

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
Honorable Paul M. Burch, Circuit Court Judge

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S.C. SUPREME COURT

MARION ALEXANDER LINDSEY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001271

APPENDIX

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INDEX

INDEX.....	i
TRIAL TRANSCRIPT.....	1
COURT REPORT'S INDEX.....	2
JURY QUALIFICATION.....	26
TESTIMONY (COMPETENCY HEARING)	
DR. PRATAP NARAYAN	
Direct Examination by Solicitor Willingham.....	126
Cross Examination by Mr. Bartosh.....	131
Redirect Examination by Solicitor Willingham	136
Recross Examination by Mr. Bartosh	137
DEFENSE MOTION NOT TO SEQUESTER JURY	139
DEFENSE MOTION FOR JURY NOT TO BE HANDLED BY SLED	139
DEFENSE MOTION FOR JURY TO PICK FOREMAN	140
DEFENSE MOTION TO BE SEATED NEAR JURY	140
TESTIMONY (VOIR DIRE)	
RODNEY PETTY	
Examination by The Court.....	176
Examination by Mr. Bartosh.....	185
Examination by Solicitor Gowdy.....	188
Examination by The Court.....	191
JOHN HOVELSRUND	
Examination by The Court.....	201
Examination by Mr. Bartosh.....	205
Examination by Solicitor Gowdy.....	207
SHERIL CUDD	
Examination by The Court.....	214
Examination by Mr. Bartosh.....	218
Examination by Solicitor Willingham	223

JOHN HOVELSRUND	
Examination by The Court	228
ASHLEY DRISCOLL	
Examination by The Court	231
Examination by Mr. Brennan	235
Examination by Solicitor Gowdy	236
RICKY LEE	
Examination by The Court	246
Examination by Mr. Brennan	250
Examination by Solicitor Barnett	257
CARLA HOWELL	
Examination by The Court	261
Examination by Mr. Bartosh	266
Examination by Solicitor Barnett	272
COLLOQUY REGARDING DOCUMENTATION TO SUPPORT	
DR. NARAYAN'S EVALUATION	277
TESTIMONY (VOIR DIRE)	
JANET PRASANLACK	
Examination by The Court	281
Examination by Mr. Bartosh	285
Examination by Solicitor Willingham	291
TAMMY QUEEN	
Examination by The Court	296
Examination by Mr. Bartosh	303
Examination by The Court	312
LUTHER CULPEPPER	
Examination by The Court	316
JON KRISHER	
Examination by The Court	317
Examination by Mr. Bartosh	322
Examination by Solicitor Barnett	326
Examination by Mr. Bartosh	330
Examination by Solicitor Barnett	331
COLLOQUY REGARDING PROSPECTIVE JUROR	332

TESTIMONY (VOIR DIRE)

ANGELA HALEY

Examination by The Court 338

DARCY THOMPSON

Examination by The Court 345

Examination by Mr. Brennan 350

Examination by Solicitor Willingham 352

TOMMY BROWN

Examination by The Court 361

Examination by Mr. Brennan 369

Examination by Solicitor Barnett 373

Examination by Mr. Brennan 381

JAMES GEDROIC

Examination by The Court 385

Examination by Mr. Bartosh 390

Examination by Solicitor Willingham 394

JOANN NETHERTON

Examination by The Court 398

Examination by Mr. Bartosh 405

Examination by Solicitor Willingham 412

TERESA GILBERT

Examination by The Court 426

EMMA ELLIS

Examination by The Court 430

Examination by Mr. Brennan 434

Examination by Solicitor Gowdy 440

Examination by The Court 450

SHIRLEY MCDOWELL

Examination by The Court 453

JAMES CREEL

Examination by The Court 460

Examination by Ms. Quimby 468

Examination by Solicitor Gowdy 478

MIGUEL MARTINEZ	
Examination by The Court	482
Examination by Mr. Bartosh	498
Examination by Solicitor Gowdy	501
MARTHA SALLIS	
Examination by The Court	502
Examination by Mr. Bartosh	507
Examination by Solicitor Barnett	513
DANNY GOMES	
Examination by The Court	517
Examination by Mr. Brennan	521
Examination by Solicitor Barnett	524
TODD HILLSTOCK	
Examination by The Court	552
Examination by Mr. Brennan	555
Examination by Solicitor Willingham	560
HAROLD MARCUM	
Examination by The Court	563
BRENDA SMITH	
Examination by The Court	567
Examination by Mr. Brennan	572
Examination by Solicitor Willingham	575
LORI BURNETT	
Examination by The Court	579
LARRY MAULDIN	
Examination by The Court	584
Examination by Mr. Brennan	589
Examination by Solicitor Barnett	592
ISABELL WILLIAMS	
Examination by The Court	594
Examination by Mr. Brennan	598
Examination by Solicitor Barnett	603
Examination by The Court	611
MACKENZIE LEAKE	
Examination by The Court	616

WILMA LANGFORD	
Examination by The Court	620
GARY MCHAM	
Examination by The Court	626
JERLYN MILLER	
Examination by The Court	634
RICHARD SMITH	
Examination by The Court	638
Examination by Mr. Brennan	643
Examination by Solicitor Barnett	650
Examination by The Court	653
COLLOQUY REGARDING PROSPECTIVE JUROR	659
TESTIMONY (VOIR DIRE)	
DONALD RAY	
Examination by The Court	660
Examination by Mr. Brennan	665
Examination by Solicitor Barnett	669
Examination by The Court	672
COLLOQUY REGARDING PROSPECTIVE JUROR	676
TESTIMONY (VOIR DIRE)	
JOHN POOLE	
Examination by The Court	679
Examination by Mr. Bartosh	689
Examination by Solicitor Gowdy	695
COLLOQUY REGARDING PROSPECTIVE JUROR	697
TESTIMONY (VOIR DIRE)	
JOHN POOLE	
Examination by The Court	701
DEAN ISRAEL	
Examination by The Court	706
Examination by Mr. Brennan	711
Examination by Solicitor Gowdy	715

COLLOQUY REGARDING PROSPECTIVE JUROR.....	720

TESTIMONY (VOIR DIRE)

JEFFREY RHINEBERGER

Examination by The Court.....	724
Examination by Mr. Bartosh.....	728
Examination by Solicitor Gowdy.....	734

KIM ROGERS

Examination by The Court.....	738
Examination by Mr. Brennan.....	743
Examination by Solicitor Gowdy.....	746

COLLOQUY REGARDING PROSPECTIVE JUROR.....	750

TESTIMONY (VOIR DIRE)

KEVIN CARTLEDGE

Examination by The Court.....	753
Examination by Mr. Brennan.....	758
Examination by Solicitor Willingham.....	761

COLLOQUY REGARDING PROSPECTIVE JUROR.....	767

TESTIMONY (VOIR DIRE)

KENNETH REESE

Examination by The Court.....	769
Examination by Mr. Bartosh.....	773
Examination by Solicitor Barnett.....	778

COLLOQUY REGARDING PROSPECTIVE JUROR.....	782

TESTIMONY (VOIR DIRE)

KENNETH REESE

Examination by The Court.....	793

TIMOTHY BREWTON

Examination by The Court.....	797
Examination by Mr. Bartosh.....	804
Examination by The Court.....	807
Examination by Mr. Bartosh.....	808
Examination by Solicitor Barnett.....	810

ALETHA MISENHEIMER	
Examination by The Court	815
COLLOQUY REGARDING PROSPECTIVE JUROR.....	820
TESTIMONY (VOIR DIRE)	
SAMUEL BARNWELL	
Examination by The Court	826
Examination by Mr. Brennan.....	830
Examination by Solicitor Willingham	835
COLLOQUY REGARDING PROSPECTIVE JUROR.....	838
TESTIMONY (VOIR DIRE)	
SAMUEL BARNWELL	
Examination by Solicitor Willingham	843
COLLOQUY REGARDING PROSPECTIVE JUROR.....	846
TESTIMONY (VOIR DIRE)	
JAMI STURGEON	
Examination by The Court	850
Examination by Mr. Bartosh.....	855
Examination by Solicitor Gowdy.....	861
MATTHEW SMITH	
Examination by The Court	865
JOSEPH FLOYD	
Examination by The Court	869
Examination by Mr. Bartosh.....	874
Examination by Solicitor Willingham	884
Examination by Mr. Bartosh.....	889
COLLOQUY REGARDING PROSPECTIVE JUROR.....	890
TESTIMONY (VOIR DIRE)	
JOANN NETHERTON	
Examination by The Court	897

LINDA FULLER	
Examination by The Court	909
Examination by Mr. Brennan	915
WILLIAM ATKINS	
Examination by The Court	921
MARVIN SMITH	
Examination by The Court	928
Examination by Mr. Brennan	932
Examination by Solicitor Gowdy	937
Examination by Mr. Brennan	943
Examination by Solicitor Gowdy	944
Examination by Mr. Brennan	949
JAMES COTTRELL	
Examination by The Court	950
COLLOQUY REGARDING PROSPECTIVE JUROR	954
TESTIMONY (VOIR DIRE)	
HEATHER SNITE	
Examination by The Court	955
MICHAEL DAWSON	
Examination by The Court	956
Examination by Mr. Bartosh	960
Examination by Solicitor Barnett	964
Examination by Mr. Bartosh	968
COLLOQUY REGARDING PROSPECTIVE JUROR	972
TESTIMONY (VOIR DIRE)	
PAM GARDNER	
Examination by The Court	982
Examination by Mr. Brennan	987
Examination by Solicitor Barnett	992
COURT'S REMARKS	995

TESTIMONY (VOIR DIRE)

JACKIE BARHAM

Examination by The Court	996
Examination by Mr. Bartosh	1000
Examination by Solicitor Willingham	1006

TESTIMONY (VOIR DIRE)

JUDY FOLK

Examination by The Court	1008
Examination by Mr. Brennan	1013
Examination by Solicitor Barnett	1020

COLLOQUY ON JURY SELECTION	1021

PREVIOUS MOTIONS RENEWED	1024

TESTIMONY (VOIR DIRE)

PATRICIA THOMAS

Examination by The Court	1026

THOMAS WILLIAMS

Examination by The Court	1031

AMANDA HAMBY

Examination by The Court	1034

STANLEY FIELDS

Examination by The Court	1036
Examination by Mr. Brennan	1041
Examination by Solicitor Barnett	1045

JEFFREY SEAY

Examination by The Court	1048
Examination by Mr. Bartosh	1054
Examination by Solicitor Gowdy	1061

ALONZO ROBINSON

Examination by The Court	1064
Examination by Mr. Bartosh	1069

MELODY RIDDLE	
Examination by The Court	1096
Examination by Mr. Brennan	1101
Examination by Solicitor Gowdy	1104
Examination by Mr. Bartosh	1107
COLLOQUY REGARDING PROSPECTIVE JUROR	1109
TESTIMONY (VOIR DIRE)	
JOYCE MARTIN	
Examination by The Court	1111
TRACY WHITAKER	
Examination by The Court	1116
SARAH SIMMS	
Examination by The Court	1121
WILLIAM PARNELL	
Examination by The Court	1128
Examination by Mr. Brennan	1132
Examination by Solicitor Willingham	1137
COLLOQUY REGARDING PROSPECTIVE JURORS	1141
TESTIMONY (VOIR DIRE)	
TRACY HOLLINGSWORTH	
Examination by The Court	1143
Examination by Mr. Brennan	1147
Examination by Solicitor Willingham	1156
BRANDON GREENWAY	
Examination by The Court	1160
Examination by Mr. Brennan	1165
COLLOQUY REGARDING PROSPECTIVE JUROR	1167
TESTIMONY (VOIR DIRE)	
JOSHUA BENNETT	
Examination by The Court	1169
Examination by Mr. Bartosh	1175

TRACY BROCK

Examination by The Court	1184
Examination by Mr. Bartosh	1195
Examination by Solicitor Gowdy	1215

COLLOQUY REGARDING PROSPECTIVE JUROR	1219

TESTIMONY (VOIR DIRE)

JOYCE MARTIN

Examination by The Court	1229

CAROLE HILL

Examination by The Court	1232
Examination by Mr. Bartosh	1237
Examination by Solicitor Gowdy	1240

COLLOQUY REGARDING PROSPECTIVE JUROR	1250

TESTIMONY (VOIR DIRE)

LINDA JONES

Examination by The Court	1263
Examination by Mr. Bartosh	1267
Examination by Solicitor Barnett	1275
Examination by Mr. Bartosh	1277

JANE VELLINES

Examination by The Court	1283
Examination by Mr. Bartosh	1287
Examination by Solicitor Willingham	1294

MATT KERN

Examination by The Court	1296
Examination by Mr. Bartosh	1300
Examination by Solicitor Barnett	1305

THADDEUS BECK

Examination by The Court	1307
Examination by Mr. Bartosh	1311
Examination by Solicitor Willingham	1316

OTIS CAMPBELL

Examination by The Court	1320

JAMES GENTRY	
Examination by The Court	1323
Examination by Mr. Bartosh	1327
Examination by Solicitor Gowdy	1333
COLLOQUY REGARDING JURY SELECTION	1339
COLLOQUY REGARDING ENHANCED 911 TAPE	1342
TESTIMONY (VOIR DIRE)	
RICHARD SMITH	
Examination by The Court	1349
JOANN NETHERTON	
Examination by The Court	1350
Examination by Solicitor Barnett	1351
COLLOQUY REGARDING EXAMINATION OF DEFENDANT BY THE PROSECUTION'S EXPERT WITNESS	1353
COLLOQUY REGARDING PRIOR MOTIONS	1355
TESTIMONY (VOIR DIRE)	
PAMELA BAGWELL	
Examination by The Court	1359
CLARA COPE	
Examination by The Court	1362
Examination by Mr. Bartosh	1368
THADDEUS BECK	
Examination by The Court	1373
THOMAS OLIVER	
Examination by The Court	1375
Examination by Mr. Bartosh	1381
Examination by Solicitor Willingham	1382
LEONARD COGDILL	
Examination by The Court	1384
Examination by Mr. Bartosh	1390
Examination by Solicitor Barnett	1396

MICHAEL WEEKS	
Examination by The Court	1398
Examination by Mr. Bartosh	1402
Examination by Solicitor Willingham	1404
Examination by The Court	1408
COLLOQUY REGARDING PROSPECTIVE JUROR	1409
TESTIMONY (VOIR DIRE)	
AMANDA MORTON	
Examination by The Court	1412
Examination by Mr. Bartosh	1416
Examination by Solicitor Barnett	1423
BRANDON GREENWAY	
Examination by The Court	1426
Examination by Mr. Bartosh	1427
JURY QUALIFICATION	1434
TESTIMONY (VOIR DIRE)	
JANET PRASANLACK	
Examination by The Court	1438
Examination by Mr. Bartosh	1441
JURY QUALIFICATION	1443
JURY SELECTION	1444
SWEARING-IN OF SELECTED JURORS	1454
COLLOQUY REGARDING 911 TAPE	1466
OPENING INSTRUCTIONS BY THE COURT	1487
OPENING STATEMENT BY SOLICITOR BARNETT	1499
OPENING STATEMENT BY MR. BRENNAN	1503
TESTIMONY	
FREDDY THOMPSON	
Direct Examination by Solicitor Barnett	1505

CHARLES CLAVENGER	
Direct Examination by Solicitor Barnett.....	1508
DIANNA DANIELS	
Direct Examination by Solicitor Gowdy.....	1510
CELESTE NESBITT	
Direct Examination by Solicitor Gowdy.....	1515
Cross Examination by Mr. Brennan.....	1538
<u>IN CAMERA</u> HEARING ON SCOPE OF MS. NESBITT'S TESTIMONY	1542
TESTIMONY	
CELESTE NESBITT	
Redirect Examination by Solicitor Gowdy.....	1554
HARVEY "BENNY" GODFREY	
Direct Examination by Solicitor Gowdy.....	1561
Cross Examination by Mr. Brennan.....	1576
GUY CARTER	
Direct Examination by Solicitor Barnett.....	1578
Cross Examination by Mr. Brennan.....	1581
DOUG BISHOP	
Direct Examination by Solicitor Willingham	1582
RANDY BOGAN	
Direct Examination by Solicitor Willingham	1585
Cross Examination by Mr. Brennan.....	1605
DANNY DEFREEZE	
Direct Examination by Solicitor Willingham	1608
Cross Examination by Mr. Brennan.....	1622
TESTIMONY	
DR. DAVID WREN	
Direct Examination by Solicitor Gowdy.....	1649
JURY MATTER	1660
COLLOQUY REGARDING DEFENDANT'S RIGHT TO TESTIFY	1662

TESTIMONY

JASON STEWART

Direct Examination by Mr. Brennan.....1668

VIRGINIA LINDSEY

Direct Examination by Mr. Brennan.....1674

CHRISTOPHER WILKINS

Direct Examination by Mr. Brennan.....1677

COLLOQUY REGARDING DEFENDANT'S RIGHT TO TESTIFY.....1680

CHARGE CONFERENCE.....1682

CLOSING ARGUMENT BY SOLICITOR GOWDY 1696

CLOSING ARGUMENT BY MR. BRENNAN.....1703

CHARGE ON THE LAW.....1706

VERDICT.....1716

COLLOQUY REGARDING EVIDENCE DURING SENTENCING PHASE 1724

OPENING INSTRUCTION.....1738

OPENING STATEMENT BY SOLICITOR WILLINGHAM.....1742

OPENING STATEMENT BY MR. BARTOSH.....1746

TESTIMONY

KIERAP.

Direct Examination by Solicitor Gowdy.....1749

Cross Examination by Mr. Bartosh.....1756

Redirect Examination by Solicitor Gowdy.....1757

Recross Examination by Mr. Bartosh.....1758

CELESTE NESBITT

Direct Examination by Solicitor Gowdy.....1759

(IN CAMERA) Direct Examination by Solicitor Gowdy.....1762

Cross Examination by Mr. Bartosh.....1783

RANDY BOGAN

Direct Examination by Solicitor Barnett.....	1792
Cross Examination by Mr. Bartosh.....	1802

DOUG BISHOP

Direct Examination by Solicitor Barnett.....	1803

MARY LYLES

Direct Examination by Solicitor Barnett.....	1806
Cross Examination by Mr. Bartosh.....	1808

SHARON SMITH

Direct Examination by Solicitor Barnett.....	1809
Cross Examination by Mr. Bartosh.....	1825
Redirect Examination by Solicitor Barnett.....	1828

TESTIMONY

CHRIS SMITH

Direct Examination by Solicitor Willingham.....	1829
Cross Examination by Mr. Bartosh.....	1845
Redirect Examination by Solicitor Gowdy.....	1860
Recross Examination by Mr. Bartosh.....	1861

BRIAN DUNCAN

Direct Examination by Solicitor Barnett.....	1862
Cross Examination by Mr. Bartosh.....	1865
Redirect Examination by Solicitor Barnett.....	1866

JANE MILLWOOD

Direct Examination by Solicitor Willingham.....	1866

ASHLEY HARRIS

Direct Examination by Solicitor Willingham.....	1869
Cross Examination by Mr. Bartosh.....	1877

CELESE NESBITT

Direct Examination by Solicitor Gowdy.....	1878

<u>IN CAMERA</u> DEMONSTRATION OF WITNESS WITH VEHICLE.....	1881

TESTIMONY

CELESTE NESBITT

Direct Examination by Solicitor Gowdy.....	1894

JURY VIEW DEMONSTRATION WITH VEHICLE 1895

COLLOQUY REGARDING JURY DEMONSTRATION WITH VEHICLE..... 1896

TESTIMONY

JAMES SLIGH

Direct Examination by Solicitor Willingham 1908

Cross Examination by Mr. Bartosh..... 1912

Redirect Examination by Solicitor Willingham 1914

Recross Examination by Mr. Bartosh 1916

BRIAN WHITE

Direct Examination by Solicitor Willingham 1917

Cross Examination by Mr. Bartosh..... 1922

CATHY MULLINAX

Direct Examination by Solicitor Willingham 1924

Cross Examination by Mr. Bartosh..... 1927

SARAH SIMMONS

Direct Examination by Solicitor Barnett..... 1930

Cross Examination by Mr. Bartosh..... 1938

STANFORD WILKINS

Direct Examination by Solicitor Willingham 1940

Cross Examination by Mr. Bartosh..... 1946

JESSICA CANNON

Direct Examination by Solicitor Willingham 1947

MARTHA SMITH

Direct Examination by Solicitor Willingham 1951

STANLE STAGGS

Direct Examination by Solicitor Gowdy..... 1954

Cross Examination by Mr. Bartosh..... 1965

MOTION FOR DIRECTED VERDICT 1971

TESTIMONY

ANN HOWARD

Direct Examination by Mr. Bartosh 1984

Cross Examination by Solicitor Barnett..... 1989

Redirect Examination by Mr. Bartosh 1993

COLLOQUY REGARDING ANN HOWARD'S QUALIFICATIONS	1996
TESTIMONY	
DR. MARGARET MELIKIAN	
Direct Examination by Mr. Bartosh.....	2000
Cross Examination by Solicitor Willingham.....	2014
Redirect Examination by Mr. Bartosh	2042
VIRGINIA LINDSEY	
Direct Examination by Mr. Bartosh.....	2044
Cross Examination by Solicitor Gowdy.....	2060
BILL BURTON	
Direct Examination by Mr. Bartosh.....	2061
Cross Examination by Solicitor Gowdy.....	2068
Redirect Examination by Mr. Bartosh	2070
LEON MCDOWELL	
Direct Examination by Mr. Bartosh.....	2070
CHRIS WILKINS	
Direct Examination by Mr. Brennan.....	2072
Cross Examination by Solicitor Willingham.....	2076
STEVEN PILGRIM	
Direct Examination by Mr. Bartosh.....	2078
BESSIE SMITH	
Direct Examination by Mr. Bartosh.....	2080
COLLOQUY ON ADMISSIBILITY OF SUICIDE ATTEMPT	2083
COLLOQUY REGARDING DEFENDANT'S RIGHT TO TESTIFY.....	2085
CHARGE CONFERENCE.....	2091
CLOSING ARGUMENT BY SOLICITOR GOWDY	2106
STATEMENT BY THE DEFENDANT	2125
CLOSING ARGUMENT BY MR. BARTOSH.....	2131
CHARGE ON THE LAW.....	2148
JURY QUESTIONS.....	2164

VERDICT	2169
MOTIONS	2172
SENTENCING	2173
AGGRAVATING CIRCUMSTANCES VERDICT FORM.....	2177
DEATH SENTENCE.....	2178
AFFIRMATION OF DEATH SENTENCE.....	2179
REPORT OF THE TRIAL JUDGE.....	2180
APPLICATION FOR POST-CONVICTION RELIEF	2192
RETURN AND RULE 12(e) REQUEST FOR SPECIFICITY	2199
AMENDED APPLICATION FOR POST-CONVICTION RELIEF	2210
RETURN OF RESPONDENT'S AMENDED APPLICATION FOR POST-CONVICTION RELIEF	2217
PRE-TRIAL MOTION.....	2267
POST-CONVICTION RELIEF HEARING TRANSCRIPT	2285
TESTIMONY	
DOUGLAS BRANNON	
Direct Examination by Mr. Vieth.....	2295
Cross Examination by Mr. Zelenka	2313
Redirect Examination by Mr. Vieth.....	2346
TORA BRAWLEY	
Direct Examination by Ms. Norris	2354
Cross Examination by Mr. Zelenka	2369
Redirect Examination by Ms. Norris	2377
Recross Examination by Mr. Zelenka.....	2378
VINCENT BELL	
Direct Examination by Mr. Collins.....	2381
Cross Examination by Mr. Simon.....	2384
Redirect Examination by Mr. Collins	2389

LENORA TOPP

Direct Examination by Mr. Vieth.....	2390
Cross Examination by Mr. Zelenka	2405
Redirect Examination by Mr. Vieth.....	2440

ROD TULLIS

Direct Examination by Mr. Collins.....	2446
Cross Examination by Mr. Zelenka	2464
Redirect Examination by Mr. Collins	2479

ROB AIKEN

Direct Examination by Mr. Vieth.....	2484
Cross Examination by Mr. Zelenka	2494
Redirect Examination by Mr. Vieth.....	2511

KAREN HATCHER

Direct Examination by Mr. Vieth.....	2513
Cross Examination by Mr. Zelenka	2540
Redirect Examination by Mr. Vieth.....	2579
Recross Examination by Mr. Zelenka.....	2586

BILL BURTON

Direct Examination by Mr. Vieth.....	2588
Cross Examination by Mr. Simon.....	2596
Redirect Examination by Mr. Vieth.....	2599

MRS. BURTON

Direct Examination by Mr. Vieth.....	2600
Cross Examination by Mr. Simon.....	2607

VIRGINIA LINDSEY

Direct Examination by Mr. Collins.....	2611
Cross Examination by Mr. Simon.....	2655
Redirect Examination by Mr. Collins	2667

BESSIE SMITH

Direct Examination by Mr. Collins.....	2672
Cross Examination by Mr. Simon.....	2702

STEVE PILGRIM

Direct Examination by Mr. Collins.....	2710
Cross Examination by Mr. Simon.....	2730
Redirect Examination by Mr. Collins	2736

TIM SIMS	
Direct Examination by Mr. Collins.....	2737
Cross Examination by Mr. Simon.....	2758
Redirect Examination by Mr. Collins	2763
JAN VOGELSANG	
Direct Examination by Mr. Vieth.....	2765
Cross Examination by Mr. Zelenka	2839
MARGARET MELIKIAN	
Direct Examination by Mr. Vieth.....	2879
Cross Examination by Mr. Zelenka	2905
Redirect Examination by Mr. Vieth.....	2920
Recross Examination by Mr. Zelenka.....	2921
MOTION TO AMEND PCR APPLICATION	2926
APPLICANT'S EXHIBIT #1 (DEFENSE OF INDIGENTS VOUCHER).....	2937
APPLICANT'S EXHIBIT #2 (FINAL INVOICE)	2944
APPLICANT'S EXHIBIT #3 (LETTER FROM LENORA TOPP)	2946
APPLICANT'S EXHIBIT #4 (LETTER FROM LENORA TOPP)	2947
APPLICANT'S EXHIBIT #5 (LETTER FROM LENORA TOPP)	2948
APPLICANT'S EXHIBIT #6 (LETTER FROM LENORA TOPP)	2949
APPLICANT'S EXHIBIT #7 (INVESTIGATIVE REPORT)	2950
APPLICANT'S EXHIBIT #8 (MEDICAL RELEASE)	2951
APPLICANT'S EXHIBIT #9 (CV – TORA BRAWLEY).....	2953
APPLICANT'S EXHIBIT #10 (BILL – TORA BRAWLEY)	2957
APPLICANT'S EXHIBIT #11 (LETTER TO DR. MELIKIAN)	2958
APPLICANT'S EXHIBIT #12 (REPORT – DR. NARAYAN).....	2960
APPLICANT'S EXHIBIT #13 (NOTES)	2991
APPLICANT'S EXHIBIT #14 (NOTE – RUSTY CLEVINGER).....	3012
APPLICANT'S EXHIBIT #15 (REPORT OF TRIAL JUDGE).....	3013

APPLICANT'S EXHIBIT #16 (NOTES – PAM CRAWFORD)	3014
APPLICANT'S EXHIBIT #17 (NOTE - LENORA TOPP).....	3018
APPLICANT'S EXHIBIT #18 (NOTES)	3019
APPLICANT'S EXHIBIT #19 (NOTES)	3021
APPLICANT'S EXHIBIT #20 (INTAKE SHEET).....	3022
APPLICANT'S EXHIBIT #21 (NOTES)	3028
APPLICANT'S EXHIBIT #22 (NOTES)	3029
APPLICANT'S EXHIBIT #23 (INCIDENT REPORT).....	3030
APPLICANT'S EXHIBIT #24 (LETTER FROM S.C. CENTERS FOR EQUAL JUSTICE)....	3038
APPLICANT'S EXHIBIT #25 (NOTES)	3044
APPLICANT'S EXHIBIT #29 (REPORT – DR. JOHN C. DUNLAP)	3045
APPLICANT'S EXHIBIT #30 (REPORT – DR. VOGELSANG)	3046
APPLICANT'S EXHIBIT #31 (BILL – MARGARET MELIKIAN).....	3052
APPLICANT'S EXHIBIT #32 (ORDER).....	3053
RESPONDENT'S EXHIBIT #1 (STATEMENT OF VINCENT BELL).....	3055
RESPONDENT'S EXHIBIT #2 (NOTES - INTERVIEW WITH MARION LINDSEY).....	3056
RESPONDENT'S EXHIBIT #3 (RUBY NELL WRIGHT LINDSEY, INTERVIEW WITH MARION LINDSEY)	3062
RESPONDENT'S EXHIBIT #4 (NOTES - INTERVIEW WITH VIRGINIA LINDSEY).....	3067
RESPONDENT'S EXHIBIT #5 (NOTE TO STEPHANIE PERRY FROM LENORA TOPP) .	3070
RESPONDENT'S EXHIBIT #6 (MITIGATING CIRCUMSTANCES DOCUMENT).....	3071
RESPONDENT'S EXHIBIT #7 (DISCOVERY FROM SOLICITOR'S OFFICE).....	3072
RESPONDENT'S EXHIBIT #8 (WITNESS DOCUMENT)	3073
RESPONDENT'S EXHIBIT #9 (SUMMARY OF STATE'S WITNESSES).....	3075

RESPONDENT'S EXHIBIT #10 (SUMMARY OF STATE'S WITNESSES)	3080
RESPONDENT'S EXHIBIT #11 (DISCOVERY FROM SOLICITOR'S OFFICE).....	3083
RESPONDENT'S EXHIBIT #12 (JURY PANEL DOCUMENT).....	3085
RESPONDENT'S EXHIBIT #13 (EXPERT WITNESS LIST).....	3089
RESPONDENT'S EXHIBIT #14 (NOTES)	3090
COURT'S EXHIBIT #1 (ABA GUIDELINES).....	3109
PETITIONER'S POST-TRIAL MEMORANDUM	3284
RESPONDENT'S POST-HEARING MEMORANDUM OF LAW	3345
ORDER OF DISMISSAL	3536
MOTION TO RECONSIDER, ALTER AND AMEND	3728
RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITIONER'S MOTION TO RECONSIDER, ALTER AND AMEND	3738
ORDER DENYING MOTION TO RECONSIDER, ALTER OR AMEND	3751
PROPOSED ORDER OF DISMISSAL	3752
INDICTMENT	3944

THE FOLLOWING EXHIBITS ARE ON FILE WITH THIS COURT:

APPLICANT'S EXHIBIT #26 (AUDIOTAPE)
APPLICANT'S EXHIBIT #27 (PHOTOGRAPH)
APPLICANT'S EXHIBIT #28 (PHOTOGRAPH)

1 evidence of pictures and things that will be presented
2 in evidence. The windows rolled up in the back.

3 Marion asked Celeste where are you going, have
4 you seen Nell. As Celeste was telling him that she
5 had not seen Nell since last Sunday, Keysha, the
6 youngest daughter, who was in her car seat -- she was
7 in a car seat in the backseat in the right passenger
8 side. Kiera who is 7 years old was in the middle
9 seat, the middle of the back seat. And Nell was
10 sitting behind the driver's side in the back seat.
11 Julia Martin was sitting in the front passenger seat.
12 Of course, Celeste was driving.

13 She was talking to him. The youngest one was
14 saying hello to Marion. Marion said roll down the
15 back window so I can see who's back there. She just
16 told him that Kiera was back there sleeping. When
17 she heard that, she gunned as fast as she could. She
18 was going to the Inman Police Department. Nell got
19 on her cell phone and called 911. You will be
20 hearing that tape. You will be hearing the last
21 words that Ruby Lindsey said that night. You will hear
22 what happened from that point on after she called.

23 What happened was, they arrived at the Inman
24 Police Department. Marion Lindsey was following in his
25 girlfriend's car, Latresse Smith's car. Celeste

1 pulled in. As the 911 call was being made, Benny
2 Godfrey of the Inman Police Department was out in the
3 parking lot. He was just receiving the call as they
4 pulled out.

5 Celeste jumped out and asked for help. Marion
6 Lindsey pulls his car behind them and up to the side
7 of them and jumps out of the car, comes to the back of
8 Celeste's vehicle. You will hear Nell Lindsey say
9 I'm not going to get out. Celeste was trying to get
10 her out. She says roll up the window and lock the
11 door.

12 He comes up to the back window and shoots two
13 shots into the back window. Goes around and shoots
14 two more shots in the side window. Nell Lindsey is
15 sitting there behind the driver's seat with Kiera
16 right beside her in and Keysha in the baby seat.
17 Three of the shots hit Nell Lindsey in the head. She
18 still had the cell phone in her hand.

19 One of the shots hit her in the back of the neck
20 and went through the backseat right in the center of
21 the back seat into the trunk. Celeste Nesbitt was
22 trying to talk to Officer Godfrey at the time it
23 happened. Mr. Godfrey saw what happened and reacted
24 as quickly as he could and fired shots and shot Marion
25 Lindsey. Marion Lindsey was captured there, taken

1 custody and taken to the hospital and was treated.

2 Nell Lindsey was dead on the scene.

3 That is basically the facts of the case, ladies
4 and gentlemen. You will be hearing some law from the
5 Judge. Judge Few will give you the law on this case.
6 The defendant has been charged with murder. Murder
7 is malice aforethought on killing somebody. And
8 malice can be an evil thing, an evil doing or evil
9 thought. It can happen just like that. It is not
10 have to be long. It does not have to be planned out.
11 He followed her to the police department. He used a
12 .38 pistol.

13 You will see all of this evidence that was found
14 at the scene. We will be showing you pictures. You
15 will be hearing that 911 tape. We just ask you to
16 consider the evidence. Because later on, we will be
17 coming up and talking to you after all the evidence is
18 shown and ask you for verdict of guilty of murder
19 against Marion Lindsey. Thank y'all very much.

20 Thank you, Your Honor.

21 **MR. BRENNAN:** May it please the Court, Your
22 Honor.

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

24 **MR. BRENNAN:** Ladies and gentlemen of the jury,
25 on September the 18th, 2002, a tragedy occurred.

1 Ruby Nell Lindsey was killed. And I am not going to
2 tell you that Marion Lindsey did not cause her death.
3 He did.

4 Just a minute ago, Mr. Barnett described four
5 shots. Ladies and gentlemen, Mr. Lindsey shot a
6 fifth time too. That fifth shot went to his head.
7 See, Mr. Lindsey was absolutely distraught. His wife
8 had left him. And she was going to make a new life.
9 But as a part of her new life, she was not allowing
10 him to see his two children.

11 Mr. and Mrs. Lindsey had separated on a number of
12 occasions before, but she had never kept the children
13 from him. This was a difference. These two boys
14 were his life. His two boys were all he had. This
15 time, she was not letting him see his boys. His baby
16 boy, his youngest son he called his road dog. He went
17 everywhere together. This time, he could not see his
18 children.

19 Mr. Barnett had mentioned a conversation that
20 took place between Marion Lindsey and Celeste. He
21 asked if she could let me see my children. And she
22 said I don't know. Ladies and gentlemen of the jury,
23 the issue in this trial is malice aforethought. That
24 is the issue. We just ask you to sit and listen to
25 all the evidence before you make your decision. Mr.

1 Lindsey was distraught. Mr. Lindsey's family had
2 fallen apart.

3 See, Marion Lindsey never had a dad. He never
4 had a dad. He was determined, absolutely determined
5 to be the dad for his two young children that he did
6 not have in his life and the opportunity to be the dad
7 that he wanted to be, that he needed to be for his
8 children --

9 **MR. BARNETT:** Objection, Your Honor. I believe
10 we're getting outside of the facts of the case and the
11 relevance of it too, Your Honor.

12 **THE COURT:** Mr. Brennan, confine your opening
13 statement to a discussion of the evidence that the
14 jury can expect to hear during the trial and no
15 argument please.

16 **MR. BRENNAN:** Yes.

17 His family had come apart. He was distraught.
18 As a result of that, Ruby Nell Lindsey's life was
19 taken. Ladies and gentlemen, we just ask you to wait
20 and listen to all the evidence before you make your
21 decision. Thank you for your time and your patience.

22 **THE COURT:** Call your first witness.

23 **MR. BARNETT:** I'll call Freddy Thompson to the
24 stand, Your Honor.

25 **FREDDY THOMPSON**

1 having first being duly sworn testified as follows:

2 **DIRECT EXAMINATION**

3 **BY MR. BARNETT:**

4 **Q** Mr. Thompson, if you will state your name for
5 the record please.

6 **A** Fred David Thomas.

7 **Q** And where do you work at, sir?

8 **A** Spartanburg County Communications 911 Department.

9 **Q** What is your position there, sir?

10 **A** My title is Assistant Director.

11 **Q** And in your duties there, are you there to
12 maintain the records of 911?

13 **A** Custodial records, yes.

14 **Q** Could you tell the jury a little bit about what
15 911 does with the records.

16 **A** After the calls come in through the radio or
17 telephone, they are then recorded onto a recording device.
18 From there, we take it from that recording device onto
19 tape or CDs to go to the various departments.

20 **Q** Did you have a request to do a 911 tape from
21 September 18, 2002?

22 **A** Yes, sir. We did.

23 **Q** Let me show you State's Exhibit 21(a). Did you
24 make a copy for the sheriff's department and so forth?

25 **A** Yes, there was a copy made of this.

1 **Q** And was this copy made and given to the Sheriff's
2 Office for the Solicitor's Office?

3 **A** Yes.

4 **Q** This is the direct tape from 911 communications?

5 **A** Correct.

6 **MR. BARNETT:** Your Honor, I would like to move
7 21(a) into evidence at this time.

8 **THE COURT:** Any objections?

9 **MR. BRENNAN:** Your Honor, for the reasons argued
10 previously, we would object to the admission of that
11 tape.

12 **THE COURT:** Well, you're going to have to
13 state them again.

14 **MR. BRENNAN:** Your Honor, 404 -- excuse me, 403.

15 **THE COURT:** You don't have to argue it. Just
16 tell me what the objection is. You object under Rule
17 403.

18 **MR. BRENNAN:** 403.

19 **THE COURT:** Any other objection?

20 **MR. BRENNAN:** 404(b), Your Honor.

21 **THE COURT:** All right. 403 objection -- this
22 is 21?

23 **MR. BARNETT:** 21(a).

24 **THE COURT:** 21(a), the 403 objection is
25 overruled. I have some additional statements to make

1 about the grounds for my ruling that I will make
2 during the next break if you all will remind me. 404
3 (b)?

4 MR. BRENNAN: Yes, Your Honor.

5 THE COURT: 404(b)?

6 MR. BRENNAN: Yes, Your Honor.

7 THE COURT: Overruled.

8 MR. BARNETT: Thank you, Your Honor.

9 BY MR. BARNETT:

10 Q Please answer any questions Mr. Bartosh may have
11 for you.

12 MR. BRENNAN: I have no questions, Your Honor.

13 THE COURT: You can step down, sir.

14 THE WITNESS: Thank you.

15 THE COURT: Call your next witness.

16 MR. BARNETT: I call Rusty Clavenger to the
17 stand.

18 CHARLES CLAVENGER

19 having first being duly sworn testified as follows:

20 DIRECT EXAMINATION

21 BY MR. BARNETT:

22 Q If you would, sir, please state your name.

23 A Charles Russell Clavenger.

24 Q Where do you work, sir?

25 A In the Solicitor's Office here in Spartanburg.

1 Q What is your position?

2 A I am the Senior Criminal Investigator.

3 Q Were you given a tape that I believe was marked
4 as 21(a) State's Exhibit of a 911 call that occurred on
5 September 18th?

6 A Yes, sir.

7 Q Did you take this tape to Greenville to Ms.
8 Daniels?

9 A I did, Ms. Diana Daniels.

10 Q Did she look at the tape and use it and transfer
11 it just simply to enhance the sound of it?

12 A Yes, sir.

13 Q Were you present during the time?

14 A I was.

15 Q Was this tape your possession from the time from
16 my office all the way over to her office?

17 A It was.

18 Q Was transferred to a CD format?

19 A It was.

20 Q Did you bring that CD format back along with the
21 tape?

22 A I did.

23 Q Is this the CD marked as State's Exhibit 21?

24 A Yes, sir, it is.

25 Q That has been in the position of the Solicitor's

1 Office since?

2 A That is correct.

3 Q Thank you, sir. If you would answer any
4 questions Mr. Bartosh or Mr. Brannan may have for you.

5 MR. BRENNAN: I have no questions, Your Honor.

6 THE COURT: You can step down, Mr. Clavenger.

7 MR. GOWDY: May it please the Court, Your
8 Honor. The state would call Diana Waters.

9 DIANA WALTERS DANIELS

10 having first being duly sworn testified as follows:

11 DIRECT EXAMINATION

12 BY MR. GOWDY:

13 Q Good morning, ma'am.

14 A Hey.

15 Q Can you introduce the yourself to the jury and
16 tell them your name.

17 A I'm Diane Walters. I'm known in the upstate as
18 Diana Daniels.

19 Q You say you're known in the upstate as Diana
20 Daniels. Is that because in addition to working for
21 Williamson and Evans, you have another job?

22 A I do. I work on the radio.

23 Q And Diana Daniels is your radio name?

24 A That's correct.

25 Q What radio station are you on?

1 **A** Currently, I work for Clemson University. I
2 produce a show heard statewide.

3 **Q** We'll call you Ms. Walters for purpose of this
4 court hearing.

5 **A** Yes, sir.

6 **Q** Where do you work in Greenville?

7 **A** I work at a recording studio called Williams &
8 Evans.

9 **Q** Can you tell the ladies of the jury what some of
10 the things that y'all do at William & Evans are?

11 **A** Our main purpose is radio and television
12 commercial production, but we have all the equipment to
13 enhance audio. We often offer that service to people.

14 **Q** Okay. Let me show you State's Exhibit 21(a) and
15 State's Exhibit 21. With those in front of you, let me
16 ask you this question. The gentleman who just testified,
17 Mr. Clavenger, did he come to your studio at some point and
18 bring State's Exhibit 21(a)?

19 **A** Yes, he bought the cassette down there one day.

20 **Q** Did you take 21(a) and attempt to enhance or
21 increase the volume?

22 **A** Yes, we did.

23 **Q** Can you tell the ladies and gentlemen of the
24 jury, what process you go through when you have a known
25 tape that you seek to enhance or raise the clarity of it?

1 **A** We took the cassette. We put it in a standard
2 cassette deck and loaded it in to my computer. On my
3 computer, I have a digital editing program called ProTools.
4 In ProTools, you can enhance the volume. You can decrease
5 the volume. You can take out background sounds or
6 whatever. In this particular case, the tape was really
7 good. All we did was raise the volume so you could hear a
8 little bit better.

9 **A** When you say all you did was raise the volume, is
10 it fair to conclude that there's nothing on the CD, State's
11 Exhibit 21, that is not also on State's Exhibit 21(a)?

12 **A** No, it is exactly the same except louder.

13 **Q** You did not add anything to it or take anything
14 off of it?

15 **A** No, we did not. In fact, we only enhanced two or
16 three sections of sound for three or four seconds.

17 **Q** Do you recall what sections of the tape you were
18 asked to enhance or concluded that needed to be enhanced?

19 **A** There was a couple of areas that was some sort of
20 mechanical sound or something some kind of loud bang that
21 they wanted to see if we could make it clear. And we made
22 it louder.

23 **Q** When you say mechanical sound, is that a term of
24 art for what could potentially be a gunshot?

25 **A** It is something that is not a human voice.

1 **Q** It could be a number of things one of which could
2 conclude gunshot?

3 **A** I would say that is true.

4 **Q** State's Exhibit 21, is that the CD is that you
5 produced at our request?

6 **A** Yes, it is.

7 **Q** Again, nothing was added or retracted from
8 State's 21(a)?

9 **A** No.

10 **Q** It were simply made louder?

11 **A** Simply made louder.

12 **MR. GOWDY:** Your Honor, we would move State's
13 21 into evidence at this point and ask the Court's
14 permission to publish it to the jury.

15 **MR. BRENNAN:** Again, Your Honor, over our 403
16 objection that we argued previously.

17 **THE COURT:** All right. The Rule 403 objection
18 is overruled. Any other objection?

19 **MR. BRENNAN:** No, Your Honor.

20 **MR. GOWDY:** May I publish it to the jury, Your
21 Honor.

22 **THE COURT:** I need to put the basis of my
23 ruling on the record. Is it suitable that with you
24 all -- we discussed it yesterday. Is it suitable to
25 put it on the record during the first break or do you

1 want me to do it now?

2 MR. BRENNAN: The break is fine, Your Honor.

3 THE COURT: You may publish it.

4 MR. GOWDY: Thank you, Your Honor.

5 THE COURT: Let me ask this question,
6 Solicitor.

7 MR. GOWDY: Yes, sir.

8 THE COURT: The exhibit that you are about to
9 publish, does it contain the entire tape or does it
10 just contain the portion that you had me listen to
11 yesterday afternoon?

12 MR. GOWDY: It contains the entire tape, I
13 only seek to introduce the part that I played last
14 night.

15 THE COURT: All right.

16 MR. GOWDY: We will be standing right beside
17 it to stop it.

18 THE COURT: I think that for purposes of the
19 record, do you have a counter on that machine so you
20 can tell me where it stopped?

21 MR. GOWDY: I'm sure there is, Judge. And if
22 I could maybe get Mr. Clavenger to help me figure out
23 where it might be.

24 THE COURT: If you can't do that, I will just
25 time it myself. And I will put on the record how long

1 the tape lasted from a certain point.

2 MR. GOWDY: Yes, sir. There may be a minute
3 clock that goes along with it. And when I stop it, I
4 will tell the Court what that minute clock is.

5 (WHEREUPON, State's Exhibit 21 was played at
6 approximately 9:47 p.m.)

7 (WHEREUPON, the tape ended at approximately 9:49 p.m.)

8 MR. GOWDY: Your Honor, 332 is the clock
9 counter.

10 THE COURT: I know that the tape played for 18
11 seconds after she said I'm not getting out.

12 MR. GOWDY: Okay.

13 Thank you, Mrs. Walters. Please answer any
14 questions the defense may have for you.

15 MR. BRENNAN: I have no questions, Your Honor.

16 THE COURT: Ma'am, you can step down.
17 Call your next witness.

18 MR. GOWDY: Your Honor, the State will call
19 Ms. Celeste Nesbitt.

20 CELESTE NESBITT

21 having first being duly sworn testified as follows:

22 DIRECT EXAMINATION

23 BY MR. GOWDY:

24 Q Good morning, ma'am.

25 A Good morning.

1 Q Ms. Nesbitt, I'm going to ask you to keep your
2 voice open up in a good strong voice so the last two
3 gentlemen of the jury can hear you, okay?

4 A All right.

5 Q I want you to introduce yourself to the jury.
6 Tell them where you live?

7 A My name is Celeste Denise Nesbitt. I live at
8 Inman, South Carolina.

9 Q For purposes of Madam Court Reporter, is Celeste
10 spelled C-e-l-e-s-t-e?

11 A Yes, it is.

12 Q Nesbitt, N-e-s-b-i-t-t?

13 A Yes.

14 Q Where do you work, Ms. Nesbitt?

15 A BMG music in Duncan, South Carolina.

16 Q How long have you been there?

17 A 17 years.

18 Q Did you go to school in Spartanburg?

19 A Yes, I did.

20 Q Where did you go to school?

21 A I went to Chapman High School. Graduated. Two
22 years of Spartanburg Tech but I didn't graduate.

23 Q What you do at BMG?

24 A Auto processing.

25 Q Did you go to school after Chapman High School?

1 **A** Yes, Spartanburg Tech.

2 **Q** What did you study at Spartanburg Tech?

3 **A** General Office Practice and Secretarial Science.

4 **Q** Do you have children?

5 **A** Yes, I do.

6 **Q** What are the ages of your children?

7 **A** I have two daughters Kiera and Keysha. The ages
8 are 11 and 5.

9 **Q** Keysha is 5 and Kiera is 11. Is that correct?

10 **A** Right.

11 **Q** Did you know Nell Lindsey?

12 **A** Yes, I did.

13 **Q** How would you describe your relationship with
14 her?

15 **A** We were like sisters. She was like a younger
16 sister to me.

17 **Q** What was the age difference if don't mind my
18 asking, Ms. Nesbitt, between you and Mrs. Lindsey?

19 **A** She was 28 at the time. I was 39.

20 **Q** Y'all have known each other for how long?

21 **A** Every since she was 10 years old.

22 **Q** I noticed on the tape she referred to you as her
23 sister. Is that the way that y'all referred to each other?

24 **A** Yes, we did.

25 **Q** Ms. Nesbitt, have you had any occasion to meet

1 Marion Lindsey?

2 A Yes, I did.

3 Q How long have you known Marion Lindsey?

4 A Since 1996.

5 Q Did you see him on a frequent enough basis that
6 you knew who he was and what he looked like?

7 A Yes, I did.

8 Q Do you see him this morning?

9 A Yes, I do.

10 Q I want you to point him out for the jury.

11 A (Pointing.) He sitting right there between his
12 two lawyers.

13 Q Okay.

14 A With the white shirt on.

15 Q Did you know him as the husband of your friend
16 Nell Lindsey?

17 A Yes, I did.

18 Q I want to go to September 18th, 2002. Let's
19 start at say 5 p.m. Where were you and who were you with?

20 A My mother, my two children. We were headed to
21 the hospital to see my grandmother who I had to admit in
22 the hospital the night before.

23 Q Okay. Your mother, what is your mother's name?

24 A Julia Martin.

25 Q You were at Spartanburg Regional?

1 **A** Yes, sir.

2 **Q** If I heard your testimony, you just admitted your
3 grandmother the day before?

4 **A** Yes, sir.

5 **Q** What was the purpose of your visit to Spartanburg
6 Regional on 18th?

7 **A** To take care of my grandmother and to see what
8 was the update that the doctors had to give us.

9 **Q** You had your two little girls with you?

10 **A** Yes.

11 **Q** At some point, did you talk to Nell Lindsey while
12 you were at the hospital?

13 **A** As I was pulling in the parking lot at 5:45, Nell
14 called me on the cell phone. She asked me where I was at.
15 I said in the parking lot trying to get find a parking lot
16 to come up to see my grandmother. She said I was calling
17 to ask if I could catch a ride home this afternoon. I said
18 sure. She said how long are you going to be there. I said
19 I would wait until she got off from work. She asked me
20 what my grandmother's room was. She said when I get off,
21 I'll be around there.

22 **Q** Ms. Nesbitt, through your relationship with
23 Ms. Lindsey had you learned her car had become disabled?

24 **A** Yes, I did.

25 **Q** She asked you for a ride home?

1 A Yes.

2 Q Did you make arrangements on where to meet?

3 A At my grandmother's room.

4 Q Ms. Lindsey was an employee of the hospital?

5 A That's right.

6 Q She would have been familiar with what your
7 grandmother's room was?

8 A Yes, sir.

9 Q Had she come at the time y'all decided upon?

10 A Yes, she told me she got off at 7:00. She would
11 be around there between 7:15, 7:05 and 7:15. She arrived
12 around 7:15.

13 Q What happened after Ms. Lindsey arrived at your
14 grandmother's hotel -- at your grandmother's hospital room?

15 A We sat there and talked for a little while about
16 my grandmother. She told me some helpful things to do to
17 help my grandmother. My sister arrived at 10 'til 8:00.
18 I said Nell, you look like you're tired, so we'll go home.
19 So we left the hospital at 8 o'clock.

20 Q Where were you living at September 2002?

21 A In Inman.

22 Q Where was Nell leaving in September of 2002?

23 A In Inman.

24 Q Who was Nell living with?

25 A Her mother.

1 Q Do you see her mother in the courtroom here
2 today?

3 A Yes.

4 Q Could you point her out for us?

5 A (Pointing.) She's sitting right there in the
6 brown sweater on, Ms. Caroline Wright.

7 Q Do you know who else was living with Ms.
8 Caroline Wright and Mrs. Lindsey?

9 A Nell's two sons.

10 Q What were their names?

11 A Alex and Trey L.

12 Q Do you recall their ages?

13 A At the time, uh, three and seven.

14 Q What kind of car were you driving?

15 A A Mercury Topaz.

16 Q Did you, your mother, your two daughters and Nell
17 began to work your way towards your car at Spartanburg
18 Regional?

19 A Yes, we did.

20 Q You recall where you parked?

21 A Parked up under Spartanburg Regional garage.

22 Q Can you tell the ladies and gentlemen of the jury
23 how the folks were situated in the car?

24 A Yes, I was in the driver's seat. My mother was
25 in the passenger seat. Nell was in the rear driver's back

1 seat. My oldest daughter was in the middle. And my
2 youngest daughter was in her car seat on the passenger side
3 back seat.

4 Q Keysha was in the car seat?

5 A Keysha was in the car seat.

6 Q Kiera was in the middle?

7 A In the middle.

8 Q Now, you said you had a Mercury Topaz. Would you
9 describe to the jury that car as being a large medium or
10 small sized car?

11 A A medium car.

12 Q Were the back seats bucket seats or was it a
13 bench seat?

14 A Bench.

15 Q There was a car seat in the back did I understand
16 you to say?

17 A Yes, sir.

18 Q Would you describe Nell as a tall lady? What
19 size lady was Nell Lindsey?

20 A She was 5'7. Probably about 150 lbs.

21 Q She was sitting in the back with your two
22 daughters?

23 A Yes, she was.

24 Q Tell the ladies and gentlemen of the jury what
25 happened after you left Spartanburg Regional. What path

1 you took to get to Inman?

2 **A** We left Spartanburg Regional. We went up to 585
3 to Pine Street. Hit 176. We went all the way up to
4 Inman. As we crossed the high bridge in Inman, we took a
5 right onto Main Street. We traveled so far up and we took
6 another right off Clark Road. Across the railroad track,
7 took a quick left on South Howard Street. As we crossed
8 Howard Street, I said to Nell I thought I saw Tresse's car.
9 She said I thought I saw it too.

10 **Q** Let me stop you right there, Ms. Nesbitt. You
11 thought you saw Treese's car?

12 **A** Right.

13 **Q** Who is Tresse?

14 **A** Treese was the girlfriend of Marion Lindsey.

15 **A** Are you saying Latresse or Tresse?

16 **A** Latresse.

17 **Q** Latresse?

18 **A** Yes.

19 **Q** L-a-t-r-e-s-s-e?

20 **A** Yes.

21 **Q** Did you know her to be acquainted with Marion
22 Lindsey?

23 **A** Yes, I did.

24 **Q** Did you know what kind of car she drove?

25 **A** Yes, I did.

1 Q Had you ever seen Marion Lindsey in her car
2 before?

3 A Yes, I have.

4 Q Can you describe what kind of car he was in?

5 A Nissan Sentra.

6 Q What did you do when you saw Mr. Lindsey in
7 Latresse Smith's car?

8 A When I saw it and mentioned it to her, she said I
9 thought I saw it turn around back in Springfield. I said
10 why didn't you say anything. She said I did not want to
11 panic or make you panic. So we continued on to her house
12 which was on down Howard Street and turn and went to
13 Pendleton Street.

14 As we were pulling up to her mother's house, she said
15 that is him driving her car. Don't stop. Keep going. I
16 continued to go on down the street. I pulled into my
17 mother's yard which she lived on the same street. I pulled
18 in and pulled back out and turned around. As I was turning
19 around, he had made a U-turn and turned facing me. How
20 did he come facing you, Ms. Nesbitt?

21 A At a head-on direction.

22 Q And you stopped?

23 A I stopped in the middle of the road.

24 Q What did he do?

25 A I rolled the window down. And he rolled the

1 window down. He said Hey, Celeste. I said Hey, Myron. He
2 said where are you going. I said to take my mother to meet
3 my sister. He said have you talked to Nell. And I said
4 three days ago.

5 Q I'm going to stop you right here. I'm going to
6 ask you two things. You referred to him as Myron. I have
7 been referring to him as Marion. Did he go by the name
8 Myron?

9 A Yes, he did.

10 Q Now I also understood you to say that he asked
11 had you seen Nell and you said I haven't seen her for two
12 days?

13 A I said I saw her three days ago.

14 Q Three days ago?

15 A Yes.

16 Q But in reality, she was sitting three feet from
17 you, right?

18 A Right.

19 Q Why did you tell him that you hadn't seen her for
20 three days?

21 A Cause I knew they had been through a lot. He
22 told me he had threatened to kill her and threatened to do
23 things. And I didn't want anything to happen right there
24 in my behalf with me and my children.

25 Q What happened after you told him I haven't seen

1 her for three days?

2 **A** My youngest daughter was speaking to him. And he
3 finally acknowledged and spoke to her. Then he asked who
4 was in the back seat. I said nobody but Keysha. And he
5 said where is your oldest daughter. I said she laying back
6 there sleep. He said is somebody else back there. I said
7 no. He said roll the window down and let me see. I told
8 him no, the window was broken.

9 **Q** Let me stop you right there, Ms. Nesbitt. I had
10 in my mind your smallish child being in the car seat. Is
11 she still able to lean forward even though she's in a car
12 seat?

13 **A** Yes, she could.

14 **Q** How could she do that?

15 **A** She slid her arms out of the latch and kind of
16 raised forward. And being that the car is not that big,
17 she kind of raised her head around and was hollering hey.

18 **Q** Having been her mother for quite some time, did
19 you ever see her slide her arms out from her car seat
20 before?

21 **A** Yes.

22 **Q** Is that she was known to do?

23 **A** Yes.

24 **Q** Can you describe the windows on your car? Were
25 they factory windows? Had they been tinted in any way?

1 **A** Yes, they had been tinted.

2 **Q** Would you describe tint as light, medium or dark?

3 **A** Dark.

4 **Q** You have dark tinted windows that are rolled up;
5 is that right?

6 **A** Correct.

7 **Q** This defendant asked you to roll your windows
8 down to the back seat so he could see who was in the back
9 seat?

10 **A** Correct.

11 **Q** And you did what?

12 **A** I told him no, the window was broken and would
13 not roll down.

14 **Q** What happened then?

15 **A** He said let me get out and see who was in the
16 back seat. I sped off.

17 **Q** You sped off?

18 **A** Yes.

19 **Q** Where did you go, Ms. Nesbitt?

20 **A** I went to the police department. I sped off.

21 Nell asked me should I call my grandmother or call down
22 911. I said dial 911. She said well, take me to the
23 police station. I said that's where we're going. I went
24 as fast as I could. I ran all the stop signs, ran the red
25 light, jumped the railroad track, hit Main Street and went

1 straight to the police department.

2 Q Were you in the courtroom when the jury heard the
3 911 tape?

4 A Yes.

5 Q Is that Nell's voice on the 911 tape?

6 A Yes, it is.

7 Q Whose voice that says get out of the car, Nell?

8 A My voice.

9 Q Whose voice is it that said I'm not getting out
10 of this car?

11 A Nell's voice.

12 Q When you got to the police station, can you
13 describe for the jury for those that are not familiar with
14 a Inman Police Station what the back look like?

15 A It is like an open parking lot. It is not very
16 big. I pulled into the parking lot. There were several
17 police cars there. I pulled in beside one of the police
18 cars that were already there. I pulled right beside it and
19 tried to get her out.

20 Q They're going to be setting that up. So try not
21 to let that distract you. I'm going to show you what has
22 been previously marked for identification purposes as
23 State's 22, 23, 24, 25 and 26.

24 A (Reviewing.)

25 Q I'm going to ask you to look at each one of those

1 and tell me whether or not you recognize the scene depicted
2 and is a fair and accurate depiction of what you saw on the
3 evening of September the 18th?

4 **A** (Reviewing.)

5 **Q** Let me ask you two things. Were you in the
6 courtroom when the 911 enhanced tape was played?

7 **A** Yes, sir...

8 **Q** Were you in the car for almost the entire time
9 that that phone would've been open and the line would have
10 been opened?

11 **A** Yes.

12 **Q** At some point, you got out of the car prior to
13 the gunshots. But up until the gunshots, were you in the
14 car?

15 **A** Up until the gunshots, I was in the car.

16 **Q** Is that a fair and accurate depiction of what
17 happened in the car on September 18?

18 **A** Yes, sir, it is.

19 **Q** Now you were good enough to look for me as
20 State's 22, 23, 24, 25 and 26. Do these fairly and
21 accurately depict the scene on September the 18th, 2002 in
22 the back parking lot of the Inman police station?

23 **A** Yes, sir, it does.

24 **MR. GOWDY:** Your Honor, we would move these
25 exhibits into evidence and ask for permission to

1 publish them to the jury.

2 THE COURT: Any objection?

3 MR. BRENNAN: No, sir.

4 THE COURT: They're admitted. 22 through 26?

5 MR. GOWDY: Yes, sir, Your Honor.

6 (WHEREUPON, State's Exhibits 22 through 26 were
7 admitted into evidence.)

8 BY MR. GOWDY:

9 Q I'll start by showing you State's 24.

10 THE COURT: Mr. Parnell, can you see that?

11 JUROR: Yes, sir.

12 THE COURT: All right. I want to make sure
13 that each one of you can see everything that is put up
14 on that screen.

15 So, Mr. Parnell, all you need to do now or later
16 is to tell me that you need to move and we will let
17 you move so you can see it.

18 And that will also go for the other jurors who
19 are close to the screen.

20 BY MR. GOWDY:

21 Q Ms. Nesbitt, can you see that image without
22 having to strain your neck?

23 A Yes, sir, I can.

24 Q I'm going to get you to describe that scene for
25 me. If you would take your mouth away from the microphone,

1 I'm going to get you to stand right here with this laser.
2 pointer and keep your voice up for the Court Reporter.
3 Okay?

4 A Okay.

5 Q Do you know how to use one of these laser
6 pointers?

7 A Yes.

8 Q Again, this is State's Exhibit 24. Ms. Nesbitt,
9 can you tell the jury which car, if any, is yours?

10 A (Pointing.)

11 Q That's what you describe as Mercury Topaz?

12 A Yes, sir.

13 Q Do you see Latresse Smith's car?

14 A Yes, sir.

15 Q Show the jury where that is?

16 A (Pointing.)

17 Q Again, who was driving that car on September the
18 18th?

19 A Marion Lindsey.

20 Q Was anyone else in the car with Marion Lindsey?

21 A No, sir.

22 Q Is this the way the parking lot looked when you
23 pulled into it?

24 A Not the fire truck and all of that.

25 Q Not the fire truck?

1 A No.

2 Q How about the blue truck to the left, was it
3 there?

4 A I can't remember. I think it was.

5 Q How about the police car?

6 A Yes, it was.

7 Q Keeping your voice up, I want you to tell the
8 ladies and gentlemen of the jury -- actually you can have
9 your seat. Tell the ladies and gentlemen of the jury when
10 you got into the parking lot of the police station what
11 happened?

12 A When I got into the parking lot of the police
13 station, I jumped out. And I tried to get Nell to get out.
14 She told me, she was talking to 911 on the phone. And I
15 was like Nell, get out. Nell, get out. As I was asking
16 her to get out, he was pulling into the parking lot. He
17 jumped out of the car and ran toward the back of the car.
18 As he ran towards the back of my car, I backed up towards
19 the front of the police car.

20 I saw him pull a gun out and stick the gun to the rear
21 passenger windshield of the car and shot into the car. I
22 then fell to the ground and hollered for help. The police
23 car that I was parked beside had a rear door that was open.
24 I crawled to the back door and crawled inside of the Inman
25 police car and laid on the floor board. I heard shots but

1 I saw nothing else.

2 Q Ms. Nesbitt, is there any doubt in your mind as
3 to who you saw shoot into the back of your car?

4 A No, it is not.

5 Q Who was it?

6 A Marion Lindsey.

7 Q You saw him shoot how many times?

8 A I saw him shoot one time.

9 Q After that shot, you did what?

10 A I fell to the ground and crawled into the back
11 seat of a police car.

12 Q That police care there?

13 A Yes, sir.

14 Q Was there anybody else other than you and Myron
15 Lindsey standing in the parking lot when you got there?

16 A Yes, it was.

17 Q Do you know who?

18 A Officer Godfrey.

19 Q Officer Godfrey from Inman City?

20 A Yes.

21 Q Did Nell ever get out of the car?

22 A No, she did not.

23 Q Did your two girls ever get out of the car?

24 A No, they didn't.

25 Q Did your mom ever get out of the car?

1 A No, they didn't.

2 Q Let me ask you a question about your mom. How
3 is she physically?

4 A She's all right.

5 Q How is she mentally?

6 A She has a touch of Alzheimer's and a loss of
7 long-term memory.

8 Q How long has she suffered from loss of memory?

9 A About five or six years.

10 Q Again, your daughter's ages at the time this
11 night, September 18th, Keysha was how old?

12 A At the time, she just turned four.

13 Q Kiera?

14 A Was 9 getting ready to turn 10.

15 Q You testified that you crawled and laid down in
16 the back of that police car, is that right?

17 A Yes, sir.

18 Q Did you hear additional gunshots?

19 A Yes.

20 Q Do you have any idea how many?

21 A No, I do not. It was a lot.

22 Q Did you see the police actually fire at Myron?

23 A When I was crawling, I seen him pull out his gun
24 and run towards me. And I heard shots as I was crawling to
25 the car.

1 Q Is there any doubt in your mind that that
2 defendant was at parking lot of the Inman City Police
3 Department and shot into the back of your car?

4 A No, it is no doubt.

5 Q I'm going to show you State's exhibit 22. That
6 is the front of whose car?

7 A My car.

8 Q That is the front of whose car?

9 A The police car. No, the car that Myron was
10 driving.

11 Q Is that how close you pulled to the police car
12 that night?

13 A Yes, it is.

14 Q I'm going to give the jury one more prospective,
15 Ms. Nesbitt. This is State's Exhibit 26. This is a view
16 going back towards -- well, what is that?

17 A (No response).

18 Q That building. Is that the Police Department?

19 A It's the Police Department, yes.

20 Q Again, that was your car?

21 A Yes, it is.

22 Q That is Latresse Smith's car?

23 A Yes, it is.

24 Q Let me ask you this. I don't want you to tell me
25 what he said. I just want ask you his demeanor. When he

1 stopped you in the roadway in Inman, what was Marion
2 Lindsey's demeanor? Was he enraged? Was he calm? Was he
3 coherent? Could you understand what he was saying?

4 A I could understand what he was saying. He was
5 not in a rage.

6 Q After the shooting takes place, Ms. Nesbitt,
7 where did you go?

8 A After the shooting took place and I heard the
9 officer say that we got him down, I crawled out the police
10 car. And I stood up and was headed to my car. Officer
11 Godfrey stopped me and told me don't go any further. The
12 Officer went to my car and pulled out my mother and went to
13 the back seat and pulled out my two kids, brought them
14 around. My oldest child was screaming that Nell was dead.
15 He took us and told us to go to the side of the building.
16 Then he later told us to go inside of the building.

