

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Jocelyn Newman, Circuit Court Judge

App. Case No. 2020-000205

H. Dewain Herring,

Petitioner,

vs.

State of South Carolina

Respondent.

APPENDIX
VOLUME V OF VII

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- 1 A Hmm-mm (Negative).
- 2 Q You were out?
- 3 A I was out.
- 4 Q And you went from here to here?
- 5 A Well, I was taken there.
- 6 Q And you don't remember anything about that, do you?
- 7 A No.
- 8 Q Or changing your clothes or anything?
- 9 A No.
- 10 Q And you said you couldn't have walked there?
- 11 A No. No. Not that I would remember anyways.
- 12 Q I mean, you were out. And you woke up at 5:30,
- 13 correct?
- 14 A Mm-hmm (affirmative).
- 15 Q That's seven and a half hours. Correct?
- 16 A Mm-hmm (affirmative).
- 17 Q And I think he asked you, there was something about
- 18 two you got from a customer and one you got from the
- 19 bartender?
- 20 A Two I bought for myself and one from a customer.
- 21 Q And an hour after this you knew something wasn't
- 22 right, didn't you?
- 23 A Mm-hmm (affirmative).
- 24 Q I mean, you knew something happened to you?
- 25 A Mm-hmm (affirmative).

1 Q You felt that. You realized that right off the bat.
2 Man, I've been drugged. Right?

3 A Correct.

4 Q And is there any confusion whatsoever prior to you
5 taking this drink, prior to 10:00 about what happened
6 before that, about what time you got to Chastity's,
7 if you even went to Chastity's?

8 A No.

9 Q That didn't affect you at all about that time right
10 before, did it?

11 A No.

12 Q Now, the first incident would have been the end of
13 2003?

14 A Correct.

15 Q Two years and a month or so before this incident?

16 A Correct.

17 Q Where did you get the drink from? Do you remember?

18 A It was a customer that had purchased a drink for both
19 me and Ms. McClendon. And he left the club after he
20 paid for the two drinks and said he would be back.

21 Q Okay. So a customer got you this drink?

22 A He got both of us at the same time. No, no. He
23 didn't. He paid the bartender. I was called on
24 stage.

25 Q But you and Ms. -- her last name is McClendon?

- 1 A McClendon.
- 2 Q You all both worked there, right?
- 3 A Correct.
- 4 Q I mean, you were a dancer there. And you're the one
5 that got something in your drink. A dancer, correct?
- 6 A Correct.
- 7 Q And you said about 30 to 40 minutes later. Was that
8 after you had the beer or whatever?
- 9 A Yes.
- 10 Q You started feeling bad?
- 11 A Yes.
- 12 Q You actually regurgitated. You threw up, right?
- 13 A Yes.
- 14 Q I mean, you remember throwing up?
- 15 A Oh, yes.
- 16 Q And you know it didn't feel right?
- 17 A No.
- 18 Q And then 20 minutes or so later you felt so bad you
19 wanted to leave, right?
- 20 A Right.
- 21 Q Did you leave and come back?
- 22 A No.
- 23 Q Did you feel so bad you couldn't even drive?
- 24 A Yes.
- 25 Q You didn't have control of your functions where you

1 even felt like you could drive?

2 A No.

3 Q But you remember that you couldn't drive. Don't you?

4 A Oh, yes.

5 Q No question about that. Do you remember going out to
6 your car or making a decision with Ms. McClendon, I
7 can't drive, you're going to have to drive?

8 A I remember in the club. I don't really remember too
9 much from the club to the -- I remember Blythewood
10 and the gas station.

11 Q So you remembered getting to Blythewood and the gas
12 station knowing you can't drive so Ms. McClendon
13 drives?

14 A Yes.

15 Q And no question about that?

16 A No question in my mind.

17 Q And at that point you went to a gas station in
18 Blythewood?

19 A Yes. She pulled over. She felt she couldn't drive
20 any further.

21 Q But she had been driving to that point?

22 A She did drive to that point.

23 Q You all talking on the way saying, man, something is
24 wrong?

25 A Yes.

- 1 Q I mean, you all were saying, God, what do we have?
- 2 A Mm-hmm (affirmative).
- 3 Q Did you say we must have gotten something put in our
- 4 drink?
- 5 A We informed the managers at Chastity's before we left
- 6 we felt something had been put in our drinks.
- 7 Q And you all were talking about that on the way to the
- 8 gas station?
- 9 A Mm-hmm (affirmative).
- 10 Q You grew up in Blythewood?
- 11 A Yes.
- 12 Q Do you remember the gas station?
- 13 A Yes. The Shell station on 21, Wilson Boulevard.
- 14 Q I'm sorry?
- 15 A Wilson Boulevard.
- 16 Q Is it still there?
- 17 A Yes, it is.
- 18 Q There's some stuff grown up around it since?
- 19 A Mm-hmm (affirmative). There's a BP right beside it
- 20 and a Subway and --
- 21 Q But you can remember pulling in there with Ms.
- 22 McClendon?
- 23 A Yes.
- 24 Q I mean, you can really remember that?
- 25 A Mm-hmm (affirmative).

1 Q And once you get there, she has decided that at that
2 point, well, I can't drive any more, correct?

3 A Correct.

4 Q Did she get pulled over when?

5 A After we left the gas station, we continued down
6 Wilson Boulevard through the town of Blythewood and
7 turned onto the street before you got to her street.

8 Q And you remember that?

9 A Correct.

10 Q And she got pulled by who? Who was it? What agency?

11 A It was an undercover officer that had been following
12 us from the gas station, is what we were told. And
13 then a marked car pulled up behind us.

14 Q And you can remember getting stopped and seeing the
15 officer?

16 A Oh, yes. I definitely remember that.

17 Q And he gave her a ticket?

18 A Yes.

19 Q And was the ticket for driving under suspension?

20 A Yes.

21 Q They take her away?

22 A Yes.

23 Q At that point the officer just let you drive on?

24 A The officer -- it was a very strange incident. They
25 never got me out of the car, period. They left me in

1 the passenger's side until they had arrested her and
2 they came over and told me to go ahead and go home.

3 Q And you remember them telling you go ahead and go
4 home?

5 A Yes.

6 Q So you felt sick. You've thrown up. You waited 24
7 minutes or so. You got outside. You remember
8 getting in the car. You remember driving to
9 Blythewood. You remember getting gas. You know it's
10 a Shell station. And you remember going forward to
11 the street near where Ms. McClendon lives. You
12 remember getting stopped by the police officer. You
13 remember her getting arrested?

14 A Mm-hmm (affirmative).

15 Q And then you remember you drove after that? Now, you
16 are from Blythewood. You didn't automatically just
17 go home?

18 A No.

19 Q Since you're from that area?

20 A I turned to go -- well, to her house, it's a little
21 different than mine. But, I mean, we went to high
22 school together and we slept over at each other's
23 houses all the time. I mean, it was very strange
24 that I couldn't figure out where I was at.

25 Q But you'd never been to her house before?

- 1 A Oh, no. I'd been to her house.
- 2 Q So you didn't automatically go back to your house
- 3 then. It didn't just take over. You knew right
- 4 where to go back home, right?
- 5 A I know which way to go home. I didn't make the
- 6 right --
- 7 Q You missed a turn?
- 8 A I went the wrong way or something.
- 9 Q And then you ended up where?
- 10 A I ended up on this road that's a very, very long road
- 11 that actually led all the way to Rock Hill.
- 12 Q And you remember that?
- 13 A And I kept going down it because I kept looking for a
- 14 gas station or somewhere to pull over and turn
- 15 around. I was afraid I was going to run out of gas.
- 16 So I kept going and kept going.
- 17 Q And you remember looking for a gas station?
- 18 A Oh yes.
- 19 Q Saying I need gas. I mean, you can remember that
- 20 trip and saying I need to stop at a gas station?
- 21 A Yes.
- 22 Q Do you remember what gas station you stopped at?
- 23 A No.
- 24 Q You got gas though?
- 25 A Yes. I got gas.

1 Q And then you went home?

2 A Correct. I asked for directions to the interstate.

3 Q From the gas station?

4 A Correct.

5 Q Then you made it back home?

6 A Mm-hmm (affirmative).

7 Q And didn't have any problem going back home, did you?

8 A No.

9 Q And I think that incident -- well, I don't know if
10 you told us before, what time was that?

11 A That was around 2 or 3 in the morning.

12 Q And you made it all that way. You got back home
13 when?

14 A I made -- no. I made it home by 3. I'd say around 3
15 I made it home.

16 Q 3:00?

17 A Yes.

18 Q Beg the Court's indulgence. That's all. Thank you
19 very much.

20 MR. HARPOOTLIAN: Just a couple of follow-up
21 questions.

22 REDIRECT EXAMINATION

23 BY MR. HARPOOTLIAN

24 Q Ma'am, Mr. Meadors asked you about what you did the
25 second time you were drugged, what you did between

1 the time you remember 10:00 in the dressing area and
2 then waking up at 5:30 the next morning. You have no
3 recollection?

4 A I have no recollection.

5 Q But if somebody had said they'd seen you driving
6 around the block, could you have argued with them
7 about it?

8 A Yeah, I would argue.

9 Q I mean, could you say you didn't do that if you have
10 no memory?

11 A Yeah. I know -- I'm pretty sure I didn't driveway
12 anywhere. They wouldn't have let me drive anywhere.

13 Q Well, how did they let you get from the dressing area
14 to the office and storage area? Who let you do that?

15 A I don't know. I'm assuming one of the floor guys or
16 somebody carried me back there.

17 Q Well, nobody reported to you that they'd seen you
18 carried?

19 A One girl said that she -- another girl had dressed
20 me.

21 Q Well, how did they know you were in there? Or do you
22 know?

23 A I'm not sure. All I know is one of the floor guys
24 came in to wake me up.

25 Q But you can't really tell us what you did after?

1 A No. I can't tell you what I did. I have no
2 recollection.

3 Q Okay.

4 A I mean, I could have done anything I suppose.

5 Q Exactly. You don't remember getting a bruise?

6 A No.

7 Q You don't remember your feet getting all bloodied up?

8 A No.

9 Q But when you woke up you had a bruise and your foot
10 were all bloodied up?

11 A Right. And that's something I think I would have
12 remembered or felt at least.

13 Q When it was happening to you?

14 A Mm-hmm (affirmative).

15 Q Now, you also indicated to Mr. Meadors, he asked you,
16 do you remember getting from the club to Blythewood?
17 And I think you indicated you did not. Is that
18 correct?

19 A I don't really remember the ride too much there. I
20 do remember the gas station and being there and
21 Jessica saying she couldn't drive any further.

22 Q So you have no memory of getting from the club to
23 Blythewood?

24 A No, not really. I mean, I couldn't tell you which
25 route she took. I couldn't tell you the way she came

1 home.

2 Q And then you have a memory of when you get to
3 Blythewood of being at the gas station?

4 A Right. And I think the cops, you know, sort of jog
5 your memory.

6 Q Now, Jessica -- excuse me. Your companion was
7 driving the vehicle, correct?

8 A Yes.

9 Q Was she's weaving all over the road?

10 A Not in my opinion. Well, I mean, I didn't think so.
11 But obviously.

12 Q Well, that's what the police officer said?

13 A Yeah, that's what the police officer said. I mean,
14 she had to have been if there was an undercover
15 following her.

16 Q I want to clarify one other thing. Mr. Meadors asked
17 you if you got the drink from the customer. Now, did
18 the customer hand you drinks or did the bartender
19 hand you drinks?

20 A The bartender. The customer had already left.

21 Q I'm talking about at any time. Do you take --

22 A No. No. The bartender handed you the drink. The
23 customer would hand the bartender the money and then
24 the bartender would bring all the drinks and lay it
25 in front of you.

1 **MR. MEADORS:** Objection. He's facing the jury
2 there.

3 **MR. HARPOOTLIAN:** I thought we said what was
4 good for the goose is good for the gander.

5 **THE COURT:** Mr. Harpootlian.

6 **MR. HARPOOTLIAN:** Sir?

7 **THE COURT:** Please conduct yourself in a
8 professional manner.

9 **MR. HARPOOTLIAN:** Yes, sir. I'm sorry.

10 **Q** And I don't mean to make light of this. But when you
11 had a drink bought by a customer, did you have the
12 customer go get you the drink and bring it to you?

13 **A** No.

14 **Q** Did you let the customer touch your drink?

15 **A** No.

16 **Q** Why not?

17 **A** Well, the way the club was set up, the bar is the
18 only place you can drink liquor drinks, period. So
19 everybody sits on a stool at the bar. There's no
20 where else to go with a drink. So the bartender
21 would hand you the drink directly.

22 **Q** Would you leave a drink on the bar unattended?

23 **A** No.

24 **Q** Why not?

25 **A** Well, me personally, I would usually finish mine

1 before I went on stage. I wouldn't come back to a
2 drink. I would make sure it was gone before I left.

3 Q Any concern about a drink being left unattended
4 that's drank in front of you?

5 A There was some concern; I mean, certainly after these
6 incidents.

7 Q And these incidents, were they reported to
8 management?

9 A Yes. They were informed.

10 Q Now, the bartender, female or male?

11 A We had a female and a male.

12 Q The bartender that handed you the drinks on these two
13 occasions, do you know?

14 A Female.

15 Q Female. A female bartender from her hand to your
16 hand to your mouth?

17 A Correct.

18 Q No customer touching it?

19 A Correct. Except for the time, the first time where
20 it was put on the bar. But she told me that she had
21 been watching it.

22 Q That's the one with you and Ms. McClendon, right?

23 A Yes.

24 Q But the second time when you blacked out --

25 A It was just handed straight to me.

1 Q Who handed it to you?

2 A The bartender.

3 Q From the bartender to you to your mouth?

4 A Correct.

5 Q No customer involved?

6 A No.

7 Q Did you report that to management?

8 A The second incident?

9 Q Yes.

10 A I left the club in a daze. I went back the next day
11 and questioned people at the club.

12 Q Pardon me?

13 A I went back the next day and questioned people at the
14 club.

15 Q Thank you.

16 MR. MEADORS: Just one.

17 RECROSS EXAMINATION

18 BY MR. MEADORS

19 Q So you remember that you thought she was driving good
20 to Blythewood?

21 A I suppose. It never registered to me that she
22 wasn't.

23 Q Thank you.

24 THE COURT: Thank you very much, ma'am. You may
25 come down. This witness be excused? Any objection?

1 MR. MEADORS: No, sir.

2 MR. HARPOOTLIAN: No objection. Any objection?

3 MR. MEADORS: I said no, sir.

4 THE COURT: You're free to go, ma'am. Thank you
5 very much for coming.

6 JESSICA MCCLENDON, after being duly sworn,
7 testifies as follows:

8 THE CLERK: You may have a seat. State your
9 full name for the record.

10 MR. HARPOOTLIAN: May it please the Court, Your
11 Honor. I do need to inform the media not to show her
12 face, please. Thank you.

13 THE COURT: So informed.

14 DIRECT EXAMINATION

15 BY MR. HARPOOTLIAN

16 Q I'm going to refer to you as Liz which is your stage
17 name. Is that okay?

18 A Yes, sir.

19 Q Liz, were you a dancer at Chastity's?

20 A I was.

21 Q And were you a dancer there around winter/spring of
22 2004 when --

23 A I really can't recall when the last time it was I was
24 there.

25 Q Okay. Let me ask you to recall an incident that may

1 have happened with -- do you see Ms. Cummings? Do
2 you know her?

3 A Yes, sir.

4 Q The young lady who just testified?

5 A Yes, sir.

6 Q Did you have an incident involving her and you all
7 trying to drive to Blythewood?

8 A Yes, sir.

9 Q Whatever time that is is what we're talking about.
10 Okay?

11 A Yes, sir.

12 Q Now, how long did you dance at Chastity's?

13 A For about four years, on and off.

14 Q Okay. Now, I want to talk to you about this incident
15 that happened with Ms. Cummings. Tell me what
16 happened that night?

17 A Well, as we were dancing in the club we both started
18 to feel dizzy, like someone had done something to us
19 maybe or unsure. It felt like it was an act. I
20 mean, I did not feel like myself. And we both agreed
21 to leave. And when we left the club, I honestly
22 couldn't tell you about the trip on the way home up
23 until the point of getting pulled over.

24 Q Okay. We'll talk about that in just a minute. Let's
25 talk about what you had to drink that night. Do you

1 drink at the club, or did you drink that night at the
2 club?

3 A I had a small cranberry vodka.

4 Q You had a small cranberry vodka?

5 A Yes, sir.

6 Q That's all you had to drink all evening?

7 A Yes, sir.

8 Q What time did you get to work? Do you remember?

9 A About a quarter to 5.

10 Q The entire evening you had a cranberry vodka. Who
11 did you get that drink from? Who handed that drink
12 to you?

13 A I'm not sure about the name but it was a female.

14 Q Female bartender?

15 A Yes, sir.

16 Q Would you take a drink from a customer handed to you?

17 A No, sir.

18 Q Why not?

19 A I don't trust strangers.

20 Q Okay. Well, that particular night the bartender
21 handed you the drink?

22 A That I had ordered, yes.

23 Q That you had ordered?

24 A Yes, sir.

25 Q Did you have anything else to drink that night?

1 A No, sir.

2 Q And you felt -- tell me how you felt when you were up
3 there. Did it hit you while you were dancing?

4 A I felt it did, sir. Confused, blurry vision. I
5 started to feel hot and sweaty and hot, cold hands,
6 shaking and was not able to dance any more.

7 Q Okay. And you decided to leave?

8 A Yes, sir.

9 Q With Ms. Cummings?

10 A Yes, sir.

11 Q Because she was feeling the same?

12 A Exactly.

13 Q Now, I don't want you to tell me what other people
14 told you.

15 A Mm-hmm (affirmative).

16 Q Do you remember driving from the club to Blythewood?

17 A No, sir.

18 Q Do you have a memory of that?

19 A The only memory I have is being pulled over.

20 Q You now know however you got in a car and drove it
21 from Chastity's?

22 MR. MEADORS: Objection to leading.

23 THE COURT: Yes, sir.

24 Q What, if anything, do you know about driving from
25 Chastity's to Blythewood? You said you don't

1 remember anything. Have you learned anything from
2 anybody else?

3 A Ms. Cummings said that we had stopped at a gas
4 station. And I don't remember that.

5 Q You don't remember the gas station?

6 A No, sir.

7 Q Yet you have no memory of it. Yet you operated a
8 motor vehicle that night?

9 A Exactly.

10 Q How far is it or how far along does it normally take
11 to drive from Chastity's to Blythewood? That's where
12 you lived at the time?

13 A Yes, sir. About 45 minutes.

14 Q 45 minutes?

15 A Yes, sir.

16 Q So for 45 minutes you have no memory that night?

17 A No, sir.

18 Q Yet we know that you were driving a car?

19 A Yes.

20 Q I'm sorry?

21 A Yes, sir.

22 Q See, she's writing it down. You've got to say yes or
23 no. Do you remember getting pulled over?

24 A Yes, sir.

25 Q And you were pulled over for what?

1 A He said -- the officer stated that we had been
2 driving around Blythewood the whole afternoon up
3 until the time at 2:00 in the morning. And it didn't
4 make sense to me because I had proof of where I was.
5 But he continued to take me from the vehicle, walk me
6 around to the back and put handcuffs on me and put me
7 in the car and let Ms. Cummings drive off.

8 Q What were you charged with?

9 A D.U.S.

10 Q Driving under --

11 A Excuse me. Yes, sir. Under suspension.

12 Q Driving under suspension?

13 A Yes, sir.

14 Q Not driving under the influence?

15 A No.

16 Q Not drunk driving?

17 A No, sir.

18 Q Not driving while impaired. Driving under
19 suspension. And your license had been suspended why?

20 A My license was suspended for open container at Myrtle
21 Beach.

22 Q Did he have you do any sobriety tests?

23 A No, sir.

24 Q And did he have you walk a line? Did he do anything
25 that indicated he thought you were impaired in any

1 way.

2 A No, sir.

3 Q And yet up until that point you have no memory?

4 A (Shakes head negatively).

5 Q Had this ever happened to you before at Chastity's?

6 A Yes, sir.

7 Q How long before?

8 A About two years. About maybe.

9 Q Was it similar or dissimilar?

10 A Similar. But I passed out actually in the club.

11 Q And --

12 A Woke up in someone's apartment. The fellow was
13 supposed to be an EMT.

14 MR. MEADORS: Objection, Your Honor. Time
15 period. Irrelevant. I'd like to approach. Four
16 years prior to this incident.

17 (Whereupon, a bench conference is had)

18 THE COURT: Sustain the objection.

19 Q Now, let me ask you a little bit about Chastity's.

20 A All right.

21 Q And you worked there for how long? Four years, on
22 and off?

23 A Yes, sir.

24 Q Tell me two things. What is a lap dance?

25 A A lap dance is when a female is supposed to entertain

1 the male by dancing and showing her body off and
2 removing clothes as well.

3 Q Does she get nude?

4 A Oh, yes.

5 Q Does she get on the gentleman's lap, hence the name
6 lap dance?

7 A Yes.

8 Q And does she rub her naked genitalia on his lap?

9 MR. MEADORS: Your Honor, objection. Why are we
10 ...

11 THE COURT: Overruled. Go ahead.

12 MR. HARPOOTLIAN: Thank you.

13 Q Is that what it is?

14 A Yes, sir.

15 Q And is that done routinely? Or was that done
16 routinely at Chastity's while you were working there?

17 A Yes, sir.

18 Q Now, this incident with Ms. Cummings where you had
19 this memory loss, did you talk to --

20 MR. MEADORS: Your Honor, we're going to object.
21 Objection to his side comment testifying and then
22 asking a question. He can ask her the question. He
23 knows the rules. And he's leading. Objection.

24 THE COURT: Don't lead your witness.

25 MR. HARPOOTLIAN: I just hear banging, Your

1 Honor, back there. If they'd just object rather than
2 slamming things, it may make things easier:

3 THE COURT: Sir, ask a question get an answer
4 and let's move on.

5 MR. HARPOOTLIAN: Yes, sir.

6 Q Did you report this incident to the management at
7 Chastity's?

8 A Yes, sir, I have.

9 Q Who did you talk to?

10 A Moe.

11 Q Moe?

12 A Yes, sir.

13 Q Okay. Was "Jon Jon" a manager, John Johnson, a
14 manager when you worked there?

15 A No, sir.

16 Q Do you remember him?

17 A Not that I can recall. No, sir.

18 Q Do you know Dr. Holbrook? Do you see this gentleman
19 right here?

20 A I do.

21 Q Stand up, Dr. Holbrook. Did you have an opportunity
22 several weeks ago to talk to him?

23 A I did.

24 Q And did you talk to him again this week?

25 A Yes, sir.

1 Q And did you relate to him what you've told us?

2 A Yes, sir.

3 Q Now, did you volunteer to come here today? Were you
4 subpoenaed to be here?

5 A Yes, sir.

6 Q Do you want to be here?

7 A No.

8 Q Did you want to testify?

9 A No, sir.

10 Q Have you ever testified before?

11 A No, sir.

12 Q Thank you. Please answer you any questions that Mr.
13 Meadors might have for you.

14 CROSS EXAMINATION

15 BY MR. MEADORS

16 Q Ms. Liz?

17 A Yes, sir.

18 Q Just few questions, please.

19 A Okay.

20 Q Confused, blurred visions, hot, sweaty, shaking,
21 couldn't dance?

22 A Yes, sir.

23 Q And you remember having those feelings?

24 A Yes, sir.

25 Q I mean, you remember having those symptoms, feelings?

- 1 A At the beginning; yes, sir.
- 2 Q Yes, ma'am. And Ms. Cummings was with you?
- 3 A Yes, sir.
- 4 Q She is not feeling good either?
- 5 A No, sir.
- 6 Q And you all tell somebody at the club hey. Because
- 7 you've got to tell somebody if you're going to leave
- 8 early when you're coming to dance I'm leaving?
- 9 A Exactly.
- 10 Q Tell them then we don't feel good, something is not
- 11 right with us, we're going to leave?
- 12 A Yes, sir.
- 13 Q So you conveyed that to somebody?
- 14 A Yes, sir.
- 15 Q And then initially she drove, didn't she?
- 16 A I drove.
- 17 Q You drove initially. I'm sorry.
- 18 A Yes, sir.
- 19 Q Okay. And you drove from the parking lot?
- 20 A Yes, sir.
- 21 Q Where do you all park? I mean, you're an employee, a
- 22 customer -- excuse me. You were an employee, not a
- 23 customer. I'll slow down.
- 24 A Yes, sir.
- 25 Q Do you all have certain places you all park as

1 employees? You know how employees might park to make
2 more room for customers?

3 A Yes, sir.

4 Q And looking at State's 51 -- if I can approach, Your
5 Honor -- where would the employees usually park?

6 A We were told to park back here around the side door
7 of Chastity's. So somewhere in this general
8 vicinity.

9 Q And you parked there that night?

10 A Yes, sir.

11 Q And that's where you left from?

12 A Yes, sir.

13 Q And that's where you drove out of there from?

14 A Yes, sir.

15 Q How did you get out once you came out of Chastity's?

16 A I don't remember the trip home.

17 Q But you drove out?

18 A Yes, sir.

19 Q Do you remember talking to your friend on the way
20 home?

21 A No, sir.

22 Q You could have talked to her?

23 A I could have, yes.

24 Q But you remember the police officer?

25 A Oh, yes.

1 Q Did I hit you?

2 A No, sir.

3 Q All right. But everything prior to the club you

4 remember. Leaving the club?

5 A Yes.

6 Q You remember feeling bad?

7 A Yes.

8 Q You remember telling somebody you were feeling bad?

9 A Yes, sir.

10 Q You remember what time you got to the club before you

11 took that drink?

12 A Yes, sir.

13 Q That didn't -- the drug didn't affect that at all,

14 did it?

15 A I didn't have a drink right when I got there. I got

16 there quarter 'til 5.

17 Q Use his words. Exactly. So prior to taking the

18 drink, no reason for you not to remember what time

19 you got to Chastity's, is there?

20 A Exactly.

21 Q Exactly. And what time did you get the Chastity's?

22 A A quarter to 5.

23 Q No question about that, is there?

24 A No. That's what time we were supposed to be at work.

25 Q 4:45?

- 1 A Yes.
- 2 Q I'm not trying to get on you. Just there's no
3 question you remember that. Correct?
- 4 A Correct.
- 5 Q And the officer -- I just wrote down here. Do you
6 remember getting pulled? You remember the officer
7 saying that he'd been following you all day. You all
8 had been in the area and you knew that was wrong
9 because you had been at Chastity's?
- 10 A Yes.
- 11 Q I mean, you remember that conversation. You remember
12 the officer telling you that?
- 13 A Yes, sir.
- 14 Q You knew -- thinking he was wrong because we had been
15 there, right?
- 16 A Yes, sir.
- 17 Q And there's no question about that conversation you
18 remember?
- 19 A No.
- 20 Q And you don't remember the name of the gas station
21 but you know where it is?
- 22 A No. I did not even know that we had stopped at a gas
23 station.
- 24 Q How long after that did the officer pull you?
- 25 A I'm not sure. I don't know when we stopped.

1 Q Okay. But when he stopped, you remember what he
2 said?
3 A I remember that he said we had been riding around.
4 Q And you knew that was wrong?
5 A Yes, sir.
6 Q And you got a ticket?
7 A Yes.
8 Q And that wasn't that long after you left Chastity's,
9 right?
10 A That wasn't long, no.
11 Q It wasn't long at all?
12 A No.
13 Q And then you remember everything after that?
14 A Actually, I don't. After he placed me in the back of
15 the police car, I don't remember anything after that.
16 I don't remember actually being driven to the jail.
17 The only thing I remember is waking up at the jail
18 and they said that the first thing I asked for was
19 money.
20 Q Wanted money?
21 A Yes.
22 Q You were under suspension for what?
23 A Under suspension for open container.
24 Q Open obtainer?
25 A Yes.

1 Q So they took you to jail?

2 A Yes.

3 Q And you stayed in jail overnight?

4 A Yeah.

5 Q And you immediately -- I mean, you told management.

6 He asked you about it, you said, hey, something is
7 wrong?

8 A Yes.

9 Q I mean, you told him that like that day or the next
10 day?

11 A That day.

12 Q I mean, you knew. Actually you knew before you left
13 Chastity's that something was wrong, didn't you?

14 A Yes.

15 Q I mean, no question about it. That's why you left,
16 correct?

17 A Correct.

18 Q You weren't feeling good?

19 A No.

20 Q It's not bad. I'm just asking you. And then the
21 next day you went and told somebody, said, hey, this
22 happened to me, management; I didn't feel good here,
23 right?

24 A Not this next day, no.

25 Q As soon as you could you went and told him, hey,

1 something happened to me?

2 A As soon as it was happening. Yes, sir; I did.

3 Q Okay. And then after that you went back and said,
4 hey, this happened here? You went back to the club.
5 He asked you. Moe I think it was. I'm not sure who
6 it was. You told Moe?

7 A Yes.

8 Q And that was shortly after the incident; I mean, a
9 day or two or sometime, correct?

10 A It was the exact day that it happened. As soon as it
11 was happening I went to him and told him I did not
12 feel good so I needed to leave.

13 Q And that's when you told Moe?

14 A Yes, sir.

15 Q And that was in December of 2003?

16 A I am not exactly sure when it was.

17 Q Well, it was December 16th of 2003 according to the
18 arrest date on the D.U.S.?

19 A Okay.

20 Q Okay. Beg the Court's indulgence. And you didn't
21 even know "Jon Jon"?

22 A No, sir.

23 Q That's all. Thank you.

24 MR. HARPOOTLIAN: Just a couple of follow-up
25 questions. May it please the Court, sir?

1 **THE COURT:** Yes.

2 REDIRECT EXAMINATION

3 **BY MR. HARPOOTLIAN**

4 **Q** Liz, you told the solicitor a moment ago that you
5 don't remember anything from leaving the club until
6 you get stopped by the police. Is that right?

7 **A** Yes, sir.

8 **Q** And then do you remember getting in the back of the
9 patrol car?

10 **A** Vaguely.

11 **Q** And do you remember anything after that until you
12 wake up in the jail the next day?

13 **A** No, sir.

14 **Q** Do you remember walking from the patrol car to the
15 jail?

16 **A** No, sir.

17 **Q** Getting booked in?

18 **A** No, sir.

19 **Q** Fingerprinted?

20 **A** No.

21 **Q** Walking to the cell?

22 **A** No.

23 **Q** And he indicated to you what the police officer --
24 you indicated what the police officer said to you,
25 right?

1 A Yes.

2 Q Did anybody tell you how you acted with the police?

3 A The people inside the jail said that I was
4 misbehaving and that they had actually locked me
5 in --

6 MR. MEADORS: Objection.

7 A -- in a room and --

8 THE COURT: Counsel.

9 MR. MEADORS: It's hearsay.

10 THE COURT: It's hearsay. I don't know whether
11 it's offered for the truth. Is it offered for the
12 truth of the matter?

13 MR. HARPOOTLIAN: I'm not offering it for the
14 truth of the matter.

15 THE COURT: That's all I want to hear.

16 MR. HARPOOTLIAN: Sir?

17 THE COURT: That's all I want to know.

18 MR. HARPOOTLIAN: Yes, sir. I'm not offering it
19 for the truth of the matter.

20 Q You were told what now?

21 A I was told that I was misbehaving and that they had
22 removed me from that pod and they put me into another
23 room.

24 MR. MEADORS: Your Honor, for the record, he is
25 not offering that for the truth of the matter. So

1 what he's saying, it's testimony.

2 **MR. HARPOOTLIAN:** If I can get to the next
3 question, I think I can show that, Your Honor.

4 **Q** Do you remember that?

5 **A** No.

6 **Q** Did they tell you specifically what you were
7 misbehaving, how you were misbehaving?

8 **A** They told me the day that I got out, yes.

9 **Q** What did they tell me?

10 **A** They told me that I was extremely rude and I put my
11 hands on a police officer. And, I mean, that's not
12 my type of behavior.

13 **Q** I'm sorry. It's not your type of behavior?

14 **A** No, sir.

15 **Q** What do you mean by it's not your type of behavior?

16 **A** I have never been in trouble for anything criminal
17 wise, my attitude.

18 **Q** Are you a violent person?

19 **A** No, sir.

20 **Q** Do you have any memory of putting your hands on a
21 police officer and being violent with that police
22 officer?

23 **A** No, sir.

24 **Q** You had one drink that night?

25 **A** Yes.

1 Q Handed to you by a female bartender at Chastity's?
2 A Correct.
3 Q Now, when you woke up the next morning, you said you
4 remember asking for money?
5 A Yes.
6 Q Why?
7 A I don't know exactly why. They wanted to know why I
8 was asking for money.
9 Q You're just saying, give me money?
10 A Give me my money. That's what they said that I said.
11 Give me my money.
12 Q And you have no idea why you said that?
13 A No, sir.
14 Q Now, when you woke up the next morning, had you been
15 shot?
16 A Had I been --
17 Q Shot. Had somebody shot you in the arm, for
18 instance? Did you have a bullet wound on you
19 anywhere?
20 A No.
21 Q Okay. Before you had that one drink that night, had
22 you consumed five or six beers?
23 A No, sir.
24 Q Had you had four or five scotches?
25 A No, sir.

1 Q Had you had since 1:00 that night, had you consumed
2 five beers and maybe six scotch and sodas?

3 A No, sir.

4 Q Begging the Court's indulgence. And I may have asked
5 you this. You were subpoenaed to be here today,
6 right?

7 A Yes, sir.

8 Q Don't want to be here?

9 A No.

10 Q Did I find you, or did you find me?

11 A I think you had somebody come find me.

12 Q Okay.

13 A Yes.

14 Q You didn't answer an ad?

15 A No.

16 Q It was --

17 MR. MEADORS: Your Honor, asked and answered.

18 MR. HARPOOTLIAN: No further questions.

19 RE CROSS EXAMINATION

20 BY MR. MEADORS

21 Q Have you ever had 17 drinks in a day?

22 A No, sir.

23 Q Thank you.

24 THE COURT: Are you finished?

25 MR. HARPOOTLIAN: Are you finished? May this

1 witness be excused, Your Honor?

2 **THE COURT:** The witness may be excused. Come
3 down, ma'am. Thank you very much. Call your next
4 witness.

5 **MR. HARPOOTLIAN:** I need about one minute just
6 to make sure who I'm putting up next. I'm almost
7 done. Can I have one minute?

8 **THE COURT:** Go ahead.

9 **MR. HARPOOTLIAN:** Yes, sir.

10 (Pause)

11 **THE COURT:** Does the jury want to stand up and
12 stretch? Feel free to. You don't have to.

13 (Pause)

14 **MR. HARPOOTLIAN:** May it please the Court, Your
15 Honor.

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

17 **MR. HARPOOTLIAN:** We call Chris Isgett to the
18 stand, please.

19 **THE COURT:** Come around.

20 CHRISTOPHER G. ISGETT, after being duly sworn,
21 testifies as follows:

22 **THE CLERK:** Please have a seat. State your full
23 name for the record.

24 **WITNESS:** My name is Chris Isgett.

25 DIRECT EXAMINATION

1 BY MR. HARPOOTLIAN
2 Q I'm sorry. State your full name for the record?
3 A Chris Isgett. Christopher G.
4 Q Christopher G, is it?
5 A Yes, sir.
6 Q Mr. Isgett, you're an attorney here in Richland
7 County?
8 A Yes, sir.
9 Q You've been practicing here how long?
10 A 25 years.
11 Q You and I know each other professionally and
12 socially?
13 A Yes, sir.
14 Q You know Barney Giese professionally and socially?
15 A Yes, sir.
16 Q Small town lawyers know each other, right?
17 A Yes, sir.
18 Q You know Dewain Herring?
19 A Yes, sir.
20 Q How long have you known Mr. Herring?
21 A I guess we were professional acquaintances, but I've
22 known him as a friend for the last two or three years
23 I guess.
24 Q Where do you know him? Just from the profession or
25 socially?

1 A Well, we met at church. He started coming to a
2 little breakfast meeting we have on Tuesdays, and
3 that's how I got to know him. We ended up having a
4 case together after that. He didn't do the same kind
5 of work.
6 Q What kind of work do you do?
7 A Civil trial work.
8 Q What does he do?
9 A Estate planning and things of that nature.
10 Q Okay. We're here today talking about what happened
11 in January of 2006?
12 A Yes, sir.
13 Q And let me show you if I can find it -- here we go.
14 This has been introduced by the state of South
15 Carolina. Can you see it a little bit if you squint?
16 A Yes, sir.
17 Q Okay. This is State's Exhibit No. -- I can't see
18 it -- 81?
19 A Yes, sir.
20 Q And this is a statement of Dewain Herring taken on
21 January 29th completed at 11:54 a.m. I want to read
22 this to you and then I'd like to ask you some
23 questions.
24 A Yes, sir.
25 Q "I played golf at Palmetto Golf Club in Aiken. I

1 drank about nine beers during the day. We got
2 finished playing golf around 5:30 p.m. We started
3 playing around 1 p.m. We then went to The Bowery, a
4 tavern and grill place in Aiken. I drank about four
5 scotches and sodas while there. My golf partner,
6 Chris Isgett" -- that would be you, Chris Isgett?
7 A Yes, sir.
8 Q -- "drove back. He took me to my house. We went in
9 and had a few more drinks. I had two to four
10 scotches and soda while at my house. I guess he left
11 my house around 8 to 8:30 p.m. I was at my house by
12 myself. My family is out of town." Okay?
13 A Yes, sir.
14 Q Now, you're the Chris Isgett that played golf with
15 him on January 9th?
16 A Yes, sir.
17 Q You're the Chris Isgett that went to The Bowery with
18 him?
19 A Yes, sir.
20 Q And you went home with him?
21 A I took him. I was driving, yes.
22 Q You were driving?
23 A Yes, sir.
24 Q "While playing golf at the Palmetto Golf Club in
25 Aiken on January 28th" -- let's go over the

1 statement. You start playing around 1?

2 A That sounds about right. We went down earlier that

3 morning. It was very crowded because it was a pretty

4 day. So that sounds about right.

5 Q "I drank" -- I don't know about that. "I drank about

6 nine beers during the day." Did he drink nine beers

7 during the day?

8 A I don't think so.

9 Q How many do you think he drank?

10 A I would say about five probably.

11 Q Were you all drinking about the same?

12 A Well, I was driving, so I don't -- no, sir. I was

13 drinking a little less probably.

14 Q Okay. But you think he had about five beers?

15 A Yes, sir.

16 Q Did you all go to The Bowery?

17 A Yes, sir.

18 Q "A tavern and grill place in Aiken. I drank about

19 four scotches and sodas while there."

20 A I don't -- I don't recall that being the case.

21 Q What do you think he drank?

22 A I know he had one and perhaps two because there --

23 Q I'm sorry. Go ahead.

24 A And that's my recollection, because we didn't stay

25 that long.

1 Q And did you have anything to eat while you were
2 there?

3 A They had an hors d'oeuvre buffet there. And Dewain
4 was eating that. We both munched on it, but he did a
5 pretty good job on it.

6 Q Okay.

7 A Excuse me.

8 Q Did a pretty good job on 'em, did he? Okay. "My
9 golf partner, Chris Isgett, drove back. He took me
10 to my house. We went in and had a few more drinks.
11 I had two to four scotches and soda while at my
12 house." Do you remember?

13 A I was not at his house that long as I recall. I
14 called my house when I got there to let my wife know
15 I was home. He may have had a drink in my presence
16 and may have mixed another as I was leaving but I did
17 not see him have --

18 Q Two four?

19 A -- four drinks. No, sir. I think perhaps two. He
20 was -- as I remember leaving, he was standing at the
21 door in the garage with me. We had been talking
22 about various things, and then I left and went home.
23 I didn't -- because I was driving, it was a Saturday
24 night, I didn't think that I needed to have any.

25 Q Well, not nine beers but five?

1 A To the best of my recollection.

2 Q Not four, but two maybe?

3 A I would -- yes, sir. I would think that's about
4 right.

5 Q And you didn't see him drink four at his house. You
6 think maybe one and then he poured another one?

7 A I would say probably two. He was working on a
8 second. And I believe it was a little earlier than
9 that that I left his house.

10 Q When you left his house, did he appear to be
11 impaired, intoxicated, drunk?

12 A No, sir. We were talking about a lot of things that
13 he was very coherent about.

14 Q Okay. Beg the Court's indulgence for a moment.
15 Thank you, Mr. Isgett. Mr. Isgett, you were
16 subpoenaed to be here?

17 A No, sir.

18 Q Didn't we send a subpoena?

19 A Yes, sir. I think since I know both sides I told you
20 it wouldn't be necessary.

21 Q Thank you.

22 THE COURT: Solicitor.

23 MR. GIESE: May it please the Court, Your Honor.

24 CROSS EXAMINATION

25 BY MR. GIESE

1 Q I just have a few questions for you, Chris, if I
2 could. I'll be very brief. So you did go to Aiken
3 with Dewain Herring that day?

4 A Yes, sir.

5 Q Played golf?

6 A Yes, sir.

7 Q Just like he said in his statement. Had some drinks
8 while you were there?

9 A Some beers on the course; yes, sir.

10 Q And you think maybe five?

11 A I would guess that; yes, sir.

12 Q So that's five beers. Then you went to The Bowery?

13 A Yes, sir.

14 Q And your testimony is that you're pretty sure he had
15 at least two?

16 A I would think two. There was some TV show, like a
17 sporting event, and all those nachos and stuff. So
18 we sat there talking. So I think perhaps two. And I
19 believe that was right when whiskey by the drink had
20 come in where they pour out of the bottle instead of
21 a mini bottle.

22 Q So you don't know how much was in it?

23 A No, sir.

24 Q Now, also at that particular time you all drove to
25 his house?

1 A Yes, sir. He lived in Gregg Park which was just
2 through the woods, a couple of miles from my house at
3 that time.

4 Q And I believe you testified that you for sure saw him
5 drink one?

6 A Yes, sir.

7 Q And when you say he drank one, was it in a small
8 glass or a large glass?

9 A Barney, I can't recall that. I just remember one.

10 Q While you were leaving, you think he fixed himself
11 another one?

12 A I am almost positive of that. Yes, sir.

13 Q So for sure you know of nine drinks that you think he
14 had that night?

15 A Some of them were beer on the golf course.

16 Q During that day?

17 A Over a long -- it seemed like we took a longer time
18 to play because it was crowded. Normally down there
19 it's not crowded. But it was one of those Indian
20 summer type days and it was very crowded. And I --
21 so over the period of time he had those beers just on
22 the golf course and then that after we left.

23 Q Approximately what time did you leave his house?

24 A I think it was probably an hour earlier than that. I
25 think it was 7'ish, maybe a little after. I don't

1 know. I'm not exactly sure, but I do not think it
2 was that late.

3 Q So between 7 p.m. and 11 that night you have no idea
4 what he drank?

5 A No, sir.

6 Q In fact, you went home that night?

7 A Yes, sir. I went straight -- I cut through Forest
8 Lake Shore Drive and went home.

9 Q And stayed at home?

10 A Yes, sir.

11 Q Thank you. That's all I have.

12 THE COURT: Anything further?

13 MR. HARPOOTLIAN: No, sir.

14 THE COURT: You may come down.

15 WITNESS: Thank you, Your Honor.

16 THE COURT: Thank you very much.

17 WITNESS: Yes, sir.

18 THE COURT: Any objection to this witness being
19 excused?

20 MR. HARPOOTLIAN: No, sir.

21 MR. GIESE: No, sir.

22 THE COURT: You're excused, Mr. Isgett.

23 MR. HARPOOTLIAN: May we approach, Your Honor?

24 THE COURT: Yes, sir.

25 (Whereupon, a bench conference is had)

1 **THE COURT:** Let's take a short break, ladies and
2 gentlemen. Go to your jury room. Don't talk about
3 the case. Just take a short afternoon break. And I
4 don't think we're going to have to run late tonight,
5 just those of you who were concerned about that.

6 (Jury out at 3:38 p.m.)

7 **THE COURT:** We'll stand at ease for ten minutes.

8 (Whereupon, a break is taken)

9 **THE COURT:** Ready?

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

11 **THE COURT:** State ready to proceed?

12 **MR. GIESE:** Yes, sir.

13 **THE COURT:** Defense ready to proceed?

14 **MR. HARPOOTLIAN:** I'm sorry, Your Honor. I am.

15 **THE COURT:** Mr. Harpootlian, are you ready for
16 the jury?

17 **MR. HARPOOTLIAN:** Yes, sir. I thought I said I
18 was ready. I apologize.

19 **THE COURT:** Bring the jury.

20 (Jury in at 3:53 p.m.)

21 **THE BAILIFF:** The jury is all present, Your
22 Honor.

23 **THE COURT:** Thank you very much. Mr.
24 Harpootlian, call your next witness.

25 **MR. HARPOOTLIAN:** May it please the Court, Your

1 Honor. The defense would call Virginia Herring to
2 the stand, please.

3 VIRGINIA HERRING, after being duly sworn,
4 testifies as follows:

5 THE COURT: Thank you very much. Please be
6 seated. State your full name for the record.

7 WITNESS: Virginia Herring.

8 DIRECT EXAMINATION

9 BY MR. HARPOOTLIAN

10 Q Ms. Herring, what relation are you to the defendant,
11 Dewain Herring?

12 A He is my husband.

13 Q And how long has he been your husband?

14 A 39 years.

15 Q I think we've already heard testimony that you all
16 met while he was at Carolina and you were at Columbia
17 College?

18 A Correct.

19 Q Now, does he have any difficulty with his hearing?

20 A Yes.

21 Q And has he had that for some period of time?

22 A Yes, he has.

23 Q Does he have technical assistance with his hearing?

24 A He has -- he wears two hearing aids.

25 Q And let me back up for just a second. Are you

1 employed?

