THE COURT: All right. So, as to that one, your
12 objections were brought to the attention of the Court, the
13 Court ruled on those. So, at the time of its introduction,
14 you'll just renew your objection and I will renew my ruling at
15 that point in time.

16 MR. FILIBERTO: If we could add, Your Honor, if I could
17 that I don't think State's gonna be in a position to lay a
18 proper foundation as to whether or not these messages were
19 sent, received, and I'd also object on the grounds of hearsay,
20 that there's no one here to validate the, the conversations
21 existed, just that there's an electronic record of something.

22 THE COURT: All right. Well, that seems to be to go to
23 issues of cross examination, not whether or not these messages
24 were contained on the phone of Ms. Hubbard and if they were
25 captured as a result of a search warrant. Now, as to who's on

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1 the other end, who sent them, I'm sure those will be questions
2 that you will pose to the -- the witness that recovered these
3 from her phone, but I don't find that that to be a reason that
4 they should not be introduced in this matter. I do find them
5 to be relevant. I do find them to be probative in this case
6 and that any prejudice, if any, will -- is outweighed by the
7 probative value of their introduction in this matter, but
8 obviously those are issues that you certainly are welcome to
9 raise on cross examination.

10 MR. FILIBERTO: Your Honor, with the -- with regard to
11 the Cellebrite, if I might move to that. The printed report
12 that Mr. Hixson just substituted.

13 THE COURT: Yes, sir.

14 MR. FILIBERTO: If the Court is going to allow that, I
15 would move that the entire report be put in, not just the cut
16 and pasted compilation of what the State would prefer to focus
17 the jury on.

18 THE COURT: Okay. Well, do you have a -- do you have a
19 copy of the one that has the entirety of what was copied or
20 seized?

21 MR. HIXSON: Your Honor, I do have one downstairs. It's
22 the copy of the entire one seized is about 1,000 pages.

23 THE COURT: Okay.

24 MR. HIXSON: It is ---

25 THE COURT: Is that what you're asking for?

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1 MR. FILIBERTO: Yes, Your Honor.

2 MR. HIXSON: It's in digital format. It doesn't exist in
3 paper format. It's on a thumb drive.

4 THE COURT: All right. Well, what I'm gonna do is -- you
5 will bring that, the witness I'm sure can identify it and
6 state that's what they looked through to come up with State's
7 Exhibit 64.

8 MR. HIXSON: If I may help the Court in this regard the
9 extraction report, the summary, which the Court -- we're
10 introducing to the Court under summary, due to its voluminous
11 nature, under Rule 1006, there is a document downstairs that
12 is, I think, 16 pages that is sorted by Ms. Hubbard's text
13 message or cell phone communications with Mr. Levan. That is
14 much smaller and that may accomplish the texts ---

15 THE COURT: That's the extraction report, one of the
16 reports that you gave to the Court in the motion hearing,
17 correct?

18 MR. HIXSON: Yes. I'm sure that it's up here anymore
19 because it's ---

20 THE COURT: How about look at this and tell me if that's
21 what you're talking about.

22 MR. HIXSON: Yes, Your Honor, that is it. That is ---

23 THE COURT: All right. How about why don't you mark that
24 for State's Exhibit for identification.

25 COURT REPORTER: 68 for identification, State's 68.

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STATE'S EXHIBIT NUMBER 68

MARKED FOR IDENTIFICATION

THE COURT: All right. So, it's been marked for identification as State's 68. Can you explain again to the Court what that is, please, sir?

MR. HIXSON: Your Honor, to lay a foundation across the board, an extraction report generates everything in the universe that's on that cell phone. It can be upwards of 1,000 to 2,000 pages. I've seen 3,000 page reports. That includes any communication to anybody. In this case that is clearly excessive. It's substantial; it's not probative. I think the Court would exclude it under 403 talking about child care and things that across the board not related to them. So, you can search the phone, not by mom and dad's conversation, but you can have Cozene, he can search it by phone numbers. So, I included the phone numbers that were included in the search warrant, that is the Defendant's phone number, Ms. Hubbard's phone number, and the victim's phone number, and he can run an extraction report just that generates the documents just on those numbers to whittle down the universe of information. That's contained in the document that the Court stamped or marked as State's 68. I don't know that that's an exhaustive list. I know that that is what this came from, if that suffices. I can show it to Mr. Filiberto. If not, then we'll have to get into the computer and print out

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1 more from that.

2 THE COURT: Well, I believe what I would want to know,
3 what I want to have the witness be able to say is that they
4 used the phone numbers that were set forth in the properly
5 issued search warrant and, as a result of the phone numbers
6 that were set forth in the search warrant, they did this
7 extraction report and the document contains the conversations
8 or any conversations involving those phone numbers that were
9 in the extraction report. So, if that's necessary to go back
10 and do that again, then it might be necessary to go back and
11 do that again.

12 But, Mr. Filiberto, you -- let me hear from you.

13 MR. FILIBERTO: Your Honor, I think if, if everything
14 between those three phone numbers were collected, that would
15 be fine, I wouldn't object. I just want ---

16 THE COURT: I think that would be proper under the Rules
17 of Evidence if it would be relevant to this matter and would
18 tie in directly with the search warrant issued in this matter.
19 So, the extraction report, I would want the witness to be able
20 to say they did what was necessary regarding those three phone
21 numbers or whatever document they have in their hand contains
22 the extracted information on those three phone numbers. So,
23 assuming 68 doesn't do that, you'll have to ask the witness
24 about that, but assuming it doesn't, how long would it take to
25 do that?

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1 MR. HIXSON: I believe I could go downstairs and I think
2 there is a printed document that has at least just the text
3 messages in maybe 30 some pages, if there's that, but I can
4 get that and find out from there. I need to show Mr.
5 Filiberto this.

6 Can I bring in two quick points, Your Honor?

7 THE COURT: Yes, sir.

8 MR. HIXSON: And this is just for the record for
9 appellate purposes. We do object in that Mr. Filiberto has no
10 standing to challenge any Penny Hubbard's phone. He doesn't
11 have any expectation of privacy in that phone and, thus, he
12 can't challenge admissibility of any of her phone number
13 information in court. He can challenge his client's, but he
14 can't challenge Penny Hubbard's. He can't challenge Barry
15 Selmon's phone. So, he can't there that way. As such, we
16 don't need a valid search warrant because he can't -- he
17 doesn't have the standing to challenge on that.

18 Also, we believe that it's appropriate for Mr. Filiberto
19 to admit this. Under the completeness, I think he's
20 completely correct in that he does -- he is entitled to put
21 the entire document in on his motion, if he wants to, but
22 we're able to present relative probative information. If he
23 wants to supplement that like with medical report or, you
24 know, just one page and then the rest of it comes in, but that
25 would be under his motion under his rule and with the

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1 consequence that come from him admitting evidence into the
2 trial. Those are -- but we -- I believe, we didn't cure with
3 whatever documents the Court requires.

4 THE COURT: All right, sir. I appreciate your arguments.

5 I'm not going to prevent you from using 64 as a further

6 ---

7 MR. HIXSON: Yes, sir.

8 THE COURT: --- examination of the records. But, I want
9 the record, evidentiary record, to reflect a document that
10 would contain the whole of the information that could be
11 extracted on those three phone numbers that are in the search
12 warrant. And then, through your questioning of the witness, I
13 would allow you then to use 64 as a result of going through
14 all of this information you have found these particular emails
15 and go through those with the witness. But for, again,
16 purposes again, if there is to be a further review, I want
17 there to be in the record a document that reflects all those
18 three phones.

19 MR. HIXSON: Your Honor, if I may, beg leave of the Court
20 to go downstairs. Cozene and I have the data and we'll print
21 that out and bring back up to the Court.

22 THE COURT: That's fine. We'll -- we'll do that and then
23 we'll resolve the issue of the photographs after you do that.
24 And just so that you're aware, apparently, the juror has shown
25 up so I'll take care of that issue while you are working on

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1 that.

2 MR. HIXSON: And may I supplement the record, just
3 briefly, Your Honor, as it relates to this information. We
4 believe, Your Honor, there is no hearsay information contained
5 in any of this and that it's non-testimonial under proffer.
6 Clearly, it was not created for the course of litigation in
7 any way and if proffer doesn't apply, it is a business
8 exception, a business record, and it's clearly admissible,
9 even if it's considered hearsay under the state of mind
10 exception. It's a -- it's a current real time recollection of
11 the state of mind of the declarants at the time this happened.
12 We just wanted to make sure that was in the record ---

13 THE COURT: All right, sir.

14 MR. HIXSON: --- in moving forward.

15 THE COURT: All right. Very good. All right. Thank
16 you.

17 MR. HIXSON: Thank you, Your Honor.

18 THE COURT: Thank y'all.

19 All right. Is Ms. Tiandra L. Tidwell present?

20 DEPUTY: Yes, Your Honor.

21 THE COURT: Could you bring her in, please?

22 DEPUTY: Yes, sir.

23 (REPORTER'S NOTE: Juror Number 417 enters courtroom.)

24 COURT TO JUROR 417:

25 THE COURT: Ms. Tidwell, come up here, please, ma'am,

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1 right there would be fine. So, tell me your full name,
2 please, ma'am?

3 JUROR 417: Tiandra L. Tidwell.

4 THE COURT: All right, ma'am, you were selected
5 yesterday as a juror in the case of State of South Carolina
6 versus Keith Sheldon Levan; is that correct?

7 JUROR 417: Yes, sir.

8 THE COURT: You understand that you were summoned for
9 jury duty for the whole week; you understand that?

10 JUROR 417: No, sir, I thought it was just for the day.

11 THE COURT: Did you not read the documentation that was
12 served upon you when you received the juror summons?

13 JUROR 417: I thought it was just for the 13th of
14 February.

15 THE COURT: I understand that. You're telling me you
16 didn't read the juror summons then that told you it was for
17 the whole week?

18 JUROR 417: No, sir.

19 THE COURT: All right. You did not understand the
20 Court's instructions yesterday when I talked about your jury
21 service for the week and what would be required of the whole
22 panel for the week; did you not hear me?

23 JUROR 417: Yes, sir.

24 THE COURT: I gave the panel downstairs, under
25 qualification yesterday, I read through a series of questions,

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1 I gave the jury panel a opportunity for any reason whatsoever
2 to come before the Court to be transferred or excused. Did
3 you come before the Court yesterday and ask for that?

4 JUROR 417: No, sir.

5 THE COURT: At any point in time yesterday, even when you
6 were excused yesterday evening and knew that you had to report
7 back tomorrow morning -- this morning at 9:30, did you ever
8 bring it to the Court's attention that you had an issue or
9 that you had a problem?

10 JUROR 417: Well, not the Court, but I was just told
11 that we had to call the number that you were given on the
12 paper.

13 THE COURT: All right. You were part of the jury
14 yesterday, correct?

15 JUROR 417: But afterwards when you ---

16 THE COURT: All right. When I was talking to the panel,
17 when I excused you, did I not make it real clear that the
18 whole panel had to come back this morning at 9:30?

19 JUROR 417: Yes, sir, but you did say after the end that
20 if we had any problems that we have to call the number on the
21 paper and -- if we had any issues. So, that's what I thought
22 I had to do, so that's what I did.

23 THE COURT: Did you have a conversation with individuals
24 from the Clerk's Office this afternoon?

25 JUROR 417: Yes, a lot of them.

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1 THE COURT: All right. And in that conversation with
2 them, did you tell them that we had wasted your whole damned
3 day yesterday and you basically were not coming back?

4 JUROR 417: No. No, I explained it to them that I had my
5 goddaughter. She was asking me why I didn't say anything
6 yesterday and I said that -- well, I stated, too, that I
7 thought we had to call the numbers, speak to the
8 representative. I was gave the run around all day all day.
9 So, I did tell them that I felt like yesterday, I thought it
10 was only gonna be one day, February the 13th, that was I aware
11 of when I was served with papers.

12 THE COURT: When the Court talked to you, at what point
13 in time did you get the impression it was only gonna be one
14 day? What did I say to the jury that would reflect in any way
15 that it was gonna be one day? What did I say that indicated
16 that to you?

17 JUROR 417: No, that was just my impression that I came
18 under. But I did, at the end when you say, it was gonna be a
19 week -- it wasn't gonna be finished until Wednesday, most
20 likely, that's what I was -- that's when I was like, okay,
21 maybe I need to say something that I do have -- I do take
22 primary care of my goddaughter. That's when I knew that I had
23 to say something, when you say it was not gonna be done till
24 Wednesday.

25 THE COURT: Thank you, ma'am.

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1 I do find that you have disregarded the juror summons in
2 this matter, that you have disregarded the specific
3 instructions of this Court. I find you in contempt of court.
4 I am fining you the amount of \$200 to be paid to the Clerk of
5 Court's office by Monday by 5:00 P.M. If you fail to do so, a
6 bench warrant will be issued for your arrest. You will be
7 brought back before me for a contempt of court hearing at
8 which time I can send you to Department of Corrections in
9 Columbia for a period of one year for failing to abide by the
10 Court's Order. So ordered.

11 Thank you very much.

12 Stay in the courtroom until they give you a copy of the
13 written Order.

14 Thank you.

15 **(RECESS.)**

16 *******OFF THE RECORD*******

17 **(On the Record.)**

18 (REPORTER'S NOTE: The following takes place outside the
19 presence of the Jury.)

20 BY THE COURT:

21 THE COURT: All right, Solicitor, where might we be?

22 MR. HIXSON: A few housekeeping matters, Your Honor, as
23 it relates to State's Exhibit 64. The Court Reporter -- after
24 discussion with the Court, we have taken 64, the original one
25 and made it 64-A. That was the one with basically a

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1 scrivener's change in it, a scheduling change in it.

2 MR. HIXSON: And so that's for ID only. We are not gonna
3 refer to that anymore, but it's in the court record and now
4 we're talking about 64-B.

5 THE COURT: Very good.

6 MR. HIXSON: Okay, so ---

7 THE COURT: Have you seen that, Mr. Filiberto?

8 MR. FILIBERTO: Yes, Your Honor.

9 THE COURT: All right. Very good.

10 STATE'S EXHIBIT NUMBER 64-A

11 MARKED FOR IDENTIFICATION

12 MR. HIXSON: Okay. Now, as it relates to the
13 extractions, we were able to go downstairs and get with
14 Cozene, we were able to whittle down the extractions. This is
15 75 pages front and back ---

16 THE COURT: Okay.

17 MR. HIXSON: --- That are the extractions from Keith
18 Levan's phone, Defendant's phone. The -- and I'll hand that
19 up to the Court.

20 THE COURT: All right.

21 MR. HIXSON: I showed Mr. Filiberto and provided a copy
22 to him ---

23 THE COURT: And ---

24 MR. HIXSON: --- to give Your Honor an idea of what we're
25 talking about.

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1 THE COURT: All right. Very good.

2 And just so that I understand it, 64-B, is that a small
3 subset of 68?

4 MR. HIXSON: Yes, you'll see that it's the universal
5 information including photographs ---

6 THE COURT: That's fine. I just want to make sure that
7 -- that 64-B is just a small subset of 68?

8 MR. HIXSON: That's correct.

9 THE COURT: All right. Very good.

10 MR. HIXSON: I'll hand it to the Court for the Court's
11 review.

12 THE COURT: All right. Very good.

13 All right. So, I'm gonna allow -- assuming the testimony
14 from the witness, I'm gonna allow 68 and 64-B into evidence,
15 having the witness explain what 68 is, how it was done, the
16 information obtained pursuant to a valid search warrant and
17 what he did and then his examination of it and the trying to
18 narrow the focus, let the 64-B. However you want to bring
19 that out, Solicitor, but to make sure all that testimony comes
20 in and with that, I will allow 68 and 64-B over the objections
21 of the Defendant.

22 MR. HIXSON: Your Honor, may I mark -- just ask about the
23 larger file being marked as ID only. The only reason I ask
24 that is I do not know what all is in there and I don't know if
25 there's anything that would be inadmissible because of PCR

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1 problems. It's a massive amount of information.

2 THE COURT: You have a problem with that, Mr. Filiberto,
3 that you would be able to use it for cross examination, but 68
4 would not go to the jury so as not to prejudice the Defendant
5 unnecessarily and the issue is there for, for appellant review
6 should that be available? And, if you don't want that, tell
7 me. If you want all of 68 to go in, tell me, I'm just trying
8 to see where we are.

9 MR. FILIBERTO: Your Honor, I think that the entirety of
10 the record would need to be -- would need to be entered.

11 THE COURT: All right.

12 MR. FILIBERTO: Actually, Your Honor, if I might -- you
13 said you're going to put in the smaller record that Mr. Hixson
14 ---

15 THE COURT: I'm gonna put -- I'm gonna allow 64-B into
16 evidence and the jury will look at that. There's -- and I'm
17 -- I don't know if you've looked at every single line that's
18 contained in 68?

19 MR. FILIBERTO: I have not, Your Honor.

20 THE COURT: I would just say a brief review of it, maybe
21 you might want to look at that and see whether or not it would
22 be in your client's best interest. I'm not telling you what
23 to do here. Okay? You want to look at it and skim through it
24 and see if ---

25 MR. FILIBERTO: Can I just have a couple of minutes ---

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1 THE COURT: --- you really want all of 68 to go in.
2 Okay? You've got one?

3 MR. FILIBERTO: Yeah, I have one, Your Honor.

4 THE COURT: Okay.

5 MR. FILIBERTO: If I could just have a couple of minutes?

6 THE COURT: Yes, sir.

7 MR. FILIBERTO: Thank you.

8 THE COURT: All right. Yes, sir, Mr. Filiberto?

9 MR. FILIBERTO: Thank you, Your Honor. After some
10 further review, I would not be objecting to just the smaller
11 record going into evidence.

12 THE COURT: All right. And 68 will be marked for
13 identification as part of the record for appellant review
14 should that be necessary.

15 MR. FILIBERTO: Yes, Your Honor.

16 THE COURT: All right. Very good.

17 All right, Solicitor, what else, please?

18 MR. HIXSON: I believe that's it.

19 THE COURT: All right. So, now we need to deal with
20 screenshots or the photographs that were State's Exhibits 42
21 through 53, correct?

22 MR. HIXSON: That's correct, Your Honor. I can give you
23 a slight background on it. We have the Cellebrite Report
24 printed out Hubbard's phone. That's in court today, already
25 put into evidence. That phone was not supportable by the

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1 Cellebrite, so they couldn't get the messages off of it. So,
2 the detective, or Cozene, did it the old-fashioned way. He
3 took a picture of the screen instead of getting an extraction
4 report for it.

5 THE COURT: All right. So, just so that I'm clear and
6 the records clear, 42 and -- through 53 come from what phone?

7 MR. HIXSON: From the Pantech 360.

8 THE COURT: Owned by who?

9 MR. HIXSON: Orian Cozene, Crime Scene Specialist ---

10 THE COURT: No, no, no, no. Owned -- owned by?

11 MR. HIXSON: Penny Hubbard, I apologize.

12 THE COURT: All right. Very good.

13 All right. What objection, if any, do you have, Mr.
14 Filiberto, to the introduction of State's 42 through 53?

15 MR. FILIBERTO: Your Honor, the presentation that the
16 State would make is that those are messages sent between two
17 parties. I don't believe they can lay a proper foundation for
18 that and I believe it's hearsay unless somebody is here to
19 authenticate that they were indeed sent back and forth and
20 read.

21 THE COURT: All right. I'm not sure what the testimony
22 of your witness is going to be, Solicitor. I would say it
23 would probably need to be limited to the -- as a result of a
24 proper valid search warrant, they examined the contents of
25 this phone owned by the individual, Ms. Hubbard. They found

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1 certain information contained therein and took photographs of
2 it. These photographs were reflected of the information
3 contained therein, but I'm not sure that it would go further
4 than that for your witness to say that he knows that Ms.
5 Hubbard sent this message to X, Y, and Z. You can state what
6 it reflects and what it shows on the phone and what the
7 messages are and what it says. Would you be intending for him
8 to say something else?

9 MR. HIXSON: No, it's pure data, Your Honor, in that
10 regard.

11 THE COURT: Okay. So, he's just explaining this is the
12 data on the phone, this is what the data says?

13 MR. HIXSON: That's correct.

14 THE COURT: All right.

15 MR. HIXSON: In addition to that, Your Honor, it's
16 corroborated by the Levan Cellebrite Report. So, you will see
17 sent, read, received on the Levan Cellebrite Report, also. So
18 in other words, if it came from Levan, it will be on Levan's
19 Cellebrite Report. If it was sent by Barry Selmon, it will
20 also be on Barry Selmon's Cellebrite Report ---

21 THE COURT: All right.

22 MR. HIXSON: --- and that somebody sends him.

23 THE COURT: All right, sir. Well, if there is an
24 objection, Mr. Filiberto, to a particular question, I think
25 the parameters are set, but if there's an objection to a

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1 particular question that the State asks of its witness, then
2 I'll ask that you object to that particular question at that
3 point in time and I'll rule on it in its context at that point
4 in time.

5 MR. FILIBERTO: Yes, Your Honor.

6 THE COURT: All right. Thank you.

7 All right. So, with that, is the State ready for the
8 jury to come in?

9 MR. HIXSON: Yes, Your Honor.

10 THE COURT: Defense?

11 MR. FILIBERTO: Yes, Your Honor.

12 THE COURT: Very good. Ask the jury to come in, please.
13 (REPORTER'S NOTE: Jury enters courtroom.)

14 THE COURT: All right. Mr. Foreman, ladies and gentlemen
15 of the jury, I do apologize for the delay. There were
16 discussions I had to have with Counsel that I could not
17 conduct those in your presence. Further, I believe the work
18 that was done by Counsel and the Court will narrow the scope
19 of this particular trial. So hopefully it was helpful to that
20 regard, also.

21 All right, Solicitor, you may proceed?

22 MR. HIXSON: Thank you. At this time we'd call Crime
23 Scene Supervisor Cozene.

24 THE COURT: All right, sir, please come around, sir. And
25 just meet the Clerk right at the corner, sir.

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ORIAN BOAZ COZENE - DIRECT BY HIXSON

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1 CLERK: Please raise your right hand and place your left
2 hand on the Bible?

3 ORIAN BOAZ COZENE, HAVING BEEN SWORN
4 TESTIFIES AS FOLLOWS:

5 COURT REPORTER: Please state your full name and spell
6 your first and last, please.

7 MR. COZENE: My name is Orian Boaz Cozene. That's O-R-I-
8 A-N B-O-A-Z, as in zebra, C-O-Z as in zebra, E-N-E.

9 THE COURT: Go ahead, Solicitor.

10 DIRECT EXAMINATION OF ORIAN BOAZ COZENE BY MR. HIXSON:

11 Q: Good afternoon, sir. How are you?

12 A: Wonderful; how are you?

13 Q: Please tell this jury what you do for a living?

14 A: I'm a police officer for the City of Myrtle Beach.

15 Q: In what capacity do you serve?

16 A: I'm the supervisor for the Crime Scene Division.

17 Q: Okay. And in, in that capacity, is one of the things
18 that you may do for the Myrtle Beach Police Department is

19 become familiar with technology concerning cell phones, text
20 messages, digital electronic devices, things like that?

21 A: Yes, sir. I do the majority of the cell phone forensics
22 for the Police Department.

23 Q: Can you explain to the jury what that is?

24 A: Cell phone forensics is basically extracting the data
25 from electronic devices, cell phones, iPads and the like,

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1 tablets. We're able to use a couple of different types of
2 software and hardware to be able to extract the data in order
3 to be able to use it for investigations.

4 Q: Okay. And when you say that physically, what is the
5 process that you do say if you come into possession of a cell
6 phone, what exactly do you do with it?

7 A: The whole process?

8 Q: Yes.

9 A: Generally, when I receive a cell phone, it's usually
10 either by consent or a search warrant. I make sure everything
11 is valid. I then take a photo of the search warrant or the
12 consent and then also document and photograph the cellular
13 phone and make sure it's exactly the one that I'm supposed to
14 be processing. Once I do that, I also take it apart and make
15 sure the serial numbers and everything match up. Then I use
16 the Cellebrite, which is a unit that is able to extract data
17 from cell phones in order to get the data off of it.

18 Q: So, Cellebrite is actually a company that manufactures
19 technology or hardware and software to do this process?

20 A: Yes, sir. They have the Cellebrite -- what we have is a
21 Cellebrite UFED Touch, which is a small -- a small unit that
22 we actually use the USB connections into your cell phones,
23 that connects to that unit and that unit communicates with
24 your cell phone in order to extract the data.

25 Q: And then how -- you actually plug it into something?

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1 A: Yes, sir.

2 Q: Okay. And then what happens to the data in the cell
3 phone, does it download into the Cellebrite machine for a
4 report?

5 A: Yes, sir, what it does is the Cellebrite unit is
6 basically the middle portion from the cell phone. See the
7 cell phone is connected to the Cellebrite unit, Cellebrite
8 then extracts the data and extracts it for us to a USB drive
9 that we use to use on another program called Physical Analyzer
10 to parse out all the data that generates our report and we
11 save that report to our investigative drive and to a -- a CD
12 or DVD in order to hold it for evidence..

13 Q: Okay. And, so these reports may show the universal
14 information that's on that cell phone -- a modern smart phone
15 has a ton of information; is that fair to say?

16 A: Yes, sir.

17 Q: And as a result of that, if it's on that phone can it
18 read and recover, in some cases, deleted information?

19 A: Yes, sir, depending on the type of phone it has as well
20 as the firmware. In the version of Cellebrite, if it's able
21 to it'll be able to extract the current data that's on the
22 phone and possibly some of the deleted data that somebody
23 tried to delete such as phone logs or text messages and such.

24 Q: Okay. And is it a read-only type of device? Can you
25 manipulate the information in the Cellebrite?

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1 A: You cannot.

2 Q: Explain that in more detail if you can.

3 A: Really, it's just push a button and it goes. If you have
4 a specific cell phone and you look up that model number for
5 that phone, it has a profile and it will tell you what kind of
6 extractions it can do whether it's a logical or physical
7 extraction. Logical is the data in the operating system, the
8 user data; and the physical extraction is all the data on the
9 -- in the memory that it can get. You just hit the button and
10 that runs by itself and once it's complete, then it -- the
11 files on a USB Drive and you can't do anything with it except
12 for use the Cellebrite and the other program, the Physical
13 Analyzer to be able to extract the data, which again, you just
14 select that folder and it will parse out all the data for you,
15 what it can, for that phone.

16 Q: In some cases -- let me back up. Was that technique
17 utilized in this case in any way?

18 A: Yes, sir.

19 Q: Okay. Did you have an opportunity to come in contact
20 with a telephone of Keith Levan?

21 A: Yes, sir, I did.

22 Q: And how did you come in contact with that telephone, if
23 you recall

24 A: Keith Levan's phone was provided to me by PFC Stair with
25 another cell phone and an envelope and search warrants to be

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ORIAN BOAZ COZENE - DIRECT BY HIXSON

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1 able to process those phones.

2 Q: So, it had been seized into evidence and had been in the
3 evidence locker and then you went to process it?

4 A: Yes, sir.

5 Q: Okay. And then were you able to compare and let me show
6 you what's been marked as State's Exhibit 27, see if you
7 generally recognize that, excuse me, 72?

8 A: Yes, sir; that's a Galaxy Note 4.

9 Q: Okay. And I'm gonna show you -- is that the cell phone
10 of Keith Levan that you recall doing an extraction on in this
11 case?

12 A: Yes, sir, I do.

13 Q: Okay. Let me show you -- and did you generate an
14 extraction report in this particular case?

15 A: Yes, I did, sir.

16 Q: Okay. Let me show you what's been marked as State's
17 Exhibit 64-B and see if you recognize that?

18 A: Yes, sir, it's an extraction report.

19 Q: Okay. Is that a summary of the extraction report that
20 you did -- done on Keith Levan's phone?

21 A: Yes, sir.

22 Q: And are there identifying characteristics on the face of
23 that Cellebrite report such as the telephone number or the
24 social security number -- the ID number of that phone?

25 A: Yes, sir, it gives you the model number of the phone and

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ORIAN BOAZ COZENE - DIRECT BY HIXSON

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1 the type. So, it's SMN910T, which is a Galaxy Note 4, which
2 is also located on the front of the cover and once you take
3 the back of the phone off, the cell -- the model number is
4 also there as well.

5 Q: Is that the model number that you recall receiving in the
6 search warrant that you did the extraction on?

7 A: Yes, sir.

8 Q: Let me also show you what's been marked as identification
9 only, State's Exhibit 68. See if you recognize that?

10 A: Yes, sir.

11 Q: What is that?

12 A: That is the full logical extraction report.

13 Q: Okay.

14 A: From that cellular phone.

15 Q: Okay. So, there's more information in the 68 that there
16 is in State's 64-B; is that correct?

17 A: Yes, sir.

18 Q: Were you able to search extraction reports for relevant
19 information and excluded irrelevant information?

20 A: Yes, sir. Once the report is generated, we can narrow it
21 down or, or, or look for specific things, such as phone
22 numbers or names or anything like that, anything that's
23 searchable in the whole report and we can generate another
24 report off of that main report of just your selected
25 information that you want to have.

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1 Q: Okay. So, you wouldn't be able to, for instance, in a
2 report, exclude information from years ago on an irrelevant
3 conversation and just focus on the information around the time
4 of the incident in question; is that safe to say?

5 A: Yes, sir.

6 Q: And was that done in this case? Was the information
7 narrowed to what's relevant in this case?

8 A: Yes, sir; it was.

9 MR. HIXSON: Your Honor, at this time, we move State's
10 64-B in evidence, as well as the cell phone, 72, into
11 evidence, Your Honor.

12 THE COURT: Any objection?

13 MR. FILIBERTO: No, Your Honor.

14 THE COURT: All right. So, that's State's 72 and 64-B,
15 correct?

16 MR. HIXSON: That's correct, Your Honor.

17 THE COURT: All right. It's in evidence without
18 objection.

19 STATE'S EXHIBITS NUMBERS 64-B AND 72

20 ADMITTED INTO EVIDENCE

21 BY MR. HIXSON:

22 Q: Did you do any other Cellebrite extractions in this
23 matter?

24 A: Yes, sir.

25 Q: In fact, did you have an opportunity to come into contact

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ORIAN BOAZ COZENE - DIRECT BY HIXSON

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- 1 with the victim in this case, Barry Selmon's cell phone?
- 2 A: Yes, sir; I did.
- 3 Q: Do you recall -- you did do an extraction on that cell
4 phone?
- 5 A: Yes, sir; I did.
- 6 Q: And was that cell phone recovered from the victim or the
7 victim's car?
- 8 A: It was recovered in the victim's car.
- 9 Q: And did you do a Cellebrite extraction based on a search
10 warrant from there?
- 11 A: Yes, sir, I did.
- 12 Q: Let me show you what's been marked as State's 69 and see
13 if you recognize that document.
- 14 A: Yes, sir; I do.
- 15 Q: Okay. And what does that show, if you know?
- 16 A: This is a, a smaller report of the victim's phone.
- 17 Q: Okay. And that report includes some call logs as well as
18 text messages?
- 19 A: Yes, sir, it was filtered for our -- searched and
20 filtered for specific phone numbers.
- 21 Q: Okay. At this time we'd move -- and this is a fair and
22 accurate copy of the report that you did?
- 23 A: Yes, sir.
- 24 MR. HIXSON: At this time, we move State's 69 into
25 evidence?

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1 THE COURT: Any objection?

2 MR. FILIBERTO: No, Your Honor.

3 THE COURT: All right. It's in evidence without
4 objection.

5 STATE'S EXHIBIT NUMBER 69

6 ADMITTED INTO EVIDENCE

7 BY MR. HIXSON:

8 Q: And finally, did you have an opportunity to do an
9 extraction report on Penny Hubbard's cell phone?

10 A: Yes, sir; I did.

11 Q: And also did you have mere physical possession of her
12 cell phone, also ---

13 A: Yes, I was.

14 Q: --- in order to do the extraction?

15 A: Yes, sir.

16 Q: And did you obtain possession of this based on a lawful
17 search warrant?

18 A: Yes, sir; I did.

19 Q: Were you able to compare the identifying numbers, the
20 social security -- I mean, the serial numbers and the
21 electronic ID numbers of this -- this is the phone that --
22 this is Penny Hubbard's phone?

23 A: Yes, sir.

24 Q: Let me show you what's been marked as State's 71 and see
25 if you recognize that.

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1 A: Yes, sir; that's the phone.

2 Q: Okay. And let me show you State's Exhibit 70 and see if
3 you recognize that?

4 A: That is the extraction report from that cellular phone,
5 the Pantech.

6 Q: Okay. And I notice -- and this is a fair and accurate
7 copy of the report that you ran on this cell phone at Myrtle
8 Beach Police Department?

9 A: Yes, sir; it is.

10 MR. HIXSON: At this time, we move State's 71 and 70 into
11 evidence.

12 THE COURT: Any objection to those two?

13 MR. FILIBERTO: No, Your Honor.

14 THE COURT: 70 and 71 are in evidence without objection.

15 MR. HIXSON: Thank you, Your Honor.

16 STATE'S EXHIBIT NUMBER 70 AND 71

17 ADMITTED INTO EVIDENCE

18 BY MR. HIXSON:

19 Q: Now, I notice that -- take a look at that Cellebrite
20 report. Are there any text messages in that report?

21 A: No, sir; there are not.

22 Q: And I'm referring to State's 7 --- I'm referring to
23 State's 70, Your Honor.

24 THE COURT: All right, sir.

25 Q: Okay. And matter of fact, compared to the other ones,

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1 that report seems a little small; why is that?

2 A: This cellular phone was not supported other than a
3 logical extraction that was only able to pull off the contacts
4 of that cellular phone. So, there was no other data able to
5 be extracted at that time for that model of phone.

6 Q: So were you able to physically review the phone itself
7 and see whether or not there were messages and calls to and
8 from on that phone?

9 A: Yes, sir; I was.

10 Q: Okay. In a situation like this, as an investigator, when
11 you can't get a data report downloaded with it, what technique
12 might you use to secure that information for the Court?

13 A: We -- if we cannot extract the data and get it with the
14 Cellebrite or anything else, we have to go through them
15 manually -- get the data by manually going through the cell
16 phone and taking photos of call logs, text messages or
17 whatever else the investigator would like to have off the
18 cellular phone.

19 Q: Okay. And you might actually take a physical, old-
20 fashioned picture of a screenshot of the phone and save that
21 for evidence at a future date?

22 A: Yes, sir; that is what we do.

23 Q: Was that done in this case?

24 A: Yes, sir; it was.

25 Q: Okay. Let me show you a series of photographs; State's

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1 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, and 53. Can you
2 look at those and just see if you recognize them. I'm gonna
3 ask you later on if that's a fair and accurate representation
4 of the screen shots that you took of State's 71?

5 A: Yes, sir.

6 Q: Did you manipulate this phone in any way? Did you change
7 or alter those screen shots or type in any numbers in any way
8 while you were in possession of that phone?

9 A: No, sir; I did not.

10 MR. HIXSON: At this time, we would move these
11 photographs into evidence; I'll read them again if ---

12 COURT REPORTER: 42 through 53.

13 MR. HIXSON: 42 through 53, Your Honor.

14 THE COURT: Any objection to State's 42 through 53?

15 MR. FILIBERTO: Your Honor, just the same objections for
16 foundation and hearsay.

17 THE COURT: All right. Very good. Based upon the
18 Court's prior rulings, I'll reaffirm that and allow State's 42
19 through 53 into evidence over the objection of the Defense.

20 MR. HIXSON: Thank you very much, Your Honor.

21 STATE'S EXHIBITS NUMBER 42 THROUGH 53

22 ADMITTED INTO EVIDENCE

23 BY MR. HIXSON:

24 Q: All right. Now, if you could, let's talk about content
25 now and lay the foundation for some of these, okay. So I'm

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1 gonna refer you to, first in time is the Cellebrite download
2 of State's 64-B in evidence, and that's your copy of your
3 extraction report; is that right?

4 A: Yes, sir.

5 Q: And how are these extraction reports made out, in other
6 words, do they go in chronological order, are they all over
7 the place, how exactly are they sorted?

8 A: They're sorted by timeline.

9 Q: Okay.

10 A: Well, the default is is sort of by timeline, so it goes
11 -- you can see it in sequence of how it happened in time.

12 Q: Okay. So, the first in time on Page 64, I'm gonna draw
13 your attention to the third page, and that's specifically the
14 very bottom of Page 32, can you read text message who it was
15 from and the subject matter of that text message?

16 A: On the last page?

17 Q: Yes, sir; the last page, it's Line 310?

18 A: It's in the inbox for the phone, so that was received and
19 it is from the phone number of 1-843-333-33 -- 843-333-3562
20 and it is under the name of Penny. That's ---

21 Q: Let me ask -- answer this question for you, so from this
22 point on in this Cellebrite report, if we say it's from Penny,
23 it comes from the phone number of this phone; is that correct?

24 A: Yes, sir.

25 Q: Okay. So for the purposes of the Court, from Penny is

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- 1 from that number, and then it's to -- so if we're looking at
2 this Cellebrite report, whose phone is it coming to?
3 A: It's coming -- it's going to Penny if it says to.
4 Q: From Keith Levan's phone; is that correct?
5 A: Yes, sir.
6 Q: Okay. I just want to explain context so we don't have to
7 do it every time. So, what date was this sent, this is the
8 first in the series?
9 A: It's February 10th, 2015.
10 Q: Okay. And what was the text message, please?
11 A: Text message is, So, when were you planning on leaving
12 me?
13 Q: And there's an indication to the left of that; what does
14 that say?
15 A: Read.
16 Q: That means the message was opened and read?
17 A: Correct.
18 Q: Can you go up to 307, please?
19 A: 307 is to Penny. That's on the 10th, February 10th, 2015
20 at 1:18:06 P.M. It is also sent and it states, What are you
21 talking about?
22 Q: Let's line up, please.
23 A: That is from Penny.
24 Q: To the Defendant?
25 A: To the Defendant at 2/10/2015 at 1:23 and 37 seconds P.M.

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1 and it says read and states, You know what I am talking about,
2 the letters to that girl from Asian date, all those letters of
3 how you think about her all the time and want to be with her.

4 Q: Okay. Let's go to 295 at the bottom of the next page
5 from the Defendant -- is that from the Defendant to Penny?

6 A: Yes, sir, it's sent to Penny on 2/10/2015 at 1:45 P.M.
7 It's sent and says I'm not really serious about it. She is
8 never going to come no matter what I try. If I were -- if it
9 were real, there would be a lot more planning involved, but it
10 is not real.

11 Q: 291, please.

12 A: 291 is sent, that is to Penny at 1:54 P.M. and 38 seconds
13 on the 10th of February, 2015. It is sent in that column.
14 And it states, This is not real. I treat it like a video
15 game. Well, I don't expect you to understand. I know you
16 have someone else in mind, all the signs are there. You just
17 found your excuse to leave me. Hope you found all that you
18 were looking for.

19 Q: Okay. 289, please, and that is from the Defendant Levan
20 to Penny Hubbard, correct?

21 A: Correct, and that was at 1:57 on the 10th. It was sent
22 and says, I guess I will go back to playing video games
23 instead.

24 Q: The next line, please?

25 A: That is to Penny at 2:17 P.M. on the 10th of February,

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1 2015, and it is sent, and it states, I haven't done anything
2 worse with you than you done to me to start with.

3 Q: 277, please. Who wrote that?

4 A: That was from the Defendant to Penny at 2:19 P.M. on the
5 10th of February, 2015. It was sent and it states, At least I
6 don't talk about other guys while having sex. Oh, Keith,
7 hurry up and get this over with. Barry is online; I really
8 need to talk to him or really need to talk with him so badly,
9 end quote.

10 Q: 276, please.

11 A: That was sent to Penny at 2:20 and 58 seconds on the 10th
12 of February, 2015. It says, If it is not him, it's Tony,
13 Chris, Jan (spelled phonetically), Racing Fast Dave, an Orr
14 (spelled phonetically), Blue Avinger, et cetera.

15 Q: 273, please. Who is that from and who is that to?

16 A: 273 is from the Defendant or -- I'm sorry, from Penny.
17 It is in the inbox, it is read, and it says, Have fun with
18 your new wife.

19 Q: And that was Ms. Hubbard to Mr. Levan, correct?

20 A: Yes, sir.

21 Q: Okay. Now, it appears -- can you look at the next time
22 stamp, the next date on the Cellebrite Report; what date is
23 that?

24 A: Line 49?

25 Q: No, the date -- the last text message you just read on

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- 1 Line 273 is February 10th of 2015; is that right?
- 2 A: Correct.
- 3 Q: The next one, which is message 49, what date was that
- 4 written on?
- 5 A: That was written on 2/20.
- 6 Q: So, it's 11 -- 10 days after the last message, correct?
- 7 A: Yes, sir; 2/20/2015.
- 8 Q: Okay. Can you tell me what that one's all about?
- 9 A: That was sent to Penny. And the message was, Do you want
- 10 to come with me to fire department? I'm not going to work on
- 11 stuff, just inspect L78 for hydraulic leak. We can get
- 12 something to eat.
- 13 Q: Okay. 47, please?
- 14 A: That is the inbox from Penny at 7:11 P.M.; it is read.
- 15 Q: Three hours later than the last one, right?
- 16 A: Yes, sir. It says sorry, I was being a sleepy grouch,
- 17 but again, it is hard not to be tired.
- 18 Q: Okay. Line 46, please?
- 19 A: Line 46 is sent to Penny at 7:12 P.M. and 32 seconds. It
- 20 says, They want me to eat at the fire station. I am helping
- 21 them with a car. Driftwoods is packed.
- 22 Q: Okay. And then for now Line 45, the next one, that is
- 23 ---
- 24 A: Line 45 is from -- it's in the inbox, from Penny.
- 25 Q: So, Penny writes that to Levan, correct?

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- 1 A: Yes, sir, at 7:19 and 44 seconds and it is read.
- 2 Q: On the 20th; is that right?
- 3 A: Yes, sir.
- 4 Q: Okay.
- 5 A: On the 20th, it's read. And it says, Guess who will be
6 gone the whole night then?
- 7 Q: Okay. Let's hold it right there. Okay? Thank you.
- 8 Let me show you a copy of that you have from the victim's
9 cell phone, from Barry Selmon's cell phone. I believe that is
10 State's 69. Will you take a look at that, please?
- 11 A: Yes, sir.
- 12 Q: You have that? I'm gonna refer you -- it's the same
13 format, right, capturing the test messages?
- 14 A: Yes, it is.
- 15 Q: I'm gonna refer you -- is this the same format that
16 starts to the oldest one and chronologically works its way up
17 to the date and the time of the incident?
- 18 A: Yes, sir; it does.
- 19 Q: Let me point you to Line 15. Can you tell the same
20 thing, who it's to and from and recall -- is this the victim,
21 Barry Selmon's, cell phone?
- 22 A: Yes, it is, sir.
- 23 Q: Okay. Can you please tell the -- read to the jury what
24 was going on at that time?
- 25 A: Line 15 is in the inbox from the number is Penny, which

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1 is the same phone number as the last, at 9:25 and 23 seconds
2 A.M. on February the 11th. It is read.

3 Q: So, this is one day after the initial conversation you
4 just read that was on the 10th and this happens on the 11th;
5 is that correct?

6 A: Yes, sir.

7 Q: Okay.

8 A: This is read and it says OMG..I cannot believe what -- I
9 cannot believe I wrote you instead of Sarah. That what
10 happens when I drink. It's been two months last night. Was
11 the only way to calm myself. I am not touching it again.
12 Sorry to had to read that.

13 Q: Okay. Line 14, please. So, that's from Mr. Selmon to
14 Penny; is that correct?

15 A: That is -- on line 14?

16 Q: Yes.

17 A: Yes. This is sent to Penny at 10:04. And it says
18 Alemeo, I'm here, too, if you need to talk. I told you about
19 him, and remember I am a medium.