17 Q Those cries that we heard on the 911 tape, were
18 those your children?

19 A Yes, they were.

20 Q What happened to your car after September 18?

21 A They transported it to crime lab.

22 Q Did you ever get it back?

23 A Yes, I did.

24 Q How many days later?

25 A I'm not exactly sure like how many days.

1 Probably like a week.

2 Q A week later?

3 A Yes.

4 Q Do you still own that car?

5 A No, I don't.

6 Q What did you do with it?

7 A I sold the car.

8 Q To whom?

9 A Mary Lyles.

10 Q Mary Lyles, is that somebody you knew?

11 A My cousin's grandmother.

12 Q Did you sell it to her shortly after law
13 enforcement gave it back to you in September?

14 A The exact same day.

15 Q The same day?

16 A Yes, sir.

17 Q Before you sold it, did you have an opportunity
18 to look in the car or look inside the car one last time?

19 A Yes, I did.

20 Q Had the windows been repaired or what damage had
21 been done to the windows, do you know?

22 A The windows had been repaired from that gunshot.
23 Cause the windows were clear. My windows were tinted.
24 When I got it back, the rear window and the driver's back
25 window was clear. I also have the bullet hole in the

1 seat.

2 Q A bullet hole in the car seat itself?

3 A In the car seat itself, in the rear car seat.

4 Q Not the baby seat but the back bench of the car
5 seat?

6 A Yes.

7 Q You sold the car to Mary Lyles?

8 A Yes, sir.

9 Q Please answer any questions the defense may have
10 you. Thank you.

11 MR. BRENNAN: May it please the Court.

12 THE COURT: Yes, sir.

13 BY MR. BRENNAN:

14 Q Ms. Nesbitt, my name is Doug Brennan. And I am
15 one of Marion Lindsey's attorneys.

16 THE COURT: Are you going to need the
17 overhead?

18 MR. BRENNAN: No, I will not, Your Honor.

19 THE COURT: All right. Let's put the lights
20 back up.

21 BY MR. BRENNAN:

22 Q I understand this is difficult and I will try not
23 to make it any more so. You testified that your two young
24 children were in the car that day?

25 A Yes, sir.

1 Q Was it only the baby spoke with Myron?

2 A Spoke to him? Her and my mother spoke.

3 Q What did your youngest child call Marion Lindsey?

4 A Uncle Ron.

5 Q Uncle, I'm sorry. Uncle what?

6 A Uncle Ron.

7 Q So they were close with Marion Lindsey; is that
8 correct?

9 A Yes, sir.

10 Q Do you remember your oldest child climbing
11 between the two front seats to say hello to Uncle Ron?

12 A No. She was sleep.

13 Q Before you got to the police station, you were
14 talking about a conversation that occurred between you and
15 Mr. Lindsey from in your car?

16 A Yes.

17 Q Do you remember him asking if Ruby was going to
18 let him see his kids?

19 A Yes, I do.

20 Q And what did you say to him?

21 A I don't know.

22 Q Okay. Do you have any idea how long it had been
23 since Ruby had let Marion see the kids?

24 A No, I don't.

25 Q You were like sisters?

1 **A** Yes, sir.

2 **Q** Are you aware that Mr. Lindsey and Ruby had
3 separated before?

4 **A** Yes, sir.

5 **Q** Is this the first time that they had separated
6 that she hadn't let him see the kids?

7 **A** That is the first time she didn't let him see the
8 kids.

9 **Q** All right. Had she said anything about making
10 changes at work in reference to her husband?

11 **A** Yes.

12 **Q** What did she say to you about making changes at
13 work?

14 **A** Since I'm filing for a divorce, I'm taking him
15 off my insurance.

16 **Q** She told you she was taking him off the
17 insurance?

18 **A** Yes, she did.

19 **Q** Had she ever said that to you before?

20 **A** No, that was the first-time.

21 **Q** The first time?

22 **A** Yes.

23 **Q** Was Kiera asleep on the floorboard?

24 **A** No, she was not. She was sleep between my
25 youngest daughter and Nell. She was laying on Nell's arm.

1 **Q** Okay. Just one second.

2 You said you first became aware and you met Mr.
3 Lindsey in 1996?

4 **A** Yes.

5 **Q** You know how long Ruby and Marion had been
6 together?

7 **A** Not exact.

8 **Q** Were they together before you met him?

9 **A** Yes.

10 **Q** So it was longer than 1996?

11 **A** Yes.

12 **Q** All right. When you pulled into the police
13 station, where was Officer Godfrey?

14 **A** At a car. At a police car standing outside
15 putting his arm inside of his jacket.

16 **Q** Okay. Was it next to that car, was he standing
17 next to the car that you pulled next to?

18 **A** No.

19 **Q** It was off to the side?

20 **A** Yes.

21 **Q** Do you remember in a statement stating that
22 Officer Godfrey had come running from behind the side of
23 the building?

24 **A** No. The car was not far from where we pulled in
25 at. It was not around a building.

1 **A** Okay. But he was not standing next to the car,
2 the white car.

3 **A** No, he was not.

4 **Q** Thank you, ma'am. I have nothing else.

5 **MR. GOWDY:** I do have some brief rebuttal. I
6 would like to respectfully approach the bench for
7 moment before I go into it though.

8 **THE COURT:** All right, sir.

9 (WHEREFORE, a bench conference was held off of the
10 record.)

11 **THE COURT:** Ladies and gentlemen, we're going
12 to take a break.. Generally, we will go from about an
13 hour and 15 minutes to an hour and 45 minutes between
14 breaks. Breaks will be generally 10 to 15 minutes.
15 I have a legal matter I'm going to take up as soon as
16 you leave. I don't know how long, this break could
17 be a little longer than that, but I'm going to try to
18 get back to you within 10 to 15 minutes. So please go
19 back into the jury room now.

20 (WHEREUPON, the jury exit at approximately 10:24 a.m.)

21 **THE COURT:** Solicitor.

22 **THE COURT:** Your Honor, may it please the
23 Court. Mr. Brennan asked a series of questions of Ms.
24 Nesbitt relating to the dissolution of Marion and Nell
25 Lindsey's marriage. He particularly asked about Nell

1 having Marion Lindsey taken off insurance at work, was
2 this the first time she was not going to let him see
3 the kids despite the fact I think Ms. Nesbitt's
4 testimony is she has answered I don't know when asked
5 if he would be able to see the kids.

6 Clearly, the notion of the dissolution of their
7 marriage is now in play. I think it is only fair
8 that I ask Ms. Nesbitt why this marriage was
9 dissolved. Because he is the one, he mentioned it in
10 opening and he mentioned it in --

11 **THE COURT:** All right. Any objection?

12 **MR. BRENNAN:** Yes; Your Honor. I don't believe
13 I opened the door to any prior bad acts yet. I asked
14 about the end of the marriage. That was it.

15 **THE COURT:** I don't know what the answers will
16 be to the questions that Mr. Gowdy might ask in
17 rebuttal. But that would be, depending on what those
18 answers will be, that would be when you might possibly
19 could make an objection based on 404(b). Right now,
20 we're talking about relevance, whether or not this
21 witness' knowledge of the reasons for the dissolution
22 of the marriage are relevant. And you asked this
23 witness these two questions was he going to let her,
24 was she going to let Mr. Lindsey see the kids and was
25 this not the first time that he was being taken off

1 the insurance.

2 I am assuming that the reason you did that is to
3 bring out evidence that would relate to Mr. Lindsey's
4 state of mind at that time to support the argument
5 that I expect you will eventually make that you are
6 entitled to a charge on the lesser included offense of
7 voluntary manslaughter. In other words, that Mr.
8 Lindsey might possibly had been mad or upset over the
9 fact that his wife would not let him see his kids or
10 over the fact that his wife was taking him off of his
11 insurance and that that is perhaps the sudden heat of
12 passion and could possibly rise to the level of
13 sufficient legal provocation so that you will be
14 entitled to that charge.

15 What Mr. Gowdy is suggesting, I believe, is
16 that if that is going to be your position, he is
17 entitled to explore with this witness exactly how all
18 of that came about so perhaps we can see whether or
19 not Mr. Lindsey was justified in being mad over it.

20 Is that right, Mr. Gowdy?

21 **MR. GOWDY:** Yes, sir, your Honor.

22 **THE COURT:** From that standpoint, the evidence
23 that Mr. Gowdy seeks to bring out on reply is
24 relevant. If there are other objections that you
25 want to raise -- and I don't know why. I don't know

1 the answer to the question why. I don't know if
2 there's a 404(b) problem or not. You have to make
3 that objection contemporaneously unless you know
4 specifically now. If you know specifically now what
5 some of the answers to those questions are going to
6 be, perhaps we can bring them up now and rule on them.

7 **MR. BRENNAN:** The one I would reference to is
8 the 911 tape. The fact that he had been arrested
9 before, actually had gotten out of jail the day before
10 on criminal domestic violence. I am assuming that
11 she knows about that. It has already been played for
12 the jury.

13 **THE COURT:** Was that the basis of your 404(b)
14 objection that you made at, for the 911 tape?

15 **MR. BRENNAN:** Yes, Your Honor.

16 **THE COURT:** I did not understand that. I could
17 not figure out why you were making a 404(b) objection.
18 But now I know. So let me think it through. And I
19 will decide what to do about it. So, the alleged CDV
20 that occurred the night before?

21 **MR. BRENNAN:** That's correct.

22 **THE COURT:** Anything else that you know of, a
23 specific answer that you would object to under 404(b)?

24 **MR. BRENNAN:** Your Honor, because she and the
25 victim were like sisters, I'm assuming that she knows

1 the details of Ruby Nell Lindsey and Marion Lindsey's
2 marriage and could provide other bad act evidence,
3 Your Honor, or testimony. And for the same 404(b)
4 rules I would, reasons, I would object to those
5 questions or that question which will elicit prior bad
6 act of testimony.

7 **THE COURT:** Mr. Gowdy, I'm going to just
8 assume that to the extent that there is evidence in
9 response to these questions that would constitute
10 prior bad acts that you are offering it to show the
11 intent of the defendant so it would be admissible.

12 **MR. GOWDY:** Intent, Your Honor. And if I
13 thought about it long enough, it might actually fit
14 into one of the other exceptions of 404(b) also.
15 Hopefully, Barry and Donnie will be thinking while I'm
16 talking.

17 **THE COURT:** Well, I don't want to put you in
18 the difficult position of having to think and talk at
19 the same time. So I will be glad to go ahead and take
20 a break if you would like.

21 **MR. GOWDY:** That would be fine, Your Honor.
22 My frustration was, of course, that Mr. Brennan is
23 going to have a free swing at the piñata. He was
24 going to be able to put before the jury that Mr.
25 Lindsey was upset about not being able to see his kids

1 without the context of why that not being able to see
2 his kids was. Which I suspect Mrs. Nell was tired of
3 having the hell beat out of her. So that's the
4 context --

5 **MR. BRENNAN:** Objection, Your Honor.

6 **THE COURT:** Listen. The tension is high. We
7 all know that. You can make that argument without
8 going into that much of colorful detail in your
9 descriptions.

10 **MR. GOWDY:** Yes, sir.

11 **THE COURT:** All right. I will rule -- we will
12 resume argument on the 404(b) objection in just a
13 minute. Let me go back for a second. To the 403
14 objection as to both tapes, first of all, you made the
15 403 objection on the basis of the tapes being
16 cumulative. I overruled that objection yesterday.
17 I probably did not state my objection as clearly as I
18 should have.

19 It is not in my view cumulative that at all.
20 Because -- in the first place, because even though the
21 evidence on the 911 tape relates to the subject as the
22 testimony of the eyewitnesses, it is evidence of a
23 completely different character. It is evidence that
24 shows, that corroborates that in a way that is not
25 cumulative. Secondly, at this point in the trial or

1 at a point in the trial when that tape was offered, it
2 wasn't cumulative at all because it was the only
3 evidence in the record. So 403 as to it being
4 cumulative is overruled.

5 I discussed it in fair detail my thinking on the
6 question of whether or not the screams on the tape
7 were fairly prejudicial and whether their potential
8 for unfair prejudice outweighed its probative value.
9 I believe I just explained it thoroughly enough except
10 to say this additional thing. That is, I don't think
11 the screams are unfairly prejudicial at all. It will
12 come as no surprise to anybody that a nine-year-old
13 child, she was seven at the time, correct, or is she
14 nine?

15 **MR. GOWDY:** I thought she was nine.

16 **MR. BRENNAN:** She was nine.

17 **THE COURT:** That a nine-year-old child sitting
18 besides an adult that she sees shot and concludes is
19 dead will scream. That is not a surprise to anybody.
20 The fact that there are screams on the tape is not in
21 my opinion likely to shock the jury any more than just
22 hearing the fact that there was a nine-year-old child
23 beside the lady when she got shot. I don't see any
24 unfair prejudice.

25 I believe that I said yesterday that I would

1 reserve ruling on the 403 objection for the enhanced
2 version of the tape. As I said yesterday, that is
3 overruled. Or as I predicted yesterday, that is
4 overruled. Because the volume, to me, is not all that
5 much different. I don't hear that much difference
6 between the volume of the unenhanced tape and the
7 enhanced tape. I don't see an reason really to look
8 at the enhanced version of the tape any differently
9 from the unenhanced version of the tape except that
10 you can hear the sounds that the witness described as
11 mechanical sounds more clearly.

12 It's the State's theory, of course, that those
13 are gunshots. But the fact that you can hear those
14 sounds on the enhanced tape is not any unfair
15 prejudice. But on the other hand, the fact that you
16 can hear the sounds increases substantially the
17 probative value of the enhanced version of the tape.
18 Those objections are overruled.

19 Now, when the question was asked of Ms. Nesbitt
20 why did you tell Mr. Lindsey that you had not seen his
21 wife in two or three days when in fact she was seated
22 three or feet away from you and her answer was because
23 I knew about the marriage, I know about the threats,
24 he had threatened to kill her and that kind of thing.
25 There is a potential hearsay objection there. I

1 noted it when it happened.

2 But it is clear to me that that evidence was not
3 offered to prove the truth of the matter asserted but
4 was simply offered to explain what reasonably needed
5 to be explained to the jury in order to relate to this
6 witnesses credibility why she said something that was
7 not true on that occasion. So it was not offered to
8 prove the truth of the matter asserted in my view.
9 You were certainly justified in not raising an
10 objection to it at that time. We will take a short
11 break. And we will come back and address the 404(b).

12 (WHEREUPON, a short recess was taken at approximately
13 10:42 a.m.)

14 (WHEREUPON, the Court resumed at approximately
15 10:47 a.m.)

16 **THE COURT:** All right. We've got several jurors
17 who smoke. And for example, during this last break,
18 we let three or four of them go out and smoke. I was
19 under the impression that the defendant was going to
20 stay in the courtroom the whole time. But it
21 certainly makes sense that from time to time, he will
22 need to go back and do whatever it is that he needs to
23 do.

24 I need for Buck Cockrell from S.L.E.D. and you
25 folks from the jail to coordinate how you are going to

1 move the jury and how you are going to move the
2 defendant and make sure that they will not cross paths
3 under any circumstances. You don't have to do that
4 now. But maybe during the next break, you folks in
5 the jail meet with S.L.E.D. And y'all coordinate how
6 you are going to do that. And make sure that their
7 paths will not cross and it will not be possible at
8 any point in time for the members of the jury to see
9 the defendant when he is handcuffed.

10 All right. You have it?

11 **MR. GOWDY:** Yes, sir, Your Honor. I appreciate
12 the Court for allowing me to argue this. The last
13 thing I would have to say about it, my recollection
14 was Mr. Brennan asked Celeste Nesbitt questions
15 relative to whether or not Nell was going to let him
16 see their children. What I would like to do is put
17 that clear implication that's in the jury's mind in
18 context. I don't know what the answer is. It may
19 very well be --

20 **THE COURT:** She can -- you can come on up,
21 ma'am.

22 **MR. GOWDY:** We know from the 911 tape that
23 there was a court order in place. For all I know,
24 Nell interpreted the Court order to mean that she and
25 he cannot have contact. Clearly, they were not

1 supposed to have contact. What I do know is what is
2 left now is the notion that Nell was just not letting
3 him see his children. What I would like to explore
4 is what the basis for that might be. Right now,
5 there's no context around it.

6 **THE COURT:** All right. What the Solicitor has
7 done is to announce that he has the intention of
8 asking these questions and to allow the issue of the
9 relevance of those questions to be addressed before he
10 asked them. That is why he suggested that perhaps
11 the defense had opened the door to these questions
12 being asked in other words to make them relevant.

13 In my view they are relevant. The subject is
14 relevant. It's not that there is anything that you
15 did improper or, you had to bring this up. We had to
16 get into this subject. And in order for the jury to
17 probably understand why or whether Mr. Lindsey might
18 have been in the sudden heat of passion, it is
19 appropriate to examine why it is that these things
20 happened.

21 To the extent that this witness knows anything
22 about it, you can ask her about it, looking
23 specifically at the question of the incident that
24 occurred that night before. Again, I don't know if
25 she knows anything about it. I don't even know what

1 it is yet.

2 But, she has already said, she has already
3 testified that the reason she did not tell Mr.
4 Lindsey the truth about why Nell, about the fact that
5 Nell was in the back seat was because she knew of the
6 history between them. She knew of threats to kill
7 and that is kind of a summary of what she said. If
8 the incident of the night before plays into that, I'm
9 not sure if that it is another crime or act. I'm not
10 sure that it is part of the same event. That's what
11 we used to call res geste.

12 **MR. GOWDY:** Res geste, yes.

13 **THE COURT:** Are you ready for the jury?

14 **MR. BRENNAN:** Your Honor, I am simply saying
15 that she has already answered the question --

16 **THE COURT:** Let me do this. If you have an
17 objection make it in limine, make it. Otherwise, I'm
18 bringing the jury in. The only thing I've done is
19 said that if Mr. Gowdy wants to ask questions about
20 why Mr. Lindsey might have been mad about the fact
21 that he could not see his children or the fact that he
22 was being taken off of her insurance, that is
23 relevant. That's all I have done. If you have any
24 other objections you want to make now, make them.
25 Let's don't argue on what I've already ruled on.

1 **MR. BRENNAN:** Nothing, Your Honor.

2 **THE COURT:** All right. Bring the jury in.

3 (WHEREUPON, the jury enters at approximately 10:51
4 a.m.)

5 **THE COURT:** Solicitor.

6 **MR. GOWDY:** May it please the Court?

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

8 **REDIRECT EXAMINATION**

9 **BY MR. GOWDY:**

10 **Q** Ms. Nesbitt, I have just a few more questions
11 for you. On cross examination, Mr. Brennan asked you
12 whether the defendant asked you on September 18th is Nell
13 going to let me see my children. Do you remember the
14 question?

15 **A** Yes.

16 **Q** And your question today, and I assume also that
17 night because you testified your answer today was I don't
18 know. What I'm going to ask you now, Ms. Nesbitt, is
19 what was the basis of your answer on September 18th, 2002
20 to this defendant of I don't know when he asked am I going
21 to be able to see my children? Why did you say I don't
22 know?

23 **A** Because I did not know whether she was or not.
24 They have a lot of they had had a lot of altercations
25 before then. She told me she wasn't let him going to see

1 the kids. Like I said, I didn't know.

2 Q When you said occasions, do you mean occasions of
3 separation?

4 A Yes, occasions of separation.

5 Q Occasions of violence?

6 A Separation and violence.

7 MR. BRENNAN: Objection, Your Honor.

8 THE COURT: On what basis?

9 MR. BRENNAN: 404(b).

10 THE COURT: All right, I don't know if you all
11 had time to fill out your lunch menus a minute ago.
12 Maybe you were a little bit too rushed in filling out
13 your lunch menus. So I'm going to give you a chance
14 to study back over your selections and to make sure
15 you did not make a mistake. And I'll be back with you
16 as soon as I can. Please go back to the jury room.
17 (WHEREUPON, the jury exits at approximately

18 10:53 a.m.)

19 THE COURT: All right. Proceed.

20 MR. GOWDY: Your Honor, I asked the questions
21 the fairest way that I could.

22 THE COURT: No, I just want to hear the answer.

23 MR. GOWDY: Well, my argument is that is what
24 puts that comment into context. It is unfair to leave
25 out --

1 **THE COURT:** Hold on just a minute.

2 All right. Let's -- well, as far as the answer
3 that has been given so far which is occasions of
4 separation or occasions of violence or something like
5 that. What was the answer?

6 **MR. BARTOSH:** The answer was occasions of
7 altercations.

8 **MR. GOWDY:** No, that's not what I said. I
9 said occasions of separation or occasions of violence.

10 **MR. BARTOSH:** I'm referring to what the witness
11 said. When he asked the first question, she said they
12 had separated because of altercations.

13 **THE COURT:** Well, in event, altercations and
14 violence and separation to the extent those are other
15 crimes or wrongs or bad acts, the objection is
16 overruled because it relates to the question of
17 intent. Now, if -- I'm assuming that Mr. Gowdy if
18 given the opportunity is going to go a little bit
19 deeper and ask for some explanation of that. No?

20 **MR. GOWDY:** Your Honor, it would be only a
21 little more context.

22 **THE COURT:** I want to hear it now.

23 **MR. GOWDY:** Okay.

24 **BY MR. GOWDY:**

25 Q Ms. Nesbitt, you testified that you and Mrs.

1 Lindsey were like sisters?

2 A Yes.

3 Q Did you discuss with her things that happened
4 earlier, a few days before September 18th?

5 A Yes, I did.

6 Q Were you aware that there was a court order
7 saying Nell, Marion Lindsey was not supposed to have any
8 contact with Nell Lindsey?

9 A Yes, I was.

10 Q Did you discuss that with Nell Lindsey?

11 A Yes, I did.

12 Q With respect to her state of mind, do you know
13 whether or not she interpreted that court order to mean he
14 is not supposed to come around her or the children?

15 A That's what she said.

16 THE COURT: So she says that she interprets the
17 court order to mean that the defendant could not see
18 the children?

19 MR. GOWDY: Yes, sir.

20 THE COURT: What's the objection?

21 MR. BRENNAN: I don't have an objection to that
22 question, Your Honor.

23 THE COURT: You could probably come up with a
24 hearsay objection. But I don't believe it would be
25 hearsay. It's not -- if Ruby Lindsey -- well,

1 apparently Ruby Lindsey must have told this witness
2 what her interpretation of that order was insofar as
3 it relates to the children?

4 **MR. GOWDY:** Yes, sir. That's the last
5 question I asked Ms. Nesbitt.

6 **THE COURT:** And so her telling Ms. Nesbitt that
7 would be an out-of-court statement?

8 **MR. GOWDY:** Relating to her state of mind.
9 It's not a statement of facts. It's state of mind.
10 That's what we're going at here. His state of mind,
11 could he see his kids. And her state of mind, was she
12 being malicious or was she following a court order or
13 her interpretation of a court order.

14 **THE COURT:** All right. I am satisfied that it is
15 not hearsay. If it offered to prove the truth of the
16 matter asserted, it is admissible under 803(1) and
17 (3). My understanding is the court order was entered
18 the day before?

19 **MR. BRENNAN:** The night before.

20 **THE COURT:** So within approximately 24 hours of
21 Mrs. Lindsey's death.

22 **MR. BRENNAN:** That is correct, yes, Your
23 Honor.

24 **THE COURT:** So if Ms. Lindsey told Ms. Nesbitt how
25 she interpreted that order, that statement would have

1 had to be made during that 24-hour period.

2 MR. GOWDY: Yes, sir.

3 MR. BRENNAN: Yes, sir.

4 THE COURT: So it would have been a statement of
5 her impression in the present tense of some fact that
6 is relevant to the case. So it is admissible. Are
7 you going any further?

8 MR. GOWDY: That is as far as I'm going.

9 THE COURT: Bring in the jury.

10 MR. GOWDY: Unless he wants to go -- that is
11 as far as I'm going right now.

12 (WHEREUPON, the jury enters at approximately 11:00
13 a.m.)

14 MR. GOWDY: May it please the Court, Your
15 Honor?

16 THE COURT: Yes, sir.

17 BY MR. GOWDY:

18 Q Ms. Nesbitt, just a couple more questions. You
19 testified that you and Mrs. Lindsey were like sisters?

20 A Yes.

21 Q And y'all have been since many, many, many years
22 ago?

23 A Correct.

24 Q Did ya'll talk about the more intimate details of
25 one another's lives?

1 **A** Yes, we did.

2 **Q** Were you aware of a court order that had been
3 issued in the hours or the day prior to September 18th that
4 existed between Marion Lindsey and Nell Lindsey?

5 **A** Yes.

6 **Q** Are you aware of whether or not Nell Lindsey
7 interpreted the Court order as to mean her husband was not
8 supposed to come around her or --

9 **MR. BRENNAN:** Objection to leading, Your Honor.

10 **MR. GOWDY:** I'm trying to lead to avoid the
11 problem, Judge. I'm happy to ask an open-ended
12 question.

13 **THE COURT:** Why don't you?

14 **BY MR. GOWDY:**

15 **Q** Are you aware of a court order or did Mr. Lindsey
16 discuss with you a court order that been issued in the
17 hours or day prior to September 18?

18 **A** She discussed with me that a court order had been
19 issued.

20 **Q** Do you know what that court order was about?

21 **A** A domestic violence of him jumping on her at her
22 job or something.

23 **MR. BRENNAN:** Objection, Your Honor, 404(b).

24 **THE COURT:** Would you permit Mr. Gowdy to lead
25 the witness so that we can avoid any 404(b) problems?

1 I will.

2 You may.

3 MR. GOWDY: Thank you, Your Honor.

4 BY MR. GOWDY:

5 Q Ms. Nesbitt, do you know whether Mrs. Lindsey,
6 Nell Lindsey, interpreted the court order and did she
7 relate to you that she interpreted the Court order to mean
8 this defendant was not supposed to have contact with Nell
9 Lindsey or their children?

10 A She told me he was not supposed to come around
11 her or her children. That was what the Court, they told
12 her.

13 Q Thank you very much, Ms. Nesbitt.

14 MR. GOWDY: That's all the questions I have,
15 Your Honor.

16 THE COURT: Recross?

17 MR. BRENNAN: Yes, Your Honor.

18 RECCROSS EXAMINATION

19 BY MR. BRENNAN:

20 Q Hade you have seen Mr. Lindsey --

21 MR. BRENNAN: No questions, Your Honor

22 THE COURT: Ma'am, you may step down.

23 MR. GOWDY: Your Honor the State would call
24 Officer Benny Godfrey.

25 HARVEY "BENNY" GODFREY

1 having first being duly sworn testified as follows:

2 **DIRECT EXAMINATION**

3 **BY MR. GOWDY:**

4 **Q** Good morning to you. I'm going to ask you in a
5 good strong voice to speak up so the last two jurors in the
6 jury box can hear. Would you introduce yourself to the
7 jury? Tell them where you work.

8 **A** Harvey Bernard Godfrey. I work at the Inman City
9 Police Department.

10 **Q** Do you go by a name other than Harvey or Bernard?

11 **A** Yes, I go by Benny.

12 **Q** How long have you been in law enforcement,
13 Officer Godfrey?

14 **A** 17 years.

15 **Q** How long have you been with Inman City Police?

16 **A** Six.

17 **Q** Prior to that, where were you?

18 **A** Spartanburg County.

19 **Q** And let me ask you this, currently what are your
20 duties and responsibilities at the Inman City Police
21 Department?

22 **A** Uniform patrol. I patrol the neighborhoods, work
23 traffic and work any crimes that may occur inside the city
24 as far as investigating.

25 **Q** In 2002, September 2002 to be more particular

1 were you also employed with the Inman City Police
2 Department?

3 A Yes.

4 Q And were your responsibility substantially
5 similar as they are today?

6 A Yes.

7 Q Are you a graduate of the police academy?

8 A Yes.

9 Q Have you had any other particular training or is
10 training required to maintain your status as a law-
11 enforcement officer?

12 A Yes.

13 Q Tell the jury what is involved in maintaining
14 your status as a police officer.

15 A We have to have four courses which would be
16 related to various areas in law-enforcement such as drugs.
17 Just your basic investigations. We have to have legal
18 updates at least once a year, driving qualifications.

19 Q Have you attended any other schools, narcotic
20 schools or any kind of investigative schools with either
21 the Sheriff's Department or the Inman Police?

22 A Yes.

23 Q Could you tell the jury what those school might
24 have been.

25 A I been to narcotics classes.. I been to child

1 abuse and neglect classes, traffic investigations, burglary
2 investigations.

3 Q Officer Godfrey, I want to go back with you to
4 September the 18th, 2002. Were you on duty in the early
5 evening hours, let's say seven o'clock?

6 A Yes.

7 Q What were you doing then?

8 A I normally would come in at 7:00 and work until
9 7:00 in the morning. I was just going to work. We had
10 made regular routine patrols around the area. Myself and
11 Officer Tucker who was working that night also made an
12 arrest at one of the local convenience stores. Officer
13 Tucker elected to carry the subject down because I had to
14 meet with another officer to meet with one of our drug
15 informants to show him some picture line ups.

16 Q Is it fair to say that Inman Police Department in
17 conjunction with the Spartanburg Sheriff's Department were
18 in the middle of a drug roundup or in the investigative
19 stages of a drug roundup back then?

20 A Yes.

21 Q Is that what your attention was on back on
22 September the 18th?

23 A Yes.

24 Q Was your attention diverted from that on to
25 something else?

1 **A** Yes.

2 **Q** Tell the jury about a dispatch that you received.

3 **A** I was pulling into the Inman Police Department
4 back parking lot to go inside just to receive some pictures
5 to carry to show our informant. At the time I was getting
6 out of the car, Spartanburg County Communications called me
7 and was giving me a call for a rolling domestic.

8 **Q** Tell me and the jury what a rolling domestic is.

9 **A** A rolling domestic is basically the same thing as
10 a domestic dispute between two people. It just happens to
11 be in either one vehicle or two vehicles.

12 **Q** All right. So a domestic is a dispute between
13 family members, partners or something like that?

14 **A** Yes.

15 **Q** Now, I don't whether you were in court this
16 morning or not when the jury heard the 911 tape.

17 **A** Yes.

18 **Q** That was not your voice on the 911 tape, is that
19 correct?

20 **A** No.

21 **Q** Do calls go to a central location and then are
22 dispatched back out to you?

23 **A** Yes.

24 **Q** At any point, were you ever in contact with Ms.
25 Nell Lindsey?

1 A No.

2 Q Did the dispatch inform you that there was a
3 weapon involved?

4 A No.

5 Q How did it simply come across?

6 A It came across as, they called my number. And I
7 answered them. And they said there was a rolling domestic
8 headed your to your P.D. At the same time they were
9 dispatching the call, two cars were pulling into the back
10 parking lot.

11 Q Did you make any assumptions based on the two
12 cars pulling into the parking lot?

13 A I assumed that was the rolling domestic.

14 Q The jury has seen pictures of the back parking
15 lot of the Inman Police Station including pictures of what
16 looks like a blue pickup truck.

17 A Yes.

18 Q Do you know whose blue pickup truck that may be?

19 A That is mine.

20 Q Well, let's wait and do that in a second. Walk
21 the jury through what happened when those two cars pulled
22 in the back parking lot of the Inman police station.

23 A When the two cars pulled in, I had my walkie-
24 talkie in my hand and was trying to listen to what the
25 dispatchers had to say. At the same time, the cars pulled

1 in. A lady from the first car that pulled, it pulled right
2 beside my patrol car, jumped out and was running to the
3 side of the car I was on. I was at the back rear passenger
4 -- driver's corner when she jumped out and came running
5 around.

6 She was hollering something to the affect that he's
7 going to get her or something like that. At that point, I
8 turned and looked back towards her car. And I saw a black
9 male with a handgun pointing it at the back glass. At that
10 time, I reached for my gun and hollered don't. And he
11 fired two rounds into the back glass.

12 Q What happened after those two rounds were fired
13 into the back window. When I say the back glass, what car
14 was it fired into?

15 A Ms. Nesbitt's car.

16 Q The car she had just gotten out of?

17 A Yes.

18 Q At that point, I was taking cover behind the car.
19 I saw a black male run between my car and her car. And I
20 saw to two more flashes that appeared to be from a gun. I
21 started around the back side of the car and I lost sight of
22 him at that point. Several seconds later, he came back out
23 in front of the car pointing the firearm at me. And I
24 fired four rounds.

25 Q You discharged four rounds from your service

1 revolver, is that right?

2 A Yes.

3 Q Service revolver may be an old term. Your
4 weapon, is that right?

5 A Yes.

6 Q I'm going to show you State's Exhibit 5 and ask
7 you whether or not you recognize what is in that box.

8 A Yes.

9 Q What is that Officer Godfrey?

10 A That's my weapon.

11 Q Even though I referred to that as a revolver, it
12 is in fact a pistol, right?

13 A Yes, sir.

14 MR. GOWDY: Your Honor, I would move State's
15 Exhibit 5 into evidence.

16 THE COURT: Any objection?

17 MR. BARTOSH: No.

18 THE COURT: Let me do this and this will govern
19 us for the rest of this trial. I can see that you
20 have a plastic -- is that going through the chamber?

21 MR. GOWDY: It is going through the, uh, I
22 don't even know what that is.

23 THE COURT: That is just holding it in the box?

24 MR. GOWDY: Yes, sir. You want somebody to
25 clear the weapon?

1 **THE COURT:** I want, before any weapon is brought
2 into the courtroom, I want a law enforcement officer
3 to make sure that it is not loaded.

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

5 **THE COURT:** I do not you want it to be possible
6 for it to become loaded during the course of the
7 trial.

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

9 **THE COURT:** So you can take one of those snap ties
10 or whatever and run it through there. If there's
11 going to be any ammunition entered into evidence, we
12 will control that. Is that what you have in the bag?

13 **MR. GOWDY:** I think this is the clip and this
14 is the weapon.

15 **THE COURT:** Are there any live rounds in the
16 clip?

17 **MR. GOWDY:** I would hope not but let me
18 check and see.

19 **THE COURT:** Officer, would you check that weapon
20 and make sure is not loaded?

21 **THE WITNESS:** Yes, sir.

22 (WHEREUPON, the officer examined the weapon.)

23 **THE WITNESS:** It is not loaded.

24 **THE COURT:** All right, sir. No live ammunition
25 in the clip?

1 **MR. GOWDY:** None in the clip. None in the
2 gun. The live ammunition is State's Exhibit 7.
3 State's Exhibit 6 is the clip which goes with State's
4 Exhibit 5. At this point, I would introduce 5, 6, and
5 7 into evidence.

6 **THE COURT:** Any objection?

7 **MR. BRENNAN:** No, sir.

8 (WHEREUPON, State's Exhibit 5 through 7 were admitted
9 into evidence.)

10 **THE COURT:** All right. With your permission,
11 Solicitor, I want State's Exhibit 7 to be kept over
12 here at the Clerk's desk separate from the other
13 exhibits.

14 **MR. GOWDY:** Yes, sir, Your Honor.

15 **THE COURT:** If it ever becomes necessary for you
16 to use it or for the jury to examine it, we will deal
17 with it at that time.

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

19 **THE COURT:** If you have any more weapons, I want
20 them checked before they are offered into evidence.

21 **MR. GOWDY:** Yes, sir.

22 **BY MR. GOWDY:**

23 **Q** Officer Godfrey, this is your gun and your clip,
24 right?

25 **A** Yes, sir.

1 **Q** How many cartridges or bullets fit into your
2 clip?

3 **A** It is 15 clip.

4 **Q** Do you keep one in the gun also?

5 **A** Yes, so it is a total of 16 in the weapon.

6 **Q** To the best of your recollection, how many rounds
7 did you discharge on September 18th?

8 **A** I fired four rounds.

9 **Q** Of those four rounds, how many were directed
10 toward Marion Lindsey?

11 **A** All four.

12 **Q** Do you know whether or not you hit him with any
13 of the rounds?

14 **A** I know I did hit him but I cannot tell you where.

15 **Q** You know you hit him how? Did he fall?

16 **A** Yes.

17 **Q** After he fell, what did you do?

18 **A** I firing when he fell. And at that point, two
19 other officers that were inside that worked for Spartanburg
20 County came outside. And I told them to cover him. They
21 did at that point. Then another officer that just happened
22 to come up, the Sergeant with Spartanburg County pulled up.
23 And he really did not know what was going on at the time.
24 I told him what was taking place.

25 They disarmed the defendant at that point. I called

1 for an ambulance at some point. I had to recover my
2 walkie-talkie. I had dropped it on the ground. And then
3 we retrieved the kids and the other lady out of the car.

4 Q I want to stop before you get there. And I want
5 to ask you this, did you ever see the face of the man who
6 shot into the back of Celeste Nesbitt's car?

7 A No.

8 Q What were you looking at, what were you focused
9 on?

10 A The weapon he had.

11 Q Can you tell this jury that the same person you
12 shot is the person that shot into that car?

13 A Yes.

14 Q How can you tell them that?

15 A He was only person that was in the parking lot
16 other than the people who were in the car, Ms. Nesbitt and
17 myself.

18 Q After you discharged your weapon and struck the
19 shooter, did you ever walk over there to see who the
20 shooter was or were you occupied with other things?

21 A I was occupied with other things.

22 Q And I believe I interrupted you when you were
23 beginning to tell the jury that one of things was to get
24 the people out of a car.

25 A Yes.

1 **Q** Tell the jury who you got out and where they were
2 located.

3 **A** We got an older lady. When we went around the
4 car on the passenger's side, I tried to get the kids out
5 first but the door was locked. We got the older lady out
6 of the front seat. One of the girls unlocked her back door
7 by the time.

8 We got both out. One was sitting in a car seat. The
9 other was sitting in the car. We got those out. And I sent
10 them up to Ms. Nesbitt who at that point was up next to the
11 side of the police department. I told them to stay there
12 then we could get everything arranged. Then shortly, just
13 a few minutes later, I had one of the other officers who
14 were there carry them inside to get them out of any danger
15 that may still exist.

16 **Q** And you did not have any interaction with the
17 shooter himself other than shooting him after he hit the
18 ground?

19 **A** That is correct

20 **Q** You have been in law enforcement for 16 years?

21 **A** 17 years.

22 **Q** 17 years. Is it standard policy or procedure
23 that any time an officer is involved in a shooting that his
24 gun is taken and confiscated?

25 **A** Yes.

1 Q Was that done in this case?

2 A Yes.

3 Q Do you recall -- if you don't, that's fine. Do
4 you recall who took your gun?

5 A Detective Tucker with Spartanburg County.

6 Q Okay. I'm going to ask Mr. Willingham if he
7 would turn this overhead projector on for me. While he is
8 doing that, I want to ask you did you get Keysha and Kiera
9 out of the car, the two young girls in the back?

10 A Yes.

11 Q Did you happen to notice anybody else in the back
12 seat?

13 A I saw a female that was sitting the left rear
14 seat.

15 Q Can you describe her condition to the jury.

16 A She had blood all over the front of her face and
17 down the front of her chest. When we pulled the last girl
18 out, her head slumped over. She appeared to be dead at
19 that point.

20 Q I am going to let you decide. These are all in
21 evidence, 22 through 26 inclusive. I'm going to put a
22 picture on the overhead for the jury. Which prospective
23 would enable you best to show the jury the full picture of
24 what happened that night?

25 A This one.

1 Q All right. And that is State's Exhibit 24.
2 Officer Godfrey, if you will keep your voice up, I'm going
3 to ask you to come down here. Have you used one these
4 before, a laser pointer?

5 A Yes.

6 Q There is the button. Describe for the jury where
7 you were standing. Keep your voice up where the Court
8 Reporter can hear you and tell the jury what you did and
9 what happened.

10 A When I -- I had just pulled into the parking lot
11 here when I received the call. I was stepping out of the
12 car when the dispatcher called. And at the same time the
13 dispatcher was calling me, two cars were pulling in. One
14 pulled here and one pulled over here. I had stepped out.
15 I was standing right over here.

16 The lady that was driving the car came out of the
17 driver's seat from there and ran around the front of the
18 car over to this side and was hollering at that point.
19 When I turned and focused back this way, she said he was
20 going to get her. I was looking to see who he was. At
21 that point, he was standing there with a gun pointing
22 directly in the back glass right here. Before I could
23 reach my weapon, he had done fired two shots in the back
24 glass.

25 I went down here. I came across here. And I saw him

1 running between the two cars. I saw two more shots. At
2 that point, I lost sight of him. He was somewhere up here
3 in front. I started down. I hollered at Celeste to see if
4 she saw him. She said no. I started in between the two
5 cars going towards the front of the car. When he come out
6 from in front on the other side there pointing a gun at me
7 and that's when I fired four rounds. He hit the ground at
8 that point.

9 Q I believe your testimony was you did not walk
10 over there. Someone else was tending to him and you got
11 the kids?

12 A I was about middle-ways the car. I kept my gun
13 trained on him. Two other officers came out from inside
14 off the porch. I told them to cover him. And they did at
15 that point.

16 Q Okay. Thank you. You can have your seat,
17 Officer Godfrey. I have one more question for you if you
18 know the answer to it. When you looked in the back of that
19 Mercury Topaz and got the two little girls out, did you
20 notice anything in Nell Lindsey's hand?

21 A A cell phone.

22 Q Those are all the questions I have, Officer.
23 Please answer any questions the defense may have please.

24 CROSS-EXAMINATION

25 BY MR. BRENNAN:

1 **Q** Officer Godfrey, my name is Doug Brennan. I'm
2 one of Mr. Lindsey's attorneys. You fired four shots at
3 Mr. Lindsey, is that correct?

4 **A** That's correct.

5 **Q** And you said you lost sight of him. Excuse me.
6 You lost sight of him. And then at some point he came back
7 actually towards you, is that correct?

8 **A** Yes. He jumped back in front of the car. He
9 came from the front of my car at the passenger side and was
10 pointing a weapon at me at that point.

11 **Q** Right. Are you sure that that weapon that he had
12 in his hand wasn't pointed like this?

13 **A** I am positive.

14 **Q** Did you shoot him in the head?

15 **A** No.

16 **Q** He was shot in the head though, is that correct?

17 **A** I don't know.

18 **Q** You don't know that he was wounded in the head?

19 **A** No, I don't.

20 **Q** You never looked at him when he was laid on the
21 ground?

22 **A** No.

23 **Q** But you did not shoot him in the head?

24 **A** No, I don't guess.

25 **Q** One second.

1 Officer Godfrey, when those two cars pulled in, were
2 you the only person in the parking lot at that time?

3 A Yes.

4 Q It was you by yourself?

5 A Yes.

6 Q Nothing further. Thank you.

7 MR. GOWDY: Nothing on redirect, Your Honor.

8 THE COURT: You can step down, Officer.

9 Call your next witness.

10 MR. BARNETT: Guy Carter.

11 GUY CARTER

12 having first being duly sworn testified as follows:

13 DIRECT EXAMINATION

14 BY MR. BARNETT:

15 Q Please tell the jury who you are.

16 A Guy William Carter, Junior. I am a Master Deputy
17 with the Spartanburg County Sheriff's Department.

18 Q Were you working back on September 18th, 2002?

19 A Yes, I was.

20 Q Were you at the Inman Police Department?

21 A Yes, sir.

22 Q If you would, tell the jury why you were at the
23 Inman Police Department.

24 A I had responded to the Inman P.D. just in
25 conducting routine paperwork. I was not on call or

1 anything.

2 Q Were you inside the police station?

3 A Yes, sir.

4 Q Could you tell the jury who was in there with you
5 at the time and what happened after that.

6 A At the time, I received a knock on the door.
7 Detective Mark Finley came to the door. I answered the
8 door and asked him what he was doing up this way. He was
9 working on a case that I was familiar with. Detective
10 Finley went to the restroom. He came back. And we got to
11 talking further about the case. I asked him if he had
12 talked to several individuals. And there was a name he had
13 not mentioned.

14 I made a phone call to a Jimmy Bobo who was the
15 Assistant Chief of the Fire Department. At which time, I
16 was on the telephone and I heard a series of random loud
17 pops. I advised Mr. Bobo that we had shots fired at the
18 Inman P.D. I dropped the phone and exited the building
19 with Detective Finley behind me. I had my weapon drawn.

20 I came down the right side of building and saw Officer
21 Godfrey standing in the parking lot behind the patrol
22 vehicle. He told me to cover him. If I could, it was a
23 cuss word. He said cover that he said Cover that
24 motherfucker. I said where is he, Benny. He said he's on
25 the ground in front of the patrol car.

1 As the picture shows, I went between the blue pick up
2 truck and the Inman patrol car with my weapon drawn. As I
3 approached the front of the patrol car, I observed a black
4 male laying face down. He had a silver revolver in his
5 left hand. And his head was turned to the right. At which
6 time, Detective Finley and Sergeant Berry were behind me
7 also. Then Sergeant Berry said the subject was still
8 breathing.

9 At which time, Sergeant Berry kicked the weapon from
10 his hand. At which time, two medics were there within a
11 short period of time. I don't know the exact amount of
12 time. At which time, the medics rolled the subjects over.
13 At that time, I observed the individual.

14 Q You see the individual in court today, sir?

15 A Yes, sir.

16 Q Can you identify him for the jury?

17 A Yes, the individual black male, white shirt,
18 defendant known as Myron Lindsey.

19 Q That is the individual you saw that night?

20 A Yes, sir.

21 Q That is the individual that had the gun in his
22 hand?

23 A Yes, sir.

24 Q After that, did y'all cover him and did you check
25 up on the occupants of the vehicle?

1 **A** At that time, things got a little hectic. I
2 reholstered my weapon and assisted Officer Godfrey in
3 taking care of the children and the two ladies.

4 **Q** Where were the children and the two ladies taken?

5 **A** They were taken to the inside of the Inman P.D.

6 **Q** And were they very emotional?

7 **A** Yes. All of them were crying and very
8 distraught.

9 **Q** Y'all secured them in the police station?

10 **A** Yes, we took them out of harm's way.

11 **Q** And Inman is in Spartanburg County?

12 **A** Yes, sir.

13 **Q** Please answer any questions Mr. Brennan may have
14 for you.

15 **CROSS-EXAMINATION**

16 **BY MR. BRENNAN:**

17 **Q** Officer Carter, how are you doing?

18 **A** I'm fine, sir.

19 **Q** You were standing there covering Mr. Lindsey
20 until the EMS got there, is that correct?

21 **A** Yes, sir. That's correct.

22 **Q** When they rolled him over, did you see the
23 injuries that he had suffered?

24 **A** I saw an amount of blood. Where the blood was
25 coming from, I don't know.

1 Q You don't know where he had been shot?

2 A No, sir.

3 Q All right. The revolver that he had, did you look
4 at it?

5 A No, sir. The only thing I observed was the
6 revolver in his left hand. As for picking it up, touching
7 it or nothing, no, sir.

8 Q Okay. Nothing further.

9 MR. BARNETT: No further questions.

10 THE COURT: You can step down, sir.

11 MR. BARNETT: We ask that he be excused.

12 THE COURT: You are excused, sir.

13 MR. BARNETT: I call Doug Bishop to the stand
14 please.

15 DOUG BISHOP

16 having first being duly sworn testified as follows:

17 DIRECT EXAMINATION

18 BY MR. WILLINGHAM:

19 Q Tell the Court who you are.

20 A My name is Jack D. Bishop.

21 Q Mr. Bishop, where do you work?

22 A I work for the Spartanburg County Sheriff's
23 Department.

24 Q What do you do for them?

25 A I work in the forensics area.

1 Q What is the forensics area of the sheriff's
2 office?

3 A We respond to crime scenes. We do photography,
4 evidence collection at the scenes.

5 Q Okay. And you did not respond to the crime scene
6 of this case, did you?

7 A No, sir. I did not.

8 Q Was that done by Randy Bogan?

9 A Yes, sir. It was.

10 Q He's got the same basic jobs as you do?

11 A Yes, sir.

12 Q You did attend the autopsy of Ruby Nell Lindsey?

13 A I did.

14 Q Do you remember when that autopsy was?

15 A No, sir. The exact day I do not.

16 Q Would a copy of your evidence sheet help refresh
17 your recollection?

18 A It would. (Reviewing.)

19 September the 19th, 2002.

20 Q Where was the autopsy of Ms. Lindsey performed

21 A It was done at Spartanburg Regional Medical
22 Center in the morgue.

23 Q Who performed the autopsy?

24 A Dr. David Wren.

25 Q I'm going to show you three exhibits. State's

1 Exhibit 16, State's Exhibit 17 and State's Exhibit 18.

2 When you were at the autopsy, did Doctor Wren remove three
3 projectiles from the body of Ruby Nell Lindsey?

4 A Yes, he did.

5 Q Did you take custody and possession of those
6 projectiles?

7 A Yes, sir. I did.

8 Q Looking at 16, 17 and 18, are those three
9 projectiles that Dr. Wren gave you?

10 A Yes, they are.

11 Q What did you do with those pieces of evidence
12 when you seen them?

13 A Brought them back to the sheriff's office. I
14 packaged them and turned them to our evidence office to be
15 sent to S.L.E.D.

16 Q All right.

17 MR. BARNETT: Your Honor, at this time I move
18 State's Exhibits 16, 17, and 18 into evidence.

19 MR. BRENNAN: No objection.

20 THE COURT: Let me see the lawyers up here.

21 (WHEREFORE, a bench conference was held off of the
22 record.)

23 THE COURT: Without objection, they are
24 admitted.

25 (WHEREUPON, State's Exhibits 16 through 18 were

1 admitted into evidence.)

2 MR. WILLINGHAM: Thank you, Your Honor.

3 Would you answer any questions the defense may
4 have for you.

5 MR. BRENNAN: I have no questions of this
6 witness, Your Honor.

7 THE COURT: You can step down, sir.

8 MR. WILLINGHAM: We call Randy Bogan.

9 RANDY BOGAN

10 having first being duly sworn testified as follows:

11 DIRECT EXAMINATION

12 BY MR. WILLINGHAM:

13 Q Tell the jury who you are.

14 A Randall Eugene Bogan.

15 Q Mr. Bogan, it's obvious from your uniform that
16 you work at the sheriff's office.

17 A Yes, sir. I do.

18 Q How long have you been at the sheriff's office?

19 A A little over 20 years.

20 Q What do you do for them?

21 A I work in the forensics department. And I have
22 been for about 5 years.

23 Q What is the forensics department?

24 A We go to crime scenes. We collect evidence.
25 Take measurements. We go to different crime scenes,

1 shootings, suicides, domestics, burglaries. We do
2 fingerprints or collect fingerprints from the scenes.

3 Q You take pictures?

4 A Yes.

5 Q Were you asked to go to the Inman Police
6 Department in response to a shooting there on September of
7 2002?

8 A Yes, sir. I was.

9 Q When you arrived on the scene, what did you find?

10 A When I arrived on the scene, I spoke with Officer
11 Carter who was there. There was shell cases in the parking
12 lot. There was three cars. One that were in the center of
13 the parking lot. One being a patrol car. And Ms. Lindsey,
14 Ruby Lindsey was located in one of the cars in the back
15 seat on the driver's side. She was deceased. There was a
16 gun in front, I believe, of the patrol car, if I'm not
17 mistaken, along with some live rounds as well.

18 Q As you found the scene, what was the first thing
19 you did at the scene?

20 A Actually I called for traffic to come out and GPS
21 the scene. Also I photographed the scene and took
22 photographs. I always take photographs of the scene. Then
23 I placed placards down of each item that I find at the
24 location. And then I take photographs again.

25 Q Okay. So you survey the scene, is that fair?

1 **A** That's correct.

2 **Q** You locate any potential evidence?

3 **A** Yes, sir.

4 **Q** You label it?

5 **A** Yes, sir.

6 **Q** And you take pictures of it?

7 **A** That's correct.

8 **Q** Okay. I've got pictures I want to go through with
9 you.

10 **A** All right.

11 **Q** If you will just bear with me for a second.

12 **A** That is fine.

13 **Q** I'm going to show you on the overhead projector
14 what's already been admitted into evidence as State's
15 Exhibit 24 and ask if that is the scene as you found it.
16 You might want to watch that microphone too.

17 **A** Yes, sir. It is.

18 **Q** Using this pointer, show the jury where you found
19 the body of Ms. Lindsey.

20 **A** In the backseat of this car right here.

21 (Pointing.)

22 **Q** I'm going to show you a series of photographs.

23 I'm going to show you State's Exhibit number 27. You
24 recognize that?

25 **A** Yes, sir.

1 Q What is it?

2 A A photograph of the vehicle that Ms. Lindsey was
3 in and the shots going through the window.

4 Q I'm also going to show you a series of
5 photographs, State's Exhibit 28, 29, 30 and 31. Can you
6 tell me what those are?

7 A All of these are from the same car and also the
8 shots that were going through the window, the rear window
9 and the passenger-side rear window or, excuse me, the
10 driver's side rear window where Ms. Lindsey was seated.

11 Q Do those photographs accurately reflect the scene
12 as you found it that night?

13 A Yes, sir. They do.

14 MR. WILLINGHAM: Your Honor, at this time, I
15 move State's Exhibits number 27, 28, 29, 30 and 31
16 into evidence.

17 THE COURT: Any objection?

18 MR. BRENNAN: No, Your Honor.

19 THE COURT: They are admitted.

20 MR. WILLINGHAM: Thank you.

21 (WHEREUPON, State's Exhibits 27 through 31 were
22 admitted into evidence.)

23 BY MR. WILLINGHAM:

24 Q At this point, I'd publish each of these
25 beginning with State's Exhibit number 27. Again, if you

1 would, tell the jury what they are seeing.

2 **A** Actually, this is the back of the vehicle that
3 Ms. Lindsey was in. There is a bullet hole here that goes
4 into the back side of the back window of the vehicle from
5 the rear driver's side.

6 **Q** I will now show you State's Exhibit 28.

7 **A** This is just a closer photograph showing a bullet
8 hole here and here. There is two right there.

9 **Q** There's a total of four?

10 **A** Yes, sir.

11 **Q** I'll show you State's Exhibit 29.

12 **A** This is a photograph of the rear of the vehicle
13 where, of course, the two bullet holes are. It is the same
14 photograph.

15 **Q** State's 30.

16 **A** This is just showing the side view as well of the
17 two bullet holes.

18 **Q** And 31.

19 **A** This is a closer view at a different angle of the
20 bullet holes. One here and one in this area.

21 **Q** And at some point, did you also find shell
22 casings?

23 **A** Yes, sir. I did.

24 **Q** Where did you find those?

25 **A** They were located on the ground. There was a

1 couple, I'm not sure exactly how many. I have to see my
2 sketch that I had drawn.

3 Q Are you referring to the crime scene sketch that
4 you prepared?

5 A Yes, sir. It was a small sketch that I had done.
6 Thank you. They were actually four casings. The four
7 casings were located actually behind and to the right of
8 the car that you just saw with the holes in it, with the
9 bullet holes in it that Mrs. Lindsey was in and kind of
10 behind the other car parked to the right side of the
11 vehicle she was in.

12 Q Let me show you State's Exhibit 32 and ask if you
13 recognize that.

14 A Yes, sir. I do. These are the markings, the
15 four shell casings. It is a total photograph of all four
16 shell casings and where they were located in the parking
17 lot.

18 Q Likewise, I'm going to show you State's Exhibit
19 33, 34, 35 and 36. Can you tell me what those are?

20 A Yes, sir. This is Number 1, which is the number
21 one shell casing that I marked as Number 1. Number 2,
22 excuse me, Number 2 shell casing, Number 3 shell casing and
23 Number 4 shell casing.

24 Q All right. Do these pictures accurately reflect
25 the scene as you found it?

1 **A** Yes, sir. They do.

2 **MR. WILLINGHAM:** Your Honor, at this time, I
3 move State's 32 through 35 into evidence.

4 **MR. BRENNAN:** No objection.

5 **THE COURT:** They are admitted.

6 (WHEREUPON, State's Exhibits 32 through 35 were
7 admitted into evidence.)

8 **MR. WILLINGHAM:** Publish them to the jury,
9 Your Honor.

10 **BY MR. WILLINGHAM:**

11 **Q** State's Exhibit 32. If you would, tell the jury
12 what they are seeing.

13 **A** This is the car to the right. The car that Mrs.
14 Lindsey was in is right over here. This is the vehicle
15 over to the right. There is Number 1, 2, 3 and 4 shell
16 casings.

17 **Q** Okay. You collected those four shell casings?

18 **A** Yes, sir. I did.

19 **Q** Make sure I'm clear, you did collect the four
20 shell casings?

21 **A** Yes, sir. I did.

22 **Q** Picked them up personally?

23 **A** Yes, sir. I did.

24 **Q** Took them in evidence?

25 **A** Yes, sir. I did.

1 Q What did you do after you took them over into
2 evidence?

3 A We actually placed them in an evidence locker.
4 And our evidence custodian collects them and puts them in
5 the evidence.

6 Q And ultimately sends them to S.L.E.D. for
7 analysis?

8 A Yes, after I do the analysis paperwork for
9 S.L.E.D.

10 Q Okay. I'm showing you State's Exhibit 1, 2, 3
11 and 4 and ask you if those are the 9 millimeter casings.

12 A Yes, sir. They are.

13 Q And those you turned into evidence to be
14 forwarded to S.L.E.D. for analysis?

15 A Yes, that is correct.

16 **MR. WILLINGHAM:** Your Honor, at this time, I move
17 State's 1 through 4 into evidence.

18 **THE COURT:** They are admitted without objection.

19 **MR. BRENNAN:** (Nods head affirmatively.)

20 (WHEREUPON, State's Exhibits 1 through 4 were admitted
21 into evidence.)

22 **BY MR. WILLINGHAM:**

23 Q Investigator, you also at one point received a 9
24 millimeter handgun or pistol?

25 A Yes.

1 **Q** I'm showing you State's Exhibit number 5.

2 **THE COURT:** Mr. Willingham, I know you did it.

3 But I just want to verify it for the jury and
4 everybody in the courtroom, you made sure that weapon
5 is not loaded as I instructed you to do before?

6 **MR. WILLINGHAM:** Yes, Your Honor.

7 **BY MR. WILLINGHAM:**

8 **Q** Showing you State's Exhibit number 5 which also
9 contains State's Exhibit number 6 which is magnet. And
10 that these are already in evidence. But do you recognize
11 those items?

12 **A** Yes, sir.

13 **Q** What did you do those times when you received
14 them?

15 **A** I collected those and also placed them into
16 evidence to be sent to S.L.E.D.

17 **Q** That would be a 9 millimeter --

18 **A** That's correct.

19 **Q** -- handgun.

20 **A** That's correct.

21 **Q** I'm going to show you additional pictures.
22 State's Exhibit number 37, do you recognize that?

23 **A** Yes, sir. This is the front of the patrol
24 vehicle where the other evidence is located. We took a .38
25 gun, some blood samples, a shirt. These are all the

1 markings for those items.

2 Q The same thing as State's 38, just a different
3 angle?

4 A Yes, sir. Just a different angle in the front of
5 the patrol car?

6 Q State's 39 is what?

7 A That is the group of live rounds that I stated
8 earlier that were in front of the patrol car that I
9 collected.

10 Q State's 40, do you recognize that?

11 A Yes, sir. This is the .38 handgun that I
12 collected from the parking lot in front as well of the
13 patrol vehicle.

14 Q Those photographs all accurately reflect the
15 scene as you found it that night?

16 A Yes, sir. They do.

17 MR. WILLINGHAM: At this time, I move State's
18 Exhibit 37, 38, 39 and 40 into evidence.

19 MR. BRENNAN: No objection.

20 THE COURT: What were the numbers again, please?

21 MR. WILLINGHAM: 37 through 40.

22 THE COURT: Without objection, they are
23 admitted.

24 (WHEREUPON, State's Exhibits 37 through 40 were
25 admitted into evidence.)

1 **MR. WILLINGHAM:** Publishing to the jury
2 State's Exhibit 37.

3 **BY MR. WILLINGHAM:**

4 **Q** Tell the jury what they are seeing please.

5 **A** This is the front of the patrol car and the items
6 that were located in front of it that were collected by me.
7 This is the patrol car. Here again is from the previous
8 photographs that you saw. The bullet holes in this window
9 right here. This is the patrol unit that was to the left
10 of that vehicle with all of the items in front of it.

11 **Q** State's 38.

12 **A** This is a different angle. The patrol vehicle
13 again. Here is all the items. It is just a different
14 angle. It is the actually looking back towards the police
15 department. The police department is over here.

16 **Q** What am I seeing in State's 39?

17 **A** This is a group of shell casings that were live,
18 not the cases but the live rounds that were on the ground
19 in front of the patrol vehicle.

20 **Q** What caliber were those?

21 **A** Those were .38.

22 **Q** .38?

23 **A** I believe .38. Yes, sir.

24 **Q** Okay. I am showing you State's Exhibit 40. What
25 is the jury seeing there?

1 **A** That is the handgun, the .38 handgun that I
2 marked as Number 6. It is located in front of the patrol
3 car.

4 **THE COURT:** Where is 38?

5 **MR. WILLINGHAM:** State's Exhibit 38?

6 **THE COURT:** Yeah. Didn't you just admit it?

7 **MR. WILLINGHAM:** Your Honor, I admitted 37 through
8 40. And that is State's 38.

9 **THE COURT:** Let me see the picture that you just
10 put up on the screen.

11 **MR. WILLINGHAM:** That is State's Exhibit
12 number 40 on the screen.

13 **THE COURT:** All right.

14 **BY MR. WILLINGHAM:**

15 **Q** On this big picture, State's Exhibit 37, show the
16 jury where the hand gun was found.

17 **A** The handgun was right here.

18 **Q** Marked by Number 6 on your picture?

19 **A** Yes.

20 **Q** Did you collect a handgun that was labeled as
21 your Item 6?

22 **A** Yes, sir. I did.

23 **Q** I am showing you State's Exhibit number 13.

24 Ensuring the Court that it has been made safe by court
25 officials. I ask if you recognize that.

1 **A** Yes, sir. This is the gun that I collected and
2 marked Item 6 from the parking lot.

3 **Q** Okay. What type of gun is that?

4 **A** This is a Taurus .38 Special.

5 **Q** A Taurus .38?

6 **A** Yes, sir.

7 **Q** What did you do with that piece of evidence when
8 you collected it?

9 **A** I also did the paperwork to send it off to
10 S.L.E.D. for analysis. And I placed it in the evidence
11 locker to be collected by the evidence personnel to be
12 placed into evidence.

13 **MR. WILLINGHAM:** Okay. Your Honor, at this time,
14 I move State's Exhibit number 13 into evidence.

15 **MR. BRENNAN:** Without objection.

16 **THE COURT:** It is admitted.

17 (WHEREUPON, State's Exhibit 13 was admitted into
18 evidence.)

19 **BY MR. WILLINGHAM:**

20 **Q** That gun is a revolver?

21 **A** That's correct.

22 **Q** I'm no gun expert. But I think that that means
23 that when you fire, the cylinder turns and another bullet
24 is ready to fire. Is that fair?

25 **A** That is correct.

1 Q It does not eject shell casings?

2 A No, sir. It does not.

3 Q Once a bullet is fired, the casing remains in the
4 gun?

5 A That's correct.

6 Q How many bullets does that gun hold?

7 A This one holds five.

8 Q I'm going to show you State's Exhibit 9, sorry
9 Your Honor -- 8, 9, 10, 11 and 12. Are these casings that
10 were removed from that gun?

11 A Yes, sir. They are. They were actually with the
12 gun. Still in the gun.

13 MR. WILLINGHAM: Okay. Your Honor, at this
14 time, I move State 8, 9, 10, 11, and 12 into evidence.

15 MR. BRENNAN: No objection.

16 THE COURT: They are admitted.

17 (WHEREUPON, State's Exhibit 8 through 12 were admitted
18 into evidence.)

19 MR. WILLINGHAM: Beg the Court's indulgence.

20 THE COURT: Yes.

21 BY MR. WILLINGHAM:

22 Q Now, Investigator, did you continue to look for
23 evidence and collect evidence at that scene?

24 A Yes, I did.

25 Q Did you look inside that Taurus for any evidence?

1 **A** Yes, I did.

2 **Q** And did you find any inside that Taurus?

3 **A** Yes, sir. I did.

4 **Q** I am going to show you State's Exhibit number 48
5 and ask if you recognize that.

6 **A** Yes, sir. This is going to be the back seat of
7 the Taurus. And this is a photograph actually of the rear,
8 the entire rear seat. The left side is where Mrs. Lindsey
9 was seated.

10 **MR. WILLINGHAM:** Your Honor, at this time, I
11 move State's Exhibit number 48 into evidence.

12 **THE COURT:** It is admitted. Without objection.

13 (WHEREUPON, State's Exhibit 48 was admitted into
14 evidence.)

15 **BY MR. WILLINGHAM:**

16 **Q** If you would, tell the jury what we are seeing
17 now.

18 **A** This is the back seat of the Taurus. On this
19 side, there's a baby seat on the right side of the vehicle.
20 On the left side is a blood stain. That's where Mrs.
21 Lindsey was seated.

22 **Q** I'm going to show you State's Exhibit number 50.
23 Can you tell me what that picture is.

24 **A** This is a photograph of a bullet hole that goes
25 through the back seat of vehicle that Mrs. Lindsey was in.

1 Q Tell me again what that was.

2 A This is a photograph of a bullet hole that goes
3 to the back seat of the vehicle that Mrs. Lindsey was in.

4 MR. WILLINGHAM: Move State's number 50 into
5 evidence.

6 MR. BRENNAN: No objection.

7 THE COURT: It's admitted without objection.

8 (WHEREUPON, State's Exhibit 50 was admitted into
9 evidence.)

10 BY MR. WILLINGHAM:

11 Q Show the jury what you're talking about.

12 A This small part, this small hole right here is a
13 hole that was a bullet hole that went through the back
14 portion of the seat. It's close to being center-ways of
15 the back seat. The back center of the back seat.

16 Q And did you look for the bullet that may have
17 caused that bullet hole?

18 A Yes, sir. I did.

19 Q And did you find it?

20 A Yes, sir. I did.

21 Q Where did you find it?

22 A In the truck of the vehicle.

23 Q I'm showing you State's Exhibit numbers 61 and
24 63. Tell me if you recognize those.

25 A Yes, sir. I do.

1 **Q** And what are they?