2 A Yes.

3 Q And where are you employed?

4 A Palmetto Health Richland.

5 Q What do you do for them?

6 A I am a registered nurse in infection control.

7 Q Okay. Do you have training as a nurse?

8 A Yes.

9 Q How long have you been a nurse?

10 A 11 years.

11 Q And you still working today? You worked for the last

12 11 years?

13 A Yes.

14 Q Now, you were talking about he has hearing aids.

15 Without those hearing -- does he wear those hearing

16 aids 24-7, or does he take them out from time to

17 time?

18 A He takes them out from time to time.

19 Q And do you attempt to have conversations with him

20 when he has those hearings aids out?

21 A Yes.

22 Q Is it difficult?

23 A Very difficult.

24 Q Can he hear you?

25 A Sometimes. It depends on where I am and where he is.

1 Q All right. And do you know what -- we showed this
2 instrument the other day called a C pack. It has a
3 mask you wear over your face. And he wears it at
4 night. Is that right?

5 A Yes.

6 Q And what is that for?

7 A It's for sleep apnea.

8 Q Does it make a sound?

9 A Yeah. It's kind of a constant hum, continuous.

10 Q Now, have there been occasions when the phone has
11 rung while he has been in bed with the C pack, and
12 does he sleep with his hearing aids in or out?

13 A Out.

14 Q So he'd be in bed without his hearing aids and with
15 the C pack on. Have there been occasions where the
16 phone has rung or the doorbell has rung?

17 A Yes.

18 Q And he hasn't heard it?

19 A Yes.

20 Q Now, you were out of town on January 28th and 29th.
21 Is that correct?

22 A Correct.

23 Q You were at the beach I believe?

24 A I was.

25 Q So you don't know what happened at your home on the

1 night of the 28th or Chastity's on the night and
2 early morning hours of the 29th?

3 A I do not.

4 Q You weren't present when he was interviewed by police
5 on the morning of the 29th?

6 A No.

7 Q You have no knowledge of any of that?

8 A No knowledge.

9 Q What time did you get home on the 29th?

10 A I think it was around 6 p.m.

11 Q Okay. And it was sometime before you saw your
12 husband. Is that correct?

13 A Yes.

14 Q And when you saw him he was in custody?

15 A Correct.

16 Q And did you take anything to him?

17 A I took his hearing aids to him.

18 Q And does he have more than one set?

19 A No.

20 Q And where did you find those hearing aids?

21 A The hearing aids were on the lavatory in our bathroom
22 next to his sink.

23 Q And you got him his hearing aids?

24 A Yes.

25 Q What about his glasses?

- 1 **A** No.
- 2 **Q** Did you have to get him another set of glasses?
- 3 **A** Yes.
- 4 **Q** He didn't have his glasses with him?
- 5 **A** He did not.
- 6 **Q** And does he wear prescription glasses?
- 7 **A** Yes.
- 8 **Q** When you all are sitting there watching TV back at
9 this time, could he see the TV screen without his
10 glasses?
- 11 **A** No, not well.
- 12 **Q** Now, you came to learn obviously that he was not home
13 or did not stay home the night you were out of town.
14 Is that correct?
- 15 **A** Yes.
- 16 **Q** From the news media and other places?
- 17 **A** Yes.
- 18 **Q** Are you and Mr. Herring still living together?
- 19 **A** Yes.
- 20 **Q** And do you plan to live with him for the rest of your
21 life?
- 22 **A** I do.
- 23 **Q** Thank you. Please answer any questions the State
24 might have.
- 25 **MR. MEADORS:** May it please the Court. No

1. questions.

2. **THE COURT:** Thank you very much, Ms. Herring.
3. You may come down.

4. **MR. HARPOOTLIAN:** May it please the Court, Your
5. Honor.

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

7. **MR. HARPOOTLIAN:** The defense rests.

8. **THE COURT:** All right. All right, ladies and
9. gentlemen. That will conclude the evidence to be
10. presented to you by the defense. Now, before the
11. trial concludes, the state -- I will tell you the
12. State has a right to rebut any of the evidence that
13. the defense has presented since they have the burden
14. of proof in this case.

15. The remaining portion of the trial will consist
16. of my instructions to you as to the law of the state
17. of South Carolina as it applies to this case, then
18. the final arguments of the counsel. Actually it will
19. be in reverse order. Counsel will argue or sum up
20. their cases to you and then I will instruct you as
21. to -- give you the law as it applies to this case.

22. That procedure, all of that procedure is likely
23. obviously to take a good bit of time. I think the
24. most efficient use of our time, since I need to
25. confer with the lawyers about the closing procedure,

1 they know that there's certain legal matters I have
2 to take up with them, the most efficient use of our
3 time would be to go ahead and dismiss you now, ask
4 you to return to the jury room at 9 in the morning at
5 which time we will conclude this trial.

6 I hope you have a pleasant evening. Again,
7 don't discuss the case among yourselves when you
8 return to the jury room or with anyone else over the
9 evening hours. Again, I'll caution you about
10 watching or listening to any or reading press reports
11 of this case. I hope you have a pleasant evening.
12 We'll see you at 9:00 in the morning at which time
13 we'll conclude this trial. Thank you very much.

14 (Jury out at 4:02)

15 **THE CLERK:** May it please the Court.

16 **THE COURT:** Any motions?

17 **MR. HARPOOTLIAN:** Yes, sir. On behalf of the
18 defendant I would renew my previously made motion for
19 a directed verdict. Viewing the evidence in a light
20 most favorable to the State, I would submit there is
21 not enough evidence to support submitting this case
22 to the jury on the pointing and presenting; nor is
23 there enough evidence to submit the case on murder,
24 although we would concede there's enough evidence to
25 submit the case to the jury on involuntary

1 manslaughter.

2 **THE COURT:** What's the State's position?

3 **MR. MEADORS:** We think there is ample evidence
4 on both, and we're not even sure that involuntary
5 manslaughter should even be charged, Your Honor.
6 We'd like to discuss that in our charge conference.

7 **THE COURT:** Yes, sir. All right. With respect
8 to the motions made by the defendant, I feel there is
9 sufficient evidence from which this jury can find
10 either for or against the defendant on either of the
11 charges, and I respectfully deny your motion.

12 Now, it's 4:00. Counsel, do you need a few
13 minutes before we take up the issue of jury charges?

14 **MR. HARPOOTLIAN:** We're ready now. Go back in
15 chambers and discuss it informally?

16 **THE COURT:** Sir?

17 **MR. HARPOOTLIAN:** Go back in chambers and
18 discuss it informally?

19 **THE COURT:** However you wish to do it. We'll
20 need it here on the record.

21 **MR. HARPOOTLIAN:** Well, I think if we went back
22 there, we could clear up about 95 percent of it and
23 then come back out here and put it on the record.

24 **THE COURT:** That's fine. I'll meet you in
25 chambers in ten minutes.

1 **MR. HARPOOTLIAN:** Thank you, Your Honor.

2 (Whereupon, a break is taken)

3 (Note - Defendant's Exhibit No. 16 is re-marked
4 as State's Exhibit No. 33 because No. 16 was
5 misplaced)

6 (WHEREUPON, Defendant's Exhibit No. 33 is marked
7 for identification and received in evidence.)

8 (Whereupon, the proceedings are concluded for
9 the day, to be reconvened tomorrow morning)

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1 Friday, May 18, 2007

2 **THE COURT:** All right. The State ready to
3 proceed?

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

5 **THE COURT:** Defense ready to proceed? Mr.
6 Harpootlian?

7 **MR. HARPOOTLIAN:** Sir?

8 **THE COURT:** Are you ready to proceed?

9 **MR. HARPOOTLIAN:** Yes, sir.

10 **THE COURT:** All right. In chambers we've had an
11 informal charge conference. The issue of the charges
12 has still not been resolved. And it's my intention
13 that because of the difference of opinion as to
14 certain of the charges, we need to do that on the
15 record as far as the objections to the Court's
16 proposed charge and any additional charges that the
17 defense is requesting or the State is requesting. I
18 think we need to complete that process on the record.

19 That presents the issue of whether this case can
20 be finished today. It's my belief based on extensive
21 length of the -- let's just put it this way. The
22 length of the trial so far and the prospect of a
23 rebuttal witness and arguing and charge and jury
24 deliberations, it would be unfair to this jury to
25 start that process, to give that, start the process

1 in front of the jury until after lunch which I
2 believe it will be. That would create a situation
3 where the jury in all likelihood would have to stay
4 together and would be here late Friday night.

5 So what I propose to do, counsel, is dismiss
6 this jury until Monday. I have inquired at least at
7 this point as to whether or not the jurors would be
8 available to return on Monday. And I have an
9 indication that they all would be available to return
10 on Monday and that's what I propose to do. Any
11 objection to that procedure?

12 **MR. GIESE:** No, Your Honor.

13 **MR. HARPOOTLIAN:** No, Your Honor.

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

15 (Jury in at 10:43 p.m.)

16 **THE BAILIFF:** The jury is present, Your Honor.

17 **THE COURT:** Thank you very much. Good morning,
18 ladies and gentlemen. Again I apologize for the
19 delay in getting started. As I told you last night,
20 yesterday evening, I believe there were a number of
21 legal matters that needed to be resolved prior to the
22 submission of the case to the jury. Those matters at
23 this point in time have not been resolved. I also
24 indicated to you that there may be -- and I don't
25 know -- a rebuttal witness or witnesses on behalf of

1 the State. The State is entitled to that procedure.

2 In any event, until these matters are resolved I
3 don't wish to keep you sitting in the jury room
4 drinking coffee. It's not good for your health and
5 it's just not fair to keep you cooped up in that
6 small room.

7 So I am going to suggest to you, and I've taken
8 an informal poll as you know, as to whether or not
9 the jury would be available the first of the week.
10 If we proceeded today I'm afraid, just given my own
11 sense of timing, that you might be here very late
12 tonight. And I don't like to give a case to the jury
13 late in the afternoon. I never do. It's just not
14 good practice in my opinion. I'd rather have you
15 fresh when you actually get the case.

16 And it looks at this point in time as though
17 that may not be until sometime this afternoon. So,
18 I'm going to dismiss you now until Monday morning at
19 9:00 at which time we will reconvene this case.

20 Again, I'm going to caution you not to discuss
21 the case with anyone else over the weekend. It
22 probably is something that you might like to talk to
23 your family about or friends about. I've asked you
24 not to do that because it runs the risk that you'd be
25 unfairly tainted by something somebody might say.

1 And I know you've respected that order.

2 I'll ask you not to view any press reports or
3 read any press reports or listen to any press
4 reports, media reports of this trial. Certainly
5 there have been such. It's pretty obvious to you
6 that there is a fairly high degree of interest in
7 this case and this community. So I'll ask you again
8 not to involve yourself with any press or media
9 reports.

10 I appreciate and I will tell you honestly that
11 these parties appreciate your patience, your
12 tolerance, and your willingness to see this matter
13 through. I hope you have a pleasant weekend. We'll
14 see you Monday morning at 9:00. Thank you very much.

15 (Jury out at 10:47 a.m.)

16 **THE COURT:** All right, counsel. As to the --
17 are you prepared to go forward with the charge
18 conference on the record?

19 **MR. HARPOOTLIAN:** Yes, sir. Your Honor, for the
20 record, before we get into that, I had indicated to
21 you I have consulted with Mr. Herring about Your
22 Honor's consulting with the jury to determine their
23 availability. I reviewed that with him. He's
24 indicated to me he had no objection to that
25 whatsoever. I think that's important to put on the

1 record.

2 **THE COURT:** Thank you. All right. There are
3 several issues that need to -- let me just first
4 start by asking, I have provided each counsel with a
5 proposed set of jury instructions. I'd like to ask
6 first from the State if there are any objections to
7 or additions to the Court's proposed instructions.

8 **MR. MEADORS:** Judge, I'd left my copy. It's
9 being brought right now from the office.

10 **THE COURT:** Well, do you want to take a few
11 minutes?

12 **MR. MEADORS:** Just a couple.

13 **THE COURT:** All right.

14 **MR. GIESE:** If we could have 15 minutes.

15 **THE COURT:** All right.

16 **MR. HARPOOTLIAN:** Maybe we can resolve some of
17 this, Judge, before --

18 **THE COURT:** Talk among yourselves. I'll be
19 available. We'll stand at ease for ten minutes.

20 (Whereupon, a break is taken)

21 **THE COURT:** Counsel, I guess the way to address
22 this, any problem with the general charge?

23 **MR. HARPOOTLIAN:** No, sir. Well, --

24 **MR. MEADORS:** No, sir.

25 **MR. HARPOOTLIAN:** -- we've got some additions to

1 some of the language on the involuntary intoxication
2 we want to talk about. But --

3 **THE COURT:** Well, I call those specific charges.

4 **MR. HARPOOTLIAN:** Yes, sir. General charge, no.
5 No, sir.

6 **THE COURT:** In other words, credibility of
7 witnesses, presumptions?

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

9 **MR. MEADORS:** None whatsoever, Judge.

10 **THE COURT:** And then we get to the first charge
11 which is murder.

12 **MR. HARPOOTLIAN:** We're fine with that.

13 **MR. MEADORS:** Your Honor's charges? Yes, sir.

14 **MR. HARPOOTLIAN:** On murder.

15 **MR. MEADORS:** Oh, yes, sir.

16 **THE COURT:** All right. Move on to involuntary
17 manslaughter.

18 **MR. MEADORS:** Your Honor, I think Your Honor --

19 **THE COURT:** Let me just ask, is there any
20 objection to the charge of involuntary manslaughter
21 as a lesser-included charge of murder?

22 **MR. HARPOOTLIAN:** Your Honor, we have submitted
23 to Your Honor we'd like to make a part of the record
24 our proposed -- some of it is in addition and the
25 language a little bit different on our proposed

1 involuntary.

2 **MR. MEADORS:** Your Honor, for the record, before
3 we get to that, we do object to the charge. I think
4 we have talked about that in chambers. But for the
5 record, we do object it to. We understand Your Honor
6 is charging that.

7 **THE COURT:** I said that that is my -- based on
8 the facts that have been presented so far, I think
9 it's an appropriate charge. But I certainly will
10 allow you State to take whatever position you think
11 is appropriate.

12 **MR. MEADORS:** And, Judge, in that I think Your
13 Honor's charge encompasses the statute and the case
14 law, and we would agree with Your Honor's charge,
15 that that is the correct law.

16 **THE COURT:** It's taken primarily out of the Leon
17 Crosby case.

18 **MR. MEADORS:** Which I tried in Kershaw.

19 **THE COURT:** Which I think the solicitor is
20 familiar.

21 **MR. HARPOOTLIAN:** Your Honor, in addition to
22 your charge, perhaps the best way to put it is, we
23 have a charge, we'd ask for State vs. Gilliam which
24 is basically reguoted in State vs. Reese and State
25 vs. Brown which we've handed up which is: "One who

1 causes the death of another by the negligent use of a
2 deadly weapon or instrumentality may be convicted of
3 involuntary manslaughter."

4 **THE COURT:** Wait a minute. Where are you
5 reading?

6 **MR. HARPOOTLIAN:** Well, we've got two.

7 **THE COURT:** Oh, I'm sorry. You had two --

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

9 **THE COURT:** -- suggested. And I was reading
10 from the other one.

11 **MR. HARPOOTLIAN:** The Gilliam case is a 1903
12 case affirmed and mentioned again by State vs. Quick.

13 **THE COURT:** Let me --

14 **MR. HARPOOTLIAN:** I apologize. You see one with
15 Gilliam on the bottom and one with Reese and Brown on
16 the bottom?

17 **THE COURT:** Yes, I do.

18 **MR. HARPOOTLIAN:** Okay.

19 **THE COURT:** Which one are you referring to?

20 **MR. HARPOOTLIAN:** Well, they're both basically
21 the substance.

22 **THE COURT:** You're asking for both?

23 **MR. HARPOOTLIAN:** Yes, sir. But we would submit
24 that if you use the quote from Reese and Brown that
25 we have one who causes the death of another by the

1 negligent use of a weapon or instrumentality may be
2 convicted of involuntary manslaughter which is the
3 modern summary of what they say in Gilliam, the 1903
4 case. That would satisfy us.

5 **MR. MEADORS:** Your Honor, we think Your Honor's
6 charge is a direct -- is the law, short and sweet;
7 and anything else would come close to a charge on the
8 facts. And we think Your Honor should just charge
9 the law and let us both argue.

10 **MR. HARPOOTLIAN:** Well, Your Honor is going to
11 say on murder that one may infer malice from the use
12 of a deadly weapon. This is the charge on
13 involuntary manslaughter concerning the use of a
14 deadly weapon.

15 **THE COURT:** Well, I have to -- Solicitor, I do
16 have to look at Reese again. Reese was reversed by
17 the Court of Appeals on the involuntary manslaughter
18 charge but then the Supreme Court reversed the Court
19 of Appeals and said that there was no need to give an
20 involuntary manslaughter charge which I had not done
21 at the trial.

22 **MR. MEADORS:** And, Your Honor, that is of course
23 what we cited why we don't think that involuntary
24 should be charged in this case based on the State v.
25 Reese.

1 **MR. HARPOOTLIAN:** I think we're past that issue.

2 **MR. MEADORS:** Well, I understand that.

3 **MR. HARPOOTLIAN:** But, Your Honor, this language
4 is the Gilliam language in Reese and Brown which are
5 more modern versions of Gilliam, just basically that
6 the negligent use of a deadly weapon or
7 instrumentality may be convicted of involuntary
8 manslaughter. And we would ask in light of the
9 Mouzon language --

10 **THE COURT:** Well, the Mouzon language is not in
11 here right now.

12 **MR. HARPOOTLIAN:** Well, let me look at something
13 real quick.

14 (Pause)

15 **MR. HARPOOTLIAN:** I'm sorry. I said Mouzon. I
16 didn't mean Mouzon. What I meant was that if a
17 person using a deadly weapon without just cause or
18 legal excuse takes the life of another malice may be
19 inferred. If that language is there for murder, then
20 we believe this language ought to be there
21 appropriately for involuntary manslaughter, is I
22 guess what I'm saying. I don't know why I said
23 Mouzon.

24 **THE COURT:** Well, because it sounds like Mouzon.
25 That's why. You know, my proposed charge does quote

1 the language of the statute. It says to constitute
2 involuntary manslaughter, there must be a finding of
3 criminal negligence. Criminal negligence statutorily
4 defined is reckless disregard for the safety of
5 others. It just doesn't have that following sentence
6 that you had.

7 **MR. HARPOOTLIAN:** And the reason we'd like this
8 in there, Judge, is because you specifically say in
9 the murder charge that you can infer malice from the
10 use of a deadly weapon. However, under involuntary
11 manslaughter we think the jury should know that the
12 negligent use of a deadly weapon is involuntary
13 manslaughter.

14 **MR. MEADORS:** And, Your Honor, that might be a
15 charge on the facts of this case because I am
16 planning on arguing it. And I think it's appropriate
17 based on the evidence that if he shot that gun and
18 even if he didn't realize somebody was back there,
19 that's murder. So, this, Your Honor, would cause
20 confusion based on the facts of this case that I
21 think in this case that would be an attempted charge
22 on the facts from his side. Because I think you have
23 the argument use of a handgun, if he's even pointing
24 it at that door, it's murder.

25 **MR. HARPOOTLIAN:** Well, there's some testimony

1 he wasn't pointing at the door.

2 MR. MEADORS: We can argue it both ways. I
3 understand that, Your Honor.

4 MR. HARPOOTLIAN: But the law should be -- Your
5 Honor, if you don't charge this, then all the jury
6 hears is the use of a deadly weapon.

7 THE COURT: No. I disagree with you. Because
8 criminal negligence is in -- reckless disregard for
9 the safety of others is in my proposed charge.

10 MR. HARPOOTLIAN: But our court has said one who
11 causes the death of another by the negligent use of a
12 deadly weapon or instrumentality may be convicted of
13 involuntary manslaughter. So, on one hand you're
14 going to say on murder the use of a deadly weapon can
15 infer, may infer malice; and yet on involuntary
16 manslaughter you don't say the negligent use of the
17 deadly weapon may be involuntary manslaughter.

18 So, all they've got to say is, oh, he had a gun,
19 it's murder. And that's not the law. And all we're
20 asking is that you clarify to the jury that merely
21 the use of a gun or a deadly weapon doesn't -- it may
22 infer malice; but if it's negligent, it's not
23 necessarily malice.

24 MR. MEADORS: We would have to say more than he
25 just had a gun, for the record, obviously.

1 **THE COURT:** All right.

2 **MR. HARPOOTLIAN:** So, Your Honor, we would ask
3 for this language from --

4 **MR. MEADORS:** Your Honor, we would object.

5 **MR. HARPOOTLIAN:** -- Reese Brown which is again
6 the only reason we've given you the --

7 **THE COURT:** I'm going to go back.

8 **MR. HARPOOTLIAN:** Yes, sir. The only reason we
9 gave you the Gilliam language is in 1903 and 1932 and
10 1945 and then a Reese, 2006; it's a continuum of
11 cases that say the jury should be charged with that.

12 **THE COURT:** All right. I will take that under
13 consideration.

14 **MR. HARPOOTLIAN:** Thank you, Your Honor.

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

17 **MR. HARPOOTLIAN:** Your Honor, the --

18 **THE COURT:** And I'll allow you to -- the
19 language that you want is: "One who causes the death
20 of another by negligent use of a deadly weapon or
21 instrumentality may be convicted of involuntary
22 manslaughter." That's what you want.

23 **MR. HARPOOTLIAN:** Absolutely.

24 **THE COURT:** I'll see if Reese says that.

25 **MR. MEADORS:** That's different from an inference

1 though, Judge. There's a murder. And I think it's
2 allowable on the one side.

3 **THE COURT:** All right. I understand.

4 **MR. HARPOOTLIAN:** As to -- Your Honor, we'd like
5 to deal with the involuntary intoxication last.

6 **MR. MEADORS:** I think he wanted to save that for
7 last.

8 **MR. HARPOOTLIAN:** Right.

9 **MR. MEADORS:** The judge is going to go through
10 it.

11 **THE COURT:** Just wait a minute. My next
12 proposed charge was on handgun, concealed weapons
13 permit.

14 **MR. HARPOOTLIAN:** No objection.

15 **MR. MEADORS:** And this included the statutes
16 that we went through?

17 **THE COURT:** Yes, sir. All three statutes.

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

19 **MR. MEADORS:** Thank you.

20 **THE COURT:** Pointing and presenting a firearm.

21 **MR. HARPOOTLIAN:** No objection.

22 **MR. MEADORS:** Nothing from the State.

23 **THE COURT:** The defense of habitation.

24 **MR. HARPOOTLIAN:** No objection.

25 **MR. MEADORS:** No, sir. No objection.

1 **THE COURT:** That's as to pointing and presenting
2 only.

3 **MR. MEADORS:** Yes, sir. Oh, yes, sir. For the
4 record we had objected to the defense of habitation.
5 Yes, sir.

6 **THE COURT:** Oh.

7 **MR. MEADORS:** But we agree with your charge
8 without question. If you're going to do it, we are okay
9 with the wording.

10 **THE COURT:** I think the facts in this case
11 support it.

12 **MR. MEADORS:** And just our position was, since
13 they had a lawful search warrant, we didn't think
14 they'd be entitled to the defense of habitation. We
15 understand Your Honor's ruling.

16 **MR. HARPOOTLIAN:** Your Honor, can we skip over
17 voluntary and involuntary intoxication for a moment?

18 **THE COURT:** Skip over both of them?

19 **MR. HARPOOTLIAN:** Yes, sir. Because we need to
20 talk about them I think in tandem. Don't you think?

21 **MR. MEADORS:** Yes, sir. And, Judge, going back
22 to the defense of habitation just so the record is
23 clear, I plan on arguing that they had a lawful
24 search warrant.

25 **MR. HARPOOTLIAN:** Well, if they didn't -- well,

1 they had a search warrant. We argued -- yes. We've
2 argued about that two weeks ago.

3 **THE COURT:** I'm not sure what you're asking me
4 to do. There's nothing else if you skip over them.

5 **MR. HARPOOTLIAN:** Right. Then --

6 **MR. MEADORS:** We have no objection to the
7 voluntary intoxication, your charge.

8 **MR. HARPOOTLIAN:** No. We have no objection to
9 the voluntary intoxication. Right. And we just need
10 to talk about involuntary intoxication. But we'd
11 like -- there's some other additional charges we've
12 requested, Judge, we'd like to talk about before we
13 get to involuntary intoxication. Is that okay?

14 **THE COURT:** What are they?

15 **MR. HARPOOTLIAN:** Well, one of them would be
16 accident. We need to make this part of the record.
17 I understand that you are going to deny that. Is
18 that correct, Your Honor?

19 **THE COURT:** It's not on the record.

20 **MR. HARPOOTLIAN:** Well, I mean, I've asked on
21 the record. And I'm filing a copy of what we
22 submitted to you this morning with the clerk, with
23 the court reporter. Or do you want to consider this?

24 **THE COURT:** No. I want it clear on the record
25 that accident, the defense of accident is only

1 allowable when the defendant is involved and engaged
2 in a lawful act.

3 (WHEREUPON, Court's Exhibit No. 6 is marked for
4 identification.)

5 **THE COURT:** I felt or feel that accident is not
6 appropriate in this case as a defense.

7 **MR. MEADORS:** Your Honor, we have a memo we'd
8 like to make -- I think we had told Your Honor about
9 it.

10 **MR. HARPOOTLIAN:** Do you have one for me?

11 **MR. MEADORS:** I do have a copy. Opposing the
12 charge. We understand Your Honor's ruling. Thank
13 you.

14 (WHEREUPON, Court's Exhibit No. 7 is marked for
15 identification.)

16 **MR. HARPOOTLIAN:** And, your Honor, just for the
17 record, let me state our position is that he had a
18 lawful right to have the weapon out in his car with a
19 concealed weapons permit. Therefore, accident would
20 be an appropriate charge in this case, just for the
21 record.

22 **THE COURT:** Okay.

23 **MR. MEADORS:** I don't know if you want me to
24 respond. But we have the memo. Clearly we don't
25 think he had the right. For the record. He didn't

1 have a right to have it out in the parking lot there,
2 Your Honor, waiting. And also lack of due care in
3 the exercise of handling it. He had been drinking
4 all day. Allegedly.

5 **MR. HARPOOTLIAN:** I would move on to --

6 **THE COURT:** Let me ask you.

7 **MR. HARPOOTLIAN:** Sir?

8 **THE COURT:** Never mind. Go ahead.

9 **MR. HARPOOTLIAN:** The next one I'd like to
10 discuss is permissive inferences. We have given you
11 a copy of a page from Professor Hubbard's charge
12 book. And you've briefly touched on this in your
13 charge, but we'd like for you to expand on it a
14 little bit since you're going to be talking about the
15 use of a deadly weapon may infer malice.

16 **MR. MEADORS:** Judge, we'd respectfully object.
17 All this is covered in your general charge, quite
18 adequately I might state on behalf of the State
19 feels. And I've never seen this charge.

20 **THE COURT:** You know, courts tell us that when
21 requested the Court has got to at least consider
22 them.

23 **MR. MEADORS:** Oh, I know that. I was just
24 putting my position on the record.

25 **THE COURT:** I say many times any reasonable

1 doubt must be resolved in favor of the defendant.

2 **MR. HARPOOTLIAN:** Sir? I'm sorry. I didn't
3 hear you. I apologize.

4 **THE COURT:** I said I say many times in my charge
5 that any reasonable doubt must be resolved in favor
6 of the defendant.

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

8 **THE COURT:** I don't want to repeat that.

9 **MR. HARPOOTLIAN:** Yes, sir. The difference
10 between this and your charge is --

11 **THE COURT:** I understand. Two or more
12 inferences.

13 **MR. HARPOOTLIAN:** Yes, sir. If Your Honor wants
14 to take this under consideration and look at it, we
15 would not have a problem with that.

16 **MR. MEADORS:** We would ask Your Honor to
17 consider it. We respectfully object to it, Your
18 Honor.

19 **THE COURT:** There may be some language out of
20 that that is not included in the general charge.

21 (WHEREUPON, Court's Exhibit No. 8 is marked for
22 identification.)

23 **MR. HARPOOTLIAN:** Your Honor, the next charge is
24 again one from Professor Hubbard's book called
25 Recklessness, Mental State. And it's a little more

1 extensive than what you have in your charge.

2 **THE COURT:** I will tell you --

3 **MR. HARPOOTLIAN:** Sir?

4 **THE COURT:** -- this sounds like a definition
5 from a tort case as opposed to a criminal case. I
6 see some citation of the law of torts.

7 **MR. HARPOOTLIAN:** But some of them are criminal.

8 **THE COURT:** One of them.

9 **MR. HARPOOTLIAN:** One of them. Again, if you'd
10 like to consider this --

11 **THE COURT:** I'll consider it.

12 (WHEREUPON, Court's Exhibit No. 9 is marked for
13 identification.)

14 **THE COURT:** All right. What's next?

15 **MR. HARPOOTLIAN:** Would you like me to move on
16 to the next one, Your Honor?

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

18 **MR. HARPOOTLIAN:** Your Honor, there's the
19 defendant's request to charge on adverse inference
20 for failure to call a witness.

21 **THE COURT:** Well, let me find it.

22 **MR. HARPOOTLIAN:** And we have enclosed three
23 cases. The most recent one is Charping which is a
24 2006 case. And Charping says: "An adverse inference
25 from the unexplained failure of a party to call an

1 available witness is generally held not warranted
2 where the material facts assumed to be with the
3 knowledge of the absent witness have been testified
4 to by other qualified witnesses."

5 Now, Charping says that. You've got to read
6 that in the context of State vs. Richardson. "An
7 adverse inference may rise against any party; that
8 is, either the State or the defendant, from an
9 unexplained failure to call a witness or witnesses
10 particularly available to that party."

11 We think if you charge all of this what the jury
12 hears is that adverse inference arises as in
13 Richardson and Davis. But if they find with the
14 material facts assumed to be within the knowledge of
15 the absent witnesses have been testified to by other
16 qualified witnesses, there is no adverse interest.

17 So it defines what the adverse inference is and
18 when they don't have to hold it against them. They
19 are going to argue -- we're going to argue that the
20 failure call all the other officers involved in the
21 shooting, for instance, in one case, gives rise to an
22 inference that they would have said something that is
23 inconsistent with the two officers that did testify.
24 They are going to argue under Charping that it would
25 just have been cumulative. And so we think this

1 charge is appropriate.

2 **MR. MEADORS:** That's not all I'm going to argue.
3 Your Honor.

4 **MR. HARPOOTLIAN:** It's not?

5 **MR. MEADORS:** No, sir. Basically State v.
6 Hammond says this type of instruction is disfavored
7 in South Carolina, Your Honor. It's a charge that's
8 still permitted and it continues to have a roll in
9 civil cases. Arnold v. Yarborough, I think Gathers
10 vs. South Carolina Electric and Gas, obviously all
11 civil cases, Your Honor. It may be appropriate where
12 the lack of the witness hinders the defense.

13 There is something else in here, Your Honor, I
14 found that night, that if both sides had equal access
15 to them, and we're talking about Tom Hodges here I
16 think, Sergeant Tom Hodges, the other officer. They
17 had as equal access --

18 **MR. HARPOOTLIAN:** Tavenner.

19 **MR. MEADORS:** Excuse me?

20 **MR. HARPOOTLIAN:** Tavenner.

21 **MR. MEADORS:** Tavenner was there. He was not
22 one who pulled or actually discharged his weapon.
23 But those two were available to both sides. They had
24 equal access to them, Your Honor. I've never seen an
25 inference charge that would have been -- we had three

1 officers testified that fired their guns in there.
2 They could have called them as easily as we could.
3 And I think the case law says if it's available to
4 them as much to us. So this would be another reason
5 for Your Honor not to charge it, and so we would
6 respectfully ask you not to do that. And we can
7 argue.

8 MR. HARPOOTLIAN: Charping, Your Honor, says
9 it's appropriate under some circumstances.

10 MR. MEADORS: We would submit this isn't one of
11 those, Your Honor.

12 THE COURT: All right.

13 MR. HARPOOTLIAN: I make this a part of the
14 record. You'll let us know that on Monday, Your
15 Honor?

16 THE COURT: I'll let you know this afternoon.

17 MR. HARPOOTLIAN: Great.

18 (WHEREUPON, Court's Exhibit No. 10 is marked for
19 identification.)

20 MR. MEADORS: Your Honor, it says specifically
21 except when a witness is equally available to both
22 sides.

23 THE COURT: What are you referring to?

24 MR. MEADORS: Okay. Never mind. I was going
25 back to Charping. That's fine.

1 **MR. HARPOOTLIAN:** Your Honor, we have a proposed
2 charge on witness intoxication. "If you find the
3 witness has been drinking or consumed drugs prior to
4 observing events to which the witness testified, you
5 may but are not required to infer the observations or
6 memories of this witness are impaired."

7 One of the key State's witnesses, Ms. Grainger,
8 indicated she had done two lines of cocaine and had
9 several drinks before she went out and engaged in the
10 conduct for which she was called upon to recollect.

11 **MR. MEADORS:** Your Honor, obviously your general
12 charge about credibility, believability of witnesses
13 covers, you can consider their activity, their
14 inactivity, what they are doing. You can believe
15 part a witness says, all of what a witness says.
16 This is getting close to charging on the facts. And
17 specifically his reason for doing this is charging on
18 the facts which we don't think is appropriate.

19 **THE COURT:** You know, everybody in this case had
20 at least one drink.

21 **MR. HARPOOTLIAN:** Exactly.

22 **MR. MEADORS:** Which again, that's a charge on
23 the facts.

24 **MR. HARPOOTLIAN:** Including the defendant.

25 **THE COURT:** I said everybody in this case.

1 MR. HARPOOTLIAN: Yes, sir.

2 MR. MEADORS: I think he meant, included that.

3 MR. HARPOOTLIAN: So, Your Honor, --

4 THE COURT: Just hold on a minute.

5 MR. MEADORS: And out of fairness to Mr.

6 Herring, we really don't think it should be charged.

7 I mean it. I don't think it's fair for either side.

8 THE COURT: Hold it. Stop.

9 MR. HARPOOTLIAN: You're not going to --

10 MR. MEADORS: To the charge.

11 THE COURT: This has been going on for two
12 weeks. What are you asking?

13 (WHEREUPON, Court's Exhibit No. 11 is marked for
14 identification.)

15 MR. HARPOOTLIAN: Sir?

16 THE COURT: I'm looking at your memorandum.

17 MR. HARPOOTLIAN: Yes, sir.

18 THE COURT: And tell me what you're asking.

19 MR. HARPOOTLIAN: I am asking you to --

20 THE COURT: I'm sorry. Wait a minute. Hold it.

21 I was looking at the memorandum. Do you have a
22 proposed charge on that? Does State v. Alexander,
23 you're citing a 1927 case.

24 MR. HARPOOTLIAN: It's still good law.

25 THE COURT: "If you find that a witness had been

1 drinking or consumed drugs".

2 MR. HARPOOTLIAN: That's fine.

3 THE COURT: Which I doubt they were talking
4 about in 1927. But it may say that. I don't know.

5 MR. HARPOOTLIAN: Well, I mean I think we've
6 updated it.

7 THE COURT: Paraphrased it.

8 MR. HARPOOTLIAN: Well, I think the language is
9 the same except "drugs".

10 THE COURT: "Prior to observing events to which
11 the witness testified, you may but are not required
12 to infer, that the observations or memories of that
13 witness were impaired."

14 MR. HARPOOTLIAN: Yes, sir. Yes sir.

15 THE COURT: Besides that, --

16 MR. HARPOOTLIAN: Sir?

17 THE COURT: -- this is an Oconee County case.
18 They had a lot of them.

19 MR. HARPOOTLIAN: Well, we're not using Oconee
20 or Darlington County law in this.

21 THE COURT: This is a liquor still case.

22 MR. HARPOOTLIAN: Yes, sir. It's still good
23 law.

24 THE COURT: Well, it's a rather lengthy case. I
25 don't see the quoted language.

1 MR. HARPOOTLIAN: I've given you my only copy,
2 Judge.

3 THE COURT: I'll read it.

4 MR. HARPOOTLIAN: Right. Your Honor, you'll
5 look at that? You'll --

6 THE COURT: Yes, sir.

7 MR. HARPOOTLIAN: Okay. All we have left, Your
8 Honor, is the involuntary intoxication charge. And
9 if you put our proposed charge next to your proposed
10 charge, we both say --

11 THE COURT: Wait a minute. Hold it a minute.
12 Just let me put them side-by-side.

13 MR. HARPOOTLIAN: Yes, sir.

14 THE COURT: All right.

15 MR. MEADORS: Yes, sir.

16 THE COURT: Ready to proceed?

17 MR. MEADORS: Judge, the first difference
18 that --

19 MR. HARPOOTLIAN: Well, I'm sorry.

20 MR. MEADORS: Is for what or by whatever means.

21 MR. HARPOOTLIAN: If I can just proceed down.
22 It's, you say "by whatever means". We say "for
23 whatever purpose". We both I think took this from
24 the A.L.R. If you read down: "The defendant has
25 raised the defense of involuntary intoxication.

1 Generally, voluntary intoxication is not a defense
2 under the law. However, if a person becomes
3 involuntarily intoxicated by the province of
4 another" -- we say 'for whatever purpose'; you say
5 'by whatever means' -- "the affirmative defense of
6 involuntary -- or he may assert the defense of
7 involuntary intoxication." So the only difference is
8 we say "for whatever purpose"; you say "by whatever
9 means".

10 MR. MEADORS: We would object to "purpose"
11 because we think that puts another mental element in
12 there, Your Honor. And I think the issue is by
13 whatever means, however it got there. And "purpose"
14 would be irrelevant.

15 MR. HARPOOTLIAN: We don't have any problem
16 putting "by whatever means" and "for whatever
17 purpose". Put them both in.

18 MR. MEADORS: Why does "purpose" need -- we
19 would object to "whatever purpose", Your Honor,
20 because that's not an issue.

21 MR. HARPOOTLIAN: Okay. Then --

22 THE COURT: Well, there has been no purpose if
23 it in fact occurred.

24 MR. HARPOOTLIAN: Yes, sir.

25 THE COURT: There's certainly been no

1 testimony -- I mean, there has been testimony that it
2 may have occurred. But there's absolutely no
3 testimony that there was a purpose behind it.

4 **MR. HARPOOTLIAN:** Oh, yes. Money. Get the
5 customer as lubricated as possible to get as much
6 money as you can from him.

7 **MR. MEADORS:** The only testimony has been
8 getting the dancers so they can take advantage of
9 them. There's been no testimony to get the
10 customers.

11 **MR. HARPOOTLIAN:** No. There's been no
12 testimony -- well, anyway, that's all right.

13 **THE COURT:** I understand your position.

14 **MR. HARPOOTLIAN:** Then if you find by the -- we
15 have: "If you find" -- you say "if proven to you by
16 the greater weight of evidence or preponderance of
17 the evidence that the defendant was involuntarily
18 intoxicated --"

19 **THE COURT:** Involuntarily.

20 **MR. HARPOOTLIAN:** "Involuntary intoxication is a
21 complete defense and you must find the defendant not
22 guilty. That's pretty much the same between you and
23 us.

24 **MR. MEADORS:** And ...

25 **MR. HARPOOTLIAN:** Then, Your Honor, ...

1 **THE COURT:** In order for the defendant.

2 **MR. HARPOOTLIAN:** Right. Okay.

3 **MR. MEADORS:** Why don't you just read it?

4 **MR. HARPOOTLIAN:** "In order for the defendant to
5 be entitled to the defense of involuntary
6 intoxication, the defendant must prove two things.
7 First the defendant must prove by the greater weight
8 or preponderance of the evidence that he unknowingly
9 or involuntarily consumed or ingested a foreign
10 substance which brought about the involuntary
11 intoxication."

12 Now, you then at that point -- and let me go
13 through all this before I come back to all that. You
14 say then: "Considering this issue, you may also
15 consider the state of the intoxication of the
16 defendant before and after the alleged foreign
17 substance was consumed."

18 Okay? Then you say, "Second", and we also say,
19 "Second, the defendant must prove by the greater
20 weight or the preponderance of the evidence that as a
21 result of his involuntary intoxication he lacked
22 capacity to distinguish moral or legal right from
23 moral or legal wrong."

24 "The court recognized the act charged in this
25 case murder was wrong. In other words" --

1 **THE COURT:** That's from --

2 **MR. HARPOOTLIAN:** Sir?

3 **THE COURT:** That's from Pittman.

4 **MR. HARPOOTLIAN:** That's fine. "In other words,
5 the defendant must prove he lacked the capacity to
6 know right from wrong or that the act was wrong."
7 And then you say, "In considering this issue, as with
8 the first issue, you may also consider the state of
9 intoxication of the defendant before and after the
10 alleged substance was consumed."

11 Now, you've said that before and you say that
12 again. We think that's a charge on the facts.
13 You've also -- because you previously charged
14 voluntary intoxication is not a defense. So why is
15 it relevant to involuntary intoxication if you've
16 already charged it once?

17 **THE COURT:** Well, the cases that I have read,
18 and I point out, and I need not point it out to you,
19 there is no South Carolina case --

20 **MR. HARPOOTLIAN:** Yes, sir.

21 **THE COURT:** -- defining involuntary
22 intoxication.

23 **MR. HARPOOTLIAN:** Yes, sir.

24 **THE COURT:** Of record. There's a case that you
25 cited which is on appeal to the South Carolina

1 Supreme Court. And we don't know what they'll do
2 with it. So what I have done is gone to other
3 jurisdictions and reviewed several sources, legal
4 sources.

5 And the point that is constantly made in various
6 jurisdictions, and it's not unanimous, is that the
7 defendant's state of intoxication at the time of the
8 alleged event, the consummation of the foreign
9 substance is something that a jury can consider and
10 should consider because it may exacerbate his
11 condition or a condition. It may not. But this
12 whole issue of dosage amount and 17 drinks I think is
13 relevant for this jury to consider.

14 **MR. HARPOOTLIAN:** Well, then, Your Honor, could
15 I ask you to do this? Instead of saying it between
16 the two and then again, can you just say --

17 **THE COURT:** I can say it once instead of twice.

18 **MR. HARPOOTLIAN:** Just say it once at the end.
19 "In considering this issue, you may also consider the
20 state of intoxication of the defendant before after
21 the alleged foreign substance was consumed." Just
22 say it at the end rather than saying it the first
23 issue, second issue. And we wouldn't object to that.

24 **THE COURT:** All right. Any objection to that
25 from the State?

1 **MR. MEADORS:** Well, in a spirit of compromise
2 then, Judge, at the end where you say, "You may
3 consider all the facts and circumstances in your
4 determination whether State has met its burden of
5 proof", could you again there at the end prior to
6 that, if you're going to take that out in the middle
7 and put that in once at the end, could you again
8 state that --

9 **THE COURT:** I think that's --

10 **MR. MEADORS:** If it's proven by a preponderance
11 of the evidence by the defense. And then after that
12 do -- just put that down at the bottom. If proven to
13 you by a greater weight or preponderance of the
14 evidence --

15 **THE COURT:** All he's asking is that it not
16 necessarily repeated twice.

17 **MR. HARPOOTLIAN:** That's right.

18 **THE COURT:** I'll just take one of them out and
19 let them know that's something they can hear.

20 **MR. HARPOOTLIAN:** That's fine. We don't have
21 any objection to that.

22 **MR. MEADORS:** Would you consider putting it at
23 the end of that, right after that? You can put it:
24 "If this is proven to you by a greater preponderance
25 of the evidence by the defense", just that it's an

1 affirmative defense; and then add after that: "But
2 the State must prove everything beyond a reasonable
3 doubt."

4 *THE COURT:* I'm working on it. I think I
5 understand what you both --

6 *MR. MEADORS:* Thank you.

7 *MR. HARPOOTLIAN:* We don't have any objection to
8 the rest.

9 *THE COURT:* All right. Well, that's
10 interesting, because it's a creation.

11 *MR. HARPOOTLIAN:* Well, your Honor, I'm proud to
12 have participated in the birth of this product of
13 yours. I think that's it. Judge, as to the jury
14 verdict form, you've got guilty before not guilty.
15 Could you put not guilty before guilty? Does it
16 matter.?

17 *MR. GIESE:* No objection from the State.

18 *THE COURT:* Sir, it doesn't matter.

19 *MR. HARPOOTLIAN:* Okay.

20 *THE COURT:* I know. It's what you always do.

21 *MR. MEADORS:* As long as they're consistent all
22 the way through whichever way.

23 *THE COURT:* Just for the record, the way the
24 verdict form is written it is written in the
25 alternative, a finding on each of the charges.

1 **MR. HARPOOTLIAN:** Yes, sir.

2 **THE COURT:** Well, I can't use the word "or" if
3 you do -- on the lesser-included is what I'm talking
4 about. I'm just asking if you think that might be
5 confusing to the jury.

6 **MR. HARPOOTLIAN:** No, sir.

7 **THE COURT:** Okay. That's fine. If everybody
8 agrees to it, then we'll do it.

9 **MR. MEADORS:** Fine. Yes, sir. No objection.

10 **MR. HARPOOTLIAN:** I think -- let me check with
11 the guy who knows the law one minute. Your Honor, I
12 think that's all we have.

13 **MR. MEADORS:** Beg the Court's indulgence.
14 Begging Your Honor for one second, please. Your
15 Honor, nothing further from the State. Will Your
16 Honor let us know as to your decision on these
17 charges?

18 **THE COURT:** This afternoon.

19 **MR. MEADORS:** This afternoon. Thank you, sir.

20 **THE COURT:** Now, approach the bench.

21 (Whereupon, a bench conference is had)

22 **THE COURT:** Counsel, for scheduling purposes, I
23 will consider these matters and what I'll do if I
24 feel changes need to be made and that will be my
25 final instruction.

1 **MR. HARPOOTLIAN:** You will fax them to us
2 tonight?