20 Q: Line 13, please.

21 A: Line 13 is the inbox and it's from Penny.

22 Q: To the victim?

23 A: To the victim; yes, sir.

24 Q: What's that say?

25 A: At 7:29, and it was read. It says, You were so right.

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- 1 Just found out that he is talking to a girl at the mall and
2 was sending her flowers and jewelry. I am so mad.
3 Q: Line 12, please.
4 A: That is sent to Penny at 7:30 P.M. on the 12th. I knew
5 that. I am never wrong.
6 Q: Line 11, please.
7 A: Line 11 is the inbox from Penny at 7:32 P.M. on the 12th
8 and it was read. And it states, It was bad enough that I
9 found out about the girl on the site, now this??
10 Q: Line 10 from the victim to Ms. Penny, correct?
11 A: That's sent, yes, sir, to Penny on the 12th at 7:32 and
12 54 seconds. It says, So what you going to do about it?
13 Q: Line 9, please.
14 A: Line 9 is in the inbox from Penny at 7:33 and 38 seconds.
15 It's read. It says, Sorry...I do not know what to do and feel...he
16 said he was going to cancel the flowers...too late.
17 Q: Line 8, please.
18 A: Line 8 is sent to Penny at 7:34 and 12 seconds. It says,
19 You can't tell me you believe that shit.
20 Q: Line 7, please.
21 A: Line 7 is the inbox from Penny at 7:34 and 43 seconds.
22 It is read. It states, Just wanted you to know that you were
23 right...the psychic medium stuff.
24 Q: Line 6, please, sir.
25 A: Line 6 is sent to Penny at 7:35 and 37 seconds. It

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1 states, I wish you'd listened to me before, but what are you
2 going to do? That's the question.
3 Q: Line 5.
4 A: Line 5 is sent to Penny at 7:39 and 12 seconds and it
5 states, Do you want to get even with him? You know where I am
6 at? LOL.
7 Q: And that is from the victim to Penny Hubbard, correct?
8 A: Yes, sir; that is sent to Penny.
9 Q: And that's dated February 12th?
10 A: February 12th, 2015 at 7:39 P.M.
11 Q: Okay. Line 4, please.
12 A: Line 4 is from Penny. It's in the inbox at 7:44 and 10
13 seconds. It states are you working now?
14 Q: Does Barry Selmon respond to that? Line 3, please.
15 A: Line 3 is sent to Penny at 7:44 and 58 seconds. No, I'm
16 off.
17 Q: Okay. Is that the end of that series of text messages?
18 A: Yes, sir.
19 Q: On that date?
20 A: Yes, sir, on the 12th. That is the last one.
21 Q: The date of the last text message from Barry Selmon that
22 says he's off work; what's the time?
23 A: The time is 7:44 and 58 seconds on the 12th.
24 Q: Were there any telephone calls made from Penny Hubbard
25 and Keith Levan's joint home number to Barry Selmon's cell

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- 1 phone? And I'd refer you to the call log of voice calls, not
2 just text message calls, on the first page of State's 64-B --
3 no, excuse me -- 69?
- 4 A: Yes, sir.
- 5 Q: And that's a -- what is that on Line 10?
- 6 A: Line 10 is an incoming call from 1-843-293-1504 at 7:45
7 and 40 seconds.
- 8 Q: Okay. So -- and that call duration is how long?
- 9 A: 16 minutes and 9 seconds.
- 10 Q: At the end of that text message, there's a 16-minute
11 telephone call between Penny Hubbard and Barry Selmon; is that
12 correct?
- 13 A: Yes, sir.
- 14 Q: Okay. I'm gonna take you back now in time to 64-B, which
15 is Keith Levan's Cellebrite extraction report. All right? Do
16 you have that record?
- 17 A: Yes, sir.
- 18 Q: And we left off, I believe, on the 10th. We read the
19 11th and now we're back to the conversation on the 12th about,
20 Do you want to go to the fire station and eat? That was line
21 49; do you recall that?
- 22 A: Yes, sir.
- 23 Q: Okay. And then we talked to -- we're on line 45, the
24 last thing that you read, I recall is -- can you reread Line
25 45? That happened, I think you testified, on the night of

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1 February 20th at 7:19 P.M. which would be approximately seven
2 hours before Barry Selmon is killed; is that correct?

3 A: Yes, sir.

4 Q: Read that to us again, please.

5 A: That was the inbox from Penny at 7:19 and 44 seconds. It
6 is read. And it says, Guess you will be gone the whole night
7 then?

8 Q: And that's from Penny Hubbard to Keith Levan, right?

9 A: That is correct, yes.

10 Q: Okay. Is there a subsequent text message after that?
11 Line 43, please.

12 A: Yes, sir. It's on the inbox from Penny at 8:05 P.M.
13 It's read. And it states, Why did you not take your service
14 truck?

15 Q: So, Hubbard is asking Keith Levan why he didn't take his
16 work truck; that's correct? That's your understanding?

17 A: Yes, sir.

18 Q: From that text message. Now if you'd read the next text
19 message, that's into the next day, that's Line 26?

20 A: Yes, sir. It is sent to Penny at 9:45 A.M. on the 21st,
21 and it's sent -- it says, Sorry, I snapped and became the
22 monster I feared.

23 Q: Line 15, please.

24 A: That is sent to Penny at 11:00 A.M. and 59 seconds on the
25 21st. It says, Is anyone looking for me.

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1 Q: Line 14, please.

2 A: That is the inbox from Penny at 11:03 and 17 seconds.

3 It's read. It states, They will look at his Facebook and know
4 it was you. I believe there's a few dots. I hope they look
5 at the Heather Elvis and Drexel also..Barry is always full of
6 shit..but maybe he was not. Don't know. Just come home.

7 Q: Finally, Line 6 at the top of the -- Message 6, please,
8 at the top.

9 A: Message 6 is to a person named Hannie, which is at 1:38
10 55 seconds on the 21st. It is sent. And it says, I am out.
11 Someone tried to hurt family and I protect them. I
12 accidentally did very wrong, so I have to turn myself into
13 police. Can please keep this news quiet? Very sad this
14 happened..

15 Q: Okay. I'll take you back to victim, Barry Selmon's phone
16 for a moment -- we're almost done. It's kind of difficult to
17 go through this. I'm gonna draw your attention now to the
18 conversation was the night of February 21st. And I'll draw
19 your attention to the last comment that you made on that was
20 Line 3, if you recall. I believe you indicated that it was a
21 text message to Penny from the victim, Barry Selmon, and he
22 told her, No, I'm off.

23 A: That's correct.

24 Q: And that was on the 12th, right?

25 A: Yes, sir, at 7:44.

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1 Q: What does Line 2 say?

2 A: Line 2 is sent to Penny at 4:16 A.M. on the 21st of
3 February, 2015. It states, Is that you? Where are you going?

4 Q: Okay. And then the final message, Barry Selmon's final
5 text message -- let me back up in time and make sure they're
6 in chronological order. I want to show you the call log for
7 voice calls. That's on the second page, that's line 9. What
8 does that indicate to you?

9 A: It's an outgoing phone call to Penny at 4:16 and 20
10 seconds on the 21st of February 2015.

11 Q: Now, what time was that voice call? So, that's a call
12 from the victim, Barry Selmon, placed a voice call to Penny
13 Hubbard's phone; is that correct?

14 A: Yes, sir, at 4:16 and 20 seconds in the morning.

15 Q: At 4:16 and 20 seconds, correct?

16 A: Yes, sir.

17 Q: Was that a pickup? Was there any call duration on that
18 phone?

19 A: It says two seconds.

20 Q: Okay. So, Barry Selmon placed a call to Penny Hubbard
21 and it's a pickup of two seconds; is that -- that's what the
22 Cellebrite report shows?

23 A: Yes, sir; it says call duration two seconds.

24 Q: That's the call duration on that report?

25 A: Yes, sir.

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1 Q: Is there another phone call after that from Penny
2 Hubbard, Line 8?

3 A: Yes, sir. It is a missed call at 4:21 and 53 seconds,
4 duration is zero; it's missed.

5 Q: So, from 8 to 1, are those all missed calls?

6 A: Yes, sir.

7 Q: And the call duration on those calls all show zero?

8 A: All show zero; yes, sir.

9 Q: On 9, Number 9, it's a two-second voice call to Penny
10 Hubbard?

11 A: Yes, sir.

12 Q: And then finally let's go to the text message. That's
13 Text Message 1; that's the last text message; is that right?

14 A: Yes, sir.

15 Q: Can you describe that to this jury, please?

16 A: That is in the inbox from Penny at 4:27 and 31 seconds.
17 It is unread and it states, Answer your phone.

18 Q: And that was at 1:27 and 31 seconds, right?

19 A: Yes, sir.

20 Q: That Penny Hubbard texted Barry Selmon and asked him to
21 Answer your phone?

22 A: Yes, sir.

23 Q: Almost there. Let me show you a series of photographs, I
24 believe we've already moved these into evidence, Your Honor, I
25 believe, if I recall, that's 42 through 53, as I recall?

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1 THE COURT: Yes, sir, they're in evidence over the
2 objection of the Defense.

3 Q: Okay. We -- I'll tell you what, I'll just do it the old
4 fashioned way. See if you recognize that -- and I'm just
5 gonna show it to the jury as you're talking about what that
6 is.

7 A: Yes, sir. That is the Pantech phone of Penny Hubbard.
8 It's without the case that you'll see with it right there.

9 Q: Okay.

10 A: And the next one is a photo of the call log for Keith's
11 number, phone number.

12 Q: State's 42 and State's 43. I'm showing the witness
13 State's 44 and State's 45; what are those?

14 A: It's also a -- oh, I'm sorry -- it's a contact list.
15 This is for Barry's, I believe, cell phone number. And then
16 you also have the home phone number for what is believed to be
17 Penny's home phone.

18 Q: State's 44 and 45. How about 46 and 47?

19 A: 46 is the messages, so that one's to Keith on February
20 20th at 7:30 P.M. is time stamped on her phone. It says, I
21 guess you'll be gone the whole night then? And 47 is also
22 messages, Keith at February 20th at 8:15, Well, why did you
23 not take your service truck? Photos of the messages from the
24 phone.

25 Q: State's 48 and 49?

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1 A: 48 is another message. Barry -- it states, Is that you?
2 Where are you going? And then the other message says, Answer
3 your phone. And, the time stamps.

4 Q: And once again, this is Barry's Selmon's -- I'll withdraw
5 the question.

6 State's 50 and State's 51?

7 A: Message, Keith, Sorry I snapped and became the monster I
8 feared. And the other message is, Is anyone looking for me?
9 -- with the name of Keith.

10 Q: State's 52 and 53?

11 A: 52 and 53 is a long message, so I had to scroll to get
12 the whole message in two photos, and it's from Keith, and says
13 -- to Keith, They will look at this -- at his Facebook and
14 know it is you. I hope they look at the Heather Elvis and
15 Drexel, also. Barry is always full of shit, but maybe he was
16 not, don't know. Just come home.

17 Q: Officer Cozene, is that the extent of the Cellebrite
18 extraction that you did on the victim's phone, Penny Hubbard's
19 phone and the Defendant's phone?

20 A: Yes, it is.

21 Q: Let me ask you this as it relates to some of threats and
22 things concerning -- did you have an opportunity to do any
23 additional research related to the outstanding complaints by
24 this Defendant for any stalking complaints with Myrtle Beach
25 Police Department concerning Keith Levan or Barry Selmon

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1 stalking Keith Levan?

2 A: Yes, sir, I spoke to our dispatch and had them check our
3 RMS, which is our Report Management System, to see if there
4 was any complaints from the Defendant, and they did not say
5 there was any complaints at all on file.

6 Q: There was never complaints on file about Barry Selmon
7 stalking against this individual?

8 A: No; there was not.

9 MR. HIXSON: So to confirm what I have offered him as a
10 foundational the witness, Your Honor, 64 is in -- B is in, 69
11 is in, 70 is in, 42 through 53 is in. Is that right, Ms.
12 Madam Court Reporter?

13 COURT REPORTER: Yes, sir.

14 MR. HIXSON: I have no further questions of this witness,
15 Your Honor.

16 THE COURT: All right. Cross examination?

17 MR. FILIBERTO: Thank you.

18 CROSS EXAMINATION OF ORIAN BOAZ COZENE BY MR. FILIBERTO:

19 Q: Mr. Cozene, just really briefly, the digital extraction
20 you did from the cell phones in question that Mr. Hixson asked
21 you about a hundred questions on, would you know -- it's fair
22 to say that you don't know who sent or who read any of those
23 messages?

24 A: Correct.

25 Q: Just that electronically they were communicated between

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- 1 some mechanical devices?
- 2 A: All I know is the data was on those specific cell phones.
- 3 Q: Right. So, you're not here testifying that Penny Hubbard
- 4 sent a message or that Keith Levan sent a message?
- 5 A: No, sir. I'm only testifying that it's on the phone.
- 6 Q: Correct. Okay. Thank you. One other question, you
- 7 indicated that you did a search for records of complaints
- 8 filed at the PD related to Mr. Sullivan and/or Mr. Levan.
- 9 Isn't it fair to say, though, that there are times people go
- 10 down and attempt to file a complaint and talk to somebody and
- 11 no documented record of those conversations occurs?
- 12 A: Only if they request that there's no report. A lot of
- 13 times there's gonna be an informational report that they'll do
- 14 just kind of a CYA for the officer in case there's a complaint
- 15 that a victim comes in and says that they talked to a specific
- 16 officer in reference to something and the officer didn't do
- 17 anything. Generally, there's -- should be an informational
- 18 report that just states what the victim did and the victim
- 19 would not want any prosecution, but there was nothing in there
- 20 with his name other than the current charge, no.
- 21 Q: But not with respect to just a general person walking in
- 22 with a complaint, it's fair to say that while generally it's
- 23 done, it's not done every time?
- 24 A: I can't say it's done a hundred percent; no, sir.
- 25 Q: Nothing further. Thank you.

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1 THE COURT: Any redirect?

2 MR. HIXSON: No, sir.

3 THE COURT: You wish the witness to be excused?

4 MR. HIXSON: Yes, sir.

5 THE COURT: Any objection?

6 MR. FILIBERTO: No, Your Honor.

7 THE COURT: All right, sir, you're released to go back to
8 your regular duties.

9 A: Thank you.

10 THE COURT: Next witness, Solicitor?

11 MR. HIXSON: Crime Scene Specialist Scott Williamson
12 from the Myrtle Beach Police Department.

13 THE COURT: All right, sir.

14 CLERK: Please raise your right hand and place your left
15 hand on the Bible.

16 SCOTT WILLIAMSON, HAVING BEEN SWORN

17 TESTIFIES AS FOLLOWS:

18 CLERK: Please state your full name and spell your last
19 name.

20 MR. WILLIAMSON: Scott Williamson. The last name is
21 spelled W-I-L-L-I-A-M-S-O-N.

22 DIRECT EXAMINATION OF SCOTT WILLIAMSON BY MR. HIXSON:

23 Q: Good afternoon, sir.

24 A: Good afternoon.

25 Q: Tell this jury what you do for a living.

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1 A: I'm a police officer with the Myrtle Beach Police
2 Department.

3 Q: And in what capacity do you perform your duties?

4 A: I'm assigned to the Crime Scene Division.

5 Q: Okay. I think we've talked enough about what the Crime
6 Scene Division does. So, you collect evidence, take photos,
7 et cetera; is that safe to say? Did you have an opportunity
8 to do -- utilize those functions in this case?

9 A: Yes, sir.

10 Q: Okay. And talk about specifically how you got involved
11 in this case.

12 A: I came in for regular duty on February 21st and was asked
13 to accompany two detectives and meet another Horry County
14 Detective outside of our jurisdiction to execute search
15 warrants.

16 Q: Okay. And where did you -- do you recall what
17 information you obtained about executing a search
18 warrant at [REDACTED] Rosewood Drive here in Horry County?

19 A: I was provided a search warrant by Detective Lent from
20 Horry County Police Department and then when I spoke with
21 Detective McPherson, one of our detectives that had
22 accompanied me there, he stated that they were looking for
23 firearms, any kind of firearms, accessories, ammunition, and
24 that they had been provided an area on that property where to
25 look.

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1 Q: Okay. Let me show you a series of photographs. If you'd
2 take a look at those and see if you recognize those, and I'm
3 gonna ask you if those are a fair and accurate representation
4 of the scenes that you saw when you performed your search
5 warrant duties?

6 A: Yes, sir. These are actually photos of both places that
7 I went, sir.

8 Q: Just take a look at all of them and we'll talk about them
9 in more detail.

10 A: Yes, sir. They are a fair and accurate representation of
11 where I went.

12 Q: Okay. So, I think you previewed that to the jury. So,
13 in fact, you ended up serving two search warrants that day; is
14 that safe to say?

15 A: Yes, sir.

16 Q: Okay. Let's just start with the first one in time.
17 Let's talk about the Boxwood Drive, excuse me, the Rosewood
18 Drive search warrant. Okay?

19 A: Yes, sir.

20 Q: Were you -- what specific items -- I mean, you could look
21 for a bunch of items, but what items were you specifically
22 looking for when you went to that location?

23 A: At the Rosewood Drive address, we were looking for -- I
24 was described as an ALL RIGHT-15 style rifle, any kind of
25 ammunition or magazines or accessories that would go along

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1 with that kind of rifle.

2 Q: Okay. Let me show you what's been marked as State's 54
3 and see if you recognize that. I mean, you already did, so
4 ---

5 A: Yes, sir; I already did.

6 MR. HIXSON: We would move 54 into evidence, Your Honor.

7 THE COURT: Any objection?

8 MR. FILIBERTO: No, Your Honor.

9 THE COURT: State's 54 is in evidence.

10 STATE'S EXHIBIT NUMBER 54

11 ADMITTED INTO EVIDENCE

12 MR. HIXSON: May I publish that, Your Honor?

13 THE COURT: Yes, sir.

14 MR. HIXSON: That's Slide 39, please.

15 BY MR. HIXSON:

16 Q: Is that picture the same as the one you're looking at on
17 the screen?

18 A: Yes, sir.

19 Q: Okay. Is that the location that you performed a search
20 warrant and try to look for a weapon?

21 A: Yes, sir.

22 MR. HIXSON: I'm showing State's 55. I believe that's --
23 I'd like to admit that into evidence.

24 THE COURT: Any objection?

25 MR. FILIBERTO: No, Your Honor.

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1 THE COURT: All right. It's in evidence without
2 objection.

3 STATE'S EXHIBIT NUMBER 55

4 ADMITTED INTO EVIDENCE

5 MR. HIXSON: May I publish that, Your Honor, please?

6 THE COURT: Yes, sir.

7 BY MR. HIXSON:

8 Q: 40. What is this; is that the same as the photograph?

9 A: Yes, sir.

10 Q: What is it we're looking at, please?

11 A: That is the back property to the right of the front of
12 the [REDACTED] Rosewood house.

13 Q: If you look to the right side of the screen, is that a
14 shed of some kind?

15 A: Yes, sir. I described it in my report as a tool shed.

16 Q: Did you find anything of any evidentiary interest behind
17 that tool shed location?

18 A: Yes, sir.

19 Q: What did you find?

20 A: I'll try and read you the list from my report, sir.

21 Q: Let me -- sure, go ahead; yes, please.

22 A: If I could refer to my report to refresh my memory, we
23 found lots of items there. We found a DPMS brand AR-15 style
24 rifle Model A-15, with a serial number of FH56643. That was
25 wrapped in a white plastic trash bag like a kitchen trash bag.

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1 I found two Cammenga brand boxed magazines that would fit in
2 an AR-15. They were still within their packaging, meaning
3 they were unused. I found two black-colored metal box
4 magazines containing live ammunition. There were 45 rounds of
5 loose .223 caliber ammunition; it was a Remington brand taken
6 out of those two box magazines. There was one box of Hornady,
7 I believe the brand is Zombie-Max, .223 caliber ammunition.
8 There was 20 rounds of that type ammunition in that box.
9 There was a box of Remington UMC .223 ammunition which was
10 labeled a 200 round mega pack, is the size of the box. Within
11 that box was a 141 rounds of unfired Remington brand .223
12 ammunition. And then there were four Styrofoam ammunition
13 bricks taken from the Remington mega pack box that did not
14 contain ammunition.

15 Q: Let me show you a photograph that's been marked as
16 State's 56. And I'd like to move that into evidence, Your
17 Honor?

18 THE COURT: Yes, sir. Any objection?

19 MR. FILIBERTO: No, Your Honor.

20 THE COURT: All right. State's 56 is in evidence without
21 objection. All right.

22 MR. HIXSON: And that is Item 41.

23 STATE'S EXHIBIT NUMBER 56

24 ADMITTED INTO EVIDENCE

25 BY MR. HIXSON:

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1 Q: Is that the same photograph we're looking at on the TV
2 screen?

3 A: Yes, sir.

4 Q: What does that photograph depict?

5 A: It depicts a box of ammunition entitled Remington UMC and
6 then a white trash bag, as I described, behind it.

7 Q: Okay.

8 A: And that's the -- to the right is the corner of the tool
9 shed that we described and then -- I'm sorry -- to the left.
10 And to the right is a tree that's also depicted in one of the
11 other photographs.

12 Q: Did you find a weapon inside that trash bag?

13 A: Yes, sir.

14 MR. HIXSON: Your Honor, I'm preparing to show the
15 witness State's Exhibit 61. And Your Honor, pursuant to the
16 Supreme Court Order, we have secured this weapon. The
17 Sheriff's Department has inspected it, has put a cable lock
18 through the trigger making it inoperable before we present
19 this to the jury.

20 THE COURT: Very good.

21 BY MR. HIXSON:

22 Q: Let me show you what's been marked as State's Exhibit 61
23 and see if you recognize this item.

24 A: Let me see if I can match the serial number for you.

25 Q: Okay.

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1 A: Yes, sir, I recognize the item, and it matches the serial
2 number in my report.

3 Q: Okay.

4 COURT REPORTER: Can you please read the serial number?

5 Q: I sure can. It is DPMS Model A15 FH56643 caliber .223-,
6 .525 6 millimeter. And if you can on the dust cover -- I see
7 there's inscriptions on the dust cover. Can you read what the
8 inscription on that dust cover says?

9 A: It says Zombie Hunter and then the O in the word Zombie
10 is a biohazard symbol.

11 MR. HIXSON: Your Honor, at this time, we would move this
12 DPMS AR-15 A15 into evidence?

13 THE COURT: Any objection to that?

14 MR. FILIBERTO: No, Your Honor.

15 THE COURT: State's 61 is in evidence without objection.
16 You may proceed.

17 STATE'S EXHIBIT NUMBER 61

18 ADMITTED INTO EVIDENCE

19 BY MR. HIXSON:

20 Q: Now you indicated, I believe, that you have recovered
21 ammunition magazines, this as well?

22 A: Yes, sir.

23 Q: And approximately how many rounds of ammunition did you
24 recover from -- Your Honor, I'm gonna secure it back here if
25 that's appropriate?

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1 THE COURT: Yes, sir. You now need to leave the boxes.

2 MR. HIXSON: I'll put it between Your Honor and Madam
3 Court Reporter?

4 THE COURT: That's right. Thank you, sir.

5 A: Your prior question, I believe there was 201 total rounds
6 of ammunition, if I'm adding them up correctly here.

7 BY MR. HIXSON:

8 Q: You have 200-and-some rounds of total ammunition?

9 A: Yes.

10 Q: And two 30-round magazines at least that we know?

11 A: Yes, actually four box magazines. Two were still in
12 their packaging, two were removed from the packaging and had
13 ammunition in them.

14 Q: Two had been used; two hadn't been unwrapped yet?

15 A: Yeah, that's consistent with that; yes, sir.

16 Q: Let me ask you, Did you have an opportunity to perform a
17 second search warrant?

18 A: Yes, sir.

19 Q: And in fact was that -- what's the address for the second
20 search warrant? It's the Boxwood Drive address; is that
21 correct?

22 A: Yes, sir; [REDACTED] Boxwood Drive.

23 Q: And what were you there for -- who lives at Boxwood
24 Drive?

25 A: I was told that Mr. Levan was there along with Ms.

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1 Hubbard.

2 Q: Ms. Hubbard, okay. And did you, in fact, execute a
3 search warrant on that [REDACTED] Boxwood Drive?

4 A: Yes, sir.

5 Q: Let me show a series of photographs. I think you already
6 looked at them. I'm sure you already authenticated those as a
7 fair and accurate representation.

8 A: Yes, sir. Yes, sir; they're a fair and accurate
9 representation.

10 MR. HIXSON: And I show the witness 57, 58, and I believe
11 it's 59, Your Honor. Let me make sure that's right.

12 THE COURT: All right.

13 MR. HIXSON: We'd move these into evidence.

14 THE COURT: Any objections to those three photographs?

15 MR. FILIBERTO: No, Your Honor.

16 THE COURT: All right.

17 MR. HIXSON: And 60, Your Honor.

18 THE COURT: All right. And 60, also.

19 MR. FILIBERTO: No, Your Honor.

20 MR. HIXSON: 57 through 60.

21 THE COURT: So, 57 through 60 are in evidence without
22 objection.

23 STATE'S EXHIBIT NUMBERS 57 THROUGH 60

24 ADMITTED INTO EVIDENCE

25 MR. HIXSON: May I publish these also, Your Honor?

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1 THE COURT: Yes, sir.

2 BY MR. HIXSON:

3 Q: Let's take a look at 57; that is 42. Is that the same
4 photo you're looking at there?

5 A: Yes, sir.

6 Q: What all does that depict?

7 A: That depicts the front of the residence at [REDACTED] Boxwood
8 and several vehicles that were parked there when I arrived to
9 execute the search warrant.

10 Q: Does it appear to be service trucks, and a personal truck
11 at the residence?

12 A: Yes, sir.

13 Q: Let me show you what's been marked in evidence as State's
14 58 see -- that is 43, Slide 43, please. Is that the same
15 photograph?

16 A: Yes, sir; it's the same.

17 Q: What is that a photograph of?

18 A: That's a photograph of a table where I left the search
19 warrant at the time we were finished with the execution of it.

20 Q: There's a variety of different video games on the top of
21 that?

22 A: Yes, sir. I see Call of Duty, Walking Dead, and a box of
23 tissue, things like -- of that nature.

24 Q: Now, while you were in the residence performing your
25 search, did you -- did any information come to your attention

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1 that indicated perhaps this house was wired for some kind of
2 surveillance system?

3 A: Yes, sir. On the outside, I observed there was a
4 surveillance camera on the front directly above the porch and
5 there's also wiring traveling along the outside of the house
6 and entering the house in a hole in the wall.

7 Q: Okay. Did you attempt to investigate whether or not
8 there was a DVR system, surveillance camera system inside the
9 Levan house?

10 A: Yes, sir.

11 Q: Did you in fact find any evidence of that?

12 A: Yes, sir, in the, in the bedroom in the back, which would
13 be a front bedroom. If you're looking at the house, you'll
14 see a front window, that would be the window to that bedroom.
15 That is where the line lead from one of the surveillance
16 cameras that we saw out front. Then, inside the house in the
17 back of a closet, we found wires coming in through the top of
18 the closet that are consistent with wires that are typically
19 used in a surveillance system like that, a video wire attached
20 with a power wire to it. And then as we searched -- further
21 searched the room, on the bookcase we found an actual video --
22 digital video recorder unit on the bookcase disconnected from
23 the wiring in the closet.

24 Q: I'm gonna show you State's 59 that's in evidence. 44
25 please? Can you describe that photograph to the jury what

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1 we're looking at?

2 A: Yes, sir, that's the back of a closet and that's the wire
3 hanging down from a hole in the wall. The wire on the left,
4 you'll see is yellow, and that's a video signal wire. And
5 then on the right is a like 12-volt power supply wire.

6 Q: So, would there normally be a digital recording unit
7 connected to that wiring?

8 A: Yeah, if it was being used, yes, sir.

9 Q: Okay. Did you find the surveillance equipment connected
10 to that wire?

11 A: No, sir.

12 Q: It had been disconnected?

13 A: Yes, sir.

14 Q: Let me show you State's 60. Do you recognize that? And
15 that is slide 45, please.

16 A: Yes, sir; I do recognize it.

17 Q: And that's an accurate picture of what you see on the
18 screen right there?

19 A: Yes, sir.

20 Q: What is that at that that we're looking at a picture of?

21 A: That is a Swann brand digital video recording system. It
22 would be compatible with the type of wire coming out of the
23 wall. It could be used to connect to that and record digital
24 video from the camera.

25 Q: So this surveillance system had been removed from his

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- 1 normal location connected and put up on a shelf somewhere?
- 2 A: Yes, sir.
- 3 Q: Did you all disconnect it or was it disconnected when you
- 4 arrived with the search warrant?
- 5 A: It was disconnected when we arrived.
- 6 Q: Did you collect that digital video recorder?
- 7 A: Yes, sir.
- 8 Q: I'm showing the witness, Your Honor, what's been marked
- 9 as State's Exhibit 62.
- 10 See if you recognize that?
- 11 A: Yes, sir.
- 12 Q: What is that?
- 13 A: It is a Swann brand four-channel digital video recorder,
- 14 and I have a serial number actually on the report here that I
- 15 could verify it's the same serial number. Would you like it
- 16 out loud or ---
- 17 Q: No, that's all right.
- 18 A: Okay.
- 19 Q: Is that the one that you recovered from the Levan
- 20 residence when you executed the search warrant?
- 21 A: Yes, sir.
- 22 Q: It was functioning at the time -- was it functioning at
- 23 the time and were you able to extract video from this when you
- 24 got back to Myrtle Beach Police Department?
- 25 A: It was as you see it there. We collected it, packaged

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1 it, and then did not do anything with it at that time. We
2 didn't know if it was pertinent to the investigation at that
3 point.

4 Q: Let me rephrase that. Subsequent to that, did you
5 extract video from this device?

6 A: Yes, sir, at a later date; yes, sir.

7 MR. HIXSON: At this time, we'd move 62 into evidence,
8 Your Honor.

9 THE COURT: Any objection to that?

10 MR. FILIBERTO: No, Your Honor.

11 THE COURT: All right. It's into evidence without
12 objection.

13 STATE'S EXHIBIT NUMBER 62

14 ADMITTED INTO EVIDENCE

15 BY MR. HIXSON:

16 Q: And finally, when you did perform an extraction on that
17 DVR, did you put it or transfer it to some type of portable
18 medium such as a USB port or a DVD disc?

19 A: Yes, sir, a thumb drive, USB mass storage device, and we
20 also burned a copy onto a disc so it would be playable other
21 computers.

22 Q: Have you had an opportunity, prior to coming to court, to
23 review the contents of the video on here and review it for
24 accuracy?

25 A: Yes, sir.

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1 Q: Okay. I'm showing you a copy of what's been marked as
2 State's Exhibit 63. Can you describe what that is?

3 A: It's a recordable DVD. It's states Keith Levan, Boxwood
4 Drive, and then has court copy, and then I initialed it that
5 this the copy that I viewed.

6 Q: Okay. And the DVR drive itself, essentially can run for
7 hours and hours; is that correct?

8 A: Yes, sir.

9 Q: And there's a substantial amount of information on it; is
10 that correct?

11 A: Yes.

12 Q: The disc that you referred for this -- reviewed for
13 court, does that encompass the timeframe around the killing of
14 Barry Selmon?

15 A: Yes, sir.

16 Q: Okay. And this is a fair and accurate representation; is
17 that correct?

18 A: Yes, sir.

19 MR. HIXSON: At this time, we'd like to publish State's
20 63?

21 THE COURT: Any objection?

22 MR. FILIBERTO: I'd object; yes, Your Honor. Improper
23 foundation ---

24 THE COURT: All right, sir. I'm gonna allow 63 in
25 evidence over the objection of the Defense. You may publish

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1 it to the jury.

2 MR. HIXSON: Thank you, Your Honor.

3 STATE'S EXHIBIT NUMBER 63

4 ADMITTED INTO EVIDENCE

5 BY MR. HIXSON:

6 Q: And as we get this pulled up, were you inside the house
7 at Boxwood Drive?

8 A: Yes, sir.

9 Q: And you recognize the image that you reviewed is the
10 video from inside the house on Boxwood Drive?

11 A: Yes, sir.

12 Q: Okay. Initially, you'll see several individuals in this
13 shot; is that correct?

14 A: Yes, sir.

15 Q: Is -- the male in the shot, is that Keith Levan?

16 A: I, I did not know what Keith Levan looked like at the
17 time, so then I did not know, but subsequently -- yes, sir; it
18 is.

19 Q: Okay. Initially, there's a female in the shot as well;
20 is that your understanding when you reviewed it and saw that?

21 A: Yes, sir.

22 Q: Can you describe when you see the video, do you see a
23 computer screen in the bottom center of the video?

24 A: Yes, sir.

25 Q: Okay. And if you feel -- I may ask you a few questions

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1 as it plays to help orient this for the jury.

2 (REPORTER'S NOTE: State's Exhibit Number 64 published.)

3 Q: At the bottom center of the screen, you see a little
4 triangle; what is that?

5 A: I believe it to be the corner of a computer screen.

6 Q: Okay. For Madam Court Reporter, we're showing the time
7 stamp on a computer screen that's February 21st of 2015 at 4
8 o'clock in the morning.

9 Were you able to determine how accurate that counter was?
10 Was the counter off or on or what's your understanding as to
11 how accurate it was?

12 A: My understanding is, is the correct date and the time was
13 accurate to within a few minutes of the actual time.

14 Q: I guess for the Court's edification, is this entire video
15 roughly seven minutes long; is that your understanding?

16 A: Yes, sir.

17 Q: Does that appear to be an assault -- a rifle that the
18 individual is carrying?

19 A: Yes, sir, it appears to be a AR-15 style rifle.

20 Q: And is that the location of the computer screen I think
21 you testified to earlier?

22 A: Yes, sir; it's the same screen.

23 Q: So, that count jumped by two minutes; is that correct?

24 A: Yes, sir.

25 Q: Can you tell what he appears to have in his hand at that

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1 time?

2 A: I'm sorry; what was your question?

3 Q: That's okay. We've passed it. I believe that's the
4 third time he's checked that computer screen?

5 A: Yes, sir.

6 Q: Is that a handgun?

7 A: That's what it appears to be, sir, yes.

8 Q: Is that a hatchet?

9 A: Yes, sir, it looks like a hatchet or some sort of a
10 tomahawk type weapon.

11 Q: Now the time camera on the screen at this time is 4:05;
12 is that right?

13 A: Yes, sir.

14 Q: Based on additional investigations, did you come to
15 understand that that's Ms. Hubbard?

16 A: Yes, sir.

17 Q: And this was 4:37, so approximately 35 to 38 minutes had
18 gone by?

19 A: Yes, sir.

20 Q: And you've been in the house, so the part of the left
21 side of the screen, is that the front door in and out of the
22 house, where see folks going in and out on the left; is that
23 correct?

24 A: Yes, sir; that's correct.

25 Q: Does that appear to be Mr. Levan putting his tomahawk

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1 away, hatchet away?

2 A: Yeah, it appears to be the same one from the earlier
3 video or earlier portion of the video.

4 Q: Is that a white plastic bag?

5 A: Yes, sir.

6 Q: Is that look consistent with the bag that you found
7 behind the shed?

8 A: Yes, sir. The size and shape it appears there's
9 something long wrapped up in it.

10 MR. HIXSON: That's State's 63, Your Honor, in evidence.

11 THE COURT: All right, sir.

12 BY MR. HIXSON:

13 Q: Finally, you were at Boxwood Drive -- Your Honor, and
14 we'd refer the witness to State's 2. You indicated that [REDACTED]
15 Boxwood Drive address on that, right?

16 A: Yes, sir, it's listed right here.

17 Q: Okay. And the incident location, I think, the testimony
18 you recall is where Mr. Selmon was shot and killed?

19 A: Yes, sir. It was behind the hhgregg store. I'm sorry --
20 that would be up here in this corner.

21 Q: Do you have personal knowledge of the drive time
22 distance, the normal -- the normal drive time distance
23 between, excuse me, hhgregg and Boxwood Drive?

24 A: Yes, sir, last Monday I drove -- I went to Boxwood Drive
25 and drove from Boxwood Drive with the most common route to

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SCOTT WILLIAMSON - CROSS BY FILIBERTO

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1 hhgregg and, approximately 7:30 at night, it took around 12 to
2 13 minutes.

3 Q: Okay. And so in February 21st in the wintertime here in
4 the Grand Strand at 4 o'clock in the morning, would you expect
5 that drive time to be shorter or longer?

6 A: I would expect it to be shorter with less traffic and
7 catching the red lights and green lights better than what you
8 would and you wouldn't have to wait for the cross traffic.

9 Q: Perhaps especially if you're speeding away from something
10 it would be even shorter yet?

11 A: Yes, sir.

12 MR. HIXSON: I have no further questions, Your Honor.

13 THE COURT: Cross examination?

14 MR. FILIBERTO: Thank you, Your Honor.

15 CROSS EXAMINATION OF SCOTT WILLIAMSON BY MR. FILIBERTO:

16 Q: I have just a few questions. You indicated the DVR
17 machine was unplugged when you got to the Levan residence?

18 A: Yes, sir.

19 Q: And so there's no power to it?

20 A: There were no cords connected to it.

21 Q: Did you do anything to verify -- is there any way your
22 testimony can verify that that time date stamp accurately
23 reflects whatever activities went on at that time?

24 A: No, sir, there's no real way to verify it. When we made
25 the copy of the video, the digital information from the video,

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SCOTT WILLIAMSON - CROSS BY FILIBERTO

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1 you perform a search that says I want to look at this time to
2 this time, and we ---

3 Q: But you don't know that what was visually shown happened
4 at that time Solicitor Hixson indicated it in his question?

5 A: Correct.

6 Q: Okay. I mean, it's fair, I just -- as part of your
7 investigation when Mr. Levan was taken into custody, did you
8 take possession of and review the clothing he was wearing?

9 A: Yes, sir.

10 Q: And did you notice anything particularly about the jacket
11 he was wearing?

12 A: I'm sorry, Mr. Levan's clothing?

13 Q: Mr. Levan's clothing?

14 A: No, I didn't -- I do not remember actually ---

15 MR. FILIBERTO: May I approach the witness and show him
16 this ---

17 THE COURT: Yes, sir.

18 A: If you can refresh my memory, that's fine -- I'm not ---

19 MY MR. FILIBERTO:

20 Q: If you could just ---

21 A: Thank you. Okay. That's why I was a little confused. I
22 was thinking maybe I had gotten the -- the victim's clothing,
23 but -- Okay. Yes, sir; I do remember this.

24 Q: Okay. When you examined the jacket Mr. Levan was
25 wearing, did you notice anything that caught your attention?

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SCOTT WILLIAMSON - CROSS BY FILIBERTO

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1 A: Yes, sir, there's a reddish stain on the front of it.

2 Q: Did you determine if that reddish stain was blood?

3 A: Yes, I performed a presumptive test on it and it came
4 back positive.

5 Q: And did you any examination to determine whose blood that
6 was?

7 A: I do not have the capability.

8 MR. FILIBERTO: Court's indulgence just one minute, Your
9 Honor?

10 THE COURT: Yes, sir.

11 MR. FILIBERTO: I have no further questions for this
12 witness, Your Honor.

13 THE COURT: Any redirect?

14 MR. HIXSON: No, sir.

15 THE COURT: All right. Do you wish this witness to be
16 excused?

17 MR. HIXSON: Yes, sir.

18 THE COURT: All right.

19 Sir, you are released from your subpoena; you may go back
20 to your regular duties.

21 A: Thank you, Your Honor.

22 MR. HIXSON: I beg the Court's indulgence for a brief
23 minute?

24 THE COURT: Yes, sir.

25 All right, Solicitor, your next witness please?

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SCOTT WILLIAMSON - CROSS BY FILIBERTO

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1 MR. HIXSON: Your Honor, at this time, the State of South
2 Carolina rests.

3 THE COURT: All right. Very good.

4 Are there matters of law for the Court at this point in
5 time, Mr. Filiberto?

6 MR. FILIBERTO: There would be, Your Honor.

7 THE COURT: All right.

8 All right, ladies and gentlemen, the State has rested its
9 presentation of evidence in this particular matter. There are
10 matters of law I have to take up outside of your presence that
11 I must discuss with the attorneys. It will take some period
12 of time to do that.

13 (To Counsel.) Could y'all could come up and talk to me
14 for one second?

15 (REPORTER'S NOTE: A bench conference was held off the record
16 in the presence of but out of hearing of the Jury.)

17 THE COURT: All right, ladies and gentlemen, I know we've
18 kept you from going back and forth, it's the Court's intention
19 that I'm gonna let y'all go home for the evening because there
20 are some matters I have to take up outside of your presence.
21 I don't know how long this is going to take and I want to
22 cover some matters with the Counsel. So, I'm gonna let you go
23 home for the evening. I want you to please be back at 9:30 in
24 the morning. I want you to come out into the courtroom at
25 9:30, so I'll leave it to Madam Bailiff and the Deputy to let

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1 you know when they want you to assemble downstairs in the Jury
2 Assembly Room.

3 Again, I'm certain that the Clerk's office will have
4 something for you in your jury room, so I'm sure they'll
5 probably want you here a little bit earlier so that you can
6 enjoy that.

7 Please remember, don't talk about the case, don't allow
8 anybody to talk to you about it, don't go home and discuss it,
9 you can't do any research, you can't look up anything. You
10 are deciding this case, the twelve of you, based upon the
11 facts and evidence presented in this courtroom and from no
12 other source.

13 So, with that, I'll see you back -- please come back and
14 be here ready to go by 9:30, please.

15 Thank you very much.

16 (REPORTER'S NOTE: Jury exits courtroom. The following takes
17 place outside the presence of the Jury.)

18 THE COURT: All right, Mr. Filiberto, motions on behalf
19 of the defense?

20 MOTIONS:

21 MR. FILIBERTO: Your Honor, at this time, we'd make a
22 motion for directed verdict of not guilty on the charges based
23 on the State's failure to provide appropriate evidence,
24 intentional killing, malice aforethought.

25 THE COURT: All right, Solicitor, your response?

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1 MR. HIXSON: We believe we've provided substantial
2 evidence. We actually have direct evidence in this case in
3 addition to circumstantial evidence. By the Defendant's own
4 admissions, he armed himself with an AR-15 rifle for the
5 purpose of committing a felony and that is pointing and
6 presenting a firearm. His actual quote was, I grabbed an AR
7 and went down there to scare him. To scare him by brandishing
8 a firearm is pointing and presenting under South Carolina law.
9 So, at the bare minimum without going further in the argument,
10 he committed a felony in that regard. That is malice
11 aforethought. I believe certainly enough malice aforethought
12 to present that to the jury.

13 I obviously have other stuff considering he intended to
14 fire at the gas tank of the vehicle. I can't think of a
15 reason why an individual would fire at a gas tank of a moving
16 vehicle unless the intention was to cause an explosion. That
17 is expressed malice aforethought I believe in that statement
18 alone by Mr. Levan.

19 Certainly, in the light most favorable to the State, we've
20 accomplished our burden of proof and some of those issues
21 obviously are gonna have to be decided by a jury. We
22 respectfully ask Your Honor to deny the defense motion.

23 THE COURT: All right. Very good.

24 Any reply, Mr. Filiberto?

25 MR. FILIBERTO: No, Your Honor.

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RULING OF THE COURT

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1 RULING OF THE COURT:

2 THE COURT: All right. Very good.

3 Regarding this particular matter, the directed verdict,
4 the Defendant would be entitled to a directed verdict if the
5 State failed to produce evidence of the offense charged.
6 Here, the Defendant being charged with the crime of murder.
7 As the Trial Judge, I'm concerned with the existence of
8 evidence, not with its weight, not with its credibility or
9 believability, but only whether or not the evidence exists.
10 Regarding this, the -- again, the Defendant would be entitled
11 to a directed verdict motion if the evidence merely raised a
12 suspicion that the accused was guilty.

13 I must view the evidence and all reasonable inferences in
14 the light most favorable to the non-moving party; that is in
15 the light most favorable to the State. And, if I find any
16 direct evidence or any substantial circumstantial evidence
17 that reasonably tends to prove the guilty of the accused, then
18 it would be proper to send the matter to the jury.

19 Here, there is certainly substantial or there is direct
20 evidence of the matter that involves the various videos, the
21 statements of the Defendant, clearly the arming of himself
22 with the AR-15 style rifle along with other weapons, the
23 resulting action of what actually happened to the victim in
24 this matter, based upon the testimony of the Medical Examiner
25 and the Crime Scene Specialist, the evidence found at the

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RULING OF THE COURT

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1 scene, that being the cartridge casings matching the type of
2 ammunition used in the AR-15 style rifle, I do find that there
3 is direct evidence and, also, substantial circumstantial
4 evidence all of which pointing to the Defendant as the person
5 who committed the crime and committed the actions as alleged
6 by the State. And, therefore, considering all of that
7 evidence, I find it is more than sufficient to submit the
8 matter to the jury for its deliberation and decision in this
9 matter and, therefore, respectfully decline to grant your
10 motion for a directed verdict.

11 MR. FILIBERTO: Yes, sir.

12 THE COURT: Further motions on behalf of the defense?

13 MR. FILIBERTO: Your Honor, I think at this time I might
14 reserve a chance to bring one up in the morning.

15 THE COURT: All right, sir. What I -- I obviously have
16 excused the jury. Are you prepared at this point in time for
17 me to ask your client whether or not and advise him of his
18 constitutional rights and advise -- and ask him whether or not
19 he wishes to testify in this matter or would you want to do
20 that first thing in the morning before we get started?

21 MR. FILIBERTO: Your Honor, I have no objections to you
22 doing it now.

23 THE COURT: All right. Very good.

24 All right. Mr. Levan, could you stand up please, sir?

25 You can place him under oath.

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KEITH SHELDON LEVAN - BY THE COURT

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1 CLERK: Please raise your right hand.

2 KEITH LEVAN, HAVING BEEN SWORN

3 TESTIFIES AS FOLLOWS:

4 THE COURT: All right. Mr. Levan, at this point in time,
5 I'm going to explain to you certain of your constitutional
6 rights. If at any point in time, you do not understand me,
7 have a question, you need something explained to you, got some
8 concern, you need to bring that to the Court's attention. You
9 can raise your hand, tell your attorney, but in some way you
10 have to indicate that to the Court. We in agreement there?

11 MR. LEVAN: Yes, sir.

12 THE COURT: All right, sir. Very good. Now we've
13 reached the stage of the trial where you can present a
14 defense. You have the right to call witnesses if you so
15 choose to and you also have the right to testify. Now the
16 Fifth Amendment to the Constitution of the United States of
17 America states in part that no person shall be compelled in
18 any criminal case to be a witness against himself. That means
19 you cannot be required to testify in this case. You can
20 testify if you so wish to do so, but nobody can make you
21 testify; do you understand that?

22 MR. LEVAN: Yes, sir.

23 THE COURT: All right, sir. Now, if you decide to
24 testify, you would be treated just the same as all the other
25 witnesses that have already testified in this case. You would

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KEITH SHELDON LEVAN - BY THE COURT

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1 be examined or questioned by your attorney and then you would
2 be cross examined or questioned by the State as to any matters
3 the Court deemed relevant regarding this particular matter;
4 you understand that?

5 MR. LEVAN: Yes, sir.

6 THE COURT: Is there any prior record that the State
7 would wish to examine the Defendant about?

8 MR. HIXSON: Yes, Your Honor, he has a record for
9 stalking and aggravated stalking, I believe, out of
10 Pennsylvania. We have tried to contact Pennsylvania to see
11 whether or not -- it appears that he received a five-year
12 probationary sentence on one, one year on the other. I
13 believe one is a felony; the other one, I believe, is probably
14 a misdemeanor. That is the only one in question and beg the
15 Court's indulgence for one moment.