2 **A** This is a photograph of the trunk of the vehicle.
3 Actually I used a dowel rod. A dowel rod is just a
4 straight piece of wood. It is approximately two to three
5 feet long. It is round. It will go through any openings a
6 bullet hole may have made. Actually, I placed the dowel
7 rod through the back seat here.

8 And it shows the angle in which the bullet went where
9 we could find the projectile a lot easier. The projectile,
10 of course, is the bullet that is shot from the gun. I
11 followed the dowel rod. And it pointed exactly to where
12 the projectile was located in the trunk in the vehicle. I
13 found the projectile. That is what these pictures depict.
14 The trunk, the dowel rod and the projectile that was
15 located in the trunk.

16 **MR. WILLINGHAM:** Your Honor, at this time, I
17 move State's Exhibit 61 and 63 into evidence.

18 **MR. BRENNAN:** Without objection.

19 **THE COURT:** It's admitted.

20 (WHEREUPON, State's Exhibits 61 and 63 were admitted
21 into evidence.)

22 **BY MR. WILLINGHAM:**

23 **Q** I'm showing you first State's Exhibit 61. Tell
24 the jury what that is.

25 **A** This is the opposite side of the back seat of

1 vehicle. This is the dowel rod I was speaking of earlier
2 that I placed through the hole of the front side of the
3 seat. It went through and showed this angle. And you
4 cannot really see it in this picture right here, but right
5 in this area is where the projectile was located. It just
6 shows you the dowel rod that goes and the angle that the
7 bullet went through to the seat and into the trunk of the
8 vehicle.

9 Q 63 shows the jury what?

10 A This is a close-up of it. This is the end of the
11 dowel rod that you were just looking at. Here's the
12 projectile here that is located in the trunk.

13 Q Was that projectile recovered?

14 A Yes, sir. It was.

15 Q I'm showing you State's Exhibit number 19 and ask
16 if that is the projectile you recovered.

17 A Yes, sir. It is.

18 Q And you turned that to the evidence to be sent
19 for examination at the State Law Enforcement Division?

20 MR. WILLINGHAM: Your Honor, at this time, I
21 move State's 19 into evidence.

22 MR. BRENNAN: No objection, Your Honor.

23 THE COURT: It's admitted.

24 (WHEREUPON, State's Exhibit 19 was admitted into
25 evidence.)

1 BY MR. WILLINGHAM:

2 Q Now, Investigator, did you using that dowel
3 retrace the path of the bullet?

4 A Yes, sir. I went the opposite direction as well.

5 Q Was that photographed as well?

6 A Yes, sir. It was.

7 Q I'm going to show you a series of photographs.
8 State's Exhibit 54, 55, 56 and 58. Tell me if you
9 recognize those too.

10 A Yes, sir. This is where I went in reverse. I
11 showed the angle here going from the seat into the trunk.
12 These were photographs of where I showed going through the
13 window on the passenger rear side into the seat. It is
14 actually the reverse from the seat through the window.

15 Q Those accurately reflect what you did?

16 A Yes, sir. These are the photographs I took of
17 the dowel rod.

18 MR. WILLINGHAM: Your Honor, at this time, I
19 move State's Exhibit 54, 55, 56 and 58 into evidence.

20 MR. BRENNAN: No objection, Your Honor.

21 THE COURT: Give me the numbers again please.

22 MR. WILLINGHAM: It will be 54, 55, 56 and
23 58.

24 THE COURT: They are admitted.

25 (WHEREUPON, State's Exhibits 54, 55, 56 and 58 were

1 admitted into evidence.)

2 **BY MR. WILLINGHAM:**

3 Q I'm showing the jury first exhibit number 58. If
4 you would, tell the jury what they're seeing.

5 A This is the back seat that you saw earlier. This
6 is the dowel rod that I placed through. You saw the other
7 side of the dowel rod in the trunk. This is the opposite
8 side coming from the seat inside the passenger compartment.
9 This is the dowel rod I placed in the hole to get the angle
10 at which the bullet was fired.

11 Q State's Exhibit 56, what are we seeing there?

12 A This is a diagram of the dowel rod, a photograph
13 rather that comes from the seat here where the entrance of
14 where the bullet hole was and going to the right of where
15 the window was located.

16 Q I'm showing you State's Exhibit 55.

17 A This is the dowel rod going through the window
18 here. And out of the hole that was inside of the rear
19 passenger side window.

20 Q State's 54.

21 A That is a close-up of the same photograph that
22 you just saw.

23 **MR. WILLINGHAM:** Beg the Court's indulgence.

24 If you could, please answer any questions the
25 defense may have.

1 **MR. BRENNAN:** May it please the Court, Your
2 Honor.

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

4 **CROSS-EXAMINATION**

5 **BY MR. BRENNAN:**

6 **Q** Deputy Bogan, the pistol, the .38 pistol that was
7 found at the front of Officer Godfrey's car, --

8 **A** Yes, sir.

9 **Q** Can you tell the Court how many bullets that gun
10 held.

11 **A** I don't believe I, I believe I stated five. Yes,
12 sir.

13 **Q** That was a five-shot gun.

14 **A** That is correct.

15 **Q** And you collected the five casings from that
16 weapon, is that correct?

17 **A** Yes, sir. They were still in the weapon. Yes,
18 sir.

19 **Q** And those have been introduced by evidence?

20 **A** Yes, sir.

21 **Q** And a casing is an empty shell, right?

22 **A** That's correct.

23 **Q** The bullet is the part that comes out. The
24 casing is the part that stays in the gun, is that correct?

25 **A** That is correct.

1 Q So that would indicate that that gun has been
2 fired five times, is that correct?

3 A That is correct.

4 Q You have identified four bullets that were fired
5 from that gun, is that correct?

6 A That is correct.

7 Q Where is the fifth bullet? Do you know?

8 A No, sir. I don't. I don't know if it may have
9 been shot up in the air or what happened.

10 Q Now the gun that Officer Godfrey had, it ejects
11 the casings, correct?

12 A That is correct.

13 Q The casings that you found behind the patrol
14 car --

15 MR. BRENNAN: Sorry, Your Honor. Beg the
16 Court's indulgence.

17 BY MR. BRENNAN:

18 Q Those casings, those came from Officer Godfrey's
19 gun?

20 A It does, some. I don't think you can see all four
21 of them. But yes, sir, that's three. I can't really see
22 the fourth one.

23 Q Those are remnants of the shots fired by Officer
24 Godfrey, is that correct?

25 A Yes, sir.

1 **Q** Those indicate any shots fired by Mr. Lindsey,
2 correct?

3 **A** No, sir.

4 **Q** When you came upon the scene, was Mr. Lindsey
5 still there?

6 **A** No, sir. He already been transported to the
7 hospital.

8 **Q** You took this picture, correct?

9 **A** Yes, sir. I did.

10 **Q** And you took blood samples or blood evidence from
11 that spot, correct?

12 **A** Yes, sir. I did.

13 **Q** Whose blood was that?

14 **A** I never saw the analysis. I'm sorry.

15 **Q** Okay. I'm sorry. What is -- what is the white
16 things? What is that and that?

17 **A** Those, I think, are towels or sheets that were
18 left by EMS workers.

19 **Q** All right. At any point, was Ruby Nell Lindsey
20 lying in this area?

21 **A** To the best of my knowledge, no, sir.

22 **Q** That is the front of officer Godfrey's car there,
23 isn't that correct?

24 **A** Yes, sir. It is.

25 **Q** And this little corner here, that is the corner

1 of the grey Topaz, correct?

2 A Of the grey vehicle that Mr. Lindsey was in.

3 Q Okay. I'm going to give that back.

4 A All right.

5 Q Sir, I don't have any more questions. Thank you.

6 MR. WILLINGHAM: No redirect.

7 THE COURT: You can step down, sir.

8 MR. WILLINGHAM: The State calls Danny
9 Defreeze.

10 DANNY DEFREEZE

11 having first being duly sworn testified as follows:

12 DIRECT EXAMINATION

13 BY MR. WILLINGHAM:

14 Q If you would, tell the jury who you are.

15 A My name is Frank Dan DeFreeze.

16 Q Mr. DeFreeze, where do you work?

17 A I work for the South Carolina Law Enforcement
18 Division. I am assigned to the forensic services laboratory
19 in Columbia. And I work within the unit where we do the
20 identification of firearm and tool mark evidence.

21 Q And how long have you been at the firearm and
22 tool mark department?

23 A Since my first employment with S.L.E.D. which was
24 in 1967, I was assigned there then. And I been there with
25 the exception of about a five-year period the entire time.

1 **Q** And what type of educational background do you
2 have to allow you to perform your duty?

3 **A** I have a Bachelor's Degree from the University of
4 South Carolina. My principal training in the field of
5 firearm and true tool mark information was received at
6 S.L.E.D. As I said, I was first assigned to the firearm
7 and tool mark unit upon my employment. I began a period of
8 instruction in the techniques of firearm and tool mark
9 identification.

10 I received that instruction from a gentleman named
11 Miller Kate. Mr. Kate established the S.L.E.D. Forensics
12 Laboratory when S.L.E.D. itself was established in 1947. I
13 also studied under others. After a period of about two and
14 a half years of instruction and working cases under his
15 supervision and under that of Lieutenant Carl Stokes who
16 was there at the time, I began accepting cases on my own
17 and testifying as to my results which I have been doing
18 since 1969.

19 **Q** So in your 35 plus years experience, have you
20 testified in court before?

21 **A** Yes, I have.

22 **Q** How many times?

23 **A** It is probably in excess of 600 now.

24 **MR. WILLINGHAM:** Your Honor, at this time, I
25 move to have Mr. DeFreese qualified as an expert in

1 the area of firearm and tool mark identification.

2 MR. BRENNAN: Without objection.

3 THE COURT: Ladies and gentlemen, let me take a
4 second to explain to you what that means. I do
5 designate Mr. DeFreeze as an expert in firearm and
6 tool mark identification. That is what you said?

7 MR. WILLINGHAM: Yes, Your Honor.

8 THE COURT: Ladies and gentlemen, ordinarily
9 witnesses are not allowed to give opinions during
10 their testimony. But an expert witness is someone who
11 by experience or training has become an expert in some
12 field or study. An expert witness and one whom I
13 designate as an expert witness is allowed to give
14 opinions within their areas of expertise.

15 You are expected to evaluate and to judge and
16 weigh this witness' credibility as an expert just as
17 you would judge and weigh the credibility of any other
18 expert. You are not bound to accept the opinion of an
19 expert. You give it the weight that you believe it
20 deserves, if any.

21 All right, sir. You may proceed.

22 MR. WILLINGHAM: Thank you, Your Honor.

23 BY MR. WILLINGHAM:

24 Q If you would, tell the jury what your job as a
25 firearm analysis and tool mark identification expert is.

1 **A** We are frequently asked, because the S.L.E.D.
2 forensic laboratory does different kinds of analyses for
3 police departments and Sheriff's departments throughout
4 this State. They will frequently collect evidence and send
5 it to us for analysis. Within the firearm and tool mark
6 unit, we're most often asked to identify bullets back to
7 the firearms in which they were fired or cartridge cases
8 back to the firearms in which they were fired, in some
9 cases where firearms are not available to identify
10 different ammunition components as perhaps being fired by
11 the same firearm.

12 And most frequently, in the case of tool marks, we are
13 asked to identify a tool with some, usually a compromised
14 physical security device such as a lock or safe or
15 something to see if we can identify the particular marks on
16 that object as being made by the tool. Firearm
17 identification is actually a rather large sub-specialty of
18 the field of tool mark identification. Because in the case
19 of firearms, the firearm is the tool. It marks the objects
20 that come into contact with it which are bullets and
21 cartridge cases.

22 **Q** And did you receive a number of pieces of
23 evidence in this case to analyze?

24 **A** I did.

25 **Q** I'm going to show you first State's Exhibits

1 number 5 and 6. I want to ensure the Court that they have
2 been safe. And ask if you received those items for
3 analysis.

4 A Yes, sir. I did.

5 Q What is Item 5?

6 A Item 5 is a Beretta 9 millimeter Luger caliber
7 semiautomatic pistol. Item 6 is the detachable box
8 magazine what fits this Beretta pistol.

9 Q Okay. Did you find that pistol to be in working
10 order?

11 A Yes, I did.

12 Q Explain to the jury what you mean when you say a
13 semiautomatic pistol.

14 A A semiautomatic pistol is a type of autoloading
15 firearm. It is a handgun in which some of the energy of
16 the cartridge is used to function the firearm. After
17 firing, the recall in this case causes to the mechanism of
18 the firearm to extract and eject a fire cartridge case and
19 to load a round from the magazine to prepare the firearm
20 for the next fire. By semiautomatic, I mean it fires one
21 shot each time the trigger is pulled as distinct from a
22 fully automatic firearm like a machine gun that continues
23 to fire as long as the trigger is pressed and ammunition is
24 present.

25 Q What happens to that particular weapon when a

1 bullet is fired?

2 **A** When a shot is fired, a bullet goes down the
3 barrel and out of the firearm. A short bit of time later,
4 the cartridge case from which that bullet came is extracted
5 and ejected from the firearm. The firearm is, thereafter,
6 prepared for the next shot to be fired if ammunition is
7 present.

8 **Q** So the casing is ejected?

9 **A** Yes, automatically without operator doing
10 anything else.

11 **Q** I'm showing you State's Exhibits 1, 2, 3 and 4
12 and ask if you recognize those items.

13 **A** (Reviewing.) Yes, sir. I do.

14 **Q** What are those Items 1 through 4?

15 **A** Items 1, 2, 3 and 4 are four fired 9 millimeter
16 Luger cartridge cases.

17 **Q** Did you perform any analysis to compare those
18 four cartridges to State's Exhibit number 5?

19 **A** Yes, sir. I did.

20 **Q** What analysis did you perform?

21 **A** Upon receiving the pistol from Item 5, I
22 collected certain information about it. And I test fired
23 Item 5 to get cartridge casings that I knew it had fired.
24 I later took the test fire cartridge cases from the pistol,
25 Item 5, and first compared them under a microscope with

1 each other to see what sort of markings were present and
2 whether they were sufficient and identifiable. I find that
3 they were.

4 Thereafter, I took one of the cartridge cases that I
5 knew this pistol Item 5 had fired. And I microscopically
6 compared it with the cartridge casings that are pressed in
7 Items 1, 2, 3 and 4. I found sufficient matching breach
8 face impressions so that I could conclude that all four of
9 these fired cartridge casings were fired by this pistol and
10 by no other pistol.

11 Q So those four cartridge cases were fired by this
12 9 millimeter Beretta?

13 A Correct.

14 Q And could not have been fired by any other gun?

15 A Correct.

16 Q First, let me show you what has been introduced
17 as State's exhibit number 13.

18 MR. WILLINGHAM: And again, Your Honor, it has
19 been made safe.

20 BY MR. WILLINGHAM:

21 Q And ask if you recognize that item.

22 A Yes, sir. I do.

23 Q What is it?

24 A State's Exhibit 13 is a Taurus .38 special
25 caliber double action revolver.

1 Q How is that weapon different than State's Exhibit
2 5?

3 A State's Exhibit 13 is also a handgun. But it is
4 a type of the handgun that is manually operated. It does
5 not use any of the energy from the firing of the cartridge
6 to operate it. And it unlike the pistol does not
7 automatically extract and eject cartridge cases every time
8 it is fired. Instead of holding ammunition in a detectable
9 box magazine as the 9 millimeter Luger pistol did, this one
10 holds up to five cartridges in the cylinder which rotates
11 it to the central part of the firearm.

12 It is necessary for the shooter to either manually
13 cock the hammer fired in a single action mode. That is, to
14 manually cock the hammer there after you pull the trigger.
15 Or a single long pull of the trigger will cause the
16 cylinder to be rotated into alignment to bring the next
17 unfired cartridge forward and when the hammer reaches a
18 certain point in its movement, it would be released and
19 cause the cartridge to be fired.

20 Q I am certainly no firearm's expert. But I
21 believe that if the hammer is pulled back already and the
22 trigger is fired, that's called single action.

23 A That is the single action mode of the firing in
24 which the trigger does only one thing, which is to fire the
25 cocked hammer.

1 Q And the term double action in reference to that
2 weapon means what?

3 A It means the trigger does two things. The
4 trigger both cocks the hammer and it fires the firearm.

5 Q After that weapon is fired once, does it stay in
6 single action mode or does it go back double action?

7 A It will require a double action, a long pull of
8 the trigger or it would require manually cocking the
9 firearm. The pistol, State's Exhibit 6, State's Exhibit 5.
10 It is also a double action. But after the first shot, it
11 goes into the single action mode thereafter. Because the
12 slide goes into the rear doing the ejection cycle and cocks
13 the hammer.

14 It is not so with State's Exhibit 13. It is always
15 manually operated. It is always necessary for the hammer
16 to be manually cocked. Either by cocking it with your
17 thumb or by a long heavy pull of the trigger.

18 Q Did you test that weapon to find out if it was in
19 working order?

20 A I did.

21 Q Can you tell me how many pounds of pressure it
22 takes to pull that trigger in single action mode?

23 A I measured State's Exhibit 13, single action
24 trigger pull to be three and a half pounds.

25 Q Did you determine the amount of force necessary

1 to pull the trigger in double action mode?

2 A I did.

3 Q What was that?

4 A It varied between eleven and eleven and a quarter
5 pounds.

6 Q Is it fair to say or is it a fair
7 characterization to say that is a fairly significant amount
8 of force to be applied to that trigger in double action
9 mode to cause it to fire?

10 A Yes, sir. It is. It is a fair amount of
11 pressure. And the pressure is applied over a considerable
12 distance. For the three and a half pound trigger pull, it
13 is not really necessary to pull the trigger very far. For
14 the eleven to eleven and a quarter pound double action
15 trigger pull, it is necessary to pull the trigger at a
16 considerable distance.

17 Q At eleven pounds of pressure?

18 A Yes.

19 Q I want to show you has already been introduced as
20 State's Exhibits 8, 9, 10, 11 and 12 and ask you if you
21 recognize those.

22 A Yes, sir. I do.

23 Q Did you perform any analysis on those items?

24 A Yes, sir. I did.

25 Q Based upon those analysis were you able to

1 determine what weapon fired those shell casings?

2 A I was.

3 Q What weapon was it?

4 A State's Exhibit 13.

5 Q Which is the .38 Taurus?

6 A Yes, sir. State's Exhibit 9 through 12 or 8
7 through 12, excuse me, all fired .38 special caliber
8 cartridge cases which were fired by this revolver.

9 Q To the exclusion of all others?

10 A Yes, sir.

11 Q I'm going to show you first State's Exhibit
12 number 16.

13 A Yes, sir.

14 Q Do you recognize that?

15 A I do.

16 Q What is it?

17 A It is a fired plain lead bullet.

18 Q When you received that bullet, was there any
19 indication from where that bullet had come from?

20 A The container which it was fired was marked Ruby
21 N. Lindsey.

22 Q Can you further tell where that bullet had been
23 recovered Mrs. Lindsey?

24 A It is marked Post-head A.

25 Q And did you perform any analysis on that item,

1 State's Exhibit 16?

2 A I did.

3 Q And what were you able to conclude as a result of
4 that analysis?

5 A I compared the bullet with State's Exhibit 16
6 with test bullets fired by both the 9 millimeter pistol,
7 State's Exhibit 5 and the .38 Special caliber pistol,
8 State's Exhibit 13. I found the same general riffling
9 characteristic on this bullet and on test bullets fired by
10 the revolver, by State's Exhibit 13.

11 The general riffling characteristics present on this
12 bullet were not, they were different from those of the 9
13 millimeter pistol. However, this pistol is somewhat
14 variable in the markings it places on even test bullets.
15 Test bullets are difficult to identify with each other.
16 And this bullet in State's Exhibit 16 was very badly
17 damaged. I was not able to identify this bullet as being
18 the one. I can say this, two guns, it could been a fired by
19 this one and could not have been fired by the other one.

20 Q So there are times in your experience where you
21 have been able to match bullets or, yeah, bullets with a
22 gun?

23 A Yes, sir. When a bullet is sufficiently
24 undamaged, and when a firearm is consistent in the markings
25 it leaves on bullets that are fired through its barrel, I'm

1 able to conclude that a particular bullet was fired by a
2 particular riffle firearm which includes pistols and
3 revolvers. When the bullet is too badly damaged or the
4 firearm is not consistent in its markings, I just can't
5 say.

6 Q So State's Exhibit 16, this bullet could have
7 been fired from State's Exhibit 13?

8 A Correct.

9 Q But it could not have been fired by State's
10 Exhibit 5?

11 A That's correct also.

12 Q I'm going to show you State's Exhibit number 17.

13 A Yes, sir.

14 Q What is that?

15 A This is also a fired plain lead bullet.

16 Q Recovered where from?

17 A It is marked as brain. And it is also marked
18 Ruby N. Lindsey.

19 Q Okay. And were you able to make any
20 determinations on that piece of evidence?

21 A My results on Item 17 was the same as Item 16.
22 It had general riffling characteristics similar to test the
23 fired by 13 and different from those in Item 5.

24 Q To summarize, could it have been fired by the .38
25 Taurus?

1 **A** Correct.

2 **Q** But could not have been fired by the 9 millimeter
3 Beretta?

4 **A** Also correct.

5 **Q** Showing you State's 18. I will ask you the same
6 questions on that?

7 **A** Yes, sir.

8 **Q** Did you receive that piece of evidence?

9 **A** I did.

10 **Q** Can you tell where it came from?

11 **A** This one is also marked as Ruby Lindsey.

12 **Q** Does it indicate that it was from the jaw area?

13 **A** It's got so much tape on it. It's a little
14 difficult to read. I believe I wrote it in my notes.

15 Yes, sir. The container was labeled as R-jaw.

16 **Q** And it too was a fired plain lead bullet?

17 **A** It is.

18 **Q** What opinions do you have based upon your
19 analysis of that item?

20 **A** The same as Item 16 and 17. It could have been
21 fired by the revolver in State's Exhibit 13. It could not
22 have been fired by the semiautomatic pistol.

23 **Q** Finally State's Exhibit number 19.

24 **THE COURT:** Let me see y'all up here just one
25 second.

1 (WHEREFORE, a bench conference was held off of the
2 record.)

3 **BY MR. WILLINGHAM:**

4 Q What is State's 19?

5 A State's Exhibit 19 is also a fired plain lead
6 bullet.

7 Q Any indication where it was coming from?

8 A State's Exhibit 19 was labeled as being removed
9 from the trunk of the vehicle.

10 Q Okay. And you performed an analysis on that?

11 A I did.

12 Q And based upon that analysis, what conclusion did
13 you draw?

14 A My results were the same as item 16, 17 and 18.
15 It was consistent and could have been fired by Item 13. It
16 could not have been fired by Item 5. But I can't identify
17 it as being fired by Item 13 to the exclusion of all other
18 similar guns.

19 Q If you would answer any questions that they have
20 for you. Thank you.

21 **CROSS-EXAMINATION**

22 **BY MR. BRENNAN:**

23 Q Based on the analysis that you've done and that
24 you testified to, you were shown or you were given five
25 casings from that .38 revolver. Is that correct?

1 **A** There were five fired .38 special cartridge
2 pistols received. And I identified all five of them as
3 having been fired in the revolver, yes, sir.

4 **Q** Okay. Four bullets?

5 **A** There will four bullet specimens received, that
6 is correct?

7 **Q** Were you ever told anything about where the fifth
8 one might be?

9 **A** No.

10 **Q** You were given four bullets that you determined
11 were fired from this nine millimeter, is that correct?

12 **A** No, there will four fired cartridge cases which
13 were 9 millimeter Luger cartridge cases which I identified
14 as having been fired by that pistol. They were fired by
15 that gun.

16 **Q** Did you do any analysis on the bullets that were
17 fired by that gun?

18 **A** I received one bullet which was a jacket, a
19 copper alloy jacket, a hollow point bullet that was marked
20 as removed from the body of Mariana -- Mariana [sic]
21 Lindsey received in a container marked foreign body. The
22 foreign body was a rivet I believe. It was not consistent
23 with an ammunition component. But the bullet that was
24 received with that was fired by the 9 millimeter Luger
25 pistol, State's Exhibit 5.

1 Q Okay. What you can say is the bullets that were
2 fired, you can't say that those four bullets that you
3 analyzed shot from a .38 caliber weapon specifically came
4 from that gun?

5 A That is correct.

6 Q But they did not come from that gun?

7 A That is also correct. They could have been fired
8 by this one. Could not have been fired by that one.

9 Q All right. Just for clarification, you've got
10 four bullets from that gun?

11 A No, we've got four -- we got, yeah, four bullets
12 and five cartridge casings.

13 Q Five casings, correct?

14 A Yes, sir.

15 Q Thank you. I have nothing further.

16 MR. GOWDY: Nothing further from this
17 witness, Your Honor.

18 THE COURT: You can step down, sir.

19 END OF VOLUME 3
20
21
22
23
24
25

1624A

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF SPARTANBURG) Case No(s) .: 02-GS-42-0453
State of South Carolina)
Plaintiff,)
-VS-) TRANSCRIPT OF RECORD
Marion Lindsey) VOLUME 4 OF 4
Defendant.)

May 17, 2004
Spartanburg, South Carolina

B E F O R E:

HONORABLE JOHN C. FEW, Judge.

A P P E A R A N C E S:

TREY GOWDY, Esquire
Solicitor

BARRY BARNETT, Esquire
Assistant Solicitor

DONNIE WILLINGHAM, Esquire
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TERESA B. JOHNSON
OFFICIAL REPORTER

1	VOLUME 1 OF 4				
2		<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
3	Exhibits Page				
4	Jury Qualification	26			
5	Competency Hearing				
6	Witness: Pratap Narayan				
7	by Mr. Willingham	126			
8	by Mr. Bartosh		132		
9	by Mr. Willingham			136	
10	by Mr. Bartosh				137
11	Jury Qualification				
12	Juror: Rodney Petty				
13	by The Court	176			
14	by Mr. Bartosh	185			
15	by Mr. Gowdy	188			
16	by The Court	191			
17	Juror: John Hovelsrud				
18	by The Court	201			
19	by Mr. Bartosh	205			
20	by Mr. Gowdy	207			
21	Juror: Sheil Cudd				
22	by The Court	214			
23	by Mr. Bartosh	218			
24	by Mr. Willingham	223			
25	Juror: John Hovelsrud	228			

	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
1				
2	Juror: Ashley Driscoll			
3	by The Court	231		
4	by Mr. Brennan	234		
5	by Mr. Gowdy	236		
6	Juror: Rick Lee			
7	by The Court	246		
8	by Mr. Brennan	250		
9	by Mr. Barnett	257		
10	Juror: Carla Howell			
11	by The Court	261		
12	by Mr. Bartosh	266		
13	by Mr. Barnett	272		
14	Juror: Janet Prasanlack			
15	by The Court	281		
16	by Mr. Bartosh	285		
17	by Mr. Willingham	291		
18	Juror: Tammy Queen			
19	by The Court	296		
20	by Mr. Bartosh	303		
21	by The Court	312		
22	Juror: Luther Culpepper			
23	by The Court	316		
24				
25				

	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
1				
2	Juror: Jon Krisher			
3	by The Court	317		
4	by Mr. Bartosh	322		
5	by Mr. Barnett	326		
6	by Mr. Bartosh	330		
7	by Mr. Barnett	331		
8	Juror: Angela Haley	338		
9	Juror: Darcy Thompson			
10	by The Court	345		
11	by Mr. Brennan	350		
12	by Mr. Willingham	352		
13	Juror: Tommy Brown			
14	by The Court	361		
15	by Mr. Brennan	369		
16	by Mr. Barnett	373		
17	by Mr. Brennan	381		
18	Juror: James Gedroic			
19	by The Court	385		
20	by Mr. Bartosh	390		
21	by Mr. Barnett	394		
22	Juror: Joann Netherton			
23	by The Court	398		
24	by Mr. Bartosh	405		
25	by Mr. Willingham	412		

	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
1				
2	Juror: Teresa Gilbert	426		
3	Juror: Emma Ellis			
4	by The Court	430		
5	by Mr. Brennan	434		
6	by Mr. Gowdy	440		
7	by The Court	450		
8	Juror: Shirley McDowell			
9	by The Court	453		
10	Juror: James Creel			
11	by The Court	460		
12	by Ms. Quimby	468		
13	by Mr. Gowdy	478		
14	Juror: Miguel Martinez			
15	by The Court	482		
16	by Mr. Bartosh	492		
17	by Mr. Gowdy	498		
18	Juror: Martha Sallis			
19	by The Court	502		
20	by Mr. Bartosh	507		
21	by Mr. Barnett	513		
22	Juror: Danny Gomes	.		
23	by The Court	517		
24	by Mr. Brennan	521		
25	by Mr. Barnett	524		

	VOLUME 2 OF 4			
	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
1				
2				
3	Juror: Todd Hillstock			
4	by The Court	552		
5	by Mr. Brennan	555		
6	by Mr. Willingham	560		
7	Juror: Harold Marcum			
8	by The Court	563		
9	Juror: Brenda Smith			
10	by The Court	567		
11	by Mr. Brennan	572		
12	by Mr. Willingham	575		
13	Juror: Lori Burnett			
14	by The Court	579		
15	Juror: Larry Mauldin			
16	by The Court	584		
17	by Mr. Brennan	589		
18	by Mr. Barnett	592		
19	Juror: Isabell Williams			
20	by The Court	594		
21	by Mr. Brennan	598		
22	by Mr. Barnett	603		
23	by The Court	611		
24				
25				

	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
1				
2	Juror: Mackenzie Leake			
3	by The Court	616		
4	Juror: Wilma Langford			
5	by The Court	620		
6	Juror: Gary McHam			
7	by The Court	626		
8	Juror: Jerlyn Miller			
9	by The Court	634		
10	Juror: Richard K. Smith			
11	by The Court	638		
12	by Mr. Brennan	643		
13	by Mr. Barnett	650		
14	Juror: Donald Ray			
15	by The Court	660		
16	by Mr. Brennan	665		
17	by Mr. Barnett	669		
18	by The Court	672		
19	Juror: John Poole			
20	by The Court	679		
21	by Mr. Bartosh	689		
22	by Mr. Gowdy	695		
23	by The Court	702		
24				
25				

	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
1				
2	Juror: Dean Israel			
3	by The Court	706		
4	by Mr. Brennan	711		
5	by Mr. Gowdy	715		
6	Juror: Jeffrey A. Rhineberger			
7	by The Court	724		
8	by Mr. Bartosh	728		
9	by Mr. Gowdy	734		
10	Juror: Kim Rogers			
11	by The Court	738		
12	by Mr. Brennan	743		
13	by Mr. Gowdy	746		
14	Juror: Timothy Brewton			
15	by The Court	797		
16	by Mr. Bartosh	804		
17	by The Court	807		
18	by Mr. Bartosh	808		
19	by Mr. Barnett	810		
20	Juror: Aleta Misenheimer			
21	by The Court	816		
22	by Mr. Brennan	830		
23	by Mr. Willingham	835		
24				
25				

	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
1				
2	Juror: Samuel Barnwell			
3	by The Court	826		
4	by Mr. Brennan	830		
5	by Mr. Willingham	835		
6	Juror: Jami Sturgeon			
7	by The Court	850		
8	by Mr. Bartosh	855		
9	by Mr. Gowdy	861		
10	Juror: Matthew Smith			
11	by The Court	865		
12	Juror: Joseph Floyd			
13	by The Court	868		
14	by Mr. Bartosh	874		
15	by Mr. Willingham	884		
16	by Mr. Bartosh	889		
17	Juror: Joann Netherton			
18	by The Court	897		
19	Juror: Linda Fuller			
20	by The Court	909		
21	by Mr. Brennan	915		
22	Juror: William Atkins			
23	by The Court	921		
24				
25				

	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
1				
2	Juror: Marvin Smith			
3	by The Court	928		
4	by Mr. Brennan	932		
5	by Mr. Gowdy	938		
6	by Mr. Brennan	943		
7	by Mr. Gowdy	944		
8	by Mr. Brennan	949		
9	Juror: James Cottrell			
10	by The Court	950		
11	Juror: Heather Snite			
12	by The Court	955		
13	Juror: Michael Dawson			
14	by The Court	956		
15	by Mr. Bartosh	960		
16	by Mr. Barnett	964		
17	by Mr. Bartosh	968		
18	Juror: Pam Gardner			
19	by The Court	996		
20	by Mr. Brennan	987		
21	by Mr. Barnett	992		
22	Juror: Jackie Barham			
23	by The Court	996		
24	by Mr. Bartosh	1000		
25	by Mr. Barnett	1006		

	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
1				
2	Juror: Judy Folk			
3	by The Court	1008		
4	by Mr. Brennan	1013		
5	by Mr. Barnett	1020		
6	Motions	1024		
7	Juror: Patricia Thomas			
8	by The Court	1026		
9	Juror: Thomas Williams			
10	by The Court	1031		
11	Juror: Amanda Hamby			
12	by The Court	1034		
13	Juror: Stanley Fields			
14	by The Court	1036		
15	by Mr. Brennan	1041		
16	by Mr. Barnett	1045		
17	Juror: Jeffrey Seay			
18	by The Court	1048		
19	by Mr. Bartosh	1054		
20	by Mr. Gowdy	1061		
21	Juror: Alonzo Robinson			
22	by The Court	1064		
23	by Mr. Bartosh	1069		
24				
25				

1	VOLUME 3 OF 4				
2		<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
3	Juror: Melody Riddle				
4	by The Court	1096			
5	by Mr. Brennan	1101			
6	by Mr. Gowdy	1104			
7	by Mr. Bartosh	1107			
8	Juror: Tracy Whitaker				
9	by The Court	1116			
10	Juror: Sarah Simms				
11	by The Court	1121			
12	Juror: William Parnell				
13	by The Court	1128			
14	by Mr. Brennan	1132			
15	by Mr. Willingham	1137			
16	Juror: Tracy Hollingsworth				
17	by The Court	1143			
18	by Mr. Bartosh	1147			
19	by Mr. Willingham	1156			
20	Juror: Brandon J. Greenway				
21	by The Court	1160			
22	by Mr. Brennan	1165			
23	Juror: Joshua Bennett				
24	by The Court	1169			
25	by Mr. Bartosh	1175			

	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
1				
2	Juror: Traci Brock			
3	by The Court	1184		
4	by Mr. Bartosh	1195		
5	by Mr. Gowdy	1215		
6	Juror: Joyce Martin			
7	by The Court	1229		
8	Juror: Carole Hill			
9	by The Court	1232		
10	by Mr. Bartosh	1237		
11	by Mr. Gowdy	1240		
12	Juror: Linda Jones			
13	by The Court	1263		
14	by Mr. Bartosh	1267		
15	by Mr. Barnett	1273		
16	by Mr. Bartosh	1277		
17	Juror: Jane Vellines			
18	by The Court	1283		
19	by Mr. Bartosh	1287		
20	by Mr. Willingham	1294		
21	Juror: Matt Kern			
22	by The Court	1296		
23	by Mr. Bartosh	1300		
24	by Mr. Barnett	1305		
25				

	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
1				
2	Juror: Thaddeus Beck			
3	by The Court	1307		
4	by Mr. Bartosh	1311		
5	by Mr. Willingham	1316		
6	Juror: Otis Campbell			
7	by The Court	1320		
8	Juror: James Gentry			
9	by The Court	1323		
10	by Mr. Bartosh	1327		
11	by Mr. Gowdy	1333		
12	Motions	1342		
13	Juror: Marvin Smith			
14	by The Court	1349		
15	Juror: Joann Netherton			
16	by The Court	1350		
17	by Mr. Barnett	1351		
18	Motions	1353		
19	Juror: Pamela Bagwell			
20	by The Court	1360		
21	Juror: Clara Cope			
22	by The Court	1362		
23	by Mr. Bartosh	1368		
24	Juror: Thaddeus Beck			
25	by The Court	1373		

	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
1				
2	Juror: Thomas Oliver			
3	by The Court	1375		
4	by Mr. Bartosh	1381		
5	by Mr. Willingham	1382		
6	Juror: Leonard Cogdill			
7	by The Court	1384		
8	by Mr. Bartosh	1390		
9	by Mr. Barnett	1396		
10	Juror: Michael Weeks			
11	by The Court	1398		
12	by Mr. Bartosh	1402		
13	by Mr. Willingham	1404		
14	by The Court	1408		
15	Juror: Amanda Morton			
16	by The Court	1412		
17	by Mr. Bartosh	1416		
18	by Mr. Barnett	1423		
19	Juror: Brandon J. Greenway			
20	by The Court	1426		
21	by Mr. Bartosh	1427		
22	Jury Qualification	1434		
23	Juror: Janet Prasanlack			
24	by The Court	1438		
25	by Mr. Bartosh	1441		

INDEX

1639

		<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
1					
2	Jury Selection	1444			
3	Motions	1466			
4	Opening Statement				
5	by The Court	1487			
6	by Mr. Barnett	1499			
7	by Mr. Brennan	1503			
8	Witness: Freddy Thompson				
9	by Mr. Barnett	1505			
10	Witness: Charles Clavenger				
11	by Mr. Barnett	1508			
12	Witness: Diane Waters Daniels				
13	by Mr. Gowdy	1510			
14	Witness: Celeste Nesbitt				
15	by Mr. Gowdy	1515			
16	by Mr. Brennan		1538		
17	by Mr. Gowdy			1554	
18	Witness: Harvey Godfrey				
19	by Mr. Gowdy	1562			
20	by Mr. Brennan		1576		
21	Witness: Guy Carter				
22	by Mr. Barnett	1578			
23	by Mr. Brennan		1581		
24	Witness: Doug Bishop				
25	by Mr. Willingham	1582			

	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
1				
2	Witness: Randy Bogan			
3	by Mr. Willingham	1585		
4	by Mr. Barnett		1605	
5	Witness: Dan Defreeze			
6	by Mr. Willingham	1608		
7	by Mr. Brennan.		1622	
8		VOLUME 4 OF 4		
9	Witness: J. David Wren			
10	by Mr. Gowdy	1649		
11	Court Remarks to Defendant		1662	
12	Witness: Jason Stewart			
13	by Mr. Brennan	1668		
14	Witness: Virginia Lindsey			
15	by Mr. Brennan	1674		
16	Witness: Christopher Wilkins			
17	by Mr. Brennan	1677		
18	Court Remarks to Defendant		1680	
19	Requests for Charge	1682		
20	Closing Argument			
21	by Mr. Gowdy	1696		
22	by Mr. Brennan	1703		
23	Jury Charge	1706		
24	Verdict	1723		
25	Court Remarks	1738		

		<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
1					
2	Opening Statement				
3	by Mr. Willingham	1742			
4	by Mr. Bartosh	1746			
5	Witness: Kiara P.				
6	by Mr. Gowdy	1753			
7	by Mr. Bartosh		1756		
8	by Mr. Gowdy	1757			
9	Witness: Celeste Nesbitt				
10	by Mr. Gowdy	1759			
11	by Mr. Bartosh		1783		
12	Witness: Randy Bogan				
13	by Mr. Barnett	1792			
14	by Mr. Bartosh		1801		
15	Witness: Doug Bishop				
16	by Mr. Barnett	1803			
17	Witness: Marion Lyles				
18	by Mr. Barnett	1806			
19	by Mr. Bartosh		1808		
20	Witness: Sharon Smith				
21	by Mr. Barnett	1809			
22	by Mr. Bartosh		1825		
23	by Mr. Barnett			1828	
24	Witness: Chris Smith				
25	by Mr. Willingham	1829			

	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
1				
2	by Mr. Bartosh	1845		
3	by Mr. Willingham		1860	
4	by Mr. Bartosh			1861
5	Witness: Brian Duncan			
6	by Mr. Barnett	1862		
7	by Mr. Bartosh		1865	
8	by Mr. Barnett			1866
9	Witness: Jane Millwood			
10	by Mr. Willingham	1866		
11	Witness: Ashley Harris			
12	by Mr. Willingham	1869		
13	by Mr. Bartosh		1877	
14	Witness: Celeste Nesbitt			
15	by Mr. Gowdy	1878		
16	Witness: James Sligh			
17	by Mr. Willingham	1908		
18	by Mr. Bartosh		1912	
19	by Mr. Willingham			1914
20	by Mr. Bartosh			1916
21	Witness: Brian White			
22	by Mr. Willingham	1917		
23	by Mr. Bartosh		1922	
24	Witness: Cathy Mullinax			
25	by Mr. Willingham	1923		

	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
1				
2	by Mr. Bartosh	1927		
3	Witness: Sarah Simmons			
4	by Mr. Barnett	1930		
5	by Mr. Bartosh	1938		
6	Witness: Stanford Wilkens			
7	by Mr. Willingham	1940		
8	by Mr. Bartosh	1946		
9	Witness: Jessica Cannon			
10	by Mr. Willingham	1947		
11	Witness: Martha Smith			
12	by Mr. Willingham	1951		
13	Witness: Stanley Staggs			
14	by Mr. Gowdy	1954		
15	by Mr. Bartosh	1965		
16	Witness: Ann Howard			
17	by Mr. Bartosh	1984		
18	by Mr. Barnett	1989		
19	by Mr. Bartosh	1993		
20	Witness: Margaret Melikian			
21	by Mr. Bartosh	2000		
22	by Mr. Willingham	2014		
23	by Mr. Bartosh	2042		
24	Witness: Virginia Lindsey			
25	by Mr. Bartosh	2044		

INDEX

1644

	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
1				
2	by Mr. Gowdy	2060		
3	Witness: Bill Burton			
4	by Mr. Bartosh	2061		
5	by Mr. Gowdy	2068		
6	Witness: Leon McDowell			
7	by Mr. Bartosh	2070		
8	Witness: Chris Wilkins			
9	by Mr. Brennan	2072		
10	by Mr. Willingham	2076		
11	Witness: Steve Pilgrim			
12	by Mr. Bartosh	2078		
13	Witness: Bessie Smith			
14	by Mr. Bartosh	2080		
15	Court Remarks to Defendant	2085		
16	Request for Charge	2091		
17	Closing Argument			
18	by Mr. Gowdy	2106		
19	by Mr. Lindsey	2125		
20	by Mr. Bartosh	2131		
21	Jury Charge	2148		
22	Jury Question	2164		
23	Verdict	2169		
24	Sentencing	2172		
25	Certificate of Reporter	2176		

EXHIBITS

1645

1	<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
2		STATE' S EXHIBITS		
3	S-1	9 mm casing	1486	1592,1742
4	S-2	9 mm casing	1486	1592,1742
5	S-3	9 mm casing	1486	1592,1742
6	S-4	9 mm casing	1486	1592,1742
7	S-5	Beretta 9 mm	1486	1570,1742
8	S-6	Black clip	1486	1570,1742
9	S-7	9 mm round	1486	1570,1742
10	S-8	.38 special casing	1486	1598,1742
11	S-9	.38 special casing	1486	1598,1742
12	S-10	.38 special casing	1486	1598,1742
13	S-11	Winchester .38 special	1486	1598,1742
14	S-12	Federal .38 special casing	1486	1598,1742
15	S-13	Taurus .38 special	1486	1597,1742
16	S-14	Projectile	1486	
17	S-15	Projectile	1486	
18	S-16	Projectile	1486	1584,1742
19	S-17	Projectile	1486	1584,1742
20	S-18	Projectile	1486	1584,1742
21	S-19	Projectile	1486	1602,1742
22	S-20	R.P. live round	1486	
23	S-21	911 tape	1486	
24	S-21(a)	Enhanced CD	1486	1513,1742
25	S-22	Photo	1486	1530,1742

EXHIBITS

1646

<u>1</u>	<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
2	S-23	Photo	1486	1530, 1742
3	S-24	Photo	1486	1530, 1742
4	S-25	Photo	1486	1530, 1742
5	S-26	Photo	1486	1530, 1742
6	S-27	Photo	1486	1588, 1742
7	S-28	Photo	1486	1588, 1742
8	S-29	Photo	1486	1588, 1742
9	S-30	Photo	1486	1588, 1742
10	S-31	Photo	1486	1588, 1742
11	S-32	Photo	1486	1591, 1742
12	S-33	Photo	1486	1591, 1742
13	S-34	Photo	1486	1591, 1742
14	S-35	Photo	1486	1591, 1742
15	S-36	Photo	1486	
16	S-37	Photo	1486	1594, 1742
17	S-38	Photo	1486	1594, 1742
18	S-39	Photo	1486	1594, 1742
19	S-40	Photo	1486	1594, 1742
20	S-41	Photo	1486	
21	S-42	Photo	1486	
22	S-43	Photo	1486	
23	S-44	Photo	1486	
24	S-45	Photo	1486	
25	S-46	Photo	1486	1800

EXHIBITS

1647

1	<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
2	S-47	Photo	1486	
3	S-48	Photo	1486	1599, 1742
4	S-49	Photo	1486	
5	S-50	Photo	1486	1600, 1742
6	S-51	Photo	1486	
7	S-52	Photo	1486	
8	S-53	Photo	1486	
9	S-54	Photo	1486	1603, 1742
10	S-55	Photo	1486	1603, 1742
11	S-56	Photo	1486	1603, 1742
12	S-57	Photo	1486	
13	S-58	Photo	1486	1603, 1742
14	S-59	Photo	1486	
15	S-60	Photo	1486	
16	S-61	Photo	1486	1601, 1742
17	S-62	Photo	1486	1601, 1742
18	S-63	Photo	1486	1601, 1742
19	S-64	Photo	1486	1659, 1742
20	S-65	Photo	1488	1945
21	S-66	Photo	1488	1945
22	S-67	Photo	1488	1945
23	S-68	Photo	1488	1804
24	S-69	Photo	1488	1804
25	S-70	Photo	1488	1804

EXHIBITS

1648

	<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
1				
2	S-71	X-ray	1488	1804
3	S-72	X-ray	1488	1804
4	S-73	Photo	1488	1800
5	S-74	Photo	1488	1770
6	S-75	Photo	1488	1770
7	S-76	Photo	1488	1774
8	S-77	Car seat	1488	1760
9	S-78	Booking card	1488	1937
10	S-79	Bond sheet	1488	1937
11	S-80	Indictment	1488	1952
12	S-81	Lab sheet	1488	1952

13

14

DEFENDANT' S EXHIBITS

15

No exhibits offered.

16

17

COURT' S EXHIBITS

18

C-1 Photo 1734

19

C-2 Photo 1734

20

C-3 Photo 1734

21

C-4 Photo 1734

22

C-5 Photo 2162

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C-6 Jury Question 2165

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C-7 Jury Question 2165

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P R O C E E D I N G S (con't)

THE COURT: Call your next witness.

MR. GOWDY: Your Honor, if it pleases the Court, the State calls Doctor David Wren.

MR. WILLINGHAM: And we ask that Dan Defreeze be excused.

THE COURT: He's excused.

JOHN DAVID WREN

having first being duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. GOWDY:

Q Good afternoon, Dr. Wren.

A Good afternoon.

Q Could I get you to introduce yourself to the jury and tell them what your specialty in the medical field is.

A My name is John David Wren. I am a pathologist with Spartanburg Pathology Associates. We have a contract with all the hospitals, but I'm specifically with the Spartanburg Regional Medical Center where I'm the Laboratory Medical Director, Chairman of the Department of Pathology and a practicing physician with license in pathology.

Q Can you give the jury the benefit of an overview of your educational background.

A First of all, I have a Bachelor's Degree, a

1 Master's Degree and a Doctor of Philosophy Degree in
2 Chemical Engineering from Clemson University. I also have
3 a medical degree from the Medical University of South
4 Carolina. And I did a combined anatomic and clinical
5 pathology residency at the Medical University of South
6 Carolina fulfilling my requirements for the, to take the
7 board of combined anatomic and clinical pathology in three
8 years and nine months.

9 While I was there, I was also assistant medical
10 examiner for Charleston County. One weekend a month under
11 the direction of forensic pathologist at the Medical
12 University, I did forensic autopsies for the State of South
13 Carolina on bodies that were sent to the Medical University
14 usually doing between four and eight each weekend. And
15 that was in partial requirement in fulfilling a residency
16 in pathology -- forensic pathology.

17 Q Can you give the jury a sense of how many
18 autopsies you have performed in your career?

19 A I don't have an exact number. But I usually do
20 about a 170 a year for the last probably 15 years. So it
21 is pretty close to 2000 by now.

22 Q Have you been qualified previously in the state
23 or federal court as an expert in the general field of
24 pathology?

25 A Yes. I've been qualified in about 20 counties in

1 South Carolina as an expert in forensic pathology and
2 anatomic and clinical pathology.

3 MR. GOWDY: Your Honor, at this point, we
4 would move Doctor Wren in as an expert generally in
5 pathology and also more specifically in forensic
6 pathologist.

7 MR. BRENNAN: No objection.

8 THE COURT: I qualify him as an expert
9 pathologist and forensic pathologist.

10 BY MR. GOWDY:

11 Q Could you tell the jury what forensic pathology
12 is.

13 A Forensic pathology is a branch of pathology.
14 Specifically, a branch of anatomic pathology in which the
15 pathologist is concerned with medical legal investigations.
16 Whether it be a coroner's autopsy or other medical legal
17 cases, a forensic pathologist is specifically trained to
18 make judgments in that area.

19 Q Dr. Wren, did you have occasion to do an autopsy
20 involving a Ruby Nell Lindsey?

21 A Yes, I performed an autopsy on an individual
22 named, identified as Ruby Nell Lindsey in the Spartanburg
23 Regional Medical Center Autopsy Room on September the 19th
24 2002 beginning at approximately 10 a.m.

25 Q Can you tell the jury what her cause of death

1 was?

2 **A** I stated that in my opinion the actual cause of
3 death was a distant gunshot wound to the head.

4 **Q** When you say distant, Dr. Wren, can you tell the
5 jury what you mean by distant as opposed to contact or near
6 contact?

7 **A** Basically gunshot wounds are, on individuals are
8 in three general categories. That being distant meaning
9 that it is so far, the shot was fired so far away from the
10 body that it leaves no other markings except the gunshot
11 wound itself. A contact gunshot wound would be one in
12 which the barrel was placed either tight against the skin
13 or loose against the skin.

14 In that case there may or may not be, there usually is
15 but may or may not be splitting of the skin around the
16 gunshot wound. It will be powder deposited within the
17 wound itself. If it were a shotgun or something of that
18 nature, one would usually find packing inside the path of
19 the gunshot wound.

20 The other category is an immediate range gunshot wound
21 in which the barrel is within a distance in which burning
22 powder and soot will be deposited on the skin and can be
23 recognized as either soot on the skin or little abrasions
24 from the burning powder hitting the skin and causing
25 abrasions on the skin. In some cases, one could actually

1 pick a powder out if it has not completely burned away.

2 Q Dr. Wren, you described the gunshot contact
3 gunshot wound as one that's either tightly pressed against
4 the skin or against the skin but not tightly compressed.
5 Can you give the jury a sense in terms of distance how far
6 a gun barrel can be from the object that it hits to be
7 classified as an intermediate and then distant, how far can
8 it be and still be classified as distant?

9 A Immediate is any where from actually not against
10 the skin up to, depending on the weapon, it can be, with
11 larger weapons, it can be up to 12 to 18 inches. In
12 handguns, it is usually no more than 8 to 10 away. One
13 would not see any evidence. Anything further than that
14 away, there would be no other evidence other than the
15 actual hole made by the projectile itself.

16 Q So if I understood you correctly, Dr. Wren, in
17 handguns, it could be 10 inches and still classified as a
18 distant gunshot?

19 A That is correct. Basically, if you have a
20 handgun that is being used, a ballistics expert can take
21 that gun, using the same type of ammunition, they can take
22 that weapon and fire it at various distances back from a
23 white target and one can see the pattern that can often be
24 matched to that on the body if it was an immediate gunshot
25 wound. So one can tell approximately how far it was away

1 if there is any residue or soot there.

2 Q Dr. Wren, can you show the jury using either my
3 head or yours, whichever you feel more comfortable using,
4 how many injury wounds, exit wounds you identified in Nell
5 Lindsey's head and what the location of those exit and
6 injury wounds was.

7 A Well, I found evidence of four gunshot wounds. I
8 numbered them arbitrarily. Usually, I number from top to
9 bottom and then from front to back. And it's just to keep
10 track of them. The first gunshot wound that I identified
11 was in the back of the head in this case. It was three and
12 a quarter inches from the top of the head and about three
13 quarters of an inch to the left of midline. So it was in
14 the back of approximately this area here.

15 This wound was irregular in shape. It measured a half
16 inch or 31 hundreds of an inch. Beneath that wound itself
17 up against the skull itself and partially embedded in the
18 skull was a flattened lead bullet. It did have some
19 visible ends and grooves. It measured 1.8 inches long,
20 0.97 inches wide and 0.15 inches thick. It was stopped by
21 the skull which was pretty thick in that area. That was
22 the first gunshot wound.

23 That bullet, I labeled as best I could with the letter
24 zero which was the last number of the autopsy. I mean the
25 number zero, the last number of the autopsy, the letter A,

1 indicating that it was the first bullet I recovered, and a
2 delta, which is a Greek letter that I use to identify
3 bullets and other objects.

4 Gunshot number two, I labeled appeared in the left
5 temporal region. Three and a quarter inches from the top
6 of the head. And three and a quarter inches from the left
7 of midline. And from midline around the head, there was
8 four inches circumferentially. This wound was irregular in
9 shape. There was some brain and blood protruding from
10 defect. It measured 0.50 or a half an inch by 0.45 or 45
11 one-hundredths of an inch in overall dimensions.

12 This gunshot wound actually passed into the cranial
13 vault. It went through both loads of the cerebrum. It hit
14 the lateral right orbital plate of the base of the, top of
15 the eye rather and the bone above the eye. And the bullet
16 actually came to rest in the brain tissue there in that
17 area. It has, it was distorted. It had visible ends and
18 grooves also. It measured 70 one-hundredths by 50 one-
19 hundredths by 43 one-hundredths.

20 I labeled that bullet with the Arabic number zero.
21 The letter B and again Delta. I considered the path of
22 that gunshot wound was forward at about 15 degrees from the
23 horizontal. It was downward approximately 28 degrees and
24 left to right in basically in this type manner.

25 The gunshot wound number three was near the nape of

1 the neck which was the back of the neck. It was five and a
2 three quarter inches from the top of the head whereas the
3 first one I described was three and a quarter inches. It
4 was a little bit lower. It was one inch to the right of
5 the midline rather than to left the midline.

6 That bullet passed through the soft tissues of the
7 back of the neck and came to rest near the angle of the jaw
8 in the right jaw region. That bullet was, the wound was
9 irregular in shape. And it measured up to 58 one-
10 hundredths of an inch in diameter. This bullet passed
11 slightly downward, left to right 20 degrees and back to
12 front. That bullet was mildly distorted. It wasn't very
13 distorted. It measured .35 inches in diameter at the base
14 and up to 0.68 or 68 one-hundredths inches long. I labeled
15 that zero again, a C on that one and Delta.

16 The other gunshot wound that I found was a grazing gun
17 shot wound in the lower postural neck midline. It was
18 diagonally oriented downward and to the right meaning that
19 the left side was a little bit higher than the right. This
20 one was 1.6 inches long. A little bit longer than, about
21 the length of the width of my finger. And it was .45 or 45
22 one-hundredths inches wide. It's a little bit of
23 hemorrhage around that wound and slightly discolored.
24 There was no actual bullet recovered from that gunshot
25 wound. It was a grazing gunshot wound.

1 Q If I understood your testimony correctly, you
2 found three injury wounds for gunshots and three bullets
3 actually inside the head, for lack of a better word, of
4 Mrs. Lindsey?

5 A That is correct.

6 Q You found evidence of a fourth shot that I guess
7 in layman's terms would be a glancing or superficial blow?

8 A A grazing gunshot wound.

9 Q A grazing gunshot?

10 A Right.

11 Q But you did not recover the bullet for that
12 because it was not part of the autopsy?

13 A Right. And I did not go to the scene.

14 Q Yes, sir. Now I maybe asking you a question
15 outside of your area of expertise. And if I am, I
16 apologize. Could you tell from the injury caused from that
17 grazing gunshot whether enough tissue was taken as to have
18 any appreciable effect of the velocity of that bullet. In
19 other words, would that bullet have been able to continue
20 on given the injury that it did to the back of the neck?

21 A Yes.

22 Q Let me show you, Dr. Wren, State's Exhibits 16,
23 17 and 18 and ask you whether or not you recognize those
24 exhibits.

25 A Yes, these are three lead bullets that are in

1 containers that are actually labeled by me and signed by
2 me. I did not measure them but I can tell they fit the
3 general description. And I can make out these scratchings
4 that I did on them.

5 Q All right. Those would have been the three
6 bullets that you took from Nell Lindsey's head during the
7 autopsy?

8 A Yes. The flatter one is the one that was
9 recovered from the back of the head that was up against the
10 skull that did not penetrate the skull. The one labeled 17
11 is rather well distorted. That was the one that was
12 removed from the brain itself. And the other one is only
13 distorted on the nose. It has an intact base. That was
14 the one that was removed from the angle of, near the angle
15 of the jaw.

16 Q Dr. Wren, in your opinion as a medical doctor and
17 expert in the field of pathology, would either of the two
18 gunshot wounds where you recovered the bullet from inside
19 the cavity of her head been fatal shots?

20 A I usually identify gunshot wounds as either
21 immediately fatal or potentially fatal. The one that
22 actually entered her head was the one that was immediately
23 fatal. The other two were potentially fatal in that she
24 could have bled to death from -- actually the other three,
25 she could have bled to death or gotten an infection from

1 any of those three and eventually died. There was not
2 enough bleeding from the two that the, the two others for
3 her to have actually bled to death immediately. But she
4 could have bled to death if she had not been attended to,
5 from any of the others. Not likely, but she could have.

6 Q Finally, Dr. Wren, I'm going to show you State's
7 64 and ask you whether or not that was a picture that you
8 recognized or whether you were --

9 A Yes, this was a picture of all three bullets. It
10 is labeled FA0220 in my writing on a small tape measure
11 type thing where we have photographs of each of the bullets
12 that were recovered at the autopsy. And they are
13 consistent with those in these files here.

14 MR. GOWDY: Your Honor, we would move
15 State's 64 into evidence.

16 MR. BRENNAN: No objection.

17 THE COURT: There are admitted.

18 (WHEREUPON, State's Exhibit 64 was admitted into
19 evidence.)

20 MR. GOWDY: Dr. Wren, I have no further
21 questions for you. Thank you for your time. Please
22 answer any questions Mr. Brennan may have.

23 MR. BRENNAN: I have no questions.

24 THE COURT: You can step down, sir. Thank you
25 for coming, Dr. Wren.

1 Ladies and gentlemen, I am told that your lunch
2 is here. So we're going to take a break now and eat
3 lunch. We will resume probably in about an hour,
4 maybe an hour and fifteen minutes. So have a nice
5 lunch. Remember that you may not discuss the case. We
6 will see you shortly.

7 (WHEREUPON, the jury exits at approximately 1:20 p.m.)

8 **THE COURT:** All right. We'll be in recess until
9 I finish my lunch.

10 **MR. GOWDY:** Your Honor, I have had a matter
11 brought to my attention that I think is significant
12 enough to bring to the Court's attention.

13 **THE COURT:** All right. Go ahead.

14 **MR. GOWDY:** We had a call this morning to our
15 office from an Angela Payne. We have her number. She
16 called to report that a juror that I am happy to say
17 is not on the jury but one that was called back
18 yesterday in her judgment had been discussing the
19 case, telling where she was going to be staying and
20 otherwise violated what may have been the Court's
21 instructions. This lady felt compelled to call my
22 office and report it. And I feel compelled to bring
23 to the Court's attention.

24 **THE COURT:** This was someone who was in the
25 panel?

1 **MR. GOWDY:** She was in the panel. She was
2 not selected. She was juror 134.

3 **THE COURT:** All right. Thank you.

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

5 (WHEREUPON, a lunch recess was taken at approximately
6 1:21 p.m.)

7 (WHEREUPON, the Court resumed at approximately 2:22
8 p.m.)

9 **THE COURT:** What do you say, Solicitor?

10 **MR. GOWDY:** Your Honor, the State has no more
11 witnesses in its case in chief.

12 **THE COURT:** Mr. Bartosh.

13 **MR. BARTOSH:** Your Honor, we will offer some
14 testimony. The defense will offer some testimony.
15 However, we have discussed with Mr. Lindsey
16 concerning his right to testify. He -- we told him
17 that he has an absolute right to testify. He has an
18 absolute right not to testify.

19 We can make a lot of decisions about how to try
20 the case but one decision we can't make is whether or
21 not he testifies. We told him what we think the
22 advantages of testifying are and what the
23 disadvantages are. We've also explained to him that
24 he can talk to anybody he wants to but ultimately the
25 decision has to be his and his alone. We would ask

1 the Court to inquire of him.

2 **THE COURT:** Are you satisfied that he understands
3 everything that you talked to him about concerning his
4 right to testify and his right not to testify?

5 **MR. BARTOSH:** Yes, sir. I am.

6 **THE COURT:** All right, sir.

7 Mr. Lindsey, raise your right hand, please, sir.

8 (WHEREUPON, Mr. Lindsey was sworn.)

9 **THE COURT:** All right. You can put your hand
10 down. Now, I'm going to talk to you about what your
11 lawyer has already talked to you about. If I say
12 anything that confuses you or if I ask a question that
13 you don't understand, you stop me. Okay?

14 **MR. LINDSEY:** Yes, sir.

15 **THE COURT:** Now, do you understand that you have
16 an absolute right under the United States Constitution
17 and the Constitution of South Carolina to remain
18 silent and that you can not be compelled to testify in
19 this case. Do you understand that?

20 **MR. LINDSEY:** Yes, sir.

21 **THE COURT:** If you choose not to testify, then I
22 will explain to the jury that you have that right not
23 to testify and that that right, that your exercise of
24 that right can not and must not be held against you.
25 You understand that I will do that?

1 **MR. LINDSEY:** Yes, sir.

2 **THE COURT:** You also understand that you have the
3 right to testify. You do?

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

5 **THE COURT:** And that if you do testify, you would
6 be like any other witness in the case and subject to
7 cross-examination on any subject that might be
8 relevant to this case. Do you understand that?

9 **MR. LINDSEY:** Yes, sir.

10 **THE COURT:** And do you also understand that that
11 would include the possibility of your being cross-
12 examined about any criminal record that you might
13 have.

14 **MR. LINDSEY:** Yes, sir.

15 **THE COURT:** And you discussed that with him, Mr.
16 Bartosh?

17 **MR. BARTOSH:** We have, Your Honor.

18 **THE COURT:** Are there convictions in his past that
19 would be useful to the State in impeaching his
20 credibility?

21 **MR. BARTOSH:** There are convictions that the
22 State could use, yes, sir.

23 **THE COURT:** Is there any need for me to address
24 those now or are you satisfied that either they will
25 or they won't be able to use those in cross-

1 examination?

2 **MR. BARTOSH:** I am satisfied, Your Honor, that
3 they would be able to use those during the cross-
4 examination.

5 **THE COURT:** All right. Mr. Lindsey, as Mr.
6 Bartosh said, your lawyers make a lot of decisions for
7 you in this case. They make a lot of strategic
8 decisions. They decide whether or not to call other
9 witnesses. They decide about cross-examination and
10 all that stuff. You are the one who have to decide
11 whether or not you're going to testify. In preparing
12 yourself to do that, you need to consult with your
13 lawyers. I understand that you have, is that
14 correct?

15 **MR. LINDSEY:** Yes, sir.

16 **THE COURT:** You also need to consult with
17 anybody else that you rely on for advice and counsel.
18 Have you done that?

19 **MR. LINDSEY:** Yes, sir.

20 **THE COURT:** Are you ready to make up your mind
21 as to whether or not you wish to testify?

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

23 **THE COURT:** Do you need any more time to talk
24 to your lawyer or anybody else right now before you
25 make up your mind?

1 **MR. LINDSEY:** No, sir.

2 **THE COURT:** Is there anything about this
3 decision that you don't understand, sir?

4 **MR. LINDSEY:** No, sir.

5 **THE COURT:** Have you made up your mind?

6 **MR. LINDSEY:** Yes, sir.

7 **THE COURT:** And are you going to testify?

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

9 **THE COURT:** Mr. Bartosh, are you satisfied
10 that he has made that decision voluntarily and
11 knowingly and intelligently understanding his rights
12 that we have discussed and that you have discussed
13 with him?

14 **MR. BARTOSH:** Yes, sir.

15 **THE COURT:** Is there anything else that I need
16 to talk to him about, anything I might not know about
17 such as perhaps his ability to understand what I'm
18 saying, are you satisfied that he understand
19 everything I just said?

20 **MR. BARTOSH:** I am satisfied.

21 **THE COURT:** Is there anything else we need to
22 talk about before I accept his decision not to
23 testify?

24 **MR. BARTOSH:** No, sir. Not as to the issue of
25 whether or not to testify.

1 **THE COURT:** All right. Is there anything
2 else?

3 **MR. BARTOSH:** The only other thing that I would
4 like to put on the record is that Mr. Lindsey has a
5 conviction of assault and battery with intent to kill
6 from 1996. I have explained to him that no matter
7 what the jury returns, what verdict they return in the
8 guilt phase, the two possible verdicts that he would,
9 the best that he could hope for would be life without
10 parole because he would be brought under the Two
11 Strike Law.

12 The State also served him with a ten-day letter
13 notifying him that they would seek life without parole
14 if he were to be convicted of manslaughter. I have
15 been served with that note also. So Mr. Lindsey
16 also understands that. That out of everything, the
17 best he can hope for is life without parole.

18 **THE COURT:** It is my understanding that you
19 intend to call some other witnesses?

20 **MR. BARTOSH:** Yes, sir.

21 **THE COURT:** You will discuss with your client
22 whether or not he has changed his mind about his
23 testimony at the end of your having called those
24 witnesses.

25 **MR. BARTOSH:** I will, Your Honor.

1 **THE COURT:** And if you will remind me, I will
2 also do that.

3 **MR. BARTOSH:** Yes, sir.

4 **THE COURT:** All right.

5 **MR. BARTOSH:** Yes, sir.

6 **THE COURT:** I believe that his decision at
7 this point not to testify is made knowingly and
8 intelligently and voluntarily, that he fully
9 understands his right under the Fifth Amendment and
10 also his right to testify. At this point, I will
11 certainly accept that decision.

12 **MR. BARTOSH:** Thank you, Your Honor.

13 **THE COURT:** Are you ready?

14 **MR. BARTOSH:** Yes, sir.

15 **THE COURT:** Bring them in.

16 **MR. GOWDY:** Would the Court like me to rest on
17 the record when the jury comes in?

18 **THE COURT:** I believe so.