3 **THE COURT:** We will have them available for your
4 runner. Why don't you stick around, Mr. Harpootlian?

5 **MR. HARPOOTLIAN:** I'll be waiting with baited
6 breath.

7 **THE COURT:** Stand at ease.

8 **MR. HARPOOTLIAN:** Thank you, Your Honor.

9 **MR. MEADORS:** Thank you, Your Honor.

10 (Whereupon, the proceedings are concluded for
11 the day, to be reconvened Monday morning)

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1 Monday, May 21, 2007

2 **THE COURT:** All right. Good morning, counsel.
3 State ready to proceed?

4 **MR. MEADORS:** The State's ready, Your Honor.

5 **THE COURT:** Defense ready to proceed?

6 **MR. HARPOOTLIAN:** The defendant is ready to
7 proceed, Your Honor. I'd like to put a matter on the
8 record.

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

10 **MR. HARPOOTLIAN:** We had a charge conference on
11 Friday and we dealt with a number of requests by the
12 defense. I don't believe there was a request by the
13 State. After we left here on Friday we received a
14 fax from the State requesting the so-called Mouzon
15 charge. Your Honor has included that in your charge
16 added to what we got on Friday afternoon. We would
17 object to it for several reasons. The first is that
18 Mouzon is a nineteen-fifty ...

19 **THE COURT:** 7.

20 **MR. HARPOOTLIAN:** 7 case involving a high speed
21 wreck which killed somebody. And the -- we would
22 submit that -- including recklessness, wantonness,
23 willfulness, that we believe has been subsumed --
24 well, first of all, it is burden shifting, A. B), we
25 have been subsumed by the reckless -- by the

1 involuntary manslaughter statute which uses almost
2 the same terms, reckless.

3 We think it's going to lead to confusion on the
4 part of the jury as to reckless murder as opposed to
5 reckless -- the recklessness required for involuntary
6 manslaughter. And we would submit in this case there
7 are -- there's not a factual basis which would
8 support even this charge, should it be
9 Constitutional, should it be legal, should it be the
10 appropriate law.

11 There is no evidence whatsoever that he pointed
12 a gun at anybody. It's not in this record. It can't
13 even be inferred from this record. Therefore, it
14 would be negligent handling of a firearm which would
15 either be not guilty or involuntary manslaughter.

16 **THE COURT:** Well, I considered -- I think I
17 considered all that over the weekend and decided as
18 late as this morning to add the language of the
19 Mouzon charge. I respectfully deny your motion.

20 **MR. HARPOOTLIAN:** And we would respectfully
21 except to your ruling, Your Honor.

22 **THE COURT:** Okay. Anything further?

23 **MR. HARPOOTLIAN:** No, sir.

24 **THE COURT:** All right. State ready for the
25 jury?

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

2 **THE COURT:** Defense ready?

3 **MR. HARPOOTLIAN:** Yes, sir.

4 **THE COURT:** Bring the jury, please.

5 (Jury in at 9:13 a.m.)

6 **THE BAILIFF:** The jury is present, Your Honor.

7 **THE COURT:** Good morning. Thank you very much.

8 Good morning, ladies and gentlemen. We're now ready
9 to continue with this trial. Solicitor.

10 **MR. MEADORS:** If it please Your Honor, the State
11 would call Dr. Demi Garvin.

12 DR. DEMI GARVIN, after being duly sworn,
13 testifies as follows:

14 **THE CLERK:** Thank you. Please have a seat in
15 the witness stand and state your full name for the
16 record.

17 **WITNESS:** My name is Dr. Demi, D-E-M-I; Garvin,
18 G-A-R-V-I-N.

19 DIRECT EXAMINATION

20 **BY MR. MEADORS**

21 **Q** Dr. Garvin, good morning.

22 **A** Good morning.

23 **Q** Would you please relate to the jury where you were
24 born, where you were raised, your background, your
25 training, your education and in particular the

1 education you have received and your experience in
2 the field that we're offering you here today as an
3 expert?

4 A I was born and raised in Durham, North Carolina. I
5 lived in Raleigh, Durham and Chappell Hill, North
6 Carolina. I obtained a Bachelor of Science degree
7 from Furman University in 1981. I was in cystic
8 fibrosis research for two years at the University of
9 North Carolina Chappell Hill in Chappell hill, North
10 Carolina, after which time I entered graduate school
11 at the University of South Carolina College of
12 Pharmacy here in Columbia. I obtained the Doctor of
13 Clinical Pharmacy degree in 1987 from that program.

14 Subsequent to that I was employed by the South
15 Carolina Law Enforcement Division, better known as
16 SLED, here in Columbia, South Carolina, for 16 years
17 where I performed as a clinical and forensic
18 toxicologist and drug chemist.

19 Subsequent to that I was hired by Sheriff Leon
20 Lott at the Richland County Sheriff's Department here
21 in Columbia, South Carolina, in two capacities, first
22 as the drug chemistry technical leader for the
23 forensic sciences laboratory and also as the
24 assistant laboratory director for the sciences within
25 the laboratory.

1 A clinical and forensic toxicologist, first let
2 me say that a clinical toxicologist is an individual
3 who assesses patients, living patients, for adverse
4 drug interactions, drug/drug interactions and the
5 deleterious effects that any substance is capable of
6 having on the human body.

7 Also the clinical toxicologist performs the
8 function of assisting treating professionals,
9 specifically physicians in the development of patient
10 care in the event that a toxic insult or a substance
11 is believed to have an adverse affect on the patient
12 and helping to direct that therapy and to monitor the
13 patient during the course of that therapy.

14 The forensic toxicologist is an individual who
15 analyzes body fluids and tissues in both living and
16 deceased individuals for the purpose of identifying
17 drugs, alcohol and other chemicals which again may
18 have had an adverse affect on the individual, whether
19 they are living or deceased, and then interpreting
20 those results and testifying in a court of law as
21 necessary.

22 The examples of intoxication, for example, that
23 are important in this line of work would be driving
24 under the influence cases where intoxication is often
25 a question, drug facilitated sexual assault where

1 again intoxication may be in question or other forms
2 of chemical restraint.

3 The other aspects of my job include functioning
4 as an inspector for the Federal government under the
5 Department of Health and Humans Services where I
6 travel around the country and in Canada inspecting
7 laboratories that are engaged in urine drug testing
8 of employees.

9 In am also a faculty member from the departments
10 of chemistry and pharmacy at the University of South
11 Carolina. And I also have my own consulting company,
12 the Forensic Science Network with two other
13 colleagues where we review medical malpractice,
14 Workers' Compensation cases, as well as develop
15 technologies in drug analysis and other green
16 chemistry, if you will.

17 Q Let me ask specifically about drug facilitated sexual
18 assault. You testified you had experience and
19 training in that area?

20 A Yes, sir.

21 MR. HARPOOTLIAN: I'm sorry, Your Honor. I
22 can't hear. I can't hear Mr. Meadors.

23 Q You testified you had experience and training in that
24 area. Is that correct?

25 A Yes, sir. In addition to analyzing hundreds of body

1 fluids and tissues in criminal sexual conduct cases
2 as a forensic toxicologist and testifying in those
3 cases, I have also trained sexual assault nurse
4 examiners throughout the state, pathologists and
5 coroners as well in this area.

6 Q What, if any, committee were you on as far as the
7 DFSA or drug facilitated sexual assaults?

8 A The --

9 Q Can you -- go ahead.

10 A I'm sorry. One of our professional organizations, my
11 primary professional organizations, the Society of
12 Forensic Toxicologists, has a committee, a
13 subcommittee known as the Drug Facilitated Drug
14 Assault Committee. That committee over the past
15 several years, I believe since approximately 2002,
16 has been engaged in developing literature, education
17 materials, testing algorithms for laboratories in
18 individuals who are involved in investigating,
19 testing and interpreting information in drug
20 facilitated sexual assault cases.

21 I was asked to provide information, laboratory
22 testing information to that committee in order to
23 develop the appropriate laboratory cutoffs and the
24 drug panels, the different -- and provide advice as
25 to what drugs should be included on those panels for

1 that testing.

2 **Q** Have you been offered as an expert in courts of
3 records of this state in the area of clinical and
4 forensic toxicology and as a drug chemist?

5 **A** Yes, sir. Over 200 times.

6 **Q** Over 200 times?

7 **A** Yes, sir.

8 **MR. MEADORS:** Your Honor, at this time we would
9 offer Dr. Demi Garvin as an expert in the field of
10 clinical and forensic toxicologist and drug
11 chemistry.

12 **MR. HARPOOTLIAN:** Might I Voir Dire just
13 briefly?

14 **THE COURT:** Certainly.

15 VOIR DIRE EXAMINATION

16 **BY MR. HARPOOTLIAN**

17 **Q** Doctor, you primarily have testified concerning
18 forensic tests that you -- blood samples, tissue
19 samples, those sorts of things you've tested. Is
20 that correct?

21 **A** That is part of what I've testified to. Yes, sir.

22 **Q** Have you been qualified to testify about date rape
23 drug drugs?

24 **A** Yes, sir, I have.

25 **Q** And where is that? When? When?

1 **A** When have I?

2 **Q** Uh-huh (affirmative).

3 **A** I have probably been qualified over a dozen times in
4 that area in the State of South Carolina.

5 **Q** And that was based on a forensic test done of blood
6 samples?

7 **A** That was based on the toxicology examination and
8 investigative materials that were provided as part of
9 my interpretation.

10 **Q** But you actually had the opportunity to get a blood
11 test and look at it and see whether there was the
12 presence of drugs there?

13 **A** I did not personally obtain the blood test. The
14 blood samples and other body fluids were presented to
15 me for analysis and interpretation.

16 **Q** Right. But you had a blood test --

17 **MR. MEADORS:** Your Honor, objection. This is
18 going beyond her qualifications.

19 **MR. HARPOOTLIAN:** Well, I'm trying to determine
20 whether she's done it based on clinical studies or
21 blood tests.

22 **THE COURT:** Well, ask her that question.

23 **MR. HARPOOTLIAN:** Yes, sir.

24 **Q** When I say you had a blood sample, you didn't draw a
25 blood sample?

- 1 A No, sir, I did not.
- 2 Q Somebody presents a blood sample to you of a sexual
- 3 assault victim?
- 4 A That's correct.
- 5 Q Then you do the analysis?
- 6 A That's correct.
- 7 Q And typically, if you think there has been what I
- 8 would call a date rape drug, you would call a drug
- 9 induced sexual assault?
- 10 A It is referred to drug facilitated sexual assault.
- 11 Q Drug facilitated sexual assault. You would see the
- 12 presence of something like a diazepam? A
- 13 Benzodiazepine. I'm sorry.
- 14 A That's one example. Yes, sir.
- 15 Q Okay. And then, having that blood sample, you would
- 16 then be able to testify whether or not that person
- 17 had been given drugs?
- 18 A In conjunction with other materials. Yes, sir.
- 19 Q Right. Have you ever testified when you did not have
- 20 such a blood sample or a --
- 21 A I'm sorry. Could you --
- 22 Q In a drug induced sexual assault, have you always had
- 23 blood samples?
- 24 A No, sir. Oftentimes we've had urine samples.
- 25 Q I'm sorry. Blood, urine, some bodily fluid?

1 A Yes, sir. That's correct.

2 Q You had one in every case that you've testified
3 about?

4 A I don't know if there's been one in every case. But
5 in the preponderance of cases I would say that is
6 true.

7 Q Have you done differential diagnosis?

8 A No, sir. I'm not a diagnostician.

9 Q Okay. Thank you. We have no objection, Your Honor.

10 THE COURT: All right. You may proceed.

11 DIRECT EXAMINATION

12 BY MR. MEADORS

13 Q Please tell the ladies and gentlemen of the jury what
14 you reviewed in this case specifically if you can?

15 A Yes, sir. I reviewed the ASIS initiating report
16 formed by Sergeant Linfert of the Richland County
17 Sheriff's Department. I reviewed Richland County
18 Sheriff's Department incident reports, arrest
19 reports, notes taken by Captain Stan Smith, Deputy
20 Chief David Wilson, Sergeant David Linfert,
21 Investigator Scott Faust, statements from Mr. Carl
22 Weeks, Renisha Grainger, Nicole Beran, Angel Koon,
23 Donald Hawkins, statements provided by Mr. Dewain
24 Herring, crime scene investigative reports from Jay
25 Russell, Ray Livingston, Stan Richards, Coroner's

1 report from Robert Dean, the autopsy report from Dr.
2 Stan Kessler, evidence of property section chain of
3 custody information, motor vehicle records, concealed
4 weapons permit, criminal history photographs, a
5 website documentation from Mr. Herring's law
6 practice, 911 telephone calls, video footage from
7 Chastity's Gold Club, medical records on two
8 occasions from Mr. Herring's appearance at Palmetto
9 Health Richland, Mr. Herring's court transcript
10 testimony, Dr. Holbrook's testimony, and the
11 pertinent peer reviewed medical and forensic
12 literature.

13 Q Now, you said earlier you had been involved in
14 analyzing, interpreting and testifying in cases
15 involving intoxication?

16 A Yes, sir.

17 Q Are there any specific examples you can give us of
18 that?

19 A Yes, sir. Specifically, typically, when the issue of
20 intoxication arises, in my experience and training,
21 it has been in driving under the influence cases,
22 drug facilitated sexual assault which is defined as
23 the incident for the event where an individual is
24 surreptitiously administered alcohol and/or other
25 drugs and is not able to consent or resist to sexual

1 acts which they are then engaged in.

2 Also there are other instances of chemical
3 restraint which result in intoxication such as the
4 so-called "Mickey Finn" situation where an individual
5 may be surreptitiously given alcohol and/or other
6 drugs for the purpose of robbery, for example, or in
7 young children who are given medications or alcohol,
8 to include alcohol, so that they do not have to be
9 taken care of.

10 Q After reviewing all the records in this case and
11 analyzing the data, reading the statements -- and are
12 you aware there's been an allegation of involuntary
13 intoxication obviously, correct?

14 A Yes, sir, I am.

15 Q Do you have an opinion as to whether or not based on
16 your training and expertise and your reviewing the
17 documents whether or not Dewain Herring was
18 involuntarily intoxicated?

19 A Yes, sir, I do.

20 Q Could you tell the jury what that is?

21 A In my opinion to a reasonable degree of scientific
22 and medical certainty, I do not believe Mr. Dewain
23 Herring was at any time provided a substance
24 involuntarily that resulted in his intoxication.

25 Q And specifically on January 29th, 2006?

1 A That's correct.

2 Q Please tell them why you say that. What do you base
3 that opinion on?

4 A May I approach the board, sir?

5 MR. MEADORS: Your Honor, can she approach the
6 board?

7 THE COURT: Certainly.

8 Q Do you need a --

9 A Yes, sir. Thank you. In instances of intoxication
10 there are essentially three different events which
11 can occur if we are to clinically and forensically
12 assert that intoxication has occurred. The first
13 would be voluntary intoxication where the individual
14 knowingly ingests a substance or substances which can
15 result in their being impaired.

16 Q Is that like drinking a lot of beer or liquor?

17 A Yes, sir. Excuse me. Knowingly ingests alcohol
18 and/or other drugs.

19 The second instance would be a combination of
20 involuntary and voluntary intoxication where the
21 individual has already or continues to ingest
22 knowingly a substance or substances such as alcohol
23 or other drugs. But then in addition, at some point
24 the individual is surreptitiously or without his or
25 her knowledge given additional alcohol and/or other

1 drugs. So the two exist in combination.

2 The final example would be strictly involuntary
3 intoxication where at no time is the individual aware
4 that he or she is being given alcohol and/or other
5 drugs.

6 In this particular instance, after reviewing all
7 the documents and information that was provided to
8 me, I did not feel that Mr. Herring was the victim of
9 involuntary intoxication for reasons that I will go
10 into in just a moment.

11 Also, secondary to that I do not feel that he
12 was the victim of both voluntary and involuntary
13 again for reasons I will go into in just a moment.
14 Which left voluntary intoxication given the fact that
15 Mr. Herring over the course of the day but more
16 importantly proximate to the shooting that occurred
17 on January 29th had been voluntarily ingesting
18 alcohol during that time period.

19 Now, why was I --

20 Q Why did you rule out two and three?

21 A The reason why I was able to rule out scenarios two
22 and three, those being both voluntary and involuntary
23 intoxication or strictly involuntary, is because the
24 hallmark feature in involuntary intoxication is the
25 victim's incapacitation, incapacitation meaning the

1 victim is clearly incapable of fending for himself or
2 herself during that process. Now, incapacitation has
3 a wide continuum. It can mean that the individual is
4 present but is physically incapable of moving or it
5 can fall on the continuum of anywhere to
6 unconsciousness.

7 Now, this is very important because in the case
8 of Mr. Herring, the fact Mr. Herring was ingesting
9 alcohol or ethanol at the time that he was in the
10 club and prior to his time at the club, I would
11 expect any additional intoxicant that was provided to
12 him, any additional drug which in combination with
13 alcohol could have rendered him incapacitated.

14 There was clearly enough time during the time
15 that he was in Chastity's Club for the two of those
16 together to be potentiated or synergistic or to act
17 together to make him incapacitated to the point where
18 both he and witnesses would have been able to
19 describe this.

20 So again, the combination of alcohol and any
21 additional intoxicant would have in my opinion
22 rendered him significantly impaired enough for that
23 to have been distinguished both by him and witnesses.
24 And there wasn't any information to that effect.

25 Also there are case reports of victims

1 developing amnesia, specifically what is called
2 anterograde amnesia in cases of drug facilitated
3 sexual assault or the "Mickey Finn" incident, if you
4 will. But this anterograde amnesia does not exist in
5 isolation, meaning the individual is not merely going
6 to have anterograde amnesia or be unable to recall
7 events after the intoxicating experience or the
8 administration of drugs or alcohol to the exclusion
9 of physical impairment.

10 And, in fact, on page 57 of Mr. Herring's
11 transcript he also indicated that at no time was he
12 physically impaired. He had, quote, only merely been
13 drugged, unquote. And that is in direct contrast to
14 what in my education, training and experience I would
15 feel would have to exist in order for such an event
16 to have occurred.

17 Q Well, what does this word mean? Anterograde?

18 A Anterograde. Anterograde amnesia is defined as the
19 individual's inability to recall events occurring
20 after alcohol and/or drugs are administered; so, in
21 other words, everything forward from that period of
22 time.

23 Q And in this case as far as anterograde, your review,
24 was Mr. Herring consistent or inconsistent with this?

25 A I'm sorry? I didn't understand your question.

1 Q Is mr. Herring's conduct after you reviewed the
2 statements he gave consistent or inconsistent with
3 this?

4 A They were inconsistent. And the reason that they
5 were inconsistent was in my opinion I felt that Mr.
6 Herring's activities and his behavior was purposeful.
7 He -- actually according to witnesses, according to
8 the testimony, the statements that I read, eye
9 witnesses describe him as proposing a plan,
10 exhibiting organized behavior.

11 He tells the witnesses in a threatening manner
12 that he's going -- they don't want him to leave the
13 club, that if he returns to the club there is going
14 to be trouble. He then leaves the club under his own
15 power. He is mobile, ambulatory. There is no
16 evidence on the video or by any of the other
17 witnesses' statements that he appeared to be
18 impaired, was not in possession of his faculties.

19 He enters his -- he is viewed outside the club
20 engaged in conversation with personnel of the club.
21 He then gets into his vehicle. He returns, which
22 again is purposeful.

23 Q Would that be consistent or inconsistent with being
24 involuntarily intoxicated?

25 A I believe it to be inconsistent. He then returns

1 home and again engages in purposeful behavior and
2 removes the gun from his vehicle and places it inside
3 his home.

4 In addition to that, in reviewing both the 911
5 transcript as well as the statement that was given at
6 the Richland County Sheriff's Department, on two
7 occasions Mr. Herring was deceptive, indicating to
8 both the 911 personnel and law enforcement that he
9 had been in bed at home asleep during the period of
10 time when in fact he was at the club, again which in
11 my opinion would be inconsistent with the
12 incapacitation and anterograde amnesia that he claims
13 to have had during this time.

14 Q So your opinion as to whether or not he experienced
15 or had the signs and symptoms consistent with
16 involuntary intoxication is that he did not?

17 A That's correct.

18 Q What's retrograde?

19 A Retrograde amnesia is the instance --

20 Q Do you want another piece of paper?

21 A No, sir. I think I can do it. Retrograde amnesia is
22 the situation where an individual is unable to recall
23 events prior to or before the alcohol or drug are
24 administered. So anything prior to the time the
25 drink and/or the drugs are supposedly administered to

1 someone, they cannot recall events that occurred
2 before that.

3 Q So if one was not to remember a specific thing but
4 that was prior to the alleged drug being ingested to
5 him, that would have nothing to do with the drug
6 being ingested in him, correct?

7 A That's correct. Yes, sir.

8 Q Walking to the car and then returning back to talk to
9 "Jon Jon", consistent or inconsistent with
10 involuntary intoxication?

11 A I would -- I would find it to be inconsistent, sir.

12 Q Leaving Chastity's and coming back consistent or
13 inconsistent with involuntary intoxication?

14 A Inconsistent, sir.

15 Q Taking the gun from the car and putting it in the
16 house, consistent or inconsistent with involuntary
17 intoxication?

18 A Inconsistent.

19 Q Inconsistent with incapacitation, right?

20 A Yes, sir. There was no incapacitation documented.

21 Q In your opinion, based on everything you've testified
22 and everything you've reviewed, Dr. Demi Garvin, do
23 you have an opinion of whether or not Mr. Herring
24 knew right from wrong at the time of the shooting on
25 January 29th, 2006, specifically 12:06:06?

1 A Yes, sir, I do.

2 Q Please tell the jury what that opinion is and what
3 you base it on?

4 A I believe that on January 29th of 2006, Mr. Herring
5 did know right from wrong at the time of the
6 shooting. And I base that on my review of all the
7 documents, the pertinent peer reviewed medical
8 literature, and what I believe to be on the basis of
9 my education, training and experience activities
10 which are completely inconsistent with involuntary
11 intoxication.

12 Q Specifically?

13 A Specifically, purposeful behavior, carrying out the
14 behavior which he had indicated that he was going to
15 carry out, the fact that he was ambulatory. There is
16 no evidence of impairment or intoxication at the time
17 that these events were occurring.

18 Purposeful behavior after he leaves the club;
19 specifically, removal of the gun from his vehicle and
20 placing it in the house, and also the fact that
21 despite the fact that Mr. Herring indicates that he
22 has no recall of certain activities or events that he
23 engaged in during that period, anterograde amnesia
24 does not occur in isolation. I would expect to see
25 an incapacitation or to have either seen it in the

1 documentation in the 911 or the video, security video
2 that was presented; but also on the part of witnesses
3 who provided statements, whether at the club or
4 during the time that he was interviewed.

5 In addition to that, the medical records both on
6 the first and second presentation indicate that Mr.
7 Herring was alert and oriented times four. And, in
8 fact, he had a Glasgow comoscale of 15 which is
9 perfect, meaning that all of his faculties -- he was
10 in possession of all of his faculties on his first
11 hospital presentation, and there was no evidence in
12 the emergency medical record run sheet that he was
13 under the influence of any intoxicant or was confused
14 or did not understand what was happening to him.

15 Q One final question. I think you talked about drug
16 facilitated sexual assaults already, correct?

17 A Yes, sir.

18 Q What roll, if any, did motive play in the cases
19 you've dealt with that?

20 A In cases of chemical restraint, drug facilitated
21 sexual assault, when an individual is involuntarily
22 intoxicated, there is an inability on the part of
23 that individual to fend for themselves or to do
24 anything about what is happening to them.

25 In this particular case Mr. Herring was

1 completely able to fend for himself and, in fact, was
2 able to carry out a variety of complex activities
3 that evening.

4 **MR. MEADORS:** Beg the Court's indulgence.

5 (WHEREUPON, State's Exhibit No. 101 is marked
6 for identification.)

7 (WHEREUPON, State's Exhibit No. 102 is marked
8 for identification.)

9 **MR. MEADORS:** Your Honor, at this time we'd
10 offer State's 101 and 102.

11 **MR. HARPOOTLIAN:** Your Honor, we'd object. This
12 was great demonstrative evidence. We certainly don't
13 have any problem to him showing it to the jury during
14 argument, but it's not an exhibit that should go back
15 to the jury.

16 **THE COURT:** You marked it as evidence. Just
17 mark it for I.D. at this point. We'll take it up at
18 a later time.

19 **MR. MEADORS:** That's all we have. Thank you
20 very much.

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

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

24 CROSS EXAMINATION

25 **BY MR. HARPOOTLIAN**

1 Q You work for the Richland County Sheriff's
2 Department?

3 A Yes, sir.

4 Q And you worked there for how long?

5 A I have been there almost eight years.

6 Q Okay. Now, on January 29th of 2006, will you tell
7 the jury, please, whether or not you were -- and
8 you're head of the toxicology lab down there?

9 A No. I'm the assistant laboratory director in their
10 chemistry technical care.

11 Q But blood, urine, bodily fluids that are brought in
12 for examination would come through you or somebody
13 down there?

14 A No, sir. We don't have a toxicology laboratory at
15 the Sheriff's Office.

16 Q Would it come through you to go to SLED?

17 A They could. Yes, sir.

18 Q And tell the jury, please, what bodily fluid sample,
19 blood, urine, tissue did you receive from Dewain
20 Herring to be processed by SLED to determine what his
21 blood alcohol level was or what date rape drug, if
22 any, had been administered to him?

23 A There was no body fluid taken.

24 Q And you've looked at the medical records?

25 A Yes, sir.

- 1 Q And you know that Mr. Herring before he was ever
2 interrogated, before he was ever taken or brought
3 back to the Richland County Sheriff's Department, he
4 was taken to the hospital, right?
- 5 A Yes, sir.
- 6 Q And at the hospital he was there what? About 6:30,
7 7:00?
- 8 A He arrived at 5:35 a.m.
- 9 Q And was released at about 7:30, 8:00?
- 10 A Approximately.
- 11 Q He was there then for two and a half hours?
- 12 A Yes, sir.
- 13 Q Did the Richland County Sheriff's Department obtain a
14 blood, urine or tissue sample that you would want to
15 do analysis of alcohol or blood?
- 16 A No, sir, they did not.
- 17 Q Now, in your experience in eight years, is that
18 unusual?
- 19 A For a suspect? Yes, it is.
- 20 Q Okay. Now, the kind of intrusion we're talking about
21 here are called -- and if I mispronounce it or
22 butcher it, correct me -- Benzodiazepines?
- 23 A Benzodiazepines are a sedative hypnotic. I'm not
24 sure I understand your question.
- 25 Q Well, Rohypnol, is that a Benzodiazepine?

- 1 A It is.
- 2 Q GHB, is that a Benzodiazepine?
- 3 A No, it's not.
- 4 Q But it has similar effects as a Benzodiazepine?
- 5 A It's a sedative hypnotic.
- 6 Q Right. Now, sedative hypnotics -- and they have --
- 7 and for instance, Rohypnol was legal in this country
- 8 for a number of years?
- 9 A No, sir. Rohypnol has never been legal in this
- 10 country.
- 11 Q What about GHB?
- 12 A GHB is an orphan drug, and it can be prescribed only
- 13 for the cataplexy. That's the only time an
- 14 individual can be prescribed that drug.
- 15 Q But these kinds of drugs are legal elsewhere in the
- 16 world?
- 17 A Rohypnol is. GHB is not.
- 18 Q Okay. And if you look at the -- you're familiar with
- 19 Goodman and Gillman?
- 20 A Oh, yes, sir.
- 21 Q And you're familiar with Human Pharmacology,
- 22 Molecular to Clinical, by Merlini, Loniker, Minnerman
- 23 and May?
- 24 A No, sir, I'm not.
- 25 Q What about "A to Z Drug Facts"?

- 1 A Yes. I am familiar with that publication.
- 2 Q And "Basic and Clinical Pharmacology", by Lang I
- 3 believe. Bertram C. Catsung?
- 4 A I'm familiar with it. Yes, sir.
- 5 Q Okay. Now, if you go to these treatises -- and these
- 6 are books you would use as a pharmacologist, right?
- 7 A I may have occasion to use them. Yes.
- 8 Q If you were to look for the symptoms of this class of
- 9 drugs?
- 10 A Which particular class? I'm sorry.
- 11 Q Date rape drugs. Rohypnol, for the sake of argument.
- 12 A Specifically Rohypnol?
- 13 Q Right.
- 14 A All right.
- 15 Q You would see that these drugs cause
- 16 depersonalization?
- 17 A At sufficient doses they can. Yes, sir.
- 18 Q At some dose?
- 19 A Yes, sir.
- 20 Q Depersonalization. What is depersonalization?
- 21 A Depersonalization is an instance where the individual
- 22 is disconnected from himself or herself.
- 23 psychologically, does not feel to be in his own body,
- 24 if you will.
- 25 Q An out-of-body experience?

1 A Yes. That can be a term used to describe it. Yes,
2 sir.

3 Q And also they say derealization. What is that?

4 A It's an instance where the individual does not feel
5 that they are -- they don't know reality from lack of
6 reality, if you will.

7 Q And those -- and I'm talking about Rohypnol
8 specifically. But Rohypnol called "roofies" I think
9 in the date rape drug world, are they not?

10 A That's one slang term. Yes, sir.

11 Q Okay. They share -- Rohypnol shares common
12 characteristics with drugs ranging from Xanax to
13 Valium to a whole bunch of these Benzodiazepines. Is
14 that correct? Dose dependent?

15 A Yes, sir. But I want to add that Benzodiazepines are
16 merely one class of drugs that could be associated
17 with date rape or intoxication. There are close to a
18 hundred different drugs that could be used for that
19 purpose.

20 Q Correct. I'm not -- I guess what I'm trying to find
21 out is, all of these drugs though, the reason they're
22 effective, the date rape drugs is, they cause some
23 disinhibition, right?

24 A They can. Yes, sir.

25 Q They in many cases cause this -- what kind of amnesia

1 was that?

2 A Anterograde.

3 Q Amnesia. That's important if you're going to use it
4 as a date rape drug because they don't have any
5 memory of being raped. Isn't that right?

6 A That can occur. Yes, sir.

7 Q And in some instances these drugs, like Triazolam,
8 T-R-I-A-Z-O-L-A-M, would you consider that a date
9 rape drug?

10 A It can be, yes.

11 Q They can cause anger and hostility, can they not?

12 A Yes, they can.

13 Q And a paradoxical reaction. Anger, hostility and
14 mania; what does that mean if one of these drugs
15 causes that? What does that mean?

16 A In the absence of alcohol?

17 Q Well, with or without alcohol.

18 A That paradoxical reaction occurs when an individual
19 engages in bizarre, unanticipated, aggressive
20 behavior that is otherwise uncharacteristic of the
21 individual.

22 Q So under the influence of these drugs, you can have
23 bizarre, violent behavior, correct?

24 A That has been documented. Yes, sir.

25 Q Okay. And not have any memory of it?

1 A That is correct.

2 Q Okay. Now, did you hear the testimony -- you've read
3 the testimony of Mr. Herring and Dr. Holbrook. Is
4 that correct?

5 A I observed Dr. Holbrook's testimony. I did not read
6 it.

7 Q Did you observe Mr. Herring or read his testimony?

8 A I read his testimony.

9 Q Now, there were two young ladies that testified after
10 Dr. Holbrook, a Ms. Cummings and a Liz, we referred
11 to as Liz. Did you read their testimony?

12 A No, sir, I did not.

13 Q Were you made aware of their testimony?

14 A I was informed that they testified. I was not --
15 there was not sufficient time for me to review their
16 testimony or any file associated with their
17 testimony.

18 Q What were you told about their experience at
19 Chastity's?

20 A There was some indication that they had described
21 something akin to working at the club and then not
22 remembering where they were or what they had done at
23 some point past that.

24 Q At some point at what?

25 A At some point beyond their working at the club.

1 Q Okay. If one of them testified that she took a
2 drink, one drink, had nothing else to drink that
3 night, didn't feel well, got in her car to drive home
4 to Blythewood with another young lady, has no memory
5 whatsoever of going out, opening the door of her car,
6 getting in her car, cranking up her car, driving her
7 car to Blythewood, has no memory of that trip
8 whatsoever; is that consistent or inconsistent with a
9 date rape drug?

10 A It could be consistent. At this point in time I
11 would say in my opinion there's insufficient
12 information to discern effectively whether it is.
13 But it could be.

14 Q Whether it was or wasn't?

15 A That's correct.

16 Q Then the testimony is they go to a gas station in
17 Blythewood. She has no memory of that gas station
18 where they stopped. Okay?

19 A Yes, sir.

20 Q She then remembers a Sheriff's Deputy pulling her
21 over. She has a memory of that. Right?

22 A All right, sir.

23 Q And the other witness corroborated that, that she was
24 pulled over by a Richland County Sheriff's Deputy who
25 ran a license check and found that her license had

1 been suspended for open container sometime before
2 that and takes her into custody for driving under
3 suspension. Not driving under the influence.
4 Driving under suspension. Right?

5 A Right, sir.

6 Q Now, if an officer saw somebody who was impaired;
7 that is, unsteady on their feet, slurred speech,
8 fumbled for their license, somebody clearly impaired,
9 would expect them to take them into custody, wouldn't
10 you, for driving under the influence? I mean, this
11 is your area of expertise, right?

12 A It is my area. Yes, sir.

13 Q But since he didn't take her into custody for that,
14 merely the driving under suspension, is that
15 something that's important for you to know?

16 A Yes, sir.

17 Q Then her next memory is waking up in the jail the
18 next day seven or eight hours later, no memory of
19 going to jail, no memory of being booked in, no
20 memory of being fingerprinted, no memory of doing
21 anything except waking up in the jail the next
22 morning. Consistent or inconsistent with receiving a
23 date rape drug?

24 A Potentially consistent.

25 Q And she's told that she had a fight, a violent

1 encounter with the police officers. And she's a very
2 peaceful, normal person; I mean, normally, not
3 subject to getting into fights, not subject to
4 getting into a rage. Consistent or inconsistent with
5 a date rape drug?

6 A Potentially consistent.

7 Q Would you have an opinion to a degree of scientific
8 certainty more probably than not as to whether she
9 was administered a date rape drug at Chastity's?

10 A I would say there's insufficient information to
11 arrive at that conclusion.

12 Q Why is that?

13 A Because that is one piece of the puzzle. I would
14 require extensive documentation. Unfortunately, we
15 didn't have the opportunity to investigate that case
16 to determine whether or not a drug facilitated sexual
17 assault did occur.

18 Q Okay. Now, she comes back according to her testimony
19 and reports it to the management at Chastity's.
20 Okay?

21 A Yes, sir.

22 Q And another girl that's with her that night on two
23 separate occasions had this sort of experience and
24 reports it to the management at Chastity's. Okay?

25 A Yes, sir.

1 Q Now, you are a commissioned law enforcement officer?

2 A Yes, sir, I am.

3 Q You carry a gun?

4 A Yes, sir.

5 Q And you are a law enforcement officer. Does it
6 bother you that this information wasn't passed on to
7 the Richland County Sheriff's Department?

8 A It's unfortunate that the victim did not file an
9 incident report with the Sheriff's Department.

10 Q What about the management at Chastity's? Should they
11 have filed something?

12 MR. MEADORS: Objection.

13 THE COURT: Sustained.

14 Q Now, I'm trying to assess -- you didn't have enough
15 information -- I mean, if this young lady, the
16 information is that she walked and talked and looked
17 as if she were not impaired in any way but had no
18 memory of it, that's consistent with getting a date
19 rape drug, right?

20 A I would say that there is still insufficient
21 information to arrive at that conclusion, sir.

22 Q But it's consistent?

23 A It is insufficient information to arrive at that
24 conclusion.

25 Q Well, you've looked at the video of Mr. Herring. And

1 no one testified that he appeared to be impaired, did
2 they?

3 A That's correct.

4 Q So there's no evidence of impairment. You're not
5 saying he was under the influence of alcohol, are
6 you?

7 A I'm saying he was under sufficient influence of
8 alcohol to have had his inhibitions lowered and
9 increase in self-confidence and to have engaged in
10 emotionally unstable behavior.

11 Q But he doesn't appear to be impaired on the video?

12 A Mr. Herring, begging your pardon, sir, on
13 January 29th, 2006 was an alcohol dependent
14 individual. And as a function of that, he is capable
15 of functioning well while under the influence of
16 alcohol.

17 Q Nobody has testified -- you read Mr. Weeks. Did you
18 read their testimony? Mr. Weeks? Mr. Hawkins?

19 A I read their --

20 Q Angel Koon? Or did you just read their statements?

21 A I read their statements.

22 Q Are you aware of the fact they testified and they
23 were questioned, asked by the solicitor, every one of
24 them; doesn't appear to be impaired, didn't have
25 slurred speech, wasn't unsteady on his feet. And you

1 attribute that to the fact that he had a bout with
2 alcoholism. Is that correct? Alcohol dependent?

3 A He is an alcohol dependent individual. Yes, sir.

4 Q Right. Now, so it was insufficient in the young
5 lady, Liz. She got in her car, cranked it up, drove
6 it, didn't appear to be driving under the influence,
7 talked with police officers, didn't appear to be
8 under the influence. That sounds like the same thing
9 we hear from Mr. Herring, right?

10 A No, sir. I think there is a multitude of information
11 available to us as to Mr. Herring's condition.

12 That's not the case with Ms. Cummings' condition.

13 Q A multitude of information from -- now, let's talk
14 about before the shooting. Who is it from?
15 Mr. Weeks?

16 A The personnel at the club.

17 Q The personnel at the club. And you then would be
18 taking everything they said as truthful?

19 A I take it as part of the investigative file that I'm
20 reviewing in order to arrive at my conclusion.

21 Q Donnie Hawkins. You're taking as truthful his
22 statement you read?

23 A Yes, sir.

24 Q Are you aware that when he testified he recanted on
25 part of that statement?

1 A No, sir, I'm not.

2 Q If he had said that he was standing next to the
3 deceased when he was shot in his statement and then
4 the video when we showed it to him said, there he ^{was} his
5 right there with his back to the deceased being shot
6 in just a moment, would that make a difference to
7 you?

8 MR. MEADORS: Your Honor, objection. That's not
9 correct.

10 MR. HARPOOTLIAN: Well, Your Honor, this is
11 cross examination.

12 THE COURT: I understand. Go ahead. You can
13 test her knowledge.

14 Q Would that make a difference to you?

15 A No, sir. That doesn't have any bearing in my opinion
16 of whether involuntary intoxication occurred in this
17 case, sir.

18 Q What about whether Mr. Hawkins was credible or not?
19 Does that matter to you?

20 A Insofar as I read the statement; yes, sir. It's
21 consistent with Mr. Herring's statement.

22 Q Okay. Now, let's talk about -- when were you asked
23 to give an opinion on this?

24 A In --

25 Q In this case. When were you asked to give an

1 opinion?

2 A Well, I was consulted on several occasions during the
3 case, and then I was asked to testify last week.

4 Q Well, when were you first consulted about this?

5 A I was consulted shortly after Mr. Herring was taken
6 to the hospital.

7 Q I'm sorry. Are you talking about January 29th, 2006?

8 A I don't know that it was January 29th. Yes, it would
9 have been January 29th because Sergeant Linfert asked
10 me about the medications that Mr. Herring was on
11 prescriptively at that time.

12 Q You were consulted about that?

13 A Yes, sir.

14 Q Did you tell them to get a blood sample?

15 A No, sir, I did not. I did not think there was any
16 need for one.

17 Q Were you made aware by Sergeant -- this was after he
18 had been shot?

19 A Yes, sir.

20 Q Did Sergeant Linfert tell you that he denied being
21 out that night when he was asked by Sergeant Linfert,
22 that he could hear him yelling, I haven't been to
23 River Drive tonight? Did Sergeant Linfert tell you
24 about bizarre behavior?

25 A No, sir. He did not. We just discussed the

1 medications that he was on.

2 Q Did Sergeant Linfert indicate to you what happened at
3 the club, that he had gone in a back room, got naked
4 and masturbated? Did he tell you that?

5 A Not at that time. No, sir.

6 Q Did you ask him?

7 A No, sir; I did not.

8 Q What time of day did Sergeant Linfert call you?

9 A I don't recall, sir.

10 Q Early morning?

11 A It was during the normal workday.

12 Q And had Mr. Herring come back from or was he still at
13 the hospital?

14 A He may have been at the hospital for the second time
15 at that point.

16 Q You would agree the Sheriff's Department can ask for,
17 get a search warrant for, get some legal document to
18 take blood from somebody at the hospital, right?

19 A Yes, sir. We have done that on many occasions.

20 Q You would agree with me had you gotten that blood
21 sample, you being the Sheriff's Department, that
22 morning, this involuntary intoxication issue would
23 have been -- could be resolved relatively easily,
24 that there should be some evidence or nonevidence of
25 one of these drugs in his bloodstream or urine,

1 correct?

2 A As I stated earlier, sir, I don't believe involuntary
3 intoxication is an issue in this case and it was for
4 that reason that we did not obtain a blood or urine
5 sample.

6 Q And you made that decision that morning?

7 A Based on the medications that he was on and the
8 circumstances that were presented to me. That is
9 correct.

10 Q So you made that decision?

11 A No, I didn't make that decision. The decision was
12 made by someone else. But that was the consultation
13 that I provided.

14 Q But if they had drawn blood, the Richland County
15 Sheriff's Department had drawn blood that morning, we
16 would have known whether or not there was one of
17 these drugs in his urine or blood, correct?

18 A Again, sir, there was no evidence of --

19 Q I'm not asking you that. I'm asking you, if it had
20 been drawn at 7 or 5:30, whenever he got there, if
21 the Sheriff's -- and you've indicated the Sheriff's
22 Department on many occasions has asked for blood and
23 gotten it. If they had asked, you would have had
24 a -- or SLED would have a blood or a urine sample to
25 test, correct?

1 A If they'd obtained blood, there would have been a
2 sample of blood to test. Yes, sir.

3 Q And if it had been tested, then there would have been
4 either evidence of a date rape drug or not evidence
5 of a date rape drug. You could have excluded it or
6 included it, correct?

7 A On the basis of the blood tests, there would have
8 been a drug or there wouldn't have been a drug.
9 That's correct.

10 Q And so there wouldn't be a need for you to give an
11 opinion based on looking at videos and watching him
12 and talking to him, getting witness statements and
13 all of that. It would be either there or it wouldn't
14 be there, right?

15 A No, sir. That's incorrect. I don't interpret
16 anything on the basis of a blood sample alone. I'd
17 have to look at the entire file to draw that
18 conclusion.

19 Q Are you telling me that if you found Rohypnol in his
20 blood that morning, you couldn't tell this jury that
21 he was involuntarily intoxicated?

22 A Sir, I can tell you right now that Rohypnol was not
23 present in Mr. Herring's blood sample, would not have
24 been present in Mr. Herring's blood.

25 Q I understand you're telling me that. But you're

1 telling me that based on your best guess. I'm
2 talking about the blood sample --

3 **MR. MEADORS:** Your Honor, objection. If he'd
4 lower his voice and not scream at the witness,
5 please.

6 **THE COURT:** This is cross examination. Go
7 ahead.

8 **Q** I am asking you -- you do work for the Richland
9 County Sheriff's Department, right?

10 **A** I believe I already indicated that, sir. Yes.

11 **Q** And that department was the one that didn't get the
12 blood sample?

13 **A** That's correct.

14 **Q** You're aware they didn't do any ballistics. Right?

15 **A** I'm not here to discuss ballistics.

16 **Q** Well, are you aware of that?

17 **A** We wouldn't do ballistics on a case on which a
18 shooting occurred on the basis of our officers, sir.

19 **Q** Are you aware of it?

20 **A** Yes, sir.

21 **Q** Oh, okay. And you're here this morning and you're
22 telling this jury that blood sample be damned, you
23 don't care what a blood sample would show. You
24 know --

25 **MR. MEADORS:** Objection. Objection to be

1 damned.

2 Q -- that there was no Rohypnol in his blood. Is that
3 what you're telling us?

4 A The reason why I don't believe that there was
5 Rohypnol present in Mr. Herring's bloodstream, sir,
6 is because the pharmacology and the toxicology of the
7 drug is such that one can go from alert to
8 unconscious in 30 minutes. And there was more than
9 ample opportunity for that drug to have taken effect
10 in combination with alcohol while Mr. Herring was in
11 the club. And that's why that medication was ruled
12 out.

13 Q But are you telling me that people that get Rohypnol,
14 "roofies", go unconscious within 30 minutes, that
15 that happens every time?

16 A In combination with alcohol; no, sir. I did not say
17 that.

18 Q It's dose dependent, isn't it?

19 MR. MEADORS: Your Honor.

20 THE COURT: Sir, let her answer the question.

21 MR. HARPOOTLIAN: I'm sorry. Go ahead.

22 A In combination with alcohol, I would have expected
23 Mr. Herring if he had been given Rohypnol, or for
24 that matter any other medication that was a
25 co-intoxicant or co-sedative with ethanol, to have

1 become under the influence and noticeably impaired at
2 the time that he received it. There was ample
3 opportunity for him to have done so while he was in
4 the club.

5 Q Is it dose dependent?

6 A Yes, it is.

7 Q So the higher the dose, the more chance of that
8 happening. The lower the dose, the more chance of
9 that happening?

10 A Yes. But he also had alcohol on board, sir.

11 Q Well, but you've indicated that because he's had
12 alcohol that perhaps he's a little more able to
13 handle the effects of alcohol, right?

14 A But once another drug is co-administered, it's a
15 different ballgame at that point, sir.

16 Q Tell the jury, please, what study you're relying on
17 to say that someone is unconscious within 30 minutes
18 with the combination of alcohol?

19 A No. I didn't say they would be unconscious. I said,
20 sir, that after the medication is administered an
21 individual can go from being alert to potentially
22 unconscious inside of 30 minutes.