16 THE COURT: All right, sir.

17 MR. HIXSON: Harassment and stalking out of Pennsylvania,
18 that would be it. Disorderly conduct, there's no way --
19 that's the only one potentially the only in question and --
20 I'm trying to find the sentence. I apologize, Your Honor.
21 He's got -- there was a 1997 conviction, he pled guilty, five
22 years' probation. There's a bunch of arrests, but we wouldn't
23 assert that we would cross examine him on that unless it's
24 elicited by the Defense.

25 THE COURT: All right. So, there's one -- one crime that

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KEITH SHELDON LEVAN - BY THE COURT

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1 you wish to ask him whether or not he was convicted of that
2 particular matter; is that correct?

3 MR. HIXSON: That's correct, Your Honor.

4 THE COURT: All right. And tell the Court again what
5 that is, please.

6 MR. HIXSON: It's aggravated stalking and harassment.

7 THE COURT: All right. Have you been able to look at
8 that, Mr. Filiberto?

9 MR. FILIBERTO: I reviewed the NCIC report, Your Honor.
10 We're not a hundred percent sure it's accurate. We indicate
11 that it's been almost 20 years ago and so we've not gotten ---

12 THE COURT: All right.

13 MR. FILIBERTO: --- enough information. We understand,
14 Mr. Levan at one point was under the understanding, as he
15 advised me, that that matter was just going to be resolved and
16 dismissed for him as he came here and it now shows up on his
17 NCIC.

18 THE COURT: All right. So, what is the date of that
19 conviction, Solicitor?

20 MR. HIXSON: There are two of them. I'm showing that the
21 one clearly is a misdemeanor. What I'm looking at , it says
22 convicted 1997. He pled guilty to that. He received five
23 years probationary sentence and that probation was transferred
24 to South Carolina according to this NCIC report.

25 THE COURT: All right. So, it was a five-year probation;

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1 is that correct?

2 MR. HIXSON: That's correct, Your Honor.

3 THE COURT: All right, so -- all right. So, that would
4 have expired maximum term, it would have expired in 2002,
5 correct?

6 MR. HIXSON: I believe you're correct.

7 THE COURT: All right. So, looking at -- looking at 609,
8 it says that evidence that a person has been convicted of a
9 crime would be admitted subject to 403 if the crime was
10 punishable by death or imprisonment in excess of one year
11 under the law, which the witness was convicted and evidence
12 that an accused has been convicted of such crime shall be
13 admitted if the Court determines probative value of admitting
14 this evidence outweighs the prejudicial effect of the accused
15 and the time limit is the evidence of the conviction under
16 this rule is not admissible if a period of more than ten years
17 have elapsed since the date of the conviction or of the
18 release of the witness from confinement imposed for that
19 conviction, whichever is the later date, unless the Court
20 determines, in the interest of justice, that the probative
21 value of the conviction is supported by specific facts and
22 circumstances substantially outweighs its prejudicial effect.

23 What would you say to that in that obviously the 10 years
24 have expired since, you know, at its latest, 2002?

25 MR. HIXSON: My feeling, Your Honor, by the Rule, I think

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1 the only position the State would be in was non-direct
2 impeachment on the existence of the conviction, but perhaps if
3 the testimony of Mr. Levan gets in an area concerning who's
4 the initial aggressor, who's not the initial aggressor, if we
5 get into there, I may at that time ask the Court -- I wouldn't
6 intend to impeach him simply with that conviction.

7 THE COURT: All right.

8 MR. HIXSON: But, I would cross that bridge when we came
9 to it if the testimony got that far.

10 THE COURT: Well, just on its face, I'm not -- I do not
11 find that Rule 609 of Rules of Evidence allow you to ask him
12 about that particular conviction. Should there be some type
13 of testimony on behalf of the Defendant that could open the
14 door to a question about that conviction, we'll just reserve
15 that for a later ruling by the Court, but at the present time,
16 assuming the Defendant does not answer in such a way that it
17 would allow such questions, the State may not do so.

18 MR. HIXSON: Thank you, Your Honor.

19 THE COURT: All right. So at the present time, Mr.
20 Levan, the State's not gonna be able to allow -- is not gonna
21 be allowed to ask you about that conviction, the time limit
22 having far expired, but I'm sure your attorney will talk to
23 you about this. I'm leaving for future -- should there be
24 some answer that you give or testimony that you give that
25 might allow the State to ask you that question, but I'll leave

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KEITH SHELDON LEVAN - BY THE COURT

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1 that to your attorney to explain that situation to you because
2 that's just a hypothetical possibility and the Court's not
3 ruling on hypotheticals or possibilities.

4 Now if you decide to testify, that's got to be your
5 decision. You receive your advice from your attorney and then
6 you make the decision whether or not you wish to testify in
7 this matter. Do you understand that?

8 MR. LEVAN: Yes, sir.

9 THE COURT: All right, sir. And obviously that decision
10 has got to be made freely and voluntarily, intelligently made
11 with knowledge of what we have now talked about and, you know,
12 of your Fifth Amendment rights and the consequences of, of
13 your decision to testify.

14 If you decided not to testify, if that was your choice, I
15 would instruct the jury, and give them instructions that they
16 cannot consider that fact whatsoever. They can't talk about
17 it in the jury room, they can't use it mentally in their
18 deliberations, they cannot use it in their decision in this
19 matter; you understand that?

20 MR. LEVAN: Yes, sir.

21 THE COURT: All right, sir. Now, it being your decision
22 to decide whether or not you wish to testify, do you have any
23 questions you need to ask your attorney at this time?

24 MR. LEVAN: Not at the moment, sir.

25 THE COURT: All right. Is there anything that we have

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BY THE COURT

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1 discussed that you do not understand?

2 MR. LEVAN: No, sir.

3 THE COURT: All right, sir. Do you wish to testify in
4 this case?

5 MR. LEVAN: Yes, sir.

6 BY THE COURT:

7 THE COURT: All right. Very good. Thank you very much.
8 All right. So, we will -- you can just have a seat.

9 We will resume with that tomorrow morning first thing,
10 9:30 the testimony of the Defendant. As I understand it, at
11 the present time, Mr. Filiberto, other than the testimony of
12 your client, there is no intention to call any other
13 witnesses; is that correct?

14 MR. FILIBERTO: Not at this time, Your Honor.

15 THE COURT: All right. Very good.

16 Yes, Solicitor?

17 MR. HIXSON: Briefly, Your Honor, I just want to put on
18 the Court's radar, obviously I understand the Court can't rule
19 on this right now because the Court hasn't heard anything yet,
20 but I have a lot of case law concerned about some of the
21 statements and some of the statements that came in through
22 Will Kitelinger and Mike Quinn (spelled phonetically) that
23 were after he invoked his right to counsel that makes it
24 appear that Mr. Levan testifies consistent with that. We may
25 have issues where all the prior alleged prior difficulties

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1 coming in between like reputation in the community and whether
2 Barry Selmon had a concealed weapons permit and any of this
3 kind of stuff. So, the case on *State v. Taylor* as well as
4 other very specific and prior difficulties as it relates to
5 initial aggression is appropriate, but many trials on
6 collateral matters relating to specifics of prior difficulties
7 are inadmissible. Obviously, I don't know what that's gonna
8 be, Judge, so I understand that, but I don't want to be a Jack
9 in the box jumping up and down and ---

10 THE COURT: Well, I appreciate that.

11 MR. HIXSON: --- appreciate the ---

12 THE COURT: But, you know, at this point in time, you
13 know, I don't know what the questions nor the answers are
14 going to be posed by Mr. Filiberto nor any response to those
15 questions. I'm glad for you to raise the issue to the Court
16 and make everyone aware that it's a concern but, you know,
17 we'll just have to deal with it as it comes up, if it comes
18 up.

19 MR. HIXSON: Indeed, Your Honor.

20 THE COURT: All right. All right. So with that, we will
21 resume tomorrow morning at 9:30.

22 Again, Mr. Levan, you are released under the terms and
23 conditions of your bond and -- please stand up for a second.
24 You're released under the terms and conditions of your bond
25 and, again, the Court's instructions to you what would happen

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1 if you do not reappear tomorrow morning at 9:30. Again, I'm
2 giving you a direct order to reappear in this courtroom by
3 9:30 tomorrow morning.

4 Thank you very much.

5 MR. FILIBERTO: Thank you, Your Honor.

6 MR. HIXSON: Thank you, Your Honor.

7 (RECESS.)

8 *****OFF THE RECORD*****

9 END OF DAY TWO.

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1 FEBRUARY 15, 2017 - DAY THREE

2 (On the Record.)

3 (REPORTER'S NOTE: The following takes place outside the
4 presence of the Jury.)

5 THE COURT: All right. Is the State ready for the jury
6 to come in?

7 MR. HIXSON: We are, Your Honor.

8 THE COURT: And the defense?

9 MR. FILIBERTO: Yes, Your Honor.

10 THE COURT: Any matters we need to cover before they come
11 in? You've got everything?

12 MR. HIXSON: No, sir, not that I'm aware of.

13 THE COURT: All right. Good deal.

14 Ask the jury to come in please, sir.

15 (REPORTER'S NOTE: Jury enters courtroom.)

16 THE COURT: Mr. Filiberto, you ready to proceed?

17 MR. FILIBERTO: I am, Your Honor.

18 THE COURT: Call your first witness.

19 MR. FILIBERTO: Thank you. Defense would call Keith
20 Levan.

21 THE COURT: All right, sir, please come around and meet
22 the Clerk over here and be sworn, sir.

23 CLERK: Please raise your right hand and place your left
24 hand on the Bible.

25 KEITH SHELDON LEVAN, HAVING BEEN

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KEITH SHELDON LEVAN - DIRECT BY FILIBERTO

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1 SWORN TESTIFIES AS FOLLOWS:

2 CLERK: Please be seated. State your full name and spell
3 your last name.

4 MR. LEVAN: Hello. My name is Keith Sheldon Levan, L-E-
5 V-A-N.

6 THE COURT: Go ahead, Mr. Filiberto.

7 MR. FILIBERTO: Thank you, Your Honor.

8 DIRECT EXAMINATION OF KEITH SHELDON LEVAN BY MR. FILIBERTO:

9 Q: Mr. Levan, how long have you lived in Horry County?

10 A: Approximately 18 years.

11 Q: And are you in a committed relationship with a woman
12 named Penny Hubbard?

13 A: Yes, very committed relationship.

14 Q: How many -- how long has that been going on?

15 A: In a couple of months it will be 17 years.

16 Q: Okay. Do you have family with her?

17 A: Yes; I have a son, a stepson, and two grandchildren.

18 Q: At the time of this incident, were you employed?

19 A: Yes, sir.

20 Q: Where were you employed?

21 A: I was currently employed at Horry County Fleet Services.

22 Q: So, you work for Horry County Government?

23 A: Yes, sir.

24 Q: And what were your duties in that role; what kind of job
25 was it?

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1 A: I was a certified EVT, Emergency Vehicle Technician, and
2 it was my responsibility for the safety and performance of
3 firetrucks, maintenance thereof, safety precautions,
4 ambulances the same, and police cars.

5 Q: Okay. At that time was -- or generally around that time,
6 was Ms. Hubbard also working?

7 A: Yes, sir.

8 Q: And where was she working?

9 A: She was working at Grand Strand Healthcare.

10 Q: In the months leading up to this event, did -- now I
11 can't ask you anything that would say what Ms. Hubbard told
12 you, but as a result of conversations you had with Ms.
13 Hubbard, did she let you know about somebody she started
14 working with, Mr. Barry Selmon?

15 A: Yes, sir; she kept me in communication with that. She
16 was very upset about the -- her communication between them.

17 MR. HIXSON: Your Honor, we object specifically to
18 hearsay information relating to Ms. Hubbard. She has to
19 testify to that.

20 THE COURT: All right, sir.

21 MR. HIXSON: In addition, I'm concerned about the
22 particularities of the difficulty.

23 THE COURT: You can't relay the conversations that you
24 had with Ms. Hubbard without her testifying. You can talk
25 about what you did as a result of that.

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1 MR. FILIBERTO: Thank you, Your Honor.

2 BY MR. FILIBERTO:

3 Q: As a result of your conversations with Penny, did you
4 become increasingly concerned about safety for yourself and
5 your family?

6 A: Oh, yes. I would lose a lot of sleep, wake up in the
7 middle of the night, check doors and locks, and I took safety
8 precautions to protect my family for about two years. And
9 over the past couple or previous months before the incident, I
10 had gotten very terrified.

11 Q: At any point, did you ever go to report the basis of your
12 concerns to the police?

13 A: Yes, sir.

14 Q: What was the result of those conversations?

15 A: I had spoke to the police and they had told me if I do
16 not have any other witnesses or photographs of any of the
17 actions of Mr. Selmon towards me, Penny, or any verbal
18 witnessed communication, they said her communication was not
19 admissible in placing charges, and all the text references and
20 emails were not admissible in court or to press charges.

21 Q: Okay. So, they basically said you didn't have enough for
22 them to take any action?

23 A: Yes, sir.

24 Q: You heard testimony earlier that there was no report of
25 any of the conversations you had with the police, at least in

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1 Myrtle Beach. Did you -- you know, were you aware that they
2 didn't even write a report of it?

3 A: No, I -- at the time, I had a -- did not know Barry's
4 full name and I gave him a misspelling and that may have
5 caused a discrepancy in that.

6 Q: I'm gonna show you what's been premarked as Defense
7 Exhibit 1 and ask you if you recognize what that is?

8 A: Yes, sir. That is Mr. Barry Selmon holding a large
9 firearm, intimidating firearm.

10 Q: How did -- when was the first time you saw this?

11 A: It was about the first week of September 2014 and it was
12 accompanied with a message.

13 Q: Okay. The ---

14 MR. HIXSON: Your Honor, once again, we're objecting to
15 the particularities of the difficulty. We don't even know if
16 there was prior difficulty between these individuals and now
17 we're introducing -- I object to the introduction of the
18 photograph. The content we'll talk about it. We don't even
19 know that this is directed to Mr. Selmon or -- he says he
20 doesn't even know the guys last name.

21 THE COURT: Well, let's cover the receipt of it more
22 fully to find out how it came into existence. Okay?

23 BY MR. FILIBERTO:

24 Q: How did you come into possession of this photograph?

25 A: Penny was crying, and she had showed it to me on the

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1 computer, and I visually saw it.

2 Q: So Penny gave -- Penny received this photo?

3 A: Yes.

4 Q: And showed it to you and it upset her?

5 A: Yes, and the message, and I read the message.

6 Q: Just to answer my questions and ---

7 A: Yes, sir.

8 Q: --- and that was about four months prior to these events?

9 A: Yes, sir.

10 MR. FILIBERTO: Your Honor, I would move Defense 1 into
11 evidence.

12 THE COURT: All right. Let me see it, please.

13 MR. FILIBERTO: Yes, sir.

14 THE COURT: Ladies and gentlemen of the jury, I'm gonna
15 need to receive some legal arguments from the State and
16 Defense about this exhibit, and I need to have some
17 discussions with them about the law and I can't do that in
18 your presence. So, I need for you to go to your jury room for
19 a little bit, please. Thank you.

20 MR. HIXSON: Your Honor, I'll withdraw my objection to
21 it. It's already been published, we already know what the
22 content of it is and so I have arguments over the relevance of
23 it and since the jury already knows what it says, let's look
24 at it and talk about it.

25 THE COURT: Well, all right. Y'all come over here and

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1 talk to me.

2 (To the jury.) Y'all sit down for just a second.

3 (REPORTER'S NOTE: A bench conference was held off the record
4 in the presence of but out of hearing of the Jury.)

5 THE COURT: All right. So, the State has withdrawn its
6 objection to Defendant's 1. I'm going to allow Defendant's 1
7 into evidence without objection.

8 MR. FILIBERTO: Thank you, Your Honor.

9 DEFENDANT'S EXHIBIT NUMBER 1

10 ADMITTED INTO EVIDENCE

11 BY MR. FILIBERTO:

12 Q: Because of the concerns that you felt as it related to
13 Mr. Selmon, at some point did you ask Penny to stop
14 communicating with him?

15 A: Yes, sir.

16 Q: Okay. And the communications were they -- at some point,
17 did they stop working together; let me back up. At some point
18 did they stop working together?

19 A: Yes, sir, it was in about August.

20 MR. HIXSON: Your Honor, once again, I'm gonna object to
21 any details. Prior difficulties -- once again, if there are
22 prior difficulties, that's admissible, *State v. Taylor*, *State*
23 *v. Boyd*. The specifics of many trials over prior difficulties
24 with a witness that's not even testifying are not admissible.
25 Ms. Hubbard has to come in and talk about whether she was

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1 scared or not.

2 THE COURT: All right. Well I didn't take that question
3 to be such. I took it as a matter as to whether they had any
4 contact after a period of time, and I'm gonna allow that
5 question. I'm not gonna allow follow-up questions about that,
6 but I'm gonna allow that question and answer.

7 Thank you.

8 BY MR. FILIBERTO:

9 Q: So, you, you -- they did not -- at some point they
10 stopped working together, yes?

11 A: Yes, sir.

12 Q: And the night in question when these events occurred, in
13 the early morning hours of February 21st, did something happen
14 to wake you up?

15 A: Yes, sir.

16 Q: About what time was that?

17 A: About 3:30.

18 Q: What was it that woke you up?

19 A: Just Penny getting emotionally distraught and crying.

20 Q: What kind of condition was Penny in at that time?

21 A: She was in emotional distress, had a lot of anxiety, and
22 she had consumed large amounts of alcohol and she had to go
23 outside to smoke cigarettes to calm her nerves.

24 Q: Okay. Was Penny's computer open at the time you woke up?

25 A: Yes, sir.

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1 Q: And did you see anything on there that concerned you?

2 A: Yes, sir, she pointed it out to me.

3 Q: What did she point out to you?

4 A: She had pointed out to that Mr. Selmon told her according
5 to the printed message that was described as the information
6 as Barry Selmon -- it was the account in reference to him that
7 he said that ---

8 MR. HIXSON: Object. We're gonna object to any contents
9 hearsay, Your Honor. We have no content at all. We don't
10 know if it's -- it's entirely hearsay. If it's the statement
11 of Barry Selmon, the victim; it's hearsay. The statement of
12 Penny Hubbard is hearsay. They have to come in here and tell
13 it ---

14 THE COURT: Do you have any exception to the hearsay
15 rule?

16 MR. FILIBERTO: State of mind, Your Honor.

17 THE COURT: Let, let's cover his state of mind first
18 before we cover the contents of what was contained on the
19 computer.

20 MR. FILIBERTO: Yes, sir; Your Honor.

21 THE COURT: Let me -- let me just -- just cover that part
22 first and then we'll deal with -- don't go into the contents
23 that was on the computer.

24 BY MR. FILIBERTO:

25 Q: How did you respond after looking at the message that was

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1 on the screen?

2 A: I just got terrified. And, I really didn't know what to
3 do. I have received these messages and heard these messages
4 over and over again and they were getting increasingly worse.

5 Q: Okay.

6 A: And my son, was aware of it, too.

7 Q: All right. Well, let's talk about you right now. As a
8 result of reviewing those messages, was there -- at one point
9 was there an agreement for Mr. Selmon to meet Penny?

10 A: It wasn't a mutual agreement.

11 Q: Was there a con -- text that said they were gonna meet at
12 a certain place?

13 A: He referenced and told her to be at the Walmart parking
14 lot garden center or he would kidnap my son.

15 Q: Okay.

16 MR. HIXSON: Once again, Your Honor, that's the content
17 that we're talking about.

18 THE COURT: All right. The jury will -- all right. I'm
19 gonna caution you one time, sir. Do not talk about the
20 content or specifics unless the Court absolutely authorizes
21 you to do so. You may talk, the case law is clear,
22 generalities only. Do you understand me?

23 A: Yes, sir.

24 THE COURT: All right. And you listen to the questions
25 of your attorney and you respond to the questions of your

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1 attorney.

2 The jury will disregard that last statement. If it's
3 inadmissible, it's not proper in this case. You will not use
4 it in your decision in this matter. Proceed.

5 MR. FILIBERTO: Thank you, Your Honor.

6 BY MR. FILIBERTO:

7 Q: After reviewing what you saw on the internet, what did
8 you decide to do?

9 A: Me and Penny had argued and the argument -- I had tried
10 to implore her to get this reported to the police and her to
11 bear witness of these actions.

12 Q: Okay. And I'm gonna try and narrow you down. What did
13 you decide to do as a result of that?

14 A: I, I had a glass of wine to calm my nerves down and I
15 didn't know how to resolve this, this terror that I had felt
16 and the emotional distress Penny was being put through.

17 Q: As a result of information you, you gleaned in your
18 conversations, did you decide to try and confront Mr. Selmon?

19 A: Yes, sir.

20 Q: Did -- let start it this way -- what did you want to
21 accomplish by confronting him?

22 A: Just to tell him to leave her alone and my family alone
23 and stop terrorizing me and my son. My son would cry himself
24 to sleep because he thought Scary Barry was going to get him.

25 Q: Okay. Again we want to focus on you, Mr. Levan.

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1 We've seen evidence that you took at least one weapon, maybe
2 more, with you when you left. Why did you arm yourself?

3 A: The influence from Penny's emotions, the information we
4 had acquired from Mr. Selmon not working at Grand Strand
5 Healthcare any longer, scary reasons why, the context or the
6 way the notes are written and texts are written.

7 Q: I'm gonna try and bring it back down. Were you fearful
8 in going and having this verbal confrontation with Mr. Selmon?

9 A: Yes, very, extremely, and I did not really want to do it
10 at all.

11 Q: But you did, you decided to go and ---

12 A: Yeah.

13 Q: --- try and talk to him until ---

14 MR. HIXSON: Your Honor, I object, that's a leading
15 question.

16 THE COURT: I appreciate that. I'm gonna give counsel
17 some leeway so that he cannot run afoul of the restrictions
18 here. So I'm gonna give counsel some leeway and frame the
19 questions. You may proceed, sir.

20 BY MR. FILIBERTO:

21 Q: So again, you went to have a conversation with him. And,
22 is it fair to say that you, you were afraid, you'd seen
23 photographs and heard the matters of he potentially having a
24 firearm?

25 A: Yes, I knew he carried a firearm.

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1 Q: Okay. Let me ask you, at that point that you left your
2 house, where did you go?

3 A: From leaving the driveway?

4 Q: Your location, your destination?

5 A: Destination was Walmart parking lot garden center
6 downtown Myrtle Beach.

7 Q: That parking lot pretty well lit?

8 A: Very well lit.

9 Q: The stores open 24 hours a day, isn't it?

10 A: Yes, sir.

11 Q: People coming and going?

12 A: Yes, sir, a few. And police have been known to hang out
13 there, too.

14 Q: Let me show you what's been marked as State's, I'm sorry,
15 Defendant's Exhibit 2. Do you recognize what that is?

16 A: Yes, sir. That is a bird's eye view of the area in
17 question.

18 Q: Your Honor, I move Defendant's 2 into evidence?

19 THE COURT: Any objection to that from the State?

20 MR. HIXSON: No, sir.

21 THE COURT: All right. Defendant's 2 is in evidence
22 without objection.

23 DEFENDANT'S EXHIBIT NUMBER 2

24 ADMITTED INTO EVIDENCE

25 BY MR. FILIBERTO:

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1 Q: I ask you, use this marker and put a circle again just
2 being -- do you believe that that's Walmart parking lot right
3 there?

4 A: Yes, sir, do you want me to label that?

5 Q: Just put a circle where you first went to and stopped
6 your car.

7 A: The first circle is going -- I'm sorry, my hands are so
8 shaky. That is the garden center.

9 Q: Okay. Now, please tell the jury what happened next.

10 A: As I arrived to the Walmart, I just said, what am I
11 doing; I said I can't be doing this. If anything happens to
12 me, if he goes out of control according to the information I
13 knew of him and the state of mind ---

14 Q: You had second thoughts; is that what you're trying to
15 say?

16 A: Yes, sir, I definitely had second thoughts, and I -- I
17 attempted to leave.

18 Q: Did something happen at that moment?

19 A: As I started -- my vehicle started moving forward, Barry
20 Selmon's vehicle, the Dodge Neon, come barreling across the
21 parking lot at a high rate of speed and pulled up almost next
22 to me.

23 Q: Did you engage with him at that moment?

24 A: No, sir.

25 Q: What happened next? Where did you go next?

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1 A: I drove around the parking lot in the visibility of the
2 cameras of the Walmart parking lot.

3 Q: I ask you again to put a 1 next to that first location.

4 A: Witness complies.

5 Q: Okay. Now, use that marker, if you would and put an
6 arrow showing where you went to after that, just an arrow to
7 where the location was. Put a number 2 and another dot where
8 you went to and stopped the second time. Put a dot and the
9 number 2 to where you stopped the second time.

10 A: (Witness complies.)

11 Q: Okay. So, basically across the other side of the front
12 of the store?

13 A: Yes, sir, in plain view.

14 Q: Why did you stop there?

15 A: I noticed the vehicle parked in front of the Walmart that
16 resembled a police cruiser and I thought to myself, yes, if he
17 pulls up next to me, I could talk to him. And, if he acts up,
18 the possibility of the dash cam on the officer responding to
19 that and the Walmart photographs would be ---

20 Q: All right. Let's -- did at some point Mr. Selmon's car
21 pull up next to you?

22 A: Yes, he pulled up directly next to me. My vehicle
23 stopped and his vehicle had stopped and he rolled down the
24 passenger side window and he was -- the vehicle was on the
25 driver's side of my vehicle.

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- 1 Q: Is that the first time that you looked at each other?
- 2 A: Yes, sir.
- 3 Q: And obviously Penny was not there?
- 4 A: Not -- at first he thought it was Penny.
- 5 Q: Okay. Tell the jury what happened at that time?
- 6 A: Mr. Selmon yelled over and said -- he said I just texted
- 7 you. I had the window rolled down and my seat was back and he
- 8 did not see who it was in the vehicle until I leaned forward
- 9 and just looked at him.
- 10 Q: Was there any interaction between the two of you?
- 11 A: Yes, sir.
- 12 Q: Tell us about that?
- 13 A: I leaned forward and he saw me and he reacted.
- 14 Q: Was he -- did he appear upset?
- 15 A: Oh, yes. He was furious and started making violent
- 16 gestures and yelling out obscenities and threatened to kill
- 17 me.
- 18 Q: Did you become afraid?
- 19 A: Yes, I became terrified. He threatened to kill me and go
- 20 to my house.
- 21 Q: Okay. And as a result of that, what did you do next?
- 22 A: I just panicked so bad, I just stomped on the accelerator
- 23 and went around the Walmart building in front of all the
- 24 cameras.
- 25 Q: Now, let me ask you to use this marker and sort of make a

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- 1 line showing the next place you drove to and stopped, and just
2 put a 3 there.
- 3 A: (Witness complies.)
- 4 Q: Okay, you done with that?
- 5 A: Yes, sir.
- 6 Q: So, now you're over -- is that what building is that
7 you've marked that you stopped at?
- 8 A: That is the rear of Michael's Department Store in the
9 loading dock area.
- 10 Q: And is that -- okay.
- 11 A: It's between hhgregg and Home Goods.
- 12 Q: Now, after you left there, were you trying to get away
13 from Mr. Selmon?
- 14 A: Yes, sir, I was injured and upset and confused and ---
- 15 Q: Let's go back. Did Mr. Selmon follow you?
- 16 A: Yes, sir.
- 17 Q: Okay. And we've seen some video evidence that appears to
18 be that happening. What happened when you got behind that
19 building? Please tell the jury what happened when you got
20 behind that building.
- 21 A: I ducked behind that building on my way to the police
22 department to quickly hide from him. I got around the corner
23 towards Home Goods on the outside, and as I got around the
24 building and I reached for my phone and shaking so bad,
25 trying, attempting to dial 911.

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1 Q: Did Mr. Selmon ultimately catch up with you?

2 A: Yes, he, he, he passed me with his engine screaming and
3 the windows down yelling at me and he had cut me off.

4 Q: So, you could not drive your car further from where you
5 were?

6 A: I couldn't drive it anywhere.

7 Q: I'm gonna ask you to tell the jury what happened next.

8 A: This is gonna be pretty difficult; so, bear with me.

9 Barry had -- Barry Selmon, who had pulled his vehicle in front
10 of mine, rolled his window down, yelling that I'm a dead son-
11 of-a-bitch and pointed -- and started pointing it at me like
12 that (indicating), with something in his hand.

13 Q: But there were no shots fired, correct?

14 A: No, sir.

15 Q: Did you get out of your vehicle?

16 A: Assuming the worst, based on the information I had about
17 Mr. Selmon, I assumed it was a firearm and attempted to get
18 out of the line of fire by putting the vehicle in park and
19 jumping out the driver's side door.

20 Q: Please tell the jury what happened next.

21 A: I went to flee and Mr. Selmon backed up and I had quickly
22 reached in the back for the AR15 to take it with me. And he
23 was getting closer and louder, and I -- the butt stop on the
24 AR15 was hung up in the seatbelt and prohibited me from
25 getting it out of the vehicle. I attempted to aim for the

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- 1 tires.
- 2 Q: At some point -- let me slow you down. At some point,
- 3 were you struck by Mr. Selmon's car?
- 4 A: Yes, sir.
- 5 Q: And you had some minor injuries as a result?
- 6 A: Yes, sir. They were, broken teeth on the left of my
- 7 mouth, as photographed by the Myrtle Beach Police.
- 8 Q: Okay.
- 9 A: And a sprained right foot.
- 10 Q: Okay.
- 11 The officer testified yesterday there was blood on the
- 12 jacket that you were wearing when you were arrested; is that
- 13 the same jacket you wore that night?
- 14 A: Yes, sir.
- 15 Q: And that blood, was that your blood?
- 16 A: That was from my broken tooth.
- 17 Q: Okay. After you were injured, did you get back up?
- 18 A: I, I attempted to get back up.
- 19 Q: Is that the time you armed yourself with the rifle?
- 20 A: When I was on the ground, I had lost the rifle.
- 21 Q: When you got back up, did you get it back in your hands?
- 22 A: Yes, it kinda like landed on me.
- 23 Q: And when you had it in your hands, did you feel that you
- 24 needed to protect yourself?
- 25 A: Yes, sir.

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1 Q: And tell the jury what, what happened next?

2 A: I had, I had -- the vehicle had approached me in reverse
3 at full throttle. He had struck me, knocked me down, run over
4 my right foot. I fired shots to prevent the vehicle from
5 getting any closer with the rifle hung up on the seatbelt of
6 the car. I was knocked down and let go of the rifle and he
7 was still going backwards at that time and I was being
8 dragged. He pulled forward and the rifle was up on the deck
9 lid spoiler on the right side of the vehicle and still hung up
10 on the seatbelt. As he pulled forward, the rifle went off and
11 the back window of Mr. Selmon's car shattered with the final
12 shot.

13 Q: At that time, what happened to Mr. Selmon's car?

14 A: His vehicle rapidly accelerated down a -- down the
15 loading docks, crossed Oak Forest Lane, struck the embankment
16 at Home Depot, launched into the air momentarily, landed and
17 coasted to one of the islands and came to a complete stop.

18 Q: What did you have -- what did you do next?

19 A: I loosened the rifle up from the seatbelt and disarmed.

20 Q: Did you leave the scene?

21 A: Yes, sir, I had gotten in the vehicle and called Penny
22 and started crying and left the scene not knowing the
23 situation that he was in.

24 Q: When -- did you find out the next morning that Mr. Selmon
25 had been fatally injured?

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- 1 A: Not right away, no. We had ---
- 2 Q: Several hours later?
- 3 A: It was some hours later that we ---
- 4 Q: And did you -- once you realized and that obviously there
- 5 was going to be -- you know, there was obviously a fatality
- 6 and there was gonna be an investigation, you voluntarily went
- 7 down to the police to try and explain what happened; is that
- 8 right?
- 9 A: Yes, sir.
- 10 Q: And the first time you were asked by the police
- 11 department, you told them where you had put the rifle; is that
- 12 correct?
- 13 A: Yes, sir.
- 14 Q: Never said I don't know, I don't know what you're talking
- 15 about, just told them where the rifle was?
- 16 A: Yes, sir.
- 17 Q: Mr. Levan, do you regret the events that happened that
- 18 night?
- 19 A: Definitely. Even if I wasn't arrested or charged or
- 20 anything, I, I beared the guilt of, of this event happening.
- 21 It is not at all in my nature. I wake up every morning with
- 22 it on my mind. I can't sleep at night. It is -- and to look
- 23 down at my family and -- the years to come for my son and
- 24 grandson and grandchildren to look at me and what they would
- 25 think of me and what, what would actually happen and question

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1 that and what type of childhood they would have with a person
2 like me. Yes, I definitely do regret it. I wish it would
3 never happened. I wish I was not afraid. I wish I could have
4 just confronted Barry Selmon and said, look, you're doing us
5 wrong. If you need help, I can help you. I want to be your
6 friend. I wished the best for the man, I seriously do. I am
7 not that type of person. He was down on his luck and I'm the
8 type of person to just help people. That's why I got the job
9 as an EVT. I am a heroes' hero.

10 Q: All right. All right. Thank you. Please answer any
11 questions the Solicitor has.

12 A: Okay.

13 MR. FILIBERTO: I'm sorry. Your Honor, I'd like to move
14 Defense 2 into evidence.

15 THE COURT: I think we did. Defense 2 is in evidence.

16 MR. FILIBERTO: Thank you, Your Honor.

17 THE COURT: Thank you.

18 All right. Cross examine, Solicitor?

19 MR. HIXSON: Briefly, I have a matter of law. Just --
20 may we approach for a second, Your Honor?

21 THE COURT: Sure.

22 (REPORTER'S NOTE: A bench conference was held off the record
23 in the presence of but out of hearing of the Jury.)

24 BY THE COURT:

25 THE COURT: All right, ladies and gentlemen, I'm sorry,

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1 go to your jury room for a little bit, please. Thank you.

2 (REPORTER'S NOTE: Jury exits courtroom. The following takes
3 place outside the presence of the Jury.)

4 THE COURT: All right, Solicitor, let me hear from you?

5 MR. HIXSON: Thank you, Your Honor. As Your Honor
6 recalls, yesterday we had a discussion about whether the
7 Defendant intended to testify in his own defense, and at that
8 time, Your Honor inquired about any criminal record that he
9 may have that may be subject to cross examination. If Your
10 Honor recalls, he has a harassment and stalking conviction out
11 of Pennsylvania that was -- happened in 1997. And Your Honor -
12 - the State agreed it was too far past the time limit. Matter
13 of fact, he was put on probation, I think, for three years and
14 five months. That probation transferred to South Carolina.
15 And Your Honor, I believe was correct -- the Court was correct
16 that the time limit had passed. But, at that time, I put the
17 defense on notice that if the Defendant intended to put his
18 character at issue, the State intended to use that to impeach
19 him on his statement of his reputation or his character. We
20 believe the last statement that he just made concerning I'm
21 the type of person that wants to help people, I'm not the kind
22 of guy that would do this, that he put his character in issue,
23 and we intend to use that stalking conviction to show that his
24 actions don't conform with the character or reputation
25 evidence he just submitted himself.

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1 THE COURT: All right. Mr. Filiberto, let me hear from
2 you?

3 MR. FILIBERTO: Your Honor, I think he was clearly
4 referring to his duties at his job. I don't think he painted
5 with this broad brush that the Solicitor is alluding to. This
6 conviction is 20-years-old and there's not a thing between
7 then and now. I believe it would be overly prejudicial and I
8 believe that even, even with the fact that I don't believe the
9 foundation was laid to open the door to allow the State to use
10 it.

11 MR. HIXSON: Just to supplement that.

12 THE COURT: Yes, sir.

13 MR. HIXSON: He spoke very quickly, but out of the notes
14 I took, it prefaced it by wishing him well, Mr. Barry Selmon
15 well. I'm not the type of person that would want to hurt
16 somebody; I want to help him. As Your Honor is aware, I can't
17 put that stuff in as it relates to introduction by the State,
18 but if the door is opened by the defense and he puts his
19 character at issue, I can rebut that statement of character.

20 THE COURT: All right. I am going to allow the State to
21 ask the question about his prior conviction based upon the
22 Defendant making the generalized statement that he was the
23 type of person that wants to help people and, with that
24 reference, giving the impression he does not want to hurt or
25 harm anyone. I do believe he placed his character in evidence

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BY THE COURT

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1 regarding that, and I'm gonna allow the State to ask that one
2 question. I am not, Solicitor, gonna allow you to explore any
3 further as to that particular matter.

4 Now, I will allow you, Mr. Filiberto, because it will be
5 clear from the question asked by the State, the year in which
6 and so to ask of the Defendant that, as I understand it,
7 there's no further record since that date; is that correct?

8 MR. FILIBERTO: That's my understanding from the NCIC.

9 THE COURT: Is that correct, Solicitor?

10 MR. HIXSON: There are a multitude of arrests, but we
11 were not even gonna go there.

12 THE COURT: All right, but -- so but convictions?

13 MR. HIXSON: Correct.

14 THE COURT: All right. That you can state the date and
15 ask of the Defendant, there have been no further convictions
16 of any kind since that date, if you wish to ask that, but you
17 know, the Solicitor is gonna have to put the date in evidence
18 in asking the question.

19 MR. HIXSON: That's correct. My question is very
20 specific. I'll say isn't it true that in 1997 you were
21 convicted in the State of Pennsylvania for stalking and
22 harassment.

23 THE COURT: And that's all I'm gonna allow you to ask and
24 explore in that issue, but I am doing it because of the
25 testimony of the Defendant basically at the conclusion of his

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1 testimony right before the cross.

2 All right?

3 MR. HIXSON: I think actually the conviction date was
4 '98; the arrest date was '97.

5 THE COURT: All right. So, it would be the conviction
6 date is what we would be going on. So I'm gonna allow him to
7 ask that one question.

8 MR. FILIBERTO: Thank you, Your Honor.

9 THE COURT: All right. Ask the jury to come in please.

10 (REPORTER'S NOTE: Jury enters courtroom.)

11 THE COURT: Solicitor, you may continue.

12 MR. HIXSON: Thank you, Your Honor.

13 CROSS EXAMINATION OF KEITH SHELDON LEVAN BY MR. HIXSON:

14 Q: Good morning, Mr. Levan; how are you?

15 A: Good morning; could be better.

16 Q: You had a lot to say here with your defense attorney, and
17 I appreciate that. Let's just start with your relationship
18 with Penny Hubbard. Okay?

19 A: Uh-huh (affirmative response).

20 Q: You guys -- I notice you don't have the same last name;
21 did you guys -- or have a common law relationship or do you
22 have a -- did you go through a wedding ceremony, or is it you
23 just have lived together I guess seventeen-plus years?

24 A: We've lived together for seventeen-plus years and shared
25 accounts and mortgage and everything.

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- 1 Q: Okay. And so, I suppose like any other relationship, you
2 had your ups and downs, I suppose?
- 3 A: Yeah.
- 4 Q: Bills, mortgage, and all that kind of stuff that ---
- 5 A: Yeah.
- 6 Q: --- takes a toll on a relationship, doesn't it?
- 7 A: No, not really. We had actually -- we were really good
8 at that. We -- she had her responsibilities and I had my
9 responsibilities. It wasn't split down the center like half
10 mortgage me, half mortgage her. I took care of the mortgage;
11 she took care of the cable, internet and utilities.
- 12 Q: Uh-huh (affirmative response). I noticed that the car
13 Penny drives, the Volvo, the black Volvo, it's licensed in
14 your name, I think, which is ---
- 15 A: Yes, sir.
- 16 Q: The payment and license and the registration that was
17 Penny's, that was Penny's car? I mean, it's your car, but she
18 just drives it because you have a service truck, don't you?
- 19 A: Yeah, and sometimes Penny drives the service truck.
- 20 Q: And you know that's against County policy, but I
21 understand.
- 22 A: It is not a County vehicle.
- 23 Q: Okay. It's your service truck?
- 24 A: Yeah.
- 25 Q: And you have ---

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- 1 A: It's Penny's service truck, registered to her name.
- 2 Q: Okay. And you have a white F250, is that right, also?
- 3 A: Yeah. '99 Ford F250.
- 4 Q: Okay. Let's make sure we're talking about the same
- 5 thing. So, Penny's car, I guess, the one that she drives
- 6 significantly is a black Volvo, and then those are -- isn't it
- 7 true that's your service truck and that's your house?
- 8 A: The service truck is to the left and ---
- 9 Q: This one right here?
- 10 A: Yes, sir.
- 11 Q: So, I noticed when you were kind of painting the picture
- 12 concerning your relationship that you have with Ms. Hubbard, I
- 13 think you used the word committed, a committed relationship?
- 14 A: Yes, sir.
- 15 Q: I know that you have a child in common and that's
- 16 admirable. But let's go back and talk about some of the
- 17 conversations you had with other folks when Penny wasn't
- 18 listening and maybe some of the conversations that Penny had
- 19 when you weren't listening, okay, and let's see what that term
- 20 committed relationship means. Okay? So, do you recall
- 21 coming across some -- having a text message from Penny Hubbard
- 22 when she asked about a relationship that you were attempting
- 23 to have up here on an Asian date site. Do you recall that?
- 24 Specifically, February 10th about 7 o'clock P.M. when she
- 25 texted you on your cell phone. Do you remember that?

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- 1 A: Yes, sir; it was about my pen pal friends.
- 2 Q: Your pen pal friends. Fair enough. Now, let's see if
- 3 that was important that you got the message because that
- 4 pretty much confirms that the body of the text message, the
- 5 sent/received, that you received that message and that came
- 6 from your common law wife, Penny Hubbard. So, I appreciate
- 7 that. Thank you for that. During the course of that, I think
- 8 you said several times that this is not real. Didn't you say
- 9 I treated it like a video game. I don't expect you to
- 10 understand. But all the signs are there that you have someone
- 11 else in mind, you just found your excuse to leave me. Isn't
- 12 that true you said that to Penny Hubbard? If you need to
- 13 refresh your recollection, I'll let you read this.
- 14 A: I'm confused. Let me recollect ---
- 15 Q: Can you read that to me? Read that bottom line, and
- 16 we're referring to ---
- 17 A: What number?
- 18 Q: Line 291, put it in your own words.
- 19 A: Yes, sir. I had explained to her that the computer ---
- 20 Q: Could you read it for me, please?
- 21 A: 291?
- 22 Q: Uh-huh (affirmative response).
- 23 A: It states -- it's printed up on this paper as, This is
- 24 not real. I treat it like a video game. Well, I don't expect
- 25 you to understand. I, I know you have somebody else in mind.

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1 All the signs are there; you just found your excuse to leave
2 me. I hope you found all that you're looking for.

3 Q: Okay. So let's ---

4 THE COURT: First, Solicitor, do you wish to explain that
5 answer?

6 MR. HIXSON: Thank you, Your Honor.

7 THE COURT: Sir, do you wish to explain that answer?

8 A: Yes, sir.

9 THE COURT: You may do so.

10 A: Being that Penny had misconstrued my intentions on the
11 Asiandate.com, I was being vindictive and making up stuff that
12 was offensive that would cause emotional distress and
13 retaliation to her accusations.

14 Q: Okay. I appreciate that. So, your testimony basically
15 is that you wanted to retaliate against your committed common
16 law spouse?

17 A: Yes, just make up mean things and say it.

18 Q: In order to get her fired up?

19 A: Yeah.

20 Q: That tit-for-tat?

21 A: Yeah.

22 Q: Okay. Let's move on. Okay? So, at that point in time,
23 and that was dated February 10th, so 21 days prior to Barry
24 Selmon passing away, you were aware and accusing her of
25 leaving you, while she's accusing you of leaving her; is that

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- 1 safe to say?
- 2 A: Yes, sir.
- 3 Q: Okay. And then actually you specifically cite Barry by -
- 4 - Barry's name during the course of that text message. You're
- 5 specifically aware of Barry's first name because it's an
- 6 online name, you don't know his last name because that's not
- 7 an online name; is that safe to say as well?
- 8 A: Barry who?
- 9 Q: That is exactly right, Barry who; that's exactly right.
- 10 Well, did you know during this period of time, that in
- 11 reaction to those text messages, were you aware of the fact
- 12 that Penny Hubbard was asking Barry Selmon to meet her? Did
- 13 you know that at that time?
- 14 A: At that time? She had told me when I had got home and
- 15 stuff because Barry had always told her to meet somewhere.
- 16 She never initiated any meeting place for him and never had
- 17 agreed to meet him anywhere.
- 18 Q: Let me ask you ---
- 19 A: She was being passive to his aggressive behavior.
- 20 Q: --- you have a lot of psychological terms floating around
- 21 here. Let me ask you a question.
- 22 A: I'm sorry to confuse you.
- 23 Q: Did you ---
- 24 THE COURT: All right, gentlemen.
- 25 Q: Did you ---

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1 THE COURT: Stop.

2 MR. HIXSON: I'm sorry.

3 THE COURT: Let's be clear here. Your job is to answer
4 questions directly. If you need to explain the answer, you
5 may do so. The Solicitor's job is to ask questions. Neither
6 of your jobs is to make extraneous comments.

7 Thank you very much.

8 MR. HIXSON: Thank you, Your Honor.

9 THE COURT: Continue on.

10 A: Yes, sir.

11 BY MR. HIXSON:

12 Q: The information about whether or not Penny met, did that
13 come from Penny or does that come from your personal
14 knowledge?

15 A: I'm sorry. Can you repeat the question?

16 Q: Isn't it true that Penny told you that she didn't meet,
17 but you don't know whether they met or not? Penny was
18 telling you they didn't meet?