19 (WHEREUPON, the jury enters at approximately 2:30
20 p.m.)

21 **THE COURT:** Solicitor.

22 **MR. GOWDY:** May it please the Court, Your
23 Honor, the State rests.

24 **THE COURT:** Mr. Bartosh, are you ready to
25 proceed?

1 **MR. BARTOSH:** Yes, sir.

2 **MR. BRENNAN:** Yes, Your Honor. We call Jason
3 Stewart to the stand please.

4 **JASON STEWART**

5 having first being duly sworn testified as follows:

6 **CROSS-EXAMINATION**

7 **BY MR. BRENNAN:**

8 **Q** Mr. Stewart, how are you today?

9 **A** Fine. And you?

10 **Q** Good. Would you please state your full name for
11 the record.

12 **A** Joseph Stewart.

13 **Q** And where are you employed?

14 **A** Spartanburg EMS.

15 **Q** How long have you held that job?

16 **A** I been there four years.

17 **Q** And in your job, what are your duties?

18 **A** I am a paramedic.

19 **Q** Can you tell the Court what training you have.

20 **A** I have training in all different medical aspects
21 from medical problems, trauma problems, psychological
22 problems.

23 **Q** Were you employed as a paramedic with the
24 Spartanburg Emergency Medical Service on September 18th of
25 2002?

1 **A** I was.

2 **Q** All right. Sir, did you respond to an emergency
3 call at the Inman Police Department that evening?

4 **A** I did.

5 **Q** Did you render assistance or care to Mr. Marion
6 Lindsey?

7 **A** Yes, sir. Basic care.

8 **Q** Would you tell the Court what injuries Mr.
9 Lindsey sustained.

10 **A** He had gunshot wounds.

11 **Q** Can you tell the Court to which parts of his body
12 did he have gunshot wounds.

13 **A** He had gunshot wounds to the hip area as well as
14 the legs.

15 **Q** Did he have a head wound?

16 **A** He had a head wound.

17 **Q** So there was a head injury, is that right?

18 **A** That is correct.

19 **Q** As you approached him, did Mr. Lindsey say
20 anything to you?

21 **MR. BARNETT:** Objection, Your Honor, hearsay.

22 **THE COURT:** Is it written out somewhere where I
23 can look at it?

24 **MR. BRENNAN:** Yes, it is.

25 **THE COURT:** I am going to have to send you folks

1 back into the jury room for a few more minutes. We
2 have to cover an evidentiary matter. We will get
3 with you as soon as I can. Thank you.

4 (WHEREUPON, the jury exits at approximately 2:34 p.m.).

5 **THE COURT:** The only thing in here --
6 Why don't you go ahead and answer the question.
7 What did he say?

8 **THE WITNESS:** He said that he shot himself in the
9 head.

10 **THE COURT:** Were those his exact words?

11 **THE WITNESS:** He said I shot myself in the head.

12 **THE COURT:** All right. Is that it?

13 **MR. BRENNAN:** Yes, Your Honor. I think it
14 will come in under 803, excited utterance.

15 **MR. BARNETT:** Basically, it is a self-serving
16 statement, self-serving hearsay. In our case law and
17 our rules, it basically talks about a statement that a
18 defendant made to the police officers. He wanted to
19 enter those. The statements were not entered in the
20 State's case. And they wanted to enter it in his
21 case.

22 **THE COURT:** Is it the case in Orangeburg that
23 Judge Clary tried down there where the man shot his
24 wife in the mobile home?

25 **MR. BARNETT:** There's also that case.

1 **THE COURT:** What case is that? Let me see the
2 one you got.

3 **MR. BARNETT:** Yes, sir.

4 (WHEREUPON, the Court reviewed the documents.)

5 **MR. BARNETT:** Your Honor, I do have another case
6 too. State versus Gosen.

7 **THE COURT:** Versus what?

8 **MR. BARNETT:** Gosen.

9 **THE COURT:** That's fine.

10 **MR. BARNETT:** Are you familiar with that or do
11 you need a copy of it?

12 **THE COURT:** I need to look at it.

13 **MR. BARNETT:** Yes, sir.

14 (WHEREUPON, there is a pause as Court reviews the
15 documents.)

16 **THE COURT:** Your argument is that even though it
17 might be an excited utterance, because it is self-
18 serving, it is inadmissible?

19 **MR. BARNETT:** That is one of the reasons.
20 Yes, sir.

21 **THE COURT:** Explain that to me.

22 **MR. BARNETT:** The main reason I objected is
23 because I suspect they were going to ask why he shot
24 himself. I think that is clearly beyond, first
25 thing, it is irrelevant to the guilt phase that we

1 talking about. Second thing is it is self-serving
2 hearsay basically. Our courts have held that type of
3 hearsay cannot be allowed especially when the
4 defendant present testify if he wishes to testify.

5 **THE COURT:** Those are, in all three of those
6 cases, Terry, Gosen and Caberra, those are statements
7 are made long after the event occurs. After they
8 have time to think about what their interests are and
9 to fashion a statement that is consistent with the
10 defendant's interests.

11 This is a statement that is made essentially
12 contemporaneous with a crime. The basis of the
13 holding in those other cases, it goes away from the
14 803 exceptions to the 804 exceptions looking at the
15 unavailability of the witness and to try to make it
16 non-hearsay. So without regard to the fact that this
17 is the defendant testifying, this would be, if
18 relevant, an admissible statement under 803(1). So
19 how does the fact that the defendant is the one making
20 the statement change that analysis?

21 **MR. BARNETT:** Hold on one second.

22 Your Honor, there may not be much difference.
23 The biggest problem we have is with why he shot
24 himself. I think I understand the Court's analysis
25 from the standpoint --

1 **THE COURT:** Okay. So are you telling me that
2 you do not object to the answer that the witness just
3 gave that Mr. Lindsey said that he shot himself, he
4 was trying to shoot himself in the head?

5 **MR. BARNETT:** Yes, sir. I think --

6 **THE COURT:** You withdraw the objection?

7 **MR. BARNETT:** Yes, sir. I withdraw the
8 objection.

9 **THE COURT:** Are you going any farther with this?

10 **MR. BRENNAN:** No, sir.

11 **THE COURT:** All right.

12 **MR. BARNETT:** I didn't know what his answer was
13 going to be obviously.

14 **THE COURT:** I will be right back.

15 Just one second, sir.

16 (WHEREUPON, the Court exits the courtroom at
17 approximately 2:38 p.m.)

18 (WHEREUPON, the Court enters the courtroom at
19 approximately 2:43 p.m.)

20 **THE COURT:** Bring in the jury.

21 The objection is overruled.

22 **MR. BARNETT:** Thank you, Your Honor.

23 (WHEREUPON, the jury enters at approximately 2:46
24 p.m.)

25 **BY MR. BRENNAN:**

1 **Q** Mr. Steward, before we took that break, I asked
2 you if as you were approached or after you offered care to
3 Mr. Lindsey, did he say anything to you. I will ask you
4 again. Did he say anything to you?

5 **A** He said he shot himself in the head

6 **Q** He shot himself in the head?

7 **A** Yes, sir. .

8 **Q** And then at some point, did you and other
9 paramedics transport him to the hospital?

10 **A** Other paramedics transported him to the hospital.

11 **Q** Okay. So that was really the end of your contact
12 with Mr. Lindsey?

13 **A** Yes.

14 **Q** I have nothing further.

15 **THE COURT:** Any cross-examination?

16 **MR. BARNETT:** No, questions, Your Honor.

17 **THE COURT:** You can step down, sir.

18 **MR. BRENNAN:** Your Honor, the defendant will
19 next Ms. Virginia Lindsey.

20 May it please the Court, Your Honor?

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

22 **VIRGINIA LINDSEY**

23 having first being duly sworn testified as follows:

24 **DIRECT EXAMINATION**

25 **BY MR. BRENNAN:**

1 Q Ma'am, would you please state your name for the
2 Court?

3 A Virginia May Lindsey.

4 Q Mrs. Lindsey, would you please tell the members
5 of the jury how you are related to Mr. Marion Lindsey?

6 A Marion Lindsey is my son.

7 Q Were you and your son -- are you and your son
8 very close?

9 A Real close.

10 Q Do you remember the weeks leading up to September
11 18, 2002?

12 A Yes.

13 Q Was Marion Lindsey being allowed to see his
14 children?

15 A No.

16 Q Ma'am, during those weeks, did Mr. Lindsey
17 continue to try to care for the children?

18 A Yes.

19 Q Was there an occasion where he bought groceries
20 for the children?

21 A Yes.

22 Q How did the children get those groceries?

23 A Marion brought the groceries to my house. I
24 called to Nell's house. And her mother said she wasn't at
25 home. So I said Marion had brought some groceries for the

1 kids. I said he need somebody to come and pick them up.
2 She said well, Nell's not here. But I'll tell her when she
3 get here. Later on about 11 o'clock that night, Nell came
4 and picked up the groceries.

5 Q Those were groceries that Marion had brought for
6 his children?

7 A For his kids, yes.

8 Q Some time after he purchased the groceries, did
9 it become hard or impossible for you to contact your
10 grandchildren?

11 A Yes.

12 Q Why is that, ma'am?

13 A Because they did not want them to be around their
14 daddy.

15 Q Did you will try to call Nell's house?

16 A Yes, I did.

17 Q Did you have any luck contacting Nell?

18 A I contacted her mother. Her mother said that
19 Nell was not home.

20 MR. WILLINGHAM: Objection, Your Honor,
21 hearsay.

22 BY MR. BRENNAN: th

23 Q You can't say what anybody said to you, ma'am.
24 I just what to know if you were ever able to talk to
25 children.

1 **A** No.

2 **Q** Did there come a time when your phone calls were
3 blocked?

4 **A** Yes.

5 **MR. WILLINGHAM:** Objection, Your Honor. I
6 hate to do it but I don't believe that this is
7 relevant.

8 **THE COURT:** Sustained.

9 **MR. WILLINGHAM:** Thank you.

10 **BY MR. BRENNAN:**

11 **Q** Last question. The weeks leading up to -- no
12 further questions. It has already been asked.

13 **THE COURT:** Any cross-examination?

14 **MR. WILLINGHAM:** No, sir.

15 **THE COURT:** You can step down, ma'am.

16 **MR. BRENNAN:** Your Honor, I would next call Mr.
17 Christopher Wilkins.

18 **CHRISTOPHER WILKINS**

19 having first being duly sworn testified as follows:

20 **DIRECT EXAMINATION**

21 **BY MR. BRENNAN:**

22 **Q** Would you please state your name for the Court?

23 **A** Christopher Lee Wilkins.

24 **Q** Is it true that you came from work today to
25 testify?

1 **A** Yes.

2 **Q** How are you related to Mr. Marion Lindsey?

3 **A** We're cousins.

4 **Q** Isn't also true that you guys were kind of raised
5 as brothers?

6 **A** Yes.

7 **Q** Has there been occasions in the past where the
8 two of you had introduced each other as brothers?

9 **A** Yes.

10 **Q** Very close?

11 **A** Very close.

12 **Q** Are you familiar with the weeks leading up to
13 September 18, 2002?

14 **A** Yes, sir.

15 **Q** Was Marion allowed to see his children?

16 **A** No, sir.

17 **MR. BARNETT:** Objection. I don't understand
18 the relevance of these questions either.

19 **THE COURT:** I believe that the question is, the
20 breath of the question makes it impossible to
21 determine whether or not the answer would be relevant.
22 So I sustain the objection.

23 **MR. BRENNAN:** Okay.

24 **BY MR. BRENNAN:**

25 **Q** Was Mr. Lindsey very close with his children?

1 **A** Yes, sir.

2 **Q** Was there a specific period of time where he was
3 prevented from seeing his children?

4 **A** Yes, sir.

5 **MR. BARNETT:** Objection, Your Honor. I don't
6 understand the relevance of this also.

7 **THE COURT:** I think that the -- that question, I
8 overrule the objection.

9 **MR. BRENNAN:** Thank you, Your Honor..

10 **BY MR. BRENNAN:**

11 **Q** Was there a specific period of time where he was
12 not allowed to see --

13 **THE COURT:** He has already answered that
14 question. He said yes.

15 **MR. BRENNAN:** I'm sorry, Your Honor. I'm sorry.
16 I didn't hear the answer. Forgive me. Nothing
17 further. Thank you, Your Honor.

18 **THE COURT:** Any cross-examination?

19 **MR. BARNETT:** Nothing from the State.

20 **THE COURT:** All right, sir. You can step down.

21 **MR. BRENNAN:** Can I have one second? I need to
22 check with Mr. Bartosh to see if another witness is
23 here.

24 **THE COURT:** Uh-huh (affirmative)..

25 (WHEREUPON, there was a pause.)

1 **MR. BRENNAN:** Your Honor, the defense rests.

2 We would ask the Court to inquire of Mr. Lindsey --

3 **THE COURT:** All right. All right. I will. I
4 will.

5 Ladies and gentlemen, I need you to step back in
6 your jury room for one minute. I have a matter of
7 law I need to take up.

8 (WHEREUPON, the jury exits at approximately 2:55 p.m.)

9 **THE COURT:** All right. You don't mean to say
10 that you rest because you want a minute to talk to
11 your client about whether or not he wishes to testify.

12 **MR. BRENNAN:** Yes, sir.

13 **THE COURT:** And then you want me to talk to him
14 about whether or not he wishes to testify. And you
15 did mean to ask me to do that while the jury was
16 sitting in the courtroom. And that's why I stopped
17 you.

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

19 **THE COURT:** So we will take a short break to
20 give you and Mr. Bartosh who needs to come back in
21 here right now to talk to your client about whether or
22 not he wishes to not testify.

23 (WHEREUPON, a short recess was taken at approximately
24 2:56 p.m.)

25 (WHEREUPON, the Court resumed at approximately 3:14

1 p.m.)

2 THE COURT: Have you discussed with your client
3 again as to whether or not he wishes to testimony?

4 MR. BARTOSH: Yes, sir. I have.

5 THE COURT: He still wishes not to testify?

6 MR. BARTOSH: He does, Your Honor.

7 THE COURT: Do I need to get into that with him?

8 MR. BARTOSH: It's understood.

9 THE COURT: Sir?

10 MR. BARTOSH: It's fully understood.

11 THE COURT: And you don't want to testify?

12 MR. LINDSEY: No, sir.

13 THE COURT: All right. Now, Mr. Lindsey, do you
14 understand that you have the right to address the jury
15 yourself? Of course, your lawyer has the right to
16 make a closing argument. But you also have a right to
17 make a closing argument during the guilt phase. Do
18 you want to do that?

19 MR. LINDSEY: Yes, sir.

20 THE COURT: You do?

21 MR. LINDSEY: Yes, sir.

22 MR. BARTOSH: One moment, Your Honor.

23 MR. LINDSEY: My bad. No, sir. At the end of
24 the sentencing phase.

25 THE COURT: You don't want to do it in the guilt

1 phase?

2 MR. LINDSEY: No, sir.

3 THE COURT: All right. You may be seated.

4 Anything else from the State? I mean, from the
5 defense.

6 MR. BRENNAN: No, Your Honor.

7 MR. BARTOSH: No, sir.

8 THE COURT: And I assume there's nothing from the
9 State?

10 MR. GOWDY: There's no rebuttal, Your Honor.

11 THE COURT: Then the case goes to the jury on the
12 question of whether or not the defendant is guilty of
13 murder, correct, Mr. Bartosh?

14 MR. BARTOSH: Your Honor, we would respectfully
15 request an instruction on the lesser included offense
16 of voluntary manslaughter.

17 THE COURT: Solicitor.

18 MR. GOWDY: Your Honor, I think this is one
19 those rare cases where manslaughter is requested where
20 there is neither sufficient legal provocation nor
21 sudden heat of passion. There's been absolutely no
22 testimony as to either.

23 THE COURT: Let me hear you, Mr. Bartosh
24 articulate a factual basis that would support me
25 charging the lesser included offense of voluntary

1 manslaughter.

2 MR. BARTOSH: Yes, sir. After reading State
3 versus Lockclair.

4 THE COURT: I know what the law is.

5 MR. BARTOSH: Yes, sir.

6 THE COURT: I just want to hear what you think
7 the evidence is that is in the record in this case
8 that would support voluntary manslaughter.

9 MR. BARTOSH: Your Honor, the evidence is that
10 the alleged victim withheld visitation of Mr.
11 Lindsey's children from him several weeks before the
12 incident. There is also evidence that the most
13 important thing in his life were his children. He
14 valued them more than anything.

15 THE COURT: Let me ask you a question.

16 MR. BARTOSH: Yes, sir.

17 THE COURT: Under the evidence in the record,
18 what was the most recent point in time that Ruby Nell
19 Lindsey had done anything in the way of denying
20 visitation to Mr. Lindsey with his children, the most
21 recent point in time?

22 MR. BARTOSH: The most recent point in time was
23 when they ran into one another --

24 THE COURT: Okay.

25 MR. BRENNAN: -- on the road.

1 **THE COURT:** Okay.

2 **MR. BARTOSH:** Mr. Lindsey had inquired as to
3 when she was going to allow him access to his
4 children.

5 **THE COURT:** Right.

6 **MR. BARTOSH:** Ms. Nesbitt said I don't know.

7 **THE COURT:** All right. Well, you know I'm going
8 to cross-examine you about that. When was the last
9 time that Mrs. Lindsey did anything where evidence
10 supports it to deny Mr. Lindsey visitation? I will
11 acknowledge that within three or four or five minutes
12 of the alleged event, Mrs. Nesbitt made a comment
13 that relates to the subject of whether or not Mr.
14 Lindsey was going to have visitation. But is there
15 any evidence that Mrs. Lindsey in any way
16 participated in her doing that?

17 **MR. BARTOSH:** Participated in denying him
18 visitation with his children?

19 **THE COURT:** At that point in time.

20 **MR. BARTOSH:** At the point where they met?

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

22 **MR. BARTOSH:** No, sir. But I think as Ms.
23 Nesbitt testified that she considered Mrs. Lindsey to
24 be --

25 **THE COURT:** I hate to cut you off. But since

1 you just read State versus Lockclair, you will recall
2 that when the mother of the victim threw the cigarette
3 case at the defendant, the Supreme Court said that if
4 there is sufficient legal provocation, it must in some
5 way be related to some act of the victim.

6 **MR. BARTOSH:** Your Honor, I would respectfully
7 argue that because of the relationship between Ms.
8 Nesbitt and Mrs. Lindsey, as Mr. Nesbitt testified
9 to earlier that, Mr. Lindsey took upon Ms. Nesbitt's
10 reply that she did not know that, because of that
11 relationship, that Mrs. Lindsey was going to withhold
12 those children. I think his actions afterwards would
13 be an indication that that was the provocation that
14 started this whole thing. It was throughout the
15 entire relationship prior to that, there was never
16 anything like this. But when she said I don't know,
17 and she sped off too --

18 **THE COURT:** Who is the she?

19 **MR. BARTOSH:** Ms. Nesbitt because she was
20 driving.

21 **THE COURT:** I understand that. And I
22 understand that you got this theory about how Ms.
23 Nesbitt and Mrs. Lindsey are tied in so closely
24 together that the act of one is attributable to the
25 act of the other, right?

1 **MR. BARTOSH:** Yes, sir

2 **THE COURT:** But if you will forgive me for
3 setting that little argument aside for a minute, what
4 is the last thing Mrs. Lindsey had did that could
5 have been sufficient legal provocation to send Mr.
6 Lindsey into the sudden heat of passion?

7 **MR. BARTOSH:** On the date of the event?

8 **THE COURT:** Any day. You pick the day.

9 **MR. BARTOSH:** All right.

10 **THE COURT:** You tell me what's the last point in
11 time that she did anything that is sufficient legal
12 provocation.

13 **MR. BARTOSH:** When she blocked the phone so
14 that he nor his family could contact his children.

15 **THE COURT:** All right. What evidence is in the
16 record as to whether when that occurred.

17 **MR. BARTOSH:** I will have to -- I am informed,
18 Your Honor, that his mother testified that it was a
19 week or more before the incident.

20 **THE COURT:** Okay. So the last thing that Ms.
21 Lindsey did according to the evidence in this record
22 that could possibly have been sufficient legal
23 provocation was a week or more before she was killed
24 unless I accept this theory of Ms. Nesbitt acting,
25 Ms. Nesbitt's actions being attributable to Ms.

1 Lindsey?

2 MR. BARTOSH: Your Honor, the other thing that
3 we would respectfully suggest to the Court is --

4 THE COURT: Can I have an answer to my question
5 first?

6 MR. BARTOSH: I'm sorry. Could you repeat it?
7 I was distracted by a note.

8 THE COURT: Yeah. I want to confirm that what
9 you just told me is that the last thing that Mrs.
10 Lindsey did before her death that could possibly be
11 sufficient legal provocation is to block the telephone
12 calls from Mr. Lindsey. That was a week or more
13 before she was killed. That is correct?

14 MR. BARTOSH: That is correct, Your Honor.

15 THE COURT: All right. Go ahead and say what
16 the other thing is.

17 MR. BARTOSH: The other thing was that when
18 Mr. Lindsey asked the question of Ms. Nesbitt when
19 would she allow him to see her children, Mrs. Lindsey
20 remained silent. She did not say anything. I'm
21 sure it is clear by his actions that he realized that
22 she was in the automobile.

23 THE COURT: Okay. Anything else?

24 MR. BARTOSH: I don't want to take, beat a
25 dead horse to death, Your Honor. But I would say that

1 I think, of course, the standard is if there's any
2 evidence, it does not go to the weight, it goes to the
3 existence of an instruction of a lesser included
4 offense, then we are entitled to the instruction.
5 The defendant is entitled to the instruction.

6 I think if you take the whole incident on the
7 road as one whole, one continuous event, that shows
8 that there was sufficient legal provocation, the
9 withholding of his children and that he acted in the
10 heat of passion. Because what happened was, they went
11 straight from the, once Mr. Nesbitt left, they went
12 straight from there to the Inman Police Department.
13 And Mr. Nesbitt, Mr. Lindsey according to the
14 testimony got out and that is when the event happened.

15 I think that that shows that it was one event
16 that was triggered by Mrs. Lindsey refusing to state
17 when he could see his children. As I said, I'll say
18 this and then I will sit down, Your Honor. I just
19 cannot imagine anybody that would be in the heat of
20 passion and to drive to a police station and get out
21 of a car and go around in front of everybody and shoot
22 somebody to death if they were not under the influence
23 of the heat of passion.

24 **THE COURT:** Well, the solicitor, if given the
25 opportunity, might point out that it could be malice

1 instead of the heat of passion.

2 **MR. BARTOSH:** Yes, sir. But once again, I
3 respectfully select, would suggest to the Court that
4 it does not go to the weight, it goes to the
5 existence. A reasonable juror, we believe, could
6 find that Mr. Lindsey acted in the heat of passion as
7 a result of legal provocation based on those facts.
8 Then, of course, it's up to the Solicitor and the
9 defense to try to convince the jury as to each one's
10 version.

11 **THE COURT:** All right. Well, I'm going to
12 reject argument that something that Ms. Nesbitt did
13 could amount to sufficient legal provocation. If you
14 look at Lockclair and if you look at footnote two in
15 Lockclair and the discussion that surrounds that,
16 South Carolina has made it very clear that that is not
17 the law in South Carolina. Provocation has to come
18 from the victim.

19 It is possible, it would be possible in this case
20 if Mrs. Lindsey, knowing that this was going on, had
21 communicated something to Ms. Nesbitt who then in
22 turn communicated it to Mr. Lindsey. That could be
23 an act on the part of the victim. There is no
24 evidence that that happened. Is there?

25 **MR. BARTOSH:** No, sir. We would respectfully

1 submit that by being silent, by remaining silent when
2 the question was asked that that would --

3 **THE COURT:** Let me ask you this. You are saying
4 that Mrs. Lindsey was silent and that her silence
5 would enrage Mr. Lindsey. What is the evidence in
6 the record of this case that Mr. Lindsey even knew
7 she was in the car at that point in time?

8 **MR. BARTOSH:** I think by the fact that he
9 followed the car after he turned around and left that
10 he knew.

11 **THE COURT:** He had been following the car for
12 some number of minutes before.

13 **MR. BARTOSH:** Yes, sir. And the fact that he
14 got out of the car, he never even looked in the
15 automobile at the police station. He walked up to
16 the car at the station. I think that indicated that
17 he knew she was in the automobile.

18 **THE COURT:** Okay. Well, there's evidence in the
19 record that Mr. and Mrs. Lindsey were separated,
20 correct?

21 **MR. BARTOSH:** Yes, sir.

22 **MR. BARTOSH:** Does the evidence as to what
23 their respective visitation and custody rights were?
24 Is there any evidence in the record beyond that as to
25 what their respective visitation and custody rights

1 were?

2 **MR. BARTOSH:** No, sir.

3 **THE COURT:** Other than the statements I suppose
4 from several witnesses that Mr. Lindsey had two
5 children that were also the children also of Mrs.
6 Lindsey, is there any evidence that Mr. Lindsey even
7 had visitation rights with those children legally?

8 **MR. BARTOSH:** Well, Your Honor, they were
9 legally married.

10 **THE COURT:** Uh-huh (affirmative). Okay.
11 Solicitor anything?

12 **MR. GOWDY:** The only thing I would say
13 returning the Court's attention back to Lockclair
14 where death is caused by use of a deadly weapon, words
15 alone are not sufficient to constitute legal
16 provocation. I take the position that it doesn't
17 matter if Nell Lindsey had stuck her head forward and
18 said that's right, you're not going to see your kids.

19 Under Lockclair, words alone when a deadly weapon
20 is used is never sufficient legal provocation. I
21 cannot imagine the day that silence is legal
22 provocation. That would turn Lockclair more than on
23 its head but on its something else.

24 **THE COURT:** Anything else, Mr. Bartosh?

25 **MR. BARTOSH:** No, sir.

1 **THE COURT:** All right. There's several basis
2 for my ruling that I am not going to charge voluntary
3 manslaughter. First of all, I do not believe that
4 there is ever going to be recognized a situation in
5 South Carolina where a dispute that is not at that
6 moment heated over a custody arrangement will ever be
7 recognized as sufficient legal provocation.

8 South Carolina has set up a court system, the
9 family court system, whose responsibility is to handle
10 among other things the peaceful and orderly resolution
11 of disputes regarding families and particularly
12 regarding children and particularly regarding
13 visitation. It would just make absolutely no sense
14 to say that if two people get together and have a
15 dispute about visitation of their children when all
16 they've got to do is walk or drive down to Spartanburg
17 and go see a family court judge to resolve that
18 dispute that they can take to guns and violence and
19 killing each other and that be sufficiently or
20 provocation. So that is the basic premise of my
21 ruling.

22 But secondly, there is not a shred of evidence in
23 the record that Mrs. Lindsey did anything period, at
24 all, that could possibly amount to sufficient legal
25 provocation within a week of her death. I believe

1 that there is a period of time, there is a period of
2 time that, as a matter of law, is adequate for
3 reflection. I don't know exactly what it is, but it is
4 less than a week. If you can go a week after
5 something happens, you do not any longer have
6 sufficient legal provocation.

7 I have already said that there is no, I refuse to
8 recognize the idea that Mrs. Lindsey could have done
9 something on behalf of Ms., I'm sorry that Ms.
10 Nesbitt could have done something on behalf of Mrs.
11 Lindsey that would amount to sufficient legal
12 provocation. I also agree with the Solicitor that
13 there is no way that silence could ever be sufficient
14 legal provocation. In fact, silence is what we would
15 hope that, silence and retreat are the two things that
16 we would hope people would resort to in the face of
17 conflict.

18 And those are the two things that Mrs. Lindsey
19 was engaged in with all of her heart at the time she
20 was killed. She was trying to be quiet. And she was
21 try to hide. And she was trying to run to the police
22 station and get help. And she got killed. And it
23 ain't voluntary manslaughter. So anything else in
24 the charge except for murder?

25 **MR. BARTOSH:** Your Honor, out of an abundance

1 of caution, we would respectfully object to the
2 Court's ruling on our request for instruction of
3 voluntary manslaughter based upon our argument
4 presented to the Court. Moving on to the other
5 instructions, Your Honor, I don't know if you have an
6 instruction that if the jury has reasonable doubt as
7 to any element that they are to resolve that doubt in
8 the defendant's favor. Is that included in your
9 instructions?

10 **THE COURT:** It is now.

11 **MR. BARTOSH:** Also, Your Honor, I don't know if
12 you have this in your standard instruction. We would
13 request a jury instruction that the jury is not to
14 consider the fact that the defendant did not testify.

15 **THE COURT:** I have that.

16 **MR. BARTOSH:** Okay, sir.

17 **THE COURT:** Anything else?

18 **MR. BARTOSH:** No, sir. I believe that would
19 be it.

20 **THE COURT:** All right. I am ready. Are y'all
21 ready?

22 **MR. BARNETT:** The State is ready. Mr. Gowdy
23 had to run to the bathroom. He'll be back real quick.

24 **THE COURT:** Well, there is wisdom in that
25 thought. I think I might do it myself. So why don't

1 we take five minutes. When we come back, we will
2 take begin with the defendant's closing argument?

3 **MR. BARTOSH:** No, sir.

4 **THE COURT:** The defense counsel's closing
5 argument?

6 **MR. BARTOSH:** No, sir. The State's closing
7 argument.

8 **MR. WILLINGHAM:** The State would have to close
9 first, Your Honor.

10 **THE COURT:** All right.

11 (WHEREUPON, a short recess was taken at approximately
12 3:37 p.m.)

13 (WHEREUPON, the Court resumed at approximately 3:41
14 p.m.)

15 **THE COURT:** Bring in the jury.

16 (WHEREUPON, the jury entered at approximately 3:41
17 p.m.)

18 **THE COURT:** All right. Ladies and gentlemen,
19 you have now heard all the testimony and evidence that
20 you will hear. We will now ready to move into what I
21 described for you as the third phase of the trial, the
22 closing arguments of the attorney.

23 Solicitor.

24 **MR. GOWDY:** May it please the Court, Your
25 Honor.

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

2 **MR. GOWDY:** Good afternoon, ladies and
3 gentlemen of the jury. I want to begin by thanking
4 you for your service in this case. Ordinary jury
5 service is difficult enough. Service on a capital
6 case where you are exposed to a rather arduous
7 process. We sequester you away from your family and
8 friends. It is an extraordinary service. And I know
9 I speak on behalf of the defense and everybody
10 involved in the prosecution of this case. And I
11 thank you for your service.

12 This is a simple straightforward case. It's as
13 straightforward a case of murder as you can find.
14 Before I go into the facts of it, before I go into the
15 pieces of evidence that you seen this morning in the
16 limited time we've been in the Court, I want to talk
17 to you for just a second about what your function is.

18 You are judges. You're every bit of a judge in
19 this case as Judge Few is. You don't have on robes.
20 This may be the only time you ever serve on the jury.
21 Maybe the only time you're ever in this courtroom.
22 Make no mistake about that you are judges in this
23 case. You decide what happened in that parking lot
24 at the Inman police station on September 18, 2002.
25 You and you alone decide those facts.

1 As you go through the process of deciding what
2 happened, it may seem like a daunting task
3 particularly if you have never served on the jury
4 before. I will tell you this. Listen to what Judge
5 Few tells you when he gives you his instruction.
6 Listen to the qualities that you will use, that you
7 will employ as you go through and consider the
8 testimony and the evidence that has been brought
9 before you.

10 The only thing that I will add, the only thing
11 that I will tell you is in my judgment, the
12 overarching quality or characteristic of a good juror
13 is simply this, common sense. The same common sense
14 that you use in your everyday lives, in your
15 relationships with family, friends, business, with
16 neighbors, that common sense will serve you well in
17 this case.

18 I want to move to September the 18th. I want to
19 set the stage for you. Nell Lindsey has completed 12
20 hours of work. She has got a nurse's uniform on.
21 Her car is disabled so she calls out to her friend
22 Celeste Nesbitt and ask for a ride. They meet in
23 Celeste grandmother's hospital room. They exchanged
24 pleasantries and discuss Celeste's grandmother's
25 condition.

1 And then they go get in the car. When I say
2 they, I mean five ladies. Celeste Nesbitt in the
3 driver's seat. Julia Martin in the front passenger's
4 seat. Behind Ms. Martin is a little girl named
5 Keysha in a car seat. Beside Keysha in the middle is
6 Kiera, a little girl. And then there is Nell Lindsey.
7 sitting behind her sister, if you will, friend for
8 nearly 20 years, Celeste Nesbitt.

9 They begin to truck from Spartanburg Regional to
10 Inman where both Celeste and Nell live. If you
11 remember from the testimony, Nell was living with her
12 mother and her two boys. As they go up there,
13 Celeste notice that someone as she refers to as Tresse
14 or Latreese Smith's car. A car that they were
15 familiar with. A car that Celeste has seen Myron
16 Lindsey or Marion Lindsey in before.

17 Nell's remarks, I thought I saw it to, but I did
18 not want to alarm you. Well, she should have been
19 alarmed. They go and they start heading towards
20 Nell's mother's house. And here they see the car
21 coming again. Celeste's testimony was it came
22 straight on and pulled off to the side. He wanted to
23 know where Nell was. When was the last time you
24 talked to her. Celeste lied and says it's been a
25 couple of days.

1 I want to create that visual image for you of a
2 woman who's lying to a man a couple of feet away from
3 her while her best friend, her sister, is slouched
4 down in the back seat of the car beside her kids.
5 You want the personification of fear? You got it. I
6 have not seen Nell in a couple of days. Roll the
7 window down. The window does not work. The windows
8 were tinted. The windows were tinted. Roll the
9 window down, Celeste. The windows do not work.

10 As this defendant begins to get out of the car to
11 come towards his estranged wife and two little girls,
12 Celeste takes off and heads to the sanctuary of a
13 police station. She is running red lights. And she
14 is running stop lights. And she is flying over
15 railroad tracks. This man is following her.

16 They get to what you would think would be a
17 sanctuary. You are behind the Police Department on
18 the phone with 911 in a friend's car. And it ain't
19 safe enough. He comes up. And he gets out of the car
20 with his .38 Special. And he fires two rounds through
21 that back tinted window. He walks around to the
22 side. And he fires two more rounds through that side
23 tinted window. All four shots hit Nell Lindsey.
24 Three of them in the head, one of them grazed the
25 neck.

1 I'm not going to play the 911 tape for you again.
2 You'll have it back in the jury room if you want to
3 listen to it. I'm not going to play those kids
4 screaming for you. You can listen to it if you want
5 to. But not only do you have Celeste Nesbitt telling
6 you detail by detail what happened, not only do you
7 have a 17-year veteran police officer telling you
8 detail by detail what happened, but you've got a
9 contemporaneous live recording of what is going on.

10 A play-by-play description until the shots went
11 out. And you hear a 911 operator saying ma'am, ma'am.
12 But there ain't no answer because ma'am is dead.
13 Ma'am is slumped over with her head like that holding
14 on to a live, the only thing alive about her was the
15 telephone. Those shots came from the gun held by
16 that defendant. That is murder as plainly and simply
17 as you will ever find it.

18 The judge will tell you that murder is an
19 unlawful killing of another with malice aforethought.
20 You may be wondering what is malice. Is that a term
21 that lawyers came up with? What does malice mean?
22 The Judge will tell you what malice means. Listen to
23 what the judge tells you. I believe he will tell you
24 that malice is a heart fatally bent on mischief. It
25 is a wicked or depraved soul. It is evil.

1 Malice does not mean premeditation. It can be
2 but it is not required. Malice can arise as Deputy
3 Barnett said in his opening in an instant. Malice, in
4 fact, ladies and gentlemen, can be inferred, just from
5 the use of a deadly weapon. I'm not standing front
6 of you this afternoon talking about any inferences.
7 We don't have to infer anything.

8 Malice is having a gun in the car as you go hunt
9 down your wife. Malice is shooting into the tinted
10 windows of a car when you know, you know there is a
11 child in the car. Because don't let the fact escape
12 you that that little girl was struggling to get out of
13 her carseat, unstraps her arms and leans forward as
14 only an innocent child can do and not sensing what was
15 going on. And says Hi, Uncle Ron. Hi, Uncle Myron,
16 just a couple minutes before Uncle Myron unloads four
17 bullets into the back window of a car and a side
18 window of the car. A car that that little girl was
19 sitting in.

20 You want malice? That is malice. You have got
21 a weapon. He's got weapon in the car. He is
22 hunting them down. He fires twice. He walks around
23 to the side and he fires two more times. His has
24 five more live rounds of ammunition on him before
25 Benny Godfrey takes him down. If you want malice,

1 that's the more malice than you will ever need in this
2 case. This is murder.

3 Before I sit down, I am tempted not to even
4 address this notion about this defendant not being
5 able to see his children or the other notion of the
6 EMS worker coming in to testify that Myron Lindsey
7 tried to shoot himself and head. I got two things to
8 say about that and then I'm going to be quiet.

9 There are courtrooms all across this state to
10 deal with child custody issues. There are courtrooms
11 down this hall that deal with child custody disputes.
12 Men and women go down there everyday. You do not
13 shoot your wife in the back of the head three times.
14 You go to court.

15 On the notion him trying to kill himself, I find
16 it more than ironic that when came time to shoot his
17 wife, he did not miss. He did not miss. David Wren
18 dug three slugs out of her head. When it came to
19 shoot himself, he had a little nick on the back of his
20 head.

21 You will have some evidence back with you. You
22 will have the 911 tape. I encourage you to listen to
23 it if you need to. You have two guns back there.
24 This is the gun that was used to kill Nell Lindsey.
25 This is Benny Godfrey's gun, the police officer. I

1 give this to you. And I give you three bullets, four
2 bullets. And I remind you of the ballistic expert.

3 Three of these bullets were taken out of Nell
4 Lindsey's head. One of them was taken out of the
5 trunk of Celeste's car. None of those four could
6 have been fired by Benny Godfrey's gun. There are
7 only two guns at play into this case, which means they
8 were fired by that gun. And that is the gun that was
9 in his hand. That is the gun that he got out of his
10 car.

11 If you listen to the tape, you will hear Celeste
12 Nesbitt say come on Nell, let's get out. Nell says
13 I'm not getting out. I am in the back of a police
14 station in a locked car with the windows rolled up on
15 the phone with 911. Ain't it a doggone shame that
16 that was not enough? Even that's not enough to
17 protect her from a husband that wants to kill her.
18 Her husband succeeded. Her call for 911 did not
19 work. I'm asking you to hold him accountable for
20 what he did and to find him guilty of murder.

21 **MR. BRENNAN:** Please the Court, Your Honor?

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

23 **MR. BRENNAN:** Ladies and gentlemen of the jury,
24 I spoke to you this morning. You heard the testimony
25 and the prosecution's opening argument and their

1 closing argument. This is the gun that was used.
2 This is the gun that caused the death of Nell Lindsey.
3 These are the bullets. This is the gun that was used
4 by the police officer to shoot Mr. Lindsey.

5 It was a tragedy that occurred on September the
6 18th of 2002. But like I said in my opening, the
7 issue is malice. That is the issue. The testimony
8 was of Celeste Nesbitt that these parties had
9 separated before. But in the past Mrs. Lindsey let
10 the two boys go see their dad or let him see his boys.

11 Celeste testified that she made some changes at
12 work. She took him off of the insurance. She was
13 moving on this time. This time it was different. It
14 wasn't going to be any back together this time. It
15 was different. He was still trying to provide for his
16 children. He brought them groceries. The only way he
17 could get them to the boys was through his mom.
18 That's how they had to work. Then there came a time
19 that even mom could not call anymore. They were
20 completely excluded. The boys were completely
21 excluded from Mr. Lindsey's life.

22 On that night, he see Celeste. They stop and
23 talk. He asks her do you know when I am going to be
24 able to see my boys. And it's about that time that
25 he realizes that Nell is in the back seat of the car.

1 But she's not talking to him. She has no intention
2 of letting him see those boys. None whatsoever.

3 The Solicitor said that she fled and went to
4 what you would think was sanctuary, the police
5 department. Ladies and gentlemen, I'm telling you
6 that he snapped. Who would plan anything like this in
7 the police department? He was told, he learned that
8 he wasn't going to see his babies. That was it. He
9 realized that she was in the car. And she wasn't
10 talking. You're not going to see your kids. And they
11 race off. It happened like that. And he snapped.

12 Ladies and gentlemen, it was a tragedy. The boys
13 lost their mom but the boys lost their dad too. Many
14 of these people lost a loved one. And it is terrible.
15 Ladies and gentlemen, it is terrible. He loved his
16 children. He wanted to see his children. That's all
17 he wanted. He wanted to see his babies. He could not
18 do it. He snapped.

19 It did not matter to him, he did not know where
20 it happened. It happened. Ladies and gentlemen,
21 I'm going to tell you that the State has the burden to
22 prove every element beyond a reasonable doubt. The
23 judge will define reasonable doubt for you. But they
24 have to prove malice aforethought beyond a reasonable
25 doubt. A reasonable doubt is a doubt that would cause

1 a reasonable person to hesitate.

2 Mr. Lindsey wanted to see his kids. He was
3 being prevented from seeing his boys. He snapped. It
4 is terrible he did not have the necessary malice
5 aforethought. Please consider the evidence. Apply
6 that common sense. We believe that you will find
7 that there was not the necessary malice. Thank you.

8 **THE COURT:** Ladies and gentlemen, now that
9 you have heard the evidence that you will hear in this
10 case and the arguments of the lawyers, it becomes my
11 responsibility to give you the law that is applicable
12 to this case.

13 As I told you in the beginning of this trial,
14 under the South Carolina Constitution and Code of
15 Laws, only the jury can make the findings of fact in
16 this case. I am not permitted to indicate to you how
17 I might feel. So if I have said anything or done
18 anything during the course of this trial that might
19 indicate to you that I have an opinion about the
20 facts, then you must disregard that. This jury must
21 independently weigh the testimony and evidence that
22 has been presented and decide based on that testimony
23 and evidence whether or not the State has met its
24 burden of proof in this case.

25 Ladies and gentlemen, let me illustrate for you

1 that last point that I made. You are not so much
2 here to decide what happened as you are to decide
3 whether or not the State has met its burden of proof
4 on the elements of murder as I will define them for
5 you in just a few minutes.

6 The same Constitution and Code of Laws here in
7 South Carolina that makes you the exclusive judges of
8 the facts also makes me the exclusive judge of the
9 law. If you have some idea as to what the law is or
10 what the law should be and if that differs from what I
11 will tell you the law is, then you are obligated under
12 the oath that you have just taken as jurors to set
13 your notion of the law aside and to except and apply
14 the law precisely as I will give it to you.

15 The fact that the defendant was arrested and
16 charged and indicted in this case is not evidence.
17 And cannot be considered by you as evidence in any
18 way. The indictment is simply the formal written
19 instrument that serves to process this case and bring
20 it into this court for trial.

21 The defendant has pled not guilty to that
22 indictment. The plea of not guilty casts the burden
23 on the State to prove the defendant guilty beyond a
24 reasonable doubt. A person charged with committing a
25 criminal offense in South Carolina is never required

1 to prove themselves innocent.

2 Ladies and gentlemen, it is a very important rule
3 of law in our country that a defendant in a criminal
4 trial will always be presumed to be innocent of the
5 crime with which he has been indicted unless and until
6 his guilt has been proven by evidence satisfying you
7 of that guilt beyond a reasonable doubt.

8 This presumption of innocence is not just legal
9 theory. It is not just a phrase that we use. It is
10 a substantial constitutional right to which every
11 defendant is entitled. The presumption of innocence
12 accompanies the defendant from the time he is charged
13 throughout the trial until you reach a verdict of
14 guilt based on evidence satisfying you of that guilt
15 beyond a reasonable doubt.

16 Now ladies and gentlemen, I instruct you now and
17 I emphasize to you that the fact that the defendant
18 did not testify in this case is not evidence and
19 cannot be considered by you in any way during your
20 deliberations. A defendant has a constitutional
21 right to remain silent. And the exercise of that
22 right cannot and must not be held against the
23 defendant.

24 Under the oath that you have taken as jurors, you
25 are to draw no inference and no conclusion whatsoever

1 from the fact that the defendant did not testify. Do
2 not even discuss this in the jury room. The defendant
3 is not required to prove anything. The burden of
4 proof remains on the State.

5 A reasonable doubt is a doubt that makes an
6 honest, sincere, conscientious juror in search of the
7 truth in the case to hesitate to act. Proof beyond a
8 reasonable doubt must therefore be proof of such a
9 convincing character that a reasonable person would
10 not hesitate to rely on it and act on it in the most
11 important of his or her own affairs. Proof beyond a
12 reasonable doubt can also be described as proof that
13 leaves you firmly convinced of the defendant's guilt.

14 Now, there are very few things in this world that
15 we know with absolute certainty. And in criminal
16 cases, the law does not require that the State prove
17 with absolute certainty the defendant's guilt. It
18 does not require proof that overcomes every possible
19 doubt. If, based on your consideration of the
20 evidence, you are firmly convinced that the defendant
21 is guilty of the crime of murder, then you must find
22 him guilty. But on the other hand, if think that
23 there is a real possibility that the defendant is not
24 guilty, then you must give him the benefit of the
25 doubt and find him not guilty.

1 Now, in just a second, I'm going to define the
2 crime of murder for you. I'm going to give you the
3 elements of the crime of murder. The State is
4 required under its burden of proof to prove beyond a
5 reasonable doubt each of the elements I will give you.
6 If you have a reasonable doubt as to any of the
7 elements that I give you, you must find the defendant
8 not guilty.

9 Murder is the intentional killing of a person
10 with malice aforethought. This is what the State must
11 prove beyond a reasonable doubt before you may convict
12 the defendant of murder. That the defendant did kill
13 a person and that the killing was done with malice
14 aforethought.

15 Malice is the intentional doing of a wrongful act
16 without just cause or excuse and with an intent to
17 inflict injury. Malice is word that suggests a
18 wickedness or a hatred or a determination to do what
19 one knows to be wrong without just cause or excuse or
20 legal provocation. Malice is a heart fatally bent on
21 mischief.

22 Aforethought means that the intention to do the
23 unlawful act was conceived or planned some time before
24 the actual commission of the unlawful act. However,
25 malice need not be in the mind of the one doing the

1 killing for any particular length of time before the
2 act of killing in order to render the killing murder.
3 If malice is present in the mind of the one doing the
4 killing any length of time before the act, then its
5 presence would be sufficient to render the killing
6 murder.

7 Malice may be inferred where one intentionally
8 and deliberately does an unlawful act which he or she
9 knows to be wrong and in violation of his duty to
10 another. Malice may be inferred where no excuse or
11 legal provocation appears for the killing. The law
12 also provides that the inference of malice may arise
13 if one intentionally kills another with a deadly
14 weapon.

15 A deadly weapon is any object or substance which
16 reasonably could be used to cause bodily harm. If
17 facts are proven beyond a reasonable doubt sufficient
18 to raise one of these inferences of malice, then this
19 inference would simply be one evidentiary fact to be
20 taken into consideration by you along with all of the
21 other evidence in the case bearing on the issue of
22 malice.

23 And you may give this inference such weight as
24 you determine it should receive. You may reject or
25 accept an inference of malice. Remember that the

1 State bears the burden of proving malice. The
2 defendant is not required to prove anything and is not
3 required to prove the absence of malice.

4 Now, ladies and gentlemen, you will have with you
5 in the jury room the exhibits that have been
6 introduced into evidence in this case. You will also
7 have the indictment. Let me talk to you just a little
8 bit about that. The indictment has, on the back of
9 it, a verdict form. In the lower left hand corner,
10 you see the word verdict. Below that word are four
11 blank lines.

12 On one of those blank lines, the foreperson of
13 the jury -- and I will talk to you about selecting a
14 foreperson in just a second -- will write the jury's
15 verdict and then sign it. All twelve of you must
16 agree before you can write a verdict. Your verdict
17 must be unanimous.

18 Now, there are two possible options for your
19 verdict in this case. You could have a verdict of
20 guilty or you can have a verdict of not guilty. When
21 the jury has unanimously agreed on one of those two
22 verdicts, the foreperson would write it in, sign it
23 and notify the bailiff that you reached a verdict.
24 And we will get you back out here in the jury room to
25 receive your verdict. I mean in the courtroom to

1 receive your verdict.

2 Now, as you heard me say during the course of the
3 day, there are some weapons that have been introduced
4 into evidence. As to one of those weapons, there is
5 some live ammunition. I'm going to keep the live
6 ammunition here in the courtroom. You will not have
7 it in the jury room initially. If any one of you feel
8 that you need to examine that exhibit, you let me know
9 by notifying the bailiff. And we will make
10 arrangements for you to be able to see the ammunition.

11 With regard to the tape that has been introduced
12 into evidence, if you want to hear --

13 How are we going to let them hear that when they
14 don't know the stopping point without making them hear
15 it in the courtroom?

16 If you want to hear the tape, and you are
17 certainly welcome to do that. That is an exhibit that
18 is introduced into evidence. If you want to hear it,
19 you let the bailiff know. And we will bring you into
20 the courtroom and play it for you.

21 Ladies and gentlemen, as I told you this morning,
22 you are to consider now as you go back into the jury
23 room to deliberate only the question of whether or not
24 the State has met its burden of proof on the question
25 of whether or not the defendant is guilty of murder.

1 You do not consider sentencing issues at all at this
2 time.

3 Now, in just a second, I'm going to ask you to go
4 back into the jury room. I'm going to ask you not yet
5 to begin your deliberations. I may have some matters
6 of law to take up with the lawyers. While I do that,
7 I want you twelve people on the jury to select a
8 foreperson to serve the jury.

9 The job of the foreperson is to preside over the
10 deliberations and when necessary to communicate with
11 the court. And that will need to be in writing. And
12 when the jury has reached a verdict, the foreperson
13 would fill out the verdict form as I explained and
14 sign it and notify the bailiff that you've reached a
15 verdict.

16 Other than what I just said, the job of the
17 foreperson is no different from that of any other
18 member of the jury. The foreperson's vote certainly
19 counts no more than that of any other member of the
20 jury. Now, I'm giving you the opportunity to select
21 your own foreperson. But if there's any difficulty in
22 doing that, just let me know and I will be happy to
23 appoint somebody.

24 Mr. Fields, Mr. Seay and Mr. Parnell, would
25 you please remain in your seats.

1 The rest of you, please go back into the jury
2 room but do not begin your deliberations. As soon as
3 you have decided upon a foreperson, notify the bailiff
4 as to who that is. And then we will bring you the
5 exhibits. And there will be instructions that you can
6 begin your deliberations.

7 (WHEREUPON, the jury exit at approximately 4:13 p.m.)

8 **THE COURT:** Mr. Scruggs, I'm going to need you to
9 take these three gentlemen back and put them into a
10 different jury room. If any of them have anything in
11 the jury room that the other twelve are using, you can
12 get it out for them but do not take them into that
13 room.

14 **THE BAILIFF:** Yes, sir.

15 Come with me, gentlemen.

16 **THE COURT:** And gentlemen, you all continue to not
17 discuss this case please.

18 (WHEREUPON, the alternate jurors exit at approximately
19 4:14 p.m.)

20 **THE COURT:** Any exceptions to the charge?

21 **MR. GOWDY:** No objections, no exceptions.

22 **THE COURT:** From the defense?

23 **MR. BRENNAN:** None, Your Honor.

24 **THE COURT:** All right. I want lawyers from both
25 sides to come up here and agree on the proper set of

1 exhibits that goes back to the jury. Once you have
2 done that, notify me. We'll put it on the record.
3 We'll send them back with the indictment as soon as we
4 get the identity of the foreperson.

5 (WHEREUPON, the attorneys reviewed the exhibits.)

6 **THE COURT:** The foreperson selected by the
7 jury is Ashley Driscoll.

8 (WHEREUPON, deliberation began at approximately 4:23
9 p.m.)

10 (WHEREUPON, the Court resumed at approximately 4:43
11 p.m.)

12 **THE COURT:** We got a verdict. Without making any
13 assumption as to what the verdict might be but
14 considering the possibility that it could be guilty, I
15 will instruct the jury that we are going to observe a
16 waiting period as required by statute of 24 hours.
17 And we will begin -- if as I say the verdict is
18 guilty, when do you want to begin? 4:45 tomorrow
19 afternoon?

20 **MR. GOWDY:** We are ready then but whatever
21 suits the Court.

22 **THE COURT:** If we do that --
23 What do you say, Mr. Bartosh?

24 **MR. BARTOSH:** Your Honor, I would say wait
25 until Sunday morning. We're going to come back at

1 4:30 in the afternoon.

2 **THE COURT:** Mr. Gowdy.

3 **MR. GOWDY:** Yes, sir.

4 **MR. BARTOSH:** Do you have preference?

5 **MR. GOWDY:** I am fine doing that. If it is a
6 guilty verdict, I am fine starting Sunday morning.
7 But I also wanted the Court to know if the Court wants
8 to start 24 hours from now, we are ready to go. But I
9 have no problem starting Sunday morning.

10 I don't know what the Court's decision is on
11 whether -- jurors couldn't watch service if they
12 wanted to any way. I suppose they don't have
13 televisions. So that is not going to factor into
14 anything. I've never been in court actually on Sunday
15 morning in a capital case before. That's always been
16 the 24-hour wait.

17 **THE COURT:** Well, have you heard the story about
18 Judge Clary's case down in Lexington County when the
19 church bells in downtown Lexington were ringing as the
20 jury walked into the courtroom to deliver the verdict
21 of death? I don't know if may be timing wasn't
22 tinkered with a little bit to make that story better.
23 But I heard that. In fact, one of the S.L.E.D. agents
24 that's here was serving on that case.

25 I don't know. Why don't I, uh, okay. Let's just

1 hear the verdict. Then I'm going to send the jury
2 back and I'll decide.

3 Bring them in.

4 Now, I want everybody in the courtroom to
5 understand that when this verdict is delivered, I
6 expect everybody to maintain their calm and maintain
7 their composure. And anybody who feels like they can
8 not do that should leave the courtroom now.

9 Is it suitable just to let the alternates stay
10 back where they are?

11 **MR. GOWDY:** It is to us, yes, sir.

12 **MR. BARTOSH:** Yes, sir.

13 **THE COURT:** All right.

14 (WHEREUPON, the jury enters at approximately 4:45
15 p.m.)

16 **THE COURT:** Ma'am, has the jury reached a verdict?

17 **THE FOREPERSON:** We have, Your Honor.

18 **THE COURT:** Would you pass that verdict form to
19 the bailiff?

20 (WHEREUPON, the verdict form was presented.)

21 **THE COURT:** Madam Clerk, you can publish the
22 verdict.

23 **THE CLERK:** Indictment number 2002-GS-42-4753, the
24 State versus Marion Alexander Lindsey also known as
25 Mariona Alexander Lindsey, indictment for murder, the

1 verdict guilty, signed by the forelady.

2 Madam Forelady, ladies and gentlemen of the jury,
3 is this your verdict and still your verdict so say you
4 all?

5 (WHEREUPON, all jurors respond affirmatively.)

6 **THE COURT:** All right. Ladies and gentlemen, we
7 have some scheduling issues to attend to now. I'm
8 going to address those with the lawyers and ask you
9 all to go back into the jury room for a few minutes.
10 I would like to reimpose upon you the prohibition of
11 discussing this case. So please from now until I give
12 you permission to discuss the case again, don't talk
13 about the case. So go back into the jury room. I
14 will be with you momentarily.

15 I will tell you this. Perhaps -- I understand
16 that you weren't fed all that well last night. Not
17 that any one of you complained about it. But that's
18 what I was told. I made arrangements for you all to
19 eat a meal tonight that would be a significant
20 improvement over what you had last night. That will
21 give you a little thing to think about and talk about
22 when you are back in the jury room. I will be back
23 with you in a few minutes.

24 (WHEREUPON, the jury exits at approximately 4:47 p.m.)

25 **THE COURT:** All right. Mr. Bartosh, is there

1 anything that we need to do with the jury in terms of
2 their verdict or polling the jury or anything of that
3 nature now?

4 MR. BARTOSH: No, sir.

5 THE COURT: Mr. Gowdy?

6 MR. GOWDY: No, sir, Your Honor.

7 THE COURT: All right. I think that it is a
8 significant imposition on the jury to be sequestered
9 as there are. And that if we start tomorrow afternoon
10 at about 4:40, it's now 4:48. If we started about
11 4:40 tomorrow afternoon, we can get two or three hours
12 of work in and that may or may not save the jury a
13 night at the Marriott. I don't know. But I believe
14 that that is the course that we should follow. And so
15 that's what I intend to do.

16 I'm going to bring the jury out here now. I'm
17 going to explain to them the 24-hour waiting period.
18 I'm going to tell them when we will resume. Is there
19 anything else y'all want to me talk them about now?

20 MR. GOWDY: No, sir.

21 MR. BARTOSH: Nothing from the defense, Your
22 Honor.

23 THE COURT: Any motions at this time?

24 MR. BARTOSH: No, sir.

25 THE COURT: Okay. Bring in -- And I'm going to

1 ask the alternates to come in as well and tell them
2 what the verdict is as I explain what I just said.

3 **MR. BARTOSH:** Yes, sir.

4 (WHEREUPON, the jury enters at approximately 4:49
5 p.m.)

6 **THE COURT:** Okay. For those three of you who are
7 alternates and if you don't already know, the jury has
8 returned a verdict of guilty of murder in the guilt
9 phase of the trial. And now we move into the
10 sentencing phase or the penalty phase of the trial.

11 Under South Carolina Law under a statute that has
12 been passed by the General Assembly years ago and
13 signed by the Governor, we must wait 24 hours before
14 we can begin the sentencing phase of the trial. So
15 we're going to break now. And we're going to resume
16 tomorrow afternoon at 4:40 which is exactly 24 hours
17 from when you all returned your verdict.

18 As I told the jury and let me repeat it now while
19 the alternates are in here, you may not discuss the
20 case. It's just like it was when we began. Don't
21 discuss the case at all. Don't allow anyone to
22 discuss the case with you.

23 The three alternates weren't in here when I told
24 the jury that you will be fed considerably better
25 tonight than you were last night. I'm not going to

1 announce publicly where you are eating. But I can
2 assure that of all the meals I have had in Spartanburg
3 County, some of the very best came from the place that
4 you will be eating at tonight. And that's a lot of
5 meals that I have had over here over a lot of years.

6 So I hope you will enjoy that. And I look
7 forward to seeing you all tomorrow afternoon. You
8 will be in the Courthouse probably around 4:00 or
9 4:15. I'm not sure. That will be up to S.L.E.D. Then
10 we will begin at 4:40.

11 Now, that carries us into Sunday morning. And we
12 don't have any kind of formula as to what we do on
13 Sunday morning except that we're all going to be
14 together. That is something that you all can think
15 about. And if any of you have any strong preferences,
16 you can express them to me. I might not be able to
17 accommodate you. But we can either start at 9 o'clock
18 and go or we can start at noon.

19 We have some flexibility. So it's my decision
20 but is there anybody on the jury who has a strong
21 preference, don't hesitate to express that to me. And
22 you can do that by writing me a little note. I will
23 take it into consideration tomorrow afternoon when I
24 get here.

25 Obviously, the prohibition against your reading

1 or watching or listening to any press coverage about
2 this case remains in effect. We appreciate your
3 service. We appreciate the conscientious manner in
4 which you have appeared to attend and listen to the
5 testimony. And we look forward to working with you
6 again beginning tomorrow afternoon at 4:40. So you
7 all have a nice night and a nice day tomorrow. And we
8 will see you tomorrow afternoon.

9 (WHEREUPON, the jury exits at approximately 4:52 p.m.)

10 **THE COURT:** Now, uh, anything further?

11 **MR. GOWDY:** Not from the State, Your Honor.

12 **MR. BARTOSH:** No, sir.

13 **THE COURT:** To the press -- off the record.

14 (WHEREUPON, the Court went off the record at
15 approximately 4:52 p.m.)

16 (WHEREUPON, the Court adjourned at approximately 4:53
17 p.m.)

18 (WHEREUPON, the Court resumed on May 22, 2004 at
19 approximately 4:00 p.m.)

20 **THE COURT:** All right. We are here to address any
21 issues that need to be addressed before we begin with
22 the jury.

23 **MR. GOWDY:** Your Honor, from the State's
24 prospective, the only thing I wanted to address with
25 the Court if I could is that the State would have a

1 motion to allow the jury to view the automobile, the
2 Mercury Topaz that Mrs. Lindsey was killed in. That
3 automobile, I know the Court remembers the testimony
4 was it was sold to Mary Lyles.

5 She is on our witness list and prepared to
6 testimony. She brought the car and put it in law
7 enforcement custody a month or so ago. It's been at
8 the impound lot. Her testimony would be that other
9 than having -- actually the windows were already fixed
10 when she got it. She hadn't done anything to change
11 the car. We just wanted the jury to be able to see
12 the dimensions of the car and the car itself which is
13 important to us in the sentencing phase.

14 **THE COURT:** Would there be any objection to that?

15 **MR. BARTOSH:** Yes, sir. There would be. There
16 would be less intrusive ways of them to obtain that.
17 They could take measurements and show the jury the
18 width of the seat.

19 **THE COURT:** The objection is under Rule 403?

20 **MR. BARTOSH:** Yes, sir.

21 **THE COURT:** What's the unfair prejudice?

22 **MR. BARTOSH:** Seeing the automobile itself,
23 Your Honor. If all they want to do is talk about the
24 size of the compartment, then there are other ways of
25 doing it.

1 **THE COURT:** I don't see any problem with that.
2 You can sit around and tell most people until you are
3 blue in the face what six feet means. But until they
4 see it, they don't understand it. I think it would
5 have some significant probative value. And I don't
6 understand any unfair prejudice. So I would allow it.
7 **MR. BARTOSH:** Your Honor, we would
8 respectfully --
9 **THE COURT:** I'll tell you what though, why don't
10 we do this. Let's have it brought over.
11 **MR. GOWDY:** Yes, sir.
12 **THE COURT:** And let's let Mr. Bartosh look at it.
13 There maybe something else in there. Are there still
14 blood stains on the seat?
15 **MR. GOWDY:** No, sir.
16 **MR. BARTOSH:** Your Honor, I've seen it.
17 **THE COURT:** Okay.
18 **MR. GOWDY:** I don't believe -- I saw no blood
19 stains.
20 **MR. BARTOSH:** No, sir. They cleaned the back
21 seat.
22 **THE COURT:** Can you see the bullet hole in the
23 back seat?
24 **MR. GOWDY:** Yes, sir.
25 **MR. BARTOSH:** Yes, sir.

1 **THE COURT:** And you're going to have somebody
2 demonstrate that?

3 **MR. GOWDY:** We can all stay up here in the
4 court and the jury goes downstairs.

5 **THE COURT:** Are you going to have the officer put
6 a dowel in it or something like you did before?

7 **MR. GOWDY:** I wasn't going to.

8 **THE COURT:** At this point, I'm inclined to allow
9 it. And of course, I will rule at the time that the
10 offer is made.

11 **MR. GOWDY:** I would bring to the Court's
12 attention, giving the fact that we are on Saturday and
13 Sunday that the back parking would be less full, there
14 would be less risk of people being in the back parking
15 lot. We can either do it this evening or we can do it
16 in the morning.

17 **THE COURT:** We might, depending on what we decide
18 about our start time, it might be good -- of course,
19 you are in control of when you want to offer it. But
20 if you see fit to offer it first thing in the morning,
21 then it's going to be nice and cool out there and we
22 won't suffer through the heat.

23 **MR. GOWDY:** That would our plan.

24 **THE COURT:** All right. Mr. Bartosh.

25 **MR. BARTOSH:** Yes, sir.

1 **THE COURT:** Anything you want to bring to my
2 attention concerning evidence or anything else?

3 **MR. BARTOSH:** Yes, sir. My understanding is
4 that the State intends to introduce a statement of a
5 drug charge, a statement made allegedly made
6 concerning a trafficking charge. And we would object
7 to that because it was obtained in violation of his
8 Miranda rights.

9 **THE COURT:** Okay.

10 **MR. BARTOSH:** I have a copy of the transcript.

11 **THE COURT:** Well, I guess we got to have something
12 along the lines of a Jackson v. Deno hearing, don't
13 we?

14 **MR. BARTOSH:** Your Honor, I think the
15 transcript speaks for itself.

16 **MR. BARNETT:** I believe we probably do need to
17 have a Jackson v. Deno hearing.

18 **THE COURT:** All right. Well, when you get ready
19 to offer it, let us know and we will have a hearing.

20 **MR. BARNETT:** Yes, sir.

21 **THE COURT:** Anything else, Mr. Bartosh?

22 **MR. BARTOSH:** Yes, sir. I don't know how you
23 want to handle this. May we approach.

24 **MR. BARNETT:** About the photographs?

25 **MR. BARTOSH:** Yes.

1 (WHEREUPON, the attorneys reviewed the exhibits.)

2 (WHEREUPON, a bench conference was held off the record
3 in the presence of the jury.)

4 **THE COURT:** I'm ready if y'all are ready to talk
5 about these pictures.

6 **MR. BARNETT:** Yes, sir. I talked to Mr.
7 Bartosh. I think 65, 66, and 67 are pictures from the
8 previous ABWIK. I think he has no objections from
9 those.

10 **MR. BARTOSH:** That's correct.

11 **THE COURT:** Y'all need to tell me about the
12 ones where there is an objection.

13 **MR. BARNETT:** Yes, sir. The objection he's got
14 I believe is number 74 which is a picture of Mrs.
15 Lindsey with her two children. 46 and 73 are two
16 pictures of Nell Lindsey in the back seat. The
17 relevance we would -- well, we'll let Mr. Bartosh
18 put on the record what his objections are to these.

19 **MR. BARTOSH:** Your Honor, the larger of those
20 two pictures showing Ms. Lindsey in the back seat I
21 think are more prejudicial than probative. The color
22 intensity of the photograph is much brighter than the
23 small one.

24 **THE COURT:** Can I see them while you are
25 talking?

1 **MR. BARNETT:** Yes, sir. I will get them. May
2 I approach the bench, Your Honor?

3 **MR. BARTOSH:** There are two photographs showing
4 Ms. Lindsey in the backseat of the automobile. One
5 is a larger photograph which is much more color
6 enhanced. The colors are much brighter. The details
7 are much more evident. It is a much gorier
8 photograph, Your Honor, than the second smaller
9 photograph.

10 We understand that the State seeks to introduce
11 that the relevance of the photograph is that Mrs.
12 Lindsey is holding the cell phone in her hand as shown
13 in the photograph. What we would object to, Your
14 Honor, is the larger of the photographs because of the
15 detail and the gory nature of the photograph because
16 of the colors and the detail.