23 Q Are you familiar with the journal of the American
24 Academy of Psychiatry and Law?

25 A I am familiar with the journal. Yes, sir.

- 1 Q Okay. Let me show you this article, please. Have
2 you ever read that article?
- 3 A No, sir, I have not.
- 4 Q Can you tell the jury, please, what that is? FZ?
- 5 A I'm sorry?
- 6 Q FZ or Flunitrazepam. What is it?
- 7 A Flunitrazepam is Rohypnol.
- 8 Q It's Rohypnol, right?
- 9 A That's correct.
- 10 Q You've not read this article. But you would agree
11 with me it's from a journal that's reliable?
- 12 A That is a peer review journal. Yes, sir.
- 13 Q A peer review journal. And just take a minute. I'd
14 like you to take a minute just to read the
15 introduction to see what this -- and Rohypnol
16 apparently is used in -- that's from Sweden. A study
17 done in Sweden, right? Go ahead and read it for just
18 a second and then we'll talk about it.
- 19 A I've read the abstract, sir.
- 20 Q Okay. And read me the title of it, please?
- 21 A Quote, violent Behavior-impulsive Decision Making and
22 Arterograde Amnesia while Intoxicated with
23 Flunitrazepam and Alcohol or Other Drugs, a Case
24 Study in Forensic Psychiatric Patients, unquote.
- 25 Q This is a study that was done in Sweden. Is that

1 correct?

2 A Yes. It would appear so.

3 Q Okay. Pardon me?

4 A Yes, sir.

5 Q And in Sweden apparently this drug is prescribed to
6 some juveniles who are taking other antipsychotic
7 drugs. Is that correct?

8 A It has been used in Sweden. Yes, sir. It is legal
9 there.

10 Q And it says here use of FZ -- we're going to call it
11 FZ so that I don't have to keep stumbling over this
12 name -- FZ is the same as what drug? Rohypnol?

13 A The trade name is Rohypnol. Yes, sir.

14 Q Use of FZ or Rohypnol is legal in 64 countries. Is
15 that right?

16 A Yes, sir. That's correct.

17 Q It is used for the treatment of insomnia similar to
18 other Benzodiazepine hypnotic drugs and as a
19 pre-anesthetic. Is that correct?

20 A Yes, sir.

21 Q And that goes on to say it's available in Sweden
22 under different names. Now, it says it affects --
23 the effect of it is by enhancing the transmission of
24 certain acids. GABA, what's GABA?

25 A GABA. It's a neurotransmitter in the brain.

1 Q What is that?

2 A Neurotransmitter?

3 Q Yes.

4 A Neurotransmitter is a chemical in the brain that is
5 involved in a multitude of activities in the brain to
6 include behavior, for example.

7 Q Okay. Now, there are blockers, some things called
8 blockers, right? This is not a blocker. This is a
9 key that fits into the key hole, if you will, and it
10 opens things. Right? It accesses things? As
11 opposed to a blocker, you just stick into the key
12 hole and nothing else can go in. Is that an overly
13 simplistic explanation?

14 A Yes, sir.

15 Q It's generally right though, what I've just said?

16 A I don't know, sir. That's pretty far off from how I
17 would characterize it.

18 Q Okay. It says -- I want you to go to page 239. And
19 I want to ask you if you agree or disagree with this.
20 The next to the last paragraph right above the bold,
21 the concept. "FZ causes, among other things, partial
22 anterograde amnesia; that is, the loss of the ability
23 to recall personal experiences. People are unable to
24 remember certain events that they experience while
25 under the influence of the drug. Any memory they

1 have of these events occurs only in flashes." Is
2 that correct?

3 A Yes, sir. That's what the article says.

4 Q I mean, do you disagree with the article?

5 A No, sir, I do not.

6 Q Okay. I'd like you to go over to page 241. And the
7 last paragraph, I want to ask you if you disagree
8 with that. "We have noted that during FPA's of
9 offenders that they committed some of their violent
10 crimes while under the intoxication by FZ. Dagerman
11 and Edman have recently reported that approximately
12 30 percent of young male offenders who are subjected
13 to FPA's" -- I don't know what an FPA is. Do you
14 know what that is?

15 A I have no idea, sir. I've not read the article.

16 Q Let me find it for you. It's some sort of assessment
17 apparently. It's really not relevant; I mean, not
18 important to what I'm saying. "The subjects reported
19 they obtained" -- "in-depth interviews were conducted
20 to discuss the extent and severity of violence during
21 intoxication with FZ." That would be Rohypnol. "The
22 subjects reported they obtained FZ from general
23 practitioners who prescribed the drug without
24 appropriate assessment of the patients. They
25 reported that while intoxicated with FZ they easily

1 became aggressive and committed serious offenses,
2 including murder, manslaughter and robbery and had no
3 memory of their actions." Isn't that what it says?

4 **A** It does say that, sir.

5 **Q** Do you agree or disagree with this study?

6 **A** Sir, I can't agree or disagree with this study that
7 I've not been able to read in its entirety. So I
8 don't have any comment on that.

9 **Q** Well, you've held yourself out as an expert on date
10 rape drugs. Is this statement consistent or
11 inconsistent with your beliefs about date rape drugs;
12 FZ, Rohypnol particularly?

13 **A** This isn't an article about date rape, sir.

14 **Q** I understand. It's an article about people that were
15 given these drugs. And they say they easily became
16 aggressive and committed seriousness offenses,
17 including murder, manslaughter and robbery and had no
18 memory of their actions. Do you find that to be
19 consistent or inconsistent with your opinions on the
20 use of Rohypnol, if somebody is given Rohypnol
21 knowingly or unknowingly?

22 **A** That can certainly occur with Rohypnol. Yes, sir.

23 **Q** And so people could commit murder, manslaughter and
24 robbery and have no memory of their actions. You
25 will agree with that?

1 A That has been documented. Yes, sir.

2 Q Okay. I'd like you to go to page 249, the second
3 paragraph. "It is evident, however, that all FZ
4 abusers had several types of memory disturbances
5 which are described in dissociative amnesia. When
6 the effects of the drug had worn off, the FZ abusers
7 did not remember their violent actions." Consistent
8 or inconsistent with your opinion about the effects
9 of Rohypnol?

10 A That can certainly occur with Rohypnol. Yes, sir.

11 Q Then further on down it says: "Clinical studies have
12 demonstrated that Rohypnol can cause amnesia,
13 particularly anterograde amnesia which is
14 characterized by loss of episodic memory and the
15 memory of personal experiences. For example, only
16 some circumstances around the crime would be
17 remembered." Correct or incorrect?

18 A That could certainly be consistent. Yes, sir.

19 Q And further on it says: "FZ may interact with
20 various central neurotransmitters, possibly
21 increasing the risk of detrimental behavior such as
22 disinhibition and absence of empathy. Examples of
23 these effects have been provided through the analysis
24 of the nature of violent crimes while intoxicated
25 with FZ. In certain vulnerable subjects FZ

1 intoxication may comprise an increased risk of
2 bizarre and violent behavior." Do you agree with
3 that?

4 A Yes, sir. That has been documented.

5 Q And then conclusions: "FZ facilitated violent
6 behavior leading to impulsive decision making has
7 become increasingly common in males. We conclude
8 that the psychiatry or psychologically vulnerable
9 males are particularly high risk of showing violent
10 and bizarre behavior when under the influence of FZ.
11 Although alcohol is almost always present in FZ
12 facilitated violent crimes, other drugs also are."
13 Correct? "Such as amphetamines or cannabis."

14 A That's what the statement says. Yes, sir.

15 Q Do you agree or disagree with that?

16 A It has been documented that violent or bizarre
17 behavior can occur under the influence of
18 Flunitrazepam.

19 Q So this study -- do you know of any other study of
20 this -- I mean, I've shown you this done in Sweden in
21 1992. Have you ever seen a study like this before?

22 A I've read many studies with regard to drug
23 facilitated sexual assault or intoxication, sir.

24 MR. MEADORS: Your Honor, could I have a copy of
25 that study he's been asking questions off, please?

1 **THE COURT:** I guess when he gets through.

2 **MR. HARPOOTLIAN:** When I get through.

3 **MR. MEADORS:** Thank you.

4 **Q** My question is this. Those studies done in the
5 United States, nobody is getting Rohypnol legally in
6 the United States, are they?

7 **A** No, sir.

8 **Q** So when you are doing a study in the United States,
9 somebody who has been the victim of a date rape comes
10 in. Maybe some blood was drawn. Maybe some urine
11 was drawn. And you determine they were given a
12 Rohypnol or some other date rape drug. And then
13 those studies are based on -- they're sort of
14 subjective reporting of what happened to them,
15 correct? In a way?

16 **A** Well, there are many drugs that are given for drug
17 facilitated sexual assault that we have ample
18 clinical information on because the drugs are used
19 prescriptively. Rohypnol is just one drug that's not
20 used prescriptively.

21 **Q** But you've never seen a study like this in the United
22 States?

23 **A** I'm not aware of a study exactly like this having
24 been done in the United States. No.

25 **Q** Are these studies consistent or inconsistent with

1 other studies you've seen?

2 A In what regard, sir?

3 Q That people can commit, I mean, murder, armed
4 robbery, violent kinds of crimes and have no memory
5 of them whatsoever?

6 A Interestingly, yes. I would comment on that. In
7 fact, the studies that I have reviewed where bizarre,
8 unanticipated, violent behavior occurs while the
9 individual is under the influence.

10 Q Right.

11 A When one reviews the reason for the behavior, the
12 violent behavior, in those instances, overwhelmingly
13 there is no reason for the individual to have behaved
14 in such a manner. And it would be my opinion that in
15 this case Mr. Herring had ample reason to behave in
16 the manner in which he did because he felt he had
17 been ripped off and/or possibly was not going to
18 receive the sex that he had paid for.

19 Q Tell me what that study was, where it was from? What
20 school? What journal?

21 A I would -- it's out of the text handbook of Clinical
22 Drug Interactions, the chapter "Drugs and Violence"
23 by Oshrov (phonetic) Moozayani (phonetic).

24 Q So it wouldn't be in Gillman?

25 A No, sir. It's a separate text. You don't have it

1 there, sir.

2 Q I don't, do I?

3 A No, sir.

4 Q I'm sorry. And did you bring that with you today?

5 A No, sir, I did not.

6 Q Did you use it or review it prior to your testimony
7 today?

8 A Yes, sir, I did.

9 Q And is it back in the office?

10 A No, sir.

11 Q You didn't bring it here with you?

12 A I did not. No, sir.

13 Q Now, what you said, overwhelmingly, means there are
14 cases there where there are explanations that they do
15 act for a reason. It's not 100 percent. Right?

16 A I would doubt it. No, sir.

17 Q So there are occasions where people have been given
18 these kinds of drugs and commit a violent act for a
19 reason, an explainable act but for the fact it's
20 excessive, correct?

21 A Yes, sir.

22 Q Now, I want to review with you your analysis of this.
23 And we don't have to beat a dead horse here. But
24 this is just based on your observations of the
25 videotape and the statements, right?

1 A The entire file, sir. All the items that I indicated
2 in my testimony that I reviewed.

3 Q Sure. But those are the statements of witnesses,
4 right?

5 A Sir, I reviewed much more than just the statements to
6 come to my opinions in this case.

7 Q You have interviewed -- let's go over them -- the
8 statements of people, the videotapes, the statements
9 of Mr. Herring. Right?

10 A And his testimony. Yes, sir.

11 Q And his testimony?

12 A Yes, sir.

13 Q And I think the main thing you're saying is because
14 he does not exhibit impairment, that you think that
15 when you look at the videotape he's not visibly
16 impaired, that's a key point to you, I think is what
17 you wrote down?

18 A It's one of several key points, sir.

19 Q Well, I mean, I think you said hallmark is
20 incapacitated. Those are your words, right?

21 A Yes, sir. That's correct.

22 Q So if he's not incapacitated, then you believe that
23 is the hallmark. Therefore, if he's not
24 incapacitated that he would not be under the
25 influence of a date rape drug?

1 A I -- that's one of several factors that went into
2 formulation of my opinion.

3 Q Okay. Any --

4 A The lack of incapacitation, purposeful behavior, the
5 fact that he was deceptive, the fact that he at no
6 time describes having been drugged during the
7 statement that he makes to law enforcement. That
8 only came some year plus later.

9 Q Okay. Have you done studies on the impact of a
10 gunshot wound in the arm? I mean, have you ever
11 interviewed people or determined whether or not that
12 their perception of reality may be distorted by being
13 shot and bleeding?

14 A No, sir. I've never done any studies of that.

15 Q So, if Mr. Herring, do you think -- strike that.
16 Because you're not an expert in this area. But would
17 the fact that he had been shot that morning, drug out
18 of bed, shot, taken to the hospital, bleeding while
19 he's being interviewed --

20 MR. MEADORS: Objection. Drug out of bed?

21 MR. HARPOOTLIAN: Somebody kicked in --

22 THE COURT: It's cross examination. Go ahead.

23 Q And taken down to the Sheriff's Department where he's
24 bleeding according to everyone and they have to have
25 people come in and bind him again, he's in pain;

1 would that in any way affect -- you don't know
2 because you're not a psychiatrist, are you?

3 **MR. MEADORS:** Judge, objection.

4 **MR. HARPOOTLIAN:** I may strike that question,
5 Your Honor.

6 **THE COURT:** Strike it.

7 **MR. HARPOOTLIAN:** Thank you.

8 **Q** But when you examined his statements, the fact that
9 he'd been shot and all that, did that factor in any
10 way in your analysis of his being untruthful or
11 inaccurate? Did it? Just yes or no. We can move
12 on.

13 **A** Yes, it did.

14 **Q** Okay. And how did it factor in?

15 **A** The fact that Mr. Herring was wounded was a factor in
16 my consideration. However, in listening to the 911
17 tapes and also reviewing the medical records and his
18 statement, he was very lucid. He was alert and
19 oriented. He was able to answer questions
20 appropriately despite that wound.

21 **Q** So you're -- and you're not a psychiatrist, correct?

22 **A** No, sir.

23 **Q** So your analysis is he's lucid. What is red alert,
24 red alert? What does that mean? What does somebody
25 when they pick up the phone, call 911?

1 **MR. MEADORS:** Objection. Speculation.

2 **THE COURT:** Sir, it's cross examination. If she
3 knows.

4 **Q** Why would somebody say, red alert, red alert? Does
5 that indicate lucidity?

6 **A** Perhaps to gain attention.

7 **Q** But is that lucidity? Is that what you say when
8 somebody has broke into your house and shot you?

9 **A** No. I define lucid as being able to provide your
10 name, where you live, to answer questions when posed
11 those questions; and equally importantly the fact
12 that Mr. Herring was deceptive during that 911 call
13 when he indicated that he had been -- had played golf
14 and gone home and gone to bed and he had no idea what
15 was happening.

16 **Q** He was deceptive?

17 **A** Yes, sir.

18 **Q** Now, to what extent did the getting shot in the arm
19 play in that deceptiveness? How did you weigh that
20 in, if it had an impact on him? I mean, did it make
21 him more deceptive, less deceptive, more forgetful,
22 less forgetful? How did you factor that into your
23 analysis of what he was being deceptive about and not
24 being deceptive about? Or did it? And, if so, tell
25 me if than analytical process you went through?

- 1 A Sir, I can tell you that in listening to the
2 conversation, it was my opinion that Mr. Herring was
3 in complete possession of his faculties at that time.
- 4 Q And you would agree that other people could have a
5 different opinion about that?
- 6 A Certainly.
- 7 Q Okay. And if they did have a different opinion about
8 that, then deceptiveness and lucidity wouldn't factor
9 into all this, right? If they didn't think he was
10 100 percent lucid?
- 11 A That's not my opinion, sir. I do believe he was.
- 12 Q Okay. Now, when people do things automatically, what
13 is that called?
- 14 A I'm sorry?
- 15 Q When they do it without thinking. Is there a word
16 for that?
- 17 A I don't understand your question.
- 18 Q Well, we've heard testimony using the word -- I'm
19 terrible with words -- automatism. Do you know what
20 that is?
- 21 A Yes, sir.
- 22 Q What is automatism?
- 23 A Well, drug automatism is specifically a situation
24 where an individual ingests a drug and then they
25 can't remember doing it. And so they have a

1 predisposition to take that same medication again.
2 It's commonly seen in the elderly. As they age,
3 certain drugs have the ability to produce automatism
4 and the person is not able to remember having taken
5 the medication.

6 Q But there are things people do on drugs, date rape
7 drugs or any other drugs, that display that symptom.
8 That is, that they would do routine things without
9 having to actually think about doing them. Isn't
10 that right?

11 A That can occur. Yes, sir.

12 Q So his driving home or taking the gun out of the car
13 or taking his clothes off could be due to that, could
14 it not?

15 A That's one explanation.

16 Q Is that a reasonable explanation?

17 A It's one explanation.

18 Q Okay. But it could be for someone to assume that's
19 reasonable, correct?

20 A Yes, sir.

21 Q Okay now. So I think we've determined from the study
22 that people can do purposeful things while they're on
23 date rape drugs, correct?

24 A That would not be my opinion, sir.

25 Q Somebody that commits an armed robbery or murder is

1 doing something --

2 MR. MEADORS: Your Honor, objection.

3 Q -- purposeful, aren't they?

4 MR. MEADORS: We have no idea what those studies
5 were, where they're from or anything.

6 MR. HARPOOTLIAN: Your Honor, I object to the
7 speaking objections.

8 THE COURT: Yes, sir.

9 MR. HARPOOTLIAN: -- for the fifth time in
10 like --

11 THE COURT: Sir, overruled. It's cross
12 examination. I'm going to allow it. Go ahead.

13 MR. HARPOOTLIAN: Thank you.

14 Q You looked at this study. It's a reputable journal
15 and a peer review. And you've determined, in this it
16 says that people commit purposeful crimes. Armed
17 robbery is not walking down the street and punching
18 somebody. You go in, you point a gun at somebody,
19 ask their money, correct; to get money, right?

20 A For the record, sir, I was not provided an
21 opportunity to read this article in its entirety.
22 And so I have no opinion on its content.

23 Q Well, I understand you don't have any opinion in on
24 its content. But you have indicated it's a reputable
25 journal. You've indicated in here that they say that

1 their studies indicate, this study indicates that
2 people committed armed robbery and had no memory of
3 it while on this drug. Isn't that correct?

4 A Again, sir, I've not read the article. So I wouldn't
5 be able to answer that question.

6 MR. HARPOOTLIAN: Well, maybe we ought to take a
7 brief recess for her to read the article, Your Honor,
8 if she's going to disagree with it. Could we take
9 ten minutes for her to go through it?

10 MR. MEADORS: We have no objection to that.

11 THE COURT: All right.

12 MR. HARPOOTLIAN: Fine. Do you want her to do
13 it ...

14 THE COURT: I'll let the jury take a break.

15 MR. HARPOOTLIAN: Thank you.

16 THE COURT: All right, ladies and gentlemen.
17 We've allowed the lady or the witness to read the
18 article in its entirety. There's no sense in you
19 sitting here while she does that. So just go to the
20 jury room. Relax for a minute. Again, don't discuss
21 the case while you're in the jury room. Thank you
22 very much.

23 (Jury out at 10:27 a.m.)

24 MR. HARPOOTLIAN: Your Honor.

25 THE COURT: Sir?

1 **MR. HARPOOTLIAN:** I'm asking her to examine this
2 study, not the solicitor.

3 **MR. MEADORS:** I'm just want to make a copy of
4 it, Judge, so I can look at it before cross so I
5 don't have to take a ten-minute break. There's
6 nothing wrong with that.

7 **THE COURT:** All right. Go make a copy. It
8 looks like it will be 15 minutes. We'll stand at
9 ease.

10 (Whereupon, a break is taken)

11 **THE COURT:** All right. Are we ready to proceed?

12 **MR. HARPOOTLIAN:** Yes, sir.

13 **THE COURT:** I didn't ask you. I asked the
14 witness.

15 **MR. HARPOOTLIAN:** Oh, I'm sorry.

16 **WITNESS:** I beg your pardon. Yes, sir.

17 **THE COURT:** Ma'am, are you ready to proceed?

18 **WITNESS:** Yes, sir.

19 **THE COURT:** Bring the jury, please.

20 (Jury in at 10:54 a.m.)

21 **THE BAILIFF:** The jury is seated, Your Honor.

22 **THE COURT:** Thank you very much. You may
23 continue, Mr. Harpootlian.

24 **MR. HARPOOTLIAN:** May it please the Court.

25 **Q** Let me back off for just a second. Did you bring any

1 notes with you today or make any notes in preparation
2 for your testimony?

3 A I did.

4 Q Where are they?

5 A Here with me.

6 Q Could I see them, please?

7 A Certainly.

8 Q What is that?

9 A That's a timeline.

10 Q Can I have it, please?

11 A Yes, sir.

12 Q Let me go to this article just a moment you had an
13 opportunity to read it?

14 A The article is --

15 MR. MEADORS: Your Honor, could she have her
16 notes back?

17 MR. HARPOOTLIAN: In a minute.

18 A The article is entitled: "Violent Behavior,
19 impulsive Decision Making and Anterograde Amnesia
20 while Intoxicated with Flunitrazepam and Alcohol and
21 other Drugs: A Case Study in Forensic Psychiatric
22 Patients". Yes, sir, I did.

23 Q Okay. Can I see your -- okay. And you've underlined
24 certain things here. Let me ask you about those. It
25 says: "Our objective was to study violent behavior,

1 impulsive decision making and amnesia in male
2 forensic psychiatric patients who were intoxicated
3 primarily with FZ to increase knowledge of the use of
4 FZ in vulnerable subjects. We studied five forensic
5 psychiatric patients." Is that relevant? Is that
6 important?

7 A Yes, it is.

8 Q Why?

9 A Because in this article -- if I could have the
10 article please, sir?

11 Q Uh-huh (affirmative).

12 A Thank you. In this article there were five young
13 male, ages 22 to 26, who were studied while
14 incarcerated. They were studied specifically for
15 their violent and impulsive behavior that they
16 engaged in as a function of their abuse of
17 Flunitrazepam. This is an article that addresses
18 individuals who had a previous history of
19 Flunitrazepam or Rohypnol abuse.

20 Q Okay. And these are people that took it knowingly?
21 Five people?

22 A Yes, sir.

23 Q Okay. But taking it knowingly and unknowingly, there
24 would still be the same physical manifestations
25 right? A drug is a drug?

1 A Could you repeat the question, please?

2 Q I mean, whether you knew you got it or whether you
3 didn't know you got it, the effects of a drug are
4 their effects. They cause -- certain drugs cause
5 certain affects. Whether you took it intentionally
6 or unintentionally, the effects, the amnesia, the
7 symptoms they talk about in here would be true.
8 whether you knew you took it or didn't take it,
9 right?

10 A Well, no, sir. That's incorrect. Because in this
11 particular article the individuals had a history of
12 protracted abuse of the drug, meaning they had
13 multiple administrations or instances or experiences
14 with the drug.

15 In addition to that, they all had severe
16 underlying psychiatric diagnoses to include
17 borderline personality disorder, anti-social
18 personality disorder, polypharmacy drug abuse; which
19 as the article indicates most probably made them more
20 susceptible to the violent and aggressive behavior
21 and impulsive decision making.

22 Q But what they also say in here is the drug can
23 suppress a prisoner's insight and the consequences of
24 his or her actions, right?

25 A Yes, sir.

1 Q So, I mean, are you saying the more often you use it
2 the more affect it has?

3 A I'm saying that in this article the individuals
4 demonstrated a prolonged history of abuse with the
5 drug. And the authors of the article suggest through
6 their study that they were somehow more predisposed
7 to their acts of violence.

8 Q But does it indicate -- where does it indicate in
9 here that the habitual use of it makes you more
10 predisposed than a one-time user?

11 A And I quote on page 248, second column, first
12 paragraph. Quote, It is true that alcohol
13 intoxication in itself could explain the reduction of
14 judgment and of impulse control, but the subsequent
15 acts, such as biting the victim in the face and
16 sticking a knife into the eye or a screwdriver into
17 the body of the victim, appear completely
18 incomprehensible and bizarre from the point of view
19 of normal psychology. The bizarre nature of the acts
20 is evidence that they were performed when the
21 perpetrator was in a condition of psychological
22 aberration or confusion, unquote.

23 Q Where does that say that they're habitual users?

24 A Well, earlier in the article it makes the contention
25 that their Flunitrazepam dependency in conjunction

1 with alcohol in most all of the cases was a
2 predisposing factor to their behavior.

3 Q Okay. So there's alcohol plus the FZ predisposes,
4 correct?

5 A That's correct.

6 Q Go to page 241, second paragraph. "For example, in
7 one incident in 1997, a group of teen-agers, all but
8 one with no previous criminal record, took FZ and
9 then robbed a church choir in Ulupsa. After tying
10 one of the members of the choir with ropes, an
11 elderly man in a wheel chair, they forced him to
12 swallow six mg of FZ." Right?

13 A That's what it says. Yes, sir.

14 Q So here there's a clinical study that -- I mean, does
15 that sound like --

16 MR. MEADORS: Your Honor, object. This is not a
17 clinical study.

18 MR. HARPOOTLIAN: Your Honor.

19 THE COURT: Yes, sir.

20 MR. HARPOOTLIAN: I object to the speaking
21 objections.

22 THE COURT: Sir, overruled.

23 MR. MEADORS: I object to his paraphrasing.

24 THE COURT: Overruled.

25 MR. HARPOOTLIAN: It's hard for me -- he's got

1 redirect.

2 **THE COURT:** What would you have me do?

3 **MR. HARPOOTLIAN:** I would object and I will move
4 for mistrial should it occur again, Your Honor.

5 **THE COURT:** All right.

6 **MR. HARPOOTLIAN:** Thank you.

7 **Q** Purposeful behavior. Now, does that sound like
8 purposeful behavior to you?

9 **A** Does what sound like purposeful behavior, sir?

10 **Q** Robbing the church choir and tying one of the members
11 up in the choir with ropes. Does that sound like
12 you've got to have some ability to be purposeful?

13 **A** It does sound like purposeful behavior. Yes, sir.

14 **Q** I'm sorry?

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

16 **Q** Okay. And this is -- what they cite in this study,
17 this scientific study is of one example of what some
18 teen-agers did while they were on Rohypnol. Correct?

19 **A** That's an example that's cited. It's not the study
20 itself.

21 **Q** There are a series -- they go through a series of
22 studies here in which -- I'm not going to go into all
23 the details -- but in which they do the analysis.
24 But let me go into case two. Okay? Page 246. "His
25 crime of murder was reported as a side effect of the

1 consumption of Rohypnol, FZ, to the Swedish Medical
2 Products Agency which regards this as possible."

3 Right?

4 A That's what it says. Yes, sir.

5 Q "The sequence of events are as follows: The subject
6 and his three brothers went to a restaurant in a
7 suburb of Stockholm. All were intoxicated with FZ,
8 amphetamines or cannabis. His brother started to
9 quarrel with some other guests in the restaurant and
10 the subject, NAH, became fed up with the situation,
11 took a taxi home. When he arrived home he became
12 anxious. He took more FZ. His anxiety remained
13 unchanged. He decided to go back to the restaurant."
14 To return. "Outside his house he saw his brothers on
15 a bus. He brought a gun with him and he got the
16 impression there was a fight on the bus and that his
17 brothers were involved. He entered the bus, shot
18 into its roof and ordered the passengers to get out.
19 He then went towards his brothers and noticed that
20 one of them had a knife in his hand. NAH felt
21 threatened, raised his gun, and shot his own brother
22 who held the knife." Is that correct?

23 A That's what it says. Yes, sir.

24 Q And this is a person they determined in their study
25 had taken Rohypnol. And he'd gotten it apparently by

- 1 prescription in Sweden. Is that correct?
- 2 A Yes. That's correct.
- 3 Q Purposeful behavior?
- 4 A Yes, sir.
- 5 Q Mobile, ambulatory, possessed his faculties?
- 6 A Yes, sir.
- 7 Q Returns. Right?
- 8 A Yes, sir.
- 9 Q Purposeful. Right?
- 10 A Yes, sir.
- 11 Q Now, these symptoms according to this study were
- 12 consistent with, entirely consistent with the use of
- 13 Rohypnol, correct?
- 14 A And also underlying psychiatric disorders and a
- 15 history of Flunitrazepam abuse.
- 16 Q Right.
- 17 A In addition to polypharmacy abuse.
- 18 Q Show me in here where it says the more you do it the
- 19 worse it gets.
- 20 A Well, that wasn't the point of the article. The
- 21 point of the article was, actually the reason the
- 22 article was written was to call for Flunitrazepam to
- 23 be made a controlled 1 substance or illegal in the
- 24 country of Sweden.
- 25 And this article was put together for the

1 purpose of demonstrating that individuals with
2 underlying psychiatric disorders, particularly in
3 this case young males between the ages of 22 and 26,
4 may be in fact predisposed to violent, bizarre acts
5 as a function of their underlying psychiatric
6 disorder and their Rohypnol abuse which could as the
7 you authors indicate somehow predispose them to those
8 violent acts.

9 Q Okay now. And some of them were on medications, or
10 antipsychotic medications?

11 A I don't recall reading what psychiatric medications
12 they were on at the time of the article.

13 Q Well, let's look at some of these folks. And by the
14 way, before I get on it again, go back to the bottom
15 of page 245 which talked about the gentleman who shot
16 his brother.

17 A Yes, sir.

18 Q The last line says: "During intoxication with FZ,
19 Rohypnol, he had memory disturbances, (blackouts)."
20 Is that right?

21 A Yes, sir.

22 Q "Sometimes he found himself in a hospital or police
23 station and could not remember why he was there."
24 Isn't that what it says?

25 A Yes, sir.

1 Q Now, are you saying that a predisposition to
2 psychiatric problems would make FZ or Rohypnol even
3 more active?

4 A I'm saying that's what the authors suggest in this
5 article.

6 Q Do you believe that?

7 A I don't know, sir.

8 Q Did you get a list of medications that Mr. Herring
9 was taking?

10 A From the medical records; yes, I did.

11 Q What was he taking?

12 A He indicated on his second hospital admission or his
13 second treatment that he was receiving Depakote,
14 Celexa, Wellbutrin and Vitoran.

15 Q What kind of drugs are those?

16 A Vitoran is a medication for cholesterol lowering.
17 Wellbutrin, Celexa and Depakote have multitude
18 indications, primarily depression and anxiety.

19 Q So those are drugs for depression and anxiety?

20 A They can be used for that purpose.

21 Q Will they interact with Rohypnol?

22 A They could. Yes, sir.

23 Q And what would they do with Rohypnol?

24 A Well, the sedation effect would be more enhanced
25 perhaps. They would also interact with alcohol.

1 Q Right. Would they accentuate some of the effects of
2 the Rohypnol or date rape type drug?

3 A Or the alcohol. Yes, sir.

4 Q Sure. And alcohol is a central nervous system
5 depressant, correct?

6 A Yes, sir. That's correct.

7 Q As is Rohypnol, as is all the Benzodiazepines?

8 A As are medications that Mr. Herring was on
9 prescriptively.

10 Q Right. They're all central nervous system
11 depressants, right?

12 A With the exception of Vitoran. Yes, sir.

13 Q Right. Which is cholesterol reducing. What else did
14 you find relevant in this article?

15 A I didn't find this article relevant to our situation
16 here, sir.

17 Q A study of people taking Rohypnol under prescriptive
18 or voluntary basis who suffered memory losses, were
19 extremely violent, and could -- I'm sorry --
20 exhibited purposeful behavior, were mobile,
21 ambulatory, possessed their faculties, returned on
22 some occasions to commit a criminal act and have
23 anterograde amnesia; you didn't think that was
24 relevant?

25 A No, sir. I don't think the situation is the same.

1 Q And why?

2 A Well, number one, in fact the behavior was violent,
3 extremely aggressive, very bizarre. As I mentioned
4 earlier in the quote that I gave, these were
5 individuals who in some cases stabbed multiple
6 individuals in the eyes, used screwdrivers to
7 mutilate, placed rags in the victim's mouth, stabbing
8 them several times.

9 There were multiple instances of very bizarre,
10 unexplainable violent behavior. There was also
11 severe underlying psychiatric diagnoses that had been
12 made in all of these individuals. And the
13 individuals were young males who were already
14 incarcerated for their crimes and had had a
15 protracted history of Flunitrazepam abuse, none of
16 which remotely resembles the situation here, sir.

17 Q Well, let's talk about bizarre behavior. Do you
18 think getting yourself totally disrobed and
19 masturbating and not stop masturbating in a room and
20 not even stopping your masturbation when a bouncer
21 walks in, is that bizarre or is that something you
22 regard as normal?

23 A I think that could be explained by the use of alcohol
24 alone, sir.

25 Q No, no. I'm not asking you how you explain it. I

1 want to know whether you consider it to be bizarre.

2 A I consider it to be a potential symptom from the use
3 of alcohol.

4 Q Ma'am, if you would just answer my question. Do you
5 consider it to be bizarre? Yes or no?

6 A Unexpected. I wouldn't use the term bizarre.

7 Q So you don't think it's bizarre?

8 A No. I wouldn't classify it as bizarre.

9 Q Okay.

10 A Unexpected.

11 Q Not bizarre?

12 A It was after all a strip club.

13 Q I'm sorry. And I don't frequent these places. Maybe
14 you have more knowledge than I do. But in strip
15 clubs, I thought the women were supposed to strip.

16 MR. MEADORS: Objection to what -- objection.

17 THE COURT: Go ahead. Overruled.

18 Q Right?

19 A I am familiar with the concept, yes. I believe
20 that's connect.

21 Q Okay. So why you would you expect him to strip?

22 A I wouldn't expect him to strip.

23 Q So I'm sorry. I didn't understand your answer a
24 moment ago. You didn't find him taking all his
25 clothes off and masturbating to be bizarre. You said

1 of course this is a strip club. I'm trying to find
2 out why you think the fact it's a strip club makes it
3 less bizarre to take off your clothes and masturbate?

4 A Well, based on the amount of alcohol that Mr. Herring
5 had had that evening and the fact that he was in an
6 environment where that is done, perhaps Mr. Herring
7 thought that he could engage in that behavior as
8 well.

9 Q Where because all the girls were naked, he thought he
10 could get naked. Is that what you're saying?

11 A Perhaps.

12 Q And if somebody suggested to him to get naked and he
13 was intoxicated, that would even make it more likely,
14 would it not?

15 A Certainly possible. Yes, sir.

16 Q Can someone drive a car around the effects of one of
17 these drugs, Rohypnol, GHB, or any of these other
18 drugs?

19 A Depending on the dose, perhaps they could. Yes.

20 Q Sure. And I told you about a young lady who
21 testified that she drove a car 45 minutes up to
22 Blythewood, has no memory of it. So you would
23 concede that people can do that if they've been
24 drugged?

25 A Well, I don't know that she was under the influence

1 of Rohypnol. But it is possible, given the dose.

2 Q I've also handed up to you an article published by
3 the Royal College of Psychiatrists, the United
4 Kingdom. Do you regard this to be an article, peer
5 review article?

6 A For the record, I have not read this article.

7 Q I'm sorry. I thought I handed it up to you while the
8 jury was out.

9 A It wasn't handed up to me during my testimony, and so
10 I did not review it.

11 Q Okay. Well, let me just -- it's not very long.

12 MR. MEADORS: Would Your Honor give her a few
13 minutes to review it?

14 MR. HARPOOTLIAN: I'm going to ask her about one
15 paragraph.

16 THE COURT: Ask the question. Let him ask the
17 question. Let him ask the question and then
18 determine whether she feels like she needs to read
19 it.

20 Q Is this article -- are you familiar with the entity
21 that generates this?

22 A A psychiatric bulletin. Yes, I am.

23 Q Okay. Do you find it to be one which people in
24 academe and people in your profession would look at
25 and rely on?

1 **A** Possibly. Yes, sir.

2 **Q** Okay. And I'd like you to go to page 2. Well, let
3 me start on page 1. Paradoxical --

4 **MR. MEADORS:** Objection.

5 **THE COURT:** Give her the opportunity to read it.

6 **MR. HARPOOTLIAN:** Sir?

7 **THE COURT:** If you're going to ask her questions
8 about it, she needs to be able to read it.

9 **MR. HARPOOTLIAN:** Well, I'm going to read it, a
10 paragraph with her, Your Honor. And of course I gave
11 it to the solicitor and he can read redirect her on
12 it.

13 **THE COURT:** Well, it may be taken out of the
14 context. So I don't have any idea what you're
15 reading. But to take one paragraph out of a study
16 perhaps places it out of context. I'm going to allow
17 the witness to -- if you're going to ask her about
18 the article and whatever the subject of it is, she's
19 entitled to know what it is.

20 **MR. HARPOOTLIAN:** Well, Your Honor, I believe
21 under the rule, which is 803(18) --

22 **THE COURT:** Yes.

23 **MR. HARPOOTLIAN:** -- "To the extent called, an
24 expert witness on cross examination or relied upon
25 expert's direct, statements contained in published

1 treatises, periodicals or pamphlets on a subject of
2 history, medicine or other science established as
3 reliable", which she has done.

4 **THE COURT:** I've read it. I've read it. I know
5 the rule.

6 **MR. HARPOOTLIAN:** Let me give her a minute then.
7 This is only three pages long.

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

9 (Pause)

10 **A** All right, sir.

11 **Q** I'm sorry?

12 **A** I'm finished.

13 **Q** Okay. Can you tell me what this is?

14 **A** Yes. It's from The Psychiatric Bulletin, 2002,
15 entitled: "Benzodiazepines on Disinhibition: A
16 Review". And essentially the article addresses, is
17 an attempt to describe and quantify the incidents of
18 disinhibitory reactions to Benzodiazepines and to
19 identify those at risk.

20 **Q** What is disinhibition (sic)?

21 **A** Disinhibition?

22 **Q** Yes.

23 **A** Disinhibition is the condition where an individual
24 has impulse control problems and an inability to
25 maintain their inhibitions, meaning those activities

1 that are generally considered in keeping with moras
2 or societal convention, if you will.

3 Q This is published by the Royal College of
4 Psychiatrists in the UK? You're not sure?

5 A The article is published by Carol Patent. It's
6 authored by Carol Patent.

7 Q Okay. And I think we've established this is a
8 journal that you would rely on or someone in your
9 field would rely on to look at for assessment,
10 correct?

11 A It could be one article that I would use. Yes.

12 Q Have you ever seen this article before?

13 A No, I have not.

14 Q In preparation for your testimony, did you look for
15 articles like this?

16 A No, sir. I did not.

17 Q Or similar to the Swedish study, did you look for
18 those?

19 A No, sir. I did not.

20 Q Okay. Now, if you'll go to the paragraph that says
21 "Paradoxical reactions". Right? The first page.

22 A Yes.

23 Q "A drug can have the potential to both decrease and
24 increase aggressive behavior depending on the
25 underlying characteristics of the person who consumes

1 it. Amphetamines, methyl" --

2 A Phenolate.

3 Q What is that?

4 A Methyphenolate. Ritalin.

5 Q "Ritalin, Benzodiazepines and alcohol are examples."

6 Right?

7 A Yes. That's what it says.

8 Q "In the majority of recipients of Benzodiazepines" --

9 and we've established Rohypnol is a Benzodiazepine,
10 correct?

11 A One of 30. Yes, sir.

12 Q But it is one?

13 A Yes, sir.

14 Q "Have a calming effect, but in a minority they can
15 cause paradoxical reactions, also called dis" --

16 pronounce that for me?

17 A Disinhibitory.

18 Q "Disinhibitory reactions characterized by acute
19 excitement and altered mental state, increased
20 anxiety, vivid dreams, hyperactivity, sexual disin --
21 say that again?

22 A Disinhibition.

23 Q Right. "Hostility and rage." Now, the sexual part
24 of that, would be consistent with somebody taking
25 their clothes off and masturbating in a public place?

- 1 A That could be one example of disinhibition. Yes,
2 sir.
- 3 Q Sure. Hostility would be someone that threatens to
4 kill somebody?
- 5 A That could be an example of hostility. Yes, sir.
- 6 Q And rage would be getting a gun out and setting upon
7 a course of action that might harm somebody, right?
- 8 A Yes, sir.
- 9 Q So they found that in some folks these drugs, like
10 Rohypnol, cause those reactions, correct?
- 11 A They did find that. Yes, sir.
- 12 Q Okay. Page 2, "Mechanism of Paradoxical Reactions:
13 The mechanism by which paradoxical reactions occur is
14 not completely understood but several theories
15 exist." Is that correct?
- 16 A That's what it says. Yes, sir.
- 17 Q But, I mean, do you agree with that?
- 18 A I do.
- 19 Q "The most likely explanation is that the anecsollic
20 and amnesic affects of Benzodiazepines lead to the
21 loss of restraint that governs normal social behavior
22 and reduced ability to concentrate on the external
23 social cues that guide appropriate behavior." Is
24 that correct?
- 25 A That's what it says. Yes, sir.

1 Q And then it goes on to say at the top of the next
2 column: "Several randomized placebo controlled
3 clinical studies provide support for the above.
4 Blair and Current, 1999, found that when diazepam was
5 administered to healthy volunteers, it selectively
6 impaired the ability of subjects to recognize angry
7 facial expressions. Recognition of other emotions
8 was not impaired. The author suggested that failure
9 to recognize anger could lead to the failure to
10 moderate behavior to conform to social rules." Now,
11 did you read this Blair and Current study?

12 A No, sir, I did not.

13 Q Also at the end of that it says Dagerman and
14 Lindberg, 1999?

15 A Yes. That would be this article.

16 Q That's that article?

17 A That's correct.

18 Q "Reported that a population of young violent
19 offenders, FZ abuse, led to self-reported feels of
20 power, overwhelming self-esteem and increased
21 suggestibility." Rickman and Wyman, 1998, did you
22 read that study?

23 A No, sir, I did not.

24 Q "Reported that FZ, Rohypnol, particularly when used
25 with alcohol renders women more likely to be victims

1 of sexual assault due to diminished ability to
2 respond to social cues." Right?

3 A Yes. That's what it says.

4 Q And then at the bottom, Bond, et al, which apparently
5 is a book, 1995, highlighted four factors associated
6 with Benzodiazepine induced aggression. "It occurs
7 in response to provocation. It is recognized by
8 others but not by the patient. It usually occurs
9 with high doses. And high potency drugs cause
10 particular problems." Blair and Current, 1999.
11 You're not familiar with that study?

12 A No, I'm not.

13 Q But you don't disagree with it?

14 A I haven't read it, so I'm not going to disagree or
15 agree with it.

16 Q Well, does it make a difference as you assess
17 everything here to know that?

18 A Well, I wouldn't want to agree about an article I
19 hadn't read, sir.

20 Q But would it be helpful to have read that article
21 before you gave an opinion here today?

22 A It wasn't one of the articles that I used in the
23 formulation of my opinion.

24 Q And then on the last page: "True paradoxical
25 reactions to Benzodiazepines are probably uncommon

1 but not completely unpredictable. Known risk factors
2 include how potency drugs, high doses be administered
3 by peritoneal (sic) route." What is that?

4 A Yes. And this is what makes the article not a factor
5 and not relevant in this case. Because it states
6 there as you are reading, "known risk factors for the
7 paradoxical reaction include high potency drugs, high
8 doses being administered by the parental (sic)
9 route" -- Which in this article is referenced as
10 intravenously or intranasally, neither of which we
11 have -- "to the very young or the elderly or those
12 with pre-existing central nervous system damage or
13 those with a history of aggression or impulsivity."

14 Q But here you have these symptoms. And you say
15 they're given through the nose or through the vein.
16 Is there any -- have you seen any studies indicating
17 that that gives a different reaction than people that
18 get it by drinking it orally? Is there anything to
19 distinguish?

20 A I wouldn't know, sir. I haven't conducted that
21 search.

22 Q Let me see your notes again, please. Where is the
23 list of articles that you consulted?

24 A My notations here would be the literature --
25 pertinent peer reviewed medical literature that I

1 consulted would be "Medical Legal Aspects of Alcohol"
2 by James Garriott, 4th edition. "Drug Facilitated
3 Sexual Assault: A Forensic Handbook" by Mark Labeau
4 and Oshrov Moozayani. "Handbook of Clinical Drug
5 Interactions" again by Moozayani. And "Drug
6 Facilitated Robbery or Sexual Assault" by Bouvier and
7 Ange', Primary Literature from the Therapeutic Drug
8 Monitoring Journal, April of 2004..

9 Q Now, the last one, robbery, they had clinical studies
10 of people who committed robbery while under these
11 drugs?

12 A Yes, sir.

13 Q They had no memory of committing the robbery?

14 A That's correct.

15 Q Were they purposeful in their behavior?

16 A Yes, sir.

17 Q In determining the amount of alcohol that Mr. Herring
18 had to drink prior to the incident, did you use the
19 statement taken by law enforcement or did you use his
20 testimony here?

21 A Actually I used both since the amount of alcohol that
22 he ingested over the course of the day appeared to
23 change.

24 Q Okay. Beg the Court's indulgence. Just a couple
25 more questions. The people in this study committing

1 robberies, they weren't incapacitated, were they?
2 They were mobile? To rob somebody you can't be
3 passed out, right?

4 A No. They weren't passed out. That's correct.

5 Q And they weren't incapacitated?

6 A The article addressed their amnesia. So there wasn't
7 any discussion of their incapacitation.

8 Q And tell the jury, please, how you rob somebody if
9 you're incapacitated? That is, if you're passed out
10 and not mobile, how do you rob somebody?

11 A You don't have to be passed out to be incapacitated,
12 sir. You just merely have to be impaired.

13 Q Well, to what extent were they impaired based on the
14 study you read?

15 A Well, the article wasn't written to address that. It
16 was written specifically to address anterograde
17 amnesia.

18 Q So the article, people robbed other people. They had
19 no recollection of it whatsoever. That's an article
20 you relied on in reaching your opinion. They were
21 purposeful. And you don't know what their level of
22 incapacitation, if any, was?