19 A: I know for sure she didn't meet.

20 Q: You do know for sure?

21 A: Yes.

22 Q: Okay. So, let's talk about that night in question, shall
23 we? Specifically, the conversation you had about -- well, you
24 recall the -- you saw the video, the DVR, specifically the DVR
25 video of preparation, taking an AR-15, taking what looks like

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1 a 1911-style pistol, as well as -- it looks like a combat
2 tomahawk of some type, putting it in your belt and leaving.
3 You saw the video, didn't you?

4 A: I saw the video. I just took the rifle with me. The
5 other items were placed in a -- the standby generator and
6 locked for safekeeping if Mr. Selmon had ever terminated me
7 and came to my home, there was a basically a contingency plan.

8 Q: Let me, let me -- so, let me ask you this question.
9 Isn't it true that you left the house with an AR-15, a 1911-
10 style pistol and a tomahawk and walked out the front door with
11 it?

12 A: No, sir. No, sir; that is not correct.

13 Q: Did you watch the video walking out the front door? You
14 can see it, you walk out the front door with that in your
15 belt?

16 A: I did not walk out the front door.

17 Q: Okay. Okay. Let's talk about some of your testimony
18 then and we'll get into other things. Your testimony, direct
19 testimony indicated when you left your house in whatever state
20 of preparation you testified to under cross examination, that
21 you left your house and went directly -- drove straight to the
22 meeting location, that is the Walmart garden center. Isn't
23 that true?

24 A: Yes, sir.

25 Q: Isn't that true that's what you testified to? And isn't

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1 it true that you testified that the area that you initially
2 saw Mr. Selmon in was well lit, open 24 hours, there were
3 people coming and going, and in fact sometimes, there are
4 police officers there. Isn't that what you testified to just
5 now?

6 A: Yes, sir.

7 Q: Okay. Isn't it true that you just testified under direct
8 examination that Barry Selmon, when he saw you, didn't know it
9 was you at the time, that he thought it was Penny; isn't that
10 true? Isn't that what you just testified to?

11 A: Yes, sir.

12 Q: Isn't it true that you testified on direct examination on
13 that transcript that Barry Selmon's first words were, I just
14 texted you?

15 A: Yes, sir.

16 Q: That's what you just testified to. And you testified
17 that he didn't know it was me because my seat was back, he
18 couldn't see me and didn't know who it was at first; isn't
19 that true that's what you just testified to?

20 A: Yes, sir, at first.

21 Q: Okay. And then at some point in time, when the cars are
22 pulled side by side, you make eye contact and Barry Selmon, to
23 your words, he saw me and he reacted, he was mad.

24 A: Yes, sir.

25 Q: Okay. Now, let's talk about whether or not your

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1 testimony and your statements concerning whether you saw a gun
2 or not. All right. Now isn't it true in your initial
3 statement, as well as subsequent statements, you tell
4 detectives, I thought it was a gun, but it was too dark and I
5 couldn't be sure.
6 A: I could not confirm it; that is correct.
7 Q: So, your testimony on direct and cross examination is
8 that you don't know for sure whether he had a gun or not, but
9 you thought it was?
10 A: Yes.
11 Q: Okay. Now, let's tighten this up as well. In your
12 direct examination, you said that after you realized it was
13 Mr. Selmon, you wanted to get away. So, isn't it true you
14 testified that you got out of the comfort and the speed of a
15 functioning automobile and advanced towards Mr. Selmon's car,
16 who was parked beside you in the driver's seat; isn't this
17 true what you just testified to?
18 A: No, sir.
19 Q: I think you actually said, I jumped out to get away. So,
20 you jumped out of the vehicle to get away? That's what you
21 testified to, it's on that transcript; isn't that true?
22 A: Yes, sir.
23 Q: You wanted to get away and reached into the back seat and
24 pulled out an AR-15 because you wanted to flee with that;
25 that's your direct testimony, isn't that true?

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1 A: Yes, sir.

2 Q: But of all things, the stock of the AR-15 is caught up on
3 the rear seatbelt, that's what you just testified to?

4 A: The front seat belt.

5 Q: The front seat belt. And as Barry Selmon was driving
6 away, you took -- the AR-15 was sitting on the rear trunk lid
7 by the spoiler and, as the car drove away, the seat belt
8 somehow made the firearm fire, blowing the rear window out of
9 the vehicle as Mr. Selmon drives the vehicle -- where you
10 observed him driving and crashing -- ultimately crashing;
11 that's what you testified to, isn't it?

12 A: Yes, that's what I assumed would happen.

13 Q: That's what you assumed happened, because you said you
14 saw that happen?

15 A: Yeah, I saw the rifle up there, but beyond -- from being
16 under the ground -- on the ground and looking up from
17 underneath his car.

18 Q: Let me ask you a couple of questions about your weapons
19 knowledge, if you don't mind. I'm showing you what's been
20 marked as State's 61 -- and Your Honor, this still -- Your
21 Honor, can tell it's secured with a cable lock and it's non-
22 functional.

23 THE COURT: All right, sir.

24 Q: Can you tell me how many steps it takes to make this
25 weapon begin to function and actually fire a live round? I'll

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1 help you. Isn't it true that enable to make this weapon fire
2 a live round, that you insert a live magazine in the magazine?

3 A: Yes, sir.

4 Q: And you actually have to take this charging handle and
5 actually you have to pull it back -- it won't work because of
6 the cable in it -- and you have to charge the weapon, strip it
7 around into the chamber and it makes a clicking sound. It's
8 almost like racking a shotgun; isn't that true?

9 A: Yes, sir.

10 Q: And isn't it true that in your statements that you told
11 the police that you accidentally, that you didn't mean to
12 perform that function?

13 A: I did not state that.

14 Q: You didn't? Let me ask you about your statement to the
15 police. I think you said I didn't mean to pull the charging
16 handle back, that this was an involuntary accidental act.
17 Isn't that true, that's what you told on the body cam as well
18 as telling other law enforcement in subsequent discussions;
19 isn't that true?

20 A: It was the initial -- having the weapon -- ever having to
21 do that except for the circumstance I was in and ---

22 Q: Fair enough. And what's the significance of this style
23 of AR-15? Matter of fact, it's considered a carbine; isn't
24 that right?

25 A: Yes, sir.

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- 1 Q: And the reason why it's a carbine is because that was it
2 has a retractable stock, the length can be shortened, right?
- 3 A: No, sir.
- 4 Q: It's not?
- 5 A: It's 19-inch barrel.
- 6 Q: It's a shorter barrel and a shorter stock?
- 7 A: Yes, sir.
- 8 Q: And one of the reasons, isn't it true, that your stock is
9 shorter so it's easier for motorized patrol units to get in
10 and out of a vehicle?
- 11 A: Paratroopers and people in certain vehicles. Motorized
12 drivers do not normally carry rifles.
- 13 Q: We're talking about a military rifle ---
- 14 A: Yes, sir.
- 15 Q: --- because this a military weapon ---
- 16 A: Yes, sir; military style copy of a military rifle.
- 17 Q: Okay. So, if you're getting out of the car door and the
18 door is completely open, right, a Volvo car door and a car is
19 parked beside that -- so, you have a Volvo door, driver's side
20 door open, this stock is caught on the seatbelt, and somehow a
21 weapon of this overall length can get from the seatbelt, past
22 the Volvo door all the way up onto a rear deck of a car, for
23 it to be accidentally pulled to turn and fire; that's your
24 testimony?
- 25 A: There's some discrepancies in that.

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1 Q: In your testimony -- in your testimony there are some
2 discrepancies?

3 A: Your discrepancy -- your description of my testimony.

4 Q: Fair enough. Well, let's talk about what's on video,
5 what's specifically said about your version of those events.

6 I don't think there's any discrepancy -- you had the chance to
7 see the body cam testimony, the body cam footage -- that is in
8 your own words, so it can't be misconstrued; is that true?

9 A: Yes, sir, and I was instructed that I was not being
10 filmed at the time.

11 Q: Is that instruction not on video?

12 A: That was removed from the video when you guys altered it.

13 Q: So, during the course of that body cam footage, you
14 indicated that you had squeezed off a couple of rounds. I
15 tried to hit the tires or the fuel tank; that's what you
16 testified -- what the body cam footage -- there's no mention
17 of a weapon wrapped around a seatbelt as you tried to retreat,
18 as the rounds blow through the back of the car; is that right?
19 There is no reference to that; isn't that true?

20 A: I made no reference at that time. I was not in the
21 capacity to give accurate descriptions. I had drank a half a
22 bottle of scotch before I went there to tame my nerves and I
23 just didn't have the capacity to describe everything. That's
24 why I asked to talk to a detective.

25 Q: Okay. So, let's just assume that your version of the

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1 events are true just for about three seconds. You know what a
2 trigger pull on that AR-15 is? That's a military-style
3 trigger, right; it's designed for reliability. Isn't it true
4 it's designed to make sure they aren't any accidental firings.
5 It's not a precision weapon; it is a hammer of sorts. Isn't
6 that true? It's designed to be reliable and not fired when
7 it's dropped by a paratrooper for instance. And, it's roughly
8 a 22-pound trigger pull; it's not an accidental trigger.

9 MR. FILIBERTO: Objection, Your Honor.

10 THE COURT: All right. Let's, let's ask a question and
11 not make a statement. Let's frame it such that it sounds like
12 a question, Solicitor. Okay? Thank you.

13 BY MR. HIXSON:

14 Q: Actually, for the first round, how about the rest of the
15 -- the rest of the seven are not an accident; isn't that true?

16 A: I only counted five that were intentional.

17 Q: They were intentional. Thank you for that. You
18 acknowledge -- you had mentioned early on that you
19 acknowledged and confirmed some text messages back and forth
20 between Penny Hubbard and yourself. You confirmed that you
21 texted Penny Hubbard after you killed Barry Selmon, that you
22 snapped and became the monster you feared?

23 A: That as a quote from a poem.

24 Q: Did you text that to Penny Hubbard?

25 A: Yes, sir.

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KEITH SHELDON LEVAN - REDIRECT BY FILIBERTO

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1 Q: Let me ask you one last question. I think you indicated
2 during direct examination that you're the type of person that
3 liked to help people, that you didn't want to hurt Barry
4 Selmon. Isn't it true that back 1998 in Pennsylvania, you
5 were convicted of harassment and stalking?

6 A: Yes, sir.

7 Q: I have no further questions.

8 THE COURT: Any redirect?

9 MR. FILIBERTO: Very briefly, Your Honor.

10 THE COURT: All right, sir.

11 REDIRECT EXAMINATION OF KEITH SHELDON LEVAN BY MR. FILIBERTO:

12 Q: I'm gonna start with that conviction. How old were you
13 when that happened?

14 A: I know it was in my teenage years.

15 Q: Okay. And have you been convicted of anything since
16 then?

17 A: No, sir.

18 Q: Okay. One other question. Solicitor, went out of his
19 way to talk about the mechanics and the engineering of that
20 firearm. Prior to that evening, had you ever discharged that
21 firearm?

22 A: No, sir.

23 MR. FILIBERTO: Nothing further, Your Honor.

24 THE COURT: Anything on that question, Solicitor?

25 MR. HIXSON: Yes, sir.

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KEITH SHELDON LEVAN - RECROSS BY HIXSON

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1 RECROSS EXAMINATION OF KEITH SHELDON LEVAN BY MR. HIXSON:

2 Q: Let me show you a photograph from your bookshelf. I'll
3 just ask you, isn't it true you have a Military Training
4 Manual in your bookshelf in addition to a weapon on the
5 military firearm styles of the 20th century in your research
6 library right where the DVR was recovered?

7 A: Those are my father-in-law's books.

8 Q: No further questions.

9 THE COURT: All right. Very good. You may step down,
10 sir.

11 A: Thank you.

12 THE COURT: Further witnesses on behalf of the defense?

13 MR. FILIBERTO: None, Your Honor.

14 THE COURT: All right.

15 MR. FILIBERTO: Defense rests.

16 THE COURT: Defense rests. All right.

17 Is there any reply testimony from the State?

18 MR. HIXSON: No, Your Honor.

19 BY THE COURT:

20 THE COURT: All right. All right, ladies and gentlemen,
21 that concludes the evidentiary portion of this trial. There
22 will be no more evidence presented to you regarding this
23 particular case. Obviously that does not end this case. What
24 we will proceed to in the near future will be the closing
25 arguments of the attorneys and then the charge on the law, the

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MOTIONS

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1 law that you will apply to the facts and evidence you find to
2 be true in your decision making to decide whether or not the
3 State has proven the Defendant guilty of the crime charged
4 beyond a reasonable doubt.

5 As at the end of the State's case, in every criminal
6 trial, there is a matter of law that the Court must take up
7 now with counsel. So, I will do that. Obviously, I need to
8 do that outside of your presence. I'm gonna try to do it as
9 expeditiously as possible and not keep you any longer than is
10 necessary. Please go to your jury room. I'll call you back
11 out and then we will start the closing arguments in this
12 matter.

13 Thank you very much.

14 (REPORTER'S NOTE: Jury exits courtroom. The following takes
15 place outside the presence of the Jury.)

16 THE COURT: All right. Motions from the defense, Mr.
17 Filiberto?

18 MOTIONS:

19 MR. FILIBERTO: Your Honor, I'd renew my motion to -- for
20 the Court to a directed verdict of not guilty in these
21 matters.

22 THE COURT: All right. All right. Again, I'm not gonna
23 go over the explanation that we went through before, but
24 basically, again -- you can sit down, Mr. Filiberto. Thank
25 you.

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MOTIONS

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1 The Court is concerned with the existence of evidence. I
2 am not judging his credibility and believability; that's the
3 job of the jury. The situation where the State and, again, I
4 have to view the evidence in the light most favorable to the
5 party opposing the motion, that would be the State, so the
6 evidence in the light most favorable to the State regarding
7 the Defendant's motion. Whether the State produces direct
8 evidence or substantial circumstantial evidence -- and again,
9 it's not my job to judge its credibility and believability but
10 determine whether or not that evidence exists. I find that
11 based upon the testimony that has been presented in this
12 matter, I do find that there is combination of direct and
13 substantial circumstantial evidence that is more than
14 sufficient to send the matter to the jury its determination
15 and therefore, I respectfully decline to grant your motion for
16 a directed verdict.

17 Further motions by the defense?

18 MR. FILIBERTO: Since it relates to the charges on the
19 law, Your Honor, if this is not the appropriate time?

20 THE COURT: Well, we're gonna go into that in just a
21 second and we will in just a minute. But, other than that,
22 are there any other motions?

23 MR. FILIBERTO: Just again, I'd renew my objection to the
24 Solicitor referring to the AR-15 rifle as an assault rifle.

25 THE COURT: All right, sir.

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CHARGE CONFERENCE

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1 MR. FILIBERTO: I mean in his closing arguments.

2 THE COURT: All right. Very good. I don't know of any
3 necessity by the State to refer to it in that fashion,
4 Solicitor. I don't -- I'm not saying you can't use the word
5 assault or assaulted in your closing argument, but not in
6 connection describing the rifle. There are plenty of other
7 terms; you've used them already. I'm not going to allow you
8 to describe it as an assault rifle. All right.

9 MR. HIXSON: I don't intend to, Your Honor.

10 THE COURT: All right. Very good. All right. How about
11 well let's go over the -- I assume there's no other matters of
12 law besides the charge from the State at this point in time?

13 MR. HIXSON: No, sir.

14 THE COURT: All right. Very good. All right.
15 Let's go over the requests to charge then.

16 CHARGE CONFERENCE:

17 THE COURT: What, what would you request, Mr. Filiberto?

18 MR. FILIBERTO: Your Honor, I would request that the
19 Court charge the jury with the ability to consider the defense
20 of self-defense in this matter.

21 THE COURT: Okay. Is there any objection to that from
22 the State?

23 MR. HIXSON: No, I think his testimony puts it into issue
24 and I think we need to secure -- yes, I think we need to
25 charge it, Your Honor.

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CHARGE CONFERENCE

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1 THE COURT: All right, sir. Very good then. That was
2 the Court's intention. Any, any other requests to charge that
3 you -- that you have, Mr. Filiberto?

4 MR. FILIBERTO: I would ask the Court to instruct the
5 jury on the possibility of a lesser included of involuntary
6 manslaughter.

7 THE COURT: Of involuntary ---

8 MR. FILIBERTO: I'm sorry, voluntary manslaughter.

9 THE COURT: Voluntary manslaughter?

10 MR. FILIBERTO: Yes, sir.

11 THE COURT: Does the State disagree with that?

12 MR. HIXSON: Yes, sir, Your Honor.

13 THE COURT: All right. So let's argue about that?

14 MR. HIXSON: Substantial support in the position, Your
15 Honor, the issue we have of sufficient legal provocation
16 basically. There is no testimony of a sudden incapacitating
17 or rage of violence. In addition to that, we have to have
18 sufficient legal provocation. And, Your Honor is well aware
19 that adultery can in some cases serve as the sufficient legal
20 provocation, but the Court has been very specific in *State v.*
21 *Gadson*, *State v. Cooley*, and I have copies for the Court,
22 *State v. Herring* that the language used is guilty embraced.
23 In other words, the evidence does not support a charge on
24 voluntary manslaughter -- this is *State v. Gadsden* -- where
25 Defendant suspected estranged -- his wife of adultery and laid

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1 in wait for wife's suspected paramour to arrive. Our argument
2 is that that's the one that's the most on point is *Gadsden*.
3 We believe there is no evidence to indicate a guilty embrace
4 of any kind. And when we say guilty embrace, the Court has
5 been consistent by saying walking into the home and seeing the
6 husband and wife -- I mean, excuse me -- the paramour and the
7 wife in the act of adultery. That is such a sufficient legal
8 provocation to give rise to such a rage or heat of passion
9 that it's a sufficient legal provocation. There is no such
10 information here. As a matter of fact, one of the reasons why
11 we put so much emphasis on the ten-day time period prior to
12 it, is they had been going on back and forth in heated
13 discussion back and forth about I'm leaving you, no, I'm gonna
14 leave you first. None of this is a surprise. It's been a
15 sweltering problem that should end up in Family Court, but it
16 is not sufficient legal provocation and the cases fully
17 support of that. And in addition to that, *State v. Cooley* --
18 and also we have no evidence that there was an actual affair.
19 We don't have any evidence in the record that there actually
20 was adultery. According to Mr. Levan's conversation, this is
21 all fantasy, it wasn't even real, this is a video game. He
22 didn't intend to do that and Penny never did that. His
23 testimony as that Penny never had an affair with him. I know,
24 I know for sure she never met with him. So, if that is true,
25 then there's no way that he has sufficient legal provocation

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1 to ever see a guilty embrace. The testimony on the body cam
2 footage relating to that was Penny Hubbard said, I was talking
3 to him, but I wasn't really gonna go. We have to take the
4 evidence in the record and the evidence in the record is there
5 was no affair, there was talk online and that -- there is no
6 way under the -- I'll hand the cases up -- that there's
7 sufficient legal provocation to give the jury that charge on
8 voluntary manslaughter. I'll hand -- the killing in *State v.*
9 *Herring*, the killing of wife's paramour was reduced to
10 manslaughter only when the husband comes upon the pair in
11 guilty embrace or in a flagrantly suggestive situation.

12 And, of course, we haven't even talked about cooling off
13 period. Cooling off period is a gravamen of the offense as
14 well. In this situation, there was substantial cooling off
15 periods. As a matter of fact, the video shows the Defendant
16 watching and waiting for the time -- for the direct rendezvous
17 at the Walmart garden center where he arms himself. He
18 surreptitiously attacks. And, because he's in a black Volvo,
19 her car, not his, there's substantial preparation and cooling
20 off period.

21 Let me these cases up to Your Honor.

22 THE COURT: All right, sir.

23 MR. FILIBERTO: If I might respond when Your Honor is
24 ready.

25 THE COURT: Yes, sir, I'm gonna be asking some questions.

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1 Yes, sir.

2 MR. HIXSON: This is State v. Gadsden, Your Honor.

3 THE COURT: All right.

4 MR. HIXSON: That's the piece about lying in wait and
5 this is *State v. Cooley*, Your Honor.

6 THE COURT: All right, sir. Thank you.

7 Mr. Filiberto, why is it -- what's the rationale that you
8 would give to the Court to charge voluntary manslaughter?

9 MR. FILIBERTO: Your Honor, there was testimony from the
10 Defendant that at the time -- he did attempt to leave then, at
11 the time the vehicle was cut off behind the store where the
12 shooting occurred, that there was a lot of threats related to
13 his family, his son and himself, and that we believe that that
14 would be sufficient provocation to elicit a reaction from the
15 Defendant that might, if believed by the jury, support a
16 lesser verdict of manslaughter.

17 THE COURT: Solicitor, what about that argument about
18 sudden heat of passion or when there is evidence of fear that
19 that could cause the end that sudden heat of passion would
20 change homicide murder to voluntary manslaughter.

21 MR. HIXSON: Yeah, we'd stand on *State v. Plemmons* on
22 that -- in that words alone, no matter how terrible, threats
23 are never -- no matter how terrible, are never sufficient
24 legal provocation. It has to be accompanied by some type of
25 an overt act. And one of the problems we have, Your Honor, is

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1 the Defendant's direct testimony is he claimed the shooting
2 was accidental.

3 THE COURT: Well, let's go to his -- let's go to his
4 testimony -- and I'm looking at *State v. Starnes*, 2010
5 decision, South Carolina Supreme Court, 388 S.C. 590 or 698
6 S.E.2d 604. His testimony that -- and this was when they --
7 when they were at the Walmart parking lot, and this is coming
8 from his testimony, he saw me and reacted, he was furious,
9 violent gestures, threatened to kill me, yelled at me. I
10 stomped on the accelerator and drove around behind the Walmart
11 on the way to the police department, trying to hide from him
12 around -- somewhere around Home Goods. He said he tried
13 called 911, his hands were shaking, wasn't unable to do so.
14 The victim passed him, cut him off, yelling and screaming at
15 me. In front of me he yelled, I'm a dead son-of-a-bitch,
16 something in his hand, assuming the worst, a firearm, that's
17 when he jumped out of his car, and then he goes on to explain
18 further about what happened. Is that not sufficient under
19 *State v. Starnes* to mitigate homicide to voluntary
20 manslaughter?

21 MR. HIXSON: The argument is -- you're correct, I
22 believe, in reading *State v. Starnes* but the fear has to be
23 result of a legally sufficient legal provocation. So, driving
24 erratically is not a sufficient legal provocation. He can be
25 afraid of erratic driving, but it has to be a sufficient legal

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1 provocation such as a guilty embrace of adultery or
2 brandishing a deadly weapon at the person.

3 THE COURT: Well, then he said Barry Selmon in front of
4 me yelled I'm a dead son-of-a-bitch, something in his hand,
5 assuming the worse, I assumed it was a firearm, based upon his
6 past knowledge. So, he has the right to act on appearances
7 how he is reacting to the situation. He assumes, based upon
8 his prior knowledge, based upon what he believes to be a
9 firearm in the hands of the victim, combining that with the
10 threat that the Defendant is a dead son-of-a-bitch. That's
11 not sufficient under *State v. Starnes*?

12 MR. HIXSON: I don't believe it is, Your Honor. I
13 believe that was a self-defense analysis and we're gonna argue
14 that in front of the jury. I completely agree with that.
15 That's self-defense. Sufficient legal provocation
16 is an element of voluntary manslaughter. So, if he is afraid
17 of what is a sufficient legal provocation, he can't -- words
18 alone, no matter how terrible, I'm gonna kill you is not
19 sufficiently with provocation. Punching you in the face
20 saying I'm going to kill you might be because a fight is
21 sufficient legal provocation.

22 MR. FILIBERTO: Your Honor, if I may say something?

23 THE COURT: All right. Let the Solicitor finish and then
24 I'll allow you to respond.

25 MR. HIXSON: The concern I have relating to the weapon is

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1 he acknowledges on direct and cross examination that he didn't
2 know if it was a weapon, it was too dark to tell. He assumed
3 it was a weapon. He's allowed to act on appearances on a
4 self-defense claim, but no weapon is not sufficient legal
5 provocation. Thus his fear is insubstantial for sufficient
6 legal provocation to allow the jury to consider a lesser
7 included. We're gonna argue self-defense, and I agree with
8 the Court at that. But, I don't think the words alone and the
9 lack of any -- an assumption of a weapon is not sufficient
10 legal provocation is the State's argument, Your Honor.

11 THE COURT: All right, sir.

12 Mr. Filiberto?

13 MR. FILIBERTO: The threats, the words, as well as the
14 testimony that at one point, Mr. Selmon's car backed
15 aggressively and, and actually struck Mr. Levan injuring him.
16 We would argue that that is sufficient provocation.

17 THE COURT: All right, sir. By that act of the use of
18 the vehicle to strike the Defendant and cause him some type of
19 physical injury, correct? That's your argument?

20 MR. FILIBERTO: Yes, Your Honor.

21 THE COURT: All right. Looking at this case of *State v.*
22 *Starnes*, Supreme Court indicates that reading from the case,
23 we reaffirm the principle that a person's fear immediately
24 following an act or threatening act may cause a person to act
25 in a sudden heat of passion. However, the mere fact that the

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1 person is afraid is not sufficient by itself to entitle a
2 Defendant to voluntary manslaughter charge. Consistent with
3 our law, voluntary manslaughter, in order to constitute sudden
4 heat of passion, upon sufficient legal provocation, the fear
5 must be the result of sufficient legal provocation and cause
6 the Defendant to lose control and create an uncontrollable
7 impulse to do violence. Simply stated, to warrant a voluntary
8 manslaughter charge, the Defendant's fear must manifest itself
9 in an uncontrollable impulse to do violence. A person may act
10 in a deliberate, controlled manner, notwithstanding the fact
11 he is afraid or in fear. Conversely, the person can be acting
12 under an uncontrollable impulse to do violence and be
13 incapable of cool reflection as a result of fear. The last
14 situation constitutes sudden heat of passion; the former does
15 not. Evidence that fear caused the person to kill another in
16 a sudden heat of passion will mitigate a homicide for murder
17 to manslaughter, it will not justify it. This is the
18 distinction between voluntary manslaughter and self-defense.
19 Reiterate that evidence of self-defense and voluntary
20 manslaughter may co-exist and that a charge on self-defense
21 and voluntary manslaughter may be warranted pursuant to the
22 facts of the case.

23 Based upon the facts present in this matter -- and again,
24 not my job to judge credibility or believability. Whether or
25 not the jury believes this testimony, thinks it has any basis

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1 in reality or not, the fact is that there is sufficient
2 evidence combined with what he testified that the victim did
3 the actual result of the vehicle striking him -- and again,
4 I'm not judging credibility or believability, I'm just going
5 on the testimony, that the threats, all that, I do find that
6 voluntary manslaughter is proper and I will charge voluntary
7 manslaughter and self-defense to the jury in this matter.

8 MR. FILIBERTO: Thank you, Your Honor.

9 THE COURT: Further requests on behalf of the Defense?

10 MR. FILIBERTO: Your Honor, just that I don't believe --
11 I don't know if the self-defense charge will include that
12 malice cannot be inferred by the use of a deadly weapon.

13 THE COURT: Well, since his self-defense is a issue, then
14 I will not be charging that malice can be inferred by the use
15 of a deadly weapon ---

16 MR. FILIBERTO: Thank you, Your Honor.

17 THE COURT: --- because of the self-defense portion of
18 that. So, that will not be included in the charge on murder.

19 MR. FILIBERTO: Thank you, Your Honor.

20 THE COURT: Anything else?

21 MR. FILIBERTO: Nothing, Your Honor.

22 THE COURT: Anything else from the State?

23 MR. HIXSON: No, just relating to reasonable doubt,
24 including the language concerning firmly convinced. I think
25 that's standard language, Your Honor.

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BY THE COURT

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1 THE COURT: Yes, sir, I'll be using that.

2 All right. So, why don't we, the jury's been out there
3 for a while, but obviously we haven't. What I'm going to do
4 is let's -- I'm gonna give y'all at least give 10 or 15
5 minutes to get organized so that we'll come back in -- we'll
6 do the -- we'll do the closing arguments, charge on the law,
7 and then we'll submit the case to the jury for their
8 deliberations.

9 All right?

10 MR. FILIBERTO: Thank you, Your Honor.

11 THE COURT: Take a short break.

12 MR. HIXSON: Thank you, Your Honor.

13 THE COURT: Thank you.

14 (RECESS.)

15 *****OFF THE RECORD*****

16 (On the Record.)

17 (REPORTER'S NOTE: The following takes place outside the
18 presence of the Jury.)

19 BY THE COURT:

20 THE COURT: Thank y'all. All right. Is the State ready
21 for the jury to come in?

22 MR. HIXSON: Yes, indeed, Your Honor.

23 THE COURT: All right. And defense?

24 MR. FILIBERTO: Your Honor, yes.

25 THE COURT: Ask the jury to come in please, ma'am.

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CLOSING STATEMENT BY HIXSON

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1 (REPORTER'S NOTE: Jury enters courtroom.)

2 THE COURT: All right, ladies and gentlemen, as I
3 indicated to you, we have finished the evidentiary portion of
4 the trial and what we're gonna go into now are the closing
5 arguments of the attorneys and then I'll give the charge of
6 the law.

7 As I told you at the very beginning, you remember that
8 the closing arguments by the attorneys, they're important, but
9 they are not evidence. They cannot be considered by you as
10 evidence in this case. You've received already all the
11 evidence that you're gonna make your decision upon in this
12 matter. The Counsel, by their closing arguments, will be
13 asking you to come to a certain result and, obviously, you
14 remember that you are the judges of the facts and you will
15 take those facts, look at the State's burden of proving the
16 Defendant guilty beyond a reasonable doubt, combine that with
17 the law that the Court will give to you. And, after that, you
18 will arrive at your verdict in this matter.

19 So with that, Solicitor?

20 MR. HIXSON: Thank you, Your Honor.

21 CLOSING STATEMENT BY HIXSON:

22 MR. HIXSON: Planned, preparation, and perfect
23 performance. With the efficiency of a military operation,
24 Keith Levan got rid of the competitor. He rose tit-for-tat to
25 an entirely new level. Efficiently planned and efficiently

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1 executed. He kind of came close to getting away with it. A
2 couple of problems along the way required him to go and tell
3 what happened, or at least his version of what happened, to
4 the Myrtle Beach Police Department the next day. But up until
5 that point, extraordinary efficiency. That's what this case
6 is about. That's what you've heard.

7 We would like to talk about this be some kind of
8 adulterous affair, some kind of erratical concept that's been
9 going on since boys and girls were getting along together;
10 it's not. It's the elimination of a rival so he can return to
11 the sanctity of his own home. And so, to understand how he
12 came to an efficient execution of this plan back on February
13 21st of 2015, let's talk about weeks just prior to it. Let's
14 talk about why this isn't a sudden rage or sudden heat of
15 passion, that this is an opportunity to launch an offensive;
16 that's what this is. How do we know what happened? How do we
17 know what was in the folks' states of mind at the time just
18 leading up to this? Well, the strange thing about cell phones
19 and text messages is we get to peak into the mindset of
20 somebody when they're sitting quietly in their own home and
21 they're fighting back and forth amongst themselves. Back in
22 the old days perhaps, we used to call it pillow talk, fights
23 between husbands and wives. We never know what happened. But
24 in today's modern communication, what you type into the cell
25 phone when you're really angry, speaks volumes about how you

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1 really feel, what your state of mind is at the time. And it's
2 very important to understand that on February 10th, 11 days
3 before Barry Selmon was shot through the back of the head, the
4 problem in the Levan/Hubbard household was because Penny
5 caught Keith cheating or at least trying to, and she said so.
6 She said, So, when were you planning on leaving me? That sets
7 the affairs that we're here today in motion. So, when were
8 you planning on leaving me? Keith's reaction is, of course,
9 What are you talking about? Her reaction is, You know what
10 I'm talking about, the letters from the girl from Asian Date,
11 all those letters of how you think about her all the time and
12 want to be with her. That's Keith Levan's doing. He's the
13 one that started it in a world of tit-for-tat. The rest of
14 the conversation goes -- you guys -- I didn't have a chance to
15 talk with you guys during the course of the trial. You get to
16 take all this stuff back in the jury room and read it. So, we
17 didn't really explain that to you, the evidence and the stuff
18 that you see including the videos that sometimes are hard to
19 hear, y'all get to go back and talk about it and look at it
20 amongst yourselves. So, you don't have to take my word for
21 it; read it yourself. Use your common experience and get an
22 idea about what's going on in the mindset of Penny Hubbard and
23 Keith Levan of 11 days of tit-for-tat.

24 It goes on from there and there's more in here that we
25 didn't read in court, but it's going back, so you can read it

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1 but it all supports the basic idea, hey, you know what, this
2 isn't even for real. I'm not really serious about it. She is
3 never gonna come no matter what I try. And most importantly,
4 if it's for real, there would be a lot more planning involved,
5 a lot more planning, but this isn't real. This isn't real
6 today. Matter of fact, I treat it like a video game. I don't
7 expect you to understand. But you -- I know what you're
8 doing. You already found somebody else, too. Matter of fact,
9 quote, I know you have someone else in mind, all the signs are
10 there. You just found your excuse to leave me. Tit-for-tat.
11 I guess I'll just go back to playing video games instead. I
12 haven't done anything worse than you've done to me. And, I
13 excuse you for saying this, but it's terribly important and I
14 apologize, but at least I don't talk about other guys while
15 having sex. Oh, Keith, hurry up and get this over with,
16 Barry's online and I really need to talk with him. That's the
17 mindset of Keith Levan talking to Penny Hubbard about what the
18 state of their relationship is on February 10th, 11 days
19 before Barry is killed. It's on Keith Levan's mind. That's
20 not sudden heat of passion; it's eliminating a rival in his
21 life. If it's not him, it's Tony, Chris, Jan, Racing Fast
22 Dave -- Guy, Blue Avenger, constantly. And Penny's reaction?
23 To not get mad, not to arm herself with a tomahawk; she says
24 have fun with your new life. Her role was retreat, to step
25 away from the conversation.

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1 So, time goes by. Apparently, some of these
2 conversations can heal because the next time we see some
3 indication of what's going on between those two, it's on
4 February 20th. The Defendant ask if Penny wants to go spend
5 dinner with him. He's got to work at a fire station late that
6 night. Hey, why don't you come with me and then we'll get
7 something to eat. The Defendant testified that he knows for
8 sure nothing was really going on. He knows for sure. You
9 know, he knows these kind of things. Well, I guess he didn't
10 know that during this course of this period, this time, Penny
11 didn't like it very much. And, so she reached out to a friend
12 of hers that she met at Grand Strand Healthcare, Barry Selmon.
13 No specific record introduced into evidence as to how much
14 conversation they had or not, but we know for sure that on
15 February 11th -- she apparently had texted him the day before
16 and said, oh, my God, I can't believe I wrote you instead of
17 Sarah. That's what happens when I drink. It's been only two
18 months. I'm not touching it again. Sorry you had to hear all
19 that. So, the day after this fight, Penny Hubbard is titting-
20 for-tatting, if that's even a word. I'm here, too, if you
21 need me, Barry says. I told you about him, remember, I'm the
22 median. She says, You were so right. I just found out that
23 he is talking to a girl at the mall and was sending her
24 flowers and jewelry. I am soooo mad. And you'll read that.
25 So, we got Asian Date online that will never really happen

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1 because apparently enough planning hasn't been happening, but
2 you don't have to plan that much to go to the mall and buy
3 somebody flowers at the mall, strike two, and she's so mad
4 about it, right? Does she react by arming herself and take
5 out somebody? Does she go shoot somebody at the mall?
6 Absolutely not. She doesn't know what to do. And as a result
7 of that, the text messages says, Barry says, I knew that; I'm
8 never wrong. She says it was bad enough that I found out
9 about the girl on the site, Asian Date, now this, now there's
10 two. So, what are you gonna do about it?, says Barry.
11 Sorry, I don't know what to do about it or feel. He said he
12 was going to cancel the flowers, and she says too late.
13 Canceling the flowers isn't enough to cure this problem.
14 Barry says, You can't tell me you believe that shit. Excuse
15 me. I just want you to know that you were right, the psychic
16 median stuff. Barry -- or she says -- I wish you'd listened
17 to me before, but -- what are you gonna do; that's the
18 question. Barry says to her, I wish you had listened to me
19 before, but now what's the question -- what are you gonna do
20 about it? It's a fateful question because -- Do you want to
21 get even with him? If you do, you know where I am. That's an
22 invitation for Penny to get up with Barry. Well, after that,
23 six minutes later she texted back, are you working now? A
24 couple of minutes later, he says no, I'm not -- no, I'm off.
25 And then there's a telephone call from Penny Hubbard's house,

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1 the one that you see the search warrant video in to Barry
2 Selmon's cell phone. That's the end of the record there. We
3 can only speculate whether anything happened there or not. I
4 don't know whether the beef stew was cooked but all the
5 ingredients to cook that stew was sitting on the counter, I
6 can tell you that. That was 11 days -- 10 days prior to the
7 death of Barry Selmon.

8 Now let's fast forward. There's no indication that Keith
9 Levan knew about that, no record of it. But we know on the
10 20th everything seems cool, right? Hey, you want to go to the
11 fire station with me? I've got to work all night tonight --
12 I've got to work tonight, I've got to work on the fire engine.
13 You want to come with me to the fire department, I'm gonna
14 work -- I'm gonna work on stuff. No response for three hours.
15 After three hours, Penny emails back, sorry I was a sleepy
16 grouch. It's hard to not be tired. Right after that, They
17 roped me in at the fire station; I'm helping with a car. And,
18 Driftwoods, the restaurant is packed. And then a reasonable
19 inference from the facts is Penny sees an opportunity. I
20 guess you'll working all night then? He says -- several
21 minutes later, she emails, why didn't you take your service
22 truck? If you're gonna work on the fire station, why didn't
23 you take your fire truck that you go work on stuff with? Why
24 did you take the Volvo that I drive, the Volvo that Barry
25 Selmon is used to seeing me drive? No answer to that. The

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1 next message is the next morning, Sorry, I snapped and became
2 the monster I feared. Is anyone looking for me? And then
3 finally, They'll look at his Facebook page and they'll know it
4 was you. That's when the decision to turn yourself in is when
5 you realize you're gonna get caught. We'll talk about that
6 more in a little bit. You'll have the opportunity to look at
7 the screen shots and maybe see the timing of these events.
8 Remember the reason there's photographs, not a document of
9 these is because the Cellebrite machine wouldn't download them
10 so that he just had to take pictures of them, so you'll
11 actually see the actual screenshots on the cell phone.

12 The most powerful thing, I can't say it to you enough --
13 we'll talk about it more -- I guess you'll be gone the whole
14 night then, Keith. And Barry Selmon, the last text message we
15 get from Barry Selmon is from Barry's phone to Penny's phone
16 saying, hey, is that you? Where are you going? Is that's the
17 sign of a man looking for a fight or he thinks he's gonna meet
18 up with somebody at the Walmart garden center at 4 o'clock in
19 the morning. The last text from Penny, Barry, answer your
20 phone, answer your phone. Look at the time of that, it's 4:37
21 A.M. The video we're gonna show in a second, Barry Selmon
22 lost his life right around 4:18 in the morning. Mr. Selmon
23 had been passed on and left probably for fifteen or so
24 minutes. That's something for you to decide. Take a look at
25 the time stamps. We'll show in a second; it's pretty clear.

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1 At 9 o'clock in the morning, 9:45 A.M., after you see the
2 video when the Defendant takes the assault, excuse me, the
3 weapon out of the -- out of the house, puts it in a plastic
4 garbage bag, takes it and dumps it behind his family member's
5 shed with the ammunition and everything that was used in an
6 effort to conceal and cover up the crime. After that is when
7 the text message that says, Is anyone looking for me? Am I in
8 the clear? Am I good to go? The answer from Penny Hubbard
9 is, they'll take a look at his Facebook, man, and know it was
10 you. Just come home and we'll figure something out. Well, I
11 guess we've got to figure something out. How about we make up
12 a story about going to Walmart to kidnap a kid? We've got to
13 figure something out; this isn't good for me.

14 Let's talk about the statement -- let's talk about
15 preparation, the three P's at the beginning of this case.
16 Okay? I want to give you -- this is in evidence and you'll
17 have a chance to show it, okay, this is the Boxwood Drive
18 video tape that shows around 4:20 in the morning, roughly I
19 think the time stamp on it -- I don't remember -- you'll see
20 it when we play it. I can talk about it as we're watching it.
21 This is Mr. Levan's house. If you'll notice the time stamp --
22 you know, time stamps are like VCR's when the power goes out,
23 if you don't reset it, sometimes the power -- the times off.
24 It appears that this is pretty close. Four o'clock in the
25 morning because we've got video proof that he was down there

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1 around 4:16 in the morning in front of the hhgregg. If you
2 recall, there's computer screen right at the bottom, if you
3 notice that -- if you want to take a look at it. Mr. Levan is
4 at the computer screen right here, which apparently is the
5 link that sets up this meeting between Penny Hubbard and Barry
6 Selmon at the Walmart garden center. In reaction to this
7 conversation and the details of that aren't in evidence, who
8 said what and who said when, where, we can only rely on the
9 statement of Mr. Levan on the initial body camera footage that
10 we'll talk about here in a second about what he read on that
11 screen. Mr. Levan's testimony is it's a crazy threat from
12 Barry, but we clearly tell from the text messages that Penny
13 and Barry are not threatening each other. There are no
14 threats there. If you watch the screen here in about 20
15 seconds, Mr. Levan will come out from that room armed with
16 State's Exhibit 61, an AR-15 semi-automatic military style
17 weapon. There it is right there. Other items in his hand.
18 Let's go check and see if anything's been called off yet,
19 anything on that computer. That's the planning stage, getting
20 ready to start into the preparation stage. So, the planning
21 stage is I know what I'll do, I'll get the black Volvo and act
22 like Penny. He will never see it coming. I can get close to
23 him because I can tell you if a man drives up in a service
24 truck next to a man at a Walmart at 4 o'clock in the morning,
25 they're not talking to each other. They're going their

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1 separate ways. The only way he can get close to somebody is
2 if you think it's your paramour coming to talk to you.
3 There's preparation. Hatchet, pistol, not a pistol yet, those
4 appear to be magazines. If you'll recall magazines were
5 collected. That's a holster to go on the waistband. Notice
6 the time stamp, 4:03. Let's just make sure this plan is still
7 in place, so I need to walk back to that computer and check to
8 make sure nothings been called off yet and you'll see him
9 check the computer for the third time. There's a handgun.
10 There's a -- there's a check on the computer. Everything is
11 good; the plan is still in place. AR-15, handgun in
12 waistband, hatchet. I want you to notice something about
13 this, too. Is that a sudden impulse to do violence; that is
14 smooth, it's quiet, it's flowing, it's even a slow gait. I'm
15 walking faster in this courtroom than I am for someone that's
16 suddenly enraged to do violence against another person. He's
17 confronted by the front door by Penny Hubbard. Notice his
18 demeanor toward Penny Hubbard. To believe the Defendant's
19 version of events, he just caught her cheating. There's no
20 domestic violence there. There's no sudden rage there.
21 There's a conversation there. Notice the time stamp, 4:30
22 A.M. returning from the Home Depot. Is he crying
23 uncontrollably about what just happened to Barry Selmon? Is
24 he sobbing and going, oh my goodness, what just happened? He
25 knows what happened. He executed his plan.

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1 Returned the weapon. You'll see him unload, basically. Penny
2 is sitting in the chair, comes up and says, What's going on?
3 I don't know what that conversation was, but I don't see a lot
4 of shaking hands and shaking fists and yelling and I can't
5 believe anything. There's the pistol putting away.
6 Understand, by the Defendant's own testimony, Keith Levan just
7 killed another man and that's rock solid right there. Putting
8 his hatchet away. I believe Penny is checking the computer.
9 That is efficient. That's efficient. Thirty-nine minutes and
10 the plan is finished. Down and back, you heard the testimony
11 from the Crime Scene Specialist. It takes about 10 minutes
12 maybe down and back from Boxwood Drive back home.

13 And now, what do we do now? Well, 5 o'clock, let's get
14 this rifle out of here in a plastic garbage bag. Let's get
15 out of here. We've got to go dump this thing. We've got to
16 disconnect the DVR -- to get away with this, right, now.
17 That's preparation and planning. That's it.

18 So, that's what happened in preparation to going down the
19 Walmart garden center. Okay? Now we can play the video of
20 what we actually see and can describe what the video itself at
21 the Walmart garden center and Costco shows. Y'all can take a
22 look at that.