17 We would respectfully submit that that would
18 prejudice, its prejudicial value far outweighs the
19 probative value when they have an alternative less
20 prejudicial alternative photograph which is the
21 smaller photograph which shows basically the same
22 thing. Mrs. Lindsey is holding the cell phone in
23 her hand.

24 **THE COURT:** All right. Mr. Barnett, what
25 does one photograph show that the other one does not

1 show?

2 **MR. BARNETT:** They both show slightly different
3 angles. The reason why we would like the photograph,
4 Your Honor, is not because of the cell phone.
5 Obviously, there were two children the back seat.
6 One in-between Ms. Lindsey and the baby seat showing
7 how close she was to the children.

8 **THE COURT:** Right. I understand. You have
9 other pictures that you had that you showed me a
10 minute ago that shows a truly different angle.

11 **MR. BARNETT:** Yes, sir. We will be glad to
12 introduce it from a different angle. We just want to
13 show every possible angle we can so the jury would
14 have no question in their mind. I have those
15 pictures also, Your Honor.

16 **THE COURT:** I notice one thing that the larger
17 photograph shows that, is that the bullet hole?
18 Maybe that is not the bullet hole.

19 **MR. BARNETT:** Yes, sir. It is the bullet hole.
20 We have another -- what I'm trying do to, Your Honor
21 is --

22 **THE COURT:** That is the bullet hole that is
23 right at the center console of the seat?

24 **MR. BARNETT:** Yes, sir. If I can make sure that
25 we're talking about the same thing. Yes, sir. That

1 is a reason why I think that is relevant. It shows a
2 little extra.

3 **THE COURT:** Let me see the other picture
4 again.

5 **MR. BARNETT:** Yes, sir. That would be picture
6 number 73.

7 **THE COURT:** Well, I note of these pictures of
8 the body inside of the car, if you have somebody that
9 is going to testify that that is the bullet hole --

10 **MR. BARNETT:** Yes, sir.

11 **THE COURT:** -- that is only one that shows the
12 bullet hole.

13 **MR. BARNETT:** Yes, sir.

14 **THE COURT:** With the aggravating circumstances
15 being -- just leave them right there for just a second
16 -- endangering the lives of other people in a public
17 place, that danger is actually where the sleeping
18 child was sitting, right?

19 **MR. BARNETT:** Yes, sir.

20 **THE COURT:** It is within what normally looks
21 to me, looks to me to be within what would be normally
22 that child's part of the seat.

23 **MR. BARNETT:** Yes, sir.

24 **MR. BARTOSH:** Your Honor, there is another
25 photograph of that bullet hole. It was introduced in

1 the guilt phase with the dowel through it showing the
2 seat.

3 MR. BARNETT: That is correct.

4 THE COURT: Let me see that.

5 MR. BARNETT: That is correct. But I would just
6 argue that obviously we did not have the body in that
7 picture.

8 THE COURT: Okay. Okay. You have handed me
9 48, 55, and 54 which don't really show the bullet hole
10 itself although it shows the dowel. Let me hand those
11 back to you.

12 MR. BARNETT: Yes, sir.

13 THE COURT: You have shown me 50, 58, and 56
14 that show the dowel, two of them show the dowel coming
15 out of the bullet hole. Show in relation to where
16 Ms. Lindsey was sitting. It shows it as part of the
17 center seat of the car. And then 50 shows the bullet
18 hole, but you can not tell for sure what part of the
19 seat it was in because it does not show the whole
20 seat. Let me see the one, uh --

21 MR. BARTOSH: Is that the one with the bullet
22 hole?

23 MR. BARNETT: Yes, sir.

24 THE COURT: This is 73. It shows the bullet
25 hole and the body. I think it is, I mean, as Ms.

1 Lindsey's body has fallen over to her right and her
2 head appears to have hit the car seat, that has sort
3 of stopped her body from falling, her head is what
4 looks to me to be six to ten inches past the bullet
5 hole.

6 **MR. BARNETT:** That is correct, Your Honor.

7 **THE COURT:** I don't know. I think probative
8 value of showing the amount of space that is between
9 where Mrs. Lindsey was sitting and where the car seat
10 is knowing that or having ready testimony in the
11 record that there was a nine or seven?

12 **MR. BARNETT:** Nine.

13 **THE COURT:** Nine-year-old child --

14 **MR. BARNETT:** Yes, sir.

15 **THE COURT:** -- sitting in that seat. You can
16 clearly, well, I won't say clearly. It does appear
17 that the bullet hole is where the child sitting and
18 not where Ms. Lindsey was sitting. I think there is
19 pretty significant probative value to the location of
20 the bullet hole in State's Exhibit 73. That is the
21 only picture that I've seen that you showed me that
22 has both the bullet hole and Ms. Lindsey's body in
23 it.

24 **MR. BARNETT:** And the car seat.

25 **THE COURT:** And the car seat. I do also note

1 that of the other photographs that you shown me that
2 show her body in the car, it looks to me like 73 is
3 one of the least gory.

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

5 **THE COURT:** These others are not marked.

6 **MR. BARNETT:** No, sir. But I will be glad to
7 mark them as court exhibits so that way the record is
8 protected.

9 **THE COURT:** Do you disagree with that? Look
10 at those and tell me what you think. 73 is not the
11 least gory.

12 **MR. BARTOSH:** No, sir. I agree with that. I
13 understand the Court's position on this that the
14 reason --

15 **THE COURT:** Don't be too sure about my
16 position until I figure out what it is. When I
17 figure out what it is, I will rule. But I have not
18 ruled yet. We are just discussing it right now.

19 **MR. BARTOSH:** Yes, sir. Well, I would point
20 out, Your Honor, and we would produce a witness on
21 this, one the EMT folks, that Ms. Lindsey's body
22 remained in the car for seven hours before it was
23 removed. So this photograph probably does not show
24 the original. We don't know when this photograph was
25 taken. She is slumped over. It probably doesn't

1 accurately portray her position when this incident
2 occurred.

3 **THE COURT:** We will have to hear the
4 foundation about that. I have, I think I can
5 evaluate the 403 objection. But I want to hear the
6 foundation testimony before I do. Especially in
7 light of your suggestion that that photograph could
8 have been taken long after the death occurred and the
9 body could have been moved. The State needs to lay
10 the proper foundation for that photograph.

11 **MR. BARNETT:** We understand, Your Honor.

12 **MR. BARTOSH:** Thank you, Your Honor.

13 **MR. BARNETT:** Thank you.

14 **THE COURT:** All right.

15 **MR. BARNETT:** Do you want those marked as
16 Court's exhibits, Your Honor?

17 **THE COURT:** Why don't you mark those as
18 Court's Exhibits. Anything else?

19 **MR. BARTOSH:** We covered the other photograph.
20 We'll just deal with that --

21 **THE COURT:** You want to deal with 76? You
22 have an objection to State's Exhibit 76.

23 **MR. BARTOSH:** Yes, sir.

24 **THE COURT:** Is there anything prejudicial
25 about this photograph?

MR. BARTOSH: We would just object to relevance,
Your Honor. ?

THE COURT: It is relevant. That objection is overruled. Any other objection?

MR. BARTOSH: I believe that is everything.
We're going to have a Jackson v. Deno hearing.

THE COURT: All right. We don't have time to do that now. When do you propose to do that?

MR. GOWDY: Our Deno witness will be here at 5 o'clock. We can do it on break. We can do it at conclusion tonight. We can take the drug witnesses out of order and do them. I don't know how long the Deno hearing would take.

THE COURT: Do we not agree that since Mr. Lindsey takes the position that the statement that he gave was in violation of his rights under Miranda that before I can allow that statement into evidence, I've got to determine that he was read his rights, that he understood them, that he waived them and that the statement was voluntary?

MR. GOWDY: Unquestionably.

THE COURT: The only way I can do that is by hearing that testimony outside of the presence of the hearing?

MR. GOWDY: That witness will be here at 5:00.

1 **THE COURT:** Well, you can do that whenever you
2 are ready. That's up to you. I'm not going to tell
3 you how to -- I might tell you how to argue your
4 objections or respond to them, but I'm not going to
5 tell you how to put up your evidence. I won't tell
6 you how. I might structure it a little bit.

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

8 **THE COURT:** Are you ready now? It's 4:36. I
9 assume the jury is here. Are y'all already?

10 **MR. GOWDY:** The State is, Your Honor.

11 **MR. BARTOSH:** Yes, sir.

12 **MR. BARNETT:** The only thing for the record,
13 Your Honor. 74 and 75 is a picture of the children.
14 I don't think Mr. Bartosh has any objection to that.

15 **THE COURT:** Is there something about the
16 indictment not being in proper form? The verdict
17 form? The verdict form is not dated. To me, that has
18 no significance. We know when the verdict was
19 reached. But if you want it dated, we will date it.

20 **MR. BARTOSH:** Yes, sir. We do want it dated.

21 **THE COURT:** I will get Ms. Driscoll to date
22 it when she comes back out. By the way, I'm not
23 going to be bound to have Ms. Driscoll serve as the
24 forelady of the sentencing phase. I am considering
25 either appointing a different foreperson or asking the

1 jury to spread the load and to consider appointing a
2 different foreperson. Not that there is anything
3 that I know of or that I suspect. That is just what
4 I'm thinking about doing. I just wanted to let y'all
5 know that.

6 I think what I will do is I will tell -- there's
7 nothing that the foreperson would do except in
8 deliberation anyway. There's no reason for her to be
9 seated in that seat or anything like that that I know
10 of. I'm just going to let it lie for right now.
11 Okay. Anything before we bring the jury in?

12 **MR. GOWDY:** Not from the State.

13 **THE COURT:** I'm going to take a short break.

14 (WHEREUPON, a short recess was taken at approximately
15 4:37 p.m.)

16 (WHEREUPON, the Court resumed at approximately 4:51
17 p.m.)

18 (WHEREUPON, the jury enters at approximately 4:51
19 p.m.)

20 **THE COURT:** It seems like I should say good
21 morning since every other day this week when I seen
22 you first it has been in the morning. But, good
23 afternoon. I hope you all had a nice night and a
24 nice day today so far. You all look bright and
25 cheery and ready to go. So am I. So let's do it.

1 Let me ask you a couple of questions. Starting with
2 one thing we need to get Ms. Driscoll to date the
3 verdict form with a pin.

4 If you would kindly put yesterday's date below
5 your signature, I would appreciate it. What is
6 yesterday's date, the 21st?

7 **MR. GOWDY:** The 21st.

8 **THE COURT:** The 21st.

9 **THE COURT:** Has any member of the jury
10 discussed this case with anybody or has anybody
11 attempted to discuss it with you since you returned
12 the verdict yesterday afternoon? If so, please raise
13 your right hand.

14 (WHEREUPON, there was no response.)

15 **THE COURT:** No one is raising their hand. Has
16 anyone read or seen or heard anything about this case
17 since yesterday afternoon when you returned your
18 verdict? If so, raise your hand.

19 (WHEREUPON, there was no response.)

20 **THE COURT:** Nobody has raised their hand.
21 Ladies and gentlemen, because Marion Lindsey was found
22 guilty of murder yesterday as of course you all know,
23 it is necessary that we began the second phase or the
24 sentencing phase of this trial. South Carolina Code
25 Section 16-3-20 provides that if the State proves

1 beyond a reasonable doubt the existence of one
2 aggravating circumstance, the jury will recommend the
3 sentence either of life in prison or the death
4 sentence.

5 If you find that the State has proven an
6 aggravating circumstance beyond a reasonable doubt,
7 then you would determine which of those two sentences
8 the defendant will receive. The statute uses the
9 word recommendation. Let me tell you that it is not
10 a recommendation. It is the imposition of a
11 sentence. I am required to follow the recommendation.

12 Whatever recommendation you make that would be
13 the sentence if you find that the State has proven
14 beyond a reasonable doubt one aggravating circumstance
15 -- if you find that the State has not proven an
16 aggravating circumstance beyond a reasonable doubt,
17 then that will be the end of your verdict. You will
18 stop right there and notify us of your decision. I
19 will talk to you more about that at the end.

20 This case is going to be just like, this phase
21 will be like any other phase in that it has five
22 independent phases itself. We will start opening
23 statements. We will then have an evidentiary phase
24 when both sides will have a chance to offer evidence
25 either in aggravation or in mitigation of the crime of

1 murder. Then we will have a third phase when the
2 lawyers will make a closing argument to you. In the
3 fourth phase, I will give you another instruction on
4 the law. Then again a fifth phase when you go back
5 to that jury room and then you would deliberate.

6 Just as I told you yesterday, don't begin to make
7 up your mind until you have been through all five of
8 those phases especially the fifth phase when you've
9 had a chance to hear each other's views on whether or
10 not or what the sentence should be. Only then will
11 you be in the right position to begin to make up your
12 mind. Just as I told you yesterday, do not talk
13 about this case in any way until I have given you
14 permission to begin your deliberations in the
15 sentencing phase. We will now have the opening
16 statements.

17 **MR. WILLINGHAM:** If it pleases the Court?

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

19 **MR. WILLINGHAM:** At this time, the State will
20 petition the Court to move all the evidence and
21 exhibits and testimony from the first a phase of the
22 trial into this phase of the trial.

23 **MR. BARTOSH:** Your Honor, we would object to any
24 of the items of evidence that the Court admitted over
25 our objection for reasons stated in the guilt phase.

1 **THE COURT:** Subject to the objections that I
2 ruled on, the evidence is admitted.

3 **MR. WILLINGHAM:** Thank you, Your Honor. May it
4 please the Court.

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

6 **MR. WILLINGHAM:** Ladies and gentlemen, I want to
7 begin by thanking you for your verdicts yesterday, a
8 little over 24 hours ago, on behalf of the State of
9 South Carolina and on behalf of the family of Nell
10 Lindsey.. I know it is never easy to have to sit in
11 judgment of someone else for what they did but thank
12 you.

13 Now comes the part of the trial where we decide
14 the sentence. What is the right thing to do with
15 Myron Lindsey? There has been some discussion. I
16 think everyone knows that not all murders are the
17 same. Not all murders are death penalty cases. Not
18 all murders qualify. It has to be something worse.
19 There are no good murders. There's got to be
20 something that makes it worse.

21 Does the fact that a husband gunned down his wife
22 make it worse? Does the fact that the husband
23 followed her from work at the hospital to Inman --

24 **MR. BARTOSH:** Objection, Your Honor.

25 **THE COURT:** Sustained. Do not argue in you

1 opening statement, Mr. Willingham.

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

3 In South Carolina, there are certain things that
4 by statute make a murder worse. The State is
5 relying, and I'm going to read it to make sure I get
6 it right, that a murder is worse if the offender by
7 his act of murder knowingly created a great risk of
8 death to more than one person in a public place by
9 means of a weapon or device which normally would be
10 hazardous to the lives of more than one person. You
11 will have all of the evidence, ladies and gentlemen,
12 from the first phase of this trial. You will have
13 the evidence that he took this gun and fired it four
14 times.

15 **MR. BARTOSH:** Objection, Your Honor. He is
16 arguing again.

17 **THE COURT:** Overruled.

18 **MR. WILLINGHAM:** He fired it four times into the
19 back of Celeste Nesbitt's car in a public place. At
20 a police station. The evidence will show that there
21 was endangerment by the deadly weapon to more than one
22 person. He knew it. He knew that there were two
23 little girls in that back seat. He knew.

24 **MR. BARTOSH:** I want to object again.

25 **THE COURT:** Mr. Willingham, you are very close

1 to arguing whether or not he knew what he knew. You
2 state what your position is. You state what you
3 expect the evidence to be and then you will be within
4 the bounds that I have set for you that you can not
5 argue.

6 **MR. WILLINGHAM:** Yes, sir. The evidence will
7 show that the two little girls were in that back seat.
8 There names are Keysha and Kiera. The evidence will
9 show that Celeste Nesbitt was in that car. Her
10 mother, Julia Martin, was in the car. Nell Lindsey
11 was in that car. The evidence will show that those
12 little girls were in the backseat sitting next to
13 Nell.

14 The evidence has already shown that three bullets
15 ended up in Ms. Lindsey's head. A fourth one went
16 through her neck, went out, went through the back seat
17 and ended up in the trunk of that car. Why is that
18 important? You will have no clearer evidence of
19 endangerment to more than one person.

20 **THE COURT:** Let me see the lawyers at the
21 bench. All of them please.

22 (WHEREFORE, a bench conference was held off of the
23 record.)

24 **MR. WILLINGHAM:** Thank you, Your Honor.

25 The reason that it is important that that bullet

1 traveled from the back of her neck and into the seat
2 is because the evidence will show that right where
3 that bullet hole is is where the head of one of those
4 little girls would have been. You will hear those
5 facts.

6 You will hear the circumstances -- you've heard
7 the circumstances surrounding that. But before we
8 ask you to go to the jury room to deliberate, you need
9 to know more. You need to know more about the
10 victim. Right now, you know that Nell Lindsey was
11 murdered in the parking lot of the Inman Police
12 Department. But you don't know Nell Lindsey. You
13 have a faceless name. You will learn through the
14 testimony that she was a mother, a daughter, and a
15 friend. You will learn about Nell Lindsey as a
16 person. We will put a face with that name.

17 You will also learn about Marion Lindsey and
18 about things that he has done. You will learn about
19 other acts that he has done to his wife, to the
20 community. And you will learn that this incident at
21 the Inman Police Department was not the first time
22 fired through the windshield of a car at someone.

23 You will hear from a fellow named Stanford
24 Wilkins who was stopped by this defendant in his car
25 and shot by this defendant. When we finish with the

1 evidence, you will know about the crimes, you will
2 know about the victim, and you will have a clear
3 understanding of who the defendant is. And he will
4 be death penalty qualified.

5 **MR. BARTOSH:** Thank you, Your Honor. May it
6 please the Court.

7 Ladies and gentlemen of the jury. This has been
8 a long week. I know you all are tired. This is a
9 very emotional experience for everybody involved. I
10 want to thank you for your patience and your
11 forbearance. I know it has been very difficult for
12 you. This is the, you have been away from your
13 family since the first night. I speak for Myron
14 Lindsey, we thank you for your attendance.

15 I want to talk to you briefly about what this
16 whole second process is about. I would like to point
17 out two things up front. The first one is that in
18 order to consider the death penalty for Myron Lindsey,
19 Marion Lindsey, you have to first of all find if the
20 State has proven the aggravator that they are relying
21 on beyond a reasonable doubt. That is your first
22 step.

23 If they have failed to prove to each and every
24 one of you beyond a reasonable doubt that that
25 aggravator exist and there is only one, there is only

1 one, then everything stops there. You cannot
2 consider imposing the death penalty. The State has
3 failed to prove the evidence. It is very important
4 ladies and gentlemen, very important that you keep an
5 open mind as the State attempts to prove that
6 aggravator.

7 I think they are going to have a great deal of
8 difficulty in doing that. I think what they are
9 going to do is to concentrate --

10 **THE COURT:** Mr. Bartosh.

11 **MR. BARTOSH:** Yes, sir.

12 **THE COURT:** I will caution you just as I did
13 the State --

14 **MR. BARTOSH:** I apologize.

15 **THE COURT:** -- that you would not argue in your
16 opening statement. And I will, if you don't object,
17 make sure that I remind the jury that the opinions of
18 the lawyers are not evidence.

19 **MR. BARTOSH:** I apologize.

20 What I'm asking you to do is this, you are going
21 to see some very graphic evidence. There are no
22 pretty killings. You are going to see some very,
23 very graphic evidence. Probably things that most of
24 you have never seen before. You're going to hear the
25 tape again, I believe, which has some very graphic

1 sounds, conjures up some very graphic images.

2 When you took your oath as jurors, you swore to
3 decide the case fairly based on the testimony from the
4 witness stand. You are not here to reward anybody.
5 You are not here to punish anybody. You are here to
6 decide, first of all, whether or not the State has
7 carried its burden of proof by proving the aggravator
8 beyond a reasonable doubt. Second of all, if you
9 believe that they have and all twelve of you have to
10 believe that they have. You have to agree on what
11 the appropriate sentence is in this case.

12 You are going to hear as I said some pretty
13 graphic sounds, some pretty graphic images. It is
14 only human to feel sympathy for someone who is going
15 through what Mrs. Lindsey's family is going through.
16 They have lost a daughter. It is only natural that
17 you feel sympathy for them.

18 This is a most difficult case, ladies and
19 gentlemen. I am not going to you tell any different.
20 It is a most difficult case. What I am asking you to
21 do is to keep an open mind. Try to keep focus on the
22 reasons for being here, in deciding whether or not the
23 State has carried its burden or has met its burden of
24 proving that evidence.

25 You're going to hear evidence from the defense.

1 You're going to hear evidence about Marion Lindsey,
2 about his family, about his childhood. He too is a son
3 and a brother and a father. But I ask you not to
4 have any preconceived notions, to keep an open mind,
5 to consider all the evidence that you see fairly and
6 objectively.

7 I guess if I could pick one word, I ask that you
8 will remain objective. And that you remain true to
9 your oaths as jurors. And to view the evidence
10 objectively, not to reward anyone, not to punish
11 anyone, but to decide whether or not the State has met
12 its burden. Thank you.

13 **MR. GOWDY:** May it please the Court, Your
14 Honor. The State will call Ms. Kiera P. She
15 is across the hall. With a moment of the Court's
16 indulgence, she will be brought over.

17 **KIERA P.**
18 was duly sworn:

19 **THE COURT:** Solicitor, before you begin, can I
20 see you and the defense counsel up here please.

21 **MR. GOWDY:** Yes, sir.

22 (WHEREFORE, a bench conference was held off of the
23 record.)

24 **THE COURT:** Ladies and gentlemen, we need to
25 take a quick break to address something that does not

1 concern you. I'm going to ask you to go to the jury
2 room for just one second please.

3 (WHEREUPON, the jury exits at approximately 5:16 p.m.)

4 **THE COURT:** Okay, let me have the attention of
5 the media for a minute. I am going to require that
6 you not broadcast any image of this witness. I think
7 it was suggested that maybe Court TV is blocking out
8 their face. How are y'all handling that?

9 **TELEVISION CAMERAMAN:** We can crop it out so
10 that you cannot see her face.

11 **THE COURT:** In filming it or in showing it.

12 **TELEVISION CAMERAMAN:** In showing it as well.

13 **THE COURT:** How about the local media?

14 **TELEVISION CAMERAMAN:** We'll make sure that she
15 will stay down.

16 **THE COURT:** All right. Now, to the solicitor
17 as representative of this victim under the victim's
18 rights act and under the rules, do you see any problem
19 with that?

20 **MR. GOWDY:** No, sir. Your Honor. I
21 discussed this issue with Ms. Nesbitt, this child's
22 mother. I just mentioned it to her again.

23 **THE COURT:** Is she in here now?

24 **MR. GOWDY:** She was, she just left to take
25 Kiera outside.

1 **THE COURT:** She knows what we are talking
2 about?

3 **MR. GOWDY:** Yes, sir. She does.

4 **THE COURT:** She knows that they will be
5 filming her but not displaying her face on screen.

6 **MR. GOWDY:** Yes, sir. But if the Court will
7 give me 15 seconds, I will make sure that nothing has
8 changed.

9 **THE COURT:** All right, sir.

10 (WHEREUPON, the Solicitor exits the courtroom at
11 approximately 5:20 p.m.)

12 (WHEREUPON, the Solicitor enters the courtroom at
13 approximately 5:20 p.m.)

14 **MR. GOWDY:** Your Honor, may it please the
15 Court. I just spoke with Ms. Nesbitt. She is
16 comfortable with forbidding the media with her
17 daughter's face not being shown.

18 **THE COURT:** All right. And I should have asked
19 this before. I frankly should have seen it coming but
20 I didn't. What about the child's name? It is my
21 understanding that this child is still a resident of
22 Spartanburg County and goes the school here. I don't
23 want her to be subjected to any kind of harassment or
24 embarrassment or anything from people who might see
25 what is shown. What do you think and what does the

1 mother think about her name being broadcasted and her
2 name being printed?

3 **MR. GOWDY:** She has already been subject to
4 the problems that the Court has outlined since this
5 incident took place. I am not aware of any media that
6 has included her name and would obviously on behalf of
7 this child and her mother ask that neither Kiera nor
8 Keysha's names be used. In the past, our local media
9 has always been very sensitive to that.

10 **THE COURT:** Court TV agree with that?

11 **TELEVISION CAMERAMAN:** Yes, sir.

12 **THE COURT:** In order that I comply with the South
13 Carolina Victims Rights Act, let me say that under the
14 authority that is given to me under Rule 605(f)(1)(5)
15 that I am forbidding any media from broadcasting the
16 face of any child and from using the name and printing
17 the name of either of these children. All right.

18 It is not that I don't believe that you all would
19 have done that any way. It's just that I think I have
20 to do, I have to impose that order under the Victims
21 Rights Act. And it would be useful for you to know
22 that violation of that order subjects you to the
23 contempt powers of the court. If you have any
24 questions, you can ask them.

25 All right. Bring in the jury.

1 That doesn't prohibit, of course, anybody from
2 referring generally to the fact that the child
3 testified but just so long as you don't use the name
4 or the face.

5 (WHEREUPON, the jury enters at approximately 5:22
6 p.m.)

7 MR. GOWDY: Kiera P. I can't recall
8 whether she has been sworn or not, Your Honor. I
9 thought she has.

10 THE COURT: She has.

11 MR. GOWDY: All right.

12 KIERA P.

13 having previously been sworn, testified as follows:

14 DIRECT EXAMINATION

15 BY MR. GOWDY:

16 Q Good evening, Kiera.

17 A Good evening.

18 Q I want you to pretend like I'm your little sister
19 and you are yelling at me. I want the last two gentlemen
20 in the jury box to be able to hear you. Okay?

21 A Okay.

22 Q That's good. I want you to tell the jury who you
23 are and how old you are. What's your name?

24 A My name is Kiera P. And I'm 11 years old.

25 Q I want to get you to keep your voice up. Okay?

1 **A** Okay.

2 **Q** That's good. Where do you go to school?

3 **A** Inman Elementary.

4 **Q** What grade are you in, Kiera?

5 **A** Fifth.

6 **Q** What's your momma's name?

7 **A** Celeste Nesbitt.

8 **Q** You have a little sister?

9 **A** (Nods head affirmatively.)

10 **Q** What's her name?

11 **A** Keysha P.

12 **Q** Keysha? Are you nervous?

13 **A** Yes.

14 **MR. BARTOSH:** I apologize. If she could speak
15 up. I'm having a little trouble hearing her.

16 **BY MR. GOWDY:**

17 **Q** Are you a little bit nervous, Kiera?

18 **A** Yes.

19 **Q** Me too. It will only be a couple of minutes.

20 Okay?

21 **A** Okay.

22 **Q** I want to go back to September of 2002.

23 September 18. Do you remember the night Nell, your Aunt

24 Nell was shot and killed?

25 **A** Yes.

- 1 Q Were you in the car when she was shot and killed?
- 2 A Yes.
- 3 Q Where were you sitting?
- 4 A In the middle.
- 5 Q Who was to your left?
- 6 A My sister.
- 7 Q All right. I think I did my left and my right
- 8 wrong. Who was sitting behind your mom?
- 9 A My Aunt Nell.
- 10 Q Your Aunt Nell?
- 11 A Uh-huh (affirmative).
- 12 Q Who was on the other side of you?
- 13 A My sister.
- 14 Q Was she sitting in a regular seat or was she
- 15 sitting in a special kind of seat?
- 16 A A carseat.
- 17 Q What were you doing?
- 18 A I was sleep.
- 19 Q How were you asleep?
- 20 A Just regular sleep.
- 21 Q Do you sleep straight up, were you leaning one
- 22 way or the other?
- 23 A I was leaning one way.
- 24 Q Which way were you leaning?
- 25 A I was leaning on her.

1 Q When you see on her, you mean on your Aunt Nell?

2 A Uh-huh (affirmative).

3 Q When the shooting started, what did you do?

4 A I ducked under my sister's seat.

5 Q I want you to say it one more time so the jury
6 can hear you. Okay?

7 A Okay.

8 Q What did you do when the shooting started?

9 A I ducked under my sister's car seat.

10 Q You ducked under your sister's car seat?

11 A Yes.

12 Q Were you and your sister crying?

13 A Yes.

14 MR. GOWDY: Your Honor, those are all the
15 question I have for Ms. P.

16 THE COURT: Any questions, Mr. Bartosh?

17 MR. BARTOSH: Yes, sir.

18 CROSS-EXAMINATION

19 BY MR. BARTOSH:

20 Q Kiera, I just have a few questions. My name is
21 Mike Bartosh. I will try to be as brief as I can be. This
22 happened two years ago, didn't it?

23 A Yes.

24 Q I missed when you said you said how old you are
25 now?

1 A 11.

2 Q So you would have been nine back then?

3 A 10.

4 Q Do you recall how tall you were back then?

5 A About one inch tall.

6 Q I'm sorry?

7 A I was about one inch tall. I don't know.

8 Q You don't how tall you were?

9 A Huh-uh (negative).

10 Q You were asleep on the car?

11 A Yes.

12 Q I mean asleep on the seat. Could it been that
13 you sleeping on the floorboard of the car?

14 A No.

15 Q When you first heard the shots that you ducked
16 under your sister's car seat?

17 A I ducked a little bit. It was like a small bitty
18 kind of way.

19 Q Are you talking about the edge of the car seat?

20 A Yeah, the edge.

21 Q The foot of the car seat?

22 A Not the foot but the kind of the edge of the
23 back.

24 MR. BARTOSH: That's all.

25 REDIRECT EXAMINATION

1 BY MR. GOWDY:

2 Q One last question, Kiera. I want you to stand up
3 for a second okay. Come stand up right here beside me.
4 Mr. Bartosh asked I how tall you were back in. I see how
5 tall you were right now. I want you squat down just a
6 little bit as to how much you have grown in the last year
7 and a half.

8 A (Demonstrating.)

9 Q Is that about where you were back then?

10 A Uh-huh (affirmative).

11 Q Okay. That is all the questions I have for you.

12 **RECROSS EXAMINATION**

13 BY MR. BARTOSH:

14 Q If you would, just remain by right there, Kiera.
15 Do you know how high those heels are that you are wearing?

16 A Huh-uh (negative).

17 Q Do you think they are about two inches high?

18 A Maybe.

19 Q Okay. Thank you?

20 MR. GOWDY: We would ask permission that she
21 be excused.

22 THE COURT: She is excused.

23 MR. GOWDY: We will call Celeste Nesbitt.

24 **CELESTE NESBITT**

25 having first being duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. GOWDY:

Q Good evening, Ms. Nesbitt.

A Good evening.

Q Was the little girl who just testified for the jury your daughter?

A Yes, she was.

Q How old is she now?

A 11.

Q I believe you testified yesterday or maybe the day before, my memory fails me, she was in the car the night that Nell was killed?

A Yes, she was.

Q Did you have another child in the car that night?

A Yes, I did.

Q What is her name?

A Keysha P.

MR. GOWDY: Your Honor, a moment of the Court's indulgence.

(WHEREUPON, a little girl enters the courtroom.)

BY MR. GOWDY:

Q And what is this little girl's name?

A Kresha P.

Q Was she in the car that night?

A Yes, she was.

1 **Q** What was she sitting in?

2 **A** A car seat.

3 (WHEREUPON, the little girl exits the courtroom.)

4 **BY MR. GOWDY:**

5 **Q** I'm going to show you State's Exhibit 77, Ms.
6 Nesbitt, and ask if you recognize this.

7 **A** Yes, that is my daughter's seat that was in the
8 car the night.

9 **MR. BARTOSH:** No objection.

10 **MR. GOWDY:** Your Honor, we move State's
11 Exhibit 77 into evidence.

12 **THE COURT:** It's admitted without objection.

13 (WHEREUPON, State's Exhibit 77 was admitted into
14 evidence.)

15 **BY MR. GOWDY:**

16 **Q** I want to ask you about Kiera. What was she like
17 before September 18, 2002?

18 **A** She was a very happy child.

19 **MR. BARTOSH:** Your Honor, I'm going to object to
20 that as to relevance.

21 **THE COURT:** I suspect that we will benefit by
22 having a few minutes to discuss this while y'all wait
23 in the jury room. So please go back to the jury room
24 for just a second.

25 (WHEREUPON, the jury exits at approximately 5:32 p.m.)

1 **THE COURT:** Mr. Bartosh, I will hear you out.

2 **MR. BARTOSH:** Your Honor, the State is relying
3 on the aggravator the defendant by his act of murder
4 knowingly created a danger the more than one person in
5 a public place by means of a deadly weapon or a device
6 which normally would be hazardous to the lives of more
7 than one person. There is nothing about any kind of
8 traumatic experience that person may have suffered in
9 the course of that. That has nothing to with the
10 aggravator. So we would object to any discussion on
11 how she was then versus how she is now on the basis of
12 relevance.

13 **THE COURT:** Mr. Gowdy.

14 **MR. GOWDY:** Your Honor, Mr. Bartosh, I think,
15 misapprehends the reason for that question. It is
16 twofold. That young lady is a victim. The victim's
17 impact testimony is inherently admissible on two
18 fronts. Number one, there was testimony that this
19 witness, Celeste Nesbitt, and the victim Nell Lindsey
20 were like sisters. The last witness, Kiera P.
21 testified that she called her Aunt Nell. I think it
22 is entirely probative and admissible what impact Aunt
23 Nell's death had on her.

24 Secondarily, this young lady was in the car. She
25 is a victim of what this defendant did. It is entirely

1 admissible what his impact his actions have had on
2 her. They have been traumatic. It has nothing to do
3 with the aggravator. This is pure victim impact
4 testimony.

5 **MR. BARTOSH:** Your Honor, if I could be heard on
6 that. It is clearly intended to inflate --

7 **THE COURT:** I'll tell you what, in order for me
8 to evaluate impact this testimony will have, it would
9 be helpful to me to listen to it and then rule.

10 **MR. BARTOSH:** Thank you, Your Honor.

11 **MR. GOWDY:** Yes, sir. Would you like me to
12 proffer Ms. Nesbitt?

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

14 **BY MR. GOWDY:**

15 **Q** I had asked you what your daughter Kiera was like
16 prior to September 18, 2002.

17 **A** She was a happy child, she had very good grades
18 in school. She was doing well.

19 **Q** After September 18th, 2002, what is Kiera like?

20 **A** She has manic depression, panic attacks. She is
21 on medication. Her grades fell all the way down.

22 **Q** Has there been any other traumatic episode her
23 life other than sitting next a woman who was shot that in
24 your judgment as her mother could explain the difference
25 between her pre-September 18th and pro-September 18?

1 **A** No.

2 **Q** Was she in fact injured during the course of this
3 crime?

4 **A** Yes, she was cut with glass on her arm.

5 **Q** Glass that came through the window that this
6 victim was shot?

7 **A** Yes..

8 **Q** Is that her that we hear screaming?

9 **A** Yes, it is.

10 **Q** Was she in a car with Nell for a period of time
11 while Nell was dead?

12 **A** Yes, she was.

13 **Q** Was she sitting immediately beside Nell?

14 **A** Laying on her arm from the beginning.

15 **Q** Is she in counseling as a direct result of what
16 happened on September 18?

17 **A** Yes, she is still now.

18 **Q** Does she take medication as a result of what
19 happened on September 18, 2002?

20 **A** Yes, she takes Zoloft.

21 **MR. GOWDY:** That would be the State's proffer,
22 Your Honor.

23 **THE COURT:** Mr. Bartosh?

24 **MR. BARTOSH:** Once again, Your Honor, I would
25 object to relevance. It does not make it any more or

1 any less.

2 THE COURT: The relevance objection is
3 overruled. You are really talking about -- you are
4 saying that to allow this testimony is unfairly
5 prejudicial?

6 MR. BARTOSH: Yes, sir.

7 THE COURT: And that unfair prejudice
8 substantially outweighs the probative value?

9 MR. BARTOSH: Yes, sir.

10 THE COURT: So it's a Rule 403 objection?

11 MR. BARTOSH: Yes, sir.

12 THE COURT: And it is also based on the
13 constitutional principle that victim impact evidence
14 can not be admitted if it renders the defendant's
15 trial fundamentally unfair?

16 MR. BARTOSH: Yes, sir.

17 THE COURT: All right. The thing that, there
18 are two things. One thing that concerns me is the
19 last questions. You got her to essentially render a
20 medical diagnosis of manic depressive and what caused
21 it and why she is taking medication. I am a little
22 concerned about that. That is trading into the expert
23 realm.

24 Maybe the doctors told her that, in which case,
25 it is hearsay. Maybe she is just figuring that, she

1 is her mother, she is entitled to give her
2 impressions. But to give a medical diagnosis carries
3 it to a little bit different level.

4 **MR. GOWDY:** Your Honor, I would agree with that.
5 I would limit my questions to being more general as
6 opposed to a specific diagnosis. I think that a
7 mother would be qualified to discuss the changes in a
8 child's behavior, schoolwork, particularly when the
9 foundation has been laid that there's been no other
10 traumatic episode other than this incident.

11 And the fact that she is in counseling, but in
12 terms of a specific diagnosis of being manic
13 depressive -- I am not certain -- this witness
14 certainly knows that prior to September 18th, she was
15 not taking Zoloft. Pro-September 18, she's taking
16 Zoloft. I would think that she would not be able to
17 draw any conclusions on that other than to say that
18 that is a fact.

19 **THE COURT:** I believe that Ms. Nesbitt testified
20 in the guilt phase about the relationship between her
21 and Ms. Lindsey and her children and Ms. Lindsey.

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

23 **THE COURT:** All right.

24 **MR. GOWDY:** Kiera herself referred to her as
25 Aunt Nell. That's in her testimony.

1 **THE COURT:** Okay. All right. There is no doubt
2 in my mind that in order to, for the jury to
3 understand all of the facts and circumstances that
4 they need to understand in order to render the
5 appropriate sentence, they need to have the hands all
6 the way around the effect that this crime has had.
7 And that these children are not only victims of the
8 crime for having been present, but victims of the
9 crime because of fact that they are so close to the
10 lady that was killed.

11 In having heard the, uh, I don't believe that the
12 potential for unfair prejudice substantially outweighs
13 its probative value. We are in the sentencing phase
14 of the trial. The State is given more latitude in
15 terms of what it can do, both sides are. I believe
16 that the probative value of hearing how this crime has
17 affected this child is high. So the unfair prejudice
18 certainly as we said the other day, it is prejudicial.

19 But looking at that prejudice and looking at it
20 compared to everything else that the jury already is
21 going to know about this crime and the fact that the
22 two children were there, their ages, their
23 relationship to the victim of the murder, the
24 testimony that I just heard does not add significantly
25 to the prejudicial impact that the situation of the

1 crime will have the jury.

2 So I don't believe that the potential for unfair
3 prejudice substantially outweighs its probative value.
4 I'll overrule the objection. With the solicitor's
5 concession that he would not ask the witness for any
6 kind of medical type diagnosis, then I think we are
7 ready to go forward.

8 MR. BARTOSH: Your Honor, we would just
9 respectfully object to your ruling on that based upon
10 prior argument.

11 THE COURT: All right.

12 Bring in the jury.

13 (WHEREUPON, the jury enters at approximately 5:43
14 p.m.)

15 MR. GOWDY: May it please the Court, Your Honor

16 THE COURT: Yes, sir.

17 BY MR. GOWDY:

18 Q You testified that you and Nell were like
19 sisters?

20 A Yes

21 Q I'm going to ask you to elaborate on that a
22 little bit. How long had you and Nell been friends?

23 A Every since she was around the age of 10. My
24 best friend was her cousin by marriage. That's how I met
25 her. We became close from then on. All throughout her

1 life.

2 Q When you say close friends or like sisters, how
3 often would you see Nell on a weekly basis?

4 A Two or three times out of the week. If I did not
5 see her, she would call.

6 Q Were your children close to Nell?

7 A Yes, they were.

8 Q Did they call her anything other than Nell?

9 A They called her Aunt Nell.

10 Q How often would you imagine that your two
11 daughters Kiera and Kresha were around Nell Lindsey?

12 A My oldest daughter, Nell taught her all the way
13 through daycare until she started public school. My
14 youngest daughter she taught her for about a year in day
15 care.

16 Q Okay. I want you to tell the jury from your
17 perspective as a mother, what was different about your
18 daughter Kiera after September 18 and before September 18?

19 A From a happy child to a depressed child. A child
20 that would go in her room and wouldn't say nothing. We
21 would tell her to come out and play, she was afraid. If we
22 was in the car riding down the road at night and it turned
23 dark, she would cry to go home. She was scared to ride in
24 the car after dark.

25 A child that would be in her room when night fall. If

1 I go in my room and go to sleep, she would come while I was
2 sleep and stand over me. I would wake up and ask her why
3 and she would say I hear gunshots. I say, No, you don't,
4 baby. Go back to sleep. She would say I can't sleep.

5 MR. BARTOSH: Objection to hearsay, Your Honor.

6 MR. GOWDY: It's not offered to prove that to
7 the matter asserted, Your Honor.

8 THE COURT: Objection is overruled.

9 MR. GOWDY: Thank you, Your Honor.

10 BY MR. GOWDY:

11 Q Ms. Nesbitt, is your daughter Kiera in
12 counseling?

13 A Yes, she is.

14 Q Was she in counseling before September 18th?

15 A No, she was not.

16 Q Is your daughter taking medication now?

17 A Yes, she is.

18 Q Was she taking medication prior to September the
19 18th, 2002?

20 A No, she was not.

21 Q Other than sitting by her aunt while she was
22 being shot in the head four times, has anything else
23 traumatic happened to Kiera that could explain in your
24 judgment as her mother the changes in her?

25 A No.

1 **Q** Was she injured, however slight, on September 18,
2 2002?

3 **A** Yes.

4 **Q** Let me show you two pictures, State's Exhibit 74
5 and State's Exhibit 75. I want to ask you if you recognize
6 those pictures and if you can tell the Court what date
7 those pictures represent?

8 **A** The date the pictures were taken?

9 **Q** Yes, if you know.

10 **A** These pictures were taken September the 19th.

11 **Q** Of what year?

12 **A** 2002.

13 **Q** They are pictures of what?

14 **A** Of Kiera and her arm after the incident.

15 **MR. GOWDY:** Your Honor, we would move State 74
16 and State 75 into evidence.

17 **MR. BARTOSH:** No objection.

18 **THE COURT:** they are admitted.

19 (WHEREUPON, State's Exhibits 74 and 75 were admitted
20 into evidence.)

21 **BY MR. GOWDY:**

22 **Q** I see a Band-Aid on your daughter's left arm. Is
23 that correct?

24 **A** Yes.

25 **Q** What was that Band-Aid for?

1 A Where they picked glass out of her arm.

2 Q They picked glass out of her arm?

3 A Yes.

4 Q Did that glass come from either the side window
5 or the back windshield of Celeste -- of your car?

6 A Yes.

7 Q You had two little girls in the car that night.
8 Let me ask you about Keysha. How old was Keysha that
9 night?

10 A Four.

11 Q Is Keysha okay today?

12 A Yes.

13 Q Does she talk about the incident?

14 A No, every now and then but she is too young to
15 even remember.

16 Q How about Kiera?

17 A She remembers the whole thing.

18 Q Is she having trouble in school?

19 A Yes.

20 Q Is she having trouble with her friendships and
21 relationships?

22 A Yes.

23 Q Can you think of anything other than watching her
24 aunt shot that could explain the change in your daughter?

25 A No, nothing else.

1 Q While Mr. Barnett is setting up the overhead,
2 Celeste, I want to ask you to give the jury a sense of what
3 Nell Lindsey was like as a person.

4 A She was a sweet person. A hard-working person, a
5 friendly person, a good person. A person that was willing
6 to do anything for anyone. She was a loving mother. She
7 loved her kids, your kids, anyone's kids. She wanted to be
8 happy. She tried to make everybody else happy. When you
9 was mad, she make you smile. She did everything that she
10 could to try to be happy and make everyone else happy.

11 Q You mentioned she was a good mother. How many
12 children did Nell have?

13 A Nell had two sons.

14 Q Was she the primary caregiver for those two sons?
15 In other words, did they live with her?

16 A Yes, they did.

17 Q Did you believe that she was a good mother?

18 A A very good mother. She kept her sons with her
19 at all times. Even if she felt that you were tired of her
20 sons, she would tell you that me and my children will go
21 home. We used laugh about it. She would say I'll take my
22 children and I'll go home. She loved her kids.

23 Q During the time that you had known or the time
24 that you knew Nell, was she employed most of the time?

25 A Yes, she was.

1 **Q** Let me show you what has been marked as State's
2 Exhibit 76 and ask you if you recognize that picture.

3 **A** Yes, I do.

4 **Q** What is that?

5 **A** This is Nell and her two sons.

6 **Q** How close to the time of her death would you
7 estimate Ms. Nesbitt that that picture was taken?

8 **MR. BARTOSH:** Objection, Your Honor, that calls
9 for speculation on her part.

10 **BY MR. GOWDY:**

11 **Q** If you know.

12 **A** One month.

13 **Q** One month?

14 **A** Uh-huh (affirmative).

15 **MR. GOWDY:** Your Honor, we would move State
16 76 into evidence.

17 **MR. BARTOSH:** We would object to it based on our
18 prior argument.

19 **THE COURT:** Let me get back to the objection to
20 the question about when the picture was taken. It is
21 apparent to me that Ms. Nesbitt would have the
22 familiarity with the family to have a basis to answer
23 that question. That objection is overruled. As far
24 as the admission of the photograph itself, what is the
25 basis of the objection?

1 **MR. BARTOSH:** Relevance, Your Honor.

2 **THE COURT:** Overruled. I have also considered
3 that exhibit under Rule 403 as to whether or not it
4 renders the trial fundamentally unfair. It does not.
5 It is admissible under Rule 403.

6 **MR. GOWDY:** Thank you, Your Honor. Permission
7 to publish it to the jury.

8 (WHEREUPON, State's Exhibit 76 was admitted into
9 evidence.)

10 **BY MR. GOWDY:**

11 **Q** Tell the jury what they are looking at, Celeste.

12 **A** They are looking at Nell in the middle, which is
13 the mother. Her oldest son on her back, which is Alex.
14 Her youngest son in the front, which is Trey.

15 **Q** Trey?

16 **A** Yes.

17 **Q** Do you know how long Nell had been working at
18 Spartanburg Regional prior to September 2002?

19 **A** I don't know the exact dates.

20 **Q** She been there less than a year?

21 **A** Some months.

22 **Q** It has been some months, right?

23 **A** Yes.

24 **Q** Let me ask you it this way, during the course of
25 your relationship with Nell, did you also have occasion to

1 be around Myron Lindsey?

2 A Yes, I did.

3 Q How often, give us a monthly estimate. In a
4 given month, how often would you see Myron Lindsey?

5 A Maybe two or three times out the month.

6 Q Did you ever travel out of town with Nell and
7 Myron Lindsey?

8 A Yes, I did.

9 Q Did you ever see Myron Lindsey interact with his
10 wife, Nell?

11 A Yes, I did.

12 Q Did you ever see Myron Lindsey interact with his
13 children Alex and Trey?

14 A Yes, I have.

15 Q Did you ever see Myron Lindsey beat his wife?

16 A Yes, I have.

17 Q Tell the jury about some of those times.

18 A The incident when we traveled out of town and
19 went to the beach. She and I went out of town to shop. We
20 played around and killed some time. He and the guys went
21 their way. When we came back, he met us across the parking
22 lot. He walked up to us. We thought everything was calm.
23 He hauled off and hit her so hard until he almost broke her
24 jaw. She fell to the ground. He snatched her jewelry.
25 The very next day, we went over and we picked up jewelry

1 that was still left in the parking lot.

2 Q This was a family vacation I take it?

3 A Yes. She asked me to go. I told her I did not
4 want to go. I did not have any money. She was like you
5 just come and go. He's paying for the room. And just have
6 you something to eat, money for food. And I said okay.

7 Q You testified he hit her in her jaw with his fist
8 or with his hand?

9 A With his fist.

10 Q Did you happen to know if anything Nell did prior
11 to getting her jaw punched?

12 A He said we came back too late.

13 Q You came to back too came back to late?

14 A It was only 11 o'clock. On the beach during bike
15 week, it was a lot of people out there. We got caught up
16 in traffic. A couple of days later, he admitted that he
17 thought it was one o'clock.

18 Q Okay. Did you ever see Myron Lindsey hit wife,
19 Nell, other than down at the beach for coming back for what
20 he thought was late?

21 A Not from coming back from what was late but I saw
22 him hit her before.

23 Q Tell the jury about another time you saw Myron
24 Lindsey hit his wife, Nell.

25 A When he walked into my house and hit her laying

1 across my bed. We were in there looking on the computer at
2 jobs. He came and hit her because she would not get up and
3 go to her mother's house to receive a gallon of milk out of
4 his hand, directly out of his hand.

5 Q I'm going to have to get you to tell me that
6 again. He hit her for what reason?

7 A Because she would not leave my house and go to
8 her mother's house and receive a gallon of milk out of his
9 hand.

10 Q So he came to your house?

11 A Yes. Walked straight through the door and hit
12 her.

13 Q Was anyone present when he hit his wife, when he
14 hit Nell other than you?

15 A Yes, my mother and my two children.

16 Q What did you do after he hit his wife in your
17 house?

18 A I told him to get out. At the time, he had
19 outside in the vehicle his brother and two of his friends.
20 They jumped out and come running in. I said get out of my
21 house. Get out. He called back. And he apologized.

22 Q To you or to her?

23 A To me.

24 Q Can you tell the jury about any other times when
25 you had seen this defendant strike, choke, push his wife?

1 **A** One other time, a matter of fact, the first of
2 the year 2002, a friend and I were going out to a get-
3 together. Nell called and asked if she could go. I said
4 sure, let me call my friend girl and ask if she has an
5 extra ticket for you to go. She said sure. I will pay her
6 way. A few minutes before Neil pulled up, Myron pulled up.
7 He said I thought she was on her way around here. I said
8 she is. He said I'll wait for her.

9 When she pulled up, he said what are you going to the
10 baby because he had the baby that weekend. She say give
11 him here. I will take him back to my mother. So me and my
12 friend went in the house. All of a sudden, we heard some
13 fussing. I goes back to the door. He took the fist, he
14 took his fist and knocked the glass of her Lexis out.
15 Glass went all over her and the child. She sped off and
16 went home to her mother.

17 **Q** Were you present at Applebee's on the occasion
18 when Mr. Lindsey showed up to assault his wife?

19 **A** Yes.

20 **Q** Can you tell the jury about that.

21 **A** That particular night, a friend of mine was
22 taking me out to eat. His job called him into work. Nell
23 called me and asked me what I was doing. I said I was
24 going out to eat but my friend had to work, so I'm not
25 going. She said, well, I'll go. I said you know what I'll

1 pay your way if you come and go with me. She said okay.
2 She came to my house. She said my mother brought me a
3 shirt to wear so I could go with you. I said okay. So me
4 and her went.

5 He called on the phone to ask where was she. We said
6 we're going to Applebee's. We're going to go and have a
7 few drinks and eat. He said I will be in there. When we
8 backed into the parking space, he pulls up. He comes to
9 the window and say Nell come out. She locked the door and
10 she said Go on, Myron.

11 I said Get out. He probably wants to talk to you. So
12 she got out. It wasn't like anything was really going on,
13 I felt. So when she got out I felt the car jar back and
14 forth, back and forth. So I didn't think anything was
15 wrong. When she stepped back in my car, he had done hit
16 her up side the face.

17 **MR. BARTOSH:** Objection, Your Honor. She did
18 not witness the event.

19 **MR. GOWDY:** Your Honor, may I lay a proper
20 foundation?

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

22 **BY MR. GOWDY:**

23 **Q** Ms. Nesbitt, before she got out of your car at
24 Applebee's, before her husband Myron Lindsey showed up, did
25 you notice marks or scratches or bruises on her face?

1 **A** No, I did not.

2 **Q** Was her jewelry in tact?

3 **A** Yes, it was.

4 **Q** Were her clothes in tact?

5 **A** Yes, it was.

6 **Q** After she got out to speak to her husband, did
7 you notice anything different about her?

8 **A** When she got back in, her shirt was ripped and
9 her jewelry was thrown across the parking lot.

10 **Q** Do you know whether or not Nell Lindsey --

11 **THE COURT:** Solicitor, if you're changing the
12 subject, I would like to see you and Mr. Bartosh up at
13 the bench.

14 **MR. GOWDY:** Yes, sir.

15 (WHEREFORE, a bench conference was held off of the
16 record.)

17 **BY MR. GOWDY:**

18 **Q** Let me go back very briefly to the incident of
19 the Applebee's. You were still inside the car, correct?

20 **A** Yes, I was.

21 **Q** Nell got out because her husband showed up at her
22 window?

23 **A** Yes.

24 **Q** Were you still in the car?

25 **A** Yes, I was.

1 Q Could you still see what was happening between.
2 them?

3 A No, he was standing very close to her.

4 Q You testified you felt the car move.

5 A Yes, I felt the car move. But he was standing
6 very close to her.

7 Q Did you see any physical contact between this
8 defendant and Mrs. Lindsey?

9 A No, I did not see the physical contact. I just
10 know the car was jarred. He was standing very close to
11 her.

12 Q Did you notice anything different about Mrs.
13 Lindsey after she got back in the car and before she got
14 out to speak to her husband?

15 A Yes, I did.

16 Q What did you notice different?

17 A She was crying. She was scratched and bruised
18 down her neck. Her shirt was ripped and her jewelry was
19 gone.

20 **THE COURT:** All right. The, uh -- never mind.

21 **BY MR. GOWDY:**

22 Q Ms. Nesbitt, do you know whether or not Nell
23 Lindsey had taken steps to divorce Myron Lindsey?

24 A Yes.

25 Q How do you know that?

1 **A** She told me. She made a few phone calls in front
2 of me.

3 **Q** She made phone calls in front of you?

4 **A** Yes, she called different lawyers and legal aid.

5 **Q** Did you ever hear this defendant threaten his
6 wife?

7 **A** Yes.

8 **Q** Tell the jury about the substance of those
9 threats.

10 **A** He would tell her, if I catch you doing anything,
11 I will kill you, bitch.

12 **Q** I would kill you what?

13 **A** Bitch.

14 **Q** Is the word "bitch" one that he liked to use?

15 **MR. BARTOSH:** Objection, Your Honor.

16 **THE COURT:** Sustained as to what he liked.

17 **MR. GOWDY:** Thank you, Your Honor.

18 **BY MR. GOWDY:**

19 **Q** How did he refer to Nell?

20 **A** Bitch.

21 **Q** Was that an infrequent reference or a frequent
22 reference?

23 **A** Frequent.

24 **MR. GOWDY:** One moment, Your Honor.

25 **BY MR. GOWDY:**

1 Q After September the 18th, you testified during
2 the guilt phase that you got the car back from law
3 enforcement, right?

4 A Yes.

5 Q I believe you also testified that you sold that
6 car?

7 A Yes.

8 Q Tell us who you sold it to.

9 A Mary Lyles.

10 Q For the time that you got it back from law
11 enforcement until the time that you sold it to Mary Lyles,
12 did you do anything to the car?

13 A No, I did not. I looked in the car at the crime
14 lab. That was it. Once it was in the crime lab, it went
15 straight to her.

16 Q Is this the same car seat, not a replica, but the
17 same car seat that was in the car on September 18th that
18 Keysha was sitting in?

19 A Yes, it is.

20 Q Please answer questions Mr. Bartosh may have.

21 **CROSS-EXAMINATION**

22 **BY MR. BARTOSH:**

23 Q Ms. Nesbitt, are you related to Mrs. Lindsey?

24 A No, I'm not.

25 Q Is your daughter related by blood to Nell

1 Lindsey?

2 **A** No.

3 **Q** Are either one of your daughters related by blood
4 to Nell Lindsey?

5 **A** No.

6 **MR. BARTOSH:** Your Honor, we respectfully ask
7 the Court to strike any of the testimony concerning
8 the impact on the daughter because she is not a member
9 of her family. She is not a member of victim's
10 family.

11 **THE COURT:** Motion denied.

12 **BY MR. BARTOSH:**

13 **Q** On the times that, let me start from the
14 beginning. When were Myron, when was Mr. Lindsey and Mrs.
15 Lindsey married?

16 **A** I don't remember the exact year or date.

17 **Q** When did you first met Mrs. Lindsey?

18 **A** I met her when she was 10 years old. When they
19 got married, I did not find out until three months later.

20 **Q** Do you know when that was?

21 **A** It was March. I'm not sure of the date.

22 **Q** That you know how long they had been together?

23 **A** No, not the exact years. But some years.

24 **Q** Well, more than five?

25 **A** Yes, more than five. They had two children.

1 Q More than 10?

2 A Around 10.

3 Q But you don't know how long they have been
4 married?

5 A How long they had been married?

6 Q Yes, ma'am.

7 A Maybe about five or six years.

8 Q About how long? I'm sorry.

9 A Five or six years.

10 Q Over that entire period that they were together,
11 you knew them?

12 A Yes.

13 Q You would have social interaction of Mr. and Mrs.
14 Lindsey, correct?

15 A Yes.

16 Q And did you ever refer to Mr. Lindsey as your
17 brother?

18 A I used to call him brother.

19 Q Did he ever sign for a car for you?

20 A Yes, he did.

21 Q How would you describe Mr. and Mrs. Lindsey's
22 relationship?

23 A Off and on.

24 Q All right. They would separate?

25 A Yes.

1 Q From time to time?

2 A Yes, they would.

3 Q She would take the children?

4 A Yes, she would.

5 Q Where would she go when they would separate?

6 A To her mother's house.

7 Q She would stay there?

8 A Until he would ask her to come back to wherever
9 he would be at.

10 Q So it would always be that he insisted and never
11 hers?

12 A Right.

13 Q She would always go back?

14 A Yeah, she would go back.

15 Q Okay. Now she was at Spartanburg Tech, right?

16 A Yes.

17 Q Who put her through Spartanburg Tech?

18 A He paid some of it. She had financial aid, to my
19 knowledge, for the rest of it.

20 Q At least some of it was paid for by Mr. Lindsey?

21 A Yes.

22 Q Those incidents that you described of violence
23 between Mr. and Mrs. Lindsey, where there ever any police
24 reports or any law enforcement called to them?

25 A The police were called to my house on that

1 incident.

2 Q On which incident?

3 A When he came to the house and hit her because she
4 would not accept a gallon of milk out of his hand.

5 Q How about Applebee's?

6 A Yes, the police was called then.

7 Q Okay. And what did you say happened at
8 Applebee's?

9 A She got out of the car. When he pulled up to
10 Applebee's, he came to the window and asked her to get out.
11 She got out of the car, I felt the jar of the car. When
12 she had gotten back in, he had hit her, bruised her, tore
13 her shirt, threw all of her jewelry.

14 Q You remember giving a statement on that incident?

15 A Yes.

16 Q Have you reviewed it?

17 A No.

18 Q Is that the statement that you gave?

19 A Yes.

20 Q It is?

21 A Yes.

22 Q Did you mention anything about Mr. Lindsey
23 hitting Mrs. Lindsey?

24 A No, I did not mention anything about that because
25 he said -- when I talked to the officer, he said he just

1 wanted to know about the parking lot.

2 Q The officer told you he did not want to know
3 about Mr. Lindsey hitting Mrs. Lindsey?

4 A No, he asked me what kind of condition she was in
5 when he got out, I told him the same thing that was asked
6 here. He asked me what kind of condition it was when she
7 got back in.

8 Q Did you mention anything in the statement about
9 him hitting her?

10 A No.

11 Q Did you mention anything about any bruises or any
12 scratching?

13 A No, I did not in that statement.

14 Q The officer came and saw Ms. Lindsey?

15 A Yes, he did.

16 Q Does he mention, he did not say anything about
17 scratches and bruising?

18 A Yes, he did.

19 Q He did?

20 A It is in her statement.

21 Q But you saw that?

22 A No, I did not see the actual licks. I was in the
23 car.

24 Q I understand that. But you saw it afterwards?

25 A Afterwards, I saw the bruises on her. She did

1 not have them when she stepped out of the car.

2 Q In the statement, you said she did open the car
3 door and got back in. And there was no words passed back
4 and forth?

5 A Yes.

6 Q No mention about any bruises or scratching or
7 anything like that?

8 A Not in that statement.

9 Q Okay. Of all the times you say there was
10 violence between Mr. and Mrs. Lindsey, there are no police
11 reports other than Applebee's and the time that you said
12 that he came into your house?

13 A Yes. I don't know if she called the police and
14 the police pulled up and she talked to the police. The
15 police did not even talk to me. The police pulled up and
16 that's when they talked to the police.

17 Q After the incident in Applebee's, did they
18 separate?

19 A They were already separated.

20 Q Did they ever get back together after that?

21 A Not to my knowledge.

22 Q So they never got back, never got back together
23 after Applebee's?

24 A Not together, no. They spent nights and days or
25 weeks together. But that was it. She was still living

1 with her mother.

2 Q Did he live with them?

3 A No.

4 Q They would spend nights together?

5 A Yes.

6 Q Who had the children?

7 A Her mother.

8 Q She did not have them?

9 A She had the children. But when they would be
10 together most of the time, her mother would keep them.

11 Q The time you described about when she was going
12 to a get-together and she had her child and she was going
13 to go with you, was it a party?

14 A (Nods head affirmatively.)

15 Q How old was her child at that time?

16 A And he had to be two or three.

17 Q What time of day or night was this?

18 A This was about 9 o'clock at night.

19 Q She was going to take the child to the party?

20 A No, her mother was going to keep the child. He
21 had the child --

22 Q Okay.

23 A -- and was bringing the child back. Her mother
24 was keeping the child.

25 Q Okay. You said they got out and had another

1 argument?

2 A (Nods head affirmatively.)

3 Q Where was, whose mother was going to keep the
4 child at that incident?

5 A Her mother.

6 Q Not your mother?

7 A No.

8 Q She wasn't going to keep the baby at her house?

9 A Her mother was keeping her child at her mother's
10 house.

11 Q Now the photograph that we saw, do you know where
12 that was taken?

13 A I can't call the name off of my mind.

14 Q Did you go with them when they had it taken?

15 A No.

16 Q Did you see all the photographs that were taken?

17 A Yes, I did.

18 Q Was there a photograph of Mr. Lindsey and his two
19 children?

20 A No.

21 Q There was not?

22 A I did not see any.

23 Q Do you know whether there was one?

24 A I don't know because I did not see any. I saw
25 several poses of her and her kids.

1 **Q** That's all?

2 **A** That is all.

3 **Q** That's all I have.

4 **MR. GOWDY:** Nothing on redirect, Your Honor.

5 **THE COURT:** You can step down, ma'am.

6 **MR. BARNETT:** I'd like to call Randy Bogan to
7 the stand please.

8 **THE COURT:** How long will his testimony be?

9 **MR. BARNETT:** Not very long I don't believe.

10 **THE COURT:** (Nods head affirmatively.)

11 **RANDY BOGAN**

12 having first being duly sworn testified as follows:

13 **DIRECT EXAMINATION**

14 **BY MR. BARNETT:**

15 **Q** Officer Bogan, you have already testified in
16 front of the jury before?

17 **A** Yes.

18 **Q** What I would like to do is show you two pictures.
19 When you arrived at a crime scene, what is one of the first
20 things that you do at the crime scene?

21 **A** The first thing I do is I photograph the crime
22 scene. Then I look for potential evidence. Then I place
23 placards at the evidence. Then I re-photograph.

24 **Q** So you would have arrived, how long, within an
25 hour after the incident occurred?

1 **A** Yes, I would say 45 minutes to an hour.

2 **Q** So you would have took pictures after that?

3 **A** That's correct.

4 **Q** Let me show you what has been marked as State's
5 Exhibit number 3. Does that photograph fairly represent
6 what you saw that night?

7 **A** Yes, sir. It does.

8 **Q** When you arrived, you are would have took that
9 picture?

10 **A** Yes, I took that photograph.

11 (WHEREUPON, the photograph was presented to the
12 defense.)

13 **MR. BARTOSH:** Your Honor, may I have the
14 opportunity to cross-examine Officer Bogan before the
15 picture?

16 **THE COURT:** You can voir dire him about the
17 foundation for the admissibility of the exhibit.

18 **BY MR. BARTOSH:**

19 **Q** Officer Bogan, do you keep a time sheet or an
20 arrival sheet or a crime log?

21 **A** No, sir. I'm not the one to keep the crime log.
22 Usually the initial officer who is on the scene creates the
23 crime log.

24 **Q** So you would not know the exact time that you
25 arrived?

1 **A** No, sir. Not unless it was on the crime log
2 which it should be.

3 **Q** So when you say you are going by what you
4 normally would do, it takes you usually 45 minutes to an
5 hour to get on the scene?

6 **A** Yes, sir. Usually 45 minutes to an hour.

7 **Q** Okay. And you process the scene in a certain
8 order?

9 **A** Yes, sir.

10 **Q** Okay. What is that order?

11 **A** I look at the scene. I photograph the scene. I
12 -- after I take a photograph of the scene, I look at the
13 scene again to verify any evidence or potential evidence
14 that is at the scene. Then I mark that and I re-photograph
15 it.

16 **Q** I guess that's my question. Do you have any
17 particular order that you photograph?

18 **A** Whenever I usually get there.

19 **Q** What I am saying is do you photograph the car or
20 the items that are found?

21 **A** I photograph everything, everything.

22 **Q** I understand but is there any particular order
23 that you go when you photograph?

24 **A** I'm not sure.

25 **Q** I don't know that I make myself clear. What I'm

1 saying is when you arrive, you say okay, I'm going to take
2 a picture of anything that is on the ground first. And
3 then I'm going to take a picture of the house or something
4 like that or if it is a murder scene, what do you normally
5 photograph first?

6 A It depends on the type of murder that it is
7 because some are outside, some are inside. And in this
8 case, it was outside but the victim was in a car.
9 Therefore I would photograph the entire scene of the
10 vehicles and everything. And then I would focus on the
11 victim.

12 Q So it's possible from the time that you, 45
13 minutes to an hour to get there. And then say another
14 what, half hour to 45 minutes to photograph the scene?

15 A I would say so.

16 Q So it's possible it could have been as much as 2
17 hours before you took that photograph?

18 A It is possible.

19 Q That's all I have.

20 MR. BARNETT: I still move the exhibit into
21 evidence at this time.

22 MR. BARTOSH: Your Honor, we would object to
23 that because there is no foundation to say that that
24 was how she --

25 THE COURT: All right. These are the best

1 opportunities to take breaks. So we're going to take
2 about a 15-minute break. I will get you get you back
3 in here and resume testimony in about 15 minutes.