23 A No. Because the article wasn't written for that
24 purpose.

25 Q And they had no memory of it?

1 A That's correct.

2 Q Thank you, ma'am.

3 THE COURT: Cross examination. I'm sorry.
4 Redirect.

5 MR. MEADORS: May it please the Court.

6 REDIRECT EXAMINATION

7 BY MR. MEADORS

8 Q "Violent Behavior, Impulsive Decision Making and
9 Anterograde Amnesia while Intoxicated with
10 Flunitrazepam and Alcohol or Other Drugs: A Case
11 Study in Forensic Psychiatric Patients." Is that
12 what you were given in answering questions on then?

13 A Yes, sir.

14 Q Did the individuals in this case study have prior
15 records?

16 A Yes, they did.

17 Q Did they have prior psychiatric problems?

18 A Yes, sir. Severe.

19 Q Documented?

20 A Yes, sir.

21 Q On page -- and were they all in what age group?

22 A 22 to 26.

23 Q And on page 244, did they or did they not all have
24 other substance abuse problems?

25 A Yes. All but one, sir.

1 Q And did they or did they not all have -- were all of
2 them unemployed?

3 A Yes, sir.

4 Q No social support?

5 MR. HARPOOTLIAN: I'm sorry. I can't hear Mr.
6 Meadors.

7 Q Any social support group?

8 A No, sir.

9 Q And number 5, case study 5, do you know whether or
10 not mother's death was considered a factor?

11 A Yes, it was.

12 Q Homelessness? Unemployment?

13 A Yes, sir.

14 Q Case 2, abuse among brothers?

15 A Yes, sir.

16 Q Did you or did you not see problems with primary
17 support group, number 2?

18 A I did.

19 Q Anti-social personality?

20 A Yes, sir.

21 Q One, two, three and four?

22 A Yes, sir.

23 Q Excuse me. Borderline personality and narcissistic
24 personality. And anti-social personality on number
25 4, correct?

- 1 A Yes, sir.
- 2 Q 2, did you or did you not see sedative abuse --
- 3 A Yes, sir.
- 4 Q -- dependence?
- 5 A Yes, sir.
- 6 Q Opioid. Pronounce that for me?
- 7 A Opioid narcotic*dependence.
- 8 Q Cannabis?
- 9 A Yes, sir.
- 10 Q Amphetamines?
- 11 A Yes, sir.
- 12 Q Alcohol?
- 13 A Yes, sir.
- 14 Q Depressive sort?
- 15 A Yes, sir. Polypharmacy drug abuse.
- 16 Q 239, starting with: "Many personality traits"?
- 17 A Yes, sir.
- 18 Q What does that say?
- 19 A "Many personality traits of male forensic psychiatric
- 20 patients differ from those of randomly selected
- 21 subjects from a normal population."
- 22 Q Psychiatric patients. A few more questions. You
- 23 deal with sexual assault cases?
- 24 A Yes, sir.
- 25 Q Is there a difference in sexual assaulting cases and

1 other violent offenses like shootings or stabbings as
2 to whether or not and when blood is asked for?

3 MR. HARPOOTLIAN: Objection, Your Honor. It's
4 leading, (A).

5 Q Is it or is it not?

6 A Could you ask the question again, please, sir?

7 Q Yes. Sexual assault cases versus other violent
8 offenses like shootings or stabbings, okay? Let me
9 ask you this. Do you as a professional and a
10 toxicologist, an expert, would the fact that whether
11 they had taken a drug or not, would that be a factor
12 for you to consider whether you wanted blood or not?

13 A Yes, it would. Yes, sir.

14 Q And would that be more prevalent in the date rape
15 situation than other violent offenses?

16 A Yes, it would. Most assuredly.

17 Q He asked you about some dancers I believe. I think I
18 he's talking about Ms. Cummings and Ms. Liz. Based
19 on your experience and training, if one was to vomit
20 or scratch or itch right after taking that, would
21 that be consistent with being involuntarily
22 intoxicated, having symptoms right away?

23 A It suggests intoxication. I'm not sure it
24 necessarily suggests involuntary, but it certainly
25 could suggest intoxication.

1 Q And if one exhibited that right away and expressed
2 that to someone, would that be consistent with
3 getting a substance you weren't aware of?

4 A Yes, sir. Could be.

5 Q Do you know after reviewing this file prior to the
6 end of Chief Wilson's testimony, where is it in there
7 Dewain Herring said, I've been drugged, after
8 reviewing the file?

9 A Nowhere, sir.

10 Q When is the first time that you got involved in this
11 issue as far as involuntary intoxication?

12 A Well, I was consulted in that regard last week, sir.

13 Q After Dewain Herring testified?

14 A Yes, sir. After his testimony.

15 Q Did you yourself have any knowledge that this would
16 be an issue prior to his testifying?

17 MR. HARPOOTLIAN: Objection, Your Honor.

18 THE COURT: Sustained.

19 MR. HARPOOTLIAN: Thank you.

20 Q Is there anything in the file indicating involuntary
21 intoxication?

22 MR. HARPOOTLIAN: Objection, Your Honor.

23 "Anything in the file"?

24 MR. MEADORS: Yes, sir. That you reviewed.

25 THE COURT: Sir. Overruled. Go ahead.

- 1 A Could you ask the question again, sir? I'm sorry.
- 2 Q Is there anything in the file that you reviewed that
- 3 suggests involuntary intoxication?
- 4 A No, sir.
- 5 Q From anybody?
- 6 A No, sir.
- 7 Q These dancers he asked you about, I believe
- 8 Ms. Cummings and Ms. Liz, did you have the
- 9 opportunity to view a videotape and statements from
- 10 other people that may or may not have seen them that
- 11 night?
- 12 A No, sir.
- 13 Q I want to refer back to this last study he asked you
- 14 about. And if I can approach, Your Honor, make sure
- 15 we're -- Drug Information Quarterly, Ben --
- 16 A Yes, sir.
- 17 Q Pronounce that?
- 18 A "Benzodiazepines and Disinhibition: A Review".
- 19 Q He asked you about 460, correct? Page 460, right?
- 20 A Yes, sir.
- 21 Q "Paradoxical Reactions". Then I think he asked you
- 22 under "Prevalence of Paradoxical Reactions", didn't
- 23 he?
- 24 A Yes, sir.
- 25 Q Then he asked you to skip down to "Mechanisms of

- 1 Paradoxical Reactions", correct?
- 2 A Yes, sir.
- 3 Q I want to go inbetween there. Do you see something
- 4 that says "Prevalence of Paradoxical Reactions"?
- 5 A Yes, sir.
- 6 Q And specifically, could you go to page 461?
- 7 A Yes, sir.
- 8 Q On the top left on page 461, one, two -- could you
- 9 just start with, "For example"? What does that say
- 10 about prevalence of paradoxical reactions after
- 11 reviewing it?
- 12 A I'm sorry. Could you tell me where again?
- 13 Q May I approach? One, two, three, four, five, six,
- 14 starting with the word "similarly". What does this
- 15 article say about prevalence of paradoxical
- 16 reactions?
- 17 A This statement begins, quote, "Similarly, when Green
- 18 Blatt, et al, 1984, reviewed 45 controlled trials,
- 19 they found no difference in the incidents of
- 20 behavioral disinhibition between patients given
- 21 Triazolam, Flunitrazepam and placebo."
- 22 Q Now, what's a placebo?
- 23 A Placebo is no drug at all.
- 24 Q And that's a controlled clinical trial, correct?
- 25 A That's correct.

1 Q And tell them what you -- and the drugs they were
2 given, what were the drugs they were given, these
3 folks?

4 A Specifically Triazolam and Flunitrazepam. These are
5 two Benzodiazepines. It's just like Flunitrazepam or
6 Rohypnol.

7 Q So how does it work? Do patients know whether
8 they're getting the placebo or the other drug?

9 A No, they don't.

10 Q So then after they have been taking the drugs, do
11 they then do a study of the reactions?

12 A That's correct.

13 Q And the folks that have the placebo and the folks
14 that have the drug, they don't know what they're
15 taking?

16 A Correct.

17 Q And as a result of that clinical study, Dr. Demi
18 Garvin, what incidents of behavior disinhibition was
19 found?

20 A There was no difference between placebo or drug.

21 Q None. That's all.

22 MR. ELAM: Just a couple more questions.

23 RECROSS EXAMINATION

24 BY MR. HARPOOTLIAN

25 Q Maybe we're looking at different places on here. But

1 does not it say on page 1, "58 percent of the
2 patients randomized to Alprozolam (phonetic)
3 experienced paradoxical relations, compared to 8
4 percent with placebo"?

5 A Well, the first part of that sentence is: "In a
6 further study of the efficacy of Alprazolam in
7 borderline personality disorder.

8 Q Right.

9 A So there again, there's an underlying psychiatric
10 disorder that's been diagnosed. "58 percent of
11 patients randomized to Alprazolam experienced
12 paradoxical reactions compared with 8 percent with
13 placebo."

14 Q It says: "While these studies, numerous case reports
15 and published case series suggest that paradoxical
16 reactions are common, large studies and systematic
17 reviews have generally found them to be rare." But
18 they exist, correct?

19 A They do.

20 Q "Published case series report that disinhibition
21 occurs in 10 to 28 percent of patients treated with
22 Alprazolam"?

23 A Alprazolam.

24 Q But found no difference in the instance of aggressive
25 behavior between Imipramine and whatever the other

1 one is, right?

2 A In patients treated for panic disorder, again an
3 underlying psychiatric diagnosis.

4 Q And they find that it's tough to -- they say it's
5 difficult to quantify. "Because overt rage reactions
6 are rare, they're difficult to quantify." Isn't that
7 what they say at the end of that paragraph?

8 A It says: "In a review of this subject, Deech and
9 Jennings conclude that in the general population the
10 incidents of aggressive dis-control after
11 administration of a Benzodiazepine is less than one
12 percent, similar to the incidents with placebo; and
13 because overt rage reactions are rare, they are
14 difficult to quantify."

15 Q "To quantify." Right. Now, you've done a bunch of
16 reading on this. Is the effect of these drugs, the
17 Benzodiazepines and others, more affective for
18 elderly people than non-elderly people?

19 A What affect, sir?

20 Q The affects of them, the memory loss, the
21 aggressiveness or whatever.

22 A In and of itself, I can't answer that question. It
23 depends on a number of factors. It depends on not
24 just age but whatever medications the person is on,
25 what the drug is being used for, how the drug is

1 being given, how frequently it's being given. That
2 question is too broad for me to be able to answer.

3 Q What's this?

4 A It's Goodman and Gillman, "A Pharmacological Basis of
5 Therapeutics".

6 Q This is basically the Bible for pharmacists and
7 pharmacologists?

8 A I wouldn't refer to it as the Bible, sir. It's one
9 of many texts we use in the course of our profession.

10 Q It's the one that if you study to be a pharmacist is
11 at the Medical University of South Carolina. It's
12 one of the books used there. Is that not correct?

13 A It is used. And I did use it during the course of my
14 study, yes. I have it on my shelf.

15 Q Okay. Let's go to page 356 of this where they talk
16 about --

17 MR. MEADORS: Your Honor, objection.

18 THE COURT: Approach the bench.

19 (Whereupon, a bench conference is had)

20 Q Are you aware that the definitive resources in this
21 area indicate that elderly patients tend to be more
22 sensitive to these drugs than the non-elderly?

23 A Now, that would depend on what indications, sir. I
24 think that's a general statement. I wouldn't
25 necessarily agree with that in the affirmative.

1 **MR. HARPOOTLIAN:** Your Honor, I'd like to cross
2 examine based on Goldman and Gillman, page 356, to
3 this witness.

4 **THE COURT:** Well, sir, you had that opportunity.

5 **MR. HARPOOTLIAN:** No. I understand. That was
6 cross examination. This is recross. I don't know of
7 any limitation --

8 **THE COURT:** I don't know what it is.

9 **MR. HARPOOTLIAN:** I don't know of any limitation
10 that wouldn't allow me to re-examine her.

11 **THE COURT:** Because it's in effect presenting
12 new evidence. It's A new subject material that was
13 not brought out on either direct or redirect.

14 **MR. HARPOOTLIAN:** What was brought out on
15 redirect was a question concerning the age and the
16 effect. I'm attempting to ask her to look at a
17 journal to see if that's consistent --

18 **MR. MEADORS:** Could we approach, please, sir?

19 **MR. HARPOOTLIAN:** -- or inconsistent. But if
20 Your Honor is ruling I cannot do that, I understand
21 your ruling.

22 **THE COURT:** All right. Let's move on.

23 **MR. HARPOOTLIAN:** I except to it. But I'm
24 moving on.

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

1 **MR. HARPOOTLIAN:** Thank you.

2 **Q** Right. Let's go back to this study done on the
3 psychiatry bulletin. If you'll go to page 462. And
4 it goes -- we've read this paragraph before. "True
5 paradoxical reactions to Benzodiazepines are probably
6 uncommon but not completely unpredictable. Known
7 risk factors include, high potency drugs, high dosage
8 being administered by perinatal routes, very young,
9 elderly, those with pre-existing CNS damage and those
10 with a history of aggression or impulsivity."

11 So one of the factors they found was the age.
12 If you're older, that was one factor they looked at
13 in this study. Is that correct?

14 **A** In addition to the route of administration,
15 intravenous or intranasal.

16 **Q** Ma'am, on the morning that Mr. Herring is at the
17 Richland County hospital, right; he's been shot, he's
18 at the hospital, who called you?

19 **A** No one called me, sir.

20 **Q** Who did you consult with?

21 **A** At the time that he was at the hospital I didn't
22 consult with anyone and no one consulted with me to
23 the best of my knowledge.

24 **Q** Well, you testified I think on cross about talking to
25 Sergeant Linfert?

1 **A** Yes. Sergeant Linfert inquired about the medications
2 that Mr. Herring was on prescriptively. And I
3 believe that was done during normal business hours
4 when I was at work and he was at work. I don't know
5 where Mr. Herring was at that time.

6 **Q** Did you at that point say, hey, maybe we ought to get
7 some blood?

8 **A** No, sir, I did not.

9 **Q** Today as you sit there, you being a toxicologist, you
10 being a person that processes and asks for and is
11 involved in that process, you think that was a
12 mistake?

13 **A** No, sir, I do not.

14 **Q** Thank you. No further questions.

15 **THE COURT:** You may come down. Thank you very
16 much, ma'am. Any objection to this witness being
17 excused?

18 **MR. HARPOOTLIAN:** None.

19 **MR. MEADORS:** Joye Cameron.

20 MARGARET J. CAMERON, after being duly sworn,
21 testifies as follows:

22 **THE CLERK:** Thank you. Please have a seat in
23 the witness stand and state your full name for the
24 record.

25 **WITNESS:** Margaret Joye Cameron, C-A-M-E-R-O-N.

1 **THE COURT:** Mr. Bailiff, would you get a cup of
2 water for one of the jurors, please.

3 **THE BAILIFF:** Yes, sir.

4 (Pause)

5 DIRECT EXAMINATION

6 **BY MR. MEADORS**

7 **Q** Did you say Joye Margaret Cameron?

8 **A** Margaret Joye.

9 **Q** Margaret Joye. I'm sorry. Ms. Cameron, please tell
10 these ladies and gentlemen of the jury where you were
11 born, where you were raised?

12 **A** I was born in Columbia but I was raised in Fairfield
13 County, Winnsboro.

14 **Q** What did you do after -- where did you go to high
15 school?

16 **A** I went to Fairfield Central High.

17 **Q** What did you do after that?

18 **A** I worked at a daycare center for a few years, and
19 then I went and got my EMT and started working for
20 Fairfield County EMS.

21 **Q** After working for a daycare you went to work for EMT
22 and started working for Fairfield?

23 **A** Yes, sir.

24 **Q** If you'll just be sure and talk into that, please,
25 ma'am. And did you receive any training prior to

1 working for Fairfield?

2 A I had to go through a six-month class to get my basic
3 EMT. And about two years after that I went through
4 another six-month class to be an intermediate which
5 is being able to start IV's and assist patients with
6 their masks. And in '98 I started working for
7 Richland County and they sent me to paramedic school
8 which was another six to nine months. And that gives
9 me the right to interpret cardiac strips and give
10 meds.

11 Q So you went from Fairfield. You got this training.
12 Then you started working for Richland County EMS in
13 what year?

14 A '98.

15 Q Who heads Richland County EMS?

16 A George Rice right now. Michael Byrd. George Rice.

17 Q And as a part of your duties as a Richland County EMT
18 or EMS, what do you do?

19 A I work 12.25 hours. We work two days off, two, work
20 three, off two. We get every other weekend off. I'm
21 subject to go to any call where anyone needs us when
22 they call 911.

23 Q Do you have -- other than the training you've told us
24 about, do you go through any what I call continuing
25 legal training in you all's field?

1 A The first Thursday of every month we have to go to an
2 in-service training class to keep our certifications
3 up.

4 Q So you are a certified what?

5 A Paramedic.

6 Q So if there's an incident, somebody is hurt or
7 whatever, you respond, correct?

8 A Yes, sir.

9 Q And I want to call your attention, do you do
10 something every two years, too?

11 A Every two years we have to have our advanced life
12 support. We have to have a -- it's a two-day class
13 for that. And pediatric life support, there's a
14 two-day class for that. And every two years we take
15 those classes to renew our certifications with those.

16 Q Tell these ladies and gentlemen of the jury, how many
17 scenes do you think you have responded to?

18 A I have no idea. I can't tell them.

19 Q Do you remember responding to 460 Alexander Circle?

20 A Yes, I do.

21 Q And do you know what time you responded?

22 A It was in the morning, around 4 or so.

23 Q Okay. Do you have your run sheet with you?

24 A I do.

25 Q And specifically, do you remember what time?

1 **A** We received the call at 4:29 and we arrived at the
2 home at 4:39.

3 **Q** You're at 460 Alexander Circle. And what day was it?

4 **A** It was -- I don't remember exactly what day it was.
5 I think it was like a Saturday morning, Sunday
6 morning.

7 **Q** Was it January 29th though?

8 **A** Oh, yes. It was January 29th..

9 **Q** Saturday night, Sunday morning. And can you tell the
10 jury, did you go inside the house?

11 **A** We had to have a standoff for about an hour before we
12 were allowed to go into the home. And when we went
13 into the home, he was sitting in a chair and he was
14 handcuffed.

15 **Q** And you say who? Who are you talking about?

16 **A** This gentleman over here. Mr. Herring.

17 **MR. MEADORS:** We'd like the record to reflect
18 she's pointed to Mr. Dewain Herring, Your Honor.

19 **THE COURT:** The record will so reflect she's
20 identified the defendant.

21 **Q** You say he was handcuffed?

22 **A** Yes, sir.

23 **Q** What medical attention, if any, did you give him?

24 **A** At that time he allowed us to bandage his wound. He
25 had a through-and-through gunshot to the meaty part

1 of his left upper arm. We bandaged that with a
2 bleeding control.

3 Q And you say we.

4 A My partner and I.

5 Q And who was your partner?

6 A His name is Josh White.

7 Q And at this point, I guess if you're bandaging his
8 wound, you're close to him?

9 A Yes, sir.

10 Q Were you communicating with him?

11 A Trying our best to communicate with him. He was a
12 little upset.

13 Q And you said he was letting you tend to his wound, I
14 think you said?

15 A Yeah. He allowed us to wrap and bandage it.

16 Q And you say he allowed us. Did you all actually have
17 conversations back and forth, I'm going to do this or
18 do that?

19 A Not so much. I asked him what happened, and he said
20 that --

21 MR. HARPOOTLIAN: Objection, Your Honor.

22 MR. MEADORS: Your Honor.

23 MR. HARPOOTLIAN: May we approach?

24 (Whereupon, a bench conference is had)

25 Q Did you all bandage his wound?

- 1 A Yes, we bandaged his wound.
- 2 Q Did you discover any medical history other than sleep
- 3 apnea?
- 4 A No, we did not.
- 5 Q Did you document that in your --
- 6 A Yes, I did.
- 7 Q What other vital signs did you take?
- 8 A I took his blood pressure and put him on our heart
- 9 monitor. Any time we use a monitor we're supposed to
- 10 also give oxygen. I tried to put the oxygen on him.
- 11 He adamantly refused that. And I also started an IV
- 12 in his right arm.
- 13 Q In your notes do you have whether or not prescription
- 14 meds were taken?
- 15 A He denied that. I specifically asked him: "Any
- 16 medical history?" He said, "Sleep apnea." And I
- 17 said, "Do you take any medicines?" "No." "Do you
- 18 have any allergies?" "No."
- 19 Q Okay. So during this process you're asking him
- 20 questions?
- 21 A Mm-hmm (affirmative).
- 22 Q He's answering?
- 23 A Mm-hmm (affirmative). We're in the unit. We're in
- 24 the truck.
- 25 Q So you actually rode with him from the house --

- 1 A Yes.
- 2 Q -- to the hospital?
- 3 A Yes.
- 4 Q Did you have trouble understanding him?
- 5 A Not any problem whatsoever.
- 6 Q Did he appear to understand you based on your
- 7 questions? I mean, were they appropriate?
- 8 A Yes.
- 9 Q Were they timely?
- 10 A Yes.
- 11 Q Did he say anything about neck pain?
- 12 A No. He never he denied any neck or back pain.
- 13 Q And does that little jiggly thing, that third line
- 14 up, does that mean no neck, back pain?
- 15 A Yeah. Negative for neck or back pain.
- 16 Q All right. And how would you have known to put that
- 17 down there?
- 18 A "Does your neck hurt?" That's what we asked him.
- 19 Q Did he answer you?
- 20 A He said, "No, my neck does not hurt." "Are you
- 21 hurting anywhere else?" No, he was not.
- 22 Q Did he allow to you do anything else?
- 23 A He wouldn't let us splint his arm and he wouldn't let
- 24 us put on the oxygen. But that was it.
- 25 Q Did he say, you're not going to do anything else?

- 1 A If I tried to do something, he said no.
- 2 Q Did he have good movement or not?
- 3 A Yeah. He could completely move that arm. At first
- 4 he was handcuffed behind him. And then I got the
- 5 police to handcuff both wrists to the side of our
- 6 stretchers. So he was moving his arm just like that.
- 7 He had good range of motion.
- 8 Q You said you responded. You don't know how many
- 9 incidences, correct?
- 10 A Right.
- 11 Q Did you make an observation about his demeanor?
- 12 Specifically, did you smell any alcohol?
- 13 A I smelled some alcohol. But when I asked him had he
- 14 been drinking or doing any drugs, he said no.
- 15 Q He said no?
- 16 A Mm-hmm (affirmative).
- 17 Q Did he appear intoxicated to you?
- 18 A No. He could walk to the stretcher. He could
- 19 ambulate on his own. He was not staggering at all.
- 20 He came down out of his house and down the steps.
- 21 Q Primary impression: 15, what does that mean?
- 22 A Where are you talking about?
- 23 Q On the run sheet. Primary impression?
- 24 A That's the signal we have. Certain complaints have
- 25 numbers that go with them. And that's a gunshot

1 wound.

2 Q Describe Dewain Herring's demeanor to you?

3 A He was rude. He was very just -- any time I tried to
4 ask him something or do something, it was a (witness
5 makes exasperated sound) and roll his eyes and give a
6 half answer here, a half answer there. He was
7 just -- he was just very rude. It seemed like he was
8 just disgusted to be in the back of our ambulance.

9 Q Disgusted what?

10 A To be in the back of our ambulance.

11 Q Thank you.

12 CROSS EXAMINATION

13 BY MR. HARPOOTLIAN

14 Q Ma'am, my name is Dick Harpootlian. And I don't
15 think we've met before. Have we?

16 A No, sir.

17 Q Okay. What kind of IV did you give him? What did
18 you give him?

19 A Normal saline.

20 Q Okay. And that's just to hydrate him a little bit?

21 A Yes. And in case that he -- something were to go
22 wrong, he'd have access to give drugs.

23 Q Okay. And you indicated he was a little bit -- a
24 little upset I think was what you said?

25 A Yes.

1 Q He'd been shot, right?

2 A Yes.

3 Q Now, have you worked multiple gunshot wound cases?

4 A Yes.

5 Q Typically when people have been shot, do they get --

6 A Typically when they've been shot, they want help.

7 They want somebody to help them and get them to the
8 hospital.

9 Q Right.

10 A They're not aggravated because you're there.

11 Q Well, were you aware of the fact the police kicked in
12 the door?

13 A That, I have nothing to do with that.

14 Q Well, but did you know that happened to him?

15 A Yes.

16 Q Did you know that at least in his opinion that he'd
17 been shot in an unprovoked way?

18 MR. MEADORS: Objection.

19 Q Did you know that?

20 THE COURT: Overruled.

21 Q Did you know that?

22 A No. He never -- I mean, he never acted as if he did
23 anything or he didn't do anything.

24 Q Well, I mean, could he be upset with something other
25 than you? He was just upset because he's been shot,

1 somebody has broken into his house. You saw multiple
2 bullet holes everywhere, didn't you?

3 A No. I did not. I saw one through the window when he
4 asked me to get his shoes.

5 Q I'm going to ask you if you saw -- okay. Here we go.
6 Referring to Defendant's Exhibit 15, do you remember
7 seeing these bullet holes?

8 A No.

9 Q 17 of them?

10 A No.

11 Q Okay.

12 A You know, I was getting his shoes and getting them
13 out of the room where he was shot.

14 Q Right. Right. He did not appear to be intoxicated
15 to you?

16 A No, he did not.

17 Q Now, did anyone ask you to get a blood sample?

18 A No. We don't do that.

19 Q Where is that done?

20 A At the hospital.

21 Q Is that pretty routine to do?

22 A If the police request it.

23 Q They give it if the police request it?

24 A That, or if there is a coma of an unknown origin,
25 they test their blood to see --

1 Q Right.

2 A -- what's wrong with them.

3 Q Now, you've worked multiple gunshot wounds. Let's
4 not talk about demeanor. Let's talk about, do they
5 say things after they've been shot that they may not
6 remember later on sometimes?

7 A I don't talk to them later on to know.

8 Q Okay. Is it painful to be shot?

9 A I would assume so. I've never been shot.

10 Q Well, you've seen people who have been shot?

11 A Yes, I have.

12 Q It looks like they're in pain, right?

13 A Sometimes, no.

14 Q Sometimes, no. But he was rude to you?

15 A Yes.

16 Q And you don't know why?

17 A My job is there to help.

18 Q Right.

19 A I don't -- I mean, I don't expect -- I treat
20 everybody with the same respect. And, yes, he was
21 rude.

22 Q Thank you.

23 THE COURT: Anything further, sir?

24 REDIRECT EXAMINATION

25 BY MR. MEADORS

1 Q How do you mean he was rude?

2 A He was refusing oxygen when his body possibly needed
3 it. He was just huffing and puffing and rolling his
4 eyes and just angry, period, that we were there.

5 Q Was he alert and oriented?

6 A He was conscious, alert and oriented times three,
7 which is person, place and time.

8 Q Person, place and time?

9 A Yes.

10 Q Thank you.

11 THE COURT: Anything further?

12 MR. HARPOOTLIAN: No, sir.

13 THE COURT: You may come down, ma'am. Thank you
14 very much. Any objection to this witness being
15 excused?

16 MR. HARPOOTLIAN: No objection.

17 MR. MEADORS: Beg the Court's indulgence. The
18 state of South Carolina rests.

19 THE COURT: All right. Thank you very much.
20 Ladies and gentlemen, that concludes the testimony in
21 this case. The remaining portion of the trial
22 consists of the arguments of counsel and my charge to
23 you on the law of the state of South Carolina as it
24 applies to this case. However, your lunch is ready.
25 I think it will be appropriate and the most efficient

1 use of our time for you to go ahead, have your lunch.
2 We'll reconvene at 1:00 at which time we'll conclude
3 this trial. You're excused to go to the jury room
4 and have your lunch. Don't begin any -- let's have
5 order in the courtroom, please. Don't begin any
6 deliberations or discuss the case among yourselves
7 while you're in the jury room. Thank you very much.

8 (Jury out at 12:06 p.m.)

9 **THE COURT:** Any motions?

10 **MR. HARPOOTLIAN:** Your Honor, we would renew our
11 previously made motion for a directed verdict.
12 Viewing the light in a most favorable to the State,
13 we would submit there is no evidence to support a
14 verdict of murder.

15 **THE COURT:** All right. Anything further?

16 **MR. HARPOOTLIAN:** Oh. And involuntary
17 manslaughter. I'm sorry. I might as well throw that
18 in while I'm at it. And pointing and presenting. I
19 apologize.

20 **THE COURT:** All right. Well, again, I have no
21 reason to feel that my decision should be any
22 different than at the directed verdict stage. I
23 still feel that the evidence goes beyond that of mere
24 conjecture or suspicion. There is evidence, either
25 direct or circumstantial or some combination of both,

1 which reasonably tends to prove the guilt of the
2 defendant or from which that guilt might be logically
3 and reasonably deduced if that evidence is taken in
4 the light most favorable to the State; or at this
5 stage, in the light most favorable to either party.
6 So I must respectfully deny your motion for a
7 directed verdict.

8 Anything else prior to submission of this -- or
9 final arguments in this case?

10 **MR. HARPOOTLIAN:** No, sir.

11 **MR. MEADORS:** Beg the Court's indulgence.

12 (Pause)

13 **MR. MEADORS:** No, sir.

14 **THE COURT:** All right. Thank you very much.
15 We'll reconvene at 1:00. Be prepared with final
16 argument.

17 (Whereupon, a break is taken)

18 **MR. MEADORS:** Your Honor, we have one board
19 which should be in here in 30 seconds.

20 **THE COURT:** I didn't hear you.

21 **MR. MEADORS:** One board which should be in here
22 in less than 30 seconds.

23 (Pause)

24 **THE COURT:** All right, Solicitor. Are you ready
25 to proceed?

1 **MR. GIESE:** The State's ready.

2 **MR. HARPOOTLIAN:** May it please the Court, Your
3 Honor?

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

5 **MR. HARPOOTLIAN:** For the record, pursuant to
6 The State v. Charles Beighley, a 1971 case, we
7 require the State to -- let me make sure I get my
8 quote correct -- "to fully disclose the law upon
9 which it relies if demanded by the opposite party."
10 I am demanding that he fully disclose the law.

11 **MR. MEADORS:** I will try, Your Honor.

12 **MR. HARPOOTLIAN:** Well, I think it's mandatory.

13 **THE COURT:** Ready for the jury?

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

15 **MR. HARPOOTLIAN:** The defense is ready.

16 **THE COURT:** Bring the jury, please.

17 (Jury in at 1:05 p.m.)

18 **THE BAILIFF:** The jury is seated, Your Honor.

19 **THE COURT:** Thank you very much. All right,
20 Ladies and Gentlemen. I hope you had a pleasant
21 lunch. We're now ready to continue with the trial.
22 Solicitor, closing remarks.

23 **MR. MEADORS:** May it please the Court?

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

25 **MR. MEADORS:** Solicitor Giese, Mr. Harpootlian,

1 Mr. Newman. John Johnson is dead. John Johnson is
2 dead. In his opening -- in his opening statement Mr.
3 Harpootlian said this is Dewain Herring's day in
4 court. It is. But it's also John Johnson's day in
5 court. We're not allowed to offer victim impact
6 evidence, but we're allowed to at least introduce
7 back on the front row --

8 MR. HARPOOTLIAN: Objection, Your Honor. They
9 are not --

10 MR. MEADORS: -- John Johnson's family.

11 MR. HARPOOTLIAN: Objection, Your Honor.

12 MR. MEADORS: That's all I was going to say.

13 MR. HARPOOTLIAN: Objection, Your Honor.

14 THE COURT: Sustained.

15 MR. HARPOOTLIAN: Thank you. Your Honor, I
16 would object to the Solicitor's demeanor during this.
17 He knows that was improper.

18 MR. MEADORS: That is not true, Judge. I do not
19 know that. I've done that in every murder trial I've
20 ever done.

21 MR. HARPOOTLIAN: I object.

22 THE COURT: Sustained.

23 MR. MEADORS: On behalf of Solicitor Giese, Stan
24 Smith, Linfert, the family of John Johnson, I want to
25 thank you for being here and thank you for the

1 attention you've given this case. John Johnson is
2 dead. When you go back in your jury room I'm going
3 to ask you to do two things. Go back on that
4 blackboard, write the name Dewain Herring, to be
5 sure. But also on that blackboard write the name of
6 John Johnson, "Jon Jon".

7 Thank you for being here. My name is John
8 Meadors. I haven't have been introduced to you and I
9 haven't got to talk to you yet. I am the deputy
10 solicitor for the Fifth Judicial Circuit. I work for
11 the elected solicitor, Solicitor Barney Giese. We
12 are here representing Richland County against the
13 defendant, Dewain Herring.

14 I want to briefly tell you now what we're going
15 to be doing for the next hour or two or two and a
16 half. This is called closing arguments. It's not a
17 really good name for it. We can't sit here and argue
18 back and forth. But it's the chance for the
19 attorneys to tell you what they think the law is and
20 the reasonable inferences.

21 I am going to tell you now what I think the law
22 is and what His Honor will charge you and give you
23 examples of those facts, facts that I think amplify
24 the law or show the law in one way or the other. Mr.
25 Harpootlian be will allowed to get up after that and

1 give his inferences on the law. And then the state
2 of South Carolina through Solicitor Giese will do the
3 final close since we have the burden of proof. And
4 he'll come before you and tell you what he believes
5 the facts are or what the facts have been and what
6 the inferences are.

7 I don't know how you all got here every day. I
8 didn't see you all leave your house. I don't know
9 how you walked into the courtroom. But if you cross
10 Blanding Street and start to head into this
11 courthouse, it took me a long time to notice it; but
12 on the gates when you come up to this courthouse,
13 there are the Scales of the Justice. I don't know if
14 any of you all saw it.

15 But as you come into the first floor and you
16 start to get on that first floor elevator, to the
17 left of the far left elevator, it says: "Justice
18 will direct our course. Justice will direct our
19 course." It's kind of a subconscious reminder, and
20 it's an example of Lady Justice. You all know what
21 Lady Justice is, the statue holding the Scales of
22 Justice. She is blindfolded. Isn't that beautiful?
23 She is blindfolded. Lady Justice.

24 Oh, for sure she's going to drop the blindfold
25 to look and watch demeanor of a witness, watch their

1 expressions. She doesn't stay blindfolded as to what
2 happens in court. But she's blindfolded to the
3 prejudices, the preconceived notions that we all may
4 or may not have. She sits and listens. And that's
5 why she's blindfolded.

6 It doesn't matter how you got here, what car you
7 drove, where you're from; Lady Justice is going to
8 ensure that justice is delivered, no matter who you
9 are, no matter where you're from. And, ladies and
10 gentlemen, you all know who Lady Justice is. You all
11 are Lady Justice.

12 Week in and week out this is like a team, if you
13 will. Mr. Harpootlian says we're adversaries. We're
14 in the pursuit of the justice. And the most valiant,
15 valuable player of that team comes in week in and
16 week out. It's the jury who listens to the evidence,
17 decides what the truth is, decides what's credible,
18 what's believable.

19 And you take that; and His Honor, Judge Cooper,
20 is going to charge you the law in just a little bit.
21 And based on that law and what you think is true,
22 what you think is believable, you're going to come
23 back with a verdict. And that's all we can ask of
24 you, ladies and gentlemen; nothing more, certainly
25 nothing less. This courtroom is one of the few

1 places unfortunately where everybody is going to be
2 treated the same.

3 The burden is on the State in this case is the
4 same burden that's on every criminal prosecution in
5 the country. You all know what it is. You can tell
6 me right now. We have to prove the defendant, Dewain
7 Herring, guilty beyond a reasonable doubt. That's
8 it. We don't have to prove the defendant guilty
9 beyond all doubt. You could never get justice.
10 Beyond a reasonable doubt.

11 And in my search for it over the years of how to
12 define it, it's not a whimsical doubt. It's not an
13 imaginary doubt. It's not a fanciful doubt. It's
14 beyond a doubt that would make reasonable folks
15 hesitate to act. It's not unreasonable doubts. You
16 may doubt that the sun is going come up or the river
17 is going to go through, quit running through Columbia
18 tomorrow. That's not a reasonable doubt. We must
19 prove the defendant guilty beyond a reasonable doubt,
20 beyond a doubt you can attach a reason. It's almost
21 like common sense.

22 Now, I know he's not going to object to the next
23 thing I'm going to say. Mr. Harpootlian is a fine
24 lawyer. And when you have lawyers who are advocates,
25 they sometime, it can be inferred, attempt to put up

1 smoke screens to keep your attention away from what
2 we believe the facts are. He is a smoke screen
3 machine, if not a semi-automatic and automatic smoke
4 screen machine. Putting up smoke screens here, here,
5 here, to keep you from looking at what this case is
6 about: John Johnson, 3722 River Drive.

7 Sometimes in my pursuit of the explanation of
8 what a reasonable doubt is, I say, well, sometimes
9 they're just questions. You know, you might have a
10 question about something. There might be a question
11 here; there might be a question there. But questions
12 a lot of time, folks, are just questions. Just
13 because you may have a question about something
14 doesn't mean it's a reasonable doubt. You can never
15 answer all the questions. But a fine lawyer cannot
16 take a question which is irrelevant or another
17 question and make them and create reasonable doubt in
18 this courtroom. You can't do it.

19 You have to decide that there's a reasonable
20 doubt based on the testimony you've heard. We submit
21 there's no reasonable doubt in this case. I'm going
22 to spend a little bit of time here going over what I
23 think are the biggest smoke screens, things that I'm
24 going to tell you are not in our opinion inferential
25 based on the evidence reasonable doubts.

I'm going to get into this some as I go over the witnesses in regards to credibility, believability. But the shots fired at [redacted], the shots fired by John Baker, Gwyn, Linfert going into the wall, SLED through Coonfield coming back and trying to determine the trajectory there, to talk on and on and on about there have nothing to do with John Johnson's death.

You remember when Coonfield said, what does this have to do with Chastity's? Nothing. Nothing to do with Chastity's. To be sure, it has to do with pointing and presenting a firearm, which I'm going to get to. To be sure, you ought to consider that in connection with his statement he made. And I'm going to get into that.

But the facts and the number of shots fired here, put the Sheriff's Department on trial about and the shots there, that has nothing to do with John Johnson getting murdered at 3722 River Drive. That's

1 a smoke screen on that murder charge. Please see
2 through it.

3 Another smoke screen; I used to say when I was
4 doing opening statements that Columbo -- I don't do
5 this any more, but I guess I'm doing it now -- was
6 one of my favorite characters. He was a bumbling,
7 stumbling investigator. And you get to see the
8 crime. I don't know if you all saw it. And then
9 you'd get to see him figure out how to do it.

10 And I remember telling juries we don't have a
11 video of this case but we have the next best thing.
12 We have eye witnesses. I said, if we did have a
13 video, they'd be attacking the video? Guess what? I
14 was right. We've got a video.

15 Does it show every minute detail that went on?
16 No. But it shows one shot. It shows one shot
17 outside, we know there's a hole in the door, and it
18 shows one dead John Johnson inside. We've got a
19 video. He's attacking the video.

20 We sent it down to Cape Canaveral. We tried to
21 get it more clear. You can't. But you'll see it
22 back there. You'll see it. Thank goodness we've got
23 the video. He may say, oh, we could have gotten the
24 video sooner. What about the hard drive? We didn't
25 have the hard drive. Chuck Earles said, I don't know

1 if we could have gotten that or not back then, the
2 technology. I don't know. But we've got the video.

3 Another smudged screen on that camera back
4 toward the back. Well, it's crystal clear through
5 several witnesses you couldn't see back in the
6 champagne room. That showed the back of the bar
7 area, the back of the dance room. It never would
8 have shown him down in the champagne room anyway.
9 You've got him walking out. You see him walking in
10 the front. I think it's camera 4 or 12. I'm not
11 sure. You'll have them back there. And then you've
12 got him walking outside.

13 It's a smoke screen. We got the first video
14 that night. That was in the mind of those officers
15 when they went over there. We'll get to the defense
16 of habitation in a minute and firing a gun. They
17 knew they had a suspect. They knew he had driven up
18 there. They knew John Johnson was dead.

19 And then they get the other camera views several
20 weeks ago. Well, thank goodness we got them.
21 They've been locked in there. There wasn't any
22 malfeasance or anybody's doing wrong. But we got
23 them. And we had the first video, the first shot,
24 that night less than an hour later. That's good
25 evidence. That showed the shot. That showed the

1 car.

2 What's the other biggest, second biggest maybe
3 smoke screen in here? Chastity's. Who went to
4 Chastity's? I think he said I kind of got drawn in
5 there by the neon light. Who went to Chastity's?
6 Dewain Herring went to Chastity's.

7 Now the fact he went to Chastity's, her lawyer
8 is going to put Chastity's on trial? A cesspool he
9 says? These people in there working hard to make a
10 living, and now it's their fault he chose to come in
11 there? Put them on trial? It's the biggest smoke
12 screen.

13 How much is champagne? Do you get champagne in
14 the room? What's that got to do with anything? The
15 grinding, how many times did you hear him talking
16 about grinding and going down? That's got nothing to
17 do with John Johnson being dead. Put Chastity's on
18 trial because of the establishment they are. He went
19 in there.

20 Prior to this alleged drug, there wasn't no
21 alleged drug. He chose to go in there. Now he's
22 going to put them on trial. Bad attitudes? Who had
23 the bad attitudes, the arrogance? They kicked him
24 out. Cesspool.

25 Ray Livingston, Investigator Ray Livingston, in

1 the Army, comes back, and he goes there and he works.
2 And he draws this diagram. Do you remember Mr.
3 Harpootlian said, well, that really isn't relevant to
4 anything, is it, Investigator Livingston? It's a
5 smoke screen. It's relevant where his body was.
6 That's relevant. It's relevant how close he was to
7 that door which is consistent when he fell back after
8 that shot came through that door.

9 Ray Livingston. Go watch on the tape. 12:30,
10 1:30. He was out there investigating, had his light,
11 going around looking, made his diagram. Two days
12 later -- or the next day; I'm not sure -- did you
13 find out they had any video? Yes, I did. Did you
14 look at it? Yes, I did. What did you see? I saw
15 the shot, the flash.

16 You all go back there and use your common sense
17 and see what you see. Based on that, did you do
18 anything else? No. We knew where his body was. We
19 had the car. We had the shot. He was dead. We
20 don't have a measuring tape but we have the video on
21 it. And I'd rather have the videotape.

22 This now becomes State of South Carolina vs.
23 Chastity's, State of South Carolina -- he's putting
24 Chastity's on trial, the video on trial and now Ray
25 Livingston. He's blaming Ray Livingston. See

1 through that for what it is.

2 SLED. Blame SLED. That's another smoke screen.
3 You're covering up for your buddies who used to be
4 there? Well, if they are, they're not doing a good
5 job. Doing all these streamers he put in there.
6 SLED says we've got multiple shots. We're trying to
7 confirm where the shots came from. That's what we're
8 trying to do. We're out there doing our job.
9 Doesn't look like they're covering up for anybody to
10 me. The smoke screen.

11 But, you know, the other thing, this
12 involuntarily intoxicated I'm going to touch on, the
13 solicitor is going to touch on. Does it make any
14 common sense? Those two witnesses he called to talk
15 about incidents two years prior to this and maybe two
16 and a half, all dealing with female dancers.

17 Here you had a guy in there, pretty affluent,
18 looked good, had money? Why not keep getting his
19 money, keep getting his money? Why not just stop at
20 \$300? You've got an ATM machine right there. Keep
21 him coming. Let's keep getting his money, keep
22 getting his money. Does that make any common sense?

23 The blood. Some document he talked about that
24 was in evidence that said if he consents get the
25 blood. And then he asked some other questions.

1 Could you get it? The only time involuntary
2 intoxication was heard was Thursday of last week when
3 it came out of Dewain Herring's mouth. Involuntary
4 intoxication is a smoke screen. And I'm going to go
5 through the law on what the judge is going to charge
6 you on that in just a moment.

7 He may get up here and say we didn't call some
8 witnesses at . We called -- I don't know what
9 he's going to argue. I'm trying to anticipate. We
10 called Linfert. We called Gwyn. I'm going to go
11 through it in a minute. Then we called Baker. Baker
12 is the one who shot through the wall. The only other
13 person who shot through the wall there I think was
14 Tom Hodges you heard about. You going to keep
15 calling all of them, give them the same questions?
16 He works for the Richland County Sheriff's
17 Department. We both had access to him. If he wanted
18 to call him, he would have called him. That's a
19 smoke screen if he starts to argue that, about who
20 did or didn't call witnesses.

21 A couple of more smoke screens and then I'm
22 going to get into the law, that I think are -- he
23 actually is putting the Richland County Sheriff's
24 Department on trial several ways; for doing a bad job
25 at Chastity's, even though they got the videotape

1 that night of the hour the suspect and the driver's
2 license number.

3 Go back there and watch on that tape, 12:30,
4 12:40. I'm not sure when. Carl Weeks is showing on
5 his hands -- he may have showed it up here -- but the
6 license tag number. And they start rolling and they
7 get the video. They go get the driver's license.
8 They confirm that's the same person. They go by
9 Landmark and they go get a search warrant, they go to

10
11 What else are you supposed to do in law
12 enforcement? They call. They knock. They don't
13 call. They knock on his door. They go visit.
14 Nobody is there. They go back and get a search
15 warrant, a lawful warrant. They do what they're
16 supposed to do. And now he's going to come up say,
17 oh, the big wigs just went to You all didn't go
18 there to "Jon Jon"'s. Why is he doing that? He's
19 putting everybody on trial, trying to appeal to
20 everybody. It's a smoke screen. Officer-involved
21 shooting is why they went to . It's been
22 testified uncontroverted.