23 Are you ready to get that rolling?

24 Let's talk about a couple of key points I want you to be
25 aware of. Take a look at the time stamps on State's 30 and

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1 State's 31. We know that beyond a reasonable doubt that that
2 black Volvo goes in front of hhgregg at 4:16 and 18 seconds.
3 4:16 and 18 seconds. We ready to roll? Okay. First thing
4 you pay attention to, the time stamp's off. We know the other
5 time stamps are accurate. So, this looks like it's off by 5
6 or 8 minutes. We know that because the cell phone records
7 show the phone calls before then and the time stamps there
8 showed the phone calls. But we can see Vehicle A and Vehicle
9 B. The black Volvo is front and the Neon is in back.
10 Remember this is Walmart garden center up here. Okay? That's
11 Home Depot and this is hhgregg and the video is coming from
12 Costco. So, here they come. Car A, Levan, and Barry's right
13 there. And Barry thinks it's Penny. We know that because of
14 the Defendant's own testimony. You can't see him turn into
15 hhgregg because of the stop light. There's a right turn right
16 in front of hhgregg. Stop it right there, but you want see
17 any -- we're pretending we'll stop here. That's when these
18 photos were taken right in front of hhgregg, right here. You
19 can put that -- you can get back and take a look at it because
20 you can see the parking block markers. I've got to orient
21 myself. Right here, you can look at the prints and see right
22 here. Volvo first, 8 seconds later Barry Selmon at 4:16. At
23 4:16 Barry Selmon text, Hey, is that you?, to Penny Hubbard's
24 phone. Hey, Penny, is that you? How do we know that
25 happened? When Keith Levan testified, he said, Hey, when the

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1 door opened, Barry thought it was Penny and said, Hey, I just
2 texted you. So, we know that was 4:16 in the morning. Watch
3 right here. Here's the end of it. Here's where the
4 confrontation takes place, right here. Here's where Barry
5 Selmon realized that he has to run for his life because he's
6 got a man with an AR-15 in Penny Hubbard's car that is there
7 for no good. Watch -- that interaction lasts 7 seconds. You
8 count it to yourself or you can go back and look at it.
9 There's the car moving, there it goes, pow, pow, pow, pow,
10 pow, pow, pow, pow, pow. Some -- shot at some point in time,
11 comes to rest there. Keith Levan states he doesn't see what
12 happened, but watch him slow, run the stop sign, commits a
13 minor traffic violation right here, clear view, makes the turn
14 down the road to head back to home, shell casings fall off his
15 car right there and were recovered right there in the roadway.
16 Interesting point about this, if you want to, you can, you
17 heard testimony, no one comes around that car anytime until
18 the police arrive. You'll see the blue light. You'll
19 actually see the sun come up as this thing goes on. Point
20 being is no one came to that car. No one took a gun out of
21 that car. No gun was found in that car. That's an unarmed
22 dead man, unarmed. Keith Levan testified, I thought maybe he
23 was waving a gun, but it was so dark I wasn't sure. Well,
24 that sound is the sound of a man reaching for some way to say
25 this isn't murder. He says he didn't even know it was a gun

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1 and that irrational fear caused a man to die. It's not, it's
2 murder. He prepared for it and did it.

3 Let's go on to the statement by Mr. Levan and now that
4 you've got to see -- had a chance to those, let's talk about
5 the transcript of his version of the events and how that can't
6 happen. The body cam footage, it is what it is. It's not a
7 great recording studio, right? It's just a tiny little mic.
8 You got to see what the officer was wearing on the witness
9 stand. So whatever is happening in real time, there are no
10 retakes; it is what it is. Okay? So the important points to
11 remember -- and you'll get a chance to hear it, in better
12 sound hopefully. Remember he reports he shows up for Keith to
13 claim, Mr. Levan to claim ---

14 MR. FILIBERTO: Your Honor ---

15 MR. HIXSON: --- he's been stalking ---

16 THE COURT: Just a second, Solicitor.

17 Yes, sir.

18 MR. FILIBERTO: Your Honor, I would -- the transcript was
19 excluded from evidence. I would ask the Solicitor only to use
20 the video that he got into evidence of the body cam interview.

21 THE COURT: If you've made notes, Solicitor, you can use
22 those, but you may not display to the jury something that is
23 not in evidence. Thank you.

24 MR. HIXSON: Your Honor, I intended to read off of them,
25 but I'm not gonna display it.

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1 THE COURT: Those -- you -- you've -- I assume you've
2 made notes and if you can make notes at the time, I'm glad for
3 you to do so, but you may not display it to the jury; it's not
4 in evidence. Thank you, sir.

5 MR. HIXSON: Thank you, Your Honor. Listen specifically
6 when you get an opportunity to listen to it and you'll hear
7 Penny Hubbard's voice on there saying, yeah, we were on the
8 computer last night and we came out and Keith saw -- and then
9 Keith chimes in and says, yeah, they were on the computer last
10 night talking. And I told him I was gonna go meet him.
11 Penny's saying, I told him I was gonna go meet him down at the
12 Walmart garden center, but I really wasn't gonna go. That's
13 on the body cam footage. And so then we started fighting and
14 Keith -- and Keith Levan in his voice you'll hear him say,
15 yeah, I kind of freaked out; I kind of got upset about it. So
16 I grabbed an AR-15, I just went down there to scare him. I
17 just wanted to scare him. Penny Hubbard is supporting the
18 version of events that we all know is true, that when he went
19 to the computer, they saw a rendezvous between Penny Hubbard
20 and Keith Levan at the Walmart garden center at 4:00-something
21 in the morning. When he testified that he was going down
22 there, he didn't go any stops, didn't go looking for the
23 Defendant or looking for the victim, he said I went straight
24 to the meeting place, boy. And one key point I want you to
25 know and pay attention to, in that body cam footage, Keith

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1 Levan says we were supposed to go, we were supposed to meet,
2 meaning Barry and Keith; we were supposed to meet. He doesn't
3 say Penny and Barry were supposed to meet. Who sent that
4 message when he was down there because the inference from that
5 writing and that body cam footage is he is the one that typed
6 in the computer, Hey, meet me down there. That's the plan.
7 That's the plan. He didn't drive his service truck down
8 there. He tricked Barry Selmon by driving the Volvo so he
9 could get close to him. He said it himself, he said when he
10 pulled up there, he didn't know, he thought it was Penny. He
11 thought it was Penny. I was sitting back in the seat with the
12 seat reclined behind tinted windows in the dark and when he
13 realized it was me, he freaked out. He ran for his life.
14 Listen to it carefully. You'll also hear the statement by the
15 Defendant, Yeah, you know, I pulled back the charging handle
16 and I didn't mean to. You can't unintentionally pull that
17 back. That's how you charge a weapon, getting ready for it to
18 go, and you raise it up to your shoulder and you fire it at
19 least 7 times, if not 12 times shattering the rear glass and
20 putting a bullet through the man's head. That's not an
21 accident and we'll show you the pictures we're talking about
22 in a second. He specifically also expresses his specific
23 malicious intent to commit the crime cause he says I grabbed
24 the rifle and I went down there to scare him. In South
25 Carolina that's a felony pointing and presenting in and of

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1 itself. It is a crime to try to brandish a firearm and scare
2 somebody in and of itself. He also says I just wanted to
3 shoot out the tires or the gas tank. I was aiming for the
4 tires or the gas tank. Is there any nonviolent reason to
5 shoot a gas tank of a car besides causing it to explode? Even
6 by its own admission there, it's an intentional act.

7 Finally, on the witness stand, when I was cross examining
8 him concerning the accidental firing by the weapon beyond the
9 trunk, he admitted at least five shots were intentional. I
10 don't know where the accident thing was going, but he admitted
11 five and we'll talk about that more in a second.

12 I want to point and bring your attention to one specific
13 timing event that's terribly important why we can prove beyond
14 a reasonable doubt that the Defendant's version of the events
15 of an altercation beside the Walmart garden center is untrue
16 because we know without question that the hhgregg photos, they
17 almost serve like timing gates, like in the Olympics when you
18 pass this point and then this point, you can figure out what
19 times things are going on. When hhgregg, the time stamp for
20 the Volvo was 4:16 and 18 seconds. Barry Selmon's following
21 him right behind him 8 seconds later. Okay? If you recall,
22 when Keith Levan testified and said he saw him at the Walmart
23 garden center, saw him there. When he realized that it was
24 Levan, or excuse me, when he thought it was Penny, the victim
25 said, hey, I just texted you. I texted you -- Where are you

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1 going? He's sending it to Penny and what time was that phone
2 call made? 4:16, 4:16. They were in front of the hhgregg.
3 They weren't in front of Walmart garden center. They were
4 driving the hhgregg where it was dark. I thought it was
5 amazing testimony, but I thought I would have to work a little
6 harder to get it out. It came right at me. Hey, we met at
7 the Walmart garden center, but guess what, it's open 24 hours
8 a day; it's lighted; there's cops there; there's people coming
9 and going all the time. I can't use an AR-15 and kill my
10 paramour's person; somebody might see me. So I'm gonna drive
11 back behind where it's dark where no one is and Barry Selmon's
12 going, Hey, where are you going? Our meeting place was the
13 Walmart garden center; where are you going? He texted her
14 while he's still alive -- he's about to be killed. While he's
15 still alive, he texted her and then he makes a phone call.
16 Perhaps the most chilling of all. The first call is a text
17 message so, excuse me, this is the wrong thing. The first one
18 is a text message, So, where are you going? But then he
19 actually calls Penny Hubbard. He actually calls her. So the
20 first one was at -- the where are you going was at 4:16 and 20
21 seconds. So four seconds after he passes this, he calls her.
22 He already texted, Where are you going? Now, he calls her and
23 that phone calls a pick up. Penny Hubbard picked up that
24 phone, two seconds, hung up on him. She just got done
25 watching Keith Levan walk out of the house with an AR-15, a

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1 hatchet and a pistol, and he just called after he texted her
2 and he's about to die. We know it's picked up because the
3 rest of the phone records that you'll look at show multiple
4 hang -- missed call, missed call, missed call, missed call,
5 missed call, missed call, zero, zero, zero. That call was
6 answered and hung up on.

7 I apologize, I might be talking too much and I stepped
8 out of my -- excuse me. Thank you. So, let's go through
9 these very quickly. We've already established this case is in
10 entitled State of South Carolina v. Keith Levan, but it's
11 really Keith Levan v Penny Hubbard. It's a nonstop tit-for-
12 tat for Family Court. It shouldn't be in here for the murder,
13 but unfortunately it is.

14 We talked about the cell phone information. We talked
15 specifically how we know what was proceeding this crime. It
16 wasn't the second incident, it wasn't walking home. A classic
17 voluntary manslaughter situation is when you walk home from
18 work and say honey, I'm home and oh my goodness and you walk
19 in the door and you see them together and what our court calls
20 a guilty embrace. That is appropriate for a reduction of
21 charge from murder to voluntary manslaughter. You are so
22 overcome by rage and heat of passion that you are so
23 uncontrollable that you grab a candlestick or something. No
24 candlestick here; preparation, planning and performance is
25 what's here. It's appropriate in some cases; it's not here,

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1 and we know that by the cell phone records. So take a look at
2 that; that's what the purpose of those records have been used
3 for. Okay? We also have the body cam statement. Please look
4 at that, talk about it. And you listen to it and you tell me
5 what you hear. Preparation for the murder, that is video
6 inside the Boxwood Drive area, we've all seen that. That is
7 uncontroverted. That's quite a preparation for an accidental
8 encounter. Costco surveillance video establishes, and
9 conclusively establishes the chain of events leading up to
10 that and the timing of the events and the expectation that
11 Barry Selmon had, right or wrong, he believed he was going
12 there to meet a woman, had no idea he was about to meet an
13 armed combatant. Keith Levan testified to that fact. He had
14 absolutely no idea, and that's the point we're talking about.
15 Barry Selmon was tricked. I'm gonna reiterate that and move
16 on.

17 We get an idea what's in Penny's Selmon -- Penny
18 Hubbard's mindset when he texts, Got to work on a fire
19 truck...I guess you're gonna be gone then, right? All night?
20 I got an opportunity to set up a meeting at the Walmart garden
21 center. Penny Hubbard, in the body cam states, you will hear
22 her say, I was talking to Barry online. He found out about it
23 and got upset. I was supposed to meet him at the Walmart
24 garden center, but I really, really wasn't gonna go. He saw
25 the opportunity to execute the plan saying I'm gonna act like

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1 you and I'm gonna go down there and meet him and end this
2 right now. He drove the Volvo with dark tinted windows.
3 Levan's direct examination indicated that Barry Selmon
4 couldn't see who was in it, didn't know who was in it. He had
5 the seat back and was leaned back. And, in fact, his direct
6 testimony was he thought it was -- he thought it was Penny; he
7 didn't know it was me. And when he walked up there he said,
8 Hey, I just texted, you corroborating the exact timing of
9 those pictures. He texted her at 4:16 saying, Hey, where are
10 you going? We're supposed to meet back here in the lighted
11 area. Why we going back here in the dark? And she's even
12 questioning, why didn't you take your service truck if you had
13 to work at the fire department? Why are you taking my car?
14 There's his car. Ready to roll. No reason you can't unless
15 it's part of the planning. This is Keith. The first text,
16 Hey, where are you going? There's a screenshot; that's on
17 Penny Hubbard's phone, 4:16:03 A.M. Please look at your own
18 leisure at the screenshots from Home Depot where it
19 establishes the first car through to proves that there was no
20 altercation in the Walmart garden center because under cross
21 examination, he admitted texting or forwarded -- Hey, I just
22 texted you, meaning any meeting between Levan and Barry Selmon
23 happened after that text, happened after 4:16, happened after
24 they passed in front of hhgregg, happened back in the dark.
25 Then Barry calls Penny 7 seconds later, that's corroborated on

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1 the cell phone records, you'll look at that and see those
2 timings are right on the money and consistent with the hhgregg
3 camera. That call lasts two seconds; we've already talked
4 about that.

5 Now, the Defendant tried to cover up the murder. How do
6 we know that? He disconnects the DVR system. There's no
7 reason to do this if it's an accidental or a self-defense
8 shooting. You wait for the police to arrive and say I can't
9 believe this just happened. There's no wrong availed to
10 disconnect the DVR. You don't have to take weapons and
11 multiple ammunition and hide it behind a shed. Did anybody
12 see me? Shew. Got to tell her, man, I snapped and became a
13 monster. And, is anyone looking for me. How's it look coming
14 home? Am I gonna get away with this? Nope. You'll see the
15 text message that says, Nope, they'll look at your Facebook
16 and they'll know it was you.

17 Let's talk about the elements of murder and apply it to
18 the facts that we've just talked about. Killing is -- murder
19 is very straightforward in South Carolina. The killing of
20 another person with malice aforethought -- excuse me, it's not
21 malice after five, that's a scrivener's error; it's called
22 aforethought. And the key part of this malice can be
23 expressed malice or implied malice. So, how do we prove
24 malice in the State of South Carolina? Well, very rarely do
25 we have someone that says I am going to kill you and then they

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1 do it. That happens sometimes, but very rarely does it
2 happen. Here we have expressed malice in that I took an AR-15
3 and went down there to scare him. The commission of a felony
4 is by its nature -- there's unlawful conduct and malice in
5 there. He also in his own body cam statement says, I'm firing
6 at the gas tank. I want to fire at the gas tank. We all know
7 -- you don't put a bullet in a man's gas tank unless you want
8 the car to go boom. Whether it does or not, I don't know, but
9 there's no reason to do that unless you intend to cause harm
10 and he says that was in his mind as he went down to the
11 hhgregg. That was in my mind, I'm gonna scare him, I'm gonna
12 shoot at him and I'm geared up for it. That's how we can
13 prove malice. We can always also prove malice by the
14 instrumentality and the nature of what was used. You guys can
15 take that into consideration and think, hmm. So, if you're
16 out cutting trees and a tree falls on somebody, was the
17 instrumentality such that would cause death; no, that's tough.
18 But, if you take 60 rounds of ammunition and a military style
19 weapon and a handgun there is -- you're not making cake with
20 it, you're killing them. You can use that as an example of
21 malice to show that what was in the man's heart was ill will,
22 a dark heart or a blackened heart intent on doing evil. You
23 can use that and it is apparent, the preparation for it. You
24 can also use the circumstances surrounding the crime, the
25 number of gunshots and we'll talk about that right now. Let's

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1 clarify this right now, that was deliberate aimed gunfire.
2 We've collected seven shell casings. Crime Scene indicated
3 there may be as many as 10 holes in it and we'll talk about
4 that for a second. Seven shots, that's a little bit of an
5 indication of the preparation planning perhaps to get the
6 search warrant on the thing. We've got Call to Duty video
7 games, we've got Zombie Hunter on the rifle.

8 We have an intention and we also have Mr. Levan
9 indicating that those weren't his training manuals or military
10 style manuals, the training thing, that they're his
11 grandfather's; perhaps they were. But this crime was executed
12 as if he'd read them. Look at the bullet holes in the back of
13 that car. I don't know if you can see it. Notice none of
14 them are at the tires. There's at least 10. That makes 7 --
15 1, 2, 3, 4, 5, 6, 7, 8, 9. And perhaps the most chilling of
16 all -- I'll come back to that slide. Perhaps the most
17 chilling of all, that's a headshot right through the
18 windshield, right at his headrest. That's a headshot. Was
19 Barry Selmon killed? Headshot. That's not a gas tank.

20 How do we also know about a variation of the events of
21 whether they have a gun or not? If you notice this spoiler
22 has a bullet deflection in it, right? And so by common sense
23 it would indicate the shooting position of the individuals
24 here and the victim's car is here because the bullet didn't go
25 this way, it couldn't have gone this way. So, we know most

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1 likely circumstantially that, that the Volvo was here and
2 Selmon was here as he drives away. Otherwise, the bullet
3 couldn't have hit it. It would've come this way, right,
4 until he gets far enough away and the rounds are going
5 straight at him. The firing position has to start here.
6 Barry Selmon passenger to Levan the driver, right? Well, what
7 do we also know about that? Too dark, couldn't see, tinted
8 windows and the windows are up, no gun in the car. There's no
9 presentation of a firearm towards this individual. There's no
10 presentation of a firearm. No one's recovered, it wasn't in
11 the car and it's in the dark and you can't see it. His only
12 admission was he said yeah, it was dark, I couldn't really
13 tell for sure. Headshot.

14 Let's talk about voluntary manslaughter now and talk
15 about why this case is not voluntary manslaughter. That's the
16 elements in South Carolina. Okay? It's the unlawful killing
17 of another in sudden heat of passion without malice
18 aforethought. In other words, you're so enraged like we
19 talked about before. How do we know it wasn't that? The
20 planning, preparation and execution; it's not that. There is
21 not irresistible impulse to do violence. There is no credible
22 testimony that the -- Barry Selmon had a weapon. If there was
23 any credible testimony about the reason that he called was to
24 tell Penny Hubbard, I'm here, come down to Walmart, bring your
25 kids so I can kidnap them. That's incredible, it's false.

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1 There is no credible testimony that he was in fear for his
2 life, but for the tit-for-tat going back and forth between
3 Penny Hubbard and Keith Levan. There's a lot of that. By his
4 own admission, I guess it was a tit-for-tat. I guess I've
5 made some stuff up just to make her enraged, to make her mad.
6 The intended victim was Penny Hubbard and this individual is a
7 tool to get to her and that is not sudden heat of passion;
8 that's preparation, that's planning and that's performance.
9 This is not voluntary manslaughter -- it is not voluntary
10 manslaughter. Watch the Boxwood video and see if there is a
11 sign of sudden heat of passion on that.

12 Now as it relates to his version of the events in the
13 back or by the Walmart, we know that there was no fight at the
14 Walmart. The phone records and the time stamps prove that's
15 impossible and his testimony that he pulled up beside him.
16 When he pulled up beside him, when the Defendant pulled up
17 beside the victim, I believe it's fairly true that that
18 occurred, but that's the moment he realizes that I better run
19 for my life when Levan, by his own testimony, says I was so
20 afraid I wanted to retreat, but he advances on the passenger
21 side of the vehicle, pulling a weapon from inside his car
22 because he wants to run from there and all he has to do is
23 press the accelerator or better yet, all he has to do is stay
24 home and nothing happens. If he just stays home and doesn't
25 arm himself. When he says I was so afraid, I have to grab a

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1 weapon, I have to get out of the car, after jamming the
2 charger handle, and then somehow it accidentally goes off and
3 then it goes off two more times including a headshot to the
4 back of the window. Incredible. And then once again, that's
5 the sound of a man trying to do what he can to not be held
6 accountable for his actions. We all can understand that.
7 It's not the truth though. No irresistible impulse to do
8 violence. An extraordinary amount of malice aforethought in
9 this case. It's dripping with it.

10 And let's talk about self-defense, finally. Let's get
11 this last little bit of it. In South Carolina, you just can't
12 say I was defending myself, but you actually have to show and
13 establish four separate elements. Any one element and the
14 entire story falls, all right. So any one thing fails, you
15 have to find beyond a reasonable doubt that each one applies.
16 If anyone fails, the whole thing will fail. Okay? So self-
17 defense in South Carolina is the most important one is the
18 Defendant cannot be at fault in bringing on the difficulty.
19 You have to be clean hands, doing nothing wrong when somebody
20 jumps you. Well, the Boxwood video proves that he is the one
21 that is responsible for bringing on the difficulty. Arming
22 yourself, going to a surreptitious meeting, he is causing the
23 conflict. Self-defense fails on prong number one right out of
24 the gate. All right. So let's just go forward and talk about
25 every other one. The second one, he has -- the Defendant has

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1 to actually believe he was in eminent fear. His statement was
2 I thought he had a gun; I thought he had a gun. We know there
3 was no gun. We know that he didn't even know for sure if
4 there was no gun and in the light most favorable to him, he
5 couldn't have been in fear for bodily injury or death after he
6 already confronted the man with an AR-15.

7 Finally, anybody else in the same circumstance confronted
8 with those facts would have felt the same way. Arguably that
9 fails, too. Nobody else would be down there confronting
10 somebody that apparently is a paramour to your wife and claim
11 that you're the one that's victimized by the whole process.
12 That's not reasonable. Stay at home or do what Penny says,
13 leave. Find that the Defendant had no other means to avoid
14 the danger, that's commonly referred to as your duty to
15 retreat. You got the duty to retreat. In other words, if
16 just doing nothing saves somebody's life, you don't have to
17 use lethal force; do that. If not going down there or seeing
18 him, then do that, but don't say I had to retreat by arming
19 myself and advancing towards him and firing at him. And that
20 is not my version of retreat. That's not a retreat; that's
21 murder. So all the prongs fail. You don't have to find all
22 prongs, just one prong. It's not self-defense; it's a plan
23 prepared for and executed act.

24 Barry Selmon didn't bring on the difficulty and he didn't
25 have a gun and he was shot in the back of the head, quite,

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1 quite literally running for his very life. That's what
2 happened.

3 I want to talk to you guys about a couple of things.
4 Here in a second, Defense Counsel is gonna get a chance to
5 come and talk to you about all these things. They're gonna
6 talk to you about their version of the events. Judge is gonna
7 charge you on the law to apply in this case. All right? And
8 at that time, we'll place all the exhibits and everything and
9 bring them back to you and then you'll start deliberating and
10 you'll bring all this stuff, maps, videos, all that kind of
11 back and you'll start looking at it. And quietly you'll
12 realize that somebody else is back in the jury with you, one
13 other person, and she'll be sitting quietly back in the corner
14 and some of you won't even see her at first, some of you may
15 already know who she is right now, and her name is Justice and
16 she'll be quiet at first and let you guys talk, but one by
17 one, each one of you will hear her voice, quietly at first and
18 then it'll continue to get louder as you're talking and
19 deliberating, you get louder and she's saying guilty, guilty.
20 Keith Levan is guilty for the murder of Barry Selmon. Guilty.

21 THE COURT: Mr. Filiberto?

22 MR. FILIBERTO: Thank you, Your Honor. May it please the
23 Court?

24 THE COURT: Yes, sir.

25 CLOSING BY FILBERTO:

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1 MR. FILIBERTO: Ladies and gentlemen, I appreciate this
2 last opportunity to speak to you, and I appreciate the fact
3 that throughout this trial, you continued to look and you
4 stayed focused on everything that's been presented, all the
5 evidence, which His Honor has already instructed you coming
6 from the witness stand and from these exhibits, from Mr.
7 Hixson and now from myself.

8 What -- I'm gonna begin by, by, by stating the very
9 obvious which is what happened that early morning is a
10 tragedy. It was a tragedy for the parties involved, Mr.
11 Selmon, his family, his loved ones, and in its own way was a
12 tragedy for Mr. Levan and his family. We've talked about a
13 number of things with respect to Mr. Levan. In all the years
14 that he's been in South Carolina, there's no history of him
15 being violent. He expresses his concerns usually verbally.
16 You've listened to testimony that as a result of different
17 interactions between his wife and Mr. Selmon, that Mr. Levan
18 became concerned for his family. When he woke up that morning
19 and he looked at the interaction on the computer and the
20 internet, he decided it was time to try and confront Mr.
21 Selmon verbally. That was his testimony, verbally. He took
22 some weapons, but there's no question, you see that on the
23 video. The rifle I can't speak to, but what he did testify to
24 was that he was afraid. He'd seen photographs and heard of
25 Mr. Selmon carrying a weapon. The officer even testified that

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1 while there was no weapon found, there was ammunition in the
2 vehicle and a concealed weapons permit. At some point, he
3 carried a weapons.

4 The Solicitor made a lot of the discussion about Mr.
5 Levan bringing a weapon believing that that supports an
6 argument of some level of premeditation. I would suggest to
7 you that if everybody's home had a DVR in it and you looked at
8 people leaving their house in the morning, a lot of people
9 bring a weapon with them. Now, a rifle, certainly he brought
10 that because he was -- as his own testimony that he was afraid
11 and he just wanted to have it just in case something got
12 amiss. His testimony -- and it's uncontroverted, nobody has
13 said anything that that's in evidence that that's not true is
14 that he went down there to verbally confront him and say leave
15 my family alone. His testimony clearly said that he changed
16 his mind as he was sitting there outside the Walmart. He
17 marked a few things on this where the first one where it says
18 the first place that cars came by and he didn't even wait, he
19 drove over here, which is where he stopped again because he
20 realized Mr. Selmon was following him. And that's when he
21 wanted him to see that it wasn't Ms. Hubbard in the car, that
22 it was him. Mr. Levan's testimony was that Mr. Selmon got
23 very angry, very agitated in a scary way and, and Mr. Levan
24 drove away quickly because he was scared. He drove around and
25 came down and ultimately got over by that hhgregg. You've

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1 seen video and you've seen photos and it's really telling. It
2 wasn't Mr. Levan following Mr. Selmon; it was Mr. Selmon
3 pursuing Mr. Levan. Based on Mr. Levan's testimony, Mr.
4 Selmon was angry that it wasn't Penny and that it was him.
5 That, he went behind the hhgregg and attempted to hide and Mr.
6 Selmon came around and got his vehicle in front. He went to
7 get out of the car because he couldn't drive anywhere further.
8 And that's when, according to Mr. Levan's testimony, he was
9 struck outside of his car by Mr. Selmon's vehicle. There's
10 testimony from the police officer, he had blood on his jacket
11 that was the jacket he was wearing that morning. It was his
12 blood. He got up, he -- there was some yelling back and forth
13 by Mr. Selmon according to Mr. Levan and that is when he
14 grabbed the rifle and he begun to discharge it.

15 His testimony was that he was in fear for his life. I'd
16 ask you to consider that. Should he have gone down there that
17 morning; he's already told me he shouldn't have. He was just
18 trying to make this man leave his family alone. I didn't know
19 Mr. Selmon, I'm over there listening, that when somebody has a
20 long history of not committing violent acts, having a
21 responsible job and a family, it seems pretty out of character
22 to just decide I'm gonna go down and commit homicide.

23 There is a lot of attention to a lot of text messages and
24 emails or timing of phone calls. Please don't think that's
25 that stuff out of context. Look at it in its entirety. Put

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1 it in perspective. It is important that you get the full
2 picture and, again, not my -- not my speaking to you and not
3 Mr. Hixson speaking to you. I would -- telling you that --
4 All right. What I would say is that the evidence shows that
5 after Mr. Levan left there, after he saw the vehicle drive
6 out, we don't know what he knew. His testimony was he didn't
7 know that he was severely hurt. He thought he got scared
8 because when that bullet hit the back window, he said the car
9 rocketed off at a high rate of speed. He got home, he said
10 some things. One of the things was I became a monster I
11 feared. He said on the stand that's a quote from a -- from I
12 don't know a poem or something, a book and he at some point
13 was home and obviously very upset. He at some point later on
14 in the day, was made aware that, that Mr. Selmon had died, and
15 he went down on his own to the police department with Ms.
16 Hubbard. That doesn't sound like somebody who intentionally
17 went down to commit the felony of murder. He went to down to
18 try and explain these circumstances that he tried to explain
19 to you today from the witness stand.

20 The State's made some issue about the fact that he put
21 the gun behind the shed, but the first time he was asked
22 where's the gun, he immediately responded and told them
23 exactly where it was. I'm not saying he was thinking
24 rationally or, or, or thoroughly, correctly, but if his
25 intention was to go down there and commit the kind of violent,

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1 premeditated murder that the Solicitor will suggest to you,
2 why would he go to the police, why wouldn't he flee.

3 I ask you to use your common sense. It's such a
4 critically important part as you deliberate these matters.
5 Sometimes it just doesn't make sense that a person goes with a
6 violent attempt to go down and cause great bodily harm and
7 then just goes and runs down to the police department and
8 says, hey, I'm here; I did this.

9 The -- it was also testimony from Mr. Levan that when
10 they were behind hhgregg and his testimony was that Mr. Selmon
11 cut his car off and he couldn't leave, that he said some
12 aggressive and threatening things about him and his family,
13 that he was gonna cause them harm. There was a lot of -- a
14 lot of emotion and anger, and which mean the fact that Mr.
15 Levan couldn't get out, got struck by the car, his testimony
16 was, you know, that he was scared for his life and he reacted
17 in a way that -- that ultimately led to the death of Mr.
18 Selmon. Mr. Selmon never got out of the car and would be
19 obviously facing away because Mr. Levan's testimony was it was
20 backing in on him, and that would talk about the head wound.
21 The Solicitor talked that there was a lot of bullet holes. We
22 agree. We can see them in the pictures. Mr. Selmon was not a
23 marksman -- I'm sorry -- Mr. Levan is not a marksman. He even
24 testified that he had never fired that weapon before.

25 The context for you, I would ask you to take a look at

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1 this. This is the elements of self-defense. Mr. Hixson has
2 already tried to address that. I'm just gonna talk a little
3 bit further. The testimony is that when Mr. Levan went down
4 to Walmart, at that first location when they came across each
5 other, he just drove away. He changed his mind. He got
6 scared. He ended any attempt to create a confrontation.
7 Later when he got followed, he stopped. It's not Penny; it's
8 me. There as a very angry reaction. My client drove away.
9 Mr. Levan drove away. The video evidence of the police showed
10 that he drove away and was being followed by Mr. Selmon. The
11 only other testimony that we have to that point is from Mr.
12 Levan, where he said that the car cut him off in the back.
13 There was the altercations that you've already heard the
14 testimony to and if there ever comes a place where you need to
15 rehear some of the testimony, that's available. All you have
16 to ask the Bailiff to let the Court know. He tried to get
17 away, never said a word to him when he drove away. There was
18 no confrontation until the second place where they stopped.
19 He fled, Mr. Levan fled. He was in great danger. He got
20 pulled -- he got cut off and -- and blocked in. His testimony
21 was that he believed that he saw a weapon. He knew from past
22 evidence and past discussions that he carried weapons. He
23 tried to get out of the vehicle. His testimony is that the
24 vehicle struck him. He got knocked down, he got up. There
25 were some more words and yelling and threatening behavior and

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1 he got in his vehicle and he got his weapon out and he
2 discharged his weapon and ultimately fatally injured Mr.
3 Selmon. But I would ask you to consider is the possibilities
4 and the information that is in evidence and in looking at this
5 -- and His Honor is gonna charge you on the law and his -- if
6 you consider anything that's on this not consistent with what
7 His Honor says, please disregard me and listen to the Judge.

8 But if -- I would ask you to seriously consider the fact
9 that he did try to go and leave and was pursued. The only
10 testimony we have is that he was struck by a car. There is
11 some supporting evidence in the blood on his jacket. He --
12 and he went to leave. He went to the police department. He
13 said there was an altercation and I was involved, and he told
14 them there was a gun. He didn't lie. He went there and -- why
15 would he do that? I ask you to consider that. Why would he
16 do that? He went down to try and explain what happened.

17 Malice is a not a function of having a gun. His Honor is
18 gonna tell you that. If you go to maybe half of the cars
19 parked in this courthouse parking lot, there is probably a
20 gun. People carry them for different reasons. What I am
21 telling you is that the only evidence before you that he chose
22 to go down there and confront Mr. Selmon was verbal. There's
23 nothing -- if you put everything in context, there is nothing
24 he went and said, I'm gonna go down there and I'm gonna hurt
25 that man. Okay? There's nothing in evidence. I would ask

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1 you in using the evidence and applying the evidence to the law
2 and the facts, come back with a verdict of not guilty. To the
3 extent that you think that he shouldn't have ever gone down
4 there, I would ask you to consider a lesser included charge of
5 manslaughter. It was words and threats, Mr. Levan testified
6 to his safety and the safety of his family, he got struck by a
7 car and there was a lot of fear and anger and there was
8 shooting that followed and there was obviously a fatality. I
9 ask you to consider that. Just use your common sense. It's
10 all we can ask. There's a lot of evidence and it's being
11 presented from different perspectives and a different point of
12 view. That's why we so desperately need a jury when we can't
13 sort it out and get to the same conclusion; we need y'all to
14 help us. That's what I'm asking for you to do is use your
15 common sense, accept the fact that no matter what happens
16 here, this is a tragedy that will irreparably hurt and be with
17 everybody involved.

18 Thank you for listening.

19 THE COURT: Solicitor, any reply to new matter?

20 MR. HIXSON: Yes, Your Honor, three points that was
21 brought out by Defense Counsel.

22 THE COURT: All right, sir.

23 REPLY CLOSING BY HIXSON:

24 MR. HIXSON: Very briefly. First, as to the first point
25 relating to absolutely no evidence in the record concerning

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1 the intent of the Defendant as he went down there. Listen to
2 Keith Levan's own words out of his own mouth on the body
3 camera footage when he verbally expressed his intent to scare
4 him or to fire into his gas tank. That's why he says he was
5 going down there. That is express malice, intent to do harm
6 before he ever left his own house; that's what he got armed
7 for, that's in the record and you'll hear this evidence. You
8 don't have to take my word for it or Mr. Filiberto's word for
9 it.

10 Another substantial point, this interaction at the
11 Walmart garden city never happened. We can prove it. The
12 evidence -- the lego blocks are in evidence for you to prove
13 it. The time stamps on the text messages and the time stamps
14 by going down hhgregg. At 4:16, that's all we got to
15 remember, 4:16 in the morning; Levan is in front, Selmon is in
16 back, Selmon is texting Penny Hubbard, hey, where are you
17 going because we were supposed to meet back here? And you
18 heard from the Defendant's own testimony that the first thing
19 out of Barry Selmon's mouth when Barry still thought it was
20 Penny, when they pulled up together was, Hey, I just texted
21 you. That's after 4:16 and we know they were already away
22 from the Walmart garden center to behind the hhgregg. It's
23 demonstratively false. The first interaction about being
24 pursued never happened. The only reason they left is because
25 it's open 24 hours a day and light and cops are there and

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1 people are walking around and Levan can't execute the plan
2 with witnesses. Let's get it behind the hhgregg; he thinks
3 I'm Penny, I'll follow around behind that and I can fire 10
4 rounds in the back of his car.

5 The backing up, at that moment we're referring to may
6 have very well happened. When that moment in time when he
7 sees Keith Levan or realized it's not Penny Hubbard and he
8 doesn't have a gun to pull himself, the video shows the
9 headlights of the car moving back for a second and then go
10 flying off. He may have very well moved back and go bam,
11 boom, boom, and go, because I got nothing. But that's not an
12 initial aggression because we know what happens when he gets
13 out of the car. That interaction happened in seven seconds.
14 You see the headlights, you see the car movement go as he was
15 driving as fast as he can to get away.

16 And then finally, I'll leave you with this. I think the
17 irony of this entire process is that the story that's used to
18 justify a murder is that Barry Selmon is a stalker. When
19 there's only once convicted stalker in this courtroom, it's
20 Keith Levan.

21 BY THE COURT:

22 THE COURT: All right, ladies and gentlemen, I'm gonna
23 give you a short break about five or ten minutes. Go to your
24 jury room, take a break and come back in and I'll give you the
25 law that you will use to decide this case. Take a short break

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1 please.

2 Thank you.

3 (REPORTER'S NOTE: Jury exits courtroom. The following takes
4 place outside the presence of the Jury.)

5 THE COURT: All right, Solicitor and Mr. Filiberto, I can
6 anticipate the first question that the jury is gonna ask us is
7 how do we play the DVD. Okay? In the past, I'm not sure it
8 was the Clerk's Office, I think it came from the Solicitor's
9 Office originally. It's a computer that has nothing on it
10 that plays the DVD; do we have that?

11 MR. HIXSON: Yes, Your Honor, that was gonna be my
12 proposal that Mr. Filiberto take a look at it and make sure
13 he's comfortable. Everything has been removed from the
14 desktop or whatever it is, which it is, that's what it's there
15 for so they can listen to the volume. As you know, it's hard
16 to hear across the room.

17 THE COURT: All right, sir. Mr. Filiberto, during the
18 break, if you'd take a look at that. We've used it in the
19 past in cases. I want you to assure yourself that it is free
20 of anything else that the only ability that they will have is
21 to play the DVD that or DVD's that are in evidence in this
22 matter so that they have it. So, if you'll do that, and
23 again, we'll just take a short break and they'll come in and
24 I'll then give them the law in this particular case. All
25 right?

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1 MR. FILIBERTO: Thank you, Your Honor.

2 THE COURT: Anything else?

3 MR. HIXSON: Just we positing the idea, but there is
4 evidence in the record related to the felony murder rule that
5 the foreseeable consequences of a felony, pointing and
6 presenting a firearm, can result in the death of an
7 individual. I just want to posit that for the Court's
8 consideration.

9 THE COURT: I appreciate the State's position. Based
10 upon at least my examination of the most recent Supreme Court
11 decisions, I do not believe that is a proper charge and I will
12 not be charging that to the jury.

13 Thank you very much.

14 MR. HIXSON: Thank you, Your Honor.

15 MR. FILIBERTO: Thank you, Your Honor.

16 **(RECESS.)**

17 *******OFF THE RECORD*******

18 **(On the Record.)**

19 THE COURT: All right. The State ready for the jury to
20 come in?

21 MR. HIXSON: Yes, sir.

22 THE COURT: Defense?

23 MR. FILIBERTO: Your Honor, I have been waiting to take
24 a look at the computer. I think he had trouble with the
25 password.

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1 THE COURT: Okay. So we hadn't had the chance to look at
2 then?

3 MR. HIXSON: I wasn't aware of it. They just told me so,
4 yes, that's what Mr. Terrell ---

5 THE COURT: Well, can we look at it now or there's still
6 a problem?

7 MR. FILIBERTO: It looks like a login page and I don't
8 think they could figure out the password.

9 THE COURT: Oh great. Well, that's not gonna help; the
10 jury want know it either.

11 MR. HIXSON: I didn't know that was a problem, Judge, I'm
12 sorry.

13 MR. FILIBERTO: Your Honor, the equipment is fine.

14 THE COURT: The equipment is fine?

15 MR. FILIBERTO: Yes, sir.

16 THE COURT: All right. Very good. So let's -- All
17 right. So just leave it connected to the power cord until we
18 send it into the jury and then they can plug it in over there.
19 All right.

20 All right. Ask the jury to come in, please.

21 (REPORTER'S NOTE: Jury enters courtroom.)

22 CHARGE TO JURY:

23 THE COURT: All right, ladies and gentlemen. It's now my
24 duty and responsibility to give you the law that you will
25 apply to the facts and evidence you find to be true in this

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1 particular case. I told you at the very beginning I would not
2 indicate to you at any point in time what I believed the facts
3 of this case were. I believe I've stuck to that. But, in
4 that same vein, if you came into this courtroom with any
5 preconceived ideas of what the law is or what it ought to be
6 or what it should be, what you hoped it would be, you'll
7 disregard that. You will take the law as I now give it to you
8 and apply it to the facts and evidence you find to be true in
9 this particular matter. I told you at the very beginning one
10 of your jobs, duties and responsibilities would be to judge
11 the credibility, that is the believability of the witnesses
12 that have testified before you. Now in doing so, you look at
13 and can believe, you know, one witness against several,
14 several against one, you can believe a portion of what a
15 witness said, you can disregard its entirety the testimony of
16 a witness if you have good and sound reason for doing so. You
17 look at whether that witness has exhibited to you any type of
18 interest, motive, bias, prejudice they may have in giving you
19 the testimony they gave you from the witness stand.
20 Obviously, you consider the opportunity for knowledge, how did
21 they come about that information that they gave you from the
22 witness stand.

23 Your job is to examine all the facts and evidence in this
24 case, find that evidence you find to be true, and then weigh
25 that evidence, look at that evidence to see if the State has

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1 proved the Defendant guilty beyond a reasonable doubt. That's
2 what you're doing, looking at the evidence and did that
3 evidence prove to you beyond a reasonable doubt the guilt of
4 the Defendant of the crime charged?

5 There are two types of evidence presented in virtually
6 every single case that's tried. They're called direct and
7 circumstantial evidence. Direct evidence, that's the
8 testimony of a person who claims or asserts to have knowledge
9 of an actual fact. Something that happened in their presence;
10 what they saw, what they heard. Circumstantial evidence,
11 that's proof of a chain of facts indicating the existence of a
12 fact. Now, the law doesn't make any distinction between the
13 two, a greater degree of certainty of one over the other is
14 not required, but to the extent that the State relies on any
15 circumstantial evidence, all of the circumstances must be
16 consistent with each other and, when taken together, point
17 conclusively to the guilt of the accused beyond a reasonable
18 doubt. If the circumstances merely portray the Defendant's
19 behavior as suspicious, that proof has failed. The State has
20 the burden of proving the Defendant guilty beyond a reasonable
21 doubt and that burden rests on the State whether or not the
22 State uses direct, circumstantial evidence, or some
23 combination of the two. After weighing all the evidence, if
24 you are not convinced of the guilt of the Defendant beyond a
25 reasonable doubt, you must find the Defendant not guilty.

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1 Now I qualified a witness in this matter to be an expert
2 witness. Usually, we don't allow witnesses to give their
3 opinion about something. They have to be able to testify as
4 to what actually occurred. Some witnesses by reason of their
5 experience, training, education in a certain field will -- the
6 Court will qualify them as an expert witness or that is to
7 give their opinion. Just because I did that doesn't give them
8 any special status. You weigh all the witnesses and their
9 evidence the same and you judge them all the same.

10 Prior record of the Defendant is admitted only for the
11 purpose of evaluating the credibility or the believability of
12 testimony presented and for no other purpose. You cannot and
13 may not use the existence of a prior record as any evidence of
14 the guilt of the crime for which the Defendant is now charged.
15 That is improper; you may not do that. The only weight it
16 can have is if you think it has any weight at all as to the
17 issue of credibility and believability, other than that it
18 cannot be used in any manner.

19 In order to -- in every criminal case, criminal liability
20 or criminal intent is required. Criminal intent must be
21 proven by the State beyond a reasonable doubt. Now that's a
22 matter that must be determined by the jury for the
23 circumstances surrounding the situation. There's no way to
24 prove it to some kind of mathematical certainty. You have to
25 look at the facts and evidence and then look and see if --

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1 how that intent may be inferred from the circumstances shown
2 to have existed. It's not necessary to establish intent by
3 direct or positive evidence, it may established by taking into
4 fact consideration of the acts of the parties and all the
5 facts and circumstances of the case. It's a mental state.
6 It's up to you to determine what the Defendant intended to do
7 based on the circumstances and facts shown to have existed.

8 I told you at the very beginning to the indictment, the
9 charge that the State brought against the Defendant, he pled
10 not guilty. That's when that burden of proof came upon the
11 State of South Carolina to prove the Defendant guilty beyond a
12 reasonable doubt. At that point in time, the Defendant is
13 presumed innocent of that crime. When the trial started, the
14 Defendant is presumed innocent of the crime. At this point in
15 time, the Defendant is presumed innocent of the crime for
16 which he is charged unless and until by your examination of
17 the facts you find the State has proven to you that guilt
18 beyond a reasonable doubt. The presumption of innocence, we
19 liken it to a robe of righteousness. It stays on the
20 shoulders of the Defendant unless and until the State rips
21 that robe of righteousness from the shoulders of the Defendant
22 by evidence that convinces you of the guilt of the Defendant
23 beyond a reasonable doubt. This is not just some legal
24 theory or legal phrase, it's a substantial right to which
25 every American and to which every Defendant is entitled unless

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1 you, the jury, in your collective wisdom are satisfied from
2 the evidence of the Defendant's guilt beyond a reasonable
3 doubt.

4 What's reasonable doubt? The kind of doubt that would
5 cause a reasonable, ordinary person to hesitate to act. Proof
6 beyond a reasonable doubt is proof that leaves you firmly
7 convinced of the Defendant's guilt. Now there are very few
8 things we can know with absolute certainty and the law doesn't
9 require the State of South Carolina to give you that kind of
10 proof. But, what is required is, if based upon your
11 consideration of the evidence, you are firmly convinced the
12 Defendant is guilty of the crime charged, you must find the
13 Defendant guilty. On the other hand, based upon your view of
14 the evidence, you are not firmly convinced of the guilt of the
15 Defendant of the crime charged you must give the Defendant the
16 benefit of the doubt and find him not guilty.

17 In this particular case, the State has charged the
18 Defendant with the crime of murder. The State must prove to
19 you beyond a reasonable doubt that the Defendant killed
20 another person with malice aforethought. Malice is hatred,
21 ill will, hostility towards another person. It is the
22 intentional doing of a wrongful act without just cause or
23 excuse with an intent to inflict an injury or under
24 circumstances that the law would infer an evil intent. Malice
25 aforethought does not require malice exist at any particular

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CHARGE TO JURY

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1 time before the act is committed, but malice must exist in the
2 mind of the Defendant just before and at the time the act is
3 committed. So there has to be this combination of the evil
4 intent and the act. It can be expressed or inferred.
5 Expressed is direct evidence or inferences from the facts.
6 Expressed malice is shown when a person speaks words which
7 express hatred or ill will for another or where the person
8 prepared beforehand to do the act which was later
9 accomplished. It can be inferred from some conduct showing a
10 total disregard for human life. The facts are proved beyond a
11 reasonable doubt sufficient to raise this type of inference to
12 you. It's simply an evidentiary fact that you would consider
13 along with all the other evidence and give it the weight you
14 believe it should have in your determination of whether or not
15 the State proved the Defendant guilty beyond a reasonable
16 doubt.