4 **THE COURT:** Court is still in session please.

5 (WHEREUPON, the jury exits at approximately 6:24 p.m.)

6 **THE COURT:** All right. The objection is what?

7 **MR. BARTOSH:** Your Honor, that that photograph
8 does not accurately reflect how she appeared at the
9 time of the incident. What it does reflect is at some
10 point up to two hours later. Now if they are
11 introducing it to show the position of the body inside
12 the car at the time of the incident, then there's no
13 way that somebody can verify that that is how the
14 body, that is where the body was at the time of the
15 incident.

16 **MR. BARNETT:** No, sir. What I'm doing is I'm
17 introducing this, remember Officer Godfrey's testimony
18 is that she slumped over once she was pulled out.
19 This is the way it was but obviously they secured a
20 crime scene.

21 **THE COURT:** Officer Godfrey said she slumped
22 over when they pulled the children out.

23 **MR. BARNETT:** Yes, sir. I remember that was
24 part of the record and so forth. I'm not introducing
25 it to show exactly -- obviously, that was not the

1 position that she was in when she got shot. But she
2 is definitely still holding the cell phone there. It
3 shows the approximation of where the bullet is and
4 also where the car seat is. And that is why it is
5 being shown.

6 **THE COURT:** It shows where her rear-end is
7 situated on the seat.

8 **MR. BARNETT:** Yes, sir. I don't think that that
9 has moved at all but obviously there's evidence to
10 show that.

11 **THE COURT:** What you are saying basically is
12 that the foundation for the introduction of this
13 exhibit has not been laid because there is not a
14 sufficient basis for the fact-finder to conclude that
15 the photograph fairly and accurately depicts what it
16 purports to show.

17 **MR. BARTOSH:** Your Honor, I think we can solve
18 this because there is a photograph that we were
19 provided for, we were provided in discovery, it is
20 316070.

21 **MR. BARNETT:** That is State's Exhibit 46, Your
22 Honor. The one that, this is also provided to me in
23 discovery also.

24 **THE COURT:** Wait a minute. I am not sure what
25 you're talking about. We are not talking about that

1 exhibit. We are talking about this exhibit. The
2 State is offering this exhibit into evidence. I have
3 to rule on it. I can not tell the State which
4 exhibits to offer and which not to offer.

5 **MR. BARTOSH:** That would be our objection, Your
6 Honor. It does not accurately reflect.

7 **THE COURT:** That objection is overruled. Any
8 other objection?

9 **MR. BARTOSH:** No, sir.

10 **THE COURT:** We'll take a short break.

11 (WHEREUPON, a short recess was taken at approximately
12 6:29 p.m.)

13 (WHEREUPON, the Court resumed at approximately
14 6:39 p.m.)

15 **THE COURT:** Bring in the jury.
16 Did you find the other picture?

17 **MR. BARNETT:** Yes, sir. I did.

18 **THE COURT:** Good. Who had it?

19 (WHEREUPON, the jury enters at approximately
20 6:40 p.m.)

21 **MR. BARNETT:** May it please the Court, Your
22 Honor?

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

24 **BY MR. BARNETT:**

25 **Q** Let me show you what has also been marked as

1 State's Exhibit 46. Does that picture fairly represent
2 what you took or saw that night?

3 A Yes, sir. It does.

4 Q When you go to a crime scene, do you first
5 photograph everything?

6 A Yes, sir.

7 Q You would have done that immediately when you
8 arrive at the scene?

9 A Yes, sir. What I do is I observe the crime scene
10 to see what I have initially, then I photograph. Then I,
11 of course, observe again and find out what type of evidence
12 that I have. I mark it. And then I photograph it.

13 Q The items in this pictures, did they change from
14 the time you observed them to the time you photographed
15 them?

16 A No, sir.

17 Q Okay.

18 MR. BARNETT: Your Honor, I would like to move
19 State's Exhibit 73 and 46 into evidence.

20 MR. BARTOSH: We object to them, Your Honor,
21 based on our prior objection, our prior reasons.

22 THE COURT: Did we address, we addressed the
23 foundation objection. Did we address the 403? Did I
24 discuss my ruling on that?

25 MR. BARTOSH: My understanding was you had not

1 ruled on that, Your Honor.

2 THE COURT: I'm talking about when we first
3 took this break just now. That was just foundation.

4 MR. BARTOSH: Yes, sir. My understanding is
5 that you ruled on the 403.

6 THE COURT: That I what?

7 MR. BARTOSH: That you had ruled on the 403.

8 THE COURT: Did I explain my ruling?

9 MR. BARNETT: And we talked to you about earlier
10 about it, Your Honor. I think you did put it on the
11 record.

12 MR. BARTOSH: Yes, sir.

13 THE COURT: In any event, overrule the
14 objection. I will explain the weighing of the
15 factors during the next break.

16 MR. BARNETT: Thank you, Your Honor. May I
17 publish these pictures to the jury, Your Honor?

18 THE COURT: Yes, sir.

19 (WHEREUPON, State's Exhibit 73 and 46 were admitted
20 into evidence.)

21 BY MR. BARNETT:

22 Q Let me show you State's Exhibit 73, Mr. Bogan.
23 If you would, sir, please describe what we are seeing in
24 this picture, sir.

25 A This is Mrs. Lindsey. There is a cell phone in

1 her right hand. She is slumped over. This is the baby
2 seat, or the car seat and space in between her right here.
3 Previously, on some photographs, there was a mark in the
4 center of rear seat. This was the same mark which is a
5 bullet hole that went through and into the trunk.

6 Q Was that the dowel that you put through it in the
7 early pictures?

8 A Yes, sir. It was.

9 Q Let me show you State's Exhibit 46. Is this a
10 picture of the same scene but at a different angle?

11 A Yes, sir. Actually if you turned it up like
12 that --

13 Q I apologize.

14 A This is actually a photograph looking through the
15 passenger side rear of the vehicle and into the vehicle.
16 This is basically the same photograph but a different angle
17 than what you just saw.

18 Q In the earlier pictures that you described to the
19 jury a few days before, you showed where the bullet hole
20 and the dowel and the angle of the bullet was?

21 A That is correct

22 MR. BARNETT: One moment, Your Honor.

23 Please answer any questions Mr. Bartosh has for
24 you.

25

CROSS-EXAMINATION

1 BY MR. BARTOSH:

2 Q Officer, you took those programs with a digital
3 camera?

4 A Yes, sir.

5 Q Do you have the capability of placing the time of
6 day on those photographs?

7 A On the digital, at that time, no, sir. The
8 cameras would not put the date and time on there.

9 Q Would you ordinarily write the date and time on
10 the photographs?

11 A No, sir. I never have.

12 Q You don't do any type of notation as to the time
13 you took the photographs?

14 A No, sir. I have never taped the times on the
15 photographs.

16 Q Just so I understand, are you saying that that is
17 the position that Ms. Lindsey was in when you arrived?

18 A That is correct.

19 Q Okay. That is all I have.

20 MR. BARNETT: No further questions of this
21 witness, Your Honor. We ask that he be excused.

22 THE COURT: He is excused.

23 MR. BARNETT: I would like to call Doug Bishop
24 to the stand.

25 DOUG BISHOP

1 having first being duly sworn testified as follows:

2 **DIRECT EXAMINATION**

3 **BY MR. BARNETT:**

4 **Q** You have already testified in front of the jury
5 before in the guilt phase. Let me show you what's been
6 marked as State's Exhibits 71, 72, 69, 70 and 68. If you
7 would, review those for a second.

8 **THE COURT:** Let me ask you this, the two exhibits
9 that you just introduced, 74 --

10 **MR. BARNETT:** 73 and 46, Your Honor.

11 **BY MR. BARNETT:**

12 **Q** You attended the autopsy of Nell Lindsey, is that
13 right?

14 **A** Yes, I did.

15 **Q** Did you take these pictures at the autopsy?

16 **A** Yes, I did.

17 **Q** Do these pictures fairly represent what you saw
18 at the autopsy?

19 **A** Yes, sir.

20 **MR. BARNETT:** Your Honor, I will move these into
21 evidence at this time.

22 **MR. BARTOSH:** No objection.

23 **THE COURT:** They are admitted. Give me the
24 numbers please.

25 **MR. BARNETT:** Yes, sir. 68, 69, 70, and 71, and

1 72. I would like to publish them to the jury at this
2 times.

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

4 (WHEREUPON, State's Exhibits 68 through 72 were
5 admitted into evidence.)

6 **BY MR. BARNETT:**

7 **Q** This has been marked as State's Exhibit 68. If
8 you would, describe what the jury sees here.

9 **A** Yes, sir. This is the back of her head right
10 here. There's a gunshot wound here to the back of her
11 head.

12 **THE COURT:** Move that microphone off of his
13 shoulder please.

14 **MR. BARNETT:** Yes, sir.

15 **THE WITNESS:** I'm sorry. There was the gunshot
16 wound here at the top of her head. A gunshot wound
17 here at the base of her neck. This is like a graze
18 wound across the back of her neck.

19 **BY MR. BARNETT:**

20 **Q** This is Doctor Wren holding the sign up?

21 **A** Yes. This is what they used to be able to tell
22 which, which autopsy this is.

23 **Q** Let me show you what has been marked as State's
24 Exhibit 69. Can you describe what this is for the jury,
25 sir?

1 **A** Yes. This is the side of her head. You can
2 see her ear and her eye. There is a gunshot wound to the
3 temple area.

4 **Q** Did Doctor Wren do x-rays of her head?

5 **A** Yes, sir. He did.

6 **Q** These x-rays I'm showing you is State's Exhibit
7 72. In these x-rays, especially down at the jaw region,
8 what does that show?

9 **A** That is a bullet that is inside of her head.

10 **Q** That is where it was located in her head?

11 **A** Yes, sir.

12 **Q** Did it also show other bullets? I don't know if
13 we can see it on the presentation up there. But did it
14 also show other bullets that was in her head also.

15 **A** It did.

16 **Q** Can we see the bullets now?

17 **A** Yes, it is right there.

18 **Q** Let me show you what has been marked as State's
19 Exhibit 71. Is there another bullet on that skull also,
20 on that picture on the back of her head?

21 **A** It's right there.

22 **Q** Thank you, sir. Please answer any questions
23 Mr. Bartosh has for you.

24 **MR. BARTOSH:** No questions, Your Honor.

25 **MR. BARNETT:** We ask that he be excused, Your

1 Honor.

2 THE COURT: You are excused, sir.

3 THE WITNESS: Thank you.

4 MR. BARNETT: I would like to call Mary Lyles to
5 the stand, Your Honor.

6 MARY LYLES

7 having first being duly sworn testified as follows:

8 DIRECT EXAMINATION

9 BY MR. BARNETT:

10 Q If you would, give your full name for the record
11 and let the jury know who you are.

12 A My name is Mary Davenport Miles.

13 Q Where do you live?

14 A I live at , Welford, South
15 Carolina.

16 Q What you do?

17 A I am a custodian for the school.

18 Q Do you know Celeste Nesbitt?

19 A I do.

20 Q Did you purchase an automobile from her?

21 A I did.

22 Q What type of automobile did you purchase from
23 her?

24 A It was a Mercury, I believe.

25 Q A Topaz?

1 A Yes.

2 Q Has the automobile been in your possession since
3 you brought it from Ms. Nesbitt?

4 A Yes, it has.

5 Q Has it changed in any way? Have you done
6 anything to the car?

7 A No, I only drove it to work.

8 Q About the first of April, were you contacted by
9 the Solicitor's office?

10 A I was.

11 Q Did Investigator Todd Wilson come and pick the
12 car up?

13 A He did.

14 Q It has been in the Solicitor's possession since
15 then or behind the jail since then?

16 A Yes.

17 Q Please answer -- let me ask one other question.
18 The windows, had they been fixed by the time that you
19 purchased the car?

20 A It had.

21 Q The windows that are fixed, are they clear now?

22 A Yes.

23 Q The windows that were not fixed, are they clear
24 or tinted?

25 A Clear.

1 **MR. BARNETT:** One moment, Your Honor.

2 **BY MR. BARNETT:**

3 **Q** Let me show you what's been marked as State's
4 Exhibit 23. Is that the car that you purchased off Celeste
5 Nesbitt?

6 **A** Yes.

7 **Q** And does that appear -- I'm showing -- that's
8 State's Exhibit 23. State's Exhibit 50, is that the bullet
9 hole?

10 **A** Yes.

11 **Q** Is that bullet hole still in the back seat?

12 **A** Yes, it is.

13 **Q** And is that the way it was when you turned it
14 over to the Solicitor's office?

15 **A** Yes, sir.

16 **Q** Please answer any questions Mr. Bartosh has for
17 you.

18 **CROSS-EXAMINATION**

19 **BY MR. BARTOSH:**

20 **Q** Ms. Lyles, has the car been in an accident since
21 you brought it?

22 **A** No, sir.

23 **Q** Did you put a trailer hitch on it?

24 **A** One of those little things you --

25 **Q** Yes, ma'am.

1 **A** Yeah. I did that.

2 **Q** But the back bumper hasn't been damaged since you
3 had it?

4 **A** No.

5 **Q** Okay. That's all I have.

6 **MR. BARNETT:** That's all the questions we have
7 for Ms. Lyles. I call Sharon Smith, the next
8 witness.

9 **SHARON SMITH**

10 having first being duly sworn testified as follows:

11 **DIRECT EXAMINATION**

12 **BY MR. BARNETT:**

13 **Q** Ms. Smith, if you would, give your full name for
14 the record please.

15 **A** Sharon Smith.

16 **Q** I'm going to ask you to talk a little bit louder
17 so we can all hear back here.

18 **A** Sharon Smith.

19 **Q** What do you do, ma'am?

20 **A** I'm a home health nurse.

21 **Q** Did you know Ruby Nell Lindsey?

22 **A** Yes, she was my first cousin and later on became
23 my sister. Her mom adopted me at 14.

24 **Q** How long did you know Nell Lindsey?

25 **A** We were born together. We lived in the same

1 house. Her mom and my mom were sisters. We all lived in
2 the same house. We went to preschool together.

3 Q You have known her for a long time?

4 A Yes.

5 Q Can you tell the jury what kind of person Nell
6 Lindsey was.

7 A She, she always tried to make everybody else feel
8 better no matter how she felt. She was cheerful to be
9 around. And she made you laugh.

10 Q How was she with children?

11 A She loved children. I didn't understand how she
12 could go into work at day cares all day and deal with all
13 those kids. She loved kids.

14 Q She worked in a day care?

15 A Yes.

16 Q She did that before she started working the
17 patient care field?

18 A Yes, she did.

19 Q How long did she work at day care?

20 A Uh, I don't know exactly. Maybe a year, two
21 years. Maybe three years.

22 Q Later on, did you encourage her to enter into the
23 patient care field?

24 A Yes, I did. She couldn't see herself doing it
25 but she finally did it.

1 Q When did she start doing patient care?

2 A She started in the nursing homes. I know exactly
3 but she worked in two different nursing homes in the last
4 year.

5 Q You got to keep your voice up so we can hear you.
6 I know you are nervous. But you've got to keep that voice
7 up. When she started working in there, did you use to go
8 to her house?

9 A Yeah, I would go every now and then.

10 Q And who was her two children?

11 A Trey and Alex.

12 Q Did she love them?

13 A Yeah, she loved them. She made sure they had the
14 best of everything.

15 Q Did you know Marion Lindsey?

16 A Yes, a little bit.

17 Q Marion Lindsey, did you see how he treated the
18 two children?

19 A Yes. They love their daddy, but I didn't like
20 the way that he talked to them.

21 Q How did he treat the oldest one Alex?

22 A He showed favoritism toward Trey. He would take
23 Trey more places, the younger one, with him. I believe
24 because Trey could not talk. Alex, I heard him call him
25 'lil fag or little punk sometimes.

1 **MR. BARTOSH:** I'm going to object to this as
2 irrelevant.

3 **MR. BARNETT:** I think one of the things that the
4 defense has brought up about the two children is how
5 he felt about the children and so forth and all of
6 that. We heard all through the guilt phase about
7 that.

8 **THE COURT:** Let me think about this for a
9 minute.

10 I need for you all to go back to the jury room
11 please.

12 (WHEREUPON, the jury exits at approximately 6:59 p.m.)

13 **THE COURT:** Is there something you want to say?

14 **MR. BARNETT:** Yes, sir. The other thing too is
15 we are talking about the defendant's character. I
16 think one of the things would be the character on how
17 the defendant treats his children as to all of that.
18 We heard all of that in the guilt phase that that was
19 one of the reasons why he did what he did.

20 (WHEREUPON, there was a pause.)

21 **THE COURT:** I think that I will overrule the
22 objection. The testimony is relevant. In response
23 to the suggestion that was made in closing argument of
24 the defendant that suggested that Mr. Lindsey just
25 wanted to maintain a close relationship with his

1 children and all he wanted to do was see his children.

2 Now, I guess the thing that kind of concerns me
3 is a dad is not out of line in kind of joking around
4 with his son in ways that other folks might not
5 understand. But I believe that that is something
6 that can be addressed during cross-examination.
7 Exactly what is the nature of these comments is
8 something that could be bought out with rebuttal
9 evidence. There is no question in my mind that the
10 evidence is relevant.

11 **MR. BARNETT:** Your Honor, I know Mr. Bartosh
12 has no objection to this. I'm going to ask her about
13 the youngest one about what the dad used to give him
14 to drink in the baby bottle, beer. I'm going to going
15 down that line. I think it goes to character and
16 obviously what they brought up during the guilt phase.
17 I think it is totally relevant.

18 **THE COURT:** There is apparently some evidence
19 that he gave the child beer out of a baby bottle?

20 **MR. BARNETT:** Yes, sir.

21 **THE COURT:** What else?

22 **MR. BARNETT:** The other stuff, we'll be talking
23 about him hitting Nell and things like that. That is
24 totally relevant. Concerning the two kids, his
25 oldest son he called a fag. That's what we're talking

1 about. How he treated the oldest one.

2 There's been an incident where basically if I
3 understand what the testimony is going to be, his own
4 son wanted to go with him one day. He told the oldest
5 son you're not going with me, Trey's going. The
6 other son came in crying. She witnessed that.

7 **THE COURT:** Let's take it one at a time. If
8 there's evidence that he gave a young child beer, that
9 is a crime. That is not just something that somebody
10 should do. That is a crime. Aren't they entitled to
11 prove crimes as bad acts even though there is no
12 conviction?

13 **MR. BARTOSH:** I am not so concerned about that,
14 Your Honor, as I am with what the witness initially
15 said when asked about his children, she said he loved,
16 they loved their dad. But there were things that he
17 did that she did not approve of.

18 **THE COURT:** I am going to draw the line. I
19 think that telling the oldest son that he cannot go
20 unless there is some -- I mean I have done that. I
21 take my children places sometimes. I don't let them
22 all go. I just don't see the significance. I don't
23 see the relevance of that. If there's more to it,
24 maybe we need to hear it.

25 **MR. BARNETT:** The reason he wouldn't let him go

1 is because he wouldn't be able to tell on his
2 girlfriend and things like that. Trey couldn't talk
3 about it cause he was too young.

4 **THE COURT:** That is an argument that may be
5 made based on evidence that may come in. How are you
6 going to get the evidence in through this witness?

7 **MR. BARNETT:** She observed and saw what the --

8 **THE COURT:** She observed that he would not let
9 the oldest child go. But she obviously does not know
10 what's going on inside of the mind of Mr. Lindsey as
11 to why. How did she know why? How does she know
12 that he did that in order to keep the oldest child
13 from being able to tell that he went off with other
14 women?

15 **MR. BARNETT:** That is basically what he told
16 several people. I don't know if he has personally
17 told her that or not.

18 **MR. BARTOSH:** That who told?

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

20 **MR. BARNETT:** Basically Alex had told his
21 mother. That's why he quit taking him places. She
22 witnessed that conversation, the oldest son Alex.

23 **MR. BARTOSH:** How old was he?

24 **THE COURT:** Alex told the mother, this witness
25 will testify that she saw Alex tell his mother that

1 one time when he went off with Mr. Lindsey, Mr.
2 Lindsey was messing around with other women.

3 **MR. BARNETT:** Uh-huh (affirmative). That is
4 correct.

5 **THE COURT:** From that point forward, Mr.
6 Lindsey would not take Alex with him.

7 **MR. BARNETT:** Yes. I hate to bring this up
8 early. But I know he is going to have objections to
9 this. We may as well clear it up while the jury is
10 not in here.

11 **THE COURT:** I don't think I have any problem
12 with there being evidence that he was doing things
13 with other women while he had his children with him.
14 But to me, it is a fairly big leap to say, for me to
15 allow the jury to -- you're going to argue to the jury
16 that the reason he quit taking Alex with him was
17 because Alex would tell on him.

18 **MR. BARNETT:** I'm not argue that to the jury.

19 **THE COURT:** That is the inference you want the
20 jury to draw. You just got finish telling me that.

21 **MR. BARNETT:** Yes, sir. We're not going to be
22 arguing. Obviously, she's going to testifying.

23 **THE COURT:** That is the inference you want to
24 draw from this testimony.

25 **MR. BARNETT:** Yes, sir.

1 **THE COURT:** I think that is too big of a leap
2 based on what I've heard. I think that to get the
3 jury to conclude that that's the reason that he -- to
4 me, what is important is that he was doing it, that he
5 was messing around with other women while he had his
6 children with him. You might could, I can see how
7 that could be useful to prove that by proving that in
8 order to keep from being discovered for that, he quit
9 taking his oldest son was him. Somehow, you've got
10 to get -- I think you have not yet established the
11 foundation for why he stopped taking Alex with him.

12 **MR. BARNETT:** Yes, sir.

13 **THE COURT:** You are welcome to try to do that
14 now or do it in front of the jury. At this point,
15 I'm inclined to sustain his objection about him not
16 taking Alex with him when he took Trey.

17 **MR. BARNETT:** What you like for me to ask a few
18 questions?

19 **THE COURT:** That will be fine. That's up to
20 you.

21 **BY MR. BARNETT:**

22 **Q** Ms. Smith, would he take Alex with him all the
23 time when he would go out?

24 **A** Not often.

25 **Q** Who would he take with him?

1 **A** He usually would take Trey.

2 **Q** Did you witness an occasion when Alex went out
3 and jumped in his truck?

4 **A** Yes, I was in the front yard. I heard him
5 calling a boy. I thought he was calling both of them. But
6 when Trey jumped in and Alex jumped him, he told Trey to
7 get out.

8 **Q** What does Alex do?

9 **A** He jumped down and went crying. He went back
10 into the house.

11 **Q** Did he ever in front of you tell Nell or tell his
12 dad or did his dad ever say why he could not go?

13 **A** One time he came in the house crying saying his
14 daddy or somebody got mad at him because he wouldn't call
15 some girl he was with mama.

16 **Q** Did he ever say that, did you ever hear Nell or
17 did you ever hear Marion say that he wouldn't take him
18 because he would tell Nell what was going on?

19 **A** No, he wouldn't say it.

20 **THE COURT:** All right. If that comes up, I'm
21 inclined to sustain the objection.

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

23 **THE COURT:** Bring in the jury.

24 (WHEREUPON, the jury enters at approximately 7:10
25 p.m.)

1 **THE COURT:** Go ahead.

2 **MR. BARNETT:** Thank you, Your Honor.

3 **BY MR. BARNETT:**

4 **Q** Ms. Smith, what would he call his oldest son
5 Alex?

6 **A** I heard him call him a fag.

7 **MR. BARTOSH:** Your Honor, I would object to
8 that.

9 **THE COURT:** Already ruled. Overruled.

10 **BY MR. BARNETT:**

11 **Q** Why would he call him that?

12 **MR. BARTOSH:** I'm going to --

13 **THE COURT:** Sustained.

14 **MR. BARTOSH:** -- object to that. How would she
15 know.

16 **THE COURT:** Sustained.

17 **BY MR. BARNETT:**

18 **Q** Did he ever say why he called him that?

19 **A** Yes.

20 **MR. BARTOSH:** Your Honor --

21 **THE COURT:** Wait, wait, wait, wait. That would be
22 a yes or no question.

23 **THE WITNESS:** Huh?

24 **THE COURT:** Answer that question yes or no.

25 **THE WITNESS:** Oh, yes.

1 BY MR. BARNETT:

2 Q And Mr. Lindsey said that?

3 A Uh-huh (affirmative).

4 Q Mr. Lindsey said why, is that right?

5 A Oh, yeah.

6 Q And why did he say that he called him that?

7 A He wanted to play with dolls and pocketbooks. He
8 only played with little girls because I had girls. Plus
9 he was always with his mom when she went places. He was
10 around women and girls.

11 Q His youngest son, what did his youngest son call
12 him?

13 A His road dawg.

14 Q Would Marion give him something to drink in a
15 baby bottle?

16 A He would give him beer.

17 Q Why did he give him beer?

18 A He said it made a man out of him.

19 Q Did you see him drinking beer?

20 A Yeah. Nell would try to fuss. But she did not
21 want to cause nothing so she would be quiet.

22 Q Was you at their house one time when Marion drove
23 up on a motorcycle?

24 A Yes. I was over there. He pulled up on a
25 motorcycle. He came in the house. It looked like he was

1 getting something. Nell happened to walk past the door.
2 And she said who is that girl on your bike. And he said
3 what girl. She said it was a girl sitting on there your
4 bike. She wanted to know who she was.

5 He said Get away from the door. It's none of your
6 business. She said No, I want to know who this girl is on
7 your bike. He said Didn't I tell you to shut up. Then
8 he turned around. And he hit her. And she fell on Trey.
9 So I grabbed Trey and put him in the bedroom and Alex and
10 told them to grab a book and I would read a book to them.

11 I went back out and asked Nell if she was okay. She
12 said she was okay. They were fussing or whatever they
13 were doing. I went in the bedroom with the boys and
14 closed the door and started reading a book.

15 Q Slow down a little bit.

16 A Uh-huh (affirmative).

17 Q When you went in the room and you started reading
18 the book, what happened then?

19 A I just heard fussing and fighting. They were
20 fussing and screaming. They finally left out.

21 Q The kids were in there with you?

22 A Yes.

23 Q And why did you take them in the room?

24 A Because he told me to go home. I told him I
25 wasn't leaving until I knew the boys were okay.

1 **Q** And did he do this in front of the boys?

2 **A** Yes.

3 **Q** Did Mr. Lindsey have friends come over?

4 **A** Yes. He had friends come over often. I don't
5 know if they watched -- yeah, they watched games or
6 whatever.

7 **Q** And when they came over and after they left, who
8 would clean the house?

9 **A** Nell would have to get up. Even if she's already
10 went to bed. She wouldn't fuss about it. She would just
11 have cleaned the house up. She had to have the house clean
12 before she went to bed or whatever. She would have to get
13 right back up and clean it up again.

14 **Q** So she would work during the day --

15 **MR. BARTOSH:** Your Honor, I'm going to object
16 to that as irrelevant.

17 **MR. BARNETT:** Your Honor, I think it goes to
18 character.

19 **THE COURT:** Well, I'm not sure that you might
20 didn't leave something out. Let me see you for a
21 second.

22 (WHEREFORE, a bench conference was held off of the
23 record.)

24 **BY MR. BARNETT:**

25 **Q** Did you ever see bruises on Nell?

1 **A** Yes, I have.

2 **Q** Where did you see the bruises at?

3 **A** She had a black eye a lot and maybe bruises on
4 her arm.

5 **Q** Where did she say she got them from?

6 **A** She always fell. She'd said I fell or I this or
7 that. Anything other than being hit by him.

8 **Q** Before this incident occurred when she was
9 killed, had she talked to you?

10 **A** She called me the night before. She wanted me
11 to help her. She call me and wanted me to help get a job
12 at Greenville Memorial because I used to work there. She
13 wanted me to help her relocate to Greenville because she
14 said she wanted to get away. I said I wasn't going to
15 help her move to Greenville because we wouldn't be able to
16 help her if she is way in Greenville. She said do you
17 think they would let him out of jail and I said no way.
18 Ain't no way.

19 **MR. BARTOSH:** Objection. Your Honor, may we
20 approach?

21 (WHEREFORE, a bench conference was held off of the
22 record.)

23 **THE COURT:** The objection was made as to
24 foundation. I believe a sufficient foundation is laid
25 because there is an inference to be drawn from the

1 witness that what she said was what she heard to have
2 been said. The proper foundation has been laid.
3 Overruled.

4 **BY MR. BARNETT:**

5 **Q** She called you that night and she wanted to leave
6 Spartanburg?

7 **A** She wanted me to help her move to Greenville and
8 get a job in Greenville.

9 **Q** You did not want her to move?

10 **A** I told them if she moved to Greenville, there
11 would be no family there to help her. She was in the
12 bathtub at that time. And she mentioned, she asked me
13 about him getting out of jail. I told her I did not
14 believe they would let him out.

15 It stuck to me because I could hear her get out of the
16 bathtub and go look out of the window because she said she
17 heard loud music. That's what got to me. She was really
18 scared that he was going to be out. I said I know
19 somebody will call you and let you know that he's out.
20 They're not just going to let him out like that.

21 **Q** She was scared?

22 **A** She was scared.

23 **Q** You heard her get out?

24 **A** Yeah, I heard the water.

25 **Q** Please answer any questions Mr. Bartosh may have

1 for you.

2 **CROSS-EXAMINATION**

3 **BY MR. BARTOSH:**

4 Q How much time did you spend over at their house?

5 A After a certain point, I told her I would no
6 longer be able to come over there because I was afraid I
7 would get in trouble at their house. I told her if she
8 needed me or if she ever needed anything to call me.

9 Q That is not my question, ma'am. How much time
10 did you spend their house?

11 A Which house?

12 Q All right. Tell me which house.

13 A When they were behind Ingles, I might have went
14 over there maybe out of a month, maybe four times. But
15 when they moved to Inman, I would not go over there as
16 much. I went over the maybe twice out of the month. Like
17 I said, I tried to keep myself away from him because I
18 figured I would get in trouble or in between something that
19 will go on at the house.

20 Q But you're speculating on that.

21 A No. I had a discussion with my husband because
22 at that time they were fighting. I wanted to go and get
23 involved. And after that, I felt like I will be
24 endangering myself.

25 Q So you wanted to step in the middle of it?

1 **A** Yes, I did.

2 **Q** And when you saw Mr. Lindsey give his child beer
3 in a bottle --

4 **A** Uh-huh (affirmative).

5 **Q** -- you were present?

6 **A** Yeah.

7 **Q** How did he do it? Was it in a can or in a
8 bottle?

9 **A** In a bottle.

10 **Q** What did he do?

11 **A** He poured it in a bottle and sent it outside to
12 him and give it to him.

13 **Q** Sent it outside?

14 **A** Yeah, by his brother or whoever or he would bring
15 it.

16 **Q** You would see him drink it?

17 **A** Yes.

18 **Q** You go out there with them?

19 **A** Yes.

20 **Q** The house, which was the first house that they
21 lived in?

22 **A** They moved in with a friend one time, from my
23 knowledge over behind Ingles on Asheville Highway.

24 **Q** What did the house look like?

25 **A** It was a trailer.

1 Q Where did they go from there?

2 A I believe they moved in with his friend Chris and
3 his wife.

4 Q How long did they live there?

5 A I'm not sure. That is the point. That is the
6 time I did not go around that much. Those were his
7 friends and at his friend's house. I did not want to be
8 involved.

9 Q Okay. You remember the color of the trailer?

10 A The one they lived in?

11 Q Uh-huh (affirmative).

12 A It was gray or brown I believe. I'm not sure.

13 Q You have no way of knowing -- when Mrs. Lindsey
14 told you that you saw the bruising and black eyes and
15 things like that, she said she fell?

16 A What about it?

17 Q Is that what she told you?

18 A Yes, she would tell everybody.

19 Q Okay. You had no reason to believe otherwise,
20 did you?

21 A Of course.

22 Q I'm sorry?

23 A Yes.

24 Q You had actual knowledge of how she got those
25 bruises?

1 **A** No.

2 **Q** So you had no reason to believe any different
3 than what she told you?

4 **A** Uh, yes.

5 **Q** Did you have actual knowledge how she got them?

6 **A** I don't know how she got it --

7 **MR. BARNETT:** Objection, Your Honor.

8 **THE COURT:** Overruled. Overruled.

9 **BY MR. BARTOSH:**

10 **Q** So you're speculating on how she got it?

11 **A** No, it is just a belief.

12 **Q** That is all I have.

13 **MR. BARNETT:** Just a couple on follow-up, Your
14 Honor.

15 **REDIRECT EXAMINATION**

16 **BY MR. BARNETT:**

17 **Q** Again, why did you quit going to the house?

18 **A** Like I said, I didn't want to get involved.

19 When I saw him hit her, I always told her that she was
20 bigger than him. I would always laugh. I said why don't
21 you smack him around. You are bigger than him. She was
22 not a fighter. She wanted do anything to keep peace.

23 **Q** Why was that?

24 **A** She said she did not grow up with her dad present
25 and she wanted for her boys to have their dad around. I

1 told her that for the boys to see that, that ain't going to
2 help in the future. No matter how long she was with him,
3 that was not going to help the boys. But she suggested
4 that the reason that she stayed was because she wanted them
5 to be with their dad.

6 Q Thank you, ma'am.

7 MR. BARTOSH: Nothing further.

8 THE COURT: You can step down, ma'am.

9 MR. BARNETT: May we approach?

10 (WHEREFORE, a bench conference was held off of the
11 record.)

12 CHRIS SMITH

13 having first being duly sworn testified as follows:

14 DIRECT EXAMINATION

15 BY MR. WILLINGHAM:

16 Q Tell the jury who you are.

17 A My name is Chris Smith.

18 Q Mr. Smith, where do you work?

19 A Right now, I'm employed by the DEA. I am in
20 basic training in Virginia.

21 Q Where did you work back in September of 2000?

22 A I was a narcotics investigator with the
23 Spartanburg County Sheriff's Office.

24 Q As a narcotics investigator on September the 14th
25 2000, you had an opportunity to arrest Marion Lindsey?

1 **A** Yes, I did.

2 **Q** Do you see Marion Lindsey in this courtroom?

3 **A** Yes, I do.

4 **Q** Point him out for the jury.

5 **A** (Pointing.) He's sitting here in the gray plants
6 and the striped long sleeve shirt.

7 **Q** Tell the jury where you arrested Marion Lindsey?

8 **A** I arrested him on Highway 290. It was right off
9 of Interstate 290 in Duncan. It was in the parking lot or
10 just as you exit the parking lot of the Denny's restaurant.

11 **Q** That is in Spartanburg County?

12 **A** That is in Spartanburg County.

13 **Q** How did you get to that location?

14 **A** We did what we call an order take down. That is
15 where you order up a quantity of drugs from an individual
16 who you target. As your target brings the drugs that you
17 requested, you stop on the way of right afterwards.

18 **Q** In this case, who was the target?

19 **A** The target was Marion Lindsey who we referred to
20 as Myron.

21 **Q** What did you order up?

22 **A** We ordered up two ounces of crack cocaine.

23 **Q** Where were you supposed to initially meet?

24 **A** We originally planned on meeting there at the
25 Pilot gas station which is just off of 290.

1 Q Did you in fact meet there?

2 A No, we did not.

3 Q Where did you ultimately end up?

4 A We ended up in the Denny's parking lot.

5 Q What happened in the Denny's parking lot?

6 A At the Denny's parking lot, we were, we
7 established surveillance of the parking lot, established
8 surveillance of the source in the parking lot. Lindsey
9 pulled up to the parking lot. We received information to
10 go ahead and proceed with the take down of Mr. Lindsey.

11 Q When you say proceed with the takedown, tell the
12 jury what you mean, what did you do?

13 A As his vehicle exited the parking lot, we pulled
14 along behind Mr. Lindsey. We had another narcotics unit
15 pulled in front of him. So we would have a vehicle
16 containment on the front and the rear side of his black
17 suburban. We pulled up behind his black suburban. I
18 observed him toss a package, a clear package out of the
19 passenger window.

20 Q Now you said he was in a black suburban?

21 A Yes.

22 Q Was he driving the black suburban?

23 A No, he was the passenger.

24 Q Who was driving?

25 A He had a female, I believe, her last name was

1 Curly that was driving.

2 Q Where was the defendant Mr. Lindsey sitting?

3 A He was sitting in the front passenger side.

4 Q Where did you see the object come out of the
5 vehicle?

6 A The object came out of the front passenger side.

7 Q You indicated you saw an arm?

8 A Yes, sir. You could see an arm come out.

9 Q Whose arm?

10 A It was Mr. Lindsey's arm.

11 Q Did you in fact recover what was thrown out of
12 the window?

13 A Yes.

14 Q Where did you recover it?

15 A It was sitting there by the curb on the asphalt.

16 Q Who recovered it?

17 A I recovered it.

18 Q What did you do with it after you recovered it?

19 A We placed it in evidence. We field tested it to
20 see if it tested positive for crack cocaine. Then we
21 placed it in the, we called it an emergency drop box. It
22 is a drop box at the sheriff's office where you place drugs
23 in after-hours if there is no evidence custodian.

24 Q Was it placed in a best bag?

25 A Yes.

1 Q Explain to the jury what a best bag is.

2 A A best bag is just a bag. It's supposed to be a
3 tamper proof bag plastic bag that you place the drugs in.
4 You sign it, put a custody of evidence on it. Custody of
5 evidence would be who touched it first and a sequence of
6 who touches the evidence from that point on.

7 Q Was that bag sealed?

8 A Yes, it was.

9 Q Was the substance inside?

10 A Yes.

11 Q You said you placed that into a drop box?

12 A Yes, in a drop box.

13 Q Why did you not give it to an evidence
14 technician?

15 A Late at night, there is not an evidence custodian
16 working. We have a metal drop box. It looks like
17 basically the same shape as a mailbox. It is a door that
18 pulls down and the evidence falls into it.

19 Q Did you in fact sign the arrest warrant for
20 Marion Lindsey?

21 A Yes, sir.

22 Q What did you charge him with?

23 A Trafficking crack cocaine.

24 Q As far as you know, is that charge still pending
25 against Mr. Lindsey?

1 **A** Yes.

2 **Q** Whose responsibility is it to prosecute those
3 cases?

4 **A** Pardon me?

5 **Q** Whose responsibility is it to prosecute those
6 cases?

7 **A** The State of South Carolina.

8 **Q** Ours?

9 **A** Yes, sir.

10 **MR. GOWDY:** Your Honor, at this time --

11 **THE COURT:** All right. We are experiencing or
12 they are experiencing some minor witness coordination
13 issues. We're going to take a short break right now,
14 wait for another witness to arrive. We will resume
15 immediately upon their arrival. Take a short break.
16 (WHEREUPON, the jury exits at approximately 7:34 p.m.)

17 **THE COURT:** Didn't I go through my analysis
18 under Rule 403 on those pictures of Mrs. Lindsey in
19 the car? Didn't I do that?

20 **MR. BARNETE:** Yes, sir. Me and Mr. Bartosh
21 approached you before and you addressed it.

22 **THE COURT:** On the record?

23 **MR. BARNETE:** I don't know if you went on the
24 record. You went at sidebar, the analysis, Your
25 Honor.

1 **MR. BARNETE:** I believe you did, Your Honor.

2 **THE COURT:** Well, bring me the pictures.

3 **MR. BARNETE:** Yes, sir. That was 73 and 46,
4 right, Your Honor? We also have four Court Exhibits
5 that you entered into the record also.

6 **THE COURT:** I remember discussing all of that on
7 record.

8 **MR. BARNETT:** Yes, sir. You did discuss that on
9 the record. I do remember the Court exhibits. You
10 had put that on the record. We have four exhibits
11 that were court exhibits. We talked about those
12 being more gory than the ones that were in the
13 evidence. Mr. Bartosh did verify that. We
14 discussed that on the record.

15 **THE COURT:** I discussed on the record how the
16 proximity of the bullet hole to where she is sitting
17 is one of the reasons I found it to be, have high
18 probative value?

19 **MR. BARNETE:** Yes, sir.

20 **THE COURT:** I think I did.

21 **MR. BARNETE:** Yes, sir. You did.

22 **THE COURT:** I'm going to step out in the back
23 hall. Be ready to jump as soon as that witness gets
24 here.

25 (WHEREUPON, a short recess was taken at approximately

1 7:35 p.m.)

2 (WHEREUPON, the Court resumed at approximately 7:58
3 p.m.)

4 **THE COURT:** All right. Bring in the jury.

5 Let me ask you this. Based on where we are right
6 now, what do you expect in terms of when the State
7 will finish in terms of putting up its evidence in
8 this phase?

9 **MR. GOWDY:** 11:30 or 12:00 tomorrow, Your
10 Honor.

11 **THE COURT:** Okay.

12 (WHEREUPON, the jury enters at approximately 8:01
13 p.m.)

14 **THE COURT:** All right. Ladies and gentlemen, many
15 times you see me having to weigh one thing on side and
16 one thing on the other. Right now, I am weighing the
17 fact that there's supposed to be hot pizza waiting on
18 you at your hotel in a few minutes against the need to
19 get a little bit more work done tonight. I decided
20 that the pizza substantially outweighs the need for
21 work.

22 I am taking a break for the night and sending you
23 to the hotel. We will start back tomorrow morning at
24 9 o'clock. We would treat tomorrow just like any
25 other work day. We look forward to seeing you all in

1 the morning. Have a nice night.

2 (WHEREUPON, the jury exits at approximately 8:02 p.m.)

3 THE COURT: All right. Y'all need to take
4 anything up before we break?

5 MR. BARTOSH: No, sir.

6 MR. GOWDY: Not from the State, Your Honor.

7 THE COURT: All right. We will be in recess
8 until 9:00. Again, I would be here at least by 8:15.
9 So if y'all need to bring anything up, bring it up in
10 time for us to be finished with it before 9:00.

11 MR. GOWDY: In light of that and in light of
12 tomorrow being Sunday and the weather, would you like
13 for us to have the automobile ready to be viewed first
14 thing at 9:00.

15 THE COURT: That will be fine.

16 MR. GOWDY: Okay.

17 THE COURT: Yeah. That will be good.

18 MR. GOWDY: Okay.

19 (WHEREUPON, the Court adjourned at approximately 8:03
20 p.m.)

21 (WHEREUPON, the Court resumed on May 23, 2004 at
22 approximately 9:00 a.m.)

23 THE COURT: Good morning.

24 MR. GOWDY: Good morning.

25 THE COURT: All right. I understand we have an

1 issue with the car seat in the car. You're going to
2 put up a, are y'all going to show the car first?

3 MR. GOWDY: Your Honor, we would like to. In
4 light of the fact, I didn't tell Ms. Nesbitt to be
5 back here this morning. And in light of that, she is
6 not here. We are fine with the jury seeing the car
7 without the car seat in it. There are pictures that
8 show the car seat in it and where it was. I am fine
9 having the jury view the car without the car seat.

10 THE COURT: Okay. Whatever you want to do. Then,
11 is that what you want to do first?

12 MR. GOWDY: It's suits us fine, Your Honor.
13 And given the fact that it is quiet outside and not
14 hot.

15 THE COURT: Okay. And let's see. You've got an
16 objection? Did we deal with that?

17 MR. BARTOSH: To the?

18 THE COURT: To the car.

19 MR. BARTOSH: Yes, sir.

20 THE COURT: To the view of the car.

21 MR. BARTOSH: Yes, sir. We dealt with that.
22 And you overruled my objection.

23 THE COURT: I'm not sure that I did. I think I
24 said that I needed to go see the car before I would
25 rule on it, didn't I? Let's do this. What is the

1 objection?

2 **MR. BARTOSH:** The objection is, Your Honor, my
3 understanding the reason they want to view the car is
4 to see the sides and the back seat.

5 **THE COURT:** Okay. Show me the Rule number under
6 which you make an objection. Is it Rule 403?

7 **MR. BARTOSH:** Yes, sir. There are other ways
8 to avoid a possible prejudicial effect.

9 **THE COURT:** What I'm going to do then is I'm going
10 to walk out there right now with y'all and look at the
11 car. But before I do that, I want you to tell me on
12 the record what you believe the potential for unfair
13 prejudice is.

14 **MR. BARTOSH:** Your Honor, it's the automobile
15 that -- they've been showing pictures of a person and
16 a person died. It's very seldom that a jury gets to
17 see the actual place where the crime occurred. Very
18 seldom do they take people out to --

19 **THE COURT:** How is that any different from them
20 having in evidence the weapon that fired the shots?
21 It's the actual weapon that fired the shots that
22 killed the lady.

23 **MR. BARTOSH:** I just think there is a
24 difference. They've got to prove that. They've got
25 to prove that that was the weapon. Here they don't

1 have to.

2 **THE COURT:** All right. Anything else?

3 **MR. BARTOSH:** No, sir.

4 **THE COURT:** Let's go look at it.

5 (WHEREUPON, the Court exits the courtroom at
6 approximately 9:05 a.m.)

7 (WHEREUPON, the Court enters the courtroom at
8 approximately 9:11 a.m.)

9 **THE COURT:** All right. Mr. Gowdy?

10 **MR. GOWDY:** Yes, sir, Your Honor. Ms.
11 Nesbitt is actually on her way to the courthouse and
12 should be here in less than 30 minutes. In light of
13 that, we would propose to continue on with our
14 presentation of other witnesses. And assuming she
15 does get here in a reasonable period of time, then
16 take her as a sponsoring witness.

17 **THE COURT:** That will be fine. All right. Now,
18 we're going to -- you're going to go forward with this
19 attempt to prove the drug trafficking charge?

20 **MR. GOWDY:** Yes, sir.

21 **THE COURT:** Any objection at this time, Mr.
22 Bartosh?

23 **MR. BARTOSH:** Your Honor, overnight, Mr.
24 Brennan did some research and he found a case. The
25 State versus Nadie which they've got a chemist and a

1 solid chain of custody then they could do that. They
2 could introduce it into evidence without the drugs.

3 **THE COURT:** So you have no objection?

4 **MR. BARTOSH:** The issues that we raised.

5 **THE COURT:** All right. Bring the jury in.

6 Mr. Smith, you can go ahead and sit in the jury
7 box. I will remind you that you are still under oath.

8 **THE WITNESS:** Yes, sir.

9 (WHEREUPON, the jury enters at approximately 9:16
10 a.m.)

11 **THE COURT:** You know, I'll tell you what, I'm
12 going to, I have one quick thing that I'm going to
13 have to go on the record outside of the presence of
14 the jury before we move forward. I apologize to
15 y'all. Good morning to you first of all. It's good
16 to see you.

17 I know you've seen a lot of this in and out. And
18 you might wonder sometimes what in the world they are
19 up to. But I've got something that we need to take
20 up. And it probably won't take one minute. So I need
21 you to go back in the jury room. And then we will
22 have you right back in here. I'm sorry. It's my
23 responsibility. I take it.

24 (WHEREUPON, the jury exits at approximately 9:17 a.m.)

25 **THE COURT:** All right. What State versus May

1 Baxley says is not that they don't have the drug in
2 the courtroom. It says that the defendant is
3 afforded under the due process clause the right to
4 have a meaningful opportunity to present his defense.
5 That includes the privilege to request and obtain
6 material from the State for testing. If the
7 defendant had thought or had wanted to put up evidence
8 showing that whatever that was was not crack cocaine,
9 the due process clause affords him the opportunity to
10 do that at the appropriate time. It is my
11 understanding that this case was on the trial docket
12 for some period of time, about a week after this
13 murder occurred, is that correct, Mr. Gowdy?

14 **MR. GOWDY:** Yes, sir, Your Honor.

15 **THE COURT:** So in order to make that -- so what
16 you're saying is the drug case, the trafficking case
17 was going to be tried or was at least on the docket to
18 be tried some time in the late September of 2002 time
19 frame?

20 **MR. GOWDY:** Yes, sir.

21 **THE COURT:** And the date, Mr. Smith, of your
22 arrest was what?

23 **THE WITNESS:** I believe it was September of
24 2000.

25 **MR. GOWDY:** September of 2000. The case

1 was two years old at the time of the murder and two
2 years old at the time it had been put on the trial
3 docket.

4 Mr. Bartosh, I'm assuming that you what you mean
5 when you say it's already been ruled on, you're just
6 assuming that that 2-year period of time is
7 sufficiently long for Mr. Lindsey to have sought some
8 independent testing if that's what he wanted to do?

9 MR. BARTOSH: Yes, sir.

10 THE COURT: He had a meaningful opportunity to
11 present a complete defense which would have included
12 the privilege of examining that evidence by an
13 independent chemist to determine exactly what it was.

14 MR. BARTOSH: Yes, sir.

15 THE COURT: And so you see no point in not going
16 forward. I agree with you. I just want to make it
17 clear that we all understand exactly what it is that
18 that case said, not just that the State has a right to
19 prove a drug case without the drugs.

20 This case addresses what the defendant's rights
21 are in terms of being able to examine the evidence and
22 present exculpatory evidence. The defendant has a
23 burden under this case of proving either that the
24 State destroyed it in bad faith or that the State
25 destroyed it and it had exculpatory value before the

1 defendant had a chance to explore the exculpatory
2 value.

3 MR. BARTOSH: Correct.

4 THE COURT: All right. Bring in the jury.

5 (WHEREUPON, the jury enters at approximately 9:21
6 a.m.)

7 THE COURT: Mr. Willingham.

8 MR. WILLINGHAM: Thank you, Your Honor.

9 CHRIS SMITH

10 having previously been sworn, testified as follows:

11 DIRECT EXAMINATION (con't)

12 BY MR. WILLINGHAM:

13 Q Mr. Smith, you testified the last evening that
14 the drugs that you retrieved off of Highway 290, that you
15 placed in evidence?

16 A Yes, sir.

17 Q And in a drop box?

18 A Yes, sir.

19 Q And before you placed it in a drug box, you
20 placed into a best bag?

21 A Yes.

22 Q Which is sealed?

23 A Yes, sir.

24 Q Does that best bag have a control number?

25 A Yes, sir.

1 Q What is the purpose of the control member?

2 A The purpose of the control number is to keep the
3 best bag coordinated with your chain of custody paperwork.

4 Q Is that control number unique to that best bag?

5 A Yes, it is.

6 Q Did you fill out a chain of custody form?

7 A Yes, sir.

8 Q Is the control number on that piece of evidence
9 001816?

10 A Yes, sir.

11 Q And it was sealed when you put it in the drop
12 box?

13 A Yes, sir.

14 Q Thank you.

15 THE COURT: Cross-examination?

16 CROSS-EXAMINATION

17 BY MR. BARTOSH:

18 Q Officer Smith, you said you received information
19 that Mr. Lindsey had the drugs?

20 A That he had the drugs?

21 Q Yes.

22 A He said he had the drugs on that day. I'm sorry.
23 I misunderstood you.

24 Q You said in your incident report -- have you
25 reviewed it?

1 **A** Yes, sir.

2 **Q** -- that you have received information that Mr.
3 Lindsey had the drugs on his person?

4 **A** Yes, sir.

5 **Q** Who did you receive that information from?

6 **A** A confidential source that I was working with at
7 the time.

8 **Q** All right. Had that source provided information
9 before?

10 **A** Yes, sir.

11 **Q** Had that source provided information that had led
12 to the arrest of other individuals?

13 **A** Yes, sir.

14 **Q** Had that source provided info that lead to
15 convictions --

16 **A** Yes, the source had.

17 **Q** -- of other individuals?

18 **A** Yes.

19 **Q** Now, was this event or incident videotaped?

20 **A** No, we did not videotape this.

21 **Q** Was it audiotaped?

22 **A** Yes, sir. We had what we call a kill recording.

23 That is a recording of a body transmitter. And we also had
24 a telephone recording.

25 **Q** Who was wearing the wiring?

1 A The confidential source.

2 Q The confidential source was in the vehicle with
3 Mr. Lindsey?

4 A No, sir. The confidential source was not in the
5 vehicle with Mr. Lindsey.

6 Q Well, the way I read your report was, you
7 received the information. You see Mr. Lindsey in a black
8 suburban. And you stopped him.

9 A Yes, sir.

10 Q Okay. There was no purchase?

11 A No, sir.

12 Q Where was the confidential source?

13 A That confidential source was there on the grounds
14 of Denny's restaurant just to, the purpose of the
15 confidential source there was just to confirm that Mr.
16 Lindsey was there.

17 Q I mean, you saw him, right?

18 A Sir?

19 Q You saw Mr. Lindsey?

20 A I saw, from where I was, I saw his vehicle pull
21 in. And we got information from a source stating that he
22 is here. Obviously, they did not have any money to make a
23 purchase. They were not supplied with any funds. He is
24 here. Come on in and make the arrest.

25 Q So, there was no purchase of anything?

1 **A** No, sir. There was no purchase.

2 **Q** And what happened, Mr. Lindsey, he never
3 stopped, did he?

4 **A** Pardon me?

5 **Q** He never stopped and talked to the source?

6 **A** He pulled alongside the source. I don't think
7 there was any conversation made between Mr. Lindsey and
8 the source. The source pulled away. And as Mr. Lindsey
9 pulled away, that is when the stop was made.

10 **Q** Mr. Lindsey, isn't it true that he never stopped
11 in the parking lot?

12 **A** I believe he pulled in beside the source for just
13 a moment.

14 **Q** And then backed out?

15 **A** I am not sure how he pulled along, if he pulled
16 away or backed out. But yes, he was beside the source for
17 just a moment.

18 **Q** Was there any conversation between them?

19 **A** Uh, there may have been a brief conversation. I
20 cannot recollect what it was at this point.

21 **Q** Did you listen to the tape?

22 **A** Yes, sir.

23 **Q** Was there conversation between them?

24 **A** I did not hear a conversation on that tape.

25 **Q** So there was no conversation between the two of

1 them?

2 A I did not hear one on the tape. I can only tell
3 you what the source told me.

4 Q So Mr. Lindsey drove, well, he was not driving,
5 was he?

6 A No, sir.

7 Q He was a passenger in the car?

8 A He was a passenger.

9 Q He just drove through the parking lot or the
10 driver drove through parking lot?

11 A Yes, that is correct.

12 Q And left?

13 A Uh, was attempting to leave.

14 Q And you stopped them?

15 A Yes, sir.

16 Q You stopped the car?

17 A Yes, sir.

18 Q Based on what?

19 A Based on the source relaying the information on
20 the wire something to the effect of he is here. We don't
21 have money to make purchase. As I stated, I could not,
22 from my recollection, I could not hear Lindsey's voice over
23 the wire transmission. So go ahead. The source was
24 giving us the go ahead to make the arrest.

25 Q The source did not know whether or not Mr.

1 Lindsey had drugs, did he?

2 **A** I can recount what the source told me later.

3 **Q** I'm talking about before.

4 **A** Well, a phone call have been made from the source
5 to Mr. Lindsey to purchase the drugs.

6 **Q** But no purchase was made?

7 **A** No purchase was made. That's correct.

8 **Q** No money was exchanged?

9 **A** No money was exchanged.

10 **Q** As a matter of fact, you didn't even give the
11 source any money, right?

12 **A** That is correct. The source did not have money.

13 **Q** So you obviously didn't think that a buy was
14 going to be made?

15 **A** We were not intending to make a buy. We
16 intending to order the drugs and stop him either along the
17 way or right as he was leaving.

18 **Q** You didn't trust the source?

19 **A** Yes, sir.

20 **Q** And you say you stopped the vehicle that Mr.
21 Lindsey was in?

22 **A** Yes, sir.

23 **Q** Mr. Lindsey was in the passenger side?

24 **A** Yes, he was in the passenger side.

25 **Q** When did you see the passenger or the object

1 leave the car?

2 A Just as soon as we pulled up behind him and had
3 him stopped, it was almost immediately after that.

4 Q How do you know that it was Mr. Lindsey that
5 threw the drugs out?

6 A I can see an arm toss it out the window, the
7 passenger-side window.

8 Q Right.

9 A The driver was a small Asian female. The arm
10 did it appeared to be Mr. Lindsey's and not that of the
11 female.

12 Q You did not actually see who threw the drugs out?

13 A I saw an arm that appeared to be a male arm from
14 the passenger-side window.

15 Q You did not see who threw the drugs out?

16 A Are you asking did I see a face with the arm?

17 Q Do you know the person that did?

18 A I did not see the face attached to that arm.

19 Q Describe the area where this happened.

20 A It is in Denny's parking lot. It is off of 290.
21 If you come off of I-85 and you are traveling south towards
22 Greenville, there's a Denny's parking lot and a Denny's
23 restaurant just to the left of 290.

24 Q So it is fair to say that the source was a
25 material witness to the event, is that correct?

- 1 **A** Can you define material witness in this event?
- 2 **Q** He set it up. He witnessed it.
- 3 **A** The source was there, yes, sir.
- 4 **Q** I mean he set it up and he witnessed it?
- 5 **A** Yes. Uh, excuse me. The source was not there
- 6 for the takedown.
- 7 **Q** No, what I am saying is that he set it up?
- 8 **A** Yes. That's correct.
- 9 **Q** He was present when he came by?
- 10 **A** Present when? Excuse me.
- 11 **Q** When the car arrived.
- 12 **A** Yes, sir.
- 13 **Q** Okay. So he was a material witness to this
- 14 event?
- 15 **A** Yes, sir.
- 16 **Q** What is his name?
- 17 **A** The source?
- 18 **Q** Yes.
- 19 **A** A John Miller.
- 20 **Q** Is he here? Is he available?
- 21 **A** No, he is not here at this time.
- 22 **Q** Okay. This was in the parking lot at Denny's?
- 23 **A** Yes, sir.
- 24 **Q** Can you describe the lighting?
- 25 **A** Denny's parking lot is well lit at night. It

1 has the halogen lights. It is a well lit parking lot.

2 Q So, what you are saying is that the person you
3 believed to be Mr. Lindsey threw out a package in a well
4 lit parking lot?

5 A Yes, sir.

6 Q In front of you?

7 A Yes, sir.

8 Q And you went right to it?

9 A Yes, sir.

10 Q That is all I have.

11 MR. WILLINGHAM: Your Honor, can we
12 approach?

13 THE COURT: Yes, sir.

14 (WHEREFORE, a bench conference was held off of the
15 record.)

16 (WHEREUPON, the following bench conference was held on
17 the record.)

18 THE COURT: All right. Did you get on the
19 record what he just said? He said that he thinks,
20 Mr. Willingham said he thinks that by the defense
21 lawyer asking questions about the reliability of the
22 source, that he has opened the door to going into
23 other incidents with where Mr. Lindsey sold --

24 MR. WILLINGHAM: Yes.

25 THE COURT: -- sold drugs. I don't see the

1 connection myself. To me, those will be relevant and
2 admissible any way I believe. If -- were they the
3 same confidential informant?

4 MR. WILLINGHAM: Yes, sir.

5 THE COURT: Then they are in my view an
6 additional, an additional source of relevance.

7 MR. WILLINGHAM: Yes, sir.

8 THE COURT: That's what you're talking about?

9 MR. WILLINGHAM: Yes, sir.

10 MR. BARTOSH: I would say that they would have
11 to have a source here to testify. I'm assuming the
12 sales were made to the source.

13 MR. WILLINGHAM: That is the other thing.
14 We could use the informant --

15 THE COURT: Mr. Smith can testify based on his
16 personal knowledge.

17 MR. WILLINGHAM: Yeah. Right.

18 THE COURT: If he monitored the transactions, he
19 should be able to testify about it. What you're
20 telling us is you're going to ask him about the other
21 two incidents?

22 MR. WILLINGHAM: There are two other cases
23 with a controlled buy.

24 THE COURT: You have an objection?

25 MR. BARTOSH: The source is not here. The

1 person who actually made the buy is not here.

2 **THE COURT:** So he -- all right. I am inclined,
3 I don't think I will sustain that objection. But I
4 am not sure that we're all on the same page here. So
5 what I think I will do is I will send the jury out and
6 let you ask him the questions. And we will all hear
7 the answers. And we will talk about it.

8 **MR. WILLINGHAM:** Okay.

9 **MR. BARTOSH:** All right.

10 (WHEREUPON, the bench conference concluded.)

11 **THE COURT:** Okay. Ladies and gentlemen, I will
12 have a matter of law that I will take up now. I will
13 send you back to the jury room for just a few minutes.

14 (WHEREUPON, the jury exits at approximately 9:36 a.m.)

15 **THE COURT:** Go ahead.

16 **BY MR. WILLINGHAM:**

17 **Q** Mr. Smith, the reason for the order up take down
18 on September 14, 2000 was because you had had two prior
19 transactions with Mr. Lindsey, is that correct?

20 **A** Yes, sir. That is correct.

21 **Q** That was on August 11, 2000 and June 28, 2000?

22 **A** Yes, sir.

23 **Q** And that case, those were actually drug buys?

24 **A** Yes, sir. Those were purchases.

25 **Q** Of crack cocaine?

1 **A** Yes, sir.

2 **Q** You were there?

3 **A** Yes, sir.

4 **Q** You monitored the transaction?

5 **A** Yes, sir.

6 **Q** Money was exchanged?

7 **A** Yes, sir...

8 **Q** Drugs were exchanged?

9 **A** Yes, sir.

10 **Q** They were taken into your custody?

11 **A** Yes, sir.

12 **Q** Because of those two prior incidents, that's how
13 you knew on September 14th, 2000, when you ordered up two
14 ounces of cocaine or crack cocaine, that Mr. Lindsey would
15 come with that material?

16 **A** Yes, he had been reliable in the past.

17 **Q** Was it the same informant on all three incidents?

18 **A** Yes.

19 **Q** That goes to reliability of your informant as
20 well, does it not?

21 **A** Yes, sir.

22 **THE COURT:** Mr. Bartosh, what objections, if any,
23 do you have to that line of questioning?

24 **MR. BARTOSH:** Your Honor, I think it violates
25 Mr. Lindsey's rights to confrontation. The person

1 who actually made the buy or who actually got the
2 drugs is not here. And it denies him his due right of
3 confrontation of that person. We would object to
4 that.

5 **THE COURT:** Let me make sure that I have my
6 hands on the full extent of Mr. Smith's personal
7 knowledge about what happened and what it is that was
8 sold.

9 **MR. WILLINGHAM:** Okay.

10 **BY MR. WILLINGHAM:**

11 **Q** Mr. Smith, on the June and August transaction --

12 **A** Yes, sir.

13 **Q** -- of 2000, you monitored the transaction?

14 **A** Yes, sir.

15 **Q** How?

16 **A** Visually and with recording.

17 **Q** On each occasion, how much drugs were brought?

18 **A** I have to look at the report. I think it was
19 from a half ounce to an ounce. Yes, it was a half ounce.
20 An ounce was requested on the second transaction. It fell
21 just about three grams short.

22 **Q** Okay. You supplied money to the informant?

23 **A** Yes, sir.

24 **Q** And the informant completed the transaction?

25 **A** Yes, sir.

1 **Q** In your view?

2 **A** Yes, sir.

3 **Q** In your view?

4 **A** Yes, sir.

5 **Q** Under your supervision?

6 **A** The first one was out of my view, but they pulled
7 around momentarily behind a building. Then they came
8 right back out. The second one was in view of the
9 investigators.

10 **Q** Yes, sir.

11 **Q** The substance that was purchased was what?

12 **A** Crack cocaine.

13 **Q** On both occasions?

14 **A** Yes, sir.

15 **THE COURT:** When you say in view of the
16 investigators the second time, were you one of the
17 investigators who saw it?

18 **THE WITNESS:** No, I saw the cars pull up beside
19 one another. But I believe it was Investigator
20 Henderson that was actually there to witness that
21 transaction.

22 **THE COURT:** The second one?

23 **THE WITNESS:** Yes, sir.

24 **THE COURT:** During the course of the second
25 transaction, did you see Mr. Lindsey?

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

2 **THE COURT:** And during the course of the first
3 transaction, did you see Mr. Lindsey?

4 **THE WITNESS:** Yes, sir. I saw him drive into
5 the lot.

6 **THE COURT:** And you recognized him?

7 **THE WITNESS:** Yes, sir. I knew him.

8 **THE COURT:** All right. How do you know it was
9 crack cocaine?

10 **THE WITNESS:** I believe we had it field tested
11 it. And we had a lab report from both incidences
12 stating it was crack cocaine.

13 **MR. BARTOSH:** Your Honor, if I could, this
14 witness saw neither transaction.

15 **MR. WILLINGHAM:** Judge, out of the abundance of
16 process because I want to afford the defendant every
17 possible privilege of due process, I will withdraw
18 that offer to go into his prior drug transactions. I
19 will ask Mr. Smith a few more questions in front of
20 the jury but not dealing with his prior drug
21 transactions.

22 **THE COURT:** Okay. Bring in the jury.

23 (WHEREUPON, jury enters at approximately 9:42 a.m.)

24 **MR. WILLINGHAM:** May it please the Court.

25 **BY MR. WILLINGHAM:**

1 Q Mr. Smith, in your testimony last night, you
2 indicated this occurrence or transaction is what you termed
3 a order up take down?

4 A Yes, sir.

5 Q You testified last night that in those situations
6 you order an amount of control substance?

7 A Yes, sir.

8 Q The transaction does not take place?

9 A That correct.

10 Q And the take down occurs?

11 A Yes, sir.

12 Q That is different from a buy bust?

13 A Yes.

14 Q Tell the jury what a buy bust is.

15 A A buy bust is where money is exchanged. There
16 is a transaction there. You come in and make the arrest
17 basically while both parties being, your source and the
18 target, is there on the scene.

19 Q The September 2000 incident was not a buy bust?

20 A No, sir.

21 Q No money was to exchange hands?

22 A No, sir.

23 Q No transaction was to take place?

24 A Yes, sir.

25 Q You are present for the order being placed?

1 A Yes, sir.

2 Q You are present for the take down?

3 A Yes, sir.

4 Q Do you know Marion Lindsey?

5 A Yes, sir.

6 Q Was Marion Lindsey in that parking lot?

7 A Yes, sir.

8 Q In the passenger's seat?

9 A He was in the passenger's seat.

10 Q Point him out to the jurors.

11 A (Pointing.) The gentleman sitting here the
12 defense table with the white shirt on.

13 Q Thank you, sir.

14 A Yes, sir.

15 MR. BARTOSH: One further question, Your Honor.

16 CROSS-EXAMINATION

17 BY MR. BARTOSH:

18 Q The windows in that vehicle, were they all dark
19 tinted?

20 A I cannot recollect that, sir.

21 Q You can not identify who was in the vehicle until
22 you got them out?

23 A That is correct.

24 Q Okay.

25 THE COURT: All right, sir. You can step down.

1 **MR. BARNETT:** Your Honor, the State would like
2 to call Brian Duncan to the stand please.