23 The final thing is notes. He may not bring this
24 up now. But you remember Dave Lawrence, Lieutenant
25 Lawrence? He had taken this oral statement of Dewain

1 Herring and written it down on his form. He was
2 reading off his investigative notes. Here it is. I
3 took his oral statement. Where are your notes?
4 Well, when I take notes, I get them. Then I read
5 them and put it down here. I typed it and here they
6 are.

7 Vello Paavel. Do you remember him getting up
8 here and saying, let me refer to my notes? Demi
9 Garvin, getting up here, let me look at my notes.
10 You got your notes? I sure do. Notes? Attacking us
11 for notes? His witnesses' notes, they don't even
12 come in the courtroom. They don't even come in the
13 courtroom. And he tries to imply something about
14 Dave Lawrence who took notes, immediately transported
15 them, put them on his computer and then did away with
16 them. But he kept documentation of it. He brought
17 them here and provided it to them. That's a smoke
18 screen.

19 Use your common sense. The Richland County
20 Grand Jurors indicted Dewain Herring for murder. His
21 Honor is going to charge you on the law. Murder is
22 the intentional killing of another individual,
23 living, breathing individual, with malice
24 aforethought.

25 You all, just malice, that word, just what it

1 says, malice aforethought. Aforethought is a term of
2 art. It's just got to exist at the instant that
3 trigger is fired, right then and there. It doesn't
4 have to be planned. It doesn't have to be lying in
5 wait. Although we may have some of that here even if
6 we don't have to have it.

7 You don't have to have motive in the state of
8 South Carolina. I think we've got that here. Malice
9 is the -- listen to this -- intentional doing of a
10 wrongful act without just cause or excuse. An
11 intentional doing of a wrongful act without just
12 cause or excuse. That's all it boils down to this
13 whole trial. Intentional. If you find he
14 intentionally did that, it's murder. It's murder.

15 Now, as the judge will tell you, you can't open
16 somebody's brain and see whether they had intent at
17 12:06:06 on 1-29-06. We can't look at it. But there
18 are several ways that you can consider malice, an
19 intentional killing. There are several ways it can
20 be shown to you through evidence.

21 First and foremost, malice can be expressed.
22 Intent malice, the intentional killing, the
23 intentional doing of a wrongful act without just
24 cause or excuse with an intent to inflict an injury.
25 That's called express malice. With an intent to

1 inflict an injury, express malice.

2 Well, how do you show that? Somebody says, I am
3 going to kill you, I'm going to do something to you.
4 Well, in this case you've got threats. You all don't
5 want me to come back. If someone comes back,
6 somebody is going to get f'd up. Carl Weeks. I'm
7 going to f'g shoot you. Threats. That's evidence of
8 direct malice, express malice, express, intentional
9 doing of a wrongful act without just or excuse with
10 an intent to inflict injury. I am going to kill you,
11 that's express. That's it. That's murder. That's
12 malice. That's malicious. You say it. You feel it.
13 You show it. That's express malice.

14 Can malice be shown to you all other ways? Sure
15 it can. You can have inferred malice if you didn't
16 have those threats and all which we do. Don't forget
17 we have them. But if you didn't have them, malice
18 may be inferred under the circumstances where the law
19 says you can infer evil intent. If you didn't have
20 it, since you can't look in his brain, you can infer
21 it under these circumstances with a deadly weapon.

22 Does that not make sense? If somebody has his
23 gun and uses a deadly weapon, you can infer they
24 meant to kill somebody when that bullet goes out of
25 that gun and into their hand?

1 Solicitor Giese and I ask you to infer it.
2 Infer malice from the use of a deadly weapon. Is
3 that the only way can you infer malice? No, sir.
4 No, ma'am. You can infer malice by conduct showing a
5 total disregard for human life. I don't care. Not
6 just the conscious doing of a wrongful act. I don't
7 care. A depraved heart. I want to do something.
8 You can infer that.

9 And His Honor is going to instruct you there's
10 an old South Carolina case. Please listen to this.
11 It says: Malice does not necessarily impart ill will
12 towards the individual injured but signifies rather a
13 general malignant recklessness of the life or the
14 safety of others or a condition of mind which shows a
15 heart regardless of social duty and fatally bent on
16 mischief.

17 No regard for human life, depraved heart. First
18 of all, we've got express malice: I'm going to kill
19 you. Then you've got inference of malice by use of a
20 deadly weapon. Now you've further got an inference
21 of malice by a depraved heart. He saw him standing
22 at that door. We think the evidence is clear and you
23 can infer it.

24 Two seconds later after looking and coming back,
25 two seconds later after coming back, the shot; he saw

1 him. Even if he didn't see him, this says you can
2 impart ill will, a depraved heart shooting into that
3 door which you've just come out of. You threaten
4 people, you know people are in there and you shoot
5 into that door. If he intentionally shoots into that
6 door, that's malice, that's a depraved heart, and
7 that's murder. And listen to the judge as he
8 describes it.

9 I don't care if anybody is in there. But he did
10 see him. There is malice all over this case, ladies
11 and gentlemen. Even if some of you said, well, I
12 don't know when if he saw him or not; if he shot in
13 the door, there are people in there, the law says you
14 can infer malice, depraved heart, reckless disregard,
15 plus malignant recklessness of the lives and safety
16 of others. Does that make sense? Shooting into a
17 crowded place you've just come out of?

18 Now, the judge -- if any evidence comes in, any
19 evidence whatsoever that benefits the defendant, the
20 defendant is entitled to a charge. If there is any
21 evidence that comes in through a statement or through
22 whatever, the law says the defendant gets the benefit
23 of it. I am saying it doesn't mean it's credible
24 just because you get a charge. You have to consider
25 it. You don't have to consider it long.

1 Involuntary manslaughter, you'll also be able to
2 consider this charge. The judge is going to charge
3 you that you can consider involuntary manslaughter.
4 What is involuntary manslaughter? The unintentional
5 killing. Well, that should be it. It's got to be
6 unintentional. Unintentional, without malice.

7 We've got malice expressed. We've got it
8 inferred with the use of the gun. We've got it
9 inferred, shooting in there with a malignant heart
10 while other people are in there. That should stop
11 your inquiry the State submits.

12 If you want to go on, while engaged in an
13 unlawful activity not amounting to a felony. It's
14 certainly there. Circumstantial evidence? He
15 pointed the gun, pointing and presenting a firearm.
16 It went off in there. That means he doesn't get
17 involuntary manslaughter. You shouldn't even get
18 past unintentional malice, by the way. But if you
19 do, it's knocked out there.

20 If you go on and just want to, unintentional
21 killing without malice while engaged in an unlawful
22 activity not amounting to a felony, not naturally
23 tending to cause great death or bodily injury. It's
24 a loaded .357 Ruger .40 caliber gun. It's naturally
25 going to tend to cause death or great bodily injury.

1 And it did. John Johnson is dead.

2 Also under involuntary manslaughter, once you
3 rule that out, we submit you will, you'll also be
4 able to consider involuntary manslaughter, the
5 unintentional killing without malice. Again, you
6 shouldn't get past that on either prong. But there
7 are two different ways for involuntary manslaughter.

8 While engaged in a lawful activity. There is no
9 lawful activity he's engaged in. Even if he said,
10 well, I don't know if he's pointing and presenting a
11 gun or not, but there isn't a bullet hole in the car,
12 is there? While engaged in a lawful activity.

13 The judge is going to charge you about a
14 concealed weapons permit. You've got a right to
15 conceal it. You've got a right to have it in your
16 glove compartment. If you're taking it and going
17 somewhere, in your house you've got a right to take
18 it. You can't sit in a car with a Ruger .357. I
19 wonder if that's why he doesn't remember. You don't
20 even get that prong, while engaged in a lawful
21 activity, because he's not. He should already be
22 gone, by the way, because it's unintentional.
23 There's plenty of malice here. But it's clearly not
24 engaged in a lawful activity.

25 And then also involuntary manslaughter, if you

1 somehow were to go on down for academic reasons and
2 discuss it, reckless disregard for the safety of
3 others. Now, he is going to spend a lot of time on
4 that, a lot of time on this trying to tell you all
5 what this is I submit. Reckless disregard for the
6 safety of others. That's consciously not exercising
7 ordinary care. Consciously not exercising ordinary
8 care.

9 Well, wantonness, depraved heart, extreme
10 recklessness of murder. Malignant heart is extreme
11 recklessness, not only knowing you're not exercising
12 ordinary care; wanting to, depraved heart, don't care
13 what's in there, that's the difference. And that's
14 what he did. He is going to be trying to argue this
15 is what he did. You'll never get to this, by the
16 way, as you got through the law, we respectfully
17 submit.

18 I was debating whether to do this or not. But
19 I'm going to give you two examples. Murder, I think
20 you know, as we feel the evidence is, you come out of
21 Chastity's, you fire in there, we've got express;
22 we've got inferred malice. People were inside. To
23 get this on involuntary manslaughter, I don't think
24 you can get it. But if you try to explain how you
25 can do it, let's say you've been to an abandoned

1 building. Okay? You've been inside and didn't see
2 anybody in there. You come back and you say, you
3 know, I think I'll just shoot in there.

4 Well, number one, it wouldn't be an
5 unintentional. Okay? But let's say an unintentional
6 killing without malice. Well, you're using your gun.
7 So you can infer there malice. Okay? But let's say
8 this. While engaged in a lawful activity. Well,
9 shooting into a building isn't a lawful activity.
10 That's fine.

11 Let's say you want to go on beyond that with
12 reckless disregard for the safety of others. Well,
13 you know, I shot in there. There wasn't anybody in
14 there before. It says abandoned. Somebody just
15 happened to walk in the back and I hit them. Maybe.
16 Didn't see anybody poking out. Wasn't threats.
17 Would that potentially be involuntary manslaughter?
18 I don't think so. Even under that scenario, you'd
19 never get there.

20 And I wonder whether I should even argue this to
21 you all. But you can't explain it. Even in that
22 case, maybe if it was abandoned and you hadn't given
23 anyone any threats. But you still never get there
24 here. This case he got threatened. He threatened.
25 He shot. He'd been in there. It was crowded.

1 You've got the right to come back with involuntary
2 manslaughter. Lady Justice has the right. We
3 respectfully submit that isn't the evidence. We'd
4 ask you to consider it and then move on to murder.

5 Pointing and presenting a firearm, 460.

6 Consider this for this charge. The defendant is
7 charged with pointing and presenting a firearm. The
8 State must prove beyond a reasonable doubt the
9 defendant presented or pointed at another person a
10 loaded or unloaded firearm.

11 Linfert and Gwyn say when they came in, yelled
12 police, saw him right there at the front of the
13 hallway. He moves back inside. They go in. The gun
14 was pointed at them. You remember when Mr.
15 Harpootlian asked Gwyn, well, have you been to target
16 practice? You shot all those times? Didn't hit
17 anybody? He'd never been to practice when somebody
18 pointed a gun at him. Was he scared? Yes, he was
19 scared. Linfert and Gwyn told you he pointed a gun
20 at me and we fired. That's pointing and presenting a
21 firearm.

22 You'll be able to consider the defense of
23 habitation. The defense of habitation, analogous to
24 self-defense. If the defendant or a member of his
25 family is being attacked in his home or he had reason

1 to believe that he or a member of his family was
2 being attacked, the defendant may use force necessary
3 to protect himself or his household from death or
4 serious bodily injury.

5 If he hears them, if they bang on the door, they
6 come in. And all you have to judge as far as the
7 defense of habitation is whether his statements as
8 well as his involuntary intoxication is his
9 credibility or believability. And I'm going to get
10 to that right now as I finish up.

11 Credibility, believability. He says when they
12 came in they shot me right off the bat. Incredible.
13 There is nothing backing that up. Now, his expert
14 tried to back him back down the hallway toward his
15 room. But his first statement is they shot me when I
16 came out. No, sir. No, ma'am. The flesh, the
17 tissue is back in the bedroom, back in the bedroom
18 above back in the back wall where Linfert and Gwyn
19 said he pointed the gun at me and we shot.

20 Go look at the pictures. Look at State's 73.
21 Look at State's 73. He's back in the hallway. He's
22 in the hallway and they're shooting in. Look at
23 State's 74. The door is open. That's consistent
24 with him going for the gun. The blood is right near
25 in the bedroom. State's 72. Here is where these

1 other officers, Baker and those fellows, were firing,
2 straight on. And I'm going to get to that in a
3 minute. He wasn't shot in the hallway.

4 Credibility, believability. He thought he was
5 being attacked by burglars? And all that is going
6 through his mind when they're coming in. I thought
7 he couldn't remember. That's incredible. Burglars
8 coming in and say, this is Sheriff's Department. And
9 then he makes the Sheriff's Department prove themself
10 to him, who they are, before he turns himself over?
11 Credibility, believability.

12 Now, a couple of other things. His Honor is
13 going to charge you about the voluntariness of the
14 statement. You all will have to make a determination
15 as to whether that statement was given by Dewain
16 Herring freely and voluntarily, whether it was given
17 with hope of any reward, whether he understood his
18 rights. That's up to you all.

19 Now, you heard Lawrence and LaRosa testify.
20 They read him those his rights. He understood his
21 rights. He even initialed or changed down there in
22 the middle there to separate them. He don't
23 remember? You all will make the determination of
24 whether that was freely and voluntarily given. He
25 signed it. He initialed it. He is a lawyer. Did he

1 understand his rights?

2 Finally, credibility, believability. Every case
3 comes down to it. Every case. Every case comes down
4 to credibility and believability. Oh, one other
5 thing. I forgot to talk to you about the types of
6 evidence. Direct evidence is something you see, you
7 hear, you feel, you touch, and you come in here and
8 you testify to it. Carl saying he threatened me;
9 Donnie saying he threatened me.

10 Circumstantial evidence is proof of a chain of
11 facts and circumstances indicating the existence of a
12 fact. It is evidence which immediately establishes
13 collateral facts from which the main fact may be
14 inferred. One gun, one hole, one dead John Johnson.
15 Circumstantial evidence is just as strong as direct
16 evidence.

17 Credibility, believability. Who has got the
18 most -- who has got biases? Under the influence of
19 alcohol or drugs? Let's go through. The first
20 witness we called is Donnie Hawkins. Donnie Hawkins
21 gets up and tells you what happened that night, where
22 he was.

23 Now, on cross examination -- excuse me for
24 cussing -- what does Donnie Hawkins tell us that John
25 Johnson said right before that shot? And excuse me.

1 "Oh, shit". If you look up "Oh, shit" in Webster's
2 from a manager of a nightclub, it means he's got a
3 gun. That's circumstantial evidence, strong
4 circumstantial and direct evidence. Does he see that
5 gun right after the door is open, the shot is fired?
6 Yes, sir. Yes, ma'am.

7 And he wants to talk about his prior statements.
8 Well, the first time he told anybody that was when he
9 told Mr. Harpootlian in that taped statement. Except
10 when he told his family. We've talked to him after
11 that. That's pure.

12 Donnie Hawkins told you about the threats he
13 made, the three threats the solicitor is going to go
14 over. If I come back, somebody is going to get f'd
15 up. They were.

16 Nicole Beran is next. What does Nicole tell
17 you? She talked to him coming in. And remember, you
18 all saw the video, paid her, given her his money,
19 said, he kind of looked down on me, kind of looked
20 down on me.

21 And then we get Renisha Grainger, Ms. Grainger.
22 Now it's State of South Carolina vs. Renisha
23 Grainger. He says these things to her and all kinds
24 of women. No disrespect to anybody. Some woman can
25 go all night. I want to do that. And now he's going

1 to put her on trial when he talked to her that way?
2 Her credibility? Who came to her?

3 And then she gets upset. Okay. She gets upset
4 because "Jon Jon" is dead. And, oh, Ms. Murphy, they
5 called Ms. Murphy later. Ms. Murphy cared about "Jon
6 Jon". You saw her raw emotions. Was she saying back
7 there, oh, it's all my fault? Yeah, it was. When he
8 questioned her about it, what did she tell him? Mr.
9 Harpootlian, yeah, I didn't have to come to work that
10 day. I didn't have to be there. I could have done
11 something else. That's what she meant. It wasn't
12 her fault. Going to put her on trial.

13 And what does Ms. Murphy say? Ms. Murphy says
14 he didn't even get his money back. Is that
15 consistent with somebody trying to steal or rob you?
16 Renisha Grainger.

17 After that is Angel Koon, and Angel Koon
18 testified about the film. Then she testified about
19 the threat. They told her that he threatened them.
20 No cross on that. No cross on that. She said they
21 told me he threatened them. That's pure.

22 And then next you get Carl Weeks. He says Carl
23 Weeks, who is still here and has been here the whole
24 trial. He says Carl Weeks says he treats women like
25 dogs, I think it was. Go back in the video. He told

1 Ms. Grainger just to get back there as things heated
2 up. Was he laughing at the person that came out in
3 the camera? Yeah. It was kind of unusual and funny.
4 But then you see him when he's peering around the
5 corner, watching him. He's out there waiting all
6 those minutes. It ain't funny then. It's not funny
7 then. It gets serious then.

8 Treats people like dogs? Where do you see that?
9 He's telling her to get back out of the way.
10 Solicitor Giese will talk you to you about Mr. Weeks'
11 threats.

12 What do we do after that? Then Ray Livingston
13 gets put on trial. I told you all about that. Then
14 you move over to 460. And we spend days and days and
15 days at 460. You hear Linfert and Gwyn come in. And
16 what's the cross on Gwyn? This is credibility and
17 believability. Think about this. Gwyn's statement,
18 his notes, what does he say? Well, you didn't say
19 this in here. Gun, gun, drop the gun. You didn't
20 say this. What did you stay? Drop the gun. Trying
21 to keep a smoke screen out of that.

22 Then you had Coonfield testify. And Coonfield
23 said, yeah, when there are a bunch of officers
24 firing, we try to figure out the origin of where it
25 came from. That's all we can tell you. We can never

1 tell you exactly where something is coming from. At
2 Chastity's you know the origin of where it was. You
3 could never be able to say where it was.

4 Then we called John Baker. We called John
5 Baker. And he puts John Baker on trial. And what
6 does John Baker tell you? Yeah, I came in. I knew
7 he was a suspect. I knew he was wanted for murder.
8 I hear gun. I see flashes. Yeah, then I fired to
9 where I thought the threat was. I fired through that
10 wall to eliminate the threat.

11 If he tries to make a comparison between that
12 and Chastity's, let him do it. They were there on a
13 lawful search warrant. He was trying eliminate the
14 threat, take care of his buddies, and he was trying
15 to eliminate the threat.

16 Dewain Herring was eliminating his threat as he
17 saw them and you go back through. And guess what?
18 You remember this whole intentional doing of a
19 wrongful act without just cause or excuse? He didn't
20 have any just cause or excuse. Those officers had a
21 right to be in there with a lawful search warrant.

22 Did he wish he hadn't fired there? Yes. Did he
23 wish he hadn't hit Linfert? Yes. Was he upset?
24 Yes. But he was there legally. And all you have to
25 base his testimony on is his credibility, and he says

1 he got shot as soon as they came in. That's
2 impossible. It didn't happen that way.

3 After we go to Coonfield, again Investigator
4 Lawrence, Investigator or Special Agent LaRosa,
5 Special Agent Wilson, Solicitor Giese will talk about
6 those. Listen to what he says about their
7 statements. Then you come into Chuck Earles we've
8 talked about. Eddie Porter testifies. And then Jay
9 Russell comes in and brings the fragment from the
10 brain of John Johnson to Stan Kessler. No evidence
11 of concrete or anything on there; this ricochet
12 theory, if you want to even consider that.

13 You've got then Stan Richards, Joe Powell, Vello
14 Paavel, Stan Kessler and Stan Smith. Stan Smith.
15 Stan Smith. On the 911 tape he said he may be
16 confused; he may be not sure what's going on. He
17 remembers Stan Smith and Lancy Weeks. That's a good
18 Sheriff's Department. In the heat of the battle down
19 there, I remember Stan Smith. He's already
20 formulating his defense. He says he cocked his gun
21 and uncocked it under that heat of the battle; and
22 yet, somehow that gun goes off as Solicitor Giese
23 crossed him? Well, I'm not sure. I cut it off. I
24 wasn't sure. Again I cocked and uncocked the gun
25 where all these guns are. And he can remember Stan?

1 And, folks, then finally I saved it for last,
2 it's involuntary intoxication. In order to be
3 entitled to involuntary intoxication, the defendant
4 must prove two things. He had knowingly or voluntary
5 consumed or ingested a foreign substance which
6 brought about the involuntary intoxication. As a
7 result of that, he lacked the capacity to know right
8 from wrong, right from wrong.

9 You may also consider the state of intoxication
10 of the defendant before and after the foreign
11 substance was consumed. He had 17. He tries to back
12 it down now to make this substance look like it
13 brought it up. That's what he's trying to do. He
14 knew right from wrong. Through their own doctor,
15 knew right from wrong.

16 Mr. Holbrook or Dr. Holbrook, the professor who
17 deals with animals, what does he say? I said,
18 Doctor, that couldn't have affected your memory
19 before he took it, could it? He said, no, sir. So
20 when he told the police officers that I had been at
21 bed at 11:00 and hadn't gone anywhere, that's a lie,
22 isn't it? That's a lie. And when you don't tell
23 police officers you've been somewhere where you just
24 shot through the door and killed somebody, you know
25 the difference between right and wrong? You know

1 that was wrong.

2 Credibility, believability. And they call Mr.
3 Yates. They call Mr. Yates who will tell you the
4 exact position of where Dewain Herring was even
5 though he doesn't know the entrance and exit. But he
6 can't tell you, well, that could be a bullet coming
7 from there. I just can't say. And he wants to claim
8 there's prostitution at Chastity's?

9 Credibility, believability. And finally, and I
10 am going to close with Dr. Holbrook. Do you have an
11 opinion? Yes. Have you reviewed the statements?
12 No. You haven't seen any of the statements? No. He
13 has to say no. Would that maybe make you change your
14 opinion? It might. Gives him those statements up
15 here on redirect, let him look at them a little bit
16 and then takes them up. Okay. That's enough. Does
17 it change your opinion? No.

18 What about Carl Weeks' statement? You didn't
19 see what he said? Well, no, I didn't get that one.
20 You get to watch him perform some of his examination
21 or his trying to figure out what his opinion is right
22 in front of you. That's incredible.

23 And this involuntary intoxication as well as
24 defense of habitation, they have to prove that.
25 That's called an affirmative defense. He has to

1 prove that beyond the greater weight of the evidence,
2 51 percent. Greater weight of the evidence. Dr.
3 Holbrook, it was negative. Excuse me. It was zero.
4 He even said up here his opinion could change if he
5 looked at everything.

6 Demi Garvin gets up here. It's minus 100.
7 Gives her that report which deals with psychiatric
8 juveniles? He is exhibiting no behavior whatsoever
9 consistent with that. He's thinking. He's coming
10 back. They haven't proved that, furthered their
11 defense. That's why read it, consider it and put it
12 behind you. An affirmative defense they have to
13 prove by the greater weight of the evidence. They
14 didn't do it.

15 Ladies and gentlemen, I want to thank you. I
16 don't think I quite used up my time. Did you hear
17 Joye, Ms. Cameron, the last witness? Did you hear
18 her? I'm just there to help. Was he under the
19 influence? No. He was oriented times three. How
20 would you describe him? He was just rude. That's
21 the real Dewain Herring. Your greatest power, my
22 father gave me a book, Your Greatest Power. And your
23 greatest power is your power to choose, your power to
24 choose.

25 You all are fixing to go exercise your greatest

1 power. All we can do is ask you when you're
2 exercising it, you use that power when judging what
3 you heard, the credibility, the incredibility,
4 believability. You take the law Judge Cooper is
5 going to give you and you exercise that power.

6 We say it's a verdict of guilty of murder,
7 ladies and gentlemen. That's what we're asking for,
8 is murder. Based on the express inferred malice,
9 it's wallpapered with murder. But I want to ask you
10 one other thing. Lady Justice. John Johnson is
11 entitled to the same justice. And we're asking for
12 it, as the manager of Chastity's Gold Club as he
13 would be if he was the manager of the Forest Lake
14 Country Club. Nothing more, certainly nothing less.
15 Thank you.

16 **THE COURT:** Mr. Harpootlian.

17 **MR. HARPOOTLIAN:** I need a brief recess, Your
18 Honor, to coordinate my exhibits.

19 **THE COURT:** To organize the exhibits?

20 **MR. HARPOOTLIAN:** Yes, sir. I mean, I have
21 to --

22 **THE COURT:** All right. All right, ladies and
23 gentlemen. Let's take about --

24 **MR. HARPOOTLIAN:** Five?

25 **THE COURT:** This indeed will be a short break.

1 Go to your jury room. Don't start to discuss the
2 case. Counsel needs to organize, or reorganize I
3 probably should say, the exhibits in this case so
4 that he can make a coherent presentation to you.

5 MR. HARPOOTLIAN: Thank you, Your Honor.

6 (Jury out at 1:50 p.m.)

7 THE COURT: All right, sir. You may proceed.

8 MR. HARPOOTLIAN: Your Honor, Mr. Meadors
9 mentioned -- I think it's something that we all
10 overlooked in the charge. I don't know how --

11 THE COURT: I put it in.

12 MR. HARPOOTLIAN: It's in?

13 THE COURT: It's in.

14 MR. HARPOOTLIAN: Could we see what you're going
15 to say?

16 THE COURT: Organize your exhibits, please.

17 MR. HARPOOTLIAN: Sir?

18 THE COURT: Organize your exhibits. You told
19 the Court that's what you're going to do.

20 MR. HARPOOTLIAN: Yes, sir. I just wanted to --

21 THE COURT: It's just a standard statement of
22 the defendant.

23 (Whereupon, a break is taken)

24 MR. HARPOOTLIAN: Your Honor, I'm ready.

25 THE COURT: Come to order. If you're ready, you

1 can take a seat.

2 **MR. HARPOOTLIAN:** Yes, sir. I'm sorry. I'll
3 move back so you can see.

4 **THE COURT:** That's all right.

5 **MR. HARPOOTLIAN:** Yes, sir.

6 **THE COURT:** Bring the jury, please.

7 (Jury in at 1:59 p.m.)

8 **THE BAILIFF:** The jury is seated, Your Honor.

9 **THE COURT:** Thank you very much. All right, Mr.
10 Harpootlian, you may proceed.

11 **MR. HARPOOTLIAN:** May it please the Court, Your
12 Honor. Madam Forelady, ladies and gentlemen of the
13 jury, it's been two weeks since we've met. Little
14 did you then know that's the way it happens. I think
15 I'm that guy that stood in front of you almost two
16 weeks ago and said that jury duty is the highest duty
17 one can perform for one's country in peacetime. And
18 as you look back at me, I didn't see that you
19 comprehended that, the sacrifice that would be
20 involved in this service. You now I believe have a
21 little better understanding of how serious this
22 service is and what a role you have to play in this
23 country of ours.

24 Because, you see, we all have a role here. We
25 all have a role under the law. And this case is

1 about the law. It's not about John Johnson. It's
2 not about Dewain Herring. It's not about how you
3 feel about strip clubs or don't feel about strip
4 clubs or people that go to them. It's about the law.
5 It's about the law.

6 I told you again almost two weeks ago about the
7 presumption of innocence. And this judge is going to
8 charge you with that presumption in a moment.
9 Remember I told you that many of you probably were
10 sitting around having a cup of coffee before you got
11 here, reading the newspaper, watching television.

12 You may have read or saw that the police had
13 arrested somebody and charged them with a heinous
14 crime. And you, like me or anybody else in this
15 world that read that, felt relieved. You felt
16 relieved because the police had apprehended this
17 dangerous criminal. And you did something that was
18 very natural, very acceptable and very normal. You
19 presumed that person guilty.

20 So, you see, I said to you your role in this
21 world changed when you put your hand up and took the
22 oath to follow the law. Because you have to do
23 something so unnatural, so unique, so out of the
24 normal thing that you do on your day-to-day basis
25 that is going to take every ounce of self-control you

1 have now, to follow the law.

2 Because Dewain Herring is presumed innocent. As
3 you look over there at him right now, you should see
4 him as innocent. If you follow the law, you've not
5 made up your mind. If you follow the law, that
6 presumption of innocence as the judge will tell you,
7 will follow him into your jury room and won't leave
8 him unless the 12 of you unanimously agree that he is
9 guilty of something.

10 Now, that sounds to unreal, so corny, so
11 unbelievable. But you're going to hear the judge
12 tell it to you. And if you can't follow the law,
13 then you will be breaking your oath and you will not
14 dispense justice in here. You may dispense
15 vengeance. But this isn't about vengeance.

16 I was thinking last night about trial's like
17 this; and that is, where somebody is accused of a
18 very unpopular act. And I thought back to a book I
19 read as a young man about John Adams, one of the
20 first presidents of this country, who was called upon
21 to perform a duty that many of us that do this kind
22 of work are called upon from time to time.

23 There had been a massacre. A British soldier
24 shot into a crowd of patriots in Boston. It was the
25 so-called Boston Massacre. And John Adams was asked

1 to represent one of these soldiers. And he said --
2 let me find my glasses -- "Whatever may be our
3 wishes, our inclinations for the dictates of our
4 passions, they cannot alter the state of facts and
5 evidence." Let me read that again to you. "Whatever
6 may be our wishes, our inclinations or dictates of
7 our passions, they cannot alter the state of facts
8 and evidence. The law will not unbend the uncertain
9 wishes, imaginations and wanton tempers of men."
10 That soldier was acquitted. He was found not guilty.

11 There is a history in this country of following
12 the law. That law presumes people accused of crimes,
13 accused, to be innocent. A Grand Jury returning an
14 indictment, that's not evidence of anything. You
15 look at the headlines every day. Big cases,
16 indictments dismissed. So an indictment doesn't mean
17 anything.

18 And an accusation by these officers, a warrant
19 signed, is their opinion. And their opinion is wrong
20 from time to time. But, you see, it's not that their
21 opinion is wrong; it's that they have to convince you
22 beyond a reasonable doubt that they were right. That
23 isn't a game. You might want to compare it to a
24 game.

25 You see, the judge is going to give you the law.

1 That's his role here. He is going to tell you what
2 the rules are, if you will, how you evaluate
3 evidence, what you're allowed to consider, what
4 you're not allowed to consider. And if this were a
5 baseball game, you're like the umpire. You know that
6 the strike zone is that tall but you make the call.
7 With one huge difference. Anything, any close call,
8 any call that you're not 100 percent certain of goes
9 to the defendant.

10 I told you in opening statement about a trip I
11 made to Scotland. And in that I told you that
12 Scotland, England, Britain is where this process
13 we're participating in came from. If you go into a
14 court like I did there, you'll see juries sitting
15 like this and a judge. And he may have a wig on, may
16 look a little bit different. But it's the same law.

17 And I told you in Scotland they have three
18 verdicts, not two: Guilty, not guilty, and not
19 proven. And we've combined those not proven and not
20 guilty verdicts into one verdict in this country of
21 not guilty. Because if the State fails to prove
22 their case beyond a reasonable doubt, the verdict is
23 not guilty. It does not mean that you've found that
24 the defendant didn't do anything wrong; it's that
25 you've found that the State did not prove it to you

1 beyond a reasonable doubt.

2 Now, what's a reasonable doubt? The judge is
3 going to tell you a reasonable doubt is the kind of
4 doubt that would cause a reasonable person to
5 hesitate. To hesitate. To hesitate. That's the
6 rule. That's the law: To hesitate. Proof beyond a
7 reasonable doubt is proof that leaves you firmly
8 convinced of the defendant's guilt.

9 If, on the other hand, you think there's a real
10 possibility the defendant is not guilty, you must
11 give the defendant the benefit of the doubt. So if
12 not proven beyond a reasonable doubt is the standard,
13 does Mr. Herring, does Dewain Herring have to prove
14 himself innocent, or does the State have to prove him
15 guilty beyond a reasonable doubt?

16 I heard Mr. Meadors talk about a smoke screen,
17 we're trying to distract you. You know, this isn't a
18 civil case. This isn't John Johnson suing Dewain
19 Herring where if you looked at the scales the
20 preponderance of evidence standard more likely than
21 not, you tip it just a little bit and one sides wins.
22 This is a criminal case. Beyond a reasonable doubt,
23 they have to the tip the scales dramatically. They
24 have to prove beyond a doubt which would cause a
25 reasonable person to hesitate to act. It's got to be

1 solid evidence. It's got to be evidence that when
2 you go back in that jury room leaves you with no
3 hesitancy to act. So, ladies and gentlemen, I want
4 to walk through this evidence and see if it causes
5 you to hesitate to act.

6 We'll talk about involuntary intoxication last.
7 Because involuntary intoxication is a complete
8 defense. That is, if you find that we proved to you
9 by a preponderance of the evidence through our case
10 that he was involuntarily intoxicated, that's tipping
11 the scales ever so slightly, then the State has to
12 prove to you beyond a reasonable doubt that he
13 wasn't; that is, beyond a -- and I know these sound
14 like word games. But let me walk through that again.

15 If we prove through our evidence, Dr. Holbrook,
16 if you found him to be credible and believable, if
17 you found him credible and believable in the context
18 of the two dancers that testified, Ms. Cummings and
19 Liz, if you take all that together and you believe
20 that we ever so slightly tipped those scales in our
21 favor, by the preponderance of the evidence, his
22 testimony alone was enough to do that, then the State
23 must prove to you beyond a reasonable doubt that he
24 wasn't.

25 So the first of your analysis should be, forget

1 the State's case. Did we prove to you by the
2 preponderance of the evidence that he was? More
3 likely than not, 50.1 percent, if you will. If we
4 did, then the evidence from their expert would have
5 had to convince you beyond a reasonable doubt that he
6 wasn't.

7 Listen to the judge. He will tell you these
8 terms again. But I want to talk about all the other
9 evidence and lack thereof. The video, you're going
10 to see it. What do we know about the video? We know
11 there are three, four cameras, three cameras, four
12 cameras counting the one inside, and they -- this one
13 right here at the top of the store captured image
14 after image after image after image of Dewain Herring
15 coming and going, talking, walking and leaves.

16 Now, what do we know about what we see on that
17 video at the time the shot was fired? The State put
18 forensic ballistics people on the stand. We put Mr.
19 Yates, Mr. Yates who was the head of the Alabama
20 Firearms Laboratory for 20 years, Mr. Yates who has
21 examined hundreds if not thousands of crime scene
22 photos, of weapons, and is a forensic expert
23 unparalleled, as good as Mr. Paavel.

24 The uncontradicted testimony is that that video
25 does not show from any angle the kind of flash you

1 would see with the firing of a .357 Magnum in that
2 kind of light. He indicated there would be a
3 conical, like an ice cream cone about a foot and a
4 half, two feet long, and he would expect it to be a
5 about a foot wide. Not from that camera, not from
6 the side camera, not from the other side camera.
7 Nothing.

8 The uncontradicted testimony is -- no expert --
9 they didn't put an expert up in reply. They put
10 other experts up in reply. They didn't call a
11 ballistics expert to say, oh no, no, no, no, no. No,
12 I wouldn't expect to see that. I wouldn't expect to
13 see a flash like that.

14 So the only evidence that you have, and it's
15 evidence, not conjecture, not your personal
16 experience, it's this witness's testimony that you
17 would see a flash. Unless, unless the gun was below
18 the window line. And he says for it to be below the
19 window line you can't be doing that. You can't be
20 pointing it. It has to be held forward between the
21 passenger's seat and -- let me see if it can find
22 it -- between the passenger's seat and the glove
23 compartment, in that area. If you look at State's
24 Exhibit No. 32, in this area up here.

25 Now, what do we know about the crime scene

1 processing, the processing of that car? The officer
2 testified he took GSR off the back of the seat but
3 not the bottom of the seat. He took GSR around the
4 window but not on the glove compartment or on the
5 floor. They had the car. We don't have a GSR lab.
6 They did. So there is no evidence gathered by the
7 State that contradicts what Mr. Yates says.

8 In addition, he took measurements of the car.
9 He took the video and he determined that to be where
10 the front of that car was, where the wheel was, he
11 measured back, that no one could sit in the seat
12 unless they leaned up and did like this to get the
13 shot.

14 Remember now, the shot goes through the far,
15 looking at it, right-hand side near the hinges, not
16 where, if you would believe the theory of the State;
17 I say theory of the State because there's no witness
18 saying John Johnson had his head out this door. Not
19 Donnie Hawkins, not Angel Koon, nobody.

20 He looked out once. We don't know what the door
21 was open for. He may have just pushed the door open.
22 We don't know. And Donnie Hawkins originally said in
23 his statement to the police on the night in question
24 that he was standing next to him when he was shot,
25 conceded after looking at the video that his

1 attention was somewhere else for 25 seconds before
2 the shot, that he wasn't watching, that he didn't
3 see.

4 And 14 months later, 14 months later he has an
5 epiphany. Oh, I heard John say, "Oh, shit". He
6 didn't tell the police an hour after the shooting
7 that John had said anything and he was wrong about
8 where he was standing.

9 Now, what I'm telling you is this. People in
10 these kinds of situations, and this is common
11 experience; you know, you didn't check your common
12 sense at the time front door, people that go through
13 trauma, a car wreck, they witness a car wreck, they
14 witness something traumatic, they have difficulty
15 remembering what they saw. Sometimes they add to it.
16 Sometimes they subtract.

17 But what I'm telling you is Donnie Hawkins'
18 credibility, if you look at what he told the police
19 and then look at the video, and you'll have it back
20 there, he tells the police I'm standing next to him
21 when he gets shot. And, in fact, the video indicates
22 he's got his back to him.

23 So he didn't see John Johnson stick his head
24 out. He didn't see John Johnson stick his head in.
25 He didn't see him get shot. I submit to you he

1 didn't hear him say anything. And if he did hear him
2 say "Oh, shit", it could have been for a multitude of
3 reasons, stumbling, shutting his hand in the door,
4 falling back. He didn't hear him screaming.

5 So, when I say to you proof beyond a reasonable
6 doubt, the first thing you've got to say to yourself
7 is, you've heard expert testimony that has gone
8 unchallenged. They could have recalled their
9 ballistics expert to say, oh, no; I looked at this
10 situation, and would not expect to see that kind of
11 flash. You don't hear that.

12 I looked at the measurements on this car. I
13 went back out to the scene like Mr. Yates did, and
14 you could do it other than putting the gun low. You
15 didn't hear that.

16 And the Richland County Sheriff's Department has
17 the door where the hole went. They put a number 1 on
18 the outside, a number 2 on the inside. And not
19 15 feet from this door is a box full of wooden
20 dowels. You can stick a hole through that and find
21 out what the trajectory was. Was it going up? Was
22 it going down? Was it going sideways? They have the
23 burden of proof. And if it's open to multiple
24 interpretations or conjecture, you have a reason to
25 doubt.

1 Ricochet. Oh. Mr. Livingston testified he
2 never looked for evidence of a ricochet, never looked
3 for it, never once looked for it. Went out and
4 looked for some shells, admits that ricochets could
5 come off of the brick, the metal, the side.

6 If the gun goes off and hits this brick pylon
7 and ricochets through the door, that's not murder.
8 That's probably not even manslaughter. If it hits
9 that metal, if it's in his hand and goes off, that's
10 not even involuntary manslaughter.

11 And what's the evidence before you? The only
12 evidence about where the gun is, forensic evidence,
13 is it's down near the glove compartment below the
14 level of the window. Uncontradicted, uncontroverted.

15 No evidence on the trajectory of the bullet, so
16 we can't say it's true; we can't say it's untrue.
17 But wouldn't you like the state of South Carolina to
18 have provided you -- does this give you a reason to
19 hesitate, hesitate to act? Does it bother you? I
20 submit it should.

21 I mean, you know, oftentimes we look at
22 television and we see these CSI shows. We wonder if
23 that can be true or not true. But sticking a wooden
24 dowel through a hole? This isn't sophisticated crime
25 scene processing. This isn't a sophisticated crime

1 scene tool. This is a tape measure you can buy in
2 Wal-Mart. We don't have any measurements except from
3 a spot of blood to one quarter of the door and
4 16 feet, 3 inches hallway to wall near office. It
5 makes no sense whatsoever why you would want those.

6 They concluded when they saw the video this case
7 was over. Car pulls up, a shot fired: Bang. Done.
8 Guilty. They concluded that night that they didn't
9 need to do anything else. But you do.

10 I'm not putting the Richland County Sheriff's
11 Department on trial. I'm not putting Johnson on
12 trial. I'm not putting Chastity's on trial. What I
13 am putting on trial is the quality of evidence that's
14 been provided to you. And if it leaves you
15 uncomfortable or gives you a reason to hesitate to
16 act, then you should acquit. You should find him not
17 guilty. Not proven. It's a serious thing to do.
18 It's not very popular either. John Adams did the
19 unpopular thing but the right thing.

20 The processing the crime scene information from
21 Chastity's provided by the State is worthless except
22 a video that doesn't show a flash that's consistent
23 with a .357.

24 Let's go to Now, Mr. Meadors
25 would tell you this is a distraction. I'm sorry.

1 He's charged with pointing and presenting a firearm
2 at his house. And lest we forget, this is what his
3 house looked like when the police got done with it:
4 17 bullet holes in the walls and one in him.

5 The undisputed evidence is that Dewain Herring
6 is deaf. The undisputed evidence is he can't see
7 clearly without his glass. The undisputed evidence
8 is, let me suggest this to you, the police came about
9 2:00 banged on his door with a flashlight, rang the
10 doorbell, nobody came to the door. I say he was
11 asleep, dead to the word. He has his C-pack mask on,
12 no hearing aids, and he was asleep, didn't hear even
13 the doorbell. And his wife indicates that not
14 unusual.

15 When they knocked his front door in, he got up
16 to see what it was. His testimony is that he got out
17 of his bed. Here it is. Walked down this hall, got
18 to about here and saw a bunch of people coming in.
19 Dim light. Some of the police officers say they had
20 flashlights. Some say they didn't. He immediately
21 thought he was being burglarized, so he ran back this
22 way.

23 Now, what's interesting is Linfert and Gwyn say
24 he got back down here when he got shot. But the
25 officers that fired, the ones that fired ten shots in

1 here, the one that testified, Baker I believe his
2 name was, said he shot where he thought Mr. Herring
3 was. And where did he shoot? Through the wall in
4 the hall. He's shooting through this wall.

5 Mr. Herring, the uncontradicted evidence
6 again -- by the way, they said they shipped the slug
7 they took out of the wall for DNA. Have you seen any
8 DNA testimony? Have you seen anybody testify what
9 happened to the flesh they took off that slug that
10 they took out of the wall in his bedroom? They cut
11 it out. They sent it to SLED. There's little specks
12 of blood on it.

13 Nobody ever tested it. And this is the slug
14 they say had his flesh on it. Where is that
15 testimony? We've got to assume this is his flesh
16 because nobody else got shot that night.

17 And what does Mr. Yates do there? I mean, he's
18 worked for the State for 20 years. He does a pretty
19 simple thing. He takes Mr. Herring, and his
20 testimony is that he lines up the entrance and exit
21 wounds with a laser and puts that where it appears in
22 the picture about 4.4 inches off the ground. You
23 remember him doing this. And then he put a laser to
24 the wound in his arm. You saw him do it. It matched
25 up perfectly. It only matches up in two places, in

1 the hall and near the bed. But in both instances
2 Dewain Herring's back is to the officers.

3 And I tell you what happened that night. You
4 don't have to find this as a -- you don't have to
5 find what I'm telling you beyond a reasonable doubt
6 to be true. But those police got the hell scared out
7 of them that night. They didn't expect Dewain
8 Herring to be there. They didn't expect anybody
9 there. They banged on that door at 2:00. No answer,
10 no light, no movement. They banged on that door
11 again at 4:30. No lights, no movement. They thought
12 they were going into an empty house. And out of that
13 hall popped somebody; scared the hell out of them.
14 And he runs back and they panicked.

15 I don't know whether Linfert shot first or Gwyn
16 shot first or Baker shot first; but nobody has ever
17 seen this many shots fired. And one of them hits him
18 in the arm. And the uncontradicted evidence,
19 physical evidence, not what people are saying in the
20 heat of battle, but physical evidence is that Dewain
21 Herring is standing with his back to the officers,
22 that bullet goes through his arm and embeds in the
23 wall.

24 I mean, the State had the opportunity to call
25 somebody to contradict Mr. Yates. Did see them? Did

1 you see anybody take this stand and say, oh, Mr.
2 Yates is wrong. This is how it could have happened.
3 Not one. So where is the evidence? You know,
4 oftentimes you hear people say you can't see the
5 forest for the trees. They don't want you to see the
6 trees for the forest. They want to paint with a
7 broad brush.

8 There's no concrete or metal on the slug, and
9 yet they know that there are bits and pieces of stuff
10 left in Johnson's skull. They know that going
11 through that hole could knock it off. They know
12 everything Yates told you, Mr. Yates told you has
13 been uncontradicted. And yet they'll argue to you as
14 Mr. Meadors did a moment ago, oh, well, they didn't
15 find any concrete or metal on the slug. Did somebody
16 testify to that, that it couldn't be knocked off?
17 No. Even Mr. Paavel said it could be knocked off.

18 So what do we have? We have a life changing,
19 life ruining experience for this guy over here who
20 told you from the stand it's been a horrendous
21 experience, and he apologizes to the Johnson family,
22 to his family and to everybody. This is the end of
23 his life, the end of his life because of a stupid
24 decision brought on by drinking that took him to
25 Platinum Plus and took him to Chastity's that night.

1 And let's talk a little bit about Chastity's
2 because we're going to talk a little bit about
3 involuntary intoxication. I must be old-fashioned.
4 You know, I've been in this courtroom for 35 years.
5 Like I said, I was a prosecutor for 12 with Mr.
6 Giese. Mr. Meadors and I worked together. I've been
7 on the other side of the courtroom on and off about
8 20 years or so.

9 And I've never heard the testimony I've heard
10 from this witness stand about what goes on in our
11 community with the legal approval of the authorities,
12 that women get naked and are paid \$300 or \$30 to sit
13 on the laps of men and grind their naked genitals
14 into their genitals, into their covered genitals or
15 whatever.