17 Now, if you find the State has not proved to you beyond a
18 reasonable doubt that the Defendant is guilty of the crime of
19 murder, you may consider the crime or will be required to
20 consider the crime of voluntary manslaughter, a lessor
21 included charge of murder. To prove voluntary manslaughter,
22 the State must prove beyond a reasonable doubt that the
23 Defendant took the life of another in the sudden heat of
24 passion based upon sufficient legal provocation. Both heat of
25 passion and sufficient legal provocation must be present at

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1 the time of the killing to constitute voluntary manslaughter.
2 Sudden heat of passion may for a time affect a person's self-
3 control and temporarily disturb a person's reasoning. The
4 sudden heat of passion must be the type that would make an
5 ordinary, reasonable person unable to coolly reflect on their
6 actions and would produce an uncontrollable impulse to do
7 violence. Sufficient legal provocation must be the type that
8 would make a person of ordinary reason and caution become
9 enraged and lose control temporarily. The provocation needed
10 for voluntary manslaughter must come from some act of or
11 related to the victim. Now words alone, however vulgar or
12 insulting are insufficient to be legal provocation. The words
13 be accompanied by some overt threatening act, which could have
14 produced the heat of passion. If heat of passion has cooled
15 or there was sufficient time between the provocation and the
16 killing for the passion of a reasonable person to have cooled,
17 the killing is not voluntary manslaughter. In deciding
18 whether a reasonable person would have had enough time to cool
19 off, you consider all the circumstances surrounding the
20 killing. You may consider the nature of the provocation, the
21 Defendant's mental and physical state and the circumstances
22 and relationships between the parties.

23 The Defendant in this matter has raised the defense of
24 self-defense. Self-defense is a complete defense and if it is
25 properly established, you would find the Defendant not guilty.

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1 The State -- and again this goes back to the State having the
2 burden of proof to prove the Defendant guilty beyond a
3 reasonable doubt. The State always has the burden of proof.
4 Just because the Defendant has raised this defense, doesn't
5 mean the Defendant has to prove anything to you. The State
6 has the burden of disproving self-defense by proof beyond a
7 reasonable doubt. If you have a reasonable doubt of the
8 Defendant's guilt after considering all of the evidence in the
9 case, including self-defense, you must find the Defendant not
10 guilty. On the other hand, if you had no reasonable doubt of
11 the Defendant's guilt after considering all the evidence
12 including the evidence of self-defense, then you must find the
13 Defendant guilty.

14 These are the following or the following are the elements
15 required to establish self-defense. One, without fault. The
16 Defendant must be without fault in bringing on the difficulty.
17 If the Defendant's conduct was the type which was reasonably
18 calculated to and did provoke a deadly assault, the Defendant
19 would be at fault in bringing on the difficulty and would not
20 be entitled to an acquittal, a finding of not guilty, based on
21 self-defense. Self-defense is not available to a person who
22 themselves uses language which is so contemptuous that a
23 reasonable person would expect you it to bring on a physical
24 encounter. Mutual combat. If the Defendant voluntary
25 participated in mutual combat for the purposes other than

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1 protection, the killing of the victim would not be self-
2 defense. For mutual combat, there has to be a mutual intent
3 of both parties and a willingness to fight of both parties.
4 This intent may be shown by the acts and conduct of the
5 parties and the circumstances surrounding the combat.

6 The second element of self-defense -- again, the first
7 one was without fault. The second one is imminent danger.
8 That the Defendant was actually in imminent danger of death or
9 serious bodily injury or the Defendant actually believed he
10 was in imminent danger of death or serious bodily injury. If
11 the Defendant was actually in imminent danger, it must be
12 shown that the circumstances would have warranted a person of
13 ordinary firmness and courage to strike the fatal blow or to
14 go forward with the activity to prevent death or serious
15 bodily injury. If the Defendant believed he was in imminent
16 danger of death or serious bodily injury, it must be shown
17 that a reasonably prudent person of ordinary firmness and
18 courage would have had that same belief. In deciding whether
19 the Defendant actually was or believed he was in imminent
20 danger of death or serious bodily injury, again you consider
21 all the facts and circumstances surrounding the crime
22 including the physical condition and characteristics of the
23 Defendant and the victim. The Defendant does not have to show
24 that he was actually in danger. It is enough if the Defendant
25 believed he was in imminent danger and a reasonably prudent

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1 person of ordinary firmness and courage would have had that
2 same belief. The Defendant has the right to act on
3 appearances even though the Defendant's beliefs may have been
4 mistaken. It is for you to decide whether the Defendant's
5 fear of immediate danger or death or serious bodily injury was
6 reasonable and would have been felt by an ordinary reasonable
7 person in the same situation.
8 Words accompanied by a hostile act may, depending on the
9 circumstances, establish self-defense. Evidence of prior
10 difficulties between the Defendant and the victim may be
11 considered in deciding whether a threat existed, whether the
12 Defendant had a reason to believe the threat existed and how
13 serious that threat was. Reputation of the victim as a
14 violent person may be considered in deciding whether there was
15 a need for force or whether the Defendant had reason to
16 believe there was a need for force and whether deadly force
17 was reasonably necessary. Threats made by the victim may be
18 considered in determining whether the Defendant actually was
19 or believed he was in imminent danger.

20 We come to the third element and, again, you got the
21 first one being without fault; the second being the imminent
22 danger. The third one is no other way to avoid danger. That
23 is Defendant had no other probable way to avoid the danger of
24 death or serious bodily injury than to act as the Defendant
25 did in this particular instance. The Defendant has no duty to

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1 retreat if by doing so the danger of being killed or suffering
2 serious bodily injury would increase. A person cannot be
3 required to make an exact calculation as to the degree or
4 amount of force that may be needed to avoid death or serious
5 bodily injury. Therefore, in self-defense, the Defendant has
6 the right to use the force needed to avoid death or serious
7 bodily injury. The force used in self-defense does not have
8 to be limited to the degree or any amount of force that might
9 have been used by the victim. The Defendant has the right to
10 use so much force as appeared to be necessary for complete
11 self-protection. And again, this has to be using the person
12 of ordinary reason and firmness would have had that same
13 belief. If the Defendant is justified in defending himself
14 and in firing the first shot, the Defendant is also justified
15 in continuing to shoot until it is apparent that the danger of
16 death or serious bodily injury has completely ended.

17 If you have a reasonable doubt as to whether the
18 Defendant is guilty of a greater or a lesser offense, it is
19 your duty to resolve that doubt in favor of the Defendant and
20 find him Defendant guilty of the lesser offense if that is
21 your view of the evidence and, again, it has been proven to
22 you beyond a reasonable doubt by the State of South Carolina.

23 That's the law you're gonna apply to the facts and
24 evidence you have heard in this case. Now the Court has
25 prepared for you a verdict form to aid in writing the verdict

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1 in this matter. It's straightforward. The caption of the
2 case, State of South Carolina versus Keith Sheldon Levan.
3 Murder. On the charge of murder, we, the jury, by unanimous
4 consent find the Defendant, Keith Sheldon Levan -- and I've
5 got one before the other. You've got to check one of them.
6 Don't assign anything, I've got one before the other, I have
7 to put one before the other. Not guilty or guilty. Once the
8 jury has made a unanimous decision in that matter, Mr.
9 Foreperson, if it is guilty, then you knock on the door and
10 let the Bailiff know that the jury has reached a unanimous
11 verdict. If that unanimous verdict is not guilty of murder,
12 then you proceed to the lesser included offense of voluntary
13 manslaughter. On the charge of voluntary manslaughter, we,
14 the jury, by unanimous consent find the Defendant, Keith
15 Sheldon Levan -- and again, two choices; not guilty or guilty.
16 Whatever the unanimous decision of the jury is, if you found
17 him not guilty of murder, you make a unanimous decision on the
18 lesser included offense of voluntary manslaughter, check the
19 appropriate block, you sign your name, put today's date, knock
20 on the door, and let the Bailiff know that the jury has
21 reached a unanimous verdict.

22 Now I've said unanimous here a number of times and I said
23 it at the very beginning in my opening comments to you.
24 Unanimous means exactly what you think it means. It means
25 twelve/zero. It does not mean 11/1, 10/2 any combination

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1 there is. Whatever the verdict is, it must be unanimous. It
2 must be the verdict of each and every member of the jury. Mr.
3 Foreman, when you check the appropriate block, you sign your
4 name and you put today's date on the verdict form, you are
5 indicating to the Court that every member of the jury agrees
6 that is their verdict. So, if called upon when they come back
7 into the courtroom and the Clerk reads the verdict out, if
8 called upon the jury, everyone could raise their right hand
9 and indicate yes, that is my verdict.

10 So, what I'm gonna ask that you do, Mr. Foreman, two
11 things. One, we've got lunch; it's there. I'll send you back
12 to the jury room. They'll bring it in and I want y'all to
13 enjoy that. While you're doing that, they'll get all the
14 exhibits assembled, they'll bring them in to you. Whenever
15 you are ready to begin work, you know, and y'all are done with
16 lunch, then you begin. Do not obviously begin until all the
17 evidence is brought in to you. Don't have any discussions;
18 don't talk about anything until all the evidence comes in. We
19 will be providing to you a laptop for your use should you wish
20 to play the DVDs. Again, that's up to you, but the equipment
21 will be there should you wish to do so. But again, wait until
22 all of it comes in before you begin any deliberations.

23 Mr. Foreman, take your jury to the jury room.

24 (REPORTER'S NOTE: Jury exits courtroom. The following takes
25 place outside the presence of the Jury.)

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CHARGE TO JURY

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1 THE COURT: Exceptions, deletions, additions to the
2 charge from the State?

3 MR. HIXSON: No, sir.

4 THE COURT: From the Defense?

5 MR. FILIBERTO: No, sir.

6 THE COURT: All right. Very good, gentlemen, if y'all
7 would please come forward, make sure that we have all the
8 exhibits and then when they are collected we'll make sure that
9 they go in to the jury. All right? So just unplug that, keep
10 the power cord with it, I guess.

11 MR. HIXSON: Your Honor?

12 THE COURT: Yes?

13 MR. HIXSON: Perhaps could we have a Bailiff watch or
14 something to make sure that they know how to do it, as a
15 little mini IT person, so they want to have to come out if
16 they can't get it to play.

17 THE COURT: If they have problems, then I'm sure they'll
18 write a note and they'll give it to us and then we'll fix it
19 at that point in time.

20 MR. HIXSON: Okay. Thank you.

21 THE COURT: All right. Thank you.

22 COURT REPORTER: All right. We need to review the
23 exhibits.

24 (REPORTER'S NOTE: Jury begins deliberation at 1:45 P.M.)

25 *****OFF THE RECORD*****

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BY THE COURT

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1 (On the Record.)

2 BY THE COURT:

3 THE COURT: All right, Solicitor and Mr. Filiberto, the Court
4 understands that the jury has reached a verdict in this
5 matter. Is the State ready to receive it?

6 MR. HIXSON: We are, Your Honor.

7 THE COURT: And the Defense?

8 MR. FILIBERTO: Yes, Your Honor.

9 THE COURT: All right. Very good. Just speaking to
10 everyone in the courtroom, I do not know what the verdict is.
11 We will all receive the verdict at the same time. I will tell
12 you that, and Counsel understand this, we ask this jury to do
13 a very difficult thing; that is to resolve this matter and
14 come up, twelve people, with a unanimous decision in this
15 particular matter. I expect and I demand that their verdict
16 be received with respect and silence. I will not tolerate any
17 showing of emotion regarding the verdict no matter what it is.
18 If you cannot follow these instructions, I am inviting you to
19 leave the courtroom now. If you stay and there is such an
20 outburst, you will be detained by one of the Horry County
21 Sheriff's office. I will hold a contempt of court hearing
22 after these proceedings are over if that occurs. Thank you
23 very much.

24 Ask the jury to come in.

25 (REPORTER'S NOTE: Jury enters courtroom.)

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VERDICT OF THE JURY

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1 VERDICT OF JURY:

2 THE COURT: All right. Mr. Foreman, has your jury
3 reached a verdict in this matter?

4 MR. FOREMAN: Yes, Your Honor.

5 THE COURT: All right. Very good. Could you hand the
6 verdict form to the Clerk, please?

7 You may publish the verdict, ma'am.

8 CLERK: Indictment Number 2016-GS-26-1806, State of South
9 Carolina, County of Horry versus Keith Sheldon Levan, on the
10 charge of murder, we, the jury, by unanimous consent find the
11 Defendant guilty. Dated February 15th, 2017, signed by
12 Foreperson Eric Cleveland.

13 Ladies and gentlemen of the jury, if this is your
14 verdict, so signify by raising your right hand.

15 Thank you.

16 THE COURT: All the jurors having confirmed their verdict
17 by the raising of their right hand, does the State wish to the
18 jury polled?

19 MR. HIXSON: No, Your Honor.

20 THE COURT: Does the Defense wish the jury polled?

21 MR. FILIBERTO: No, Your Honor.

22 THE COURT: All right. Very good.

23 BY THE COURT:

24 THE COURT: Ladies and gentlemen of the jury, I want to
25 thank you for your service in this particular case. You did

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BY THE COURT

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1 exactly what the Court asked you to do; that is too well and
2 truly try this case, listen to all the facts and evidence
3 which you did attentively, and then arrive at a unanimous
4 verdict in this particular matter. I understand, all the
5 participants in this matter understand that we asked you to do
6 a difficult thing, that is to all twelve of you arrive at the
7 same conclusion. I appreciate the hard work that you have put
8 into this matter. I'm gonna excuse you from your rest of your
9 jury service for this particular week. You've also earned an
10 exemption from coming back to Circuit Court jury duty for
11 three years and with that, you are now excused.

12 Thank you very much.

13 (REPORTER'S NOTE: Jury exits courtroom. The following takes
14 place outside the presence of the Jury.)

15 THE COURT: Solicitor and Mr. Filiberto, could y'all come
16 up here for just one second, please?

17 (REPORTER'S NOTE: A bench conference was held off the
18 record.)

19 THE COURT: All right. So to -- with that, we'll take a
20 short recess for five minutes and y'all get organized and
21 we'll come back in for the sentencing. All right?

22 Thank y'all.

23 (RECESS.)

24 *****OFF THE RECORD*****

25 (On the Record.)

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BY THE COURT

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1 THE COURT: Solicitor, let me hear from you regarding
2 sentencing.

3 MR. HIXSON: Thank you, Your Honor. Your Honor Is quite
4 appropriately positioned to impose an appropriate sentence as
5 Your Honor presided over this case. It was a very frankly
6 open discussion about Mr. Levan and the relationships. He had
7 a very good flavor of really what was going on. You also have
8 an idea of his criminal record. It is minimal and by all
9 accounts prior to this. He may have had some brushes with
10 the law, but it wasn't overwhelming. He is in a family
11 relationship with a child and all that stuff and is a parent
12 and the Court is aware -- and the Court is aware of all that.
13 You've also had an opportunity to see the ferocity of the
14 crime and the preparation for the crime, how it appeared and
15 the jury agreed with the arguments that it was an intentional
16 malicious act. You also saw an attempt to cover up the crime.
17 The Defendant ultimately availing himself to law enforcement,
18 coming forward and giving a version of the events that clearly
19 the jury didn't embrace. So I think you know a tremendous
20 amount of the factors involved in that, the thing that you
21 really haven't heard are some victim impact testimony or
22 statements that we'd like to present to the Court at the
23 appropriate time.

24 As Your Honor knows, it's a mandatory minimum of thirty
25 years. It is true that Mr. Levan doesn't have a violent

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BY THE COURT

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1 record. He has this stalking conviction and he was on
2 probation before out of the State of Pennsylvania that came to
3 South Carolina. The other convictions, if any, were
4 misdemeanor, maybe a traffic offense, nothing -- but certainly
5 nothing that even addressed the Court for compared to what you
6 saw happen and it pretty much played out in front of Your
7 Honor's eyes. So I'd like to introduce some victim impact ---

8 THE COURT: Yes, sir. I would be glad for you to do so.

9 MR. HIXSON: Rodney Selmon is the victim's brother and I
10 think the family has indicated to me that he's probably the
11 one that has been impacted the most by the loss.

12 THE COURT: All right, sir. Very good. Be glad for him
13 to come forward.

14 MR. HIXSON: In addition, Anastasia Selmon, this is the
15 victim's daughter.

16 THE COURT: All right. Very good. All right, sir, if
17 you would -- move that microphone to the corner. Very good.

18 All right, sir. And you don't have to bend over; you can
19 stand there and it'll pick it up from there and just if you
20 give me your name, sir, then I'll be glad to hear from you,
21 sir.

22 MR. SELMON: I'm Rodney Selmon, Barry's brother.

23 THE COURT: Yes, sir.

24 MR. SELMON: I see during this trial, Keith tried to --
25 he just didn't assassinate my brother. He tried to

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BY THE COURT

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1 assassinate his character. My brother -- he didn't have a
2 parking ticket. He was a good man. He was my best friend.
3 And, to see him try to destroy him even after he murdered him,
4 it just -- it's very upsetting, and I think that that person
5 right there needs to stay in prison the rest of his life.

6 THE COURT: All right, sir. Thank you very much, sir.
7 Yes, ma'am, again just tell me your name and then I'll be glad
8 to hear from you, ma'am.

9 MS. SELMON: Anastasia Selmon.

10 THE COURT: Yes, ma'am.

11 MS. SELMON: My dad was a great man. Whenever I found
12 out that he was killed, I was actually in basic training to be
13 in the Army and, you now, my Drill Sergeant had to wake me up
14 and tell me that my dad was shot and killed. And ever since
15 then, it just has changed my life forever. Sometimes I look
16 at people that look like my dad and I see the bullet hole and
17 I just think about how could somebody do that; how could you
18 just leave somebody just there like that with their head blown
19 off and it just bothers me and it will forever. Like, I'll
20 never have my dad again. I can never call him and ask him for
21 anything. He's gone. He won't walk me down the aisle. He
22 won't hold my children's hand. He won't be there for me ever.
23 And so, I just pray that whatever happens today, it's just for
24 the best. That's all I really have to say.

25 THE COURT: Thank you, ma'am.

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BY THE COURT

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1 Yes, Solicitor? Yes, sir?

2 MR. HIXSON: Your Honor, I believe we have one more.

3 THE COURT: All right.

4 MR. HIXSON: And that's Ms. Wright. She's Mr. Selmon's
5 sister.

6 THE COURT: All right. Yes, ma'am, again, just state
7 your name and then I'll be glad to hear from you, ma'am.

8 MS. WRIGHT: Judy Wright.

9 THE COURT: Yes, ma'am.

10 MS. WRIGHT: I'm Barry's sister. He was actually getting
11 ready to relocate to West Virginia where I live. He already
12 had a job. His daughter was graduating in two weeks and he
13 was just there for two weeks to watch her graduate from a
14 National Guard. He was gonna start a whole new life and I
15 just want everybody to know that he'll never have a chance to
16 change his life for the better. He was a good guy. He made -
17 - he would make you laugh when you wanted to cry. He was a
18 good person and he made him somebody he's not. So, I just
19 want everybody to know that.

20 THE COURT: Thank you, ma'am.

21 MR. HIXSON: Your Honor, just in closing in relation to
22 that. We certainly believe the guilty plea and mandatory
23 minimum was available to Mr. Levan if he had stepped forward
24 and admitted his responsibility and guilt and chose not to do
25 that and received a trial. We feel like he certainly deserves

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SENTENCE OF THE COURT

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1 more than the mandatory minimum and the State would concur
2 obviously with the folks that were most affected by and that
3 Mr. Levan would receive a substantial prison sentence.

4 THE COURT: All right. Thank you very much.

5 Yes, sir, Mr. Filiberto, I'll be glad to hear from you,
6 sir?

7 MR. FILIBERTO: Your Honor, we would just ask the Court
8 to consider Mr. Levan's long time of not being in any trouble
9 with the law. There were difficulties, however he reacted.
10 Obviously, the jury has felt that the -- that the elements
11 were met out for this charge. We'd simply ask you to consider
12 his lack of any violent history whatsoever. The testimony and
13 evidence that would at least be presented as mitigating and to
14 consider that in the sentence and I ask the Court to consider
15 less than the maximum sentence in this matter.

16 THE COURT: All right. Thank you, sir.

17 SENTENCE OF THE COURT:

18 THE COURT: All right, Mr. Levan, if you'd please stand,
19 sir.

20 2016-GS-26-1806, State of South Carolina, County of Horry
21 versus Keith Sheldon Levan regarding the charge of murder.
22 The jury having found you guilty of the crime of murder,
23 having found that State has proven that to them beyond a
24 reasonable doubt, the Court has heard all of the facts and
25 evidence presented in this matter. I have taken into

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SENTENCE OF THE COURT

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1 consideration the fact and evidence, the statements of the
2 family members of the victim. I have taken into consideration
3 the fact that prior to this occasion that your conduct has not
4 been one that has been one of violence or extensive criminal
5 conduct. The fact of the matter is that at your hands, the
6 victim died. Based upon the facts and evidence in this
7 matter, the sentence of the Court is the Defendant, Keith
8 Sheldon Levan, is committed to the State Department of
9 Corrections for a determinate term of 40 years.

10 Thank you very much.

11 MR. HIXSON: Thank you, Your Honor.

12 THE COURT: The Court having pronounced sentence, this
13 matter is now ended.

14 MR. HIXSON: Thank you, Your Honor.

15 MR. FILIBERTO: Thank you, Your Honor.

16 THE COURT: Thank you very much.

17 **END OF DAY THREE.**

18 **ADJOURNED.**

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CERTIFICATE OF COURT REPORTER

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C E R T I F I C A T E

I, the undersigned, Kay H. Richardson, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the hearing held in the case of State of South Carolina versus Keith Sheldon Levan, held in the Court of General Sessions for Horry County, Horry County Courthouse, Conway, South Carolina, on February 13-15, 2017.

I do hereby certify that I am neither of kin, counsel, nor interest to any party hereto.

Kay H. Richardson
Official Court Reporter

May 8, 2017.

STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions
STEPHEN H. JOHN, Circuit Court Judge

CASE NO: 2016-GS26-01806

FILED
HORRY COUNTY
2017 FEB 17 PM 2:31
RENEE M. ELYS
CLERK OF COURT
HORRY COUNTY, SC

The State, ... Respondent,

V.

Keith Sheldon Levan, ... Appellant.

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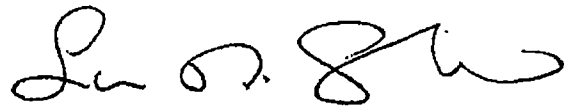
NOTICE OF APPEAL

FEB 21 2017

SC Court of Appeals

Keith S. Levan, appeals the conviction and sentence in this case. The sentence was imposed by the Honorable STEPHEN H. JOHN, on FEBRUARY 15, 2017.

February 17, 2017



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CLERK OF COURT
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CHECK AND MAKE CERTAIN THE INDICTMENT NUMBER IS ON THE APPEAL

THE STATE OF SOUTH CAROLINA
COURT OF APPEALS

APPEAL FROM HORRY COUNTY
Court of General Sessions

Steven H. John, Circuit Court Judge

Case No. 2016-GS-26-01805

RECEIVED
JUL 20 2017
SC Court of Appeals

The State of South Carolina.....Respondent

v.

Keith Shelton Levan Appellant

MOTION TO WITHDRAW DIRECT APPEAL

Pursuant to Rule 260(c) of the South Carolina Rules of Appellate Procedure, the Appellant in this matter respectfully moves to withdraw the direct appeal of his conviction. The Appellant was tried before a jury and sentenced by the Honorable Steven H. John on February 15, 2017. Appellant's counsel has reviewed the trial transcript and identified no preserved, meritorious issues to appeal.


T. Kirk Truslow
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July 19, 2017

ATTORNEYS FOR APPELLANT

ORIGINAL

The South Carolina Court of Appeals

The State, Respondent,

v.

Keith Sheldon Levan, Appellant.

Appellate Case No. 2017-000473

The Honorable Steven H. John
Horry County
Trial Court Case No. 2016GS2601806

ORDER

It appears that Appellant, with full understanding of all possible consequences of this action and with agreement of counsel, wishes to withdraw and dismiss this matter. Accordingly, this matter is dismissed. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

FOR THE COURT

BY


CLERK

Columbia, South Carolina

cc:

Keith Sheldon Levan, 00371451
Lawrence R. Filiberto, Esquire
Alan McCrory Wilson, Esquire
John Benjamin Aplin, Esquire
Timothy Kirk Truslow, Esquire

FILED

September 13, 2017 TF

FORM 5

STATE OF SOUTH CAROLINA)

County of Horry)Keith Sheldon Levan)

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

20 17 CP26 7016

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lee Correctional Institution
2. Name and location of Court which imposed sentence General Sessions Court
Fifteenth Judicial Circuit 1301 Second Avenue Conway SC 29526
3. Name(s) of co-defendant(s) (if any) Not Applicable
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2016-GS-26-1806 (Murder)
 - (b) _____

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
(a) Applicant was sentenced to 40 years on February 15, 2017
(b) _____
(c) _____
6. Check whether a finding of guilty was made:
(a) after a plea of guilty _____
(b) after a plea of not guilty and trial by jury
(c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
(a) the name of each Court to which you appealed:
i. South Carolina Court of Appeal
ii. _____
iii. _____
(b) the result in each such Court to which you appealed:
i. Voluntarily Withdrawn
ii. _____
iii. _____
(c) the date of each such result:
i. September 13, 2017
ii. _____
iii. _____
(d) if known, citations of any written opinion or orders entered pursuant to such results:
i. Order dismissing appellate case number 2017-000473
ii. _____
iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
(a) Not Applicable
(b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Trial counsel failed to adequately convey plea offer to Applicant
- (b) Failure to investigate and adequately prepare for trial
- (c) Right to supplement at a later date reserved
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Manslaughter offer rejected without Applicant's informed consent
- (b) Independent investigation was necessary for Applicant's defense
- (c) Right to supplement at a later date reserved
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? No
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
- (d) any other petitions, motions or applications in this or any other Court? No
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. Not Applicable
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. Not Applicable
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

i. Not Applicable

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. Not Applicable

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. Not Applicable

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. Not Applicable

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. Not Applicable

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) This is Applicant's first post-conviction filing
 (b) _____
 (c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? Yes
 (b) your trial, if any? Yes
 (c) your sentencing? Yes
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?
Yes

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:
 i. Larry Filiberto 216 Elm Street Conway, SC 29526
 ii. T. Kirk Truslow 418-B Main Street N. Myrtle Beach, SC 29582
 iii. Jonathan Hiller 604 16th Ave N. Myrtle Beach, SC 29577
 (b) the proceedings at which each such attorney represented you:
 i. Arraignment, Trial & Sentencing
 ii. Appeal & Post-Conviction Relief
 iii. Appeal & Post-Conviction Relief

19. State clearly the relief you seek in filing this application:
The conviction set aside and a new trial be granted and any other relief
to which the Applicant is entitled based on the matters pleaded herein
and any issues the application is amended to include hereafter

20. Are you now under sentence from any other court that you have not challenged?

No

FILED
 2017 OCT 24 AM 11:48
 CLERK OF COURT
 HORRY COUNTY, SC

STATE OF SOUTH CAROLINA)

County of Horry)

VERIFICATION

I, Keith Sheldon Levan, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Attorney for Applicant

SWORN to and subscribed before me this _____ day of _____,

(L.S.)

Notary Public

My Commission Expires: _____

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Keith Sheldon Levan, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Applicant

SWORN or affirmed to and subscribed before me this _____ day of _____,

Attorney for Applicant

Notary Public

My Commission Expires: _____

FILED
2017 OCT 24 AM 11:48
CLERK OF COURT
HORRY COUNTY, SC

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY) FOR THE FIFTEENTH JUDICIAL CIRCUIT
)

Keith Sheldon Levan,) Case No.: 2017-CP-26-07016
S.C.D.C. No. 371451,)
)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

RETURN

2018 FEB -6 PM 1:00
Horry County
Clerk of Court
Horry County, S.C.

In response to the application for post-conviction relief filed by Keith Sheldon Levan (Applicant) on October 24, 2017, Respondent would show this Court:

I.

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the April 2016 term of the Horry County Grand Jury for murder (2016-GS-26-01806). Lawrence R. Filiberto, Esq. represented Applicant. Scott R. Hixson and Thomas G. Terrell, III, of the Fifteenth Circuit Solicitor's Office, prosecuted the case.

In the pre-dawn hours of February 21, 2015, the Myrtle Beach Police Department received a report of a vehicle, engine running, sitting on the median of a retail parking lot near the interchange of highways 17 and 501. (Tr. 77-79, 86.) Officers who responded to the scene found the victim slumped over the steering wheel, deceased, with "what appeared to be brain matter coming out the right side of the head[.]" (Tr. 82-84, 171.) Law enforcement inspecting the vehicle discovered four bullet holes in the rear of the vehicle, four flat tires, and determined the scene was the result of an assault, not a motor vehicle collision. (Tr. 84-85, 121-25.) Spent

casings for Remington .223 caliber ammunition were located across the street and in the nearby roadway. (Tr. 102, 108, 109-15.) No weapons or spent casings were found in the victim's vehicle; unfired .9 millimeter ammunition was located at the bottom of the center console. (Tr. 121, 125.) The autopsy confirmed Applicant died of a gunshot to the back of the head. (Tr. 92, ll. 16-22.)

That afternoon, Applicant appeared at the Myrtle Beach Police Department and confessed to the killing. (Tr. 127-35). Applicant was promptly taken into custody. (Tr. 135, ll. 11-13.) A subsequent search of Applicant's vehicle produced spent casings for Remington .223 caliber ammunition. (Tr. 148-54.) The murder weapon, an AR-15 rifle, and additional ammunition was recovered from a wooded area indicated by Applicant in his statement. (Tr. 172-73, 238-45.) Text exchanges pulled from the phones of Applicant, Applicant's common-law wife ("Penny"), and the victim revealed a triangular relationship between the three, culminating in the victim's killing and Applicant's revelation of the killing to Penny: "Sorry, I snapped and became the monster I feared." (Tr. 220-35 (quotation at Tr. 229, ll. 21-22).)

Applicant testified to difficulties between the victim and Applicant's family, and that Applicant went to confront the victim. (Tr. 274-84.) Applicant testified the victim initially believed Penny was present in the vehicle, and became infuriated and threatening upon discovering that Applicant was instead behind the wheel. (Tr. 284-88.) Applicant recalled panicking and attempting to flee, the victim pursuing him through the retail parking lots, yelling threats, colliding with Applicant, until Applicant, armed with the AR-15, opened fire, ultimately killing the victim. (Tr. 288-93.) Applicant expressed regret. (Tr. 293-94).

On February 13, 2017, Applicant proceeded to trial before the Honorable Steven H. John and a jury. The jury found Applicant guilty as indicted on February 15, 2017. Judge John sentenced Applicant to imprisonment for a term of 40 years.

Applicant filed a timely notice of appeal. By and through appellate counsel T. Kirk Truslow, Esq., Applicant moved to withdraw the direct appeal of his conviction on July 19, 2017. By order filed September 13, 2017, the South Carolina Court of Appeals accordingly dismissed the appeal. The Remittitur was issued on October 17, 2017.

II.

In his post-conviction relief application, Applicant alleges he is being held unlawfully for the following reasons:

1. "Trial counsel failed to adequately convey plea offer to Applicant"
 - a. "Manslaughter offer rejected without Applicant's informed consent"
2. "Failure to investigate and adequately prepare for trial"
 - a. "Independent investigation was necessary for Applicant's defense"

Attached to and incorporated herein are the records of the Horry County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the trial transcript, the transcript of Applicant's statement to law enforcement (State's Exhibit 33 at trial), Applicant's appellate records, and the current application for relief. Respondent reserves the right to amend this Return upon receipt of relevant information.

III.

Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a

just result.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668. First, Applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its “reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced Applicant such that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Applicant can satisfy neither requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent respectfully requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments *will be opposed by*

the State at an evidentiary hearing pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRPC; Mangal v. State, 421 S.C. 85, 805 S.E.2d 568 (2017). All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRPC. Pro se filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRPC.

Pursuant to § 17-27-150 of the South Carolina Code of Laws, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from the Court upon a showing of good cause. Furthermore, Respondent requests that all potential exhibits and materials used to produce potential expert witness testimony be sent to Respondent well in advance of the evidentiary hearing. Respondent reserves the right to request a continuance and oppose witness testimony and exhibits that are withheld until the last minute resulting in undue prejudice to Respondent.

V.

Respondent denies each allegation not expressly admitted, qualified, or explained.

VI.

WHEREFORE, Respondent respectfully requests that this Court convene an evidentiary hearing on the allegations of ineffective assistance of counsel.

Respectfully submitted,

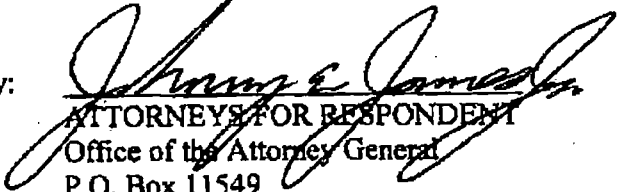
ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JOHNNY ELLIS JAMES JR.
Assistant Attorney General

By:


ATTORNEYS FOR RESPONDENT
Office of the Attorney General
P.O. Box 11549
Columbia, S.C. 29211

5 Feb., 2018

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

KEITH S. LEVAN, #371451,

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

2017-CP-26-7016

AFFIDAVIT OF SERVICE BY MAIL

2018 FEB - 5 PM 1:00
 HORRY COUNTY, SC
 CLERK OF COURT

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return on the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

T. Kirk Truslow, Esquire
 PO Box 238
 North Myrtle Beach, SC 29597

Jonathan M. Hiller, Esquire
 604 16th Avenue North
 Myrtle Beach, SC 29577

DATED this 5th day of February, 2018.


 Mallory Morris, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA)
)
 COUNTY OF HORRY) 2017-CP-26-7016

KEITH SHELDON LEVAN,
)
)
 -v-)
)
 STATE OF SOUTH CAROLINA)
 _____)

**AMENDED APPLICATION FOR
 POST-CONVICTION RELIEF**

FILED
 HORRY COUNTY
 2018 AUG -3 PM 4:02
 RENEE H. ELYS
 CLERK OF COURT
 HORRY COUNTY, SC

The applicant is currently detained at Lee Correctional Institute. On February 15, 2017, the applicant was convicted by jury trial of the offense of Murder, indictment number 2017-CP-26-1806, in the Court of General Sessions, Fifteenth Judicial Circuit, Conway, SC 29526, and was sentenced to prison for a term of 40 years.

The judgment was appealed to the South Carolina Court of Appeals, and then voluntarily withdrawn on September 13, 2017, and thereby dismissed by order, order number 2017-000473.

The applicant respectfully submits the following amended application, and submits that he had ineffective assistance of counsel in the trial level representation of his case, in violation of his 5th and 14th Amendment rights, and is therefore being held in custody unlawfully.

First, applicant submits that his council was ineffective as follows:

INVESTIGATION

Trial counsel failed to properly investigate. In particular, trial counsel failed to interview witnesses, obtain and review evidence, identify the clear need for expert witness testimony, and obtain the property testing of evidence, including but not limited to testing of the firearm alleged to have been the murder weapon, as well as the blood found on applicant's clothing.

Trial counsel failed to obtain the numerous surveillance videos in the area of the alleged murder. Although applicant requested that trial counsel obtain the surveillance videos, trial counsel took the position that he would wait to receive the video footage in discovery. As a result, two of the three videos were subsequently not available to the defense. One of the subsequently unavailable videos was viewed by law enforcement at the store, and law

enforcement took two still shot pictures from the video that the State wanted for its case. The other subsequently unavailable video was viewed by law enforcement on premises. Trial counsel, therefore, never viewed this evidence. The two videos were subsequently unavailable to the applicant in his defense.

Trial counsel failed to review applicant's telephone records. The applicant requested trial counsel obtain and review the records, rather than rely on discovery, in order to use evidence therefrom supporting applicant's past contact with a detective. At trial, a State's witness testified that there was no record of applicant's contact with the detective.

Trial counsel failed to obtain law enforcement incident reports documenting harassment and stalking claims against the victim filed by applicant and his wife. Again, at trial the State made a point to tell the jury that applicant never reported the victim to the police.

The applicant requested that trial counsel request GPS and other records of a police vehicle that was present just prior to the incident at the incident site location. The applicant advised that the Walmart video, and any GPS or other records of the police vehicle would substantiate applicant's assertion of the presence of a police vehicle at the scene and allow the defense to interview the officer and review any video from the police vehicle.

Trial counsel failed to obtain the Facebook evidence documenting the victim's threats against applicant's wife.

Despite the applicant providing the funds for trial counsel to retain the services of a private investigator, and despite applicant specifically requesting trial counsel to interview certain individuals and collect certain evidence, none of the above was accomplished.

Trial counsel failed to visit the incident site and to inspect applicant's vehicle, which would have allowed trial counsel to understand applicant's theory and version of self-defense.

TRIAL

Trial counsel failed to properly provide a meaningful defense in trial. Trial counsel's opening statement consisted of two paragraphs, and failed to identify a theory, failed to convey the legal principals of reasonable doubt, the presumption of innocence, and the State's burden of proof.

Trial counsel failed to adequately develop a self-defense theory.

Trial counsel did not present evidence of whose blood was on applicant's clothing, how the blood got on the clothing, nor was testing of the blood conducted.

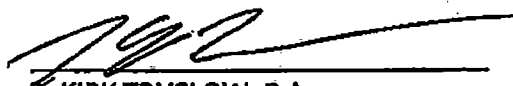
Trial counsel failed to have any ballistic testing conducted of the firearm exhibit in evidence. It became clear long before trial that the State did not conduct ballistic testing, and applicant advised trial counsel that the weapon evidence was not the weapon fired in the shooting.

Trial counsel failed to provide applicant with any counsel regarding testifying in his own defense. The applicant was told by trial counsel that he must testify, and that he had absolutely no chance of acquittal otherwise. The Applicant advised the trial attorney that he suffered from diagnosed, severe anxiety, and that he would not do well at all on direct examination or cross examination. When applicant decided not to testify just prior to being called to the witness stand, trial counsel told applicant that his failure to testify would result in being found in contempt of court, and that the jury would find the decision to be a sign of guilt. Further, trial counsel offered no advise, preparation or counsel as to how to testify before a jury, nor what to expect. The applicant

Trial counsel advised applicant that defense witnesses would be subpoenaed to trial. However, days before trial, trial counsel advised applicant that he forgot to prepare and serve subpoenas, and requested that applicant and his wife needed to contact any defense witnesses that would testify. At trial, applicant was the only defense witness.

Despite the applicant providing the funds for trial counsel to retain the services of a private investigator, and despite applicant specifically requesting trial counsel to interview certain individuals and collect certain evidence, none of the above was accomplished.

WHEREFORE, Petitioner prays that this Honorable Court grant a new trial, and for such other and further relief deemed just and proper.



T. KIRK TRUSLOW, P.A.
T. Kirk Truslow
Attorney for Petitioner
413 79th Avenue N.
Myrtle Beach, SC 29572
843-449-3304

Date: 07/31/2018

Myrtle Beach, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	2017-CP-26-07016
KEITH SHELDON LEVAN,	)	
	)	
Applicant,	)	Transcript of Record
	)	(Post-Conviction Relief)
vs.	)	
	)	November 30, 2018
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	

B E F O R E:

Honorable Kristi F. Curtis
Horry County Courthouse
Conway, South Carolina

A P P E A R A N C E S:

T. Kirk Truslow, Esquire
Attorney for Applicant

Johnny E. James, Jr., Esquire
Attorney for Respondent

TAKEN BY:

Dixie C. Eubank
Retired Circuit Court Reporter

PREPARED BY:

Kay H. Richardson
Circuit Court Reporter

Levan v. State - 2017-CP-26-07016
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Levan v. State - 2017-CP-26-07016
BY MR. JAMES

3

1 NOVEMBER 30, 2018

2 BY MR. JAMES:

3 MR. JAMES: May it please the Court?

4 THE COURT: Yes, sir.

5 MR. JAMES: Your Honor, this is the matter of Keith
6 Sheldon Levan versus State of South Carolina, Docket Number
7 2017-CP-26-07016. Mr. Levan is present here in the courtroom
8 today and is represented by Mr. Kirk Truslow, Esquire.

9 Mr. Levan was indicted at the April 2016 term of the
10 Horry County Grand Jury for murder. Lawrence Filiberto, who
11 is present in the courtroom today, represented him on that
12 charge, and the case was prosecuted by Mr. Scott Hixson and
13 Thomas Terrell, with the Fifteenth Circuit Solicitor's Office.

14 Your Honor, he proceeded to trial on February 13th, 2017,
15 before the Honorable Steven H. John and a jury, where the jury
16 found him guilty as indicted on February 15th, 2017. Judge
17 John then sentenced him to imprisonment for a term of 40
18 years.

19 Mr. Levan then filed a timely notice of appeal by and
20 through appellate counsel, Mr. Truslow. Applicant moved to
21 withdraw the direct appeal of his conviction on July 19th,
22 2017. And by order filed September 13th, 2017, the South
23 Carolina Court of Appeals accordingly dismissed the appeal and
24 the remittitur was issued on October 17th, 2017.

25 I will cede the floor over to Mr. Truslow.

Levan v. State - 2017-CP-26-07016
KEITH SHELDON LEVAN - DIRECT BY TRUSLOW

4

1 MR. TRUSLOW: Your Honor, Kirk Truslow representing Mr.
2 Levan and we're ready to proceed at this time.

3 THE COURT: Go right ahead.

4 MR. TRUSLOW: I'd call Mr. Keith Levan to the stand.

5 KEITH LEVAN, HAVING BEEN DULY SWORN,

6 TESTIFIED AS FOLLOWS:

7 CLERK: Please have a seat. State your name for the
8 Court and spell your last name, please.

9 MR. LEVAN: I am Keith Levan, L-E-V-A-N.

10 MR. TRUSLOW: Please the Court, Your Honor?

11 DIRECT EXAMINATION OF KEITH LEVAN BY MR. TRUSLOW:

12 Q: Mr. Levan, Mr. Filiberto represented you in this trial;
13 is that correct?

14 A: Yes.

15 Q: Okay. Do you recall how -- how much time lapsed between
16 the time you hired Mr. Filiberto and your trial, roughly?

17 A: It was not even two year.

18 Q: Huh?

19 A: Not even two years.

20 Q: So, he represented you for quite a while?

21 A: Yes.

22 Q: Now, when you retained him, did you, through him, retain
23 the services of a private investigator?

24 A: Yes.

25 Q: And did you meet with that investigator?

Levan v. State - 2017-CP-26-07016
KEITH SHELDON LEVAN - DIRECT BY TRUSLOW

5

- 1 A: Yes.
- 2 Q: Did you supply him with information that you had about
3 this case?
- 4 A: Yes, I did.
- 5 Q: Did you supply him with items of evidence that you
6 thought were important in this case?
- 7 A: Yes.
- 8 Q: And did you supply him with witnesses you thought were
9 important in this case?
- 10 A: Yes.
- 11 Q: All right. And did you share this information with your
12 attorney, Mr. Filiberto as well?
- 13 A: Yes.
- 14 Q: All right. And you were convicted of murder, correct?
- 15 A: Yes.
- 16 Q: All right. Did you discuss the defense of self-defense
17 with your attorney?
- 18 A: Yes, repeatedly.
- 19 Q: And what -- was that a direction that he wanted to go?
- 20 A: I was very unclear of what direction he wanted to go. He
21 never specified what he wanted to do.
- 22 Q: Okay. Now, prior to trial, did your attorney file to be
23 relieved as your attorney?
- 24 A: Yes, that was his decision.
- 25 Q: And that -- how much prior to trial was that motion made?

Levan v. State - 2017-CP-26-07016
KEITH SHELDON LEVAN - DIRECT BY TRUSLOW

6

- 1 A: About ---
- 2 Q: Or I should say, was it argued in court?
- 3 A: It was like two months.
- 4 Q: Two months prior to the trial?
- 5 A: Yes, it was in November 23rd.
- 6 Q: Okay. And did you know why he made that motion?
- 7 A: Just -- I had asked him repeatedly for -- to investigate
- 8 certain issues and he gave me very ---
- 9 Q: Did he ---
- 10 A: I'm not really sure. It's just ---
- 11 Q: Did you have -- you had disagreements about what was
- 12 important to get and who to talk to; is that correct?
- 13 A: Yes, it was quite a few disagreements on that.
- 14 Q: What was -- and obviously that motion was not granted,
- 15 correct?
- 16 A: That is correct.
- 17 Q: Did that strain your relationship with your attorney even
- 18 more?
- 19 A: I couldn't really tell, it's just as ---
- 20 Q: In regards to the investigation, let's go through this
- 21 stuff. You were accused of shooting an individual, correct?
- 22 A: That is correct.
- 23 Q: And circumstances being here in Myrtle Beach; is that
- 24 correct?
- 25 A: Yes.

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1 Q: And it was around the Seaboard Street and Walmart,
2 Coastal Grand Mall area, correct?

3 A: Yes.

4 MR. JAMES: Your Honor, I'm gonna respectfully object to
5 leading. It's appropriate to some degree, but it's been
6 pretty pervasive.

7 THE COURT: That's sustained.

8 MR. TRUSLOW: Yes, ma'am.

9 BY MR. TRUSLOW:

10 Q: Now, can you recall if there were any surveillance videos
11 that you requested that Mr. Filiberto obtained on your behalf?

12 A: Yes, there were multiple surveillance videos I requested
13 because I wanted to prove this individual's aggression towards
14 me and there were some prior aggressive things involving a
15 firearm with this individual.

16 Q: Hold on. So, let me ask you this, were the surveillance
17 videos, would in your opinion they have captured the conduct
18 of the incident that night?