3 **BRIAN DUNCAN**

4 having first being duly sworn testified as follows:

5 **DIRECT EXAMINATION**

6 **BY MR. BARNETT:**

7 **Q** If you would, tell the jury your full name.

8 **A** My name is Brian Curtis Duncan.

9 **Q** Where do you work?

10 **A** Spartanburg County Sheriff's Office.

11 **Q** What is your position?

12 **A** Master Deputy on uniform patrol on first shift.

13 **Q** Back in September 14th of 2000, what was your
14 position and where were you working? What division?

15 **A** I was working for the sheriff's office at that
16 time as well. I was the Lieutenant Supervisor over
17 Narcotics.

18 **Q** Back then, did you also work with Chris Smith in
19 the narcotics' unit?

20 **A** I did.

21 **Q** Were you the supervisor for him?

22 **A** Yes.

23 **Q** On that date, did you have an occasion to meet
24 Marion Lindsey, the defendant in this case?

25 **A** Yes, I did.

1 Q If you would, explain to the jury the situation a
2 that led you up to meeting with him that day.

3 A Investigator Smith had an informant that had been
4 giving us information. We had been investigating Mr.
5 Lindsey. At that time on that day, the source called up
6 Mr. Lindsey and ordered up two ounces of crack cocaine.
7 There was discussion of a meeting place which was the
8 Denny's on 290 there in Duncan and a time to meet there.

9 We had investigators in the parking lot as well as the
10 source. Mr. Lindsey arrived in a vehicle that we knew to
11 belong to him. As he was getting ready to leave the
12 parking lot, we basically blocked his vehicle in where he
13 could not flee. We took the vehicle down. And we
14 handcuffed the subject.

15 Before that happened, I was in the vehicle with
16 Investigator Smith. I saw a hand throw an object out of
17 the passenger-side window. The object was recovered by
18 Investigator Smith. I saw it on the ground as well. At
19 that time, it appeared to me to be crack cocaine. Mr.
20 Lindsey was arrested that day.

21 Q This is Denny's off Exits 63, is that right?

22 A That is correct.

23 Q How was the lighting there?

24 A The lighting was good in the parking lot. There
25 are street lights as well as parking lot lights up at the

1 Denny's restaurant.

2 Q You knew what vehicle Mr. Lindsey was going to
3 be driving?

4 A Yes, we did.

5 Q When you saw the arm being thrown out, which side
6 was it thrown out of?

7 A It was thrown out of the passenger side front
8 window.

9 Q What kind of arm did that appear to be?

10 A The arm of an African-American. You can not
11 tell if it was male or not, but you could tell that it was
12 African-American.

13 Q And when y'all stopped the car, how quickly after
14 that was thrown out did y'all stop the car?

15 A Immediately.

16 Q When you immediately stopped it, who was the
17 occupants of the vehicle?

18 A Latrell Crump was driving the vehicle and Marion
19 Lindsey who was the passenger in the front passenger seat.

20 Q The lady that was driving, what race was she?

21 A From my recollection, she was an Asian female.

22 Q Did she appear to have the arm that threw the
23 crack cocaine out of that window?

24 A No, she did not.

25 Q This was in Spartanburg County?

1 **A** Yes, it was.

2 **MR. BARNETT:** One moment, Your Honor.

3 Please answer any questions Mr. Bartosh may have
4 for you. Thank you, sir.

5 **CROSS-EXAMINATION**

6 **BY MR. BARTOSH:**

7 **Q** It is fair to say you did not see person who
8 threw the object that was thrown out of the window, right?

9 **A** My testimony is it was the arm of an African-
10 American.

11 **Q** You didn't see the person. You don't know who
12 that person was.

13 **A** I know who the person was. I didn't see the
14 face.

15 **Q** You are assuming that?

16 **A** Sitting in the front passenger seat where it was
17 thrown out of.

18 **Q** I understand that. This incident happened
19 September 14th of 2000?

20 **A** Yes.

21 **Q** As of September 18, 2002, had the case gone to
22 court?

23 **A** Not to my knowledge.

24 **Q** Thank you.

25 **MR. BARNETT:** Short follow-up, Your Honor.

1 May it please the Court.

2 **REDIRECT EXAMINATION**

3 **BY MR. BARNETT:**

4 **Q** Y'all stopped him immediately. Is that correct?

5 **A** Immediately.

6 **Q** Who was the man that was in the passenger side of
7 that vehicle?

8 **A** Marion Lindsey.

9 **Q** Do you see him sitting in the courtroom today?

10 **A** Yes, sir. He is sitting at the defense table
11 with the white shirt on.

12 **Q** Thank you, sir.

13 **THE COURT:** You can step down, sir.

14 **MR. BARNETT:** We ask that the witness be
15 excused.

16 **THE COURT:** You are excused.

17 **MR. WILLINGHAM:** We call Jane Millwood.

18 **JANE MILLWOOD**

19 having first being duly sworn testified as follows:

20 **DIRECT EXAMINATION**

21 **BY MR. WILLINGHAM:**

22 **Q** Tell the jury who you are.

23 **A** Jane Millwood.

24 **Q** You work for the sheriff's department?

25 **A** Yes, I do.

1 Q How long you been at the sheriff's department?

2 A 24 years.

3 Q What do you do for them?

4 A Right now, for the past 11 years, I have been a
5 Master Deputy in the evidence division.

6 Q What does the Master Deputy in the evidence
7 division, what do you do on a daily basis?

8 A We pick up any evidence including drugs from the
9 drop box which is in the squad room and also from a locker
10 that is in the I.D. division.

11 Q You maintain custody of the evidence in your
12 patrol?

13 A Yes, we do until it goes to court or an officer
14 tell us that may be destroyed.

15 Q It is a secured facility?

16 A Yes, it is. There are only three keys to it.
17 I have one. And the other officer as a key. And our
18 captain has a key.

19 Q Back in September, September the 20th of 2000,
20 did you receive a best bag from the drop box that had been
21 placed in there by Chris Smith?

22 A Yes, I did.

23 Q Was it sealed when you received it?

24 A Yeah. A best bag is a sealed bag.

25 Q That bag has a control number?

1 **A** Yes, it did.

2 **Q** That control number on that bag is 001816?

3 **A** Yes, it was.

4 **Q** What did you do with that best bag?

5 **A** When I pick up one of these packages and it has
6 it's chain, this Form C, I take it back to my office and
7 just signed it in when I received it and which officer I
8 received it from, where I got it. In this case, I got it
9 from the drop box which would've been in this squad room.
10 I signed for a sealed best bag because I don't touch the
11 drugs. Then on September 22nd, I took it to Ashley Harris
12 to be tested.

13 **Q** During the time that it was in your custody and
14 possession on September 22nd, was that seal ever broken?

15 **A** No, sir.

16 **Q** Were the drugs ever tampered with or altered in
17 any way?

18 **A** No, sir. Once I log them in our computer, they
19 are locked in our drug box.

20 **Q** Who -- you said you gave it to Ashley Harris. Is
21 that correct?

22 **A** I did.

23 **Q** Who is Ashley Harris?

24 **A** He is our chemist at the lab.

25 **Q** Okay. And it was submitted to him for analysis?

1 **A** Yes, they were.

2 **Q** After they were submitted for analysis, it was my
3 understanding that the actual substance itself was true?

4 **A** Yes, it was.

5 **Q** When was that?

6 **A** 9/26/01.

7 **Q** That is after it had been analyzed?

8 **A** Yes.

9 **Q** Thank you. If you would answer any questions
10 Mr. Bartosh has.

11 **MR. BARTOSH:** No questions, ma'am.

12 **THE COURT:** All right, ma'am. You can step
13 down.

14 **MR. WILLINGHAM:** Your Honor, we call Ashley
15 Harris to the stand.

16 **ASHLEY HARRIS**

17 having first being duly sworn testified as follows:

18 **DIRECT EXAMINATION**

19 **BY MR. WILLINGHAM:**

20 **Q** Tell the jury who you are.

21 **A** Ashley Carlton Harris.

22 **Q** You work for the Sheriff's Office?

23 **A** Yes, I do.

24 **Q** What do you do?

25 **A** I'm the lieutenant over the forensic lab

1 responsible for testing controlled substances or drugs and
2 arson cases.

3 Q How long have you been at the sheriff's office?

4 A A little over five years.

5 Q Where did you work before you came to the
6 sheriff's office?

7 A In 1997, I was hired by the State Law Enforcement
8 Division or S.L.E.D. in Columbia. I worked there for a
9 little over two years before coming up to Spartanburg to
10 run a lab in Spartanburg.

11 Q Did you do the same type of work for S.L.E.D. as
12 you do for the sheriff's office?

13 A Yes, I did controlled substance analysis. And
14 Spartanburg County was one of my assigned counties when I
15 was at S.L.E.D.

16 Q What type of educational background do you have
17 that allow you to perform your duties?

18 A I have a Bachelor of Science and Chemistry from
19 Wofford College in Spartanburg. I have a Master of
20 Science and Analytical Chemistry from Furman University in
21 Greenville.

22 Q What kind of training do you have to allow you to
23 perform the duties?

24 A When I was hired in 1997, I was at graduate
25 school in analytical chemistry when I was hired in 1997 by

1 S.L.E.D. Upon being hired by S.L.E.D. I went through a
2 four-month training program in forensic drug analysis.
3 After completing that training course, I started receiving
4 cases. And we have a continuing education. I've been
5 taking at least 30 to 40 hours in training every year since
6 then in forensic analysis and instrumentation.

7 Q Have you have testified before concerning drug
8 analysis identification?

9 A Yes, sir. I have been qualified as an expert in
10 the State of South Carolina Courts 61 times prior to today.

11 MR. WILLINGHAM: At this time, I would ask to
12 have Ashley Harris qualified as an expert in the area
13 of drug identification analysis.

14 MR. BARTOSH: No objection.

15 THE COURT: All right. He is qualified as an
16 expert in that area.

17 MR. WILLINGHAM: Thank you, Your Honor.

18 BY MR. WILLINGHAM:

19 Q Tell the jury what you do whenever you analyze a
20 drug? When a drug comes to you, would you do with it?

21 A When a drug comes to the Spartanburg Sheriff's
22 Office, I go over and pick up those drugs. The drugs will
23 be dropped in the drop box because there are cases being
24 made and the evidence officers not there. I will go to
25 the evidence department and pick up evidence that has come

1 in.

2 They will be assigned a unique lab number. The lab
3 number is L for lab number and then two digits, 18 and the
4 year. If a case come in 2000, it will have 00 and then it
5 will have a four digit number after that. The digit will
6 be the number in which it came in in that year L00 would be
7 for the year 2000. 419 will be the 419th case that came
8 in. It is assigned a unique lab number.

9 It is also inspected to make sure the case is sealed,
10 that it has not been tampered with in any way. When items
11 are placed in a best bag, it is a temporary evident bag. I
12 will check over the seals of that bag to make sure it has
13 not been tampered with, no one has tried to open it or
14 changed the contents of that bag.

15 After it has been inspected or go back to the lab, I
16 will log it into our laboratory information management
17 system. When it comes time for it to be analyzed, I
18 analyze it. I will do another inspection of the bag to
19 make sure that it is properly sealed and hasn't been
20 tampered with. Then I will run an analysis on a sample
21 that is within that bag.

22 Q Did you receive a sample or a best bag in this
23 case?

24 A Yes, I did.

25 Q Did that best bag have a control number?

1 A Yes, sir. It did.

2 Q What was that control number?

3 A L001816.

4 Q When you received that bag, was it sealed?

5 A Yes, it was.

6 Q If it had not been sealed, what would you have
7 done?

8 A If evidence is found to be unsealed, the lab
9 would not analyze it.

10 Q At some point, did you break the seal?

11 A Yes, sir. On the day that I analyzed the case,
12 as I said, when it comes down for it to be analyzed, I take
13 it out of the safe that it is stored in our lab. Analyze
14 it to make sure that that bag has not been tampered with.
15 I simply place my initials, the letters OK, and the date
16 that I'm going to prep that case on the outside of that bag
17 and open that bag. I take everything out of the bag and
18 do inventory on it and start a laboratory worksheet on the
19 case itself.

20 Q Have you performed an analysis on the substance
21 that was in that bag?

22 A Yes, I did.

23 Q Based on that analysis, do you have an opinion as
24 to what that substance is?

25 A Yes.

1 **Q** What is that analysis?

2 **A** I would refer back to the report.

3 **Q** Let me show you what's just been marked as
4 State's Exhibit 81. Do you recognize that?

5 **A** Yes, sir. This is the lab report and my Form A
6 for L00897. The 897th case that come in in 2000.

7 **Q** That is that accompanying report to match up with
8 the best bag 001816?

9 **A** That's correct.

10 **Q** Does that report accurately reflect the results
11 of your analysis?

12 **A** Yes, it does.

13 **MR. WILLINGHAM:** Your Honor, I move State's 81
14 into evidence.

15 **MR. BARTOSH:** No objection.

16 **THE COURT:** Hold on just a second. Let me see
17 the exhibit please.

18 (WHEREUPON, the Court reviewed the document.)

19 **THE COURT:** Without objection -- have you seen
20 it?

21 **MR. BARTOSH:** Yes, sir.

22 **THE COURT:** It is admitted.

23 (WHEREUPON, State's Exhibit 81 was admitted into
24 evidence.)

25 **MR. WILLINGHAM:** Thank you.

1 BY MR. WILLINGHAM:

2 Q Based upon your analysis, were you able to
3 determine what the substance was?

4 A Yes.

5 Q What was it?

6 A I found it to be crack cocaine. Total weight of
7 11.41 grams.

8 Q Do you know the value of that substance?

9 A I know the approximate value.

10 MR. BARTOSH: Objection, Your Honor. He can
11 not say that. No foundation has been laid to where
12 he can say it.

13 THE COURT: Well, you are one or two questions
14 ahead. The question is do you know the value. The
15 answer is either Yes or No. That, before you get any
16 further, you have to lay a little foundation.

17 MR. WILLINGHAM: Yes, sir.

18 BY MR. WILLINGHAM:

19 Q Do you know the value --

20 THE COURT: So, that objection is overruled.

21 THE WITNESS: Yes, I would know the approximate
22 value.

23 BY MR. WILLINGHAM:

24 Q How would you know the approximate value?

25 A I have been doing drug analysis for about seven

1 and a half years now. I've assisted the narcotics units
2 in making take downs. I've assisted narcotics units in
3 prepping cases. And I've testified 61 times prior to
4 today. I worked with narcotics officers enough to gain
5 knowledge on what drugs are sold on the street for.

6 Q Do you know the approximate value of drugs on the
7 street based upon your experience in witnessing these
8 transactions?

9 A Yes, that's correct.

10 Q How much are those drugs worth?

11 THE COURT: Hold on one second.

12 MR. BARTOSH: Your Honor --

13 THE COURT: Is there an objection?

14 MR. BARTOSH: Yes, there is an objection.

15 THE COURT: State your objection.

16 MR. BARTOSH: The objection is that he is not
17 an expert on the value of drugs. He is a chemist.
18 He analyzes drugs.

19 THE COURT: Sustained at this point.

20 Foundation is incomplete.

21 If you would lay a little bit more detail of
22 foundation, I will be happy to reconsider the
23 question.

24 BY MR. WILLINGHAM:

25 Q Tell me again how much were those drugs.

1 **A** 11.41 grams.

2 **Q** Okay. Thank you.

3 **MR. WILLINGHAM:** Thank you, Your Honor.

4 **CROSS-EXAMINATION**

5 **BY MR. BARTOSH:**

6 **Q** Officer Harris, after you analyzed those drugs,
7 what did you do with them?

8 **A** After drugs are analyzed, they are sealed in a
9 bag with my initials, the date that they are sealed and a
10 lab number and heat sealed. Those are stored in the
11 laboratory safe until they are returned to the Sheriff's
12 office. I actually wait until I get a box from the
13 Sheriff's Office. It's our largest contributor of cases to
14 be analyzed. I wait until I get a box and I take them
15 back over to the Sheriff's Office and return them back into
16 their evidence room with the chain of custody.

17 **Q** Is that what you did with these drugs?

18 **A** Yes, sir. It is.

19 **Q** Do you know when they were returned to the
20 Sheriff's Office?

21 **A** I would have to pull up the evidence transfer
22 log. I don't know off the top of my head.

23 **Q** Can you estimate or does it vary?

24 **A** Typically, it runs between two and four weeks to
25 contain enough to fill the box to return.

1 **Q** Then you get some sort of document where someone
2 signs that they have received the drugs?

3 **A** Yes, we have an evidence transfer sheet that goes
4 with that box. It has an entire listing of the every case
5 including the lab number and the control number. So the
6 lab number that I've assigned it and the control number
7 that was on that bag is listed for every case that was
8 inside that box at the time.

9 **Q** That was done in this case?

10 **A** Yes, sir. It was. That was standard operating
11 procedure.

12 **MR. BARTOSH:** That's all I have.

13 **MR. WILLINGHAM:** Nothing further.

14 **THE COURT:** All right. You can step down, sir.

15 All right. Let me see Mr. Willingham and Mr.

16 Bartosh up here and anybody else who wants to come.

17 (WHEREUPON, a bench conference was held off the
18 record.)

19 **MR. GOWDY:** The State would call Celeste
20 Nesbitt.

21 **CELESTE NESBITT**

22 having first being duly sworn testified as follows:

23 **DIRECT EXAMINATION**

24 **BY MR. GOWDY:**

25 **Q** Good morning, Ms. Nesbitt.

1 **MR. BARTOSH:** Well, our argument would be that
2 that can be accomplished in a less prejudicial ways.
3 They already introduced several photographs showing
4 the scene that they wish to take the jury out
5 including the location of the bullet hole. There is
6 one picture where the bullet hole has a dowel rod
7 pointing through the hole.

8 What that doesn't show, Your Honor, it shows the
9 position of the car seat but it is incomplete if that
10 is what they're trying to do. You don't know how
11 much space Ms. Lindsey took up. All they are left
12 with is the car seat and the backseat. If they are
13 trying to get an idea of how close was she to the car
14 seat or how close was to car seat was to her, you
15 cannot do that.

16 It is really an incomplete demonstration if that
17 is what they're trying to do. I would suggest that
18 there are other ways. There are other less
19 prejudicial ways that they can accomplish that. They
20 can do a sketch showing a --

21 **THE COURT:** It is not my job to tell the State
22 my favorite way for them to go about doing what they
23 want to do. The question is not whether there are
24 less prejudicial ways to accomplish what they want to
25 do. The question is whether the way that they have

1 chosen has the potential for unfair prejudice that
2 substantially outweighs the probative value.

3 **MR. BARTOSH:** That is my argument.

4 **THE COURT:** Let's stay focused there.

5 **MR. BARTOSH:** That is my argument. That this,
6 what they are trying to do or what they want to do,
7 the prejudicial value far outweighs the probative
8 value. Because as I say, I think what they're trying
9 to do is they are trying to get the jury to appreciate
10 the spacial relationships.

11 **THE COURT:** Yeah.

12 **MR. BARTOSH:** What that is going to do is twelve
13 people of the jury are going to look in there and see
14 where a woman was shot to death. That is what
15 they're going to be concentrating on. Not about how
16 wide the seat is or where the car seat is. But, --

17 **THE COURT:** Can I see exhibit 73 and --

18 **MR. BARNETT:** 46, Your Honor.

19 **THE COURT:** 46. I just need one of them
20 really. I have 73 in my hand.

21 **MR. GOWDY:** 73, Your Honor. And 46.

22 (WHEREUPON, the Court reviewed the documents.)

23 **THE COURT:** All right. I have been out
24 there. And I have seen it. Of course as I have
25 said several times and as is obvious, I am not

1 looking at, in making this analysis, the prejudice.
2 I am looking at the unfair prejudice. I don't see
3 any unfair prejudice, zero.

4 I have seen the car. I seen the car seat in it.
5 You cannot see blood on the seat. To me, it does not
6 look like you expect it to look if you saw Exhibit 73.
7 If you saw Exhibit 73 and you think all right, now I
8 am going to look at the car, you can expect to see
9 blood everywhere. To me, it looks very tamed, the
10 car itself. There is nothing about it that strikes
11 me as being unfairly prejudicial at all.

12 On the other hand, as I have said also before,
13 that bullet hole is well within the seating area. It
14 appears to me, now, of course, the jury has got to
15 decide this. But it appears to me that the bullet
16 hole is well within the seating area of Kiera. You
17 can look at the lines on the seat, the upholstery
18 lines on the seat. You can see that Mrs. Lindsey's
19 right hip, the edge of her right hip is to the left of
20 an upholstery line and it looks to me like maybe an
21 inch and a half.

22 The bullet hole is to the right of that same
23 upholstery line. The bullet hole is maybe 3 inches
24 outside the farthest point that Mrs. Lindsey would
25 have taken up if she was sitting up straight. That

1 is not a finding of fact. That is just the way I see
2 this exhibit.

3 It is important to me to be able to understand
4 the aggravating circumstance for the jury to be able
5 to see both -- that might cut both ways. You might
6 say the bullet hole is close to where Mrs. Lindsey
7 was sitting. Therefore, it would be unlikely to hit
8 Kiera even if she was sitting up straight and not
9 hiding under the edge of the car seat as she described
10 in her testimony.

11 That is just -- to me, that perspective is
12 important for both sides. I am not saying that the
13 evidence weighs heavily in favor of the State or that
14 it weighs in favor of the defendant in terms of
15 aggravating circumstance. It's just important
16 evidence. To me, the probative value of seeing that
17 car with that car seat in it and seeing the bullet
18 hole is high. Since I see no potential for the
19 unfair prejudice, I overrule the objection under Rule
20 403.

21 **MR. BARTOSH:** Thank you, Your Honor.

22 **THE COURT:** All right.

23 Bring in the jury.

24 You are going to ask her those same questions.

25 Then offer her the car with the car seat in it.

1 We'll go out there. I will instruct -- this is a
2 proposal. You all tell me if you want me to do it
3 differently. I will instruct the jury that they may
4 not talk at all while they are out there. We will of
5 course have the bailiffs, all of the bailiffs will be
6 with us, maybe not all of them, but several of them
7 will be, that will make sure the jury don't talk.

8 Hold on just a second.

9 We will not have the Court Reporter with us
10 although we can if you want to. But we, I will be out
11 there. You all have the right to be out there. And
12 we will let them take a few minutes to look at it.
13 Then we will come back in.

14 **MR. GOWDY:** Your Honor, what will be the
15 Court's pleasure with respect to the defendant and his
16 positioning relative to the jury during the jury view.

17 **THE COURT:** I believe that he is entitled to
18 be present. It may be that he is required to be
19 present.

20 What you say about that, Mr. Bartosh?

21 **MR. BARTOSH:** Your Honor, I really have not
22 thought of that.

23 **THE COURT:** How about if we let the detention
24 officers take him out there and put him in a place
25 close by, remove his shackles and then just let him

1 observe?

2 **MR. BARTOSH:** Your Honor, Mr. Lindsey indicates
3 to me that he does not wish to do that.

4 **THE COURT:** All right. Let me ask you this,
5 Captain. Is there a place inside that, I know where
6 we're going to be looking is right outside of the
7 jail. Is there a place where he can look out the
8 window and watch what's going on?

9 **DETENTION OFFICER:** I will check on that, Your
10 Honor, and make sure that there is.

11 **THE COURT:** Will that be suitable?

12 **MR. BARTOSH:** Your Honor, it is not a question
13 of, he just does not want to view it in any form or
14 fashion.

15 **MR. LINDSEY:** I see it every day, Your Honor.
16 (WHEREUPON, there was a pause.)

17 **THE COURT:** All right. Let me -- it is my belief
18 that South Carolina Law requires the defendant to be
19 present at every phase of a capital trial. You are
20 asking me to not require him to go and see this jury
21 view?

22 **MR. BARTOSH:** I am doing that at his request,
23 Your Honor.

24 **THE COURT:** At his request. Okay. Well, even if
25 I took him out there, he could close his eyes and

1 didn't have to look. So if he's telling me that he
2 doesn't want to go out there, --

3 Mr. Lindsey, is that true?

4 **MR. LINDSEY:** Yes, sir. I see the car two times
5 a day, Your Honor.

6 **THE COURT:** Okay. It has -- it does have some
7 logistical benefit because it's going to take some
8 time to move him out there and allow, keep the jury
9 contained while they do that.

10 Yes, sir.

11 **MR. GOWDY:** Your Honor, I would just in
12 support of what the Court has already said cite State
13 versus Clap and State versus Littlejohn, the jury view
14 is not the partaking of evidence. And so long as the
15 trial judge accompanies the jury, the defendant's
16 presence is not required under South Carolina Law.

17 **THE COURT:** All right. Thank you. Okay.

18 Bring in the jury.

19 (WHEREUPON, the jury enters at approximately 10:44
20 a.m.)

21 **THE COURT:** Okay. Ladies and gentlemen, -- I'm
22 sorry.

23 Solicitor, you may continue.

24 **MR. GOWDY:** May it please the Court.

25 **BY MR. GOWDY:**

1 **Q** Ms. Nesbitt, before we broke a moment ago, I
2 asked you to go down to the car that you formerly owned and
3 place a car seat in there exactly as it was on September
4 the 18th, 2002. Did you do so?

5 **A** Yes, I did.

6 **Q** Is the car seat in exactly the same position as
7 you recall it being on the night of Nell Lindsey's murder?

8 **A** Yes, it is.

9 **MR. GOWDY:** Those are all the questions I
10 have for Ms. Nesbitt, Your Honor.

11 **THE COURT:** All right.

12 **MR. GOWDY:** The State would request that the
13 ladies and gentlemen of the jury be allowed to view
14 the car at this point, Your Honor.

15 **THE COURT:** All right. Objection is noted. And I
16 don't believe we need to address it now since nothing
17 has changed since we addressed it about 90 seconds
18 ago.

19 **MR. BARTOSH:** Yes, sir.

20 **THE COURT:** Ladies and gentlemen, we are going to
21 go outside now. And we are going to look at this
22 exhibit, this vehicle that you have just heard
23 described. Here is how we're going to do it. We will
24 have the bailiffs to take you out there in a line. We
25 can not allow any conversation at all.

1 Now, if something that is completely unrelated to
2 this case were to come up, maybe somebody trips or
3 something happens or you need to bring something like
4 that to our attention, fine. But you may not discuss
5 anything. We won't have it on the record.

6 We'll be watching you. I'll be watching you and
7 the bailiffs. And so we're all going to be keeping
8 track to make sure that there's no conversation. Each
9 of you will have an opportunity to look at the car for
10 a few moments. You can walk around. You can open
11 doors. You can just look at it and just kind of see
12 what you think. And then we will come back.

13 Let me see the lawyers real quick.

14 (WHEREUPON, a bench conference was held off the
15 record.)

16 **THE COURT:** All right. Let me see the bailiffs up
17 here who will be going with us to take the jury
18 outside.

19 (WHEREUPON, the bailiffs approach the bench.

20 **THE COURT:** Mr. Scruggs, Mr. Humphries and Mr.
21 Nesbitt, would you raise your right hands please.

22 (WHEREUPON, each bailiff complies.)

23 **THE COURT:** Do each of you swear or affirm that
24 you will accompany the jury outside on the viewing
25 that we have described on the record and that you will

1 allow no person to speak with them and that you will
2 not allow them to speak among themselves or to speak
3 with anyone while they are out there and you will
4 return them to the jury room at my direction so help
5 you God?

6 (WHEREUPON, all bailiffs respond affirmatively.)

7 **THE COURT:** All right. We will go straight from
8 the courtroom.

9 We will go down the back stairs?

10 **MR. GOWDY:** That's fine.

11 **THE COURT:** Straight from the courtroom, down the
12 back stairs, outside. Each of you will have an
13 opportunity to view it. We will get back in line.
14 You will come straight back in.

15 And you can take them to their original jury
16 room. Then we will bring them back in when we are
17 ready. Let's go.

18 (WHEREUPON, the jury exits at approximately 10:47
19 a.m.)

20 (WHEREUPON, a short recess was taken.)

21 (WHEREUPON, the Court resumes at approximately 10:59
22 a.m.)

23 **THE COURT:** All right. Mr. Bartosh, anything you
24 need to put on the record about the jury view? Any
25 objection?

1 **MR. BARTOSH:** Your Honor, I guess it would be
2 best to wait for Mr. Brennan. But he told me that
3 Juror, I think, Ms. Sallis, as she left, she put her
4 hand on the car and appeared to be in silent prayer.

5 **THE COURT:** When she left?

6 **MR. BARTOSH:** As she was leaving the vehicle.

7 **THE COURT:** She was the last person to get in line
8 to come back?

9 **MR. BARTOSH:** Yes, sir. That was one of the
10 things that I thought might happen.

11 **THE COURT:** What?

12 **MR. BARTOSH:** I'll withdraw the objection.

13 **THE COURT:** Well, if there's anything that anybody
14 saw while we were out there that causes you concern,
15 it needs to be put on the record now. I was standing
16 behind Ms. Sallis. And when I told Mr. Humphries to
17 go and form a line so that those members of the jury
18 who were finished looking at the car could get in
19 line, he did that.

20 Everybody got in line pretty much immediately
21 except for Ms. Sallis who then walked from the
22 passenger side of the car, around the back to the
23 driver's side of the car. Looked in that rear
24 driver's side door. I was standing behind her. I
25 don't recall seeing anything. It's possible that she

1 did that and I couldn't tell that she was doing it.
2 But if she did something like that, it would have only
3 been for a second. She didn't pause to me except
4 while she was looking inside the car.

5 **MR. BARTOSH:** The other thing, Your Honor, Mr.
6 Mauldin, I believe, was using his arm as a dowel or a
7 measurement. He measured both the front driver's seat
8 and the back seat of the automobile I'm assuming to
9 get an idea of the position of the people. Of course,
10 Ms. Nesbitt was not in the car.

11 **THE COURT:** Right. I saw Mr. Mauldin doing
12 something. He was standing beside the driver's door.
13 The driver's door was closed. The driver's side rear
14 door was open. And he reached his hand through the
15 opening. It looked like he had his hand on the seat
16 back of the driver's seat. Other than that, I
17 couldn't tell what he was doing.

18 **MR. BARTOSH:** I think --
19 You want to describe it?

20 **MS. QUIMBY:** I was standing more towards the rear
21 of the vehicle. His arm was through the back door
22 opening. He rested it on the back of the driver's
23 seat. But he also was trying to do an angle. It
24 looked like he was trying to match up his elbow. He
25 was trying to figure out the angles. We wanted to

1 bring that to the attention of the Court.

2 THE COURT: Okay. Is there anything significant
3 about that?

4 MR. BARTOSH: Your Honor, jurors aren't
5 supposed to conduct their own investigation.

6 THE COURT: They are supposed to look at the
7 evidence.

8 MR. BARTOSH: Exactly, they are supposed to
9 view the evidence. But we feel in this case, he
10 started to conduct his own investigation as to angles
11 and things like that.

12 THE COURT: Uh, well, I think the jury has to
13 ultimately get around to looking carefully at those
14 angles cause that's a very key piece of evidence that
15 relates to the aggravating circumstance that is
16 alleged.

17 MR. BARTOSH: Yes, but my point is, it is not
18 his responsibility to conduct his own investigation
19 and determine on his own what the angles are. They
20 can look at the evidence and what the police officer
21 testified to as to angles and distance and
22 measurements and things like that, but a juror cannot
23 conduct his own investigation.

24 THE COURT: So the suggestion is that if the
25 juror examines the evidence that I have decided that

1 they can examine too closely, under the Court's
2 supervision, then he is conducting his own
3 investigation?

4 **MR. BARTOSH:** No, sir. What I am suggesting is
5 this, they can go out. They can look in the car.
6 They can open the door. They can look inside the car.
7 They can look at all the items that they want to.
8 But once they start trying to determine distances on
9 their own, by their own estimates and see angles by
10 their own estimates, then I think that is improper.
11 They certainly are entitled to view it. I would also
12 suggest, Your Honor, he was the only one that did.

13 **THE COURT:** Specifically, what it is that he
14 did that you say that I need to attend to is to use
15 his arm?

16 **MR. BARTOSH:** What he did was he stuck his arm
17 from the door jam to determine the length from the
18 door jam to the middle of the head rest in the front.
19 He did the same thing in the back. He stuck it, he
20 put his arm, he was attempting to use the length of
21 his arm to estimated distance is what it appeared to
22 me.

23 **THE COURT:** Solicitor.

24 **MR. GOWDY:** Your Honor, I guess falling under
25 the heading of the under liability eyewitness

1 testimony, the three of us were also out there
2 contemporaneous with defense counsel. If anything,
3 we thought the juror in question put his hand in to
4 test a tint of the window. We saw nothing about any
5 angles.

6 But even if there had been, what is to stop a
7 juror from mentally conducting the same calculations
8 that they thought he was doing with his arms. I saw
9 nothing including Ms. Sallis who paused for less than
10 a second at that car to suggest an independent
11 evaluation. Nothing.

12 **THE COURT:** Let's figure out if we can what is
13 the, where the line at what a juror can and cannot do
14 when they are looking at a piece of evidence that I
15 allow them to do.

16 **MR. BARTOSH:** You just said the word, Your
17 Honor, view. That was the whole purpose of them
18 going out there was for them to view the automobile
19 and to see how things were placed.

20 **THE COURT:** What is it that you think that
21 they did that went beyond a view?

22 **MR. BARTOSH:** It wasn't they, Your Honor. It
23 was Mr. Mauldin.

24 **THE COURT:** What did he do?

25 **MR. BARTOSH:** He conducted measurements on his

1 own. He went beyond viewing.

2 **THE COURT:** Let's assume that Mr. Mauldin did
3 that with this arm. And let's assume that another
4 juror goes out there and looks and says it looks to me
5 to be about 48 inches between the left side rear door
6 and the edge of the car seat. Am I going to have to
7 go and interrogate each juror as to whether or not
8 they made some attempt to estimated distances?

9 **MR. BARTOSH:** No, sir.

10 **THE COURT:** What is the difference between
11 what you say Mr. Mauldin did and what another juror
12 might have done?

13 **MR. BARTOSH:** That is pure speculation as to
14 whether the juror did that or not. We don't know.
15 We can't get inside their heads. Clearly, Mr.
16 Mauldin did. His was demonstrative.

17 **THE COURT:** What do you propose I do?

18 **MR. BARTOSH:** Replace him with an alternate,
19 Your Honor.

20 **THE COURT:** Uh-huh (affirmative).

21 **MR. BARTOSH:** That would be the simple remedy.

22 **THE COURT:** You know I cannot do that just
23 right off the bat. Before I do that, I would have to
24 come to the conclusion that he is not a fair and
25 impartial juror or that he has seen some evidence that

1 is not in the record. What is my next step under
2 your view of this?

3 **THE COURT:** Under my view of this, would have
4 him, question him as to what he was doing and what was
5 the purpose of him holding his hand like that. If he
6 says I just wanted to feel the seat or something like
7 that, that was one thing. If he goes to say I was
8 trying to figure out how far it was.

9 **THE COURT:** What is wrong with trying to
10 figure out how far it was? What is wrong with that?
11 They are going to do that. That is part of their
12 job. If I had a juror who said, who stopped me at
13 the beginning of deliberations and said Judge, look, I
14 just thought about this. And I'm just not going to
15 try to figure out what those distances are, you would
16 be ranting and raving to have that the juror taken off
17 the jury. What is wrong with trying to figure out
18 the distances?

19 **MR. BARTOSH:** First of all, Your Honor, it is a
20 viewing. That is what the whole purpose was for them
21 to go out there and look at it. He went beyond that.

22 **MR. GOWDY:** Your Honor, what is the difference
23 between a juror using part of his body -- and I can't
24 stress enough that the three of us who watched him do
25 the exact same thing have reached a 180 degree

1 different conclusion. But assuming Mr. Bartosh is
2 correct, what is difference between on juror using
3 part of his body for measurement purposes and the
4 other fourteen to using their mind to do the exact
5 same thing. Are we also going to voir dire them for
6 what they thought while they were out here?

7 **MR. BARTOSH:** Suppose one of them had pulled out
8 their pocket and pulled a tape measurer and measured
9 it. I don't think that would have been proper.

10 **THE COURT:** I am going to then remove from the
11 jury every juror who pulled a tape measurer out of
12 their pocket during that viewing and conducted a
13 measurement. I think where this line is drawn is the
14 jury is entitled to view and analyze the evidence
15 based on the basic characteristics that every person
16 bring into their role as jurors. Of course, that
17 includes their common sense and the things that are in
18 their mind.

19 That common sense would include how each
20 different person analyzes the things that come before
21 them during the course of their lives. Some people
22 can look at an object and estimate its size or its
23 distance without the need of any kind of measuring
24 device.

25 I can look at a table. I can look at a box. I

1 can pretty much tell you how big it is just by looking
2 at it. There would be some error. But I think I'm
3 just pretty good at estimating distances. I don't
4 need my arm usually to do that. Some other juror,
5 some other people in the world may have different ways
6 of going about doing something like that.

7 I don't believe that it is appropriate for me to
8 screen jurors based on how they go about doing the
9 things that we call on them to do in their role as
10 jurors unless that involves using something that is
11 outside the scope of evidence. That juror using his
12 arm to make an estimate of distance is no different
13 from me or some other member of the jury using their
14 eyes to make an estimate of distance. So I don't
15 see, I don't believe that there's anything for me to
16 do.

17 I believe that it would be -- if I were to get
18 that juror in here and ask him what he was doing, then
19 I'm getting into the mind of that juror and perhaps
20 making a suggestion to him that the way he goes about
21 doing one particular thing that he thinks he need just
22 to do in the course of his duty is not a proper way to
23 do that. I am reluctant to do that. I believe that
24 would be improper.

25 I believe that I got a good view of everything

1 Mr. Mauldin did. I was watching him. I actually was
2 standing up towards the front driver's side of the car
3 about 15 feet away probably even with the front of the
4 car when I first saw him go over and stick his hand in
5 through the back driver's side door. Wanting to get a
6 good handle on exactly what he was doing, I moved
7 toward the back and watched him the whole time. I
8 don't know what he was doing. But to me, he was not
9 doing anything that was a whole lot different than
10 what the other members of the jury were doing.

11 So I don't see anything to do. I don't see any
12 indication based on what I heard, looking at it the
13 way you said you saw it and the way your people saw it
14 that he was trying to make some measuring with his
15 arm, I don't see anything improper in that.

16 **MR. BARTOSH:** We are understand the Court's
17 ruling. We would respectfully object to it. Out of
18 abundance of caution, we preserve the objection. We
19 would object to that, Your Honor. We would request
20 that Mr. Mauldin be removed. We just preserve our
21 objection. That's why we make it based on the
22 argument that we made.

23 **THE COURT:** Here's what I'm going to do. I
24 instructed the jury that they cannot talk about the
25 case. There's nothing magic about this particular

1 moment in the trial for him being removed, correct?

2 MR. BARTOSH: Yes, sir.

3 THE COURT: If I remove him at any time prior
4 to their deliberation beginning, there will be no
5 error in the delay. Correct?

6 MR. BARTOSH: No, sir.

7 THE COURT: Then I am directing you or
8 somebody on your team go and find me some law that
9 supports your position. All right. I am expecting
10 you to bring that back to my attention before the jury
11 begins their deliberation.

12 MR. BARTOSH: Yes, sir.

13 THE COURT: Is the jury back?

14 THE BAILIFF: Yes, sir.

15 THE COURT: Y'all ready?

16 MR. GOWDY: Yes, Your Honor.

17 THE COURT: Bring in the jury.

18 (WHEREFORE, the jury enters at approximately 11:17
19 a.m.)

20 THE COURT: You may proceed, Solicitor.

21 MR. WILLINGHAM: Thank you, Your Honor. The
22 State calls Jimmy Sligh.

23 THE COURT: Hold on one second. When we left,
24 Ms. Nesbitt was on the stand. Did you have any
25 cross-examination you wanted to conduct on Ms.

1 Nesbitt?

2 MR. BARTOSH: No, sir. I did not.

3 THE COURT: All right. Go ahead.

4 MR. WILLINGHAM: Jimmy Sligh.

5 JAMES SLIGH

6 having first being duly sworn testified as follows:

7 DIRECT EXAMINATION

8 BY MR. WILLINGHAM:

9 Q Tell the jury who you are.

10 A James E. Sligh, Junior.

11 Q Were do you work?

12 A I'm the Division Director of Classification of
13 Inmate Records for the South Carolina Department of
14 Corrections.

15 Q How long have you been with the Department of
16 Corrections?

17 A Uh, about 22 and a half years.

18 Q Are you familiar with how inmates are classified
19 and housed at the Department of Corrections?

20 A Yes, sir.

21 Q If an inmate comes to your department having
22 received a life sentence, where would he be housed?

23 A Initially in a Level 3 institution, which is high
24 security.

25 Q Can you tell this jury what type of housing he

1 would be provided?

2 A He would be assigned to a cell that could be
3 anywhere from 75 to 100 square feet. In all likelihood,
4 he would have either one or two cell mates in that cell.

5 Q Is it possible that at some point he could have
6 more than two cell mates?

7 A I would certainly hope not but anything is
8 possible.

9 Q What a person in that have access to a yard?

10 A Yes, sir.

11 Q Explain to the jury what the yard is.

12 A The yard is just a common area of the
13 institution. The institution is set up with housing units
14 basically around an open area and there are support
15 buildings along one side.

16 Q While that person has access to the yard, would
17 that person have opportunities to have contact with other
18 individuals?

19 A Yes, sir.

20 Q Could you tell me how many?

21 A Well, he is going to be housed in a living unit
22 with as many as 300 other inmates. He has access to move
23 throughout that unit with some restrictions. Depending
24 upon the nature of the job assignment or the school
25 assignment or whatever, he is going to be interacting with

1 other inmates throughout the day and visitation or
2 recreational opportunities. It will be almost impossible
3 to say how many. Obviously, quite a number.

4 Q You indicated he would have an opportunity to
5 have a job and go to school?

6 A Correct.

7 Q Explain to the jury about that. What kind of
8 jobs do you have?

9 A The inmates do all of the work, whether it's
10 cafeteria work, custodial work, maintenance, whatever is
11 required in the institution with employee supervision.
12 The inmates pretty much perform all of the work.

13 Q Are those jobs usually solitary type jobs or are
14 they with other people?

15 A It could be both. But in most cases, they are
16 working along side other inmates.

17 Q The same with school?

18 A Correct.

19 Q You have more than one person involved in a
20 school?

21 A Right. Classroom-type setting.

22 Q What about meals?

23 A You're normally fed. We feed by units. One
24 unit at a time. So you are fed with other inmates in your
25 unit in a cafeteria style setting.

1 Q Generally, how many folks are in a unit?

2 A They are designed normally in that type of
3 institution for somewhere in the neighborhood of 250. But
4 it could where be anywhere up to 300 in a particular unit.

5 Q You indicated you have recreational privileges?

6 A Yes.

7 Q Tell the jury about that.

8 A Each unit has a fenced in yard that the inmates
9 have access to. If they are not working or not in school,
10 kind of on their own time during daylight hours, they are
11 probably 50 feet by 50 feet roughly. There could be any
12 number of inmates out there at any time during the day.

13 Q How about visitation?

14 A We have central visitation rooms. Normally, they
15 can hold up to as many as 500 people including visitors
16 usually on the weekends. So, they are obviously coming and
17 going for visitation.

18 Q And he would have contact with other inmates.
19 We've already discussed that. How about contact with other
20 guards or employees?

21 A Obviously, the supervision aspect of what we do,
22 there are officers that are located and posted in living
23 units and through all of the work areas and all of the
24 officers and employees who do supervision also. It is
25 going to be sight or sound supervision pretty much wherever

1 he is in the institution.

2 MR. WILLINGHAM: I beg the Court's indulgence.

3 BY MR. WILLINGHAM:

4 Q I may have asked you this. I may be thinking
5 about my next question. As far as visitation, is it
6 contact visitation?

7 A Contact visitation.

8 Q What does contact mean?

9 A No barriers between the inmate and the visitors.
10 They sit in an open room at either a round or square table
11 depending upon the nature of what the institution has.

12 Q How often can you have these?

13 A Depending on your custody which determines your
14 privileges, it could be up to 8 visits per month.

15 Q Thank you.

16 CROSS-EXAMINATION

17 BY MR. BARTOSH:

18 Q How many inmates are currently incarcerated in
19 the Department of Corrections?

20 A Approximately 20, it's probably 23,500. Somewhere
21 in that.

22 Q Of those 23,500, how many of them are doing life
23 without parole?

24 A Life without parole?

25 Q Yes.

1 A I could only, I have an idea of life sentences
2 but not life without parole.

3 Q How many are doing life?

4 A Approximately 2000.

5 Q So about 10 percent?

6 A A little less than 10 percent.

7 Q Is there still patrol movement in the Department
8 of Corrections?

9 A Yes, sir.

10 Q Can you explain to the jury what patrol movement
11 is?

12 A Patrol movement is scheduled and set up at each
13 institution. It determines when inmates will move from one
14 place or the another, whether it's from cafeteria to the
15 work assignment, school, to visitation, to whatever
16 activities are going on at the institution. It is normally
17 done on the hour. It is monitored very closely by
18 correctional officers and supervisors and work supervisors.

19 Q Under patrol control movement, the inmates when
20 they're not at work, they are generally in their dorms?

21 A Yes, sir.

22 Q How much yard privileges do they get?

23 A Define yard.

24 Q If they're not at work and they are not at
25 school, then they are in their dorms, right, or in their

1 cells?

2 **A** Yes, sir. Unless they've got a pass to go
3 somewhere else.

4 **Q** When they have on yard privileges when they are
5 allowed to go on the yard, how long of a period is that?

6 **A** It is just the time it takes them to move from
7 one area to the other. There's no milling on yard or
8 anything like if that's what you're asking. It's just a
9 matter of moving from one place to another.

10 **Q** So basically they're going to spend -- when they
11 are not working or they are not in school, they are
12 spending their time inside the housing unit?

13 **A** That is correct.

14 **Q** So there's really no yard privileges, right?

15 **A** I think in the context that you're asking me, No,
16 sir. We don't allow inmates to just walk out on the yard
17 when they are allowed on the yard.

18 **Q** Okay. So thank you.

19 **REDIRECT EXAMINATION**

20 **BY MR. WILLINGHAM:**

21 **Q** But there's opportunity as you indicated earlier
22 for recreation?

23 **A** Correct.

24 **Q** Where would that take place?

25 **A** Either in a fenced area that is adjacent to each

1 living unit. Some institutions have centralized
2 recreation areas.

3 Q How many hours a day do you have access to that?

4 A Depending on what his job or work assignment is.
5 Pretty much daylight hours around those.

6 Q So daylight, he could be outside his cell doing
7 something?

8 A Yes, sir.

9 Q It is not like he's sitting in his cell all day
10 unless he is working or going to school.

11 A No, sir.

12 Q You indicated that there are approximately 2000
13 people serving life sentences?

14 A Approximately.

15 Q He is not going to be housed, a person serving a
16 life sentence is not going to be housed exclusively with
17 other prisoners serving life sentences, are they?

18 A No, sir.

19 Q People with lesser sentences would also be
20 present?

21 A Yes, sir.

22 Q They are not going to be categorized by what
23 sentence they have.

24 A That is one part of it. But that is not the
25 driving force.

1 Q All 2000 people serving life are not housed in
2 one particular facility to the exclusion of all other
3 sentences

4 A Yes, sir.

5 Q You have plenty other inmates to interact with?

6 A Correct.

7 Q Serving less than life?

8 A Correct.

9 Q Thank you.

10 **RECROSS-EXAMINATION**

11 **BY MR. BARTOSH:**

12 Q The one that would determine where he goes is how
13 they are classified, correct? Violent offenders are
14 classified, people who are classified as violent offenders
15 go to a maximum-security prison, correct?

16 A They could. That's not -- that is one of a
17 combination of things that would determine that.

18 Q It just depends on how a person would score at
19 R&E?

20 A Yes, sir. Correct.

21 Q Could you tell the folks about R&E?

22 A The Reception and Evaluation Center?

23 Q Yes, sir.

24 A The Reception and Evaluation Center for males is
25 at Kirkland Correctional Institution in Columbia. All

1 newly committed inmates at the Department of Corrections go
2 to the R&E Center for basically an evaluation period.
3 There is the classification process that determines the
4 security level and therefore, the type of institution that
5 the inmate will be assigned to. There is also some
6 testing done relative to academic levels, mental health
7 issues, substance issues and some medical testing that's
8 going to determine if the inmate has any medical issues to
9 be dealt with.

10 **MR. BARTOSH:** Thank you. That's all I have.

11 **THE COURT:** All right, sir. You can step
12 down. You are free to go.

13 **MR. WILLINGHAM:** The State will call Deputy
14 White.

15 **BRIAN WHITE**

16 having first being duly sworn testified as follows:

17 **DIRECT EXAMINATION**

18 **BY MR. WILLINGHAM:**

19 **Q** Tell the jury who you are.

20 **A** I am Brian Douglas White. I work for the
21 Sheriff's Office.

22 **Q** How long you been at the Sheriff's Office?

23 **A** About 3 and a half years.

24 **Q** I need you to speak up so everybody can hear.

25 **A** Yes, sir.

1 Q How long?

2 A Three and a half years.

3 Q Thank you. You are a detective?

4 A Yes, sir.

5 Q Were you a detective back in December 2001?

6 A No, sir. I was not.

7 Q What were you back in December 2001?

8 A I was a second shift Uniform Patrol Deputy.

9 Q As a deputy, is your job responsibility to patrol
10 Spartanburg County?

11 A Yes, sir. It is.

12 Q To answer any calls?

13 A Yes, sir. It is.

14 Q Did you receive any calls on December 2001 to go
15 to Applebee's?

16 A Yes, sir.

17 Q Which Applebee's is that?

18 A It is Applebee's located on Highway 29 across
19 from the Lowe's. It was Greenville Highway at the time
20 now. Now it is called William Abernathy Highway in front
21 of the old Wal-Mart.

22 Q Okay. Why did you go there?

23 A It came out dispatched as a couple fighting in
24 the parking lot of the Applebee's restaurant.

25 Q When you got there, what did you find?

1 A When I got there, as I was driving into look for
2 the couple fighting in the parking lot, I observed a black
3 male outside of a vehicle parked in a parking space near
4 the building arguing and yelling to a subject inside of a
5 vehicle.

6 Q Did you learn who that black male was?

7 A I did.

8 Q Who was it?

9 A It was Marion Lindsey.

10 Q You see Marion Lindsey in this courtroom today?

11 A I do, sir.

12 Q Point him to the jury.

13 A He is the black male in the white shirt at the
14 defendant's table.

15 Q Did you speak with Mr. Lindsey?

16 A I did. As I approached the parking lot, he came
17 directly to my patrol car. I got out of the car. I
18 asked what was going on. He explained to me that, he
19 identified himself as Marion Lindsey and said that he was
20 arguing with his wife. I asked what had happened. He said
21 he was just arguing. I asked if he had touched her. He
22 said no.

23 I said, there were some people across the parking lot
24 looking for something. I said what are those people over
25 there looking for. He said jewelry. He said he had

1 pulled off her jewelry and threw it across the parking lot.

2 Q Whenever you learned that from Mr. Lindsey, what
3 did you tell him then?

4 A I asked him to remain standing in front of my
5 patrol car. As I approached the car where he was yelling
6 at someone in the car.

7 Q Did you notice any kind of injuries on Mr.
8 Lindsey?

9 A No, sir. I did not.

10 Q Did he point any injuries out to you?

11 A No, sir. He did not.

12 Q Did you talk to someone else after you told Mr.
13 Lindsey to stay put?

14 A I did. I went to the car. As I approached the
15 car, I observed a black female woman who was very emotional
16 and she was crying. I asked her to identify herself.
17 She said that her name was Ruby Lindsey.

18 Q Ruby Lindsey?

19 A Yes, sir.

20 Q Were you able to determine any injuries on Ms.
21 Lindsey?

22 A I did.

23 Q What did you see?

24 A I saw her where the left side of her face was
25 beginning to swell. She had scratches on her hands and

1 scratches just above her eye on her face too.

2 Q What were they doing out there in the field?

3 A She had told me that she and her cousin, Ms.
4 Nesbitt, had gone to Applebee's to eat. When she got
5 there, Marion Lindsey, her husband, had arrived and pulled
6 her out of the car and hit her. And they got into an
7 argument. Then I arrived.

8 Q What were they looking for in the field?

9 A They were looking for the jewelry that she
10 explained was taken off of her and that he threw across the
11 parking lot.

12 Q Did you sign a warrant in this case?

13 A I did.

14 Q For what charge?

15 A Criminal domestic violence.

16 Q Was Mr. Lindsey arrested that evening?

17 A No, sir. He was not.

18 Q Why not?

19 A Because when I went to approach the car that
20 Mrs. Lindsey was in, after I learned that she had been
21 assaulted, I went to go talk to Mr. Lindsey. I observed
22 him walking off around the building. I was unable to
23 determine what car he got in when he left the scene.

24 Q And the injuries that Mrs. Ruby Lindsey had were
25 what?

1 **A** Swelling to the left side of her face with the
2 scratches on her face and on her hands.

3 **Q** How about her clothes?

4 **A** She also explained to me that she had a ripped
5 shirt from when he pulled her out of the car.

6 **Q** Did you see that?

7 **A** Yes, sir. I did.

8 **Q** Thank you. Answer any questions they may have
9 for you.

10 **CROSS-EXAMINATION**

11 **BY MR. BARTOSH:**

12 **Q** Detective, did you to bring your case file?

13 **A** Yes, sir. I did.

14 **Q** Do you have a copy of the statements that you
15 took from the folks that night?

16 **A** Yes, sir. I do.

17 **Q** In the file?

18 **A** Yes, I do.

19 **Q** Do you have the one from Celeste Nesbitt?

20 **A** Yes, sir. I do.

21 **Q** Have you reviewed it?

22 **A** Yes, sir. I did.

23 **Q** Does that statement from Ms. Nesbitt mention
24 anything about any argument, not an argument, but about
25 Ms. Lindsey being hit or struck or getting scratched or

1 anything like that?

2 A No, sir.

3 Q She does not mention anything about that at all?

4 A I have to refer to my --

5 Q All right.

6 A It says here that she saw him snatch her jewelry
7 and threw it across the parking lot.

8 Q But no mention of seeing Mr. Lindsey striking
9 Ms. Lindsey or scratching her or anything like that?

10 A It does not mention that directly. She says
11 snatched.

12 Q Snatched her jewelry?

13 A Right.

14 Q She does not mention that he hit her?

15 A No, sir.

16 Q Or scratched her?

17 A No, sir.

18 Q Or anything like that?

19 A No, sir.

20 Q All right. Thank you.

21 MR. WILLINGHAM: Nothing else from this
22 witness.

23 THE COURT: You can step down, sir.

24 MR. WILLINGHAM: We call Cathy Mullinax.

25 CATHY MULLINAX

1 having first being duly sworn testified as follows:

2 **DIRECT EXAMINATION**

3 **BY MR. WILLINGHAM:**

4 **Q** Tell the jury your name.

5 **A** Cathy Mullinax.

6 **Q** You live here in Spartanburg County?

7 **A** Yes,

8 **Q** Back in December 2001, December the 1st, 2001,
9 were you at the Applebee's on Greenville Highway?

10 **A** Yes, I was.

11 **Q** Who were you with?

12 **A** My husband.

13 **Q** Why were you out there?

14 **A** To eat dinner.

15 **Q** Okay. Did you have the opportunity to eat dinner?

16 **A** We did.

17 **Q** At some point, you left?

18 **A** Right.

19 **Q** Tell me what you witnessed happening at that
20 point.

21 **A** As we were coming out of the side door of the
22 restaurant, I think the first thing we noticed was that
23 there was cars in the parking lot. I think we both knew
24 something was going on. But I'm nervous, excuse me.

25 **Q** That's all right. Don't be nervous. I need you

1 to speak up just a little bit.

2 A Okay. The first thing I saw was there was a
3 couple in front of us standing beside a car. You don't
4 really pay attention. But as we went by, I saw a guy hit
5 the girl right in the face with his closed fist. I said to
6 my husband right then, I said he just cold copped her.
7 That is the words that I used.

8 Q Right.

9 A My husband said to get in the car.

10 Q Okay.

11 A As we approached our car, which was only two cars
12 beside the car that they was standing, he opened my door. I
13 was getting in. As I was getting in, he was coming around
14 the car. We knew there was a car behind us that he was
15 going to have to get them to move the car to let us out.
16 But when I sat down and I looked back, I saw the gentleman,
17 the man grab, hit the girl, grabbed the chain on her neck.
18 Just grab it and fling it.

19 Q Right.

20 A The girl was frightened obviously.

21 Q Right.

22 A When my husband got in, he sat there for a minute
23 waiting on someone to move the car so we could back out.
24 They did not. No one came. So my husband got out. And he
25 walked towards the group of people that was standing

1 around. There was a young girl. I don't know if my
2 husband spoke to her or not. But there was a girl who came
3 and moved the car so we could back out.

4 Q Okay. Where was --

5 A And as -- I'm sorry.

6 Q I'm sorry. You go ahead.

7 A As we were leaving, again I saw the girl who was
8 being hit, I think that her attempt was to slap him. And I
9 saw him hit her again with an open hand. We called the
10 police at that time.

11 Q You called 911?

12 A 911.

13 Q Did you wait for the police to arrive?

14 A We were leaving because it was just obvious there
15 was commotion going. So we pulled across the street as we
16 were talking to 911 telling them what was going on. We
17 pulled across the street into the, I think it was the
18 McDonald's parking lot facing Applebee's to make sure the
19 police got there.

20 Q Did you stay there until the police arrived?

21 A We did.

22 Q Ms. Mullinax, do you see this man today, the man
23 that you described?

24 A Absolutely.

25 Q Would you point him out for me?

1 A That man right there.

2 Q Point him out for me.

3 A (Pointing.)

4 Q What is he wearing now?

5 A What is he wearing now?

6 Q Yes.

7 A A white shirt and black pants.

8 Q What is his race?

9 A Black.

10 Q Please answer any questions the defense may have.

11 **CROSS-EXAMINATION**

12 **BY MR. BARTOSH:**

13 Q Ms. Mullinax, you said that you saw the, let me
14 ask you this, did you give a statement that night?

15 A I did not.

16 Q The officer that just testified did not take a
17 statement?

18 A Not from me, no, sir.

19 Q What did he do, take your name and contact
20 information?

21 A We talked with 911 on the radio. That's all we
22 talked to.

23 Q How did they locate you as a witness?

24 A Through our cell phone I would imagine.

25 Q How long much after this were you contacted?

1 **A** I don't know. A couple of months, maybe.

2 **Q** You were never asked to give a statement?

3 **A** Yes, I was.

4 **Q** Did you give one?

5 **A** Uh-huh (affirmative).

6 **Q** A written statement?

7 **A** No.

8 **Q** You just gave a verbal statement?

9 **A** A verbal statement.

10 **Q** They never offered to ask you to write down what
11 you saw?

12 **A** No, sir.

13 **Q** All of the events that you described were outside
14 of the automobiles?

15 **A** Yes.

16 **Q** When you say you saw Mr. Lindsey hit Ms.
17 Lindsey, they were standing outside of the cars?

18 **A** Yes.

19 **Q** Do you remember what kind of cars they were?
20 There were two separate cars, right?

21 **A** The car that I saw that, Mrs. Lindsey, I am
22 assuming that was Mrs. Lindsey. I never seen her before.
23 The lady was standing -- I don't know the car. I can not
24 tell you. I just know that her back was leaning against
25 driver's window, that part of the door.

1 Q Of her car?

2 A I don't know whose car it was.

3 Q Of a car?

4 A Yes.

5 Q Were the windows tinted or do you not remember?

6 A I don't remember.

7 Q The man you have identified as Mr. Lindsey,
8 where was he standing?

9 A Directly in front of her.

10 Q Okay. And she was leaning against the car?

11 A Uh-huh (affirmative).

12 Q Correct?

13 A Uh-huh (affirmative).

14 Q Was there another car that you saw? You said the
15 car behind you, a young girl came out and moved it?

16 A She -- I don't know where the girl was.

17 Q Right.

18 A We were just, the car was parked directly behind
19 our car. The door was open and music was playing.
20 Blocking our exit.

21 Q You don't know whether or not that person was
22 connected with the Lindseys?

23 A I don't have a clue.

24 Q Okay. Do you remember what side the Ms. Lindsey
25 was standing on the car. You said she was standing on the

1 passenger's side or the driver's side?

2 **A** The driver's side.

3 **Q** That is all I have.

4 **THE COURT:** You can step down, ma'am.

5 **MR. BARNETT:** Your Honor, the State would like
6 to call Sarah Simmons to the stand, Your Honor.

7 **SARAH SIMMONS**

8 having first being duly sworn testified as follows:

9 **DIRECT EXAMINATION**

10 **BY MR. BARNETT:**

11 **Q** If you would, ma'am, please tell the jury your
12 full name.

13 **A** My name is Sarah Randall Simmons.

14 **Q** What do you do, ma'am?

15 **A** I'm employed in the Spartanburg County Magistrate
16 Court as the Judge.

17 **Q** You are the Magistrate Judge, is that right?

18 **A** Uh-huh (affirmative).

19 **Q** How long have you been a Magistrate Judge?

20 **A** I have been a magistrate for three and a half
21 years.

22 **THE COURT:** Ma'am, that microphone is rubbing
23 up against your blouse. Just push it away so it won't
24 make the squeaking noise. Thank you.

25 **BY MR. BARNETT:**

1 Q Judge, back on September 17, 2002, were you
2 working that day?

3 A Yes, I was the presiding judge that evening.

4 Q You were the evening shift Judge?

5 A Evening shift.

6 Q One of the duties of being evening shift Judge,
7 you set bonds on defendants that come in from the jail?

8 A At the Spartanburg County Detention Center at 8
9 p.m., I am the official judge to set bonds.

10 Q On September 17th 2002, did you have occasion,
11 did Marion Lindsey come before you that night?

12 A Yes. He was one of the persons that were there
13 on that evening.

14 Q When you do bonds, you have several defendants
15 that appear before you?

16 A Yeah, I had about 10 other persons.

17 Q That night, he was brought in on criminal
18 domestic violence warrant, is that correct?

19 A That is true.

20 Q Let me show you what has been marked as State's
21 Exhibit 78. I believe that is a copy of the jail card
22 that night.

23 A Yes. This is correct.

24 Q He was brought in on a CDV charge that night?

25 A Yes, he was.

1 **Q** That night if you would, tell you the jury, you
2 arraigned the defendant on a criminal domestic violence
3 charge?

4 **A** Yes, I did.

5 **Q** Would you explain to the jury what arraignment
6 means?

7 **A** Okay. At that time, I set bond and also give them
8 their rights. Would you like for me to explain?

9 **Q** (Nods head affirmatively.)

10 **A** Before I do anything, before I set my bonds, I
11 always review files. Therefore, all the persons that were
12 there that evening, I reviewed their files and made
13 preparation for the bond arraignment for the bonds to be
14 set.

15 **Q** When you arraign them, you explain to them their
16 right to an attorney and what their charge consist of?

17 **A** The first thing I do is share with them their
18 rights. After I share with them their rights, I also
19 share with them their violation, whatever they are there
20 for. If he was there for CDV, the charges and when he is
21 supposed to attend court and what the fine might be of the
22 penalty at that time for a CDV. If found guilty of that,
23 it would be a fine of up to \$1000 or 30 days.

24 **Q** Afterwards, you set the bond, is that right?

25 **A** Yes, I did.

1 Q When you talked to him, did he request a certain
2 kind of bond when you were talking to him about his case?

3 A Well, at the beginning of the bond arraignment, I
4 did call Mr. Lindsey's name. He did not answer first.
5 So what I did, I took care of all the other nine
6 individuals that were in there. Then when I called for
7 Mr. Lindsey again, the officer went over and touched him
8 because I asked the officer did Mr. Lindsey hear me call
9 his name.

10 When I called his name, he approached the bench. I
11 shared with him why he was there the violation. And he
12 asked me at that time was he going to receive a PR bond. I
13 told him no. I explained to him why he was not going to
14 receive a PR bond. At that time, I explained to him the
15 charges. And I shared it with him. And I did share with
16 him on here, if you see on the paper where I wrote that I
17 was going to, he was going to have a surety bond of \$1000.

18 I also gave him stipulations. I asked Mr. Lindsey, I
19 repeated it three times, do you understand what I'm saying.
20 Because at first, there was no response. When I shared it
21 with him again, I said Mr. Lindsey, do you understand that
22 there is to be no contact with the victim who is Nell
23 Lindsey. And he said yeah. I asked him again did he
24 understand. At that time, he just said yeah again.

25 But as he was being exited out the door, he began to

1 mumble. So I put asked the officer to bring him back. I
2 asked officer to bring him back to me to make sure that he
3 understand what I said. At that time, I repeated myself
4 again. I said Mr. Lindsey, do you understand your
5 violation, do you understand. And he said yeah.

6 The comment he made was at that time when I asked him,
7 he understood. I said Mr. Lindsey, are you sure you
8 understand. And he said yeah. He said well you not going
9 to give me a PR bond. I said no. This is what he said,
10 the Statement he made was he said well, I'm not going back
11 there anyway because I been away for 7 seven years. And I
12 did not make a statement. I just looked at him because that
13 was not what I was interested in hearing at the time.

14 I said do you understand again Mr. Lindsey that
15 you're not going to get a PR bond. He said well, anyway,
16 I'm not going back. I been away for 7 years anyway. I have
17 a friend. That was the comment he made. I asked the
18 other officer just go ahead and take him out because he
19 still continued to mumble.

20 Q Did he say, he said he been away from her for 7
21 years?

22 A Yes, that's what he said.

23 Q Did he say he had a girlfriend or a friend?

24 A He said I have a girlfriend anyway. At that
25 time, I made no statement. I just asked him to leave.

1 Q Was he showing you disrespect or was he just not
2 paying attention?

3 A Uh, Mr. Lindsey at that time, when I called him
4 the first time to approached the bench, he did not,
5 apparently he did not hear me or I don't know what the
6 problem was. But I called his name. I always do that
7 three times. He still never moved.

8 So I don't know if there was something that, if there
9 was a problem at that time. But he didn't make a comment.
10 And the last time when I told him that he was not going to
11 receive a PR bond, he did mumble. He talked back. And I
12 told the officer to just take him out. I came back out
13 the courtroom. I said if it needs to be shared again that
14 he is to have no contact with Nell Lindsey, I'll be glad to
15 do that.