16 It's going on tonight, went on last night,
17 apparently will go on tomorrow night. And the girls,
18 the dancers testified that when somebody comes in
19 looks like they have some money, they're pointed out.
20 And what are they there to do, according to Ms.
21 Grainger? Separate them from their money. She was
22 happy that night when they threw Herring out because
23 she got 300 bucks for doing nothing.

24 What did Nicole Beran say? He didn't look like
25 he belonged here. He looked different. And that's

1 what he looked like when he walked in the door, and
2 that's why Ms. Grainger went over to him.

3 Now, Dewain Herring had had some stuff to drink
4 that day. And Chris Isgett has come in. He's a
5 lawyer, a reputable guy, and indicates that what he
6 thought he had to drink was significantly less than
7 he said in his statement. We'll talk about his
8 statement in just a minute.

9 But it still was a lot to drink. But it didn't
10 impair him. It didn't intoxicate him. He drove.
11 Everybody that testified, everybody that testified
12 from Chastity's said he appeared to be sober, not
13 impaired.

14 But, you know, you've got to look at the
15 details. What did Grainger testify to? She
16 testified that after he had a drink they went back
17 and had a dance, a lap dance in the VIP room. They
18 left their drinks out here. Renisha didn't. She
19 wouldn't leave her drink out there uncovered. She
20 wouldn't come back and drink out of a drink that's
21 been left on the bar. Why? Because people put stuff
22 in it.

23 But Dewain comes back and he continues -- she
24 said he continued to drink his drink. After a little
25 while, after they talked a little while, she tries to

1 sell him on a \$300 dance in the champagne room where
2 he says bizarre things like, why don't we just do it
3 right here? Why do we have to go back there? I
4 don't want to go back there, man. Man, I'm tired. I
5 don't want to go back there. Let's do it right here.
6 And says sexually suggestive things, indicating I
7 submit to you if you listen to her testimony, he
8 wanted to have sex in the bar out in front of
9 everybody.

10 He then goes back to the champagne room. She
11 takes his \$300, gives 65 bucks to the house and keeps
12 the rest for herself. She's going to go freshen up.
13 And then she goes to the dressing area where she
14 waits to freshen up. As she did two lines of coke,
15 she had something drink. And she waits and then is
16 informed he's been thrown out because he's been found
17 naked masturbating in the champagne room.

18 You know, we saw Carl Weeks laughing about it.
19 I mean, if this guy was threatening to kill him, if
20 this guy posing a serious threat, what's he laughing
21 about? I mean, this is just another chump they've
22 thrown out, right? Another chump that some stripper
23 has enticed back into the champagne room to do
24 something inappropriate so they can get their money
25 and throw him out.

1 Now, we know from Liz and Ms. Cummings that
2 dancers, female bartenders hand dancers drinks with
3 Rohypnol or with a Rohypnol type drug in it. We know
4 that because both Dr. Holbrook and the State's
5 evidence that indicate that the symptoms are classic.

6 We know that Liz drove from the club to
7 Blythewood with no memory whatsoever of it, that she
8 was able to operate a motor vehicle, did not appear
9 to be intoxicated, stopped at a gas station, has no
10 memory of that, and then went a little bit further
11 and got stopped by a Richland County Sheriff's Deputy
12 who arrested her or for driving under suspension.
13 Not driving under the influence. She didn't appear
14 to be impaired. She wasn't unsteady on her feet.
15 She didn't have slurred speech. And then takes her
16 into custody, takes her to jail. She has no memory
17 of any of that, of being booked or fingerprinted or
18 going to jail. She wakes up there the next morning.

19 Now, what reason does Liz have to come before
20 you and make that up? And you've got Ms. Cummings
21 who is with her who corroborates everything she says.
22 Now, she doesn't remember getting from the club to
23 Blythewood but has more memories. Different dose?
24 Who knows?

25 But within 24 months, within 24 months Dewain

1 Herring is at that same club, at that same bar. And
2 when questioned by the police the next morning, does
3 he say he has a memory of any of that? As a matter
4 of fact, he goes to great lengths to say when he does
5 remember having been there -- let me find it. "I
6 remember the white woman with big tits. I had a
7 scotch and soda while there. I do recall, but hazy,
8 that I was there. I could not tell you if the place
9 was full or crowded or anything."

10 Hazy. Now, this is at less than 12 hours later
11 he has a hazy memory it. And of course the SLED
12 agent says, well, I said this and then he immediately
13 said that. I submit to you that he has no notes,
14 destroys his notes, destroys his notes so we don't
15 have the ability to find out whether that's -- that's
16 his recollection after 14 months; but destroys his
17 notes so we don't know exactly what he remembered.

18 He said, "Did you have any problem with anybody
19 in there?" "I went into one of the back rooms and
20 paid for a lap dance. There were other people in
21 there. The lap dance was done by a light-skinned
22 black woman."

23 Now, Mr. Lawrence is asking the questions. Does
24 he say, do you remember being caught in a room naked
25 masturbating? It's not in there. I mean, is

1 anything -- does he prompt him or ask him anything
2 about the details that he knows? He knows. He's
3 gone out and talked to the Sheriff's Department about
4 the video. And they've talked -- at that time
5 they've talked to Hawkins, they've talked to Weeks,
6 they've talked to Koon. They'd gotten statements
7 from all of them that night. They know everything
8 that he did while he was there.

9 Have they talked to him? Do they ask him about
10 that? No. Why? Why? Are they trying to get to the
11 truth here? Are they trying to find out what really
12 happened? Or were they just trying to get something
13 incriminating so they could show their guys shot
14 somebody who committed a crime?

15 The judge is going to tell you, you have to find
16 beyond a reasonable doubt that the statement was
17 voluntary. He has no recollection of signing that
18 advice of rights form. Why? Was he drugged? He'd
19 been shot. He was bleeding. And again, people in
20 that kind of trauma may have difficulty remembering
21 things just from being shot. It's a traumatic
22 experience.

23 And, by the way, they weren't interviewing the
24 police that morning about the shooting. Why? They'd
25 been through a traumatic experience. They tried to

1 kill him. That can be traumatic, trying to kill a
2 guy. I mean, if it's traumatic for the hunter to
3 pull the trigger at the deer, how do you think the
4 deer feels? They tried to kill him.

5 Only through the grace of God did that bullet go
6 through his arm rather than his heart. 17 shots
7 fired. And yet here is a guy that's going to recall
8 every detail? They don't make the police sit down
9 because they've been traumatized but they make him do
10 it. Does that give you a reasonable doubt as to
11 whether or not he was aware of his rights, aware of
12 what he was saying and giving a voluntary statement?
13 Their position is the cops weren't coherent enough to
14 do it. Why was he? He didn't shoot at them.

15 We talk about reasonable doubt. I've explained
16 that to you. And I told you that the judge is going
17 to tell you if there's a real possibility the
18 defendant is not guilty, you must give the defendant
19 the benefit of the doubt and find the defendant not
20 guilty.

21 He's going to tell you there's two kinds of
22 evidence: Direct evidence; that is, things people
23 testify they saw, they heard, they smelled, they
24 touched; and then circumstantial evidence which he's
25 going to tell you is a chain of facts. Now, I will

1 tell you a chain is only as good as its weakest link.
2 And if you have to connect a number of facts to get
3 to a conclusion and one of those facts doesn't hold
4 the rest of the chain, then there is no
5 circumstantial evidence, no circumstantial evidence.

6 And their circumstantial evidence is, because
7 the door got shot, because he made a threat back in
8 the champagne room -- and, by the way, the only
9 threats you've heard about were from Donnie Hawkins
10 saying that he said on the way out not to "Jon Jon"
11 but just generally, you better not want me coming
12 back. All that connected together is murder? That
13 he intentionally held the gun out, fired it at the
14 door? There's no one that says that. There's not a
15 single witness that says that. And the
16 circumstantial evidence, if you listen to Mr. Yates'
17 testimony, that chain is broken 15 times.

18 Now, by the way, also the testimony is that
19 while he sat in his car before he pulled out and
20 after he pulled out, he was right in this area right
21 in here before he pulled out and then came back. And
22 John Johnson was back in here getting his license
23 number and walking around here.

24 And his windows were down. You heard Mr. Weeks
25 testify to that before he ever pulled out. John

1 Johnson is 20 feet away from him, not through a door.
2 Unobstructed, walking around behind him, walking
3 around beside him 20 feet away, from here to that
4 wall. Boom. You want to kill John Johnson? He's
5 out in the parking lot. Oh, no. This is -- we're
6 going to be fair about this. We're going to wait for
7 him to get back in the door, close the door and then
8 guess where he is. No. No.

9 Circumstantial evidence. Credibility of
10 witnesses in this case. Remember Mr. Weeks?
11 Mr. Weeks is a witness they rely on the most because
12 of threats. Mr. Six-Inch-Rule Weeks. Mr. Weeks who
13 testified the girls are never allowed to get closer
14 than six inches to the men. Well, witness after
15 witness after witness proves that to be a lie. And
16 you can find that if they lied about one thing, they
17 may be lying about something else. That's your
18 judgment.

19 He runs and works at, along with the rest of
20 these people, at an establishment that sells flesh,
21 women, women that will touch you; and, according to
22 the two dancers or three dancers that I provided to
23 you, will do more than that, will have sex with you
24 in the champagne room.

25 Great men these are that sell women. Great men

1 these are. Reported, reported date rape drugs by Liz
2 and Cummings. Do they call the police? Do they get
3 somebody to do an investigation? Absolutely not.
4 Weeks, Hawkins, credible? Hmm-mm.

5 What happens at Chastity's is they get people
6 in; they liquor them up, or worse, and rip them off.
7 You heard Liz testify about that. You heard one of
8 the other dancers testify about that. It's a common
9 M.O. Gasoline and fire, and sooner or later that's
10 going to blow up. And it did this night. It did
11 this night.

12 Because when you give somebody Rohypnol or you
13 give somebody one of those drugs, study after study
14 after study indicates they become violent. They can
15 kill. They can maim. You heard the State's expert
16 admit and they don't remember it. People kill
17 people, torture people and don't remember it.

18 State's marked for I.D. is her notes she drew up
19 here for you. Incapacitation. Hallmark,
20 incapacitation. Well, incapacitation should mean
21 can't move. Yet Liz drives to Blythewood. She
22 fights the police, goes to jail. All these studies
23 indicate people commit violent crimes. Armed
24 robbery, they're not incapacitated. They're not
25 immobilized. But they do have amnesia about them.

1 So his symptoms are 100 percent consistent with all
2 the studies.

3 Now, they're not consistent who? I find this
4 fascinating. Who do they bring to you as the expert
5 to testify, oh, this ain't involuntary intoxication?
6 And we only found this out today. Who could have
7 suggested -- who is the toxicologist that Linfert is
8 talking to on the morning they have him in custody
9 when they could have gotten a blood sample and been
10 able to tell you for certain? This young lady right
11 here, the expert they put on the stand.

12 Now, is she some disinterested expert? Is she
13 someone that has no interest in this case? Or is she
14 someone that should have suggested that morning when
15 he said, well, you know, he's taken these drugs and,
16 you know, he was found in a strip club naked and, you
17 know, we had to shoot up the house; all she had to
18 say, was, you know, he's at the hospital, why don't
19 you get a blood sample?

20 It happens routinely. Do you think she feels
21 bad about that today? Because if the blood sample
22 had indicated Rohypnol or some other drug like that,
23 you wouldn't be here today. If they had done their
24 job that morning, I submit to you they wouldn't be
25 here today. But you don't have to find that. You

1 don't have to find that. If you find their failure
2 to do something like that causes you to hesitate to
3 act, you should find him not guilty.

4 The judge is going to tell you that if you find
5 that he was involuntarily intoxicated -- now, we
6 don't have a blood sample, so we have to go based on
7 symptoms. And Dr. John Holbrook, Professor Emeritus
8 at Mercer University, qualified as an expert hundreds
9 of times, testified for the prosecution and the
10 defense. Remember he told you he doesn't charge the
11 prosecution if he testifies for them.

12 He said to a degree of scientific certainty more
13 probably than not he was given a date rape drug like
14 Rohypnol. And to a degree of scientific certainty
15 more probably than not he would not know right from
16 wrong. And if you find that, now, if we've proved
17 that you beyond a preponderance of the evidence or
18 more than that and if you find that the State's
19 expert, that the witness, the evidence put before
20 you, her opinion does not prove to you beyond a
21 reasonable doubt that he wasn't, then that's a total
22 defense. You should acquit. Not murder. Not
23 manslaughter. Not guilty.

24 I made up a whole list of reasonable doubts
25 here, worked on them all weekend, took my notes, went

1 through them. Things like, Captain Smith testified
2 he did not order a blood test on Herring because,
3 quote, I think it's irrelevant to a murder
4 investigation.

5 Renisha Grainger, "Jon Jon" is dead it's all my
6 fault. "I'd dance on a stack of cash." And then she
7 said she threw the money out the window on the way to
8 Atlanta.

9 It's ten 'til 3 on a Monday afternoon. You have
10 been here two weeks. Two weeks. You've missed your
11 families. You've missed your jobs. You've missed
12 whatever normally happens in your life. And I make
13 no apologies for that. I want to thank you for it,
14 but I make no apologies.

15 Chastity's isn't on trial. The Richland County
16 Sheriff's Department isn't on trial. Their failure
17 to do forensics is not on trial. This is who's on
18 trial. Dewain Herring. 63 years old, trust and
19 estates lawyer, James Brown's lawyer, exemplary life.

20 It's his wife, Virginia. You heard from her.
21 He did a very, very, very stupid thing by going out
22 that night. But he didn't murder anybody. He didn't
23 intentionally kill anybody. And I would submit to
24 you he did not involuntarily manslaughter anybody.

25 He didn't point a gun at the police. He has

1 ruined his life. But he did none of the things that
2 he is accused of. Let me restate that. The State
3 hasn't proved to you beyond a reasonable doubt that
4 he's done it. It's not proven. Not proven.

5 Now, in a minute I'm going to sit down. That
6 may be the best news you've had all afternoon. I
7 hesitate to do that because under our system Mr.
8 Giese is going to get up here and talk to you for
9 probably an hour or so. And he is going to point out
10 all of the things I forgot to tell you.

11 God, that sounds unfair. It sounds so unfair.
12 Except, you know what? It isn't. It's as fair as it
13 gets. You know why? Because he has the burden. The
14 State has the burden of proving their case beyond a
15 reasonable doubt.

16 As you sit there and he gets up here and walks
17 in front of you, he looks at you and says, they're
18 presuming him innocent. As they sit there right now,
19 they think he is not guilty. And so as he says
20 things to you, you are supposed to look for reasons
21 why they're not true. That's your job, to challenge
22 every point he makes.

23 Now, if I have said something during my
24 argument, or Mr. Meadors or Mr. Giese says something
25 about the facts that conflicts with the way you

1 remember them, what we say is irrelevant. It's what
2 the 12 of you remember, because you are the judges of
3 the facts.

4 Likewise, if I stated something about the law
5 that conflicts with what Judge Cooper gives you,
6 disregard what I've said, or Mr. Meadors or Mr.
7 Giese, because only he can give you the law, you see.

8 So, this is going to be a process where we're
9 advocating certain positions to you and we're talking
10 about the evidence. But it's each one of you that
11 remembers. And, you know, we've got a court reporter
12 right here that's written down every word that's been
13 said in this courtroom. You have access to that
14 testimony if you want it.

15 This isn't about guessing. This isn't about
16 guessing. If you find that he was reckless in
17 handling a gun, he had a right to have a gun in that
18 car. He had a concealed weapons permit. He could
19 take it out, put it on the seat, do whatever he wants
20 with it; if you find that it's reckless, that would
21 be involuntary manslaughter. But I submit to you the
22 State hasn't proved that beyond a reasonable doubt.

23 You know, I sat there listening to Mr. Meadors a
24 little while ago and was wondering why he was writing
25 JJ and DH and 460. What is this all this about? Why

1 is he wanting you to get off on all these tangents?

2 And I thought about an experience I had when I
3 was a kid. I was enthralled with magic when I was a
4 kid up in Charlotte. And certainly Charlotte back
5 then was smaller than Columbia. It's not now. But
6 occasionally we'd have magicians come up to an
7 auditorium, not a big place.

8 But we had a magician come. And I can't
9 remember his name any more, but he was renowned at
10 the time. And he had an elephant on the stage and he
11 had police, Charlotte police circled all around it.
12 Curtain came down, curtain went up, elephant is gone.
13 I could not believe that it disappeared. I mean, I
14 was sitting on the fourth row. Didn't hear anything,
15 didn't see anything: Gone.

16 Even at that tender age I knew that he had not
17 made it evaporate into thin air. I knew that he had
18 distracted several thousand people with something
19 over here while he did the trick over here. The
20 truth was over here while he distracted us over
21 there.

22 What the state of South Carolina is attempting
23 to do, and I ask you to not fall prey to it, is when
24 you hear testimony from somebody like Mr. Yates
25 saying to a degree of scientific certainty more

1 probably than not that he was shot in the back and
2 you see and hear nothing in reply; when you hear Mr.
3 Yates testify to a degree of scientific certainty
4 more probably than not, he is an expert, that the gun
5 was not pointed out the window because there was no
6 plume, it was below the window and it was forward
7 near the glove compartment and no one contradicts
8 that; and they start screaming about wanton and
9 willful, malicious and malignant, don't be
10 distracted.

11 I haven't raised my voice to you here this
12 afternoon because I find that people that yell at you
13 and raise their voices, become very animated, don't
14 want you to look at the facts. I want you to look at
15 the evidence. I want you to examine it
16 piece-by-piece. Look at the -- they sent this video
17 to NASA, Cape Canaveral, to look at it.

18 They want you to take, you know, some guy who
19 works in strip clubs view that he saw a flash. Where
20 is NASA? NASA, they put people on the moon. They
21 examine the Hubble photographs from the Hubble
22 telescope. They looked at the Mars Rover. Where are
23 they to testify what that flash is or the absence of
24 a flash? Where are they? Not here. Because they
25 saw no gun. They saw no flash. NASA.

1 So as Mr. Giese gets up, if he raises his voice,
2 writes big letters, throws exhibits around, say what
3 you so excited about? What are you yelling about?
4 What are you pointing at? Where is the evidence?
5 Where are the witnesses? We've got a duty to find
6 him not guilty unless you convince us beyond a
7 reasonable doubt. Where are your experts?

8 Paavel sat here and listened to Mr. Yates. Did
9 he take the stand? He must have agreed with him.
10 And if you believe Mr. Yates, then he's not guilty of
11 the pointing and presenting, and at most he'd be
12 guilty of the involuntary manslaughter but not
13 murder, not murder. And if you believe Mr. Holbrook,
14 he's not guilty of murder or manslaughter and you
15 should acquit on all charges.

16 Now, the fact that he remembers some things and
17 doesn't remember others, did the police tell him he's
18 charged with murder? Did they tell him he killed
19 anybody? He just wanted to give a statement and get
20 out of there.

21 You're going to be back in that jury room
22 probably in the next hour or hour and a half,
23 depending upon how long Mr. Giese talks. And you're
24 going to begin your deliberations. Dewain Herring is
25 entitled to the verdict of each one of you. This

1 isn't a seven-to-five vote. Each one of you must
2 agree that the State has proven their case beyond a
3 reasonable doubt. And if one of you has a reason to
4 hesitate to act, then you should acquit.

5 If during this process, and it's been a long
6 one, I have offended any one of you in what I've said
7 or done, I apologize. Please do not hold that
8 against Dewain Herring. I'm his lawyer. I'm trying
9 to do the best I can.

10 And if during this process I have missed
11 something that you think I should have addressed,
12 make the solicitor address it. And if you don't hear
13 it from him, then don't hold that against Dewain
14 Herring.

15 What is a reasonable doubt in the law? A
16 reasonable doubt is the kind of doubt that would
17 cause a reasonable person to hesitate to act. Proof
18 beyond a reasonable doubt is proof that leaves you
19 firmly convinced of the defendant's guilt. If you
20 think there is a real possibility that the defendant
21 is not guilty, you must give the defendant the
22 benefit of the doubt.

23 You know, it's not normal, not natural, not the
24 way we look at the world; but you put your hand up
25 and said you would follow this law. And if you do,

1 ladies and gentlemen, if you do, I submit to you
2 there can only be one just verdict in this case, only
3 one fair verdict in this case, only one verdict. And
4 the word "verdict" comes from the Latin word, to
5 speak the truth, "veredicto". There can only be one
6 truth in this case. The State has not proven their
7 case, the State has not proven their case, and Dewain
8 Herring is not guilty. Thank you.

9 **MR. GIESE:** I need to set the tape up.

10 **THE COURT:** All right. Do you want a minute to
11 set up the exhibits?

12 **MR. GIESE:** Yes, sir.

13 **THE COURT:** All right, ladies and gentlemen.
14 The solicitor has asked for the same courtesy I have
15 extended to the defense counsel, a few minutes to set
16 up the exhibits. So just go to your jury room for a
17 few minutes, and we'll be ready as soon as the
18 solicitor is ready to begin his closing arguments.
19 Again, don't discuss the case among yourselves while
20 you're in the jury room. Thank you very much.

21 (Jury out at 2:59 p.m.)

22 (Whereupon, a break is taken)

23 **THE COURT:** You may proceed.

24 **MR. GIESE:** Your Honor, pursuant to your order
25 as to handling of weapons --

1 **THE COURT:** Yes.

2 **MR. GIESE:** -- I am putting the Court on notice
3 I will handle the .357 during my closing argument. I
4 will not point it at anyone. And it is my
5 understanding that it has a trigger lock on it to
6 where I can't hurt anyone.

7 **THE COURT:** Will Captain Smith verify that?
8 Ready for the jury, Solicitor?

9 **MR. GIESE:** The State's ready.

10 **THE COURT:** Defense ready? Defense ready?

11 **MR. HARPOOTLIAN:** Defense is ready, Your Honor.
12 I wonder, Solicitor, are you going to use that the
13 entire argument?

14 **MR. GIESE:** No. Just at the end. We'll take it
15 down afterwards.

16 **MR. HARPOOTLIAN:** Thank you.

17 **DEPUTY:** It's all right.

18 **THE COURT:** Two of them?

19 **DEPUTY:** Yes, sir.

20 **THE COURT:** All right. Thank you. Bring the
21 jury, please.

22 (Jury in at 3:15 p.m.)

23 **THE BAILIFF:** The jury is seated, Your Honor.

24 **THE COURT:** Thank you. All right, Solicitor.

25 **MR. GIESE:** May it please the Court, Your Honor.

1 (Whereupon, the portion of the video where the car
2 pulls up to the front of Chastity's is played).

3 MR. GIESE: Madam forelady, ladies and gentlemen
4 of the jury, that tape, those 39 seconds are why we
5 are here today. That, ladies and gentlemen, is the
6 focus, the reason we are all here. We are here
7 because a man, John Johnson, who was working, doing
8 his job, treating someone with respect that the State
9 submits did not deserve respect, treated the man with
10 dignity in making him leave Chastity's that night
11 because that man, that man for his dignity and his
12 integrity and his job, he received a .357 bullet into
13 his brain. That is why we're here today.

14 But you know something, ladies and gentlemen?
15 Why we're really here, we're really here because that
16 man, Dewain Herring, came back as you saw on that
17 tape, got a .357 Ruger, took it out of its holster,
18 this one right here, took this one, this gun, came
19 back to terrorize, terrorize the workers at
20 Chastity's that he had just threatened to kill.

21 And we are here, ladies and gentlemen, because
22 the malice, the hatred, the ill will, the heart
23 fatally bent on mischief, devoid of all social duty
24 that that man had in his heart, he takes this Ruger,
25 points it out the window and fires a shot into a door

1 that two seconds, two seconds prior to that had just
2 been shut.

3 And it was that malice that drove him to use the
4 eleven and a half pounds of pressure that it takes to
5 pull this trigger and fire a shot into a door that
6 hits John Johnson in the head. That's why we're
7 here. Make no mistake about it. It's because of his
8 actions, his actions that morning.

9 But for Dewain Herring and his ego the State
10 submits, his arrogance the State submits, his malice
11 the State submits, John Johnson would be here today
12 alive, with his soul intact to his body, not driven
13 out of it by that man.

14 You know, I sat in that chair right there just
15 like you all sat in your jury box and in your jury
16 chairs, most of you in the same seats each time. And
17 I watched and I watched and I watched Mr. Harpootlian
18 and I watched what he did and I watched him attack
19 and attack and attack.

20 And he is right. He got up here a couple of
21 minutes ago and said about attacking, that he needed
22 to attack. Well, ladies and gentlemen, he attacked
23 everybody. He attacked everything. He attacked the
24 Richland County Sheriff's Department. He attacked
25 Richland County EMS. He attacked the Solicitor's

1 Office. He attacked SLED. He attacked Ray
2 Livingston. He attacked Stan Smith. He attacked
3 Sergeant Linfert. Every single witness the State
4 presented from this witness stand Mr. Harpootlian
5 attacked.

6 Ladies and gentlemen, the State submits there is
7 a reason, and it's really a simple reason. The
8 reason is Mr. Harpootlian does not want you, the
9 jury, focusing on his defendant. Because the State
10 submits when you do and when you do focus on his
11 defendant -- and Mr. Harpootlian knows this; he's
12 been in the business long enough to know this -- he
13 knows that when you focus on what Dewain Herring did
14 in the early morning hours of January the 29th, he
15 knows, he knows the State submits that you, the jury,
16 will find the defendant liable for the murder and
17 guilty of the murder of John Johnson. And that's why
18 he attacks, to get you off on something else.

19 You know something else I noticed? And there
20 again, I'm just sitting there most of the time. Was
21 it just me, or was everyone in this case at fault
22 except the defendant? If you believe what Mr.
23 Harpootlian wants you to believe, Dewain Herring has
24 done absolutely nothing wrong, absolutely nothing
25 wrong.

1 Dewain Herring was the victim of a drugging.
2 Dewain Herring was the victim of a scam. Dewain
3 Herring at 460 Alexander Circle was the victim of
4 unwarranted police conduct. The police came in
5 blazing away and just shot Mr. Herring, just shot
6 him; came in, just started shooting.

7 Think of that, ladies and gentlemen. And what
8 Mr. Harpootlian wants you to believe is that Dewain
9 Herring has done absolutely nothing wrong. It's
10 everybody else's fault but his. It's some unknown,
11 unnamed bartender at Chastity's. It's the dancer,
12 Mia. It's the Carl Weeks. It's the Stan Smiths.
13 It's the Sergeant Linferts. It's the Dave Lawrence
14 of SLED. It's the Paul LaRosa of SLED. They're all
15 as they say at fault. They have all done something
16 to frame this man, to say this man has done nothing.

17 The State submits that is the furthest thing
18 from the truth in this case. But we spent two weeks
19 looking at everybody else's faults, how they faulted
20 this man, how they abused this man, how they framed
21 this man. No, ladies and gentlemen. The State
22 submits there is no one at fault here, no one at
23 fault except that man. And the evidence the State
24 submits is overwhelming, overwhelming.

25 It struck me, another thing struck me. In

1 Dewain Herring's last written statement to SLED, the
2 State Law Enforcement Division, at the end of the
3 statement, what is it that Dewain Herring said? What
4 is it that Dewain Herring wrote? You'll have the
5 statement back there. You'll have the statements
6 back there. What did he say?

7 He wrote, "But do reserve the right to edit, add
8 or delete." You remember that? Remember? Ladies
9 and gentlemen, we have just spent two weeks editing,
10 adding and deleting the State submits. The State
11 submits this, this is the theme, this is the theme of
12 this trial. The State submits there's been so much
13 editing, adding and deleting by the defense that it's
14 been continuous. It's been ongoing. All this has
15 occurred in the last several weeks. Remember that:
16 Edit, add or delete.

17 Let me talk about . . . : for just
18 a minute. I'm not going to spend a lot of time
19 talking about it. And I'm not going to be up here
20 long. , sergeant Linfert,
21 Sergeant Gwyn go in with a legal search warrant along
22 with other officers. Sergeant Linfert, Investigator
23 Gwyn.

24 Now, ladies and gentlemen, the State submits
25 this. If you believe Sergeant Linfert who has been

1 in over 1,000 search warrants in his career, if you
2 believe this man just went in and for the first time
3 in his career just happened to for no reason start
4 shooting, then find that man not guilty. 1,000 other
5 times this man has been in on search warrants; he's
6 never fired his weapon. What does that tell you?
7 Investigator Gwyn, the same thing.

8 The State submits it tells you the veracity that
9 these men have that a weapon was pulled on them, that
10 it was pointed at them. The defendant wants you to
11 believe that they just came in and started shooting.
12 Remember that? It's even in his statements. I'm not
13 even going to go to his statement. They came in and
14 just started shooting. Well, ladies and gentlemen,
15 if you believe that, find him not guilty. The State
16 submits that is not what happened that night.

17 Sergeant Linfert, Investigator Gwyn went in like
18 they legally were allowed to do, announced themselves
19 as law enforcement with a search warrant. Richland
20 County Sheriff's Department, we have a search
21 warrant. Linfert looks directly into the eyes of
22 that man who runs down the hall, gets a gun and
23 points it at him.

24 Gwyn and Linfert see the weapon. Gwyn and
25 Linfert yell, gun, drop it. Gun, drop it. He does

1 not, and he is shot. That, ladies and gentlemen, is
2 460 Alexander Circle. That's what happened. Two
3 officers both see the weapon. Both see it pointed at
4 them. And these two officers who have never fired a
5 shot in their careers were forced to. And that,
6 ladies and gentlemen, is 460 Alexander Circle. If
7 you believe these officers just went in and started
8 shooting, find him not guilty. The State submits
9 that would be a travesty, a travesty.

10 I'm going to go to Chastity's now if that's all
11 right and to the defenses that the defendant has put
12 up. And the State submits you know how you know that
13 the defendant is guilty not just beyond a reasonable
14 doubt but beyond any doubt whatsoever in this case?
15 Do you know how? The State submits it's because of
16 all the different defenses that this man has put up.

17 Here is a lawyer, an attorney who's had 17
18 months to create a defense. And the State submits
19 that's exactly what he's tried to do. What is the
20 defendant's first -- and this happens a lot the State
21 submits in court. They call it the shotgun effect,
22 where you shoot everything up against the wall, every
23 defense known to man, hoping that you all, one person
24 will grab one of the defenses and hang onto it.
25 That's what they're trying to do.

1 But look at the defenses. His first one, right
2 out of his mouth. Alibi. Right? Alibi. He is
3 arrested. He is down talking to the police. And
4 what happens? Dewain Herring says, look, I wasn't on
5 River Drive that night. I went to bed at 11:00.
6 Remember? And he's saying that for a reason, because
7 he doesn't know the police have him on tape. Dewain
8 Herring's denials of ever being at Chastity's that
9 night.

10 911 tape. On at least two occasions, two
11 occasions Dewain Herring says, I ain't been on River
12 Drive when confronted about being on River Drive.
13 Two times. Listen to the tape. He lies. Oral
14 statement to Lawrence and LaRosa. I went to bed at
15 11:00 that night. Remember? Lying.

16 And you know something, ladies and gentlemen?
17 Their own expert, their own expert in involuntary
18 intoxication came in and said he would have known, he
19 would have known that he went to Chastity's that
20 night. You remember? Their own expert says that
21 this oral statement to Lawrence and LaRosa is untrue.
22 It is an untruth. And it's all because he's hiding
23 the fact, he's hiding the fact that he was there
24 because he knows he did something wrong.

25 Third: The first written statement to Lawrence

1 and LaRosa. And it's in writing. I'm not going to
2 pull it out for you. I went to bed at 11:00.
3 Untruth. Two times, one time, one time.

4 And then finally the second written statement to
5 Lawrence and LaRosa, and I am going to pull that out.
6 You'll have it in the back with you. "Did you stay
7 at the house the remainder of the night?" "I'm
8 pretty sure I did. I thought about going to Tombo's
9 Grill to get something to eat but don't recall
10 going." "Do you recall going to Chastity's
11 Nightclub?" "No, I don't. I know where it is but I
12 don't recall ever going there." "Mr. Herring, the
13 Sheriff's Office has a videotape of you entering
14 Chastity's Nightclub last night. Does this, does
15 this help your recollection?"

16 And you know the answer. You know the answer.
17 Yeah. And I'm not going to go into the exact
18 statement because it's offensive to me. But I saw a
19 woman there. I had a scotch and soda while there.
20 But it's hazy. I couldn't tell you if it was crowded
21 or not.

22 So, ladies and gentlemen, once he is confronted
23 with the evidence, he immediately, the State submits,
24 immediately changed his defense. Didn't he? Because
25 he knew alibi wouldn't work. He knew it at that.

1 point because of the tape. This is a lawyer now.
2 This is not some homeless person. This is a lawyer
3 who has just figured out his defense of alibi is not
4 going to work.

5 But what did he do after that? He claimed
6 harmless error. Do you remember? In the statement:
7 "If the gun went off, it just went off. I didn't
8 mean to fire it. If anything happened, it was an
9 accident." Harmless error. He actually uses the
10 words. Harmless error about shooting the gun.
11 Remember?

12 Well, ladies and gentlemen, there's nothing
13 harmless about taking a .357, pointing it out your
14 window and firing a shot at a door that has just
15 closed into a bar full of people. No, ladies and
16 gentlemen, there is nothing harmless about that. Ask
17 John Johnson whether or not it's harmless to do that.
18 John Johnson is dead.

19 And, you know, he figures that out. And this is
20 interesting, too. This harmless error, slash should
21 be accident, too, because he claimed, you know, if
22 anything happened, it was accidental; the State
23 submits there is nothing accidental about this. An
24 accident in this case is not a defense.

25 His Honor is not going to tell you, he will not

1 tell you that you can use accident as a defense.
2 Accident is not a defense in this case. You cannot
3 find the defendant not guilty because of accident.
4 Ricochet or whatever. His Honor will instruct you
5 you cannot consider accident.

6 And he realized that. And he has realized that
7 since he made that statement to the police. So what
8 did he do? What did he do? He went to the age-old,
9 the age-old defense: Police set me up. The police
10 set me up. He is saying SLED and the Richland County
11 Sheriff's Department have conspired to set him up.
12 He said it from the witness stand whatever day that
13 was last week.

14 Ladies and gentlemen, if you believe that SLED
15 and the Richland County Sheriff's Department set him
16 up, find him not guilty. The State submits that is
17 not how it happens and is not how this happened.
18 They took his statement, read him his rights, and
19 that's what that man said that morning. No, ladies
20 and gentlemen, police set up is not a defense.

21 So what has he done? He has rolled on. We're
22 down to number four now, his fourth defense:
23 Involuntary manslaughter. Do you remember Mr.
24 Harpootlian arguing that? Involuntary manslaughter.
25 Lack of malice. No malice whatsoever for it to be

1 involuntary manslaughter. Well, ladies and
2 gentlemen, the State submits this case drips with
3 malice. This case has more malice the State submits
4 than any case you will ever find.

5 You have expressed malice, the threats. And
6 I'll get to those in a minute. You have an
7 implication or a possible inference if you so choose
8 of malice which is the use of a deadly weapon. The
9 case the State submits literally drips with it. And
10 the defendant and Mr. Harpootlian the State submits
11 knows that.

12 And I'm going to get to the difference of
13 involuntary manslaughter and manslaughter in a
14 minute. And why it is express malice and why it is
15 malicious and not unintentional? But they know it
16 the State submits. So they have to find another
17 defense.

18 We're on number five. And that's involuntary
19 intoxication. Well, ladies and gentlemen, the State
20 submits the first time anyone from the State heard
21 about involuntary intoxication, that's including the
22 investigators that investigated the case, was the
23 moment he took the stand and said, "I was drugged. I
24 was drugged."

25 Did he tell that to the investigators? No. Did

1 he tell that to anybody? No. Did he tell it to EMS?
2 No. And, in fact, he told EMS that he wasn't on any
3 drugs. Do you remember that testimony right here at
4 the end from the EMS lady? She said I specifically
5 asked him and he says, no, I am not on drugs. And he
6 was coherent. Involuntary intoxication? It is a
7 last-ditch effort to save him. And that's all this
8 is. It's a lawyer trying to save himself.

9 And let's talk about it for just a minute.
10 Involuntary intoxication is an affirmative defense.
11 That means they, the defense, has to prove to you
12 that he is involuntarily intoxicated. They do. The
13 State doesn't have to disprove it. They have to
14 prove it.

15 And the questions are these. One, was he
16 drugged involuntarily? And, two, did that drugging
17 make him where he could not understand the difference
18 between right and wrong? And let's start with the
19 first one. Was he drugged? What evidence do you
20 have? What evidence have they presented to you that
21 he was drugged? The defendant who took the stand and
22 said I was drugged, even though he told no one about
23 it the next day, never reported it to anybody, he now
24 says, I was drugged. That's what they have.

25 Mr. Harpootlian has also tried to bootstrap

1 these two young ladies who two years, over two years
2 before claimed to have been drugged in Chastity's.
3 So they're saying because these ladies were drugged
4 two years before, it means he was drugged two years
5 later? That's not -- the State submits that's not
6 good evidence. That's not evidence that he was
7 drugged. The only evidence they have is him. And
8 that's it. That's it.

9 Oh, I'm sorry. They had their expert from
10 Georgia who said, oh, yeah, looked at the tape, I
11 listened to him. When were you contacted about this
12 defense? Oh, two or three weeks ago. Two or three
13 week ago? They just were figuring out it's
14 involuntary intoxication? They were just figuring it
15 out, ladies and gentlemen, because they knew, they
16 knew that, number four, involuntary manslaughter was
17 not viable. That's why they rolled in involuntary
18 intoxication.

19 And let's look at this. Remember behavior after
20 being drugged? The two women that happened two years
21 before. Different managers, "Jon Jon" wasn't there
22 at the time. Two years before, the women throwing
23 up, blurry vision, felt weak, couldn't move, couldn't
24 dance, couldn't drive. Remembered driving.
25 Confused, got lost and had hot and cold flashes.

1 And what else is not on that list that's so
2 important in this case? They reported it
3 immediately. He didn't. They reported it to the
4 manager that night and they went back the next day
5 and reported it because they knew they had been
6 drugged. Remember?

7 The defendant, he could walk. You've seen it on
8 the tape. He could communicate. We saw it on the
9 tape. He could drive away. We saw it on the tape.
10 He could return. You saw it on the tape. He could
11 drive home. We saw it on the tape. He could not
12 remember anything except a shot being fired.

13 Is this consistent with this? The State submits
14 it is not, because he didn't report it immediately
15 either. It takes 16 months to report it.

16 **MR. HARPOOTLIAN:** Your Honor, I hate to
17 interrupt the solicitor, but this is burden shifting.
18 I would object to it.

19 **THE COURT:** I'll so instruct the jury.

20 **MR. HARPOOTLIAN:** Thank you.

21 **MR. GIESE:** That's what you have for him being
22 drugged, is the defendant, his word. And I'll get to
23 his word in a minute. We already know he'll lie the
24 State submits because of the alibi and because of the
25 five different or six different times he said he'd

1 never been to Chastity's. So we know he'll tell a
2 fib if he has to.

3 But what else? For this defense, involuntary
4 intoxication, for you to find that, you also have to
5 find that he did not know the difference between
6 right and wrong. At the time he fired the shot you
7 have to decide that he did not know what he was doing
8 was wrong.

9 And think about that, ladies and gentlemen.
10 Think of the evidence in this case. Four minutes
11 approximately before he fires that shot Dewain
12 Herring is doing what? Dewain Herring is arguing
13 with John Johnson about trying to get his \$300 back
14 because he believed that he had been done wrong. He
15 wanted his money. He wanted his sex or he wanted his
16 money.

17 Ladies and gentlemen, that one piece of evidence
18 tells you that he knew the difference between right
19 and wrong. That one piece. And that was four
20 minutes approximately before the shooting. Didn't
21 know the difference between right and wrong? Please.
22 Does someone who doesn't know the difference between
23 right and wrong flee the scene? If he doesn't know
24 the difference between right and wrong, why does he
25 leave? The State submits he leaves because he knows

1 what he's done is wrong.

2 And it's not, it's not he sits there after he
3 fires that shot and wanders around or leaves the car
4 there. That shot is fired and within one second,
5 look on the tape, he is gone. He is gone. Because
6 he knows that what he did was wrong. That's why he
7 leaves. Someone who doesn't know what they've done
8 is wrong does not leave. They stay. They wander
9 around. They wait. He there's.

10 And when he there's he gets home and he takes
11 this, the murder weapon, out of his car and puts it
12 underneath some clothes, this man who doesn't know
13 the defense wants you to believe that what he has
14 done is wrong, takes the gun out of the car. And
15 you'll have it, State's Exhibit No. 21. It's under
16 some clothes. And he knew. Or if he didn't know
17 what he did was wrong, why does he take the gun out
18 of the car and put it under clothes? No, ladies and
19 gentlemen of the jury, this is not involuntary
20 intoxication. It is just not the State submits.

21 And then the last thing, and I've talked about
22 this, how will you know he knew it was wrong? He
23 lies to the police. He tells them he hadn't been to
24 Chastity's because he knows, he knows that what he
25 did was wrong there. He doesn't want to get caught.

1 He doesn't know the difference between right and
2 wrong? The State submits that's crazy. That's not a
3 defense. That is not a defense in this case.

4 Let's briefly talk about the defendant's
5 testimony if we could. And I didn't write down how
6 many times he said this, but you remember him saying,
7 "I don't recall?" 25 times? 30? 50? I don't
8 recall how many times it was but it was a bunch. It
9 was a lot. I was drugged.

10 But, you know, the State submits he had a pretty
11 selective memory. Didn't he? The State submits he
12 remembered things that he thought would help him but
13 didn't remember things that hurt him. He doesn't
14 remember he says anything from about 11:00 or 11:15
15 all the way, except for a shot going off, all the way
16 down to when the police came in around I guess it was
17 4:20, 4:15. He doesn't remember anything, had no
18 recall of that except the gun might have gone off.

19 No. I think it wasn't in my hand. It was in my
20 hand. You know, I'm not exactly sure what he
21 testified to. He remembers that so that he can say
22 it was an unintentional killing because that would
23 help him with an involuntary manslaughter. But he
24 doesn't remember anything else? He doesn't remember
25 the threats? He doesn't remember the conversation he

1 had. He doesn't remember any of it. He doesn't
2 remember going back. He doesn't remember driving
3 home. That's because all of that hurts him. And
4 that the State submits is why I don't recall, I was
5 drugged. Selective memory.

6 But, you know, he remembers everything he claims
7 from 4:15 at the shooting at 460 Alexander Circle.
8 He remembers that in detail. Look at his statement.
9 He remembers everything three and a half hours, four
10 hours after the shot is fired. Four hours after the
11 shot is fired he remembers everything. Nothing up
12 here, everything after that.

13 But, you know, ladies and gentlemen, this
14 selective memory is a funny thing. It's a funny
15 thing. Because even though he remembers everything
16 that happened to him inside Alexander Circle and
17 wants you to acquit him of everything that happened
18 at Alexander Circle on his testimony alone, even
19 though he remembers all that, he wants you to believe
20 him on that, he doesn't remember his rights being
21 read? A lawyer doesn't remember his rights being
22 read to him? At 9:42? 9:42? Five hours after the
23 shooting at Alexander Circle? Five hours. He
24 doesn't remember this?

25 Do you know why he doesn't remember the State

1 submits? Because it hurts him. It kills him, the
2 State submits, because he made those statements. I
3 don't recall my rights being read to me, yet I can
4 recall everything from 4:15. No, ladies and
5 gentlemen. That is selective memory, and that's a
6 lawyer trying to get out of something. And that's
7 what we have here, an attorney creating a defense.

8 And look at that statement. Look at this when
9 you get back there, please. Look at his initials.
10 They're perfectly on the line. He signs it right
11 here where no one ever signs it because it's the end
12 of one statement, the beginning of another one. And
13 look at his signature. And he doesn't remember this?
14 Please, ladies and gentlemen. The State submits that
15 that's unbelievable, unbelievable, and tells you you
16 should not believe what that man is saying. That
17 alone ought to be enough.

18 And there again, he doesn't recall anything but
19 he does recall a shot. Therefore, it might be
20 unintentional. He says, oh, it's an unintentional
21 killing. I remember that it was because I wouldn't
22 intend to kill anybody. Well, ladies and gentlemen,
23 there again, that's defense number four if you
24 remember; not five, but four.

25 He presented some defense experts. And I

1 apologize. I'm not good with names. One was from
2 Georgia. It was the pharmacist from Georgia who
3 actually the State submits helped the State because
4 he is the one that testified that in his statement,
5 his first two statements about him going to bed at
6 11:00 and not being at Chastity's, he would have
7 remembered going to Chastity's. So we knew at that
8 point that it's an untruth.

9 So the one from Georgia the State submits
10 actually helped the State. The second one was from
11 Alabama. Actually he was the first. But the guy
12 from Alabama, I think his name was Yates. He
13 testified. Mr. Harpootlian has made a big deal about
14 how he did these measurements out at Chastity's and
15 stated that -- he was the one about the ricochet,
16 about the accident, there was an accident.

17 Well, ladies and gentlemen, the State, as I told
18 you, the judge is going to tell you, accident is not
19 a defense. What Mr. Yates said about accident is not
20 a defense.

21 And, you know, I thought it was interesting.
22 Mr. Yates testified that -- he said, well, you know,
23 I went out there and I checked. You know, I looked
24 and I did the measurements with the car and measured
25 and looked and saw and said, well, you know, you

1 can't be like this but you could turn around and you
2 can make that shot.

3 Remember on cross examination he had to be
4 asked, can you make that shot, and he said, yeah, you
5 can make that shot from that car. And remember when
6 Mr. Harpootlian was cross examining Mr. Livingston
7 and just was very, very aggressive with him about you
8 didn't take the car out there and do the measurements
9 and look at the angle and see if you can make the
10 shot? And Mr. Livingston said, no, we had it on
11 tape. We know he could make the shot. And Mr.
12 Harpootlian made a huge point about that.