19 A: Yes. It would've been quite detailed.

20 Q: Okay. And did you believe that would've supported your
21 argument of self-defense?

22 A: Yes.

23 Q: Now, let me go to this. Did you go down there to see
24 this other individual, initially?

25 A: Yes, I was acting under a suggestion of the police and

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1 the Fifteenth Circuit Solicitor's Office to confront him and
2 tell him to leave me alone.

3 Q: Okay. We'll get to all that, too. So, now, when you got
4 down there to confront him, was there a point then that you
5 became scared and were leaving?

6 A: Yeah, just like I'm like real nervous right now, because
7 I have this social anxiety disorder, I was so scared I know my
8 legs were shaking and stuff.

9 Q: And who did you feel was the aggressor in this matter at
10 the time the killing took place?

11 A: After warning him to leave me alone, I fled, and Mr.
12 Selmon began to follow me because he was very violent in his
13 physical acts as far as pounding the steering wheel in his
14 car, yelling that he was gonna kill me and stuff.

15 Q: Were you scared?

16 A: I was terrified.

17 Q: And subsequently, did he block your car and this incident
18 happened?

19 A: Yes, he blocked me in.

20 Q: And did you think he had a gun?

21 A: Yes.

22 Q: Okay. Now, and your car and his car, would you have
23 passed a Walmart and H.H. Gregg and those stores around that
24 area?

25 A: Yes, I then circled the Walmart.

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1 Q: Those store videos, are those the surveillance tapes you
2 wanted your attorney to get?

3 A: Yes, there were about 40 of them.

4 Q: And what -- let's stick with like three right now, okay,
5 the three we're talking about first and we'll get to the
6 others. What was your attorney's response to getting those?

7 A: He told me he was going to get them. And then he went
8 back and forth, saying we don't need them, and then he said to
9 wait for -- first, initially, he said he was gonna wait for
10 the discovery to get them because they were required, because
11 they were part of the crime scene evidence.

12 Q: So, in discovery -- you're aware of what came in
13 discovery, pretty much, your evidence?

14 A: I got ---

15 Q: At trial, what surveillance videos were available?

16 A: At trial, there was just the Home Depot.

17 Q: Did you learn that the other surveillance videos were no
18 longer available?

19 A: That's right. It wasn't until after trial I realized
20 they were no longer available.

21 Q: Okay. And did you learn that the officers, the
22 detectives, had actually gone and viewed these videos in
23 person, right?

24 A: Yes. It was in the report.

25 Q: Okay. And for one reason or another, they decided not to

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1 take possession of those tapes, correct?

2 A: I presume.

3 Q: Okay. Did you ever get those tapes?

4 A: No.

5 Q: Okay.

6 A: I had requested them. I even went to the place and
7 requested them.

8 Q: What is it on those tapes that the others, in addition to
9 the one that had been retrieved, what is on there that you
10 believe would've helped your self-defense argument?

11 MR. JAMES: Objection, hearsay.

12 THE COURT: I mean, if he hasn't seen it, I don't know
13 how he's gonna ---

14 MR. TRUSLOW: It is speculation, but he can saw that he
15 drove past it. Let me rephrase it.

16 BY MR. TRUSLOW:

17 Q: Did you drive by that H.H. Gregg this night?

18 A: Yes.

19 Q: Okay. And did you drive by Walmart?

20 A: Yes.

21 Q: And if you had gotten the videos from the stores, would
22 you have been depicted on them? Do you believe that they were
23 operating properly?

24 A: Yes. I was hoping that they'd operate properly.

25 MR. JAMES: Objection, speculation.

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1 THE COURT: Sustained.

2 MR. TRUSLOW: Your Honor, I don't believe it'd be
3 speculation if he's assuming a camera is working properly, if
4 he walked in front of it, he would be on it.

5 THE COURT: I understand his testimony is he drove by the
6 area where there were surveillance cameras, yes, sir.

7 BY MR. TRUSLOW:

8 Q: So, let's wrap that one up. Of all the surveillance
9 tapes out there, the only one you received was through
10 discovery from the state was one, correct, that you know of?

11 A: As far as I know. I didn't see all of the discovery.

12 Q: Okay. Were you ever told whether or not you had in your
13 defense the evidence -- all of the surveillance tapes out
14 there?

15 A: Repeat the question.

16 Q: I'm just gonna withdraw that question. And I just want
17 to follow up with one more question. You said that in trial
18 it came to your attention that the officers had viewed other
19 tapes from the scene, stores around the scene, correct?

20 A: Yes.

21 Q: They didn't produce those in trial, did they?

22 A: No.

23 Q: All right. So, now, in regards to the alleged -- the
24 victim in this matter, all right, did you talk with your
25 attorney and/or the private investigator, your investigator,

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1 about your history with this person?

2 A: Yes.

3 Q: Do you think that you explained sufficiently to them the
4 relationship you had and the problems you had with this
5 person?

6 A: Yes.

7 Q: Did you -- what all did you tell them? I mean, what
8 characteristics about this individual did you explain to them?

9 A: I pretty much explained that I was terrified of him and
10 explained that to Mr. Filiberto that my wife had a ---

11 Q: Basically, you were terrified of him?

12 A: I was terrified of him.

13 Q: And did he bother your wife in your opinion?

14 A: Yes. He did. And he ---

15 Q: Did you -- would you say knowing him, did he have a
16 reputation for violence?

17 A: Yes.

18 Q: Had he engaged in violence before -- violent acts, like
19 bomb threats, things like that?

20 A: Yes, he made a bomb threat to Grand Strand Healthcare.

21 MR. JAMES: Objection, hearsay.

22 Q: Did he possess weapons, if you know, personally?

23 THE COURT: Sustained.

24 A: Yes. He had a pistol. He had displayed that to me. He
25 had pointed it at me and he had threatened to kill me and kill

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1 himself one time.

2 Q: Now, prior to him being killed, had you reported him to
3 anybody or gone to see anybody to report to them what he's
4 doing to you over these years?

5 A: Yes, I did.

6 Q: All right. So, did you come to, actually, this
7 solicitor's office?

8 A: Yes, I had -- I had worked for Horry County, as an Horry
9 County employee. I went and saw our attorney, Denise
10 Hagemeyer, and she referred me to the solicitor's office on
11 trying to get a restraining order and they said in order --
12 and I had sat down and had a discussion with them and I even
13 sat down and had the discussion with them and I recorded the
14 conversation on my phone, which is State's Exhibit S71, but
15 ---

16 Q: Well, that's okay. Did you meet with the solicitor?

17 A: Yes, sir.

18 Q: Did you explain the issues you were having?

19 A: Yes. I said it was just a cat-and-mouse game.. I needed
20 ---

21 Q: Okay. Hold on. So, did you -- were your coworkers aware
22 of your problems with this individual?

23 A: I had mentioned a few with them and stuff, as well as the
24 police officers that would come in with the -- when I would
25 service their vehicles and ---

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1 Q: Would that include your supervisor at work?

2 A: I told my supervisor at work because he had asked me why
3 I was having problems working because I was shaking a lot and
4 he was concerned.

5 Q: Were there any individuals at a school that were aware of
6 this gentleman and your problems?

7 A: Yes, I had told the assistant principal and he stepped up
8 security in the parking lot.

9 Q: Now, at trial, did your attorney subpoena the solicitor
10 that you met with here for -- to be a witness in your trial?

11 A: No.

12 Q: Did he attempt to obtain the surveillance video of you
13 coming to the solicitor's office for this meeting?

14 A: No.

15 Q: Did he subpoena any of the police officers that you have
16 told about the victim?

17 A: No.

18 Q: And what about the -- did he subpoena the principal at
19 the school?

20 A: No.

21 Q: Did he subpoena your coworkers, any of them?

22 A: No.

23 Q: Did he subpoena your supervisor at work?

24 A: No.

25 Q: Okay. Did he subpoena any witnesses?

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- 1 A: No.
- 2 Q: Okay. Did you ask him to?
- 3 A: Yes.
- 4 Q: Did you provide him with a list of witnesses?
- 5 A: Yeah, sorry, I provided him with a list.
- 6 Q: Now, you were trying to establish self-defense at trial,
- 7 right?
- 8 A: Yes, sir.
- 9 Q: How many defense witnesses were there? Witnesses for the
- 10 defense, for your defense after the state is finished?
- 11 A: As far as I know, I was the only one.
- 12 Q: Well, there weren't any more defendants. You were the
- 13 only one that testified for you?
- 14 A: Yeah, I was the only one at trial.
- 15 Q: All right.
- 16 A: I couldn't -- I couldn't locate the people in time.
- 17 Q: Well, when did you learn that your witness list was not
- 18 being subpoenaed?
- 19 A: It was that Friday before trial. I was asked to subpoena
- 20 my own witnesses.
- 21 Q: Had you ever subpoenaed witnesses before?
- 22 A: No.
- 23 Q: And did you expect your attorney or the private
- 24 investigator to handle that stuff?
- 25 A: Yes.

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1 Q: Had they had the -- your witness list for some time prior
2 to trial?

3 A: Yes.

4 Q: So, what about, did you ask your attorneys or your
5 attorney and/or private investigator about obtaining Facebook
6 documents, social media documents of threats?

7 A: Yes, I had requested that from him.

8 Q: All right. Do you know if your investigator or the
9 attorney visited the incident site in this case?

10 A: I am not aware of that.

11 Q: And do you know whether they, either one of them, went to
12 look at your vehicle in this case?

13 A: They had trouble locating the vehicle.

14 Q: All right. Now, tell me about your vehicle, did you have
15 anything installed in that vehicle prior to the incident?

16 A: I had a dashboard camera on, on the dashboard.

17 Q: Now, how did you go about knowing how to do that or doing
18 that?

19 A: I had gotten that originally because of the stalking from
20 Mr. Selmon.

21 Q: And that's the victim in this case?

22 A: Yes, sir. That's the decedent.

23 Q: Did -- was the dash cam in your vehicle the night of the
24 incident?

25 A: Yes.

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- 1 Q: Were you driving that vehicle?
- 2 A: Yes.
- 3 Q: Okay. Did anybody produce the car camera from your car
- 4 for trial?
- 5 A: No.
- 6 Q: Did you tell your attorney about it?
- 7 A: Yes.
- 8 Q: Did you know if he requested it or subpoenaed it?
- 9 A: No, not that I'm aware of.
- 10 Q: Okay. Did you ask your attorney to get your telephone
- 11 records?
- 12 A: Yes.
- 13 Q: And do you know if he did?
- 14 A: I have not seen him get any, produce any.
- 15 Q: Were the -- why did you want your telephone records?
- 16 A: Because there was altered evidence on the Cellebrite
- 17 printout from the police.
- 18 Q: So, you wanted to match the state's evidence with your
- 19 own records?
- 20 A: Yeah, just like in *Fontus v. State* (spelled
- 21 phonetically).
- 22 Q: Do you know if the investigator or attorney created any
- 23 demonstrative evidence like a map for trial of the area where
- 24 all this occurred?
- 25 A: I had drew a map of the area and specified details to it.

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- 1 Q: Do you know if they used that to make any other maps?
- 2 A: I ---
- 3 Q: Were any maps used at trial by the defense?
- 4 A: Yes.
- 5 Q: Which map?
- 6 A: He had an aerial.
- 7 Q: The state had or you had?
- 8 A: Mr. Filiberto had it.
- 9 Q: Okay, good.
- 10 One second, Your Honor.
- 11 THE COURT: Sure.
- 12 BY MR. TRUSLOW:
- 13 Q: Okay. So, was there -- let me ask you this. Was there
- 14 any potential blood evidence in this case? Was there any
- 15 blood mentioned in any of the investigation, even if on you?
- 16 A: Yeah.
- 17 Q: And what was that?
- 18 A: They said there was blood on my jacket.
- 19 Q: Did the police take your jacket?
- 20 A: Yes.
- 21 Q: Do you -- did the police, do you know, did they do any
- 22 testing on the blood from your jacket?
- 23 A: They just did the one to find the blood, but they didn't
- 24 do any DNA.
- 25 Q: I mean, like testing to determine whose blood it is?

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- 1 A: No, not that I'm aware of.
- 2 Q: And did your attorney do any testing on the blood to see
3 whose blood it was?
- 4 A: No. I advised both the police and him, and my attorney,
5 that the blood was mine from an injury from being struck by
6 the car.
- 7 Q: All right. So, struck by Mr. Selmon's car, the victim's
8 car, that night.
- 9 A: From when he attacked me, yeah.
- 10 Q: Okay. And you advised them that it was your blood?
- 11 A: Yes.
- 12 Q: Okay. Was that established that it was your blood at
13 trial?
- 14 A: No.
- 15 Q: Okay. Did -- at trial, did the state produce what they
16 believed to be the murder weapon?
- 17 A: Did they -- I'm sorry?
- 18 Q: At trial, did the state produce in trial what they
19 believed to be the murder weapon in the case -- the weapon
20 where you shot Mr. Selmon?
- 21 A: That's what they believed.
- 22 Q: Now, was that weapon used?
- 23 A: No.
- 24 Q: Were there any -- did you ask about any ballistic testing
25 on that weapon?

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- 1 A: Yes, I requested it several times.
- 2 Q: And did your attorney do that?
- 3 A: No.
- 4 Q: Did you in this case have any expert witnesses
- 5 whatsoever?
- 6 A: No.
- 7 Q: Okay.
- 8 A: I requested them, but he didn't seem to ---
- 9 Q: And the state, are you aware of whether they did any
- 10 ballistic testing on that weapon?
- 11 A: I'm not aware, but Mr. Filiberto told me the state did.
- 12 Q: Did you see that?
- 13 A: No, I did not. And I argued with them the impossibility
- 14 of ---
- 15 Q: That it was your -- that weapon?
- 16 A: Yeah.
- 17 Q: You -- if this was a self-defense shooting, you would
- 18 know which weapon it was, right?
- 19 A: Yeah.
- 20 Q: All right. What day of the week did you start the trial
- 21 on?
- 22 A: It was a Monday, February 13th.
- 23 Q: Monday is fine.
- 24 A: Yeah.
- 25 Q: And then what day did it resolve?

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- 1 A: February 15th.
- 2 Q: I mean, what day of the week was it?
- 3 A: That was a Wednesday.
- 4 Q: So, do you remember what time of day it was?
- 5 A: It was pretty early.
- 6 Q: Was it before or after lunch?
- 7 A: Before lunch.
- 8 Q: On Wednesday?
- 9 A: Yes.
- 10 Q: Were you present for jury selection on Monday?
- 11 A: Yeah.
- 12 Q: Do you recall if that was first thing in the morning?
- 13 A: Yeah, that was first thing in the morning.
- 14 Q: Okay. Were you allowed to stay on bond during the trial?
- 15 A: Yeah.
- 16 Q: So, you were in trial Monday, Tuesday, and Wednesday, at
- 17 least part of Wednesday?
- 18 A: Yes. And I was detained with withheld for waiting for
- 19 jury deliberation.
- 20 Q: Okay. Do you remember if they did closing arguments at
- 21 the end of the trial on Wednesday or Tuesday?
- 22 A: I know the state did.
- 23 Q: Now, you said that there was only one defense witness; it
- 24 was you, correct?
- 25 A: Yeah.

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1 Q: Did you -- did you do any preparation with your attorney
2 in regards to testifying?

3 A: No, I had asked him what to expect and I, I didn't know
4 what to say if -- I said, am I allowed to say -- I had to say
5 stuff and if I didn't then I'd be -- get charged with
6 contempt. I said, can I plead the Fifth? And he says, you
7 can't do that because I don't have any rights.

8 Q: All right. Well, now you're aware that the judge at the
9 trial would question you about taking the stand and tell you
10 it was your decision, correct?

11 A: Yes. That was on the Tuesday.

12 Q: All right. Now, but did you want to take the stand?

13 A: No, I changed my mind on Wednesday.

14 Q: And what was the advice given to you by counsel about the
15 stand -- testifying?

16 A: That me backing out would be a sign of obvious guilt and
17 I would be held in contempt because he had already signed me
18 up for testimony.

19 Q: What -- what issues were there that made you not want to
20 testify?

21 A: My social anxiety disorder. I didn't -- there was just a
22 lot of issues that just -- I was like a nervous wreck.

23 Q: And have you ever been diagnosed with any conditions like
24 that?

25 A: Yes.

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1 Q: And where was that and when?

2 A: That was when I was in Pennsylvania years ago.

3 Q: Have you ever been hospitalized?

4 A: I had been hospitalized when I was a teenager.

5 Q: For anxiety?

6 A: Yes.

7 Q: And have you struggled with it through your adult life?

8 A: Yes. I'd worked with a bunch of great people at Horry
9 County that really supported me and showed their understanding
10 to me and I'd -- I've gotten the job working on fire trucks
11 and ambulances and helping the community, and sometimes
12 community service also helps me with the social thing.

13 Q: Was that -- was your anxiety, social anxiety situation,
14 did it have anything to do with your decision to flee from Mr.
15 Selmon after the initial confrontation?

16 A: Yes.

17 Q: Okay. Do you know if your attorney got your medical
18 records?

19 A: That I don't know.

20 Q: Did you ever discuss this condition with him?

21 A: Yes. He said it didn't -- it was not a issue as far as
22 the Court was concerned.

23 Q: Did they -- did he ever discuss perhaps with you being
24 evaluated prior to going to trial?

25 A: Yes. He said I was gonna get an evaluation prior to

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24

1 trial and that never happened.

2 Q: And would you have done an evaluation?

3 A: Yes.

4 Q: All right.

5 One second, Your Honor.

6 In addition to the witnesses that I mentioned earlier
7 that you wanted to have at trial, are there any others that
8 you can think of? I think we went through the ones we
9 discussed.

10 A: As far as the witnesses, possibly the witnesses that were
11 in the parking lot at Walmart at the night ---

12 Q: What about the -- oh yeah -- the night of the incident
13 when you were both in your vehicles at the incident site, were
14 -- did you notice that there was any other vehicles around?

15 A: There were some other vehicles.

16 Q: Was there -- what about a police vehicle?

17 A: Yes, there was a police vehicle.

18 Q: And did you drive by that vehicle out there?

19 A: Yes. The officer was in clear view.

20 Q: All right. And did you ask your attorney to go to the
21 police and see who was out there that night?

22 A: He said that he called the police and they told him they
23 didn't have anybody out there.

24 Q: All right. Sean Fay (spelled phonetically), do you
25 remember that name?

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25

1 A: Yes.

2 Q: Did you want him to be a witness?

3 A: If it was necessary.

4 Q: Did that have to do with your condition, correct?

5 A: Yes.

6 Q: Jeff Lefon, did you want him to be a witness?

7 A: I would like -- I wanted to have him investigated.

8 Q: Did anybody talk to him?

9 A: Not that I'm aware of.

10 MR. JAMES: I apologize. Can I get that name again?

11 MR. TRUSLOW: Jeff Lafon, L-A-F-O-N.

12 BY MR. TRUSLOW:

13 Q: Was a witness in the past to Mr. Selmon's violence and
14 issues?

15 A: Yeah, he was his supervisor.

16 Q: Heidi Gilchrest.

17 A: Yes.

18 Q: Are you familiar with that name?

19 A: Yes.

20 Q: Would she have been a good witness for your self-defense?

21 A: Yes.

22 Q: Was she talked to by anybody on your defense?

23 A: I do not know.

24 Q: Officer Rexall, remember that name?

25 A: Yes.

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1 Q: Who is he?

2 A: He works for the sheriff's department.

3 Q: Was he a witness or at least reported to a prior incident
4 with Mr. Selmon?

5 A: Yes, I had made reports to him when I was working at
6 Horry County.

7 Q: Did you know if your private investigator or attorney
8 talked with him?

9 A: I do not know.

10 Q: Was -- do you know -- he wasn't subpoenaed, correct?

11 A: That's correct.

12 Q: Denise Hagemeyer, are you familiar with that name?

13 A: Hagemeyer.

14 Q: Hagemeyer?

15 A: Yeah, she's the county attorney.

16 Q: All right. You spoke with her in the past about Mr.
17 Selmon?

18 A: Yes. I've spoken with her on a couple occasions.

19 Q: And she referred you to the solicitor's office?

20 A: Yes.

21 Q: She referred you to the solicitor's office?

22 A: Yes.

23 Q: All right. Did -- would she have been a good witness for
24 you?

25 A: Yes.

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1 Q: Officer Hemingway, you talked with him when you came
2 through to go to the solicitor's office meeting about Mr.
3 Selmon?

4 A: Yes.

5 Q: Okay. He wasn't subpoenaed to trial or investigated?

6 A: No.

7 Q: So, did you have any -- and you might've answered this,
8 did you have any preparation in regards to taking the stand?

9 A: No.

10 Q: And what -- how would you explain your appearance on the
11 stand and your testimony?

12 A: Just embarrassing.

13 Q: And you believe that was a result of your condition,
14 medical condition?

15 A: Yes, the prosecution kind of just humiliated me and
16 thought it was funny.

17 Q: All right. Now, last, in regards to any plea offers
18 prior to trial, were you aware that you signed a document that
19 you understood there was a previous plea offer of voluntary
20 manslaughter in December?

21 A: Yeah, he had stated there was some type of plea offer,
22 but he wouldn't specify the details of it.

23 Q: All right. But did you discuss that plea offer at length
24 with him at all, what it would mean and ---

25 A: No just that it was a plea offer and he gave ---

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1 Q: Do you know how -- do you know what the potential
2 sentence is for manslaughter or did you at that time? Were
3 you told?

4 A: I was very -- it was very unclear because there were so
5 many different numbers thrown out. It was nothing specific.

6 Q: Now, in regards to first the investigation -- I think
7 we've covered most of the important stuff if not all of it.
8 Is there anything standing out in your mind that we've missed
9 like an issue with regards to talking to witnesses, blood,
10 firearm, all those issues, expert witnesses, we've covered
11 that. Can you think of anything else right now about that?

12 A: The camera footage, Highway 501/17 Bypass, SCDOT camera
13 that shows direct view of the incident area; I had requested
14 that numerous times.

15 Q: And does that fall in with like all the surveillance out
16 there?

17 A: Yes.

18 Q: And you would've liked to get all of it you could have?

19 A: Yeah. I went on the website for the SCDOT to see what it
20 would entail and it does show a detailed area in the
21 background of showing the incident area, which would show that
22 I was attacked.

23 Q: Now, just in summing up though, you provided your private
24 investigator and your attorney with a fairly lengthy witness
25 list?

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- 1 A: Yes.
- 2 Q: And you don't believe that they were talked to by anybody
3 on your defense team?
- 4 A: Yeah, he like threw out a couple of people that he had
5 talked to.
- 6 Q: Well, how many? Would you say less than half of the ones
7 you gave him?
- 8 A: I'd say probably about two, off the top of my head that I
9 remember.
- 10 Q: Did you ever -- did you have a conversation with him
11 about not subpoenaing any other witnesses, any witnesses?
- 12 A: Yeah, we -- he told me there were gonna be witnesses
13 subpoenaed to the trial and ---
- 14 Q: They weren't?
- 15 A: And they weren't.
- 16 Q: Did you ask him why?
- 17 A: He said the, the -- he said he didn't get a chance to and
18 he had forgotten to, and then he said his private investigator
19 was supposed to subpoena them, and I asked him, well, can we
20 just get a continuance, and he said no, due to the Statute of
21 Limitations we cannot get a continuance on the trial.
- 22 Q: And -- okay. And you and I just talked about the issue
23 of whose blood was on you and the ballistics test on the
24 firearm. You asked that that stuff be done, correct?
- 25 A: Yes. We got in heated arguments over that.

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1 Q: Did you -- let me ask you this. I hate to end with this
2 one, but when we met way back, you used to carry a teddy bear
3 with you in my office, right?

4 A: Yes. That was Jeepers.

5 Q: What is it?

6 A: Jeepers.

7 Q: Okay, Jeepers. Did -- was Mr. Filiberto, did he know
8 about Jeepers?

9 A: Yes. I brought him in the office with me a couple of
10 times.

11 Q: All right.

12 A: And I would like hug him and cuddle him when I felt
13 really nervous.

14 Q: It helps you cope with your ---

15 A: Social anxiety disorder.

16 Q: And you would bring him to the office?

17 A: Yes. I wish I had him now.

18 Q: All right. Mr. Levan, I think that's all I've got for
19 you. Please answer any questions that the attorney general
20 has for you.

21 A: Okay.

22 CROSS EXAMINATION OF KEITH SHELDON LEVAN BY MR. JAMES:

23 Q: You planned to confront the victim in this case, correct?

24 A: Yes, I was advised to.

25 Q: Do you recall what time you planned to confront him at?

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1 A: I think it was around 4:00 in the morning.

2 Q: And did you call him up or text him with your own cell
3 phone?

4 A: I talked to him through Facebook.

5 Q: Did you contact him using your own Facebook or your
6 wife's Facebook?

7 A: I had used my wife's Facebook.

8 Q: And when you went to the location of the confrontation,
9 did you take your car or your wife's vehicle?

10 A: I took my vehicle, the Volvo station wagon that I owned.

11 Q: And went armed?

12 A: Yes, as I was advised to.

13 Q: And what did you go armed with?

14 A: I just had a -- I had a -- I had a rifle with me.

15 Q: Just a rifle?

16 A: Yes. And that was based on my level of fear of Mr.

17 Selmon. It was directly proportional to the amount of fear
18 that I felt.

19 Q: So, you were afraid of him but you went to confront him
20 at 4:00 A.M. armed with a rifle?

21 A: Yes.

22 Q: After talking to him using your wife's Facebook?

23 A: Yes. And identifying myself.

24 Q: And you did in fact shoot the victim in this case?

25 A: He kind of shot himself.

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- 1 Q: How did he shoot himself?
- 2 A: He struck me with his vehicle and the vehicle got wedged
- 3 -- it's difficult to explain.
- 4 Q: Was the gun in your hands?
- 5 A: At the time.
- 6 Q: Was it pointed at the victim?
- 7 A: It wasn't really pointed at him. When I had it in my
- 8 hands but when it got knocked out of my hands it was -- it was
- 9 up on the trunk lid.
- 10 Q: Was it loaded?
- 11 A: Yes.
- 12 Q: And the safety was off?
- 13 A: Yes.
- 14 Q: So, it was your gun that shot him, right?
- 15 A: Yes. I'd armed myself according to *State v. McCaskill*.
- 16 Q: Armed yourself per *State v. McCaskill*, did you look up
- 17 that case before you went out to him?
- 18 A: No.
- 19 Q: You said you confronted him pursuant to advice.
- 20 A: Yes.
- 21 Q: Was that advice to go out there at 4:00 A.M.?
- 22 A: There was no time specified. It was just in order to get
- 23 a restraining order, I had to -- I had to advise him to leave
- 24 and my family alone, but I kept telling them I was too scared
- 25 to really confront him.

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1 Q: And so you armed yourself with a gun?

2 A: Yes. With only intent for self-defense, and that was the
3 only intent.

4 Q: Did you consider trying to meet him in daylight?

5 A: Well, it's been a cat-and-mouse game with Mr. Selmon. He
6 has followed me several times before, and he's pointed an
7 actual firearm at me several times before, threatened me over
8 comments I've made to him.

9 Q: Did you consider trying to meet him at the police
10 station?

11 A: I don't think he would go for that. I was on my way to
12 the police station that night and he was following me trying
13 to prevent me from getting to the police station.

14 Q: You indicated you have a severe social anxiety disorder?

15 A: Yes, I have a social anxiety disorder.

16 Q: Do you take any medications to treat that disorder?

17 A: Not currently.

18 Q: What other treatment do you pursue for that disorder, or
19 what sort of treatment did you pursue for that disorder prior
20 to shooting the victim?

21 A: To deal with the social anxiety I had, to deal with that
22 basically hung around my friends from the fire department, I
23 would work at the county and with a good group that were very
24 supportive -- they knew the social anxiety disorder and they
25 got me involved with a couple of volunteer things, Habitat for

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1 Humanity and other things where I could social with people and
2 feel more comfortable with them. And a lot of times I would
3 work to deal with the -- because I enjoyed working.

4 Q: I'm certainly familiar with that cure for it.

5 A: Yeah, we're all for that.

6 Q: Who exactly told you to go confront the victim while
7 armed?

8 A: I was told that I had the right to protect myself and
9 carry -- if I needed to have a firearm.

10 Q: I understand. But respectfully, that wasn't the question
11 I asked. I was asking for a name. Who precisely told you to
12 go confront the victim in the manner that you did?

13 A: Specifically in the manner that I did?

14 Q: Specifically in the matter that you did.

15 A: Nobody specifically told me to do that. It was a very
16 general thing. I talked to Detective Kitelinger, and he said
17 I had a right to arm myself if he came after me again. And
18 that's when I had the incident at the mall when I was walking
19 to my truck and Mr. Selmon struck me, attempted to strike me
20 down with his vehicle on February 16th and that was on a
21 Monday. And that was reported on February 17th.

22 Q: Did anybody tell you not to confront the witness?

23 A: No.

24 Q: Did your wife tell you not to confront the witness?

25 A: I don't remember her saying anything not to confront him.

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1 MR. JAMES: I have no further questions for this witness.

2 MR. TRUSLOW: Nothing further, Your Honor.

3 THE COURT: You can step down.

4 MR. TRUSLOW: Petitioner would call Larry Filiberto.

5 LAWRENCE FILIBERTO, HAVING BEEN DULY
6 SWORN, TESTIFIED AS FOLLOWS:

7 THE COURT: Please have a seat and state your name for
8 the Court and spell your last name.

9 MR. FILIBERTO: Yes, ma'am. My name is Lawrence
10 Filiberto. My last name is spelled F-I-L-I-B-E-R-T-O.

11 MR. TRUSLOW: Thank you.

12 DIRECT EXAMINATION OF LAWRENCE FILIBERTO BY MR. TRUSLOW:

13 Q: Mr. Filiberto, how long have you been practicing law?

14 A: In South Carolina, it's been, I think, in '05.

15 Q: And prior to being a defense attorney and doing defense
16 work, what was your position?

17 A: I was an assistant solicitor for this circuit.

18 Q: And during that job, you worked in this building
19 prosecuting criminal cases?

20 A: Correct.

21 Q: Of all different types?

22 A: Correct.

23 Q: How long -- when did you leave the solicitor's office?

24 Just ---

25 A: Approximately, 2011.

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1 Q: Do you recall this trial was in 20 -- do you recall what
2 year it was in? 2017?

3 A: Correct.

4 Q: Okay. Now, prior to this trial, had you defended any
5 murder cases at trial?

6 A: Didn't have to go to trial, but I've represented people
7 charged with murder previously.

8 Q: Okay. Had you prior to Mr. Levan's trial, have you tried
9 -- had to go to trial in a felony case as defense counsel up
10 to that point?

11 A: No.

12 Q: You've been here for Mr. Levan's testimony, so I want to
13 just try to condense it for us. In regards to the -- did you
14 have a private investigator to use in this case?

15 A: I engaged Strand Investigations, Jay Stevens was the
16 investigator.

17 Q: All right. Did you do any -- request any testing of the
18 blood that was found on Mr. Levan's shirt?

19 A: I did not. And that request independent investigation
20 there was never any dispute with respect to the existence of
21 the blood and nobody ever tried to make an argument that that
22 it was somebody other than Mr. Levan's blood.

23 Q: What was your opinion of this case in terms of self-
24 defense?

25 A: The challenge I think was that Mr. Levan created the

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1 confrontation. I tried to make the argument -- ultimately,
2 when it was gonna go to trial, I tried to make the argument
3 that he discontinued the confrontation and then a subsequent
4 confrontation occurred between Mr. Selmon and Mr. Levan.

5 Q: All right. Now, in terms of the blood on his shirt, did
6 you raise that and use that at trial in support of self-
7 defense; do you recall?

8 A: I don't recall if I did or not. I haven't re-read the
9 entire transcript.

10 Q: And then about the firearm, did you obtain any testing or
11 ballistic testing to determine if it was the weapon used?

12 A: There was a considerable amount of expert testimony. The
13 issue was more resolved as a result of Mr. Levan and Ms.
14 Hubbard's statements to law enforcement that were admissible
15 at the trial, unfortunately, and where they -- when Mr. Levan
16 acknowledged what happened and that he discharged the weapon
17 several times in an attempt to shoot out the tires or hit the
18 gas tank.

19 Q: So -- but there wasn't any ballistic testing done?

20 A: I don't recall if the state did any, we did not arrange
21 to have any done.

22 Q: All right. Did you look at this as a pretty hopeless
23 effort going to trial in light of statements made?

24 A: I thought that we would've been better served mitigating
25 it, but we were able to get a self-defense charge and

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1 manslaughter charge to the jury. So, you know, we presented
2 evidence that the Court found sufficient enough to support
3 those jury charges.

4 Q: Okay. And did you have input on the jury charges, did
5 you have a conference about anybody that wanted to give
6 charges into the Court?

7 A: We presented our requests and arguments. So, we won some
8 arguments against the state with respect to the charges. I --
9 Deputy Solicitor Hixson particularly was energetic in his
10 argument against the -- a charge for manslaughter.

11 Q: Now, you had him sign a document indicating that he did
12 not want to plead to any type of manslaughter charge, right,
13 in 2016, December?

14 A: Correct. What happened was after we reviewed all of the
15 discovery in the case, we met and talked and Mr. Levan was
16 onboard with the fact that this -- our efforts would be better
17 served toward working hard at mitigation. Assistant Solicitor
18 Grooms and I had had conversations and he had indicated
19 verbally to me that he would be comfortable with a
20 manslaughter plea. And based on much information provided by
21 my client felt that if I could document some of the reported
22 heinous behavior on the part of Mr. Selmon it would've helped
23 a lot in getting them onboard with a plea offer that would've
24 been acceptable.

25 Q: All right. Now, though he did -- I mean, a full two

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1 months prior to trial, he indicated he was not pleading guilty
2 in writing, correct?

3 A: He -- correct, we had a number of conversations and he
4 had changed his position that he wanted to mitigate it and he
5 felt it was purely self-defense.

6 Q: Okay. Now, in terms of your motion to be relieved prior
7 to trial, what was the basis for that?

8 A: It was a difficult decision. I -- Mr. Levan started
9 coming in and he had some comments and was upset, had
10 indicated that I was too friendly with law enforcement and too
11 friendly with the prosecutors and that I -- that -- I think he
12 started to lose confidence in me. And why I did that, it was
13 based on the fact that if he didn't have confidence in me,
14 which I really wanted him to do -- to have confidence in me, I
15 wanted to give him the ability to seek counsel that he had
16 more confidence in. One of the responses that he had made to
17 me when we had gotten to the point of me having him
18 acknowledge that he was choosing not to pursue a plea and that
19 he wanted to go to trial, and he indicated subsequent to that,
20 that that was as a result of conversations with two attorneys,
21 both of whom indicated this was purely self-defense and that
22 he would be foolish to plea. And we -- I felt that if he had
23 engaged in conversations with other counsel, then he might
24 want to retain them, that that would be his decision. I
25 wanted to give him that opportunity. We had a motion hearing.

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1 He advised the Court that he did not want me to be relieved
2 and he did want me to be his attorney. And we pursued and
3 prepared for trial.

4 Q: All right. In discovery in this case, you received a
5 surveillance tape from the incident scene from one of the
6 establishments?

7 A: From the road coming down Seaboard, it clearly showed Mr.
8 Levan driving and Mr. Selmon following him.

9 Q: Okay. And did you or your investigator go attempt to
10 look at or obtain any of the other surveillance tapes?

11 A: We did. We went to the Home -- I believe it was called
12 Home Goods or something.

13 Q: Yes.

14 A: And we went and communicated with the general manager of
15 the store and indicated that there was no functional
16 surveillance system behind the store, which is really where
17 the confrontation took place.

18 Q: All right. Now, did -- are you aware that law
19 enforcement went and viewed some surveillance tapes in their
20 presence at the scene that were not produced in discovery
21 because they did not take possession of them?

22 A: I'm not sure where that's coming from. I don't recall
23 that there was any discussion from that. There was an initial
24 conversation -- or initial confrontation at Walmart, and then
25 Mr. Selmon indicated he drove to the other side of the

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1 Walmart. Mr. Selmon followed him and then he drove down to
2 where he came around by that home store and we had video of
3 that, and then we didn't have video in the back. He indicated
4 he pulled behind, I guess, a dumpster or in an area there
5 hoping that Mr. Selmon would drive by and keep going. He
6 didn't do that; he stopped. And that's where the
7 confrontation ensued.

8 Q: Now, in terms of -- I'm not gonna go through all of these
9 witnesses, but you heard the witnesses, at least most of them
10 that we're talking about, did you subpoena any of the
11 witnesses that he brought up?

12 A: I didn't. And the basis for not doing that was that our
13 -- the investigator that we engaged went and interviewed each
14 of those witnesses and more, it was probably closer to 10
15 witnesses. And every one of the witnesses that we
16 interviewed, with the exception of one, indicated they had no
17 basis or knowledge to support the matters that Mr. Levan told
18 us that they would, things that Mr. Levan told us they had
19 seen or been present for. The -- every one of them indicated
20 that that was not the case. There was one witness that I
21 don't think was credible and basically all she told the
22 investigator is I will say anything you need me to say. And I
23 wasn't willing to suborn perjury and bring someone in here to
24 do that.

25 Q: I understand. So, your testimony is that you did go

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1 interview the witnesses?

2 A: The investigator -- I had the investigator do that.

3 Although I did speak to one or two on the phone.

4 Q: Did you share that with him?

5 A: Yes, he was well-advised of that.

6 Q: How many witnesses do you think ---

7 A: It was close to 10.

8 Q: All right. Now, in regards to -- what was your
9 conversation with Mr. Levan about testifying on his own
10 behalf?

11 A: I clearly advised him of his constitutional rights to
12 testify or not to testify. I discussed with him the matters
13 of issue and challenges. I discussed with him the matters
14 related to cross examination. I indicated that, that we would
15 need to really try and lay out information related to not only
16 the self-defense, but I was concerned that the jury might not
17 get to a self-defense and was hoping that some determination
18 of what -- in the profession sometimes is referred to as
19 imperfect self-defense, would get us to a manslaughter finding
20 if we couldn't get a self-defense finding.

21 Q: All right. In regards to his ability to testify
22 decently, did you -- were you aware of his condition that he
23 spoke about on direct, social anxiety, and the use of Jeepers,
24 the teddy bear, and all that?

25 A: He had indicated to me that he had a lot of social

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1 anxiety. He never used -- or to my knowledge or maybe he did
2 and it just didn't stick with me, the term disorder. But he
3 did acknowledge to me that not only did he have it but also
4 that, I believe, Ms. Hubbard had it and would be very nervous.
5 Well, most people that testify are generally gonna be a little
6 nervous. The Jeepers thing, I think he had something with him
7 one time that he came to the office, never went forward with
8 more detail about why that was a comfort thing for him, but he
9 had acknowledged to me that he would be very nervous.

10 Q: So in regards to the trial for murder and he was
11 sentenced to four years, the trial began on Monday and
12 concluded, went to the jury Wednesday morning or mid-morning;
13 is that correct?

14 A: It was mid-day.

15 Q: So, roughly two days, a two-day trial?

16 A: Yeah, we would've -- it would've went longer. We --
17 there was nobody to subpoena, to further bolster Mr. Levan's
18 case. The matters related to the character behavior of Mr.
19 Selmon wouldn't have been admissible in my opinion. They,
20 they would have ---

21 Q: That was my question.

22 A: I think that -- I do think that the only person, besides
23 Mr. Levan, that we had scheduled to testify was Ms. Hubbard.
24 She advised me at the end of the court day on Tuesday that she
25 had changed her mind and she would not testify.

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1 Q: Okay. Now, in regards to the roughly 10 or so witnesses
2 that you interviewed, did you interview witnesses about Mr.
3 Selmon's potential reputation of violence?
4 A: That we attempted to confirm what Mr. Levan told us the
5 witnesses would tell us and ---
6 Q: Was it your position that -- I mean, you don't disagree
7 that the reputation of a victim for violence is admissible,
8 though?
9 A: I don't disagree if we could've gotten somebody credible
10 to come in on the witness stand and share that, but we were
11 unable to.
12 Q: So, did you talk to anybody -- this may be the same
13 thing, but any threats that were made by him in the past that
14 any witness would have, any witnesses you talked to about
15 that?
16 A: That the witnesses were threatened by him?
17 Q: That he threatened anybody with anything, including Mr.
18 Levan.
19 A: We took each individual witness and the things that Mr.
20 Levan indicated they were present for, they had seen, they
21 would tell us. And we dispatched Mr. Stevens to go meet with
22 them. Some people would just refuse to meet with us. Others
23 would meet with us and they wouldn't share -- they would
24 indicate I have no idea what he's talking about, and I didn't
25 see that.

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1 Q: So, you didn't find any witness ---

2 A: Nothing -- nobody that was credible.

3 Q: --- to have testify?

4 A: Nobody that was credible.

5 Q: All right. Did you consider maybe not having him testify

6 given that at that time you would've had the last closing

7 argument had you not put him up?

8 A: The main issue and -- that we had was the admissible

9 statements made by Mr. Levan to law enforcement that were

10 presented at trial. Based on those admissions, and other

11 evidence that was presented by the state such as a

12 particularly challenging text message that he sent to Ms.

13 Hubbard after the incident, right after the incident, while it

14 was a hundred percent Mr. Levan's decision to testify, we

15 would never gotten a self-defense charge or been able to try

16 and make an argument towards at worst a manslaughter finding

17 on the part of the jury.

18 Q: You heard Mr. Levan's testimony and I'm sure you're aware

19 of his position and his version of what occurred that night,

20 correct?

21 A: Yes.

22 Q: Okay. And you were able to get a self-defense charge,

23 correct?

24 A: Correct.

25 Q: Did you request -- couldn't you have requested a charge

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1 that the aggressor in the case, as you've said the worst and
2 biggest obstacle was him going there, that the aggressor can
3 withdraw and still have that claim of self-defense?

4 A: I did, which is why the judge permitted the self-defense
5 charge.

6 Q: But, I mean, you specifically under the *State v. Graham*
7 and *Duncan* could've had a charge along with self-defense
8 saying that, telling the jury that the individual, the
9 aggressor, says he drove there with the weapon and all can
10 withdraw and then claim self-defense, which would be
11 consistent with his, you know, getting scared of him and
12 running from him and getting blocked off and then having to
13 shoot in self-defense. Are you aware of that charge?

14 A: I'm aware of it. I think that based on Mr. Levan's
15 testimony it would've been a challenging attempt with the
16 Court. I don't think ---

17 Q: Wasn't that his version of what happened?

18 A: His testimony was actually pretty challenged. He kind of
19 struggled answering my questions. I had to really start
20 leading him aggressively. The state objected and the Court
21 gave me some discretion.

22 Q: Did you attempt through him or in opening and closing, to
23 convey to the jury what he told us today that, how this
24 occurred, based it on his version?

25 A: I attempted to get that in front of the jury based

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1 through his testimony.

2 Q: Did you argue it in your closing?

3 A: I don't recall.

4 Q: Your opening statement was like roughly three sentences,
5 correct?

6 A: I think it might've been a little longer than that, but
7 it wasn't particularly long.

8 Q: You didn't mention anything about reasonable doubt, did
9 you, or the presumption of innocence, or the burden of proof
10 on the state in your opening?

11 A: I think that would've been repetitive given that the
12 Court had already done that and as we got this trial started.

13 Q: In regards to the charge that I brought up that you
14 didn't request, which would fit with what his version was, you
15 think that maybe you didn't have the support for it because
16 his testimony wasn't that clear?

17 A: I think his testimony was very struggled. I, I truly
18 believe with all my heart that he was petrified of Mr. Selmon.
19 I think at 4:00 in the morning when he woke up and
20 communicated and went and had the confrontation, it was a
21 reaction that, that was tough. There was so many things that
22 we could've tried to work on but at 4:00 in the morning,
23 especially with his home video system coming into play and the
24 evidence that the police seized when they served the search
25 warrant on the home.

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1 Q: Did you request any of his medical records?

2 A: No, there's never -- there weren't really any
3 conversations related to medical treatment.

4 Q: Did you ask about Jeepers when he showed up with the
5 teddy bear? Did you think ---

6 A: The one time that I can recall that he brought a doll in
7 with him he was more to making jokes with my assistant about
8 it than he was clinging to it as though he was afraid. I
9 didn't -- it didn't escalate as something that was important
10 or noteworthy.

11 Q: Did you ask him what medications he was on in the past or
12 present when you were interviewing him?

13 A: I don't recall.

14 MR. TRUSLOW: Your Honor, that's all we'd have for Mr.
15 Filiberto.

16 THE COURT: Mr. James?

17 CROSS EXAMINATION OF LAWRENCE FILIBERTO BY MR. JAMES:

18 Q: Mr. Filiberto, some of these matters you've already
19 discussed with Mr. Truslow, but just in quick review, you
20 indicated that you attempted to obtain surveillance videos in
21 particular from the Home Goods, the rear thereof, and were
22 told that there was no functioning system back there, correct?

23 A: That's correct. I actually drove by there the other day,
24 but they appear to be out of business now. I wanted to drive
25 in the back and see if there were any cameras up there.

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1 Q: Businesses come and go all the time, right?

2 A: That's correct, sir.

3 Q: Did you make an effort to review your client's telephone
4 records?

5 A: They were given to us by the state. The ---

6 Q: Referring to the Cellebrite records.

7 A: Yeah, I'm talking about -- yeah, their examination. The
8 issue once we were clearly going to trial was -- I don't think
9 it would've been admissible or relevant to the defense of the
10 case. It was -- in all the situations related to the phones,
11 you know, where some of the conversations had to do with Mr.
12 Selmon sending threatening communications to Ms. Hubbard on
13 Facebook and I requested to be able to have access to see her
14 Facebook, well, she deleted it all. And there was nothing
15 that we could be able to see. But, ultimately, the character,
16 the evidence related to the character of Mr. Selmon, its value
17 was mostly in mitigation, and unfortunately we weren't able to
18 substantiate it. His, his history is talking about -- Mr.
19 Levan shared with us that he talked about a cage or a place
20 where he kept females that he had kidnapped, and that he had -
21 - would bring them there and treat them badly and things of
22 that nature. Unfortunately, to bring that in the murder trial
23 would have been -- it certainly goes to Mr. Levan's anxiety
24 and state of mind, but it -- my biggest concern was that he
25 had created the confrontation, which made the argument that

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LAWRENCE FILIBERTO - CROSS BY JAMES

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1 his reactions were because he was petrified, and if you go and
2 you confront the person, it makes it -- it makes that argument
3 a pretty hard sell.