16 Q Let me ask you for the jury edification.

17 A Okay.

18 Q Can you tell me what a PR bond is?

19 A Personal recognizance. He asked me are you
20 going to let me sign myself out. That is a PR, personal
21 recognizance.

22 Q They don't put any money up or anything. They
23 just sign a piece of paper?

24 A Sign their names out.

25 Q You did not do that?

1 **A** I did not. I gave him a surety bond of \$1000.

2 **Q** So he had to put up a surety of \$1000 before he
3 gets out?

4 **A** Yes.

5 **Q** And the conditions of that bond was he was to
6 have no contact?

7 **A** The conditions, and I repeated the conditions. I
8 always repeat the conditions more than three times. There
9 should be no contact with the victim while this case is
10 pending. I asked again do you understand while this case is
11 pending there should be no contact with Nell Lindsey.

12 **Q** Let me show you also State's Exhibit 79. Is
13 that a copy of the Bond sheet he would receive when he left
14 the jail?

15 **A** Yes. The Clerk always give him the sheet. They
16 also shares with him that there should be no contact with
17 the victim while this case is pending.

18 **Q** He was verbally told several times by you?

19 **A** Several times.

20 **Q** And it was also given to him in writing?

21 **A** It was given to him in writing.

22 **MR. BARNETT:** Your Honor, I would like to move
23 State's Exhibit 78 and 79 in evidence at this time.

24 **MR. BARTOSH:** No objection, Your Honor.

25 **THE COURT:** They are admitted.

1 (WHEREUPON, State's Exhibit 78 and 79 were admitted
2 into evidence.)

3 MR. BARNETT: I would like to publish them to
4 the jury at this time.

5 THE COURT: Yes, sir.

6 MR. BARNETT: One moment, Your Honor, please.

7 BY MR. BARNETT:

8 Q And Judge, when he was given this bond, it was n
9 on the night of September 17th, 2002?

10 A Yes, it was.

11 Q Later that time, did you find out something had
12 happened the next day?

13 A Yes, I did.

14 Q Did he also come before you again at a later
15 time?

16 A Yes, he did. I was the first judge to see Mr.
17 Lindsey after he returned from the hospital. He was the
18 only person that was in the arraignment that night with me
19 along with the officer. That's the time, that's when the
20 bond was denied that he would be going to General Sessions
21 Court. I explained it to him. And he made comments that
22 night. If you want me to just share those comments?

23 Q Not at this time. I think the most relevant thing
24 is what happened the night before. Thank you.

25 A Okay.

1 Q Answer any questions Mr. Bartosh may have.

2 CROSS-EXAMINATION

3 BY MR. BARTOSH:

4 Q How are you, Judge Simmons?

5 A I'm fine. Thank you.

6 Q Let me ask you a couple questions.

7 A Yes, sir.

8 Q Did you receive or did anybody in magistrate
9 court receive a phone call that Mr. Lindsey was on his way
10 to turn himself in if you recall?

11 A No.

12 Q And the warrant that was served on him that
13 night, do you know how old the warrant was?

14 A No, I did not check that.

15 Q Could it have been as much as a year? What
16 night was this?

17 A I think this was the night --

18 Q What, uh --

19 A That Monday night.

20 Q Which would have been the 17th or the 16th?

21 A It was that Monday or Tuesday.

22 Q You do not know the age of the warrant?

23 A I did not look at that specifically. I may
24 check the file the records and review it and everything.
25 But I did not look at that.

1 Q It could be possible that it was a year old?

2 A I am not sure.

3 Q How long was Mr. Lindsey in the hospital? Do
4 you know?

5 A I am not sure. I don't know. I did not keep
6 up with that.

7 Q That's all. Oh, I'm sorry. One more question.
8 Did you know that Mr. Lindsey had children with Ms.
9 Lindsey?

10 A No. I did not know Mr. Lindsey.

11 Q Did you did not know there was any children?

12 A No, I did not know Mr. Lindsey.

13 Q Your order did not address visitation of the
14 children?

15 A No, that had nothing to do with that.

16 Q Thank you.

17 MR. BARNETT: No further questions for this
18 witness. We ask that she be excused.

19 THE COURT: Thank you for coming, Judge
20 Simmons. You are free to go.

21 THE WITNESS: Thank you.

22 THE COURT: We need to take a short break.
23 The Clerk is going to come back there with some menus
24 for you all to order lunch during this break. So we
25 will be back with you in just a few minutes please.

1 (WHEREUPON, the jury exits at approximately 11:55
2 a.m.)

3 **THE COURT:** We'll take a short break.

4 (WHEREUPON, a short recess was taken at approximately
5 11:55 a.m.)

6 (WHEREUPON, the Court resumed at approximately 12:09
7 p.m.)

8 **THE COURT:** All right. Y'all ready?

9 **MR. BARNETT:** The State is ready.

10 **THE COURT:** Where are your partners?

11 **MS. QUIMBY:** Your Honor, I'll check.

12 **THE COURT:** Why don't you stay in here, Ms.
13 Quimby and let's let somebody else go check.

14 **MS. QUIMBY:** Yes, sir.

15 (WHEREUPON, Mr. Bartosh enters at approximately 12:10
16 p.m.)

17 **THE COURT:** All right. Bring in the jury.

18 (WHEREUPON, the jury enters at approximately 12:11
19 p.m.)

20 **MR. WILLINGHAM:** Please the Court. We call
21 Stanford Wilkins.

22 **STANFORD WILKINS**

23 having first being duly sworn testified as follows:

24 **DIRECT EXAMINATION**

25 **BY MR. WILLINGHAM:**

1 Q Tell the jury who you are.

2 A My name is Stanford Wilkins.

3 Q Where do you live?

4 A Boiling Springs.

5 Q Do you know the defendant Marion Lindsey?

6 A I know of him.

7 Q Okay. Did you have an opportunity to see him on
8 February 20th, 1994?

9 A Oh, yeah.

10 Q Where were you?

11 A In Inman.

12 Q Who were you with?

13 A Jessica Cannon.

14 Q What were you doing?

15 A We were getting ready to go down to her
16 grandmother's house to eat dinner.

17 Q Okay. Were you driving?

18 A Yes, I was.

19 Q What were you driving?

20 A A '92 Honda Prelude.

21 Q You left her home or Jessica's home?

22 A Jessica's.

23 Q Left Jessica's home. What happened then?

24 A Me and Jessica's dad walked outside. We were
25 sitting outside talking. Then we seen a Honda Accord come

1 by.

2 Q Okay. Did you know who in the Honda Accord?

3 A Not at the time.

4 Q Did you learn later who was in the Honda Accord?

5 A Yes, I did.

6 Q Who was it?

7 A Myron Lindsey.

8 Q After that Honda rode by, what happened?

9 A He rode back by. Me and Jessica proceeded to
10 get in the car to go to her grandmother's house to eat.

11 Q Okay.

12 A We got probably a quarter of a mile maybe or
13 less. I seen headlights coming towards my car?

14 Q What time of day was this?

15 A It was probably 8 o'clock at night, 9:00. It
16 was nighttime.

17 Q Okay. You saw headlights coming at you. What
18 did you do?

19 A I stopped. He blocked me in the middle of the
20 road. He had my car blocked like that.

21 (Demonstrating.)

22 Q All right. You stopped because your car was
23 blocked?

24 A Yes.

25 Q What is your car blocked by?

1 A Another vehicle, the Honda Accord.

2 Q The Honda Accord. After you stopped, what
3 happened?

4 A Myron Lindsey got out and shot twice, hit me
5 once. Shot through my windshield.

6 Q Okay. Where was he standing when he shot you?

7 A Directly in front of my car with my headlights on
8 him.

9 Q Did you get a look at him?

10 A Yes.

11 Q Where did he shoot?

12 A He shot me in the arm.

13 Q It came through your front windshield?

14 A Front windshield.

15 Q Where was Jessica at?

16 A She was in the passenger seat.

17 Q Did she get hurt?

18 A No.

19 Q Do you see in this courtroom the man who shot
20 you?

21 A Right there.

22 (Pointing.)

23 Q Tell me what he's wearing?

24 A A white shirt.

25 Q What does he look like?

1 **A** A black male.

2 **Q** What did you do then?

3 **A** I backed up. Then I got back in Jessica's
4 driveway. We parked the car up under the garage and went
5 into the house and called 911 and the ambulance.

6 **Q** Did the ambulance come and get you?

7 **A** Yes.

8 **Q** What kind of injury did you have?

9 **A** Sustained a bullet which is still in my arm with
10 a .45 caliber gun.

11 **Q** I'm going to show you State's Exhibit 67 and ask
12 you if you recognize that?

13 **A** Yes. That is my vehicle, the '92 Prelude.

14 **Q** Does that accurately reflect how your car looked
15 after this incident?

16 **A** Yes.

17 **Q** I'm going to show you State's Exhibit 66 and ask
18 you if you recognize that?

19 **A** It is the bullet, directly where the bullet come
20 in.

21 **Q** The photograph's showing the same thing from the
22 inside of the car?

23 **A** Yes.

24 **Q** Does that accurately reflect how it looked that
25 day?

1 A Yes.

2 Q And then State's Exhibit 65, you recognize that?

3 A Yes, that is my bullet wound.

4 Q That is the injury to your arm?

5 A Yes.

6 Q Does that it accurately reflect the way it
7 looked?

8 A Yes.

9 MR. WILLINGHAM: Your Honor, at this time I move
10 State's 65, 66 and 67 into evidence.

11 MR. BARTOSH: No objection.

12 THE COURT: They are admitted.

13 (WHEREUPON, State's Exhibits 65 through 67 were
14 admitted into evidence.)

15 MR. WILLINGHAM: Your Honor, request
16 permission to publish to the jury.

17 THE COURT: Yes, sir.

18 BY MR. WILLINGHAM:

19 Q I am first going to show you what was entered as
20 State's Exhibit 67. If you would, tell the jury what they
21 are seeing?

22 A That's my '92 Honda Prelude. I was sitting in the
23 driver's seat. And the bullet came through the windshield
24 and hit me in the arm.

25 Q What is that right there?

1 **A** That is the bullet hole.

2 **Q** Now, I'm going to show you State's Exhibit 66.

3 Tell me what that is.

4 **A** That is the inside of my '92 Honda Prelude where
5 the bullet came in aiming directly towards me.

6 **Q** What is that right there?

7 **A** That is the bullet hole.

8 **Q** This where you were sitting?

9 **A** Yes.

10 **Q** State's Exhibit 65. Tell the jury what that is?

11 **A** That's my bullet wound. The bullet went inside
12 of my arm where it remains.

13 **Q** If you would, answer any questions that they have
14 for you. Thank you.

15 **CROSS-EXAMINATION**

16 **BY MR. BARTOSH:**

17 **Q** Mr. Wilkins, did you go to court, were you
18 present when Mr. Lindsey was sentenced on this charge?

19 **A** No, I was not present.

20 **Q** Were you ever told what the sentence was?

21 **A** Yes, my mother and my father were present.

22 **Q** Can you tell the jury what the --

23 **MR. WILLINGHAM:** Objection, Your Honor. That
24 would be hearsay. There will be proper testimony as
25 to what the conviction was offered by the Clerk later

1 on.

2 MR. BARTOSH: And the sentence?

3 MR. WILLINGHAM: Yes, sir.

4 MR. BARTOSH: Then I have no questions.

5 THE COURT: All right. Sir, you can step
6 down.

7 MR. WILLINGHAM: We call Jessica Cannon.

8 JESSICA CANNON

9 having first being duly sworn testified as follows:

10 DIRECT EXAMINATION

11 BY MR. WILLINGHAM:

12 Q Tell me your name.

13 A Jessica Renee Cannon.

14 Q Ms. Cannon, you live here in Spartanburg County?

15 A No, sir. I now live in Greenville County.

16 Q Did you use to live in Greenville?

17 A I did. I lived in Inman.

18 Q Do you know a fellow by the name of Stanford
19 Wilkins?

20 A Yes, at the time, he was my boyfriend. And we
21 have one child together.

22 Q Were y'all together on February 20th, 1994?

23 A Yes, it was three days before my birthday.

24 Q Tell the jury what happened.

25 A Okay. We were at my house. I lived at my

1 parent's house with my father. We were standing outside.
2 It was getting dark. We were standing outside. And we
3 all saw the Honda Accord -- it was like a tan color -- ride
4 down the road. I heard things being said out of the car.
5 This happen like twice.

6 So I told Stanford let's just leave. Because I knew
7 leading up to that, there had been a confrontation before
8 where we were riding through downtown. And we saw Myron or
9 Marion in the car in that same Honda at a red light. And
10 he got real close to our car. I actually questioned his
11 friend at a gas station. Actually me and Nell, we were at
12 a gas station in Inman. And I asked him what was his
13 problem.

14 MR. BARTOSH: Objection, Your Honor. That is
15 hearsay.

16 MR. WILLINGHAM: Let the judge rule and then we
17 will go.

18 THE WITNESS: Okay.

19 MR. WILLINGHAM: I agree it probably is.

20 THE COURT: So, ma'am, he is not going to want
21 you to say what y'all said during the conversation.

22 THE WITNESS: Okay.

23 BY MR. WILLINGHAM:

24 Q Back to the date in question?

25 THE COURT: Let me address, when she repeated

1 her question to Nell, that is not hearsay. That
2 objection is overruled. You are anticipating what
3 was coming. Mr. Willingham says he is not going any
4 further than the conversation.

5 **THE WITNESS:** I gotcha.

6 **MR. WILLINGHAM:** Thank you, Your Honor.

7 **BY MR. WILLINGHAM:**

8 **Q** Back in February 20, 1994, did you know Marion
9 Lindsey?

10 **A** I did.

11 **Q** Did you see him that night?

12 **A** I did.

13 **Q** Tell me what happened after you pulled out of
14 your driveway.

15 **A** Okay.

16 **Q** Who were you with?

17 **A** I was the Stan Wilkins.

18 **Q** What were you in?

19 **A** His Honda Prelude.

20 **Q** Where were you sitting?

21 **A** I was sitting in the passenger seat.

22 **Q** You pulled out of the driveway. What happened?

23 **A** We backed out of the driveway. We drove, we went
24 to the left towards Highway 292. We got about three
25 houses down. This Honda Accord was coming toward us. We

1 were going straight. And this car was coming on our side
2 of the road and made us almost go in the ditch. So we
3 stopped.

4 At that point, I saw Myron get out of the car with a
5 gun pointing towards our car. We started going backwards.
6 I was screaming to Stan to just go back to our house. I
7 saw the gun.

8 Q That's okay.

9 A He pointed the gun towards our car, the car we
10 were riding in. Then I heard a shot. And I ducked down
11 in the seat. And then I heard the glass like shatter. At
12 the time, I was covering my head. The bullet came in. I
13 felt the glass hit my arm. And I just kept, was screaming
14 go back to my house. And Stanford said he got me, he got
15 me.

16 We pulled into my parent's garage. And we were
17 blowing the horn. And my daddy came running out of the
18 house because he said he heard a gun shot. He came
19 running out of house. What's going on? And Stan was
20 screaming.

21 MR. BARTOSH: Objection, Your Honor, hearsay as
22 to what her father said.

23 MR. WILLINGHAM: Not offered to prove --

24 THE COURT: He said what is going on. That is
25 not hearsay. Overruled.

1 **BY MR. WILLINGHAM:**

2 **Q** Was 911 called?

3 **A** Yes, my dad called 911.

4 **Q** Did the ambulance come and take care of Mr.
5 Wilkins?

6 **A** Yes.

7 **Q** Do you see the man in this courtroom today who
8 stopped you in the road?

9 **A** Yes.

10 **Q** Point him out to the jury.

11 **A** Marion Lindsey with the white shirt on, black
12 male, the defendant.

13 **Q** Thank you. Answer any questions the defense may
14 have.

15 **THE COURT:** All right. Let me --

16 **MR. BARTOSH:** No questions.

17 **THE COURT:** Do you have any questions?

18 **MR. BARTOSH:** No, sir.

19 **THE COURT:** You can step down, ma'am.

20 **THE WITNESS:** Thank you.

21 **MR. WILLINGHAM:** I'll call Martha Smith to the
22 stand please.

23 **MARTHA SMITH**

24 having first being duly sworn testified as follows:

25 **DIRECT EXAMINATION**

1 **BY MR. WILLINGHAM:**

2 **Q** If you would, identify yourself for the record
3 please.

4 **A** Martha Ann Smith.

5 **Q** Where do you work at, ma'am?

6 **A** Spartanburg County Clerk of Court.

7 **Q** How long have you been there, ma'am?

8 **A** Almost 22, 23 Years.

9 **Q** Is part of your duties to take care of records of
10 the court?

11 **A** Yes, sir.

12 **Q** Does that include criminal indictments?

13 **A** Yes, sir.

14 **Q** Let me show you what is been marked as State's
15 Exhibit number 80. Is that the copy of an ABWIK
16 conviction against Marion Lindsey?

17 **A** Yes, sir. It is.

18 **MR. WILLINGHAM:** Your Honor, I move this into
19 evidence at this time.

20 **MR. BARTOSH:** No objection, Your Honor.

21 **THE COURT:** It is admitted.

22 (WHEREUPON, State's Exhibit 80 was admitted into
23 evidence.)

24 **BY MR. WILLINGHAM:**

25 **Q** I was wondering if I could ask you, I call it an

1 ABWIK. Can you tell what the charge officially was?

2 A Assault and battery with intent to kill.

3 Q Did he plead no contest to that?

4 A Yes, sir.

5 Q When did he plead to that?

6 A December 14th, 1996.

7 Q What was the sentence he received?

8 A He got two years suspended to one year and one
9 years probation. Restitution.

10 Q Thank you, ma'am.

11 THE COURT: Let me see that.

12 MR. WILLINGHAM: Yes, sir.

13 BY MR. WILLINGHAM:

14 Q If you would, tell us who the victim was in that
15 case?

16 A Stanford R. Wilkins.

17 Q Thank you, ma'am. If you would, answer any
18 questions Mr. Bartosh may have.

19 THE COURT: Let me see it again.

20 MR. BARNETT: Yes, Your Honor.

21 THE COURT: Do you have any questions?

22 MR. BARTOSH: No, sir.

23 THE COURT: You can step down, Martha.

24 MR. GOWDY: Your Honor, if the pleases the
25 Court, the State will call Mr. Stanley Staggs.

STANLEY STAGGS

having first being duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. GOWDY:

Q Good afternoon, sir.

A Good afternoon.

Q Mr. Staggs, you have a good strong clear voice.

I'm going to ask you the keep it up so the last lady and the last gentleman can hear you. Tell us name and where you live?

A My name is Stanley Earl Staggs. I live in Roebuck, South Carolina.

Q If you don't mind my asking, Mr. Staggs, what age gentleman are you?

A I'm 45.

Q Do you have a family here in Spartanburg?

A Yes, I do.

Q How many children do you have?

A I have currently two children, two biological children. And I have custody of my two grandchildren. And Nell was my daughter.

Q Mr. Staggs, what do you do for a living?

A Quite a few things. I own a restaurant. I work as a production and control manager in a manufacturing facility. I coach high school track.

1 Q Where do you coach track?

2 A At Woodruff High school.

3 Q Any specialty?

4 A I think sprints and hurdles, they say. I don't
5 know.

6 Q Was Nell Lindsey your daughter?

7 A Yes.

8 Q How old were you when she was born?

9 A Nell was born when I was 16. Her mother and I
10 were both young when she was born and kind of grew up with
11 us.

12 Q Did you and Nell's mama, Ms. Wright, ever marry
13 one another?

14 A No. We were never married. But Nell was
15 always acknowledged as my child. And I was her father.
16 And Carol and I had relationship. And we raised her.
17 Unfortunately, I was not in the home with her but I was a
18 part of her life, entire life from the time she was a baby.

19 Q When you say she was a part of your life, Mr.
20 Staggs, I want you to give the jury a sense of what kind of
21 involvement you had with Nell throughout her life?

22 A As a 16-year-old, I used to work in the summer.
23 My mother worked at Albert Laboratory. They manufacture
24 Similac milk for babies. So I know what it cost to buy 96
25 Pampers out of Toys-R-Us and buy a cases of milk. So even

1 as a little baby, I was involved with her. She stayed
2 with, came to my house and stayed with me and my parents on
3 weekends. And that continued.

4 Even as she grew up and went to school, I was involved
5 with her. I remember her going to homecoming. I
6 remember her getting her first car. I remember her going
7 to the prom. I was not physically there in the house, but
8 I knew as much about her as I do with my kids. And she
9 was a good kid. She was a good kid.

10 Q Let me ask you this, Mr. Staggs, what
11 characteristics stick out most in your mind about your
12 daughter now?

13 A Her independence, her commitment to being a good
14 mother. I remember when she had the baby before she was
15 married and got her own place. Had her own trailer. Was
16 working and providing for her family without the assistance
17 of her mother or me. We helped her when we had to. She
18 was very conscientious of trying to do it on her own. I
19 commend her for that.

20 Q Was this before one Marion Lindsey came into her
21 life that she had all of these independent things?

22 A Absolutely. Before she became a part of her
23 life, she was self-sufficient. She was working hard.
24 She was a good mother. She was a good person.

25 Q I want to ask you this. I want to go back to

1 September of 2002. In the days or weeks before Nell's
2 killing, did she come to you as her father and have any
3 conversations with you about her intentions of leaving
4 Marion Lindsey for good?

5 A Yes, she did. The Saturday before she was killed,
6 she came to restaurant. It was about 8:45. She walked
7 in. And I was actually standing behind a bar. I looked
8 up and said what are you doing here. She always laughed.
9 And she said she wanted french fries. She left Inman to
10 come all the way down to Roebuck to get back to get french
11 fries. I kid her about McDonald's and Hardee's and
12 everything else on the way.

13 I could sense that something was bothering her. We
14 talked a little bit about her marital situation. And we
15 talked before, but this time seemed different. She told
16 she was done and that she wanted my help. And I said if
17 you're serious about this, you go home and you call me
18 back. And we will do what we have to. I would get in
19 touch with a lawyer. And we would get this done. But she
20 left me that Saturday night with the commitment and she was
21 going to do that.

22 She called me back Sunday night to remind me that she
23 was serious. I spoke with her even Monday after she got
24 some information about a couple of lawyers. She was going
25 to let me know how much it cost. I was going to help her do

1 this.

2 Q You offered financially to help her?

3 A Yes. Because I will be blunt with you, when my
4 daughter married Marion, it was probably three or four
5 months before she came to me to tell me she was married to
6 him. It was not matter of whether I approve or disapprove
7 of him, but I think she knows that I know he did not have
8 her best interest at heart from day one. That was, I
9 think, the reason she was very hesitant about telling me.

10 Q Did your family have traditions at the holidays
11 particularly Christmas?

12 A Yes. Every Christmas Eve for the last 20 years,
13 we've had dinner at my house, my family which included my
14 daughter Nell. She's come to all of those. Since she
15 was married or involved with Marion, she always came, her
16 and the boys. He came once in the entire time that they
17 were together to my house.

18 Q One time?

19 A One time in the entire six or seven years or
20 eight years, whatever their involvement was. But one
21 time. I thought that was strange. Holidays are for
22 families. We had the boys. And we had her. That was
23 okay.

24 Q Do you recall the time, Mr. Staggs, when this
25 defendant took his wife off his auto insurance and you had

1 to rent a car for her?

2 **A** Yes. She had a car accident and called me up
3 and said dad I need to get a rental car. And I said wait
4 a minute, you had a car accident. You have rental
5 insurance right. She said no because Marion don't have it
6 on the car. The bad thing was there was a car sitting in
7 the driveway. And he wouldn't give her access to drive it.
8 So we went ahead and got her a car with a credit card.

9 So I thought that was totally out of character for
10 anybody. My thing was they had kids who had to go to
11 school. I could not comprehend or understand that why him
12 as a father and as a man would not want to make sure that
13 at least his kids were taken care of.

14 **Q** I purposely did not ask you about this at the
15 time that you mentioned it. But you mentioned that in
16 addition to your own biological children, you are raising
17 two other children right now?

18 **A** That's correct.

19 **Q** Who lives with you, Mr. Staggs?

20 **A** Trey and Alex L.

21 **Q** Nell's two boys?

22 **A** Nell's two boys and Myron's kids.

23 **Q** They stay with you during the week and stay with
24 their grandmama, Ms. Wright, on the weekend?

25 **A** That is correct.

1 **Q** Do you have custody or some formal arrangement
2 with the Court for them?

3 **A** Yes, we do. We've got formal custody. To be
4 blunt, the night that Nell was killed, I actually
5 physically picked them up. I was concerned that with
6 everything that was going on, it would be overwhelming for
7 a two-year-old or a seven-year-old to deal with it.

8 So one of the things we cautioned ourselves was to get
9 them out of that environment. Not that it was not
10 necessarily bad. But we knew if we took them to Roebuck,
11 nobody knew them there. And they could be normal kids.
12 And we could try to put our lives back together. That's
13 the reason we did that.

14 Shortly after that, we did go to court, Carol and I.
15 And Myron was there. We got legal custody of the boys..
16 During that process, the one thing that really stuck out
17 was they asked him one question. They asked him did he
18 feel the boys were in the right environment. And his
19 answer was yes. And me sitting there, my question was the
20 big thing is the environment would have been great if he
21 had a mother and a father. That's who they needed.

22 **Q** How are the boys doing now?

23 **A** The boys are doing good. They are your normal
24 four and eight year olds. Just like every kid in America,
25 they like cartoons. They eat all day. They live

1 outdoors. They are doing well. I have been blessed to
2 have an opportunity to be with them.

3 My daughter is 17. My son is 22. Nell was the
4 oldest. All three of these guys were close. They grew up
5 as brothers and sisters. They were never different from
6 anybody. It is kind of funny now. The boys view my son
7 as uncle and my daughter as sister. I guess because she's
8 there. And he's off in college. But they've got a big
9 sister. And they've got an uncle. But they are doing
10 good.

11 Q Do either Alex or Trey ever ask about their
12 mother?

13 A Yes. Initially when we got them, Trey was in
14 diapers. He was two. Alex was seven, six, I'm sorry. But
15 yeah, they asked about their mother. Initially, let's be
16 honest, here you have a two-year-old. And that's the only
17 thing he knew was mama.

18 When we first got him, he probably thought he had 20
19 or 30 moms because everybody was overwhelming them. And I
20 know it confused him for a while. But they both asked
21 about their mom. They do today.

22 Alex is more on the emotional side. I think he was
23 closer to his mom simply because of the relationship he had
24 with his father. He spent a lot of time with his mom. You
25 sense that because he is a bright kid, very artistic. He

1 had to go through some counseling since this incident. It
2 has been tough. But he's doing well. He is doing well.

3 Q Do you have any special rules in the Staggs'
4 household relative to what kind of toys they can play with
5 or what kind of toys can be in the house?

6 A Absolutely. When we first got them, I will be
7 blunt with you, Trey had a fetish for guns initially.
8 Since this happened, we kind of took all the guns away. No
9 water guns, no cap guns, none whatsoever. It was strange
10 because most little boys grow up with guns. But it
11 reminded me so much of their mother's violent death that we
12 put that away. They have adjusted. They're okay.

13 Q The first Christmas after the Christmas of 2002,
14 the 20-year-old Staggs tradition, what changed about having
15 Christmas the way you used to have it?

16 A We normally had it my house. We have enough
17 room there. But it was just so tough missing her that
18 first year that we just went to a restaurant and actually
19 had some of Carol's family down. And it was very
20 different. Normally, you got the fireplace and you're
21 there. And she was always -- Nell was a great kid about
22 Christmas. She loved Christmas and she loved family.

23 I can remember plenty of Christmases with her sitting
24 on the floor when the boys were little playing with toys
25 and just being by the fireplace and just actually enjoying

1 family. It seemed to be the one time she had some peace
2 and rest.

3 Q What kind of mother was she, Mr. Staggs?

4 A My daughter was a great mother. She was a great
5 mother. If there was a picture of a mother in the
6 dictionary, that would be her. She worked hard everyday.
7 She wanted to give the boys the very best. I mean, never
8 wanted to short cut them. That's all you can ask for your
9 child. I admired the fact that she worked so hard by
10 herself.

11 I will be blunt Myron or Marion or whatever you want
12 to call him, he and I have never been close. I guess that
13 was rightfully so. But my daughter, I saw her with those
14 boys. I knew what she was willing to commit to and what
15 she was going to do to take care of them. That was the
16 most important thing to her. I think it had been brought
17 out that, like I said, physically I was not there with my
18 daughter.

19 But I think she understood the value of family. And
20 for a long time, I thought about the fact that what she
21 endured was simply because of that. She wanted to make
22 sure the boys had a normal family. Quote, unquote, "a
23 two-parent family" and the things we all believe in, but at
24 what price.

25 Q Mr. Staggs, let me ask you this final question.

1 Since September of 2002, you have had Trey and Alex with
2 you virtually nonstop since except for weekends when they
3 were with Ms. Wright, is that correct?

4 A Right.

5 Q During those coming on two years, how many times
6 has their father written them, called them, sent them a
7 Christmas card, sent them a birthday card?

8 A Nothing, not a word. The only time I been
9 around him was in the courtroom setting. And he mentioned
10 when we were getting the custody hearing to get the boys,
11 he mentioned seeing them then. One of the things I shared
12 with anyone was we never denied him or his family access to
13 them. We never said, uh, we've got the boys hidden some
14 place. You would be led to believe that that's the case.
15 That is not.

16 It concerns me when I hear his passion for his
17 children, but I don't see any effort. It's been almost
18 two years. Again, never a letter. I would not deny those
19 kids. I will be blunt with you. Trey when we initially
20 brought him home asked about his dad. But dad has become
21 very, very little now. They have developed their life
22 without him being a part of it.

23 They know that their mother is gone. I guess they
24 have accepted that they have no father. That is the thing
25 that really sticks me. This thing not only took away their

1 mother, it took away their father. It created orphans out
2 of my grandkids. And that's something that is tough
3 because they didn't ask for this.

4 Q Thank you, Mr. Staggs. Please answer any
5 questions Mr. Bartosh has.

6 **CROSS-EXAMINATION**

7 **BY MR. BARTOSH:**

8 Q Mr. Staggs, I got the impression from your
9 testimony that you were not a family, I apologize, not in
10 the house with your daughter.

11 A I did not live with her because I did not marry
12 her mother.

13 A Basically she was raised in a single parent home?

14 Q She was raised in a single parent home in a
15 physical sense. In terms of my involvement with my child,
16 no. My child knew who I was from the time she could speak.
17 And I was dealing with her when she was an infant.

18 Q I understand but you never lived with her?

19 A No.

20 Q Okay. You supported her?

21 A I supported her, but she is also spent time with
22 me in my house. So I guess she did live with me.

23 Q Like a normally divorced couple where they would,
24 the kids would have visitation. Her mother was her main
25 support and her main parent.

1 **A** Okay.

2 **Q** Is that true?

3 **A** True.

4 **Q** Okay. And you provided financial assistance I --

5 **A** Yes.

6 **Q** -- I assume for her well-being and for when you
7 come by to see her?

8 **A** Yes.

9 **Q** But your roll was minimal as far as her rearing?

10 **A** I don't think so. It was, I think it was a
11 little more involved than just visitation on the weekend.
12 As I said earlier, the things that normal fathers do.
13 Taking my daughter to homecoming. Riding her in a
14 convertible, escorting her and doing those things. I
15 guess that would be a normal maintenance in a strange
16 family or whatever. But in addition to that, my daughter
17 spent time with me in the summers when she was not in
18 school.

19 **Q** But day-to-day.

20 **A** Okay. Day-to-day.

21 **Q** Day to day, she was in her mother's care?

22 **A** Correct.

23 **Q** Okay. Now your understanding that the
24 solicitor's asked you about Mr. Lindsey not contacting his
25 sons. Well, let's go back to the custody first of all.

1 Did he agree to sign over custody to you?

2 A Yes.

3 Q He did not contest it?

4 A No.

5 Q Of course, he was incarcerated, correct?

6 Q So what would have been the best environment for
7 his boys giving the choices between being incarcerated and
8 your situation?

9 A Are you asking me that?

10 Q Yes.

11 A What would have been the best situation --

12 Q Where do you think that they should have gone
13 other than you?

14 A You're asking me my opinion?

15 Q Yes.

16 A You're asking my opinion now or do you want to --
17 you're asking me my opinion? My opinion would have been
18 that if he was so concerned about the well-being of boys
19 and that his family was there to support him, he would have
20 made the effort to try to get them involved in it.

21 Q Did they make an effort to see the children?

22 A No, sir.

23 Q They never asked?

24 A No, sir.

25 Q Not in those two years?

1 **A** No, sir.

2 **Q** Never contacted you?

3 **A** No, sir.

4 **Q** If you had not taken the children, where would
5 the children had gone if you know?

6 **A** I'm assume and again this is just speculation on
7 my part that Carol would probably have them, the
8 grandmother here.

9 **Q** Or DSS perhaps?

10 **A** No, that would not have happened.

11 **Q** You also understand that Mr. Lindsey's had these
12 charges pending the entire time since you've had those
13 children? .

14 **A** Yes.

15 **Q** And it was his lawyer's advice not to contact
16 them.

17 **A** I --

18 **Q** Not to contact anybody.

19 **A** I have no idea that. If you are sharing that
20 with me, --

21 **Q** Yes, I'm sharing that with you.

22 **A** -- I guess that's a fact.

23 **Q** Did Ms. Wright ever say that she wasn't able was
24 take care of the children because of her health?

25 **A** Pardon?

1 Q Did Ms. Wright ever say she was not able to take
2 care of the children because of her health?

3 A Did she ever say that?

4 Q At the, uh --

5 A The hearing?

6 Q At the hearing.

7 A At the custody hearing?

8 Q Yes.

9 A Uh, no. You want to know what was said at the
10 custody?

11 Q No.

12 A Okay.

13 Q I just want to know if she ever said -- let me
14 take it a bit farther. Has she ever said that she felt
15 that she would be unable to properly care for the children
16 because of her health?

17 A The statement was that she felt because of her
18 health the boys, being active and young as they were, the
19 boys would probably be better situated with me.

20 Q Okay. Thank you. So just to kind of back up a
21 little. Your involvement with your daughter was as a
22 nonresident father?

23 A If that is your terminology, yes.

24 Q You were not in the home like many divorced
25 couples?

1 **A** Yes.

2 **Q** Okay. You would provide financial support her?

3 **A** Yes.

4 **Q** Okay. Now you mentioned the thing about, I was
5 kind of confused about the thing about she had to get.
6 rental car because of insurance?

7 **A** Yes.

8 **Q** Did Mr. Lindsey buy her a new car every year or
9 do you know?

10 **A** To my knowledge, I don't know for sure.

11 **Q** Okay. But she told you that because it was no
12 insurance on the car, they had no car to drive?

13 **A** She had no rental coverage on the car. The
14 insurance was all in his name. And he would not get her a
15 car to drive.

16 **Q** Okay. So the fact was there was no rental
17 coverage --

18 **A** Correct.

19 **Q** -- for the car?

20 **A** Correct.

21 **Q** And he would provide her a car to drive?

22 **A** That they had in their driveway, another car.

23 **Q** Okay. Weren't all the cars that they owned in
24 her name?

25 **A** I'm not sure of that.

1 Q That's all I have.

2 MR. GOWDY: I have nothing on redirect, Mr.
3 Staggs.

4 THE COURT: You can step down.

5 MR. GOWDY: Your Honor, the State rest.

6 THE COURT: Ladies and gentlemen, we're going to
7 take a lunch break now. It's going to be a little
8 bit longer lunch break than usual. Your food has
9 been ordered. It's my understanding that you will be
10 taken back the hotel where your food will be served.
11 We should have you back down here to resume in about
12 two hours. So have a nice lunch. And we will see you
13 then.

14 (WHEREUPON, the jury exits at approximately 12:51
15 p.m.)

16 THE COURT: All right. Y'all need to take
17 anything up now before we break for lunch?

18 MR. BARTOSH: Well, I've got some motions, Your
19 Honor. But they might take a while. Do you want to
20 take them up now or do you want to wait until after
21 lunch?

22 THE COURT: I'd rather do them now.

23 MR. BARTOSH: Okay. Your Honor, we would for a
24 directed verdict as to the aggravating circumstance
25 that the State is relying on in that no reasonable

1 juror could find that the State has proven all the
2 elements of the aggravating circumstance beyond a
3 reasonable doubt.

4 Your Honor, under Sawyer v. Whitley, the Supreme
5 Court has said in order to avoid arbitrary and
6 capricious impositions of a death sentence, the states
7 have adopted narrowing factors to limit the class of
8 offenders upon which the death penalty may be imposed.
9 If the aggravating circumstance in the case is too
10 broadly interpreted, it will not sufficiently narrow
11 the class of persons eligible for the death penalty
12 and would become potentially arbitrary and capricious
13 and violate the Eight Amendment prohibition against
14 cruel and unusual punishment.

15 In this case, they relied upon 16-3-23. That the
16 offender by his act of murder knowingly created a
17 great risk of death of more than one person in a
18 public place by means of a weapon or a device which
19 would normally be hazardous to the lives of more than
20 one person. Now, what they must prove is first of all
21 that there was a great risk of death, that there was a
22 public place, and that the use of the device which
23 would be hazardous to the lives of more than one
24 person.

25 Now, we would argue, Your Honor, in the cases

1 that I have found in South Carolina where this
2 aggravator has been relied on, I believe there are
3 four of them. There is State versus Lockclair, State
4 versus Rogers, State versus Ivy and State versus
5 Fissora. Now, in each of those, Your Honor, the issue
6 of whether or not the State had violated the Eighth
7 Amendment with the aggravator of public place that
8 they were talking about was never addressed except in
9 Lockclair.

10 And I think that this case is distinguishable
11 from Lockclair because in Lockclair, as I remember,
12 there was more indiscriminate fire into a crowd.
13 Whereas, here what we have is a small number of
14 people, basically two children and two adults, in an
15 automobile. Whereas, in Lockclair, you have a large
16 number of people standing in the yard. And also
17 according to the opinion, there were children that
18 were on the road next door playing in the street.
19 There was a large number of people.

20 I think the biggest, the biggest differential is
21 the fact that there was more indiscriminate firing in
22 Lockclair than there is here. Here, there is four
23 shots. All four shots struck -- first of all, the
24 weapon was a .38, a five shot .38 caliber pistol.
25 There were four, five shots fired. Four shots struck

1 the victim. And the fifth shot struck Mr. Lindsey.

2 Now, where I have found some law, Georgia has the
3 same aggravator. And it's the same language in the
4 Georgia statute as in the South Carolina statute. In
5 State v. Polk, the facts were that a drug store, there
6 were two people in the drug store. He pulled the
7 pistol out on aisle and grabbed the cash register.
8 Then he put the two of them in the cooler.

9 And they waited in there for a while. They
10 thought he left. They came out. He was still there.
11 He struggles with one of the employees, shot him and
12 then shot the other.

13 The Georgia Supreme Court in that case held that
14 one of the aggravating circumstances found by the jury
15 was that the defendant by his act of murder -- Your
16 Honor, this is on page 14 -- armed robbery or
17 kidnaping when he knowingly created a great risk of
18 death to more than one person in a public place by
19 means of a weapon or a device which would normally be
20 hazardous to the lives of more than one person. As I
21 said, that tracks the South Carolina statute.

22 **THE COURT:** Let me stop you right there. You have
23 given me, I believe, more than you meant to give me.

24 **MR. BARTOSH:** I apologize, Your Honor.

25 **THE COURT:** There is what looks like an outline in

1 here that you probably didn't want to give me.

2 **MR. BARTOSH:** Okay. But the statutory
3 aggravating circumstances, both of which much be
4 satisfied. First the evidence that shows that the
5 defendant by his act of murder knowingly created a
6 great risk of death to more than one person in a
7 public place. And second, the evidence must show that
8 this great risk resulted from the use of the weapon or
9 a device that is normally hazardous to the lives of
10 more than one person.

11 It goes on to say that a pistol used in a public
12 place may be hazardous to the lives of more than one
13 person. But depending on how it is used, it does not
14 necessarily create a great risk of death of more than
15 one person. Great risk does not mean near possibility
16 but likelihood or high probability. Firing a gun into
17 a crowd can create a great risk of death to more than
18 one person. Shooting someone from fairly close range
19 does not by itself create a great risk of death to
20 more than one person simply because others may be in
21 the vicinity.

22 Your Honor, that is what I would say we have in
23 this case. You had a, you had someone firing at a
24 fairly short distance at one person. And so it has
25 to, it can't just be a likelihood. It has to be

1 higher than that. And we would suggest that if the
2 State is going to prove that the facts of this -- I
3 also have an unpublished Fourth Circuit opinion, Your
4 Honor, from Georgia.

5 In the case, they found an aggravating
6 circumstance where a man knowingly created a very
7 risky death to more than one person by means of a
8 weapon, a butcher knife which would normally be
9 hazardous to the lives of more than one person. This
10 is 856 S. 2d. 187. And they go on to discuss that a
11 butcher knife is not a weapon which would normally be
12 hazardous to the lives of more than one person.

13 They cite some Georgia, I apologize, North
14 Carolina cases. They say that the legislature
15 intended this aggravating factor to be limited to
16 those weapons for the devices which are indiscriminate
17 in their hazardous power. Automatic weapons such as
18 machine guns would fit that description. These
19 weapons are normally hazardous to the lives of more
20 than one person.

21 They cite a North Carolina case, the State versus
22 Jones which is 351 S. E. 2d. 122. It's a 1986 case
23 where they say a .38 caliber handgun is not a weapon
24 normally dangerous to the lives of more than one
25 person. So relying on these cases, Your Honor, we

1 would ask the Court to direct a verdict as to the
2 aggravating circumstance.

3 MR. GOWDY: Your Honor, may it please the
4 Court. Lockclair says for a number of propositions I
5 would argue to the Court are submitted. Number one,
6 it stands for the proposition that a firearm is a
7 weapon capable of killing more than one person. I
8 think that is clear. I think that the back parking
9 lot of the Inman Police Station is clearly a public
10 place which brings us to that third element about
11 knowingly creating a great risk.

12 And I noted that Mr. Bartosh mentioned that
13 these were close range shots. I couldn't help but
14 also notice that he tried to shoot himself at point
15 blank range and managed to miss. So this was further
16 away than his attempt to shoot himself. The fact is,
17 he did miss one of those four times. In a second, I'm
18 going to get to the fact that even though he hit Nell,
19 that doesn't foreclose the possibility of this
20 aggravator being into place.

21 Lockclair says this, Your Honor, Lockclair put
22 more than one person at the risk of danger because he
23 attempted, attempted to fire the gun several times but
24 the safety was on. That is South Carolina Law. He
25 attempted to fire the gun but the safety was on.

1 The facts that play here were much more egregious
2 than that. He knew there were children in the car.
3 One leaned up to say hello. Celeste Nesbitt according
4 to the evidence said the other one was asleep laying
5 in the back. Tinted windows. He fired to times
6 from the back of Nell head to the front. And then he
7 walked around and fired two more times directly in the
8 direction of two children.

9 The fact is one of those bullets missed and
10 lodged in the trunk. One of those bullets, Your
11 Honor, we saw from the x-ray went in one side of her
12 skull and went out the other side and lodged in her
13 skin but outside of the skull. Which doesn't
14 foreclosed the possibility of a through and through
15 injury. One of those bullets could have gone through
16 her head and still hit the children.

17 But the fact is that one did miss. That is all
18 that is necessary. I submit to you that even if none
19 of them had miss, he created a risk. There is no
20 requirement that these bystanders be injured. They
21 were not injured in Lockclair. There is no
22 requirement that the bystanders actually be hit by a
23 bullet. He created a great risk of danger to two
24 children.

25 It is not even get to the Benny Godfrey

1 testimony. Benny Godfrey testified this defendant
2 pointed the gun at him, at Officer Godfrey. It was a
3 public place with a weapon capable of killing more
4 than one person that presented a great risk. But for
5 the fact that her head was laying either on the front,
6 car seat or on her aunt's shoulder, we very well could
7 have two homicides in this case. South Carolina is
8 Carolina law is attempting to fire the gun with the
9 safety on qualified in Locklair.

10 **THE COURT:** The facts of the Georgia case seem
11 to me to be a good bit different. This case is
12 pretty simple to me. The evidence is that on the two
13 occasions that Mr. Lindsey apparently saw Ms.
14 Nesbitt's car, he was unable to tell that Ms., that
15 his wife was in there because of the tint in the
16 windows. Once when he passed them and they were
17 driving through Spartanburg to Inman. But more
18 importantly as they stopped side-by-side on the street
19 in Inman outside of the house of Mrs. Nesbitt's mother
20 I believe she said.

21 They were close enough to have a conversation
22 through the window. And yet Mr. Lindsey could not
23 tell that Mrs. Lindsey was in the back seat because of
24 the tinted windows. Nevertheless, he fired shots
25 into the window from two different angles while the

1 vehicle was parked in a public place. And the second
2 time around looking presumably to through the same
3 window that he could not identify her through only
4 minutes before. He fired shots in the direction of
5 two children.

6 I have seen the bullet hole in the car, in the
7 seat. The bullet hole is in the area that Kiera
8 would have been sitting in. If she had decided in
9 her -- none of us would know how to react to that
10 situation. Certainly, a nine -- she was nine at the
11 time, right?

12 MR. GOWDY: Yes, sir.

13 THE COURT: Certainly, a nine-year-old child
14 is not going to have an ability to make a rational
15 calculated decision as to how to best protect herself
16 in the seconds that followed shots being fired into
17 the head of the adult sitting next to her in the back
18 seat. It is very possible that Kiera could have
19 leaned the other way. She might could have leaned
20 toward Nell for protection. And if she had done that,
21 she would be dead. That bullet goes right through
22 the space that she would have leaned into.

23 If she had not leaned away, from my view of the
24 evidence she probably would have been hit. I've got
25 absolutely no doubt that the facts in this case are

1 sufficient to go to the jury on the aggravating
2 circumstance of creating a great risk of death in a
3 public place using a weapon that is capable of
4 producing death. I did not get the language, I did
5 not quote the statute. But I have no doubt that that
6 is sufficient. Motion is denied.

7 **MR. BARTOSH:** Thank you, Your Honor.

8 **THE COURT:** Anything further? All right.
9 We'll be in recess until, we will say 2:30.

10 **MR. BARTOSH:** Okay.

11 **THE COURT:** I will certainly be here before
12 2:30. If you would just stay in touch with me about
13 how you're coming and how much time you need, we would
14 decide exactly when we will start. It will be some
15 time in the 2:30 to a quarter of 3 range whenever I
16 expect.

17 **MR. BARTOSH:** Thank you, Your Honor.

18 (WHEREUPON, a lunch recess was taken at approximately
19 1:13 p.m.)

20 (WHEREUPON, the Court resumed at approximately 3:03
21 p.m.)

22 **THE COURT:** My law clerk found a couple of cases
23 that I think are very instructive on the question of
24 what Mr. Mauldin did or not -- either did or did not
25 do when we were viewing the vehicle.

1 **MR. BARTOSH:** Yes, sir.

2 **THE COURT:** In Ruby versus Anderson, 195 S.C. 422,
3 11 S.E. 2d. 860.

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

5 **THE COURT:** And Stone versus the City of Florence,
6 203 S.C. 522, 28 S.E. 2d. 409. That's 1943. But
7 there's no reason that I know of why the law on the
8 subject would have changed. So I give you those
9 citations so that you can --

10 **MR. BARTOSH:** We have them, Your Honor.

11 **THE COURT:** You have them?

12 **MR. BARTOSH:** Yes, sir.

13 **THE COURT:** We'll deal with them when we need to.

14 **MR. BARTOSH:** Okay, sir.

15 **THE COURT:** Now, you have something you need me to
16 take care of?

17 **MR. BARTOSH:** Yes, sir. Your Honor, our first
18 witness will be Ms. Ann Howard.

19 **THE COURT:** Ms. Howard.

20 You don't need to swear her in right now.

21 I understand that you have some issues that you
22 need for me to help you with regarding whether or not
23 you can testify. So you have information within your
24 control, information that you are aware of that came
25 from potentially privileged conversations with either

1 you or members of the South Carolina Department of
2 Mental Health and Mr. Lindsey?

3 **MS. HOWARD:** There is a state statute that says
4 that I have to ask you to ask me to testify before I
5 can.

6 **THE COURT:** Right. And Mr. Bartosh, I'm assuming
7 that Mr. Lindsey would like for this young lady to
8 testify about the things that she knows?

9 **MR. BARTOSH:** That's correct.

10 **THE COURT:** So the extent there is any kind of
11 privilege, he's waiving it?

12 **MR. BARTOSH:** That's correct, Your Honor.

13 **THE COURT:** Ma'am, with that, I will order you to
14 give the testimony that you can give in response to
15 the questions that you will be asked today. Is that
16 sufficient?

17 **MS. HOWARD:** Yes, sir.

18 **THE COURT:** All right. Thank you. You can take
19 your seat. When the jury comes back in, he'll call
20 you.

21 **MR. BARTOSH:** Thank you, Your Honor.

22 **THE COURT:** Okay. Are we ready?

23 **MR. BARTOSH:** Yes, sir.

24 **THE COURT:** Bring in the jury.

25 (WHEREUPON, the jury enters at approximately 3:11

1 p.m.)

2 **MR. BARTOSH:** Thank you, Your Honor. We will
3 call Ann Howard.

4 **ANN HOWARD**

5 having first being duly sworn testified as follows:

6 **DIRECT EXAMINATION**

7 **BY MR. BARTOSH:**

8 **Q** You are Ann Howard?

9 **A** I am Ann Howard.

10 **Q** Where are you employed?

11 **A** I'm Spartanburg County Mental Health Center.

12 **Q** How long have you been employed there?

13 **A** I've been there since 1989.

14 **Q** What is your job title there?

15 **A** My job title is Special Services Coordinator
16 which really does not say much.

17 **Q** Can you tell us what your duties are?

18 **A** My duties on varied. I have several jobs
19 collectively. One of them is that I am a professional,
20 mental health professional. My job basically is I have a
21 case load. There are certain things that I am
22 credentialed to do at Mental Health. And one of my jobs is
23 to go to Spartanburg County Detention Center at least twice
24 a month and see clients or potential clients or people who
25 have asked to see someone from Mental Health.

1 Q Can you give us the benefit of your education?

2 A I have a diploma, Registered Nurse. I have a
3 Bachelor of Science from Wofford College. I have a
4 Masters in Education from the University of South Carolina
5 in Columbia.

6 Q Can you tell us about the first time you saw
7 Marion Lindsey?

8 A Yes, sir. May I refer to my notes?

9 Q Certainly.

10 A The first time I met Mr. Lindsey was on
11 September 8, 2002. I was asked to see him. He presented
12 suicidal. He was crying, depressed. He said he did not
13 remember what had happened. All he could say was they
14 said I did. He was very upset. He was very depressed.
15 He told me that he heard voices. I thought that was
16 enough evidence there that I thought he needed to come to
17 Spartanburg Area Mental Health Center for further
18 assessment and to be seen by a psychiatrist.

19 Q Okay. You have a diagnosis or an impression
20 when you first saw him?

21 A When I first saw him, I knew he was depressed.
22 I did what we call a deferred diagnosis. Which is just
23 sort of, I did not feel like I had enough information. So
24 we had a lot of rule out, but I did not give him a
25 particular diagnosis at that time.

1 **Q** That was because you felt like you did not have
2 enough information to make one?

3 **A** Right.

4 **Q** Did you see him at a later date at Mental Health?

5 **A** Yes. I saw him two days later and did about
6 another hour assessment on him. And I got him in to see
7 the psychiatrist.

8 **Q** At that time that you saw him the second time,
9 had you made a diagnosis or did you have impression?

10 **A** The second time that I saw him was when I made
11 that diagnosis, the deferred diagnosis.

12 **Q** Okay.

13 **A** First time, I did not make a diagnosis.

14 **Q** And he saw a psychiatrist?

15 **A** Yes, sir.

16 **Q** Who was that psychiatrist?

17 **A** Freeman Smith.

18 **Q** Do you have the benefit of Doctor Smith's notes?

19 **MR. BARNETT:** Your Honor, I'm going to object
20 at this time. Basically she is looking at somebody
21 else notes. And a lay witness should not be allowed
22 to do that, to base their diagnosis off those notes.

23 **THE COURT:** The question is did she have the
24 benefit of the notes. That would be a proper
25 question. You may be a little ahead of yourself.

1 When he gets around to asking for her opinion, that is
2 where you're wanting to object?

3 **MR. BARNETT:** Yes, sir.

4 **THE COURT:** Overruled at that time.

5 **MR. BARTOSH:** Thank you, Your Honor.

6 **BY MR. BARTOSH:**

7 **Q** You do not make any diagnosis or any
8 prescription or anything. You're not allowed to write
9 prescriptions?

10 **A** I do not write prescriptions. I am allowed to
11 make a temporary diagnosis.

12 **Q** If you feel that it is appropriate, then you
13 refer the person to a --

14 **A** A psychiatrist.

15 **Q** -- a psychiatrist. In this case, that's what you
16 did?

17 **A** Yes, sir.

18 **Q** Did the doctor that you referred him to, did he
19 make diagnosis?

20 **A** No, sir. He made an impression. He made it as
21 an impression, not a diagnosis.

22 **Q** What was the impression?

23 **MR. BARNETT:** Your Honor, I would object at
24 this time.

25 **THE COURT:** Sustained.

1 **MR. BARTOSH:** What was the objection? What was
2 the basis of his objection?

3 **THE COURT:** Hearsay, lack of foundation for the
4 qualifications of the expert.

5 **MR. BARNETT:** That's correct, Your Honor.

6 **BY MR. BARTOSH:**

7 **Q** Anyway, was Mr. Lindsey prescribed any
8 medication?

9 **A** When I saw Mr. Lindsey the first time, he had
10 been at Spartanburg Regional Medical Center. He was
11 released on Celexa and Depakote.

12 **Q** Can you tell us what those drugs are?

13 **A** Celexa is an antidepressant. Depakote is a mood
14 stabilizer.

15 **Q** And after, were there any other prescriptions
16 ordered for him?

17 **A** When he saw Dr. Smith, Dr. Smith put him on an
18 anti-psychotic.

19 **Q** Can you tell us what that drug was?

20 **A** Zyprexa.

21 **Q** That was an anti-psychotic drug?

22 **A** Yes, sir.

23 **Q** Have you seen Mr. Lindsey since that time?

24 **A** Yes, sir. I have seen him several times at the
25 jail at since that time.

1 Q Is he still on those medications?

2 A No, sir. At some point, he was taken off of the
3 Zyprexa and put on Abilify.

4 Q What kind of drug is that?

5 A Abilify is a different anti-psychotic, but it is
6 still an anti-psychotic.

7 Q He is still receiving medication for being
8 psychotic?

9 A My last records indicate that he was still being
10 given the Celexa, Depakote and Abilify.

11 Q One is anti-psychotic. One is for depression.
12 The other is a mood stabilizer.

13 A Right.

14 Q He is still receiving those?

15 A As far as I know.

16 Q That is all I have.

17 **CROSS-EXAMINATION**

18 **BY MR. BARNETT:**

19 Q Do you know what the word malingering means?

20 A Malingering?

21 Q Yes, ma'am.

22 A I think I do.

23 Q Can tell us what you think that means.

24 A Basically, it means to create circumstances to
25 avoid other circumstances. I may not be saying that

1 exactly right.

2 Q So a person will create different circumstances
3 that may not be true to cover for other circumstances?

4 A Wait a minute. Repeat that please.

5 Q Basically you're saying they are creating
6 different circumstances that may not be true to cover other
7 circumstances up, is that right?

8 A Basically. You may be creating symptoms,
9 creating reasons to avoid something else.

10 Q Would that be to cover one's responsibility,
11 making up different reasons to not accept responsibility?

12 A I am not sure. I am not sure.

13 Q Wouldn't malingering be the intentional
14 production of false or exaggerated physical symptoms or
15 psychological symptoms motivated by reasons to have those
16 symptoms?

17 A Since you're reading from the DSM 40, yes, sir.

18 Q All you had was reasons that he gave to you, is
19 that right?

20 A He?

21 Q Mr. Lindsey. That is in your information that
22 is provided to me?

23 A I'm not sure that you what you are referring to.

24 Q Your notes and so forth that you took on him that
25 intake interview with him.

1 A On the intake interview and on the follow-up
2 assessment, I went on what he told me.

3 Q That was information like he told you he worked
4 at BMW?

5 A Yes, sir.

6 Q You don't know if that's true or not?

7 A No, sir.

8 Q Also you have in your intake obsessions. Is
9 that correct?

10 A Obsessions?

11 Q I don't know if you have a copy in your report
12 with you or not.

13 A Can I look at that please.

14 Q Sure.

15 A (Reading.) I did check that. I am not sure
16 why I checked that or what I was referring to. Sorry.

17 Q But obsessions would be if someone had an
18 obsession with some thing, isn't that correct?

19 A It could be. It could be just thinking things.
20 Thinking about things over and over.

21 Q You felt like he was thinking things over and
22 over and over again in his mind.

23 A Obviously, something he said to me must have made
24 me check that.

25 Q You also said something about homicidal. I don't

1 know if that's tendencies. I don't know what that is.

2 A He killed his wife. That is why I checked that.

3 Q He said he did not remember anything?

4 A He told --

5 Q I'm sorry. He did not remember anything or had
6 a poor memory about anything?

7 A I'm not sure what you are referring to.

8 Q That night, he said he did not remember anything
9 about the night that he shot and killed his wife?

10 A Right. He told me that he had no memory of
11 shooting and killing his wife.

12 Q Did he remember anything from that night?

13 A I don't remember him being specific about what he
14 did or did not remember.

15 Q Did you ask him about anything he did that day?

16 A Probably not.

17 Q Did he tell you about anything that he did that
18 day?

19 A I'm sorry. I don't remember.

20 Q You put a note in here.

21 MR. BARNETT: May I approach the witness?

22 BY MR. BARNETT:

23 Q Is that your note, ma'am?

24 A Yes, sir.

25 Q If I am reading that right, it says seems logical

1 most of the time.

2 A He would talk about not remembering certain
3 incidences. Then he would be logical about other
4 circumstances. But that is when I would ask him about
5 family about history of whatever.

6 Q You felt like he was being logical most of the
7 time, I am assuming from that note?

8 A Yes.

9 Q That is when he was talking about family, not
10 talking about that night?

11 A When he was talking about anything except that
12 night. In our assessment, we ask a lot of questions about
13 family history or other things. So, he would be logical
14 about that.

15 Q You don't know if he told you the truth about all
16 of this or not? You just had to take his word for it?

17 A Yes, sir.

18 MR. BARNETT: One moment, Your Honor, please.
19 Thank you, ma'am.

20 THE COURT: Any redirect?

21 MR. BARTOSH: Your Honor, Yes, sir.

22 **REDIRECT EXAMINATION**

23 BY MR. BARTOSH:

24 Q Ms. Howard, did you consider malingering?

25 MR. BARNETT: Objection, Your Honor. That is

1 based on opinion. She is not qualified.

2 **THE COURT:** Did you consider it?

3 **MR. BARTOSH:** Yes, sir.

4 **THE COURT:** I'm asking her. I don't understand
5 the question. Are you asking her to give an opinion
6 on whether or not he was malingering?

7 **MR. BARTOSH:** Did she consider him to be
8 malingerer.

9 **THE COURT:** Your objection?

10 **MR. BARNETT:** Objection. She is not qualified
11 as an expert on --

12 **THE COURT:** Wasn't that the same question you
13 asked her?

14 **MR. BARNETT:** I asked her what malingering meant.

15 **THE COURT:** You asked her about checking
16 malingerer on some form, didn't you?

17 **MR. BARTOSH:** No, sir. I just asked her what
18 the definition was and what was her understanding. I
19 asked her about obsessions and about things like that
20 that she marked on her report. I did not ask her
21 about malingering. I did not ask her opinion on
22 malingerer.

23 **THE COURT:** I'm going to have to be reacquainted
24 with what testimony this witness has given as
25 foundation for her ability to give that opinion in

1 court. Do you want to do it outside the presence of
2 the jury or you want to do it now?

3 **MR. BARTOSH:** We can do now.

4 **BY MR. BARTOSH:**

5 **Q** Ms. Howard, basically, you do a psychological
6 assessment, is that right?

7 **A** Yes, sir.

8 **Q** As part of that psychological assessment, you
9 determine whether or not you believe them to be
10 malingering?

11 **A** Yes, sir.

12 **Q** Did you do that in Mr. Lindsey's case?

13 **A** I did.

14 **MR. BARTOSH:** Your Honor, I would object at
15 this point. She has not been qualified as an expert
16 in that field or any field concerning that area.

17 **THE COURT:** Sustained.

18 **MR. BARTOSH:** That is all I have.

19 **THE COURT:** You can step down, ma'am.

20 Let me see the lawyers for just a second please.

21 Ma'am, you can need to stay with us for just a
22 few minutes.

23 **THE WITNESS:** I can do that.

24 - (WHEREFORE, a bench conference was held off of the
25 record.)

1 **THE COURT:** Ladies and gentlemen, I going to ask
2 you to step back in the jury room for just a second
3 please.

4 (WHEREUPON, the jury exits at approximately 3:32 p.m.)

5 **THE COURT:** All right. As far as her
6 qualifications, you basically got her to say that she
7 is a mental health specialist, that she's got a
8 college degree and that she has a Masters --

9 What's your Masters in?

10 **THE WITNESS:** Masters in Education.

11 **THE COURT:** Then you went straight into talking
12 about what she did in this case. I don't think that's
13 sufficient qualifications to get an opinion from her
14 in whether or not this man meets a clinical, the
15 elements for a clinical diagnosis of being a
16 malingerer. So that's my ruling. If you want to --

17 **MR. BARTOSH:** No, sir.

18 **THE COURT:** -- explore any further foundation,
19 that's fine. But it's my understanding you have a
20 witness coming in a few minutes who can gave that
21 diagnosis.

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

23 **THE COURT:** All right. I'm going to take a short
24 break.

25 You are free to go, ma'am.

1 (WHEREUPON, a short recess was taken at approximately
2 3:34 p.m.)

3 (WHEREUPON, the Court resumed at approximately 3:40
4 p.m.)

5 **THE COURT:** All right.

6 **MR. BARTOSH:** If I could, Your Honor, sort of
7 lay the foundation for what I think the hearing is
8 about.

9 **THE COURT:** Where is Ms. Mitts?

10 Okay. Ma'am, we'll get to you in just a second.
11 You can remain seated for a second.

12 **MR. BARTOSH:** Your Honor, when I arrived this
13 morning, I went over to see Mr. Lindsey. He told me
14 that he had a concern from some of the testimony that
15 he heard yesterday that there was some information
16 that was elicited in direct examination that he felt
17 no one could have known other than information that he
18 could have conveyed to us.

19 He believes that his -- what he's been doing is
20 he's been asking a lady at the detention facility to
21 copy certain documents for him. Some of them were his
22 notes. Some were discovery materials and things like
23 that. And she would copy them for him and then return
24 it. He believes that the only way this information
25 could have been obtained by the State was through

1 those documents, the copying of those documents.

2 Your Honor, I have explained to him that by
3 giving her those documents to copy that he has waived
4 any privilege that may exist although there was never
5 privilege between him and Ms. Mitts. But there is no
6 legal privilege between the two of them. I bring this
7 to the Court's attention because he brought it to my
8 attention.

9 **THE COURT:** Ms. Mitts, would you come up for a
10 minute please and let me ask you a few questions.

11 **MS. MITTS:** Yes, sir.

12 (WHEREUPON, Rachel Mitts was duly sworn.)

13 **THE COURT:** You work over at the jail?

14 **MS. MITTS:** Yes, sir.

15 **THE COURT:** And over the last period of time,
16 you've been doing some copying of notes that Mr.
17 Lindsey has made?

18 **MS. MITTS:** Yes, sir.

19 **THE COURT:** How many times have you done that?

20 **MS. MITTS:** I can't specifically say. I would say
21 three, four, five times. Somewhere along in there.

22 **THE COURT:** Have you ever done anything other than
23 just take what he gave you and copy it and give the
24 originals and the copies back to him?

25 **MS. MITTS:** No, sir.

1 **THE COURT:** Have you ever shown those notes or the
2 copies of those notes to anybody?

3 **MS. MITTS:** No, sir.

4 **THE COURT:** Have you ever left them sitting around
5 where maybe somebody could have looked at them?

6 **MS. MITTS:** No, sir. That's confidential.

7 **THE COURT:** And you treated them as confidential?

8 **MS. MITTS:** Yes, sir.

9 **THE COURT:** All right. So as far as you know, is
10 there any way that anybody could have known what was
11 in those notes except for Mr. Lindsey?

12 **MS. MITTS:** No, sir.

13 **THE COURT:** Have you ever read the notes yourself?

14 **MS. MITTS:** I glanced over them to make sure that
15 they are legal because that's all we make copies of.

16 **THE COURT:** I see.

17 **MS. MITTS:** We don't make personal copies.

18 **THE COURT:** You just looked at it to make sure
19 that it related to his case?

20 **MS. MITTS:** I just glanced to make sure that they
21 were related to his case. And that's all.

22 **THE COURT:** Okay. Thank you. Just hold right
23 there for just a minute.

24 Any follow up you want me to ask?

25 **MR. BARTOSH:** No, sir.

1 **THE COURT:** Thank you for coming, Ms. Mitts, you
2 are free to go.

3 **MS. MITTS:** Thank you.

4 **THE COURT:** Sorry to have interrupted your Sunday.

5 **MS. MITTS:** That's all right.

6 **THE COURT:** Ma'am, let me get you to tell me your
7 full name and spell your last name.

8 **MS. MITTS:** It's Rachel Mitts, Mitts.

9 **THE COURT:** Okay. Great. Thank you.

10 Bring in the jury please.

11 (WHEREUPON, the jury enters at approximately 3:42
12 p.m.)

13 **MR. BARTOSH:** We call Dr. Margaret Melikian.

14 **MARGARET MELIKIAN**

15 having first being duly sworn testified as follows:

16 **DIRECT EXAMINATION**

17 **BY MR. BARTOSH:**

18 **Q** Would you state your name and spell it please,
19 ma'am?

20 **A** My name is Margaret Melikian. M-e-l-i-k-i-a-n.

21 **Q** Okay. And you are a psychiatrist?

22 **A** I am a forensic psychiatrist.

23 **Q** Okay. Could you give us the benefit of your
24 education?

25 **A** I received a Bachelor of Science in Electrical