4 Q: He didn't ever give you his phone, did he?

5 A: No, sir. I did subsequently find out he was using that
6 phone to record most of our attorney/client meetings.

7 Q: Did he tell you why he was recording?

8 A: I think he ultimately lost confidence in me and I think
9 he was sharing it with other people. I advised him that he
10 was jeopardizing the attorney/client privilege by sharing it
11 with third people, but beyond that, that was pretty much his
12 decision.

13 Q: You attempted to obtain law enforcement incident reports
14 documenting harassment by the victim against your client,
15 correct?

16 A: I did.

17 Q: All right. What did you do to try and get them?

18 A: I contacted both the Horry County Police Department and
19 the Myrtle Beach Police Department and had conversations with
20 those folks. They did quick searches in their computers.
21 They said they couldn't find anything. I filed -- subsequent
22 to that I filed FOIA requests and received notices back that
23 there was no record of any conversations between Mr. Levan and
24 law enforcement, filing complaints or discussing matters
25 related to anything, not the least of which is Mr. Selmon.

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1 Q: Did you attempt to acquire any sort of GPS records to
2 ascertain the location of a police vehicle at the location as
3 alleged by Mr. Levan?

4 A: He indicated that there was a police car sitting outside
5 of Walmart at 4:00 in the morning. Many times they are there
6 for shoplifting incidents, that type of matters. The
7 challenges that we're -- Mr. Levan indicated the Horry County
8 -- well, not Horry County, but the police car that was there,
9 no way could they see or if their dash cam was activated,
10 would they have seen anything over -- it's got to be more than
11 a quarter of a mile away, which is behind the home store there
12 that the incident took place at.

13 Q: Okay.

14 A: There was plenty of evidence of Mr. Levan being there,
15 rolling down the window. Mr. Selmon saw him, drove away. Mr.
16 Selmon was very angry because he was expecting to meet Ms.
17 Hubbard, which my understanding was the message that went out
18 to Mr. Selmon, was he thought he was actually meeting Ms.
19 Hubbard. And then when he drove away -- and he did, Mr.
20 Selmon did pursue him. And again, the basis of the argument
21 that Mr. Levan didn't break off his confrontation.
22 Unfortunately, the jury didn't, didn't see it that way.

23 Q: And you indicated that Mr. Levan's wife told you that she
24 had deleted her Facebook?

25 A: No, no. Mr. Levan told me that his wife had deleted it.

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LAWRENCE FILIBERTO - CROSS BY JAMES

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- 1 Q: Okay. And you testified that you did in fact hire a
2 private investigator?
- 3 A: I did.
- 4 Q: Mr. Jay Stevens?
- 5 A: Correct.
- 6 Q: And he went and talked to all those witnesses?
- 7 A: Yes, and he came back and reported to both myself and to
8 Mr. Levan the results of those meetings.
- 9 Q: Did you visit the incident site?
- 10 A: Yes, sir.
- 11 Q: All right. Did you inspect Mr. Levan's vehicle?
- 12 A: I did not. There was no testimony related to Mr. Levan's
13 vehicle being damaged. He indicated that Mr. Selmon backed up
14 aggressively but did not hit his vehicle, and that he got out
15 of the vehicle, that he charged his weapon, and that he was
16 hoping to take out a tire and/or hit the gas tank, and did not
17 intend for his bullet to go through the back window of the
18 vehicle, of Mr. Selmon's vehicle, and then the -- Mr. Selmon's
19 vehicle just rolled across the way, across the road, and into
20 the Home Depot parking lot, which is ultimately where it was
21 found.
- 22 Q: Did you receive any other evidence in discovery relating
23 to Mr. Levan's vehicle?
- 24 A: No. They -- I did receive evidence that shell casings
25 that matched the caliber of his weapon were located where he

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1 indicated the incident took place.

2 Q: There's some testimony from Mr. Levan both -- I believe
3 both at trial and here today that he believed that the victim
4 had a gun. Was any gun ever recovered from the victim?

5 A: None in his vehicle. There were some shells -- some
6 bullets in the victim's vehicle, but no weapons.

7 Q: And you did in fact secure that self-defense charge?

8 A: Correct. The Court granted both the self-defense charge
9 and a manslaughter charge as a lesser included.

10 Q: Did Mr. Levan ever tell you that they had the wrong
11 murder weapon?

12 A: No, as a matter of fact, during his statement to law
13 enforcement, when he and Ms. Hubbard went over the next day
14 after they had charged Mr. Levan, they asked him where the
15 rifle was that he had indicated he used, and he advised them
16 that he wrapped it in a -- some kind of a bag and hidden it
17 behind a shed on some family property. I don't remember
18 exactly which property it was on. And the police went and
19 retrieved the weapon from there.

20 Q: Did you receive a copy of that statement in your
21 discovery?

22 A: Yes, I did.

23 Q: All right.

24 If I may approach the witness, Your Honor?

25 I am handing to you a document that is for the moment

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LAWRENCE FILIBERTO - CROSS BY JAMES

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1 identified as State's Exhibit 33 from the trial. And
2 momentarily we'll identify it as Applicant's -- I'm sorry --
3 Respondent's Number 1. Do you recognize the document that I'm
4 handing to you?

5 A: Yes, I do.

6 Q: All right. And could you describe what it is for me?

7 A: It is a transcript of a -- statements made by Mr. Levan
8 to the Myrtle Beach Police Department that were recorded on
9 the officer's body cam.

10 Q: All right. And was this document provided as part of the
11 discovery to you in preparation for trial?

12 A: I believe that was provided as was the actual videos, the
13 documentation and the audio portion of the body cam were
14 provided.

15 Q: And so you had an opportunity to and in fact did review
16 this in preparation for trial?

17 A: Absolutely.

18 MR. JAMES: All right. I would seek to introduce this as
19 Respondent's Number 1.

20 THE COURT: Any objection?

21 MR. TRUSLOW: No objection.

22 THE COURT: It's admitted.

23 RESPONDENT'S EXHIBIT NUMBER 1

24 ADMITTED INTO EVIDENCE

25 MR. JAMES: If I may hand this up to Your Honor for your

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LAWRENCE FILIBERTO - CROSS BY JAMES

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1 convenient reference.

2 BY MR. JAMES:

3 Q: And so based upon that, did you determine that there was
4 no value to seeking forensic ballistic evidence?

5 A: Correct. He acknowledged his discharging of the weapon
6 and that there's other evidence, unfortunately, one of the
7 things that I thought was very -- hurt him very much was a
8 text message that he sent to Ms. Hubbard right after the
9 incident.

10 Q: Do you recall what the text message was?

11 A: He -- quote me on it, but it's pretty much the substance
12 of it, that he's -- he's -- he was sorry and he, he's afraid
13 he became the monster that he feared.

14 MR. JAMES: For the reference of the Court and opposing
15 counsel, that quotation can be found at Page 229 of the trial
16 transcript, Lines 21 and 22.

17 A: I did object to the introduction of that but it was
18 overruled.

19 MR. JAMES: It is additionally cited on Page 2 of State's
20 return.

21 BY MR. JAMES:

22 Q: How much time would you say you spent with Mr. Levan in
23 preparation for testifying at trial?

24 A: Conservatively, I would say it was 50 to 60 hours. A lot
25 of that was because of his anxiety and I wanted him to be

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LAWRENCE FILIBERTO - CROSS BY JAMES

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1 comfortable. We went through session after session in an
2 attempt to get him -- and also at one point, I believe, met
3 with Ms. Hubbard and talked to her about her testimony as
4 well.

5 Q: And you indicated that Ms. Hubbard decided that she did
6 not wish to testify right before trial?

7 A: Correct.

8 Q: Did she give you a reason why?

9 A: I think it was her counsel, because she had also charges
10 pending in this matter. Although subsequent to Mr. Levan's
11 conviction, they dismissed those charges. I did not subpoena
12 Ms. Hubbard, because I considered her to be a friendly witness
13 and even if I had and I had put her on the stand and she just
14 invoked her Fifth Amendment privileges, I believe that
15 would've hurt Mr. Levan much more than having no testimony at
16 all.

17 Q: And you indicated your belief that there was nobody else
18 to subpoena?

19 A: Nobody that would corroborate with what Mr. Levan had
20 indicated they would corroborate, nobody credible.

21 Q: You indicated that Solicitor Grooms indicated to you
22 orally that he was comfortable with potentially pleading this
23 out to manslaughter?

24 A: That's correct.

25 Q: And did you communicate that plea offer to your client?

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LAWRENCE FILIBERTO - CROSS BY JAMES

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1 A: Yes. And I think the term offer here is confusing. It
2 was a discussion. There wasn't anything in writing. And we
3 agreed that I was going to provide Mr. Grooms with more
4 mitigation -- documentation of mitigation, and that was the
5 road we went down for a while until Mr. Levan changed his
6 mind.

7 Q: So, you were still in the process of actually putting
8 that deal together ---

9 A: Right.

10 Q: --- when he changed his mind and said, no, I don't want
11 to do that?

12 A: Correct. And then ultimately, he ended up leaving the
13 solicitor's office, the case was assigned to, I believe, to
14 Assistant Solicitor Terrell, and that conversation never
15 further continued, but it was irrelevant because Mr. Levan had
16 made a determination he wanted to go to trial.

17 Q: So, neither Mr. Hixson nor Mr. Terrell ---

18 A: Had that conversation.

19 Q: --- extended any offers to you?

20 A: Absolutely not.

21 Q: And there never was ---

22 A: There never was a ---

23 Q: --- really a true, firm offer to your client?

24 A: Absolutely none.

25 Q: But nonetheless, when your client indicated that he no

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LAWRENCE FILIBERTO - CROSS BY JAMES

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1 longer wished to pursue a voluntary manslaughter plea deal,
2 you had him sign off that that was his indication to you?

3 A: Yeah, I was just wanting it to be really clear that it
4 was his choice and that -- and that my advice was that it was
5 -- the state had a strong case against him.

6 Q: Do you have that document in your file?

7 A: I believe I do. Just give me a minute. I have the
8 original and a copy.

9 Q: An original and a copy?

10 A: I have the original and a copy of it, a photocopy of it.

11 MR. JAMES: If I may approach the witness?

12 THE COURT: Yes, sir.

13 BY MR. JAMES:

14 Q: If I may have that photocopy.

15 MR. JAMES: If I may have this marked as Respondent's
16 Number 2.

17 BY MR. JAMES:

18 Q: All right. I'm handing you a document that you pulled
19 from your file indicated as Respondent's Number 2 for
20 identification. It seems a little obvious since it's pulled
21 from your file, but do you recognize this document?

22 A: I do, sir.

23 Q: All right. And what is it?

24 A: It is a discussion, an affirmation, signed affirmation
25 that my client was aware that the opportunity to resolve this

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LAWRENCE FILIBERTO - CROSS BY JAMES

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1 with a manslaughter plea was available. He was choosing to
2 not pursue that and I put that it was really against my advice
3 and I thought the state had a strong case, but he was choosing
4 to go to trial and just acknowledging that it was his decision
5 and not mine.

6 Q: All right. And did he -- in the course of your
7 representation of Mr. Levan, did you have an opportunity to
8 witness his signature?

9 A: Yes.

10 Q: All right. And is that his signature on this document?

11 A: It is.

12 Q: All right. And was it signed in your presence?

13 A: It was.

14 Q: All right.

15 MR. JAMES: I'd move to introduce this as Respondent's
16 Number 2.

17 MR. TRUSLOW: No objection.

18 THE COURT: It is admitted.

19 RESPONDENT'S EXHIBIT NUMBER 2

20 ADMITTED INTO EVIDENCE

21 BY MR. JAMES:

22 Q: You indicated that at one point that you sought to be
23 relieved; is that correct?

24 A: Yes, sir.

25 Q: And you indicated that that was inspired by your belief

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LAWRENCE FILIBERTO - CROSS BY JAMES

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1 that the attorney/client relationship was broken down and that
2 Mr. Levan had lost confidence in you?

3 A: That's correct.

4 Q: And you indicated that that was because you had learned
5 that there had been communications between Mr. Levan and other
6 attorneys; is that correct?

7 A: Correct. He had sent me an email indicating that.

8 Q: All right.

9 MR. JAMES: If I may approach the witness?

10 THE COURT: Yes, sir.

11 MR. JAMES: Madame Court Reporter, if you'd mark this as
12 Respondent's Number 3.

13 BY MR. JAMES:

14 Q: All right, Mr. Filiberto, I'm handing you a document that
15 has been marked for identification as Respondent's Number 3.
16 Do you recognize this document?

17 A: I do.

18 Q: All right. What is it?

19 A: It is a printout of an email sent to my office by Mr.
20 Levan further discussing his decisions.

21 Q: All right. And what is the date on that email?

22 A: It is November 30th of 2016.

23 Q: All right.

24 MR. JAMES: I would respectfully move to introduce this
25 as Respondent's Number 3.

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LAWRENCE FILIBERTO - CROSS BY JAMES

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1 MR. TRUSLOW: Without objection.

2 RESPONDENT'S EXHIBIT NUMBER 3

3 ADMITTED INTO EVIDENCE

4 BY MR. JAMES:

5 Q: And explicitly in that email, Mr. Levan indicates that
6 he's been speaking to attorneys with, quote, much more
7 experience than you, correct?

8 A: Correct.

9 Q: And I apologize, I said quote, and I may've gotten the
10 phrasing off by order.

11 A: That was the indication was that that was the situation.

12 MR. JAMES: I beg a moment of the Court's indulgence.

13 BY MR. JAMES:

14 Q: Isn't it true that in that email, Mr. Levan indicated
15 that he was potentially willing to let you be relieved as his
16 counsel?

17 A: I believe so. I mean, I can review it again.

18 Q: But ultimately, when you went and appeared before -- was
19 it Judge John?

20 A: Judge Hyman.

21 Q: Judge Hyman, you appeared before Judge Hyman and at that
22 time Mr. Levan indicated that he wished to keep you as
23 counsel?

24 A: Correct.

25 Q: All right.

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LAWRENCE FILIBERTO - CROSS BY JAMES

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- 1 A: The purpose behind that was to give -- let him have the
2 opportunity to have somebody he had confidence in. There's no
3 question in my mind the Court would've given him a continuance
4 and a new counsel opportunity to get up to speed.
- 5 Q: There was some discussion of a stuffed animal named
6 Jeepers earlier. Did he ever bring any other stuffed animals?
- 7 A: There was just one time that I can remember that he
8 brought something and it -- I think it was more of a funny
9 conversation between him and my assistant.
- 10 Q: Okay. Any other sort of totems or tokens or ---
- 11 A: Not that I recall, sir.
- 12 Q: Okay. Did you ever tell your client that he would be
13 held in contempt if he did not testify?
- 14 A: No. And I also believe the Court made it clear that it
15 was a hundred percent his decision.
- 16 Q: Did you review all of the discovery with Mr. Levan?
- 17 A: Reviewed it all, gave him a copy of everything, with the
18 exception of his NCIC.
- 19 Q: Did you ever see, hear, or otherwise receive any evidence
20 to indicate that the Cellebrite records in the state's
21 possession were altered or modified in any way?
- 22 A: None.
- 23 Q: Did Mr. Levan ever indicate to you that he had a
24 dashboard camera in his vehicle?
- 25 A: I don't recall him ever indicating that to me. It

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LAWRENCE FILIBERTO - REDIRECT BY TRUSLOW

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1 would've been very helpful evidence. But because he had
2 already given a statement of what happened presumably it
3 would've supported that and I think that the jamming of the
4 car might've help bolster the argument for self-defense, but
5 we did get the self-defense charge.

6 Q: Did he ever indicate to you that he wished you to try and
7 retrieve camera feeds from the South Carolina Department of
8 Transportation?

9 A: I don't recall that conversation happening.

10 MR. JAMES: No further questions for this witness.

11 MR. TRUSLOW: Your Honor, just a very quick one question
12 follow-up.

13 REDIRECT EXAMINATION OF LAWRENCE FILIBERTO BY MR. TRUSLOW:

14 Q: Mr. Filiberto, in regards to what you said about his
15 testimony, if you'd just look at what I've circled there and
16 see if that helps you answer that better. The question was
17 his ability to give the version he gave today of the incident
18 night to the jury that day in trial. Does that pretty cover
19 what he was saying happened?

20 A: I'm sorry. Restate your question.

21 Q: I'll let you look at it first.

22 MR. JAMES: May I ask which portion of the transcript
23 you're looking at?

24 Q: What page is that?

25 A: 289.

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LAWRENCE FILIBERTO - REDIRECT BY TRUSLOW

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- 1 Q: 289.
- 2 A: These two circles are what you're talking about?
- 3 Q: Yeah, the one on the first page -- on your left, left
- 4 hand and then the other one.
- 5 A: Okay. That's 280.
- 6 Q: 280 and --9
- 7 A: --- 8, 288.
- 8 Q: 288 and 289.
- 9 A: Okay. I'm saying with respect to that -- what is your
- 10 question?
- 11 Q: The question is, on direct examination, despite being
- 12 nervous and all, he advised the jury that he was scared and he
- 13 was running from Mr. Selmon, correct?
- 14 A: He advised that he was trying to get away from Mr.
- 15 Selmon, correct.
- 16 Q: Okay. After having gone there to see Mr. Selmon?
- 17 A: Correct.
- 18 Q: Okay. And then so I ask you again, you said that you did
- 19 not ask for the charge of self-defense, that the aggressor can
- 20 withdraw and then become -- and then still claim self-defense.
- 21 That charge is not in here, so you didn't ask for that charge,
- 22 under *State v. Graham* and *State v. Duncan*?
- 23 A: I don't recall that I asked for that charge.
- 24 Q: And for -- the record would likely reflect if you had.
- 25 A: Correct.

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BY THE COURT

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1 Q: Okay.

2 A: If I had, it would be in the record.

3 Q: Yes. Nothing further, Your Honor.

4 BY THE COURT:

5 THE COURT: Anything further, Mr. James?

6 MR. JAMES: No, Your Honor.

7 THE COURT: Thank you, sir. You may step down.

8 Mr. Truslow, anything further from the applicant?

9 MR. TRUSLOW: No, nothing further from us, Your Honor.

10 THE COURT: Okay. Mr. James?

11 MR. JAMES: If I may have just one moment to confer with
12 opposing counsel.

13 Your Honor, the state has no witnesses.

14 THE COURT: Okay. I will look over everything carefully
15 and take it under advisement. Thank you.

16 MR. TRUSLOW: Thank you, Your Honor.

17 MR. JAMES: Thank you, Your Honor.

18 ADJOURNED.

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CERTIFICATE OF COURT REPORTER

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C E R T I F I C A T E

I, the undersigned, Kay H. Richardson, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the hearing held in the case of Keith Sheldon Levan v. State of South Carolina, held in the Court of Common Pleas for Horry County, Horry County Courthouse, Conway, South Carolina, on November 30, 2018, as reported by Dixie C. Eubank.

I do hereby certify that I am neither of kin, counsel, nor interest to any party hereto.



Kay H. Richardson

Official Court Reporter

July 23, 2019.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
Keith Sheldon Levan,	)	
S.C.D.C. No. 371451,	)	Case No.: 2017-CP-26-07016
Applicant,	)	
v.	)	
State of South Carolina,	)	
Respondent.	)	

ORDER OF DISMISSAL

2019 MAY 13 PM 2:58
HORRY COUNTY

This matter comes before the Court by way of an application for post-conviction relief filed by Keith Sheldon Levan ("Applicant") on October 24, 2017. Respondent made its return on or about February 5, 2018. The Court convened an evidentiary hearing into the matter on Friday, November 30, 2018, at the Horry County Government and Justice Center in Conway, South Carolina. Applicant was present at the hearing and represented by T. Kirk Truslow, Esq. Johnny Ellis James Jr., of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, Lawrence R. Filiberto, Esq. ("Counsel") also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original trial transcript, the records of the Horry County Clerk of Court regarding the subject convictions, Applicant's direct appeal records, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the April 2016 term of the Horry County Grand Jury for murder (2016-GS-26-01806). Lawrence R. Filiberto, Esq. represented Applicant. Scott R. Hixson, Esq., and Thomas G. Terrell, III, Esq., each of the

Fifteenth Circuit Solicitor's Office, prosecuted the case. On February 13, 2017, Applicant proceeded to trial before the Honorable Steven H. John and a jury. The jury found Applicant guilty as indicted on February 15, 2017. Judge John sentenced Applicant to imprisonment for a term of 40 years.

Applicant filed a timely notice of appeal. By and through appellate counsel T. Kirk Truslow, Esq., Applicant moved to withdraw the direct appeal of his conviction on July 19, 2017. By order filed September 13, 2017, the South Carolina Court of Appeals accordingly dismissed the appeal. The Remittitur was issued on October 17, 2017.

Present Application

In his post-conviction relief application, Applicant alleges he is being held unlawfully for the following reasons:

1. "Trial counsel failed to adequately convey plea offer to Applicant"
 - a. "Manslaughter offer rejected without Applicant's informed consent"
2. "Failure to investigate and adequately prepare for trial"
 - a. "Independent investigation was necessary for Applicant's defense"

By and through PCR counsel Truslow, Applicant amended his application by filing on August 3, 2018, to allege the additional reasons (excerpted verbatim):

3. Ineffective assistance of trial counsel, in that:
 - a. "Trial counsel failed to properly investigate. In particular, trial counsel failed to interview witnesses, obtain and review evidence, identify the clear need for expert witness testimony, and obtain the [proper] testing of evidence, including but not limited to testing of the firearm alleged to have been the murder weapon, as well as the blood found on applicant's clothing."
 - b. "Trial counsel failed to obtain the numerous surveillance videos in the area of the alleged murder."
 - c. "Trial counsel failed to review applicant's telephone records."
 - d. "Trial counsel failed to obtain law enforcement incident reports documenting harassment and stalking claims against the victim filed by applicant and his wife."

- e. "The applicant requested that trial counsel request GPS and other records of a police vehicle that was present just prior to the incident at the incident site location."
- f. "Trial counsel failed to obtain the Facebook evidence documenting the victim's threats against applicant's wife."
- g. "Despite the applicant providing funds for trial counsel to retain the services of a private investigator, and despite applicant specifically requesting trial counsel to interview certain individuals and collect certain evidence, none of the above was accomplished."¹
- h. "Trial counsel failed to visit the incident site and to inspect applicant's vehicle, which would have allowed trial counsel to understand applicant's theory and version of self-defense."
- i. "Trial counsel failed to properly provide a meaningful defense in trial. Trial counsel's opening statement consisted of two paragraphs, and failed to identify a theory, failed to convey the legal principals of reasonable doubt, the presumption of innocence, and the State's burden of proof."
- j. "Trial counsel failed to adequately develop a self-defense theory."
- k. "Trial counsel did not present evidence of whose blood was on applicant's clothing, how the blood got on the clothing, nor was testing of the blood conducted."
- l. "Trial counsel failed to have any ballistic testing conducted of the firearm exhibit in evidence. It became clear long before trial that the State did not conduct ballistic testing, and applicant advised trial counsel that the weapon evidence was not the weapon fired in the shooting."
- m. "Trial counsel failed to provide applicant with any counsel regarding testifying in his own defense. The applicant was told by trial counsel that he must testify, and that he had absolutely no chance of acquittal otherwise. When applicant decided not to testify just prior to being called to the witness stand, trial counsel told applicant that his failure to testify would result in being found in contempt of court, and that the jury would find the decision to be a sign of guilt. Further, trial counsel offered no advice, preparation or counsel as to how to testify before a jury, nor what to expect."
- n. "Applicant advised the trial attorney that he suffered from diagnosed, severe anxiety, and that he would not do well at all on direct examination or cross examination."
- o. "Trial counsel advised applicant that defense witnesses would be subpoenaed to trial. However, days before trial, trial counsel advised applicant that he forgot to prepare and serve subpoenas, and requested that

¹ This was quoted twice within Applicant's Amended PCR Application. For the sake of clarity the duplicate text has been omitted.

applicant and his wife needed to contact any defense witnesses that would testify. At trial, applicant was the only defense witness."

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Butler*, 286 S.C. at 442, 334 S.E.2d 441 (quoting *Strickland v. Washington*, 466 U.S. 668, 686 (1984)). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. *Id.*

"[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (quoting *Strickland*, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). "Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude

that a particular act or omission of counsel was unreasonable.” *Strickland*, 466 U.S. at 689; *Edwards v. State*, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). “[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” *Smith v. State*, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing *Caprood v. State*, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (citing *Strickland*, 466 U.S. at 688). Second, counsel’s deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625 (citing *Strickland*, 466 U.S. at 694).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

a. Failure to Convey Plea Offer

Applicant alleges Counsel was ineffective in failing to adequately convey a plea offer to him prior to trial. At the evidentiary hearing, Applicant testified that Counsel failed to discuss a plea offer of voluntary manslaughter made in December 2016. Applicant stated he was unaware of any details from that offer and did not know the possible sentence for voluntary manslaughter.

Counsel credibly testified after reviewing the evidence against Applicant that his main focus was on mitigation. Counsel stated the Solicitor was amenable to a plea of voluntary manslaughter. Counsel believed Applicant would be better served by accepting the plea offer rather than going to trial. Counsel stated Applicant began to change his position of accepting the plea offer as Applicant became more convinced that his actions were purely out of self-defense, and became unwilling to plead. Counsel required Applicant to sign a form documenting that Applicant was rejecting the voluntary manslaughter plea offer against the advice of Counsel.

Applicant has failed to meet his burden of showing any ineffectiveness on behalf of Counsel. The Court finds Counsel testified credibly as to Applicant's decision not to accept the December 2016 plea offer and instead go forward with trial. The Court finds no credibility in Applicant's assertion that Counsel never discussed the plea offer with him. Applicant's decision to reject the plea offer and instead proceed to trial in no way establishes any ineffectiveness on behalf of Counsel. Accordingly, Applicant has failed to meet his burden under *Strickland* and his request for relief by way of allegation 1.a. is DENIED.

b. Failure to Investigate

Applicant alleges Counsel was ineffective in failing to investigate and obtain witness testimony, relevant physical and forensic evidence, and expert witness testimony. In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. *Harris v. State*, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing *Jackson v. State*, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. *Id.*

(citing *Davis v. State*, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); *Skeen v. State*, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. *Id.*, 377 S.C. at 75, 659 S.E.2d at 145 (citing *Glover v. State*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)). Applicant alleges numerous claims against Counsel for failing to investigate, and the Court will address each in turn.

i. Failure to Interview Witnesses

At the evidentiary hearing, Applicant testified he and Counsel hired a private investigator to whom Applicant provided leads and potential witnesses. Applicant listed a number of witnesses he wanted Counsel and private investigator to pursue, including:

- Others who may have been in or near the Wal-Mart on the night in question;
- The police officer who Applicant recalled had a clear view of the confrontation;
- Sean Veigh;
- Jeff Lafon;
- Heidi Gilcrest;
- Officer Rexsaw; and
- Officer Hemingway.

Applicant testified his colleagues and schoolmates knew of the problems between Applicant and Victim, but Counsel did not subpoena them to testify, nor did Counsel subpoena the police officer or solicitor who Applicant claims to have approached prior to the shooting regarding his ongoing issues with Victim. Applicant claimed Counsel told him he had to subpoena his own witness to testify.

Counsel testified he did not subpoena the ten witnesses Applicant provided him, because he did not find them to be of any help to Applicant or his case. Counsel stated he sent the private investigator to interview the witnesses Applicant provided, however some refused to meet, and others indicated they did not have any knowledge of the events Applicant described. Counsel testified one witness indicated she would say anything Counsel 'needed' her to say on the stand,

and Counsel explained he did not feel comfortable using her as a witness. Counsel recalled explaining to Applicant his reasoning for not calling the witnesses at trial. Counsel testified he contacted the Myrtle Beach Police Department and the Horry County Police Department, and requested documents pursuant to the Freedom of Information Act. Neither Department had any record of Applicant filing complaints or speaking with any officers about Victim prior to the shooting. Counsel further testified Applicant's wife declined to testify at trial due to her own pending charges stemming from Victim's death and upon the advice of her own counsel.

Applicant has failed to meet his burden of showing any ineffectiveness on behalf of Counsel by way of allegations restated above as 2.a. and 3.a. The Court finds Counsel credibly testified he investigated the leads and witnesses offered by Applicant only to find none had any merit—either evidence suggested by Applicant did not exist, did not matter, or suggested witnesses did not corroborate Applicant's version of events. The Court finds no deficiency on the part of Counsel, nor any prejudice to Applicant from Counsel's strategic decisions not to subpoena and call witnesses determined not favorable to his client. Accordingly, Applicant has failed to meet his burden under *Strickland* and his request for relief by way of allegation encompassed by 2.a. and 3.a. is **DENIED**.

ii. Failure to Identify the Need for Expert Witness Testimony

At the evidentiary hearing, Applicant testified he requested an expert witness to review the ballistic evidence to be used at trial because no ballistic testing was ever conducted on the firearm recovered by police. However, Counsel credibly testified that any issue regarding lack of testing was resolved by the inculpatory statement given to police by the Applicant and his wife wherein Applicant admitted to shooting the victim. Counsel explained that because of all of the

overwhelming direct evidence against Applicant in this case, the best course of action was one of mitigation.

Applicant failed to present any new evidence or testimony to this Court at the evidentiary hearing that would indicate expert witness testimony would have been beneficial to his case. Therefore, this Court finds no deficiency on behalf of Counsel by not retaining an expert witness to testify at trial. Applicant has failed to meet his burden under *Strickland* and his request for relief by way of this allegation encompassed by 3.a. is **DENIED** and **DISMISSED**.

iii. Failure to Obtain and Review Evidence

I. Failure to Obtain Surveillance Videos

Applicant testified he asked Counsel to obtain various store surveillance videos from the shopping center where the shooting occurred in order to show Victim's aggression during the confrontation and in order to support his argument of self-defense. Applicant testified Counsel did not go to the stores to obtain the surveillance videos and said he would get them through discovery. Applicant learned after trial the videos had not been available. Applicant stated detectives had gone and viewed the surveillance videos at Wal-Mart, but they never took possession of them. Applicant testified he had driven past Wal-Mart and H.H. Gregg, and believed their store surveillance cameras caught him in frame. Applicant stated the video from the Home Depot² surveillance camera was the only surveillance footage used at trial. Applicant further asserted he wanted Counsel to obtain recordings from surveillance cameras operated by the South Carolina Department of Transportation (SCDOT) around the area where the shooting occurred, which Counsel did not obtain.

² Upon review of Applicant's trial transcript, the surveillance video produced at trial was from Costco, not Home Depot as stated during the evidentiary hearing. Tr. 139

Counsel testified he attempted to get recordings from the surveillance camera located at the rear of the HomeGoods, but learned there was no functioning surveillance system in place. Counsel stated he did not recall that officers went to view security footage at any store, and did not believe that happened. Counsel did not recall Applicant suggesting that he obtain surveillance videos of the area from SCDOT cameras in the area. The Court finds Counsel credibly denied having discussions with Applicant of a dashboard video from Applicant's vehicle or pursuing surveillance videos from SCDOT.

Applicant has failed to meet his burden of showing any ineffectiveness on behalf of Counsel restated above as 3.a. and 3.b. Applicant presented no evidence to satisfy his burden of showing prejudice, as he produced no additional store surveillance videos, or any recordings from SCDOT cameras, other than the sole Costco store surveillance footage used at trial.

The Court finds no deficiency on the part of Counsel, nor any prejudice to Applicant from Counsel's strategic decisions not to subpoena and call witnesses determined not favorable to his client. Accordingly, Applicant has failed to meet his burden under *Strickland* and his request for relief by way of allegation 3.a. and 3.b. is **DENIED** and **DISMISSED**.

2. Failure to Obtain Cellphone Records

Applicant alleges in his application for relief that Counsel failed to obtain independent cellphone records, claiming that the Cellebrite data recovered by law enforcement and used at trial were altered. At the evidentiary hearing, Applicant claimed he had been in contact with a detective about the Victim threatening and harassing his wife prior to the shooting, and could prove this with the 'unaltered' cellphone data. Counsel testified Applicant never gave him his cell phone to get independent data from, nor did Applicant request these records to be obtained during trial preparation. He explained he reviewed all discovery with Applicant, and credibly testified there

was nothing to show the Cellebrite records were altered. Applicant failed to present any evidence or testimony to corroborate these claims at the PCR hearing, nor did Applicant present any witnesses to verify that the Cellebrite data collected by law enforcement was compromised. This Court finds Counsel was not ineffective in failing to obtain independent records from Applicant's cell phone. Therefore, Applicant has failed to meet his burden under *Strickland* and his request for relief by way of allegation 3.c. is **DENIED** and **DISMISSED**.

3. Failure to Obtain Law Enforcement Records

Applicant alleges in his application for relief that Counsel failed to obtain police incident reports filed by Applicant and his wife, and failed to obtain the GPS records of a patrol car that was parked close to the incident site. At the evidentiary hearing, Applicant claimed he met with a detective and had filed numerous reports documenting that victim was stalking and harassing Applicant's wife prior to the shooting. Applicant claimed he spoke with a detective who was aware of Victim's alleged harassing behavior towards Applicant's wife, and filed incident reports of this behavior with law enforcement. He explained he only confronted Victim based on the advice of law enforcement and a local solicitor, and that he was afraid of Victim.

Counsel testified he contacted the City of Myrtle Beach Police Department and the Horry County Police Department and filed motions pursuant to the Freedom of Information Act ('FOIA'), but neither had any record of Applicant meeting with detectives or filing a police report. At trial, Officer Orian Cozene testified that there was no record of Applicant ever contacting or having filed a report with the police department about the Victim, or having met with a detective. Tr. 234-35.

Applicant further claimed he requested Counsel to obtain GPS or other records from the police vehicle he claimed was in the area just prior to the incident, however Counsel never

produced or requested this information. Applicant believed the GPS data would corroborate his assertion of police presence in the area and would allow Counsel to interview that officer.

Counsel explained that even if a police deputy was at the Wal-Mart, as indicated by Applicant, any such officer would not have been able to see behind the Homegoods, a quarter-mile away, where the shooting occurred, and would not have been able to provide any direct eyewitness testimony.

Applicant has failed to meet his burden of showing any ineffectiveness on the part of Counsel by way of allegations restated above as 3.d. and 3.e. First, Applicant presented *no evidence* to satisfy his burden of showing prejudice, as he produced no records of prior complaints filed with law enforcement, and no records to show a law enforcement officer present near the scene of the shooting. As such, this Court is left to speculate as to how any of these records could have benefited Applicant at trial, and find Applicant was not prejudiced by any of these allegations. Second, Applicant failed to present any testimony or evidence at the evidentiary hearing to show the FOIA responses provided to Counsel or Officer Cozene's trial testimony was not credible. Where Applicant's testimony on these issues is in conflict with that of Counsel's, this Court finds Applicant's testimony not credible. This Court finds no deficiency on the part of Counsel, nor any prejudice to Applicant in regards to these allegations. Accordingly, Applicant's request for relief by way of allegation 3.d. and 3.e. is **DENIED** and **DISMISSED**.

4. Failure to Obtain Facebook Messages

Applicant alleges Counsel was ineffective in failing to obtain the allegedly harassing Facebook messages sent to Applicant's wife by Victim. This allegation is largely addressed on the same law and facts as set forth in Section II.A.b. above—Applicant recalled asking Counsel to subpoena Facebook records to get Victim's threats against him and his wife, however, Applicant

provided no evidence to corroborate this claim, nor did his wife testify to address those messages at the evidentiary hearing.

Counsel explained Applicant's wife deleted her Facebook which prevented him from reviewing any conversations between her profile and Victim's. Applicant has failed to meet his burden of proof as to either prong of *Strickland* and, as such, his request for relief by way of allegation 3.f. is **DENIED** and **DISMISSED**.

5. Failure to Visit Incident Site and Inspect Vehicle

Applicant alleges Counsel was ineffective in failing to visit the incident site and inspect Applicant's vehicle, which prevented Counsel from understanding Applicant's theory of self-defense. This allegation is largely addressed on the same law and facts as set forth in Section II.A.b. above—Applicant claimed he had a functioning dashboard camera installed in his vehicle that would have recorded the whole incident, and recalled telling Counsel this, but he failed to recover the dashcam and it was not introduced at trial. Counsel did not recall Applicant ever mentioning a dashboard camera in his vehicle. Additionally, Counsel testified that Applicant's vehicle had no damage—compared to Victim's, which had multiple bullet holes. Applicant has failed to meet his burden of proof as to either prong of *Strickland* and, as such, his request for relief by way of allegation 3.h. is **DENIED** and **DISMISSED**.

FAILURE TO PRESENT ADEQUATE DEFENSE AT TRIAL

c. Failure to Present Opening Argument

Applicant alleges Counsel was ineffective in failing to present an effective opening statement. At trial, Counsel gave a very brief opening statement that simply admonished the jury to keep an open mind, use its common sense, and apply the law as the trial judge provided it. (Tr. 75-76). At the evidentiary hearing, Counsel acknowledged the brevity of his opening statement,

and explained his reasoning for not including reasonable doubt because "the court already did" and Counsel believed it would be repetitive.

Applicant has failed to meet his burden of showing any ineffectiveness in Counsel's opening statement. The legal principles of reasonable doubt, the presumption of innocence, and the State's burden to prove Applicant's guilt beyond a reasonable doubt were all communicated to the jury by the trial court. (Tr. 68-71; Tr. 314-15; Tr. 328, ll. 2-18; Tr. 370-83). As to Counsel's alleged failure to present Applicant's "theory of the case," to the jury, Applicant did not offer to this Court what Counsel should have set forth in his opening statement. Furthermore, Counsel's theory was made apparent throughout the trial particularly in closing arguments. The brevity of Counsel's opening statements, alone, is not adequate to establish ineffectiveness. Thus, the Court cannot find any conceivable prejudice to Applicant. Accordingly, Applicant has failed to meet his burden under *Strickland*, and his request for relief by way of allegation 1.i. is **DENIED**.

d. Failure to Develop Self-Defense Theory

Applicant alleges Counsel was ineffective in failing to adequately develop a self-defense theory of the case. To establish self-defense in South Carolina, four elements must be present:

- (1) The defendant must be without fault in bringing on the difficulty;
- (2) The defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury;
- (3) If his defense is based upon his belief of imminent danger, defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was actually in imminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life; and
- (4) The defendant had no other probable means of avoiding the danger

State v. Washington, 424 S.C. 374, 411, 818 S.E.2d 459, 478 (Ct. App. 2018) (quoting *State v. Slater*, 373 S.C. 66, 69-70, 644 S.E.2d 50, 52 (2007)). Once established, the State must disprove self-defense beyond a reasonable doubt. *Id.*, 424 S.C. at 410, 818 S.E.2d at 478. However, “[a]ny act of the accused in violation of the law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars his right to assert self-defense as a justification or excuse for a homicide.” *Id.*, 424 S.C. at 411, 818 S.E.2d at 478-79 (quoting *State v. Bryant*, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999)). Furthermore, “[t]he law says if one can give back or step aside, or retreat without increasing his danger, and thus avoid taking human life, it is his duty to do so, and unless he has done so, it will not permit his plea of self-defense.” *Id.*, 424 S.C. at 412, 818 S.E.2d at 479 (quoting *State v. Burris*, 334 S.C. 256, 268, 513 S.E.2d 104, 111 (1999)).

This Court will not restate here every fact in the record potentially relevant to the applicability or inapplicability of self-defense in this case, but will touch on its specific mention at trial. The State first raised the possibility of self-defense in its opening statement to the jury, rhetorically asking: “Why did that man at that table kill Barry Selmon that morning? Was it out of self-defense? You’ll have to decide. Is shooting a fleeing, unarmed man in the back self-defense?” (Tr. 72, ll. 21-24). The State again noted it near the end of its opening, instructing the jury that “at the end of the trial, after you’ve heard all the evidence, you’ve seen the videos, we’ll ask you to decide, was it self-defense? We’ll ask you to decide that it’s not self-defense[.]” (Tr. 75, ll. 7-9). Counsel did not specifically mention self-defense, but rather admonished the jury to keep an open mind, use its common sense, and apply the law as the trial judge provided it. (Tr. 75-76).

During the charge conference, Counsel’s first request was for a self-defense charge, which the State did not contest. (Tr. 317-18). Counsel also asked for a charge on voluntary manslaughter,

which the trial court granted over the State's objections. (Tr. 318-26). Because of the self-defense charge, the trial court confirmed upon Counsel's inquiry that it would not charge the inference of malice from the use of a deadly weapon. (Tr. 326, ll. 10-19). The trial court so instructed the jury on self-defense. (Tr. 377-81).

In closing, the State refuted self-defense element by element, arguing Applicant brought about the confrontation by arming himself and going to the "surreptitious meeting," that Applicant could not have actually feared Victim's possession of a weapon where Victim possessed no weapon and where Applicant was himself armed with an AR-15, and that Applicant had many other means of avoiding the confrontation in the first place. (Tr. 355-57). Counsel, in closing, argued that many people carry weapons with them when they leave home in the morning, that Applicant changed his mind about meeting Victim while waiting in the parking lot, and only revealed himself to Victim after realizing Victim was following him. (Tr. 359, ll. 4-22). Counsel argued Applicant was struck by Victim's vehicle, was bleeding, and only then grabbed his rifle and discharged it at Victim's vehicle. (Tr. 359-60). Counsel asserted Applicant "was in fear for his life" and conceded, as Applicant did, that Applicant should not have gone to confront the Victim, but was merely trying to get the man to leave his family alone. (Tr. 360, ll. 15-22). Counsel emphasized Applicant's cooperation with law enforcement, his willingness to direct investigators to the location of the gun, and that Applicant's vehicle was blocked such that he could not flee. (Tr. 360-62). Counsel again walked through the facts in the context of the elements of self-defense. (Tr. 362-64). In reply closing, the State emphasized Applicant's statements to police that he went to confront Victim with the specific intent of scaring him or shooting at his vehicle. (Tr. 365-66).

Applicant's various investigatory allegations, and the scope of Counsel's investigation, is largely set forth in Section II.A.b., above. At the evidentiary hearing, Applicant testified he and Counsel discussed the possibility of a self-defense strategy at trial. However, Applicant further testified Counsel never clearly indicated to him the strategy he ultimately intended to implement at trial. As to the tangentially related question of whether Applicant should or had to testify, Applicant claimed Counsel told him he had no rights, that backing out of testifying would be a sign of obvious guilt, and that he would be held in contempt if he did so. Applicant claimed Counsel did not prepare him to testify.

On cross-examination, Applicant conceded he used his wife's Facebook account to message the Victim, and planned to confront him around 4 a.m. Applicant took his wife's Volvo and went to the meeting place armed with a rifle. Applicant conceded his rifle shot Victim, but contended that Victim shot himself. Applicant asserted he armed himself per *State v. McCaskill*, but when pressed further conceded he had not read the case prior to actually going out to meet Victim. Applicant testified he was too afraid to meet with Victim, so he took the rifle with him. Pressed by Respondent with the alternative possibility of meeting Victim at the police station, Applicant replied he did not think Victim would have agreed to meet there. Applicant testified he did not remember his wife telling him not to confront Victim.

Counsel testified the central problem to the case was that Applicant set up the confrontation. Counsel indicated his belief that he was ultimately fighting a mitigation case, but noted that he did successfully secure charges on both self-defense and voluntary manslaughter. Counsel instructed Applicant that it was his right to either testify or not testify, and explained issues that would arise in cross-examination. Counsel advised Applicant his testimony was necessary to establish both self-defense and voluntary manslaughter. Counsel emphasized to the

Court that there was no chance to establish a viable self-defense claim without Applicant's testimony. Counsel in particular noted that the video from Applicant's home surveillance system, showing him preparing his rifle prior to the confrontation, was highly damaging to Applicant's case. On cross-examination, Counsel also acknowledged no weapon was ever recovered from Victim's vehicle. Counsel offered a conservative estimate of fifty to sixty hours spent preparing Applicant to testify. Counsel denied ever telling Applicant he would be held in contempt if chose not to testify.

The Court finds no deficiency of Counsel by way of this allegation, nor any prejudice to Applicant from the deficiency alleged. Given the totality of the facts before this Court, including those presented at trial and the testimony presented during the evidentiary hearing, this Court finds Counsel effectively and adequately advanced a theory of self-defense on Applicant's behalf at trial. Counsel correctly identified the strengths and weaknesses of the self-defense strategy during the evidentiary hearing, as well as during his own tactful treatment of the evidence during his closing argument at trial. This Court finds Counsel testified credibly as to all matters relating to this allegation, and finds no credibility in Applicant's assertions that Counsel: (1) coerced him into testifying by telling him he would be held in contempt if he did not do so; (2) did not prepare him to testify; and (3) did not explain to him the strategies available and to be pursued at trial. The Court also finds no credibility in Applicant's testimony at the evidentiary hearing that he did not intentionally discharge his firearm. The Court finds Applicant has presented no evidence to show how he could have more likely prevailed upon the theory of self-defense if Counsel had committed additional time to preparation on the subject. Furthermore, given the facts set forth at trial and the evidence now before it, this Court finds Applicant has failed to show any possibility, let alone a reasonable probability that the jury would have or could have reached a different outcome given