13 Well, ladies and gentlemen, their own expert,
14 their own expert from Alabama, Mr. Yates, did he take
15 the car out there? No. The State submits he did
16 not. They still had the car. Mr. Yates and all of
17 his cross examination by Mr. Harpootlian for
18 Mr. Livingston was for naught because their own man
19 when he had the car did not take it out there. Thank
20 you, Mr. Yates. Talk about an epiphany. That's an
21 epiphany. Their own man didn't take it out there.

22 Involuntary manslaughter versus murder.
23 Involuntary manslaughter, no malice; murder, malice
24 aforethought, malice aforethought, either express
25 malice or implied malice. No malice/malice. And

1 that's pretty simple.

2 But you know something else we have in this
3 case? We have a motive. We, the State, has motive.
4 The State doesn't have to prove motive, but the State
5 submits there is motive in this case. The motive is
6 the \$300 that he didn't get back for the lap dance in
7 the champagne room.

8 It gave him a motive to get angry, didn't it?
9 It gave him a motive to argue, didn't it? It gave
10 him a motive to return. And it gave him a motive the
11 State submits to kill. Not unintentional.
12 Intentional. There is a motive in this case and it's
13 the \$300 and it's that man's ego. He wanted that
14 \$300 back. He threatened him and then terrorized him
15 and then killed him. And when he fired that shot,
16 that was murder.

17 I'm almost done. I've got a little bit more.
18 What the State is asking you to do here, ladies and
19 gentlemen, is very simple. We're asking for you, the
20 jury, to look at the intentional acts of this
21 defendant, the intentional acts of this defendant.

22 Because, you know, ladies and gentlemen, when
23 you do, what you're going to find is this. On that
24 evening around 11:00 Dewain Herring walked into the
25 front entrance at Chastity's Gold Club. He

1 intentionally walked in there. He intentionally got
2 a drink. He intentionally approached Mia who as she
3 said, he chose me, remember? He chose me.

4 He gets a lap dance. He choose to pay \$30 and
5 get a lap dance in the VIP room. He then pays her,
6 comes back, pays her \$300 to get a dance, a private
7 dance in the champagne room. He intentionally pays
8 her \$300 to do that. He intentionally takes his
9 clothes off, and excuse me, masturbates himself in
10 that room. And as Dr. Garvin said, it can be from
11 the level of alcohol that he had in him.

12 He is confronted. He is told to put his clothes
13 back on and to leave. And he refuses. He wants his
14 \$300 back. He does not want to leave. He
15 intentionally stays there. John Johnson and Carl
16 Weeks have to go back to the champagne room and tell
17 him that if he does not leave they are going to call
18 the police. And at that point this man who Mr.
19 Harpootlian wants you to believe unintentionally
20 killed John Johnson, this man who did not have any
21 malice in him when he fired that shot maliciously
22 expressly says, "I am going to fucking shoot you."
23 Express malice to John Johnson and Carl Weeks.

24 Somehow, somehow they got him out. Without
25 touching him, with treating him with respect that the

1 State submits he did not deserve, they get him
2 outside. The defendant intentionally at that moment
3 goes to his car, gets in his car to leave.

4 The defendant chooses intentionally at that
5 point to leave the car, and you see it on the tape,
6 come back and confront the victim, John Johnson and
7 Donnie Hawkins out in front trying to get his \$300
8 back or get the sex. John Johnson says, we don't do
9 that here. You've got to go down the road. And take
10 a look at the tape. Go down the road. That's Bush
11 River kind of things. You've got to do it down
12 there. Never touches him, never offends him, does
13 nothing to Dewain Herring except finally gets him to
14 walk back to his car.

15 For two minutes Dewain Herring sits in that car,
16 gets his gun out, intentionally gets his gun out,
17 and, ladies and gentlemen, takes it out of its
18 holster. You heard Vello Paavel. You cannot shoot
19 this gun unless you take it out of its holster. He
20 intentionally took it out of its holster. He
21 intentionally rolled the windows down and he
22 intentionally stayed there for two minutes as his
23 anger welled, his ill will welled, and kept building
24 and building and building.

25 And finally this man, this man who had been

1 embarrassed, who was out \$300, he decides to leave
2 and he drives off. We've all seen the tape. You
3 know something, ladies and gentlemen? That malice,
4 that malice that he was building up, that hatred,
5 that ill will, the State submits it finally got him.
6 It got him as he drove away and went down River Drive
7 toward Columbia. And somewhere down there that
8 malice welled up so much that he couldn't control it.

9 And he drove back and he parked intentionally
10 right in front of that door intentionally. He didn't
11 park in the parking lot. He didn't park down near
12 the corporate offices. He didn't go in this parking
13 lot. He parked directly in front of the entrance and
14 exit.

15 No malice, Mr. Harpootlian? No malice? No.
16 Ladies and gentlemen, the State submits that's
17 malicious in of itself. But that malice had eaten
18 him up so badly that he sat there for 39 seconds the
19 State submits waiting, laying in wait, waiting on
20 someone to come out of that door to shoot.

21 And that door cracked open. John Johnson stuck
22 his head out. Within those 39 seconds, those 39
23 seconds John Johnson shuts that door. Two seconds
24 later when this man knows, has to know that no one is
25 coming out but he had just seen that crack closed for

1 the last time, he knows someone is behind that door,
2 he fires because of the malice in his heart.

3 That, ladies and gentlemen, is why we're here.
4 That malice that chewed him up, that malice that got
5 in him and that malice that made him pull that eleven
6 and a half pound trigger that killed John Johnson,
7 that's why we're here.

8 Involuntary manslaughter? No, ma'am. No, sir.
9 It's murder. He intended to kill him. He intended
10 to maim him. He intended to injure somebody. You
11 intend the natural consequences of your act. If you
12 shoot into a building where you know there are people
13 and you kill someone is there, that is malicious.

14 But you know something? I forgot something,
15 probably one of the most important pieces of
16 evidence. I'm glad I had a board. Dewain Herring's
17 threats to Donald Hawkins and John Johnson, quote,
18 "You don't want me to come back here. If I come
19 back, there is going to be some issues, someone is
20 going to get fucked up", that, ladies and gentlemen,
21 is all you need. Because guess what? He came back.
22 And there were some issues. And someone did get
23 messed up. Dead.

24 No, ladies and gentlemen, do not permit this man
25 who makes those threats who comes back to get off.

1 The State submits this is a murder and nothing less,
2 nothing less.

3 This is the part of the trial where I'm just
4 about done. And I realize the incredible sacrifice
5 that you make, that jurors make. But I also
6 understand the incredible power that you have as the
7 jury. You all are the deciders of these facts and
8 the deciders of this case. That's your job. And
9 it's an immense job. It's a huge job.

10 Before you go back there to make your decision I
11 want to hit on something that Mr. Meadors hit on.
12 And that is that in our judicial system we are all
13 equal. We are all equals. There is no one to
14 reward, no one to punish. We are all equals.

15 What the State asks you to do today is make
16 Dewain Herring, an attorney, as Mr. Harpootlian says
17 an affluent attorney, the State asks you to make Mr.
18 Herring be responsible for his acts and to have to
19 drink out of the same cup of justice that we all do.
20 That's what the State asks. Make him drink out of
21 that cup just like everyone here has to.

22 Each of you over a week ago stood up and raised
23 your right hand and you swore to this. You shall
24 well and truly try and true deliverance make between
25 the state of South Carolina and the defendant at bar

1 whom you shall have in charge and a true verdict give
2 according to the law and the evidence, so help you
3 God.

4 Ladies and gentlemen, the State asks you to
5 follow your oath. Look at the law. Remember the
6 evidence. And do your job, so help you God. The
7 State submits when you do there are no critics in
8 this case. But follow the law and the facts of
9 guilty of the murder of John Johnson and guilty of
10 pointing and presenting a firearm at those officers.
11 Thank you.

12 **THE COURT:** All right, ladies and gentlemen.
13 Now you've heard the evidence and the arguments of
14 both the State and the defendant, and I'll explain to
15 you the law as it applies to this case.

16 Under our Constitution and Code of Laws only the
17 jury can make findings of fact in this case. I am
18 not permitted to indicate to you how I may feel about
19 the facts. If I have done or said anything in this
20 case which would indicate to you I have an opinion
21 concerning the facts of this case, then you should
22 disregard that. This jury must independently weigh
23 the evidence presented in this trial and render a
24 verdict based solely on that evidence.

25 Now, the same Constitution and laws which

1 designate and make you the finders of fact also make
2 me the instructor of the law. If you have any idea
3 as to what the law is or what the law ought to be and
4 it does not agree with what I now tell you the law
5 is, you are obligated under your oath that you've
6 taken to abandon this preconception on your part and
7 to accept and apply the law precisely as I now state
8 it to you.

9 I remind you again that the fact the defendant
10 was arrested, charged and indicted in this case is
11 not evidence in this case, cannot be considered by
12 you as evidence of guilt in this case, nor does it
13 create any presumption or inference of guilt. These
14 documents are simply the formal written instruments
15 which contain the charges made against the defendant.
16 They are the formal documents by which this case was
17 brought into court.

18 Now, the indictments in this case allege two
19 different offenses against the defendant. The
20 charges are murder and pointing or presenting a
21 firearm. Each indictment contains a separate and
22 distinct offense. You must decide each indictment
23 separately on the evidence and the law applicable to
24 it uninfluenced by your decision as to any other
25 indictment. The defendant may be convicted or

1 acquitted on any or both of the offenses charged.
2 You will be asked to write a separate verdict of
3 guilty or not guilty for each indictment.

4 Now, the defendant has pled not guilty to these
5 indictments, and that plea puts the burden on the
6 State to prove the defendant guilty. A person
7 charged with committing a criminal offense in South
8 Carolina is never required to prove himself or
9 herself innocent. I remind you the defendant has no
10 burden to come forward with any defense. The State
11 always has the burden to prove the defendant guilty
12 of those offenses charged by evidence which convinces
13 you beyond a reasonable doubt of the defendant's
14 guilt.

15 This is an important rule of law of this
16 country, that the defendant in a criminal case will
17 always be presumed to be innocent of the crime for
18 which the indictment was issued unless guilt has been
19 proven by evidence satisfying you of that guilt
20 beyond a reasonable doubt. This presumption of
21 innocence does not end even when you begin your
22 deliberations, but it accompanies the defendant
23 throughout the trial until you reach a verdict of
24 guilt based on evidence satisfying you of that guilt
25 beyond a reasonable doubt.

1 The presumption of innocence in other words is
2 not a mere legal theory. It's not just a legal
3 phrase. It is a substantial right to which every
4 defendant is entitled. This presumption of innocence
5 accompanies the defendant from the time he or she is
6 charged, throughout the trial, until you reach a
7 verdict of guilt based on evidence satisfying you of
8 that guilt beyond a reasonable doubt.

9 Now, what is a reasonable doubt at law? A
10 reasonable doubt is the kind of doubt that would
11 cause a reasonable person to hesitate to act. The
12 State has the burden of proving the defendant guilty
13 beyond a reasonable doubt. Some of you may have
14 served as jurors in civil cases where you were told
15 it's only necessary to prove that a fact is more
16 likely true than not true, such as by the greater
17 weight or preponderance of the evidence. In criminal
18 cases, however, the State's proof must be more
19 powerful than that. It must be beyond a reasonable
20 doubt. Any reasonable doubt must be resolved in
21 favor of the defendant.

22 Proof beyond a reasonable doubt is proof that
23 leaves you firmly convinced of the defendant's guilt.
24 There are very few things in this world we know with
25 absolute certainty, and in criminal cases the law

1 does not require proof that overcomes every possible
2 doubt.

3 If based on your consideration of the evidence
4 you are firmly convinced the defendant is guilty of
5 the crime charged, you must find the defendant
6 guilty. If on the other hand you think there is a
7 real possibility that the defendant is not guilty,
8 you must give the defendant the benefit of the doubt
9 and find the defendant not guilty.

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

17 Circumstantial evidence on the other hand is a
18 proof of a chain of facts and circumstances
19 indicating the existence of a fact. It is evidence
20 which immediately establishes collateral facts from
21 which the main fact may be inferred. Circumstantial
22 evidence is based on inference and not on personal
23 knowledge or observation.

24 You should weigh all of the evidence in the
25 case. After weighing all of the evidence if you are

1 not convinced of the guilt of the defendant beyond a
2 reasonable doubt, you must find the defendant not
3 guilty.

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

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

18 You may consider whether any witness has
19 exhibited to you any interest, bias, prejudice, or
20 other motive in this case. You may also consider the
21 appearance and the manner of a witness while on the
22 witness stand. Also you may consider whether or not
23 at the time the witness was making those observations
24 to which the witness was testifying whether or not
25 the witness was intoxicated.

1 Now, in this case, ladies and gentlemen, there
2 has been introduced a statement of the defendant. A
3 statement alleged to have been made by the defendant
4 has been admitted into evidence in this case. While
5 the Court has determined that the statement is
6 admissible, I instruct you that you make the ultimate
7 decision of whether or not the defendant made the
8 statement.

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

16 In determining whether the statement was
17 voluntary, you should consider both the
18 characteristics of the defendant and the details of
19 the questioning. Some of the factors that you may
20 consider are the age of the defendant, the
21 defendant's education or lack of education, the
22 defendant's mental ability or capacity, the
23 defendant's I.Q. or intelligence and the defendant's
24 background and environment, the length of detention
25 and the nature of the questioning, the advice or lack

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

9 You must carefully consider all of the
10 surrounding circumstances before you give any weight
11 to the alleged statement. The State has the burden
12 of proving beyond a reasonable doubt that the
13 defendant -- I mean, I'm sorry -- that the alleged
14 statement was voluntary in this case.

15 Now, normally a person cannot give opinion
16 testimony. A lay witness, in other words, cannot
17 give opinion testimony. Normally when a person
18 testifies they must testify as to what they either
19 saw, heard or sensed by smell or something of that
20 nature. However, there is an exception to this, and
21 that's when someone is qualified because of education
22 or experience, they are permitted to give their
23 opinion in certain areas if the Court qualifies them
24 in that way. That does not mean you have to accept
25 the opinion of the expert, but it is only evidence

1 for you to use in any way in which you may see fit.
2 And we had several experts testify in this case.

3 Now, in order to establish criminal liability,
4 that's criminal liability, liability for a criminal
5 act, criminal intent is required. For example, the
6 mental state required to be proven by the State for
7 some particular crime might be a purpose or an intent
8 or knowledge or a recklessness or criminal
9 negligence. Criminal intent must be proven by the
10 State beyond a reasonable doubt.

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

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

1 Where two inferences may be drawn from the same
2 facts, one consistent with a verdict of guilty of
3 murder and one consistent with a verdict of not
4 guilty, the defendant is entitled to the inference
5 which is consistent with a verdict of not guilty of
6 murder.

7 Criminal intent is a mental state, a conscious
8 wrongdoing. It's up to you to determine what the
9 defendant intended to do based on the circumstances
10 shown to have existed.

11 Now, as you know, the defendant is charged with
12 murder. The State must prove beyond a reasonable
13 doubt that the defendant killed another person with
14 malice aforethought. While the law does not require
15 that malice shall exist for any particular length of
16 time before the commission of the act in question, it
17 must be aforethought which means that malice must
18 have been conceived in the mind of the defendant and
19 must have accompanied the act of the killing.

20 Malice is defined in the law of homicide as a
21 term of art; that is, a technical term importing
22 wickedness, excluding just cause or legal excuse. An
23 old South Carolina case says that malice does not
24 necessarily impart ill will towards the individual
25 injured but signifies rather a general malignant

1 reckless of the lives and safety of others or a
2 condition of mind which shows a heart regardless of
3 social duty and fatally bent on mischief.

4 It is a wrongful intent to harm another,
5 indicates a wicked, depraved spirit intent on doing
6 wrong. The words "express" or "inferred" do not mean
7 different kinds of malice, only the manner or way in
8 which the only kind of malice known to the law may be
9 shown to exist; that is, either by direct evidence or
10 by inference.

11 Malice aforethought presupposes a competent mind
12 capable of thinking, entertaining and remaining an
13 evil disposition which would encompass the death of
14 another human being.

15 Now, as I indicated, it may be express or
16 inferred. Malice may be expressed where previous
17 threats or lying in wait or other acts of preparation
18 show that the deed was within the defendant's mind.
19 Malice may be inferred where, though not directly
20 expressed, it is indirectly but necessarily inferred
21 from the facts and circumstances which of are proved
22 beyond a reasonable doubt. Malice may be implied or
23 inferred from the willful and deliberate and
24 intentional causing or doing of an unlawful act
25 without just cause or legal excuse.

1 If a person using a deadly weapon deliberately
2 and intentionally without just cause or legal excuse
3 takes the life of another, malice may be inferred.
4 If facts are proven beyond a reasonable doubt
5 sufficient to raise an inference of malice to your
6 satisfaction, this inference could simply be an
7 evidentiary fact to be taken into consideration by
8 you, the jury, along with all the other evidence in
9 the case, and you may give it such weight as you may
10 believe and determine it should have.

11 In any event, such an inference in no way
12 lessens the burden on the State to prove malice
13 beyond a reasonable doubt. In other words, the
14 evidence of malice from the use of a deadly weapon is
15 simply an evidentiary fact to be considered by you
16 along with the other evidence in the case, and give
17 it such weight as you determine it should have,
18 including the right to reject any such inference.

19 Now, one cannot be convicted of any crime which
20 is defined in terms of its result, as in murder,
21 unless one's act is the proximate cause or the cause
22 of the result, which in murder is the death of the
23 victim. Proximate cause is that cause which is the
24 natural and continuing sequence unbroken by an
25 efficient intervening cause which produces the death

1 and without which the result would not have occurred.

2 Now, in our state, in our law there are what are
3 known as lesser-included offenses of murder. You may
4 have heard or seen on television in other -- maybe
5 not just on television but in other places -- murder
6 is sometimes referred to as murder in the first
7 degree or murder in the second degree or murder in
8 the third degree. That's not the way our law is
9 structured, but it basically will mean the same
10 thing. So there are degrees of taking the life of
11 another human being.

12 And in this case I will instruct you as to
13 involuntary manslaughter. That is one of the
14 subsections of murder or one of the lesser-included
15 offenses under the definition of murder.

16 If you find the State has failed to prove beyond
17 a reasonable doubt that the defendant committed
18 murder as I have just described it, you may consider
19 whether the State has proved beyond a reasonable
20 doubt that the defendant committed involuntary
21 manslaughter as a lesser-included offense of murder.

22 Involuntary manslaughter is the killing of
23 another without malice and unintentionally while
24 engaged in either an unlawful act not amounting to a
25 felony and not naturally tending to cause death or

1 great bodily harm; or, a lawful act with reckless
2 disregard for the safety of others.

3 Unintentional means the defendant did not intend
4 for anyone to be killed or seriously injured.
5 Reckless disregard for the safety of others is more
6 than mere negligence or carelessness. Mere
7 negligence or carelessness is the failure to use care
8 that a person of ordinary reason would use under the
9 same circumstances.

10 Recklessness is a conscious failure to use
11 ordinary care. A reckless disregard for the safety
12 of others means that you not interested in the
13 consequences of your acts or the rights and safety of
14 others. If a person who knows or should know that
15 ordinary care requires certain precautions be taken
16 for the safety of others when using a dangerous
17 instrumentality such as a gun or a car but that
18 person fails to use those precautions without
19 concern, the person's actions are considered
20 reckless.

21 The State must also prove beyond a reasonable
22 doubt under the heading of involuntary manslaughter
23 that the defendant's act was the proximate cause of
24 death, as I have previously explained my definition
25 for murder.

1 Now, what about the defenses to either murder or
2 involuntary manslaughter? I charge you that
3 voluntary intoxication is not an excuse or a defense
4 to a crime. A person who voluntarily renders himself
5 intoxicated is no less responsible for his acts while
6 in such condition.

7 If a person voluntarily drinks intoxicating
8 liquor or uses drugs and becomes intoxicated and if
9 while in that condition commits an act which would be
10 a crime if it had been committed by a sober person,
11 the fact of drunkenness or intoxication would not
12 relieve the defendant, the intoxicated person, from
13 responsibility.

14 Now, the defendant has raised the defense of
15 involuntary intoxication. I don't want you to get
16 that mixed up with involuntary manslaughter. They
17 both have the word "involuntary" in front of them.
18 But involuntary intoxication is a defense to either
19 murder or involuntary manslaughter.

20 The defendant has raised the defense of
21 involuntary intoxication. If a person becomes
22 involuntarily intoxicated by the contrivance of
23 another or by whatever means or for whatever purpose,
24 the affirmative defense of involuntary intoxication
25 if proven to you by the greater weight or

1 preponderance of the evidence is a complete defense,
2 and you must find the defendant not guilty of either
3 of those, of either murder or involuntary
4 manslaughter.

5 In order for the defendant to be entitled to the
6 defense of involuntary intoxication, the defendant
7 must prove two things. First, the defendant must
8 prove by the greater weight or preponderance of the
9 evidence that he unknowingly or involuntarily
10 consumed or ingested a foreign substance which
11 brought about the involuntary intoxication.

12 And, second, the defendant must prove by the
13 greater weight or preponderance of the evidence that
14 as a result of his involuntary intoxication the
15 defendant lacked the capacity to distinguish moral or
16 legal right from moral or legal wrong or to recognize
17 the act charged, in this case murder, was wrong. In
18 other words, the defendant must prove that he lacked
19 the capacity to know right from wrong or that the act
20 committed was wrong.

21 In considering these two issues, you may also
22 consider the state of intoxication of the defendant
23 before and after the alleged foreign substance was
24 consumed. You may consider all the facts and
25 circumstances of this case in your determination of

1 whether the State has met its burden of proving to
2 you the element of intent as I explained to you
3 earlier.

4 Now, ladies and gentlemen, it is unlawful for
5 anyone to carry about his person any handgun, whether
6 concealed or not, except for persons granted a
7 concealed weapons permit under provision of law by
8 the State Law Enforcement Division to carry a handgun
9 about his person under any of the conditions that are
10 set forth in the permit.

11 The permittee may also transfer the handgun
12 between the permittee's person, an enclosed glove
13 compartment, enclosed console, closed trunk or in a
14 closed container secured by an integral fastener or
15 transported in the luggage compartment of the
16 vehicle.

17 A concealed weapon means a firearm having a
18 length of less than 12 inches measured along its
19 greatest dimension that must be carried in a manner
20 that is hidden from public view in normal wear of
21 clothing except when needed for self-defense, defense
22 of others and the protection of real or personal
23 property.

24 Now, as you know, the defendant is charged with
25 pointing and presenting a firearm. The State must

1 prove beyond a reasonable doubt that the defendant
2 presented or pointed at another person a loaded or
3 unloaded firearm. Well, as to this charge the
4 defendant has raised the defense of habitation or his
5 home as a defense to the pointing and presenting a
6 firearm charge.

7 The defense of habitation is analogous to
8 self-defense in that if the defendant or a member of
9 the defendant's household is being attacked in his
10 home or the defendant reasonably believed that he or
11 a member of his household is being attacked in his
12 home, the defendant may use force necessary to
13 protect himself or his household from death or
14 serious bodily harm.

15 The defense of habitation must be proven by the
16 defendant by the greater weight or preponderance of
17 the evidence; and if proven, again would be a
18 complete defense to the pointing and presenting
19 charge, and you should therefore find the defendant
20 not guilty of this charge.

21 Now, ladies and gentlemen, there are two
22 possible verdicts which you may find for each
23 indictment. They are not guilty and guilty. There
24 is no significance whatever in the order in which I
25 state the possible verdicts. It's simply that one

1 must be stated first.

2 Your verdict must represent the considered
3 judgment of each juror. In order to return a verdict
4 it's necessary that each juror agree. In other
5 words, your verdict must be unanimous. It's your
6 duty as jurors to consult with one another to
7 deliberate with a view to reaching an agreement if
8 you can do so without violence to your individual
9 judgments.

10 Each of you must decide the case for himself or
11 herself, but do so only after an impartial
12 consideration of the evidence in the case with your
13 fellow jurors. In the course of your deliberations
14 do not hesitate to re-examine your own views, change
15 your opinion if convinced it's erroneous, but do not
16 surrender your honest conviction as to the weight or
17 effect of the evidence solely because of the opinion
18 of your fellow jurors or for the mere purpose of
19 returning a verdict.

20 Remember at all times that you are not partisans
21 favoring one party over the other. You are judges,
22 judges of the facts. Your sole interest in this case
23 is to seek the truth from the evidence that has been
24 presented to you.

25 All right. I'm going to ask you now to retire

1 to your jury room. And do not begin your
2 deliberations until I give you -- until all of the
3 evidence has been presented to you and the verdict
4 form has been sent to you.

5 Now, Madam Forelady, I have prepared a verdict
6 for you. The verdict form simply reads: "We, the
7 jury, by unanimous consent on the charge of murder
8 find the defendant, Dewain H. Herring, not guilty or
9 guilty"; Or, "We, the jury, by unanimous consent on
10 the lesser charge, lesser-included charge of
11 involuntary manslaughter, find the defendant, Dewain
12 Herring, not guilty or guilty." That's as to the
13 first charge. As to the second indictment: "We, the
14 jury, by unanimous consent on the charge of pointing
15 and presenting a firearm find the defendant, Dewain
16 Herring, not guilty or guilty." If you will sign
17 where indicated and date it, knock on the jury room
18 door and we will receive your verdict.

19 Now, let me give you a couple of other sort of
20 housekeeping matters. You have seen the video. You
21 have the right to take the video to the jury room.
22 If you wish to do so, if you will let us know, we'll
23 set the video up in the jury room and have one of the
24 operators, or perhaps it might be best if -- well,
25 we'll discuss that. Well, if you want to see it, you

1 want to come back in here and let us know what you
2 want to see, that might be the easiest way rather
3 than setting all this stuff, equipment up in the jury
4 room. As you know, the jury room is kind of small.
5 So, anyway, it will be available to you during your
6 deliberations if you wish to see it.

7 The 911 tape will also be available to you. And
8 it might be such that we could send that back to you.
9 If you wish to hear that, that might be easier to do
10 than to send the video back there.

11 The firearms, if you wish to see the firearms,
12 you certainly can do so. I am prohibited from
13 allowing the firearms and the ammunition to come into
14 the jury room at the same time. I know you all seem
15 to be getting along just fine, but that's absolutely
16 prohibited. If you wish to see the firearm, I can
17 send the firearms in individually. You can look at
18 them, return them to the courtroom. If you wish to
19 see the ammunition, I'll be glad to send that in
20 separately. But the firearm comes in first. So
21 nobody can -- anyway, you know what I mean. If you
22 wish to see the firearms, you certainly can do so.

23 I told you at the beginning of this trial that
24 you were not to take -- I was going to allow you to
25 take notes. You can take notes. Again, I'll remind

1 that you the notes are for your own benefit, for your
2 own memory, not to be used to try to convince
3 somebody else as to what you took down or what you
4 thought you heard and to sort of use as a lever to
5 try to convince your fellow jurors of something that
6 you took down that maybe they didn't take down. So
7 I'll ask you to use the notes only for that purpose.

8 I think that's it. What we're going to do for a
9 few minutes, so you can just relax for a few minutes
10 in the jury room, we're going to collect the evidence
11 that's been introduced in the case. We're going to
12 send it to the jury room. Once you receive all of
13 the evidence you can begin your deliberations.

14 We are here to accommodate you for -- it's
15 quarter 'til 5. We'll deal with the time if we have
16 to deal with time at a later date. But once we --
17 once you receive the evidence in this case and the
18 jury form, I mean, the verdict form, you can begin
19 your deliberations. All right. I'm going to excuse
20 you now and ask you to retire to the jury room.
21 Again, don't begin your deliberations until you
22 receive the evidence and the verdict form. Thank you
23 very much.

24 (Jury out at 4:44 p.m.)

25 **THE COURT:** Mr. Bailiff, ask juror number 106 to

1 just sit outside in the hall.

2 **THE BAILIFF:** Yes, sir.

3 **THE COURT:** All right. Hold it. We're not
4 dismissed. Order in the courtroom, please. Any
5 exceptions, corrections or additions to the charge
6 from the State?

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

8 **THE COURT:** From the defense?

9 **MR. HARPOOTLIAN:** Your Honor, as to your charge
10 on pointing and presenting, and it's been two weeks
11 since they published the indictment, I'm not sure
12 this jury understands the pointing and presenting
13 only goes to I'd ask you to
14 instruct them the pointing and presenting only
15 relates to activities at the
16 location.

17 **THE COURT:** I'll be glad to do that.

18 **MR. HARPOOTLIAN:** In addition, Your Honor, we
19 renew our motion for you to charge accident which you
20 previously denied based on the argument of the
21 solicitor and the facts of the case.

22 **THE COURT:** I think the only thing I can do is
23 tell the jury that I have ruled that accident is not
24 a defense. I mean, I will be glad to tell them that.

25 **MR. HARPOOTLIAN:** No, sir. I'm asking that

1 you -- oh, yeah. Your Honor, we'd also renew our
2 objections to the paragraph in which you say:
3 "Considering these two issues, you may also consider
4 the state of intoxication of the defendant before and
5 after the alleged foreign substance." We object and
6 new our objection to the Mouzon charge. And the only
7 thing really I guess we'd like them to be explained
8 the pointing and presenting.

9 **THE COURT:** All right. I think that's a fair
10 request. All right. Ask the jury to return to the
11 jury box, please. Counsel, before you do that.

12 **MR. MEADORS:** Here they come.

13 **THE COURT:** Are they coming?

14 **MR. HARPOOTLIAN:** Yes, sir.

15 **THE COURT:** Let me talk to them before -- the
16 jury is coming.

17 (Jury in at 4:47 p.m.)

18 **THE BAILIFF:** The jury is seated, Your Honor.

19 **THE COURT:** All right. Ladies and gentlemen, I
20 didn't mean to cause any confusion, but the lawyers
21 pointed out to me that I may not have been clear on
22 this pointing and presenting a firearm case, charge.
23 That is a charge just as to the defendant's home. In
24 other words, he is not charged with pointing and
25 presenting a firearm at Chastity's. It's the -- I

1 just want to make sure you understand that. It's
2 just at the home where he is charged with pointing
3 and presenting a firearm at the officers, not at
4 Chastity's. Okay? I just want to make sure you
5 understood that. Thank you very much.

6 (Jury out at 4:49 p.m.)

7 **THE COURT:** Solicitor, approach the bench.

8 (Whereupon, a bench conference is had)

9 **MR. MEADORS:** Judge, based on that last
10 charge --

11 **THE COURT:** Go ahead.

12 **MR. MEADORS:** -- we would request that pointing
13 and presenting a firearm is a felony. Included in
14 Your Honor's charge is that it was unlawful activity
15 not amounting to a felony. We argue that
16 circumstantially Chastity's, when the gun was pointed
17 out, it was a pointing and presenting. We'd just ask
18 for the charge that pointing and presenting a firearm
19 is included in that under the laws of this state.

20 **MR. HARPOOTLIAN:** Your Honor, they didn't indict
21 him for pointing and presenting at Chastity's. And
22 if they felt they needed to do that, they could have
23 done it.

24 **THE COURT:** All right. I charged them directly
25 as they've been indicted.

1 **MR. MEADORS:** That's fine, sir.

2 **MR. HARPOOTLIAN:** Thank you, Your Honor.

3 **THE COURT:** Now, go ahead and check the
4 evidence.

5 **MR. HARPOOTLIAN:** Yes, sir.

6 (Pause)

7 **THE COURT:** Solicitor, any objection to excusing
8 the alternate?

9 **MR. MEADORS:** Well, yes, sir.

10 (Whereupon, a bench conference is had)

11 **THE COURT:** I'm not going to dismiss her until
12 the evidence goes in, until they begin deliberating.
13 All right. The question is, does either party have
14 any objection to dismissing the alternate, and the
15 answer is no.

16 **MR. HARPOOTLIAN:** Negative.

17 **MR. MEADORS:** I mean, nobody else has a conflict
18 that we know of.

19 **THE COURT:** No. But I'm not going to do it
20 until they start deliberating and then I'll bring her
21 back in.

22 (Jury deliberating at 5:07 p.m.)

23 (Whereupon, a break is taken)

24 (WHEREUPON, Court's Exhibit No. 12 is marked for
25 identification.)

1 (Whereupon, a bench conference is had)

2 7:05 p.m.)

3 **THE COURT:** All right, counsel. I'm informed
4 that the jury has reached a verdict. Are you ready
5 to receive the verdict?

6 **MR. GIESE:** The State's ready.

7 **MR. HARPOOTLIAN:** The defense is ready.

8 **THE COURT:** Bring the jury, please. Ladies and
9 gentlemen in the courtroom -- hold them just a
10 minute. One minute. Just one minute. This is --
11 it's been a long and difficult trial, and I realize
12 that people's emotions may be somewhat on edge at
13 this point.

14 I want to caution you again about emotional
15 outbursts in the courtroom. When the jury panel
16 returns its verdict, I know sometimes it's very
17 difficult. But I'm going to ask you to please
18 restrain any show of emotion. All right. Bring the
19 jury.

20 (Jury in at 7:13 p.m.)

21 **THE BAILIFF:** The jury is seated, Your Honor.

22 **THE COURT:** All right. Thank you very much.
23 Madam Forelady, has the jury reached a verdict?

24 **FOREPERSON:** Yes, we have.

25 **THE COURT:** All right. Will you hand it to the

1 bailiff, please.

2 (Forelady complies)

3 **THE COURT:** All right, Madam Clerk. You can
4 publish the verdict, please.

5 **THE CLERK:** Yes, sir. Indictment number
6 2006-GS-40-0881, 2006-GS-40-0914, the State of South
7 Carolina vs. Dewain H. Herring; as to indictment
8 number 2006-GS-40-0881, we, the jury, find by
9 unanimous consent on the charge of murder find the
10 defendant, Dewain H. Herring, guilty.

11 As to indictment number 2006-GS-40-0914, we, the
12 jury, by unanimous consent on the charge of pointing
13 and presenting a firearm find the defendant, Dewain
14 H. Herring, guilty. Signed foreperson, May the 21st,
15 2007. Madam Forelady, was this your verdicts and the
16 verdicts of the entire jury?

17 **FOREPERSON:** Yes, it was.

18 **THE CLERK:** Thank you.

19 **THE COURT:** Desire to poll the jury.

20 **MR. HARPOOTLIAN:** We'd like to poll the jury,
21 please, Your Honor.

22 **THE COURT:** Poll the jury, please.

23 **THE CLERK:** Yes, sir. Ladies and gentlemen of
24 the jury, I'm going to ask you two questions relating
25 to your verdict. As I call your number, please

1 answer yes or no to both questions. Number 84, was
2 this your verdicts?

3 JUROR: Yes.

4 THE CLERK: Is it still your verdicts?

5 JUROR: Yes.

6 THE CLERK: Number 164, was this your verdicts?

7 JUROR: Yes.

8 THE CLERK: Is it still your verdicts?

9 JUROR: Yes.

10 THE CLERK: Number 107, was this your verdicts?

11 JUROR: Yes.

12 THE CLERK: Is it still your verdicts?

13 JUROR: Yes.

14 THE CLERK: Number 114, was this your verdicts?

15 JUROR: Yes.

16 THE CLERK: Is it still your verdicts?

17 JUROR: Yes.

18 THE CLERK: Number 31, was this your verdicts?

19 JUROR: Yes.

20 THE CLERK: Is it still your verdicts?

21 JUROR: Yes.

22 THE CLERK: Number 101, was this your verdicts?

23 JUROR: Yes.

24 THE CLERK: Is it still your your verdicts?

25 JUROR: Yes.

1 THE CLERK: Number 176, was this your verdicts?
2 JUROR: Yes.
3 THE CLERK: Is it still your verdicts?
4 JUROR: Yes.
5 THE CLERK: Number 48, was this your verdicts?
6 JUROR: Yes.
7 THE CLERK: Is it still your verdicts?
8 JUROR: Yes.
9 THE CLERK: Number 71, was this your verdicts?
10 JUROR: Yes.
11 THE CLERK: Is it still your verdicts?
12 JUROR: Yes.
13 THE CLERK: Number 91, was this your verdicts?
14 JUROR: Yes.
15 THE CLERK: Is it still your verdicts?
16 JUROR: Yes.
17 THE CLERK: Number 178, was this your verdicts?
18 JUROR: Yes.
19 THE CLERK: Is it still your verdicts?
20 JUROR: Yes.
21 THE CLERK: Number 192, was this your verdicts?
22 JUROR: Yes.
23 THE CLERK: Is it still your verdicts?
24 JUROR: Yes.
25 THE CLERK: The jury has been polled, Your

1 Honor.

2 **THE COURT:** Thank you very much. Any motions?

3 **MR. HARPOOTLIAN:** Not concerning the jury, Your
4 Honor.

5 **THE COURT:** All right. All right. Approach the
6 bench, counsel.

7 (Whereupon, a bench conference is had)

8 **THE COURT:** All right, ladies and gentlemen of
9 the jury. I want to thank you for your service in
10 this case. The lawyers have thanked you. I haven't
11 had that opportunity. I must say that this was an
12 unusual case, it was a difficult case, but these
13 matters have to be resolved and only by an impartial
14 jury of our peers. That's our system. And you've
15 done your duty. You fulfilled your responsibility.

16 The way things work here, because it's such a
17 busy place, we don't have the luxury that television
18 shows do or Crime and Punishment, I mean, Law and
19 Order does to sentence a defendant at a later date.
20 Federal courts do that but we don't. We go ahead and
21 sentence immediately following the jury's decision,
22 which will take place in about ten minutes.

23 There is some paperwork that needs to be done
24 before the actual sentencing. But I want to tell you
25 that you are welcome to stay and witness the

1 sentencing of the defendant. And I'll explain what
2 the possible sentences are during that sentencing
3 procedure. It takes about ten minutes. And as I
4 say, you're welcome to stay. You can come and sit in
5 the audience.

6 I am going to dismiss you now to return to the
7 jury room, or at least to be excused from the jury
8 room. Your service obviously is completed for this
9 two weeks ago term of court.

10 But I do want to thank you on behalf of the
11 judicial system. I want to thank you on behalf of
12 these litigants. I want to thank you on behalf of
13 the citizens of Richland County. It's been a
14 difficult trial and you have performed admirably and
15 no one can criticize your verdict.

16 If anybody attempts to speak to you outside this
17 courtroom after this trial, you certainly are welcome
18 to speak to them, but you're also welcome not to
19 speak to them. If you choose not to speak to
20 anybody, then you certainly have the right not to
21 speak to either press or any of the parties involved
22 or anything like that.

23 So I want to again thank you very much for your
24 service. I can't do any more than that. I do --
25 Ms. Scott has -- Ms. Falcone is going to tell you

1 about your checks that are in the mail and that sort
2 of thing. They're prepared to pay you for your
3 service. And she'll do that. And anybody that needs
4 work excuses or anything like that, she'll meet with
5 you, collect your badges as we disburse at this time.

6 But as I say, the sentencing will take place in
7 the next ten or fifteen minutes. You're welcome to
8 come and witness that. Just come in the back door
9 quietly. And we'll proceed with that procedure now.
10 So, thank you very much. You're dismissed at this
11 time.

12 (Jury excused from the trial of the case at
13 7:20 p.m.)

14 **THE COURT:** All right. We'll stand at ease for
15 about ten minutes while the necessary paperwork is
16 prepared, at which time we'll commence the
17 sentencing.

18 (Whereupon, a break is taken)

19 **MR. HARPOOTLIAN:** Are you ready to proceed, Your
20 Honor?

21 **THE COURT:** If the State is ready to proceed.

22 **MR. GIESE:** The State's ready.

23 **THE COURT:** All right, Solicitor.

24 **MR. MEADORS:** If it please, Your Honor. Your
25 Honor, in the courtroom there is seven cousins of

1 John Johnson, one nephew. In addition to that, Edna
2 Jennings', aunt; James Johnson, uncle; Ms. Mary
3 Rickenbacker, grandmama; Ms. Jean Johnson, mother;
4 Mr. John Johnson, father, back here behind us, Judge.

5 In addition to that, a sister, Ms. Angela
6 Johnson. And of course under the Victims' Rights Act
7 I've told them they have a right to address the
8 Court. I think Ms. Angela Johnson at this time is
9 going to speak for the family, Your Honor, sister of
10 John Johnson.

11 **THE COURT:** Yes, ma'am. I'll be glad to hear
12 from you.

13 **MS. ANGELA JOHNSON:** Thank you. My family would
14 like to thank the jury for their patience and
15 diligence. We are relieved that justice has
16 prevailed. Although we cannot have "Jon Jon" back,
17 we will forever miss him. And thank the jury again
18 for their decision.

19 **MR. MEADORS:** Your Honor, all I'd like to say is
20 I've dealt on and off with this family for the past
21 16 months. They've been a pleasure to deal with, and
22 I want to thank them for the way they've treated us.
23 And I also want to thank the jury.

24 **MR. GIESE:** Your Honor, just very briefly. The
25 facts speak for themselves I believe. He has no

1 prior record. We leave it up to His Honor as to what
2 you sentence him to.

3 **MR. MEADORS:** Your Honor, finally also, we'd
4 like to thank the Richland County Sheriff's
5 Department.

6 **THE COURT:** All right, sir. Well, Mr.
7 Harpootlian, Mr. Herring, you understand the
8 limitations that this Court is faced with with a
9 verdict of murder, a guilty of murder. The statutes,
10 the laws of the State of South Carolina provide a
11 minimum sentence of 30 years and a maximum sentence
12 of life in prison. Those are the parameters with
13 which this Court must look at sentencing in this
14 case.

15 On the pointing and presenting a firearm, the
16 maximum sentence on the pointing and presenting a
17 firearm is five years, both of which, both sentences
18 could be run either consecutively or concurrently.
19 So the Court's hands are somewhat limited in terms of
20 what you might ask for or pray for in the way of
21 sentence. But I'll allow you to address the issue
22 and Mr. Herring to also address the issue as to that.
23 Yes, sir.

24 **MR. HARPOOTLIAN:** If it please the Court, Your
25 Honor. As you've heard, Dewain Herring is a

1 63-year-old lawyer, never been in trouble before in
2 his life. The jury has spoken. I'm not here to
3 argue with the jury verdict.

4 However, whatever your sentence is for Mr.
5 Herring, at 63, 30 being the minimum, it's tantamount
6 to a death sentence for him. I'd ask you to consider
7 the minimum because of the severe impact it will have
8 on him. It's day-for-day. So at 63, he'd get out at
9 93, which I don't think that's going to happen. So
10 I'd ask you to consider giving him the minimum
11 sentence of 30 years and run the five years
12 concurrent with it.

13 Your Honor, I'm not arguing with the jury's
14 verdict. However, I will indicate to the Court that
15 Mr. Herring is infirm. He's got several illnesses.
16 He is deaf. Prison time is going to be very tough
17 for him. So I'd ask you to -- and of course this is
18 in no way to disparage the victim's loss. However,
19 we're here for sentencing, to do what's appropriate,
20 and 30 is the minimum. We'd ask you to give that.

21 **THE COURT:** Mr. Herring, do you have anything
22 you want to say at this time?

23 **MR. HERRING:** It's very difficult for me to
24 express my sorrow to the Johnson family, my family
25 and my extended family that have been here and

1 supported me. Mr. Harpootlian and his legal team I'm
2 satisfied have done everything that they can. I will
3 ask Your Honor to please take into some consideration
4 the various infirmities that I do have which my
5 medical physicians can attest to. And I am just
6 horrifically, horrifically sorry.

7 **THE COURT:** Well, Mr. Herring, nothing I can say
8 can minimize the tragedy that occurred in this case.
9 As you clearly stated, it's been a horrific event for
10 many, many people. As I told your attorney, I'm
11 constrained by the law as to what I can and cannot
12 do. The law is very clear.

13 Therefore, Mr. Herring, Mr. Dewain H. Herring,
14 on the charge of murder, the sentence of the Court is
15 you be committed to the State Department of
16 Corrections for a period of 30 years. The pointing
17 and presenting a firearm, the sentence of the Court
18 is you be committed to the State Department of
19 Corrections for a period of five years. Both
20 sentences are to run concurrent. And if you have
21 served any time, you will be given credit for that
22 time. You will get credit for that time. Good luck
23 to you, sir.

24 **MR. HARPOOTLIAN:** Thank you. Your Honor, for
25 the record, I'd like to note previously made motions,

1 renew those motions. For the record. And they're
2 denied I assume.

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

4 **MR. MEADORS:** Thank you, Your Honor.

5 **MR. GIESE:** Thank you, Your Honor.

6 **THE COURT:** This court is adjourned.

7 (Whereupon, the proceedings are concluded)
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CERTIFICATE OF REPORTER:

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

I, Jenny H. Williams, Official Court Reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Richland County, South Carolina, on the 7th, 8th, 9th, 10th, 11th, 14th, 15th, 16th, 17th, 18th, and 21st days of May, 2007.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

November 26, 2007

Jenny H. Williams

Jenny H. Williams, Court Reporter

ARREST WARRANT

I-975787

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Richland Bond Court

THE STATE

RCSD#0601256929

against

Dewain H Herring

Address: [REDACTED]

Columbia, SC 29206-

Phone: [REDACTED] SSN: [REDACTED]
 Sex: M Race: W Height: 5 11 Weight: 220
 DL State: DL #:

DOB: [REDACTED] Agency ORI #: 04000

Prosecuting Agency: Richland County Sheriff Department

Prosecuting Officer: David Linfert

Offense: Murder

Offense Code: 0116

Code/Ordinance Sec: 16-03-0010, 0020

This warrant is CERTIFIED FOR SERVICE in the

☐ County/ ☐ Municipality of

The accused
 is to be arrested and brought before me to be
 dealt with according to the law.

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to
 defendant Dewain Herring
 on 1-30-06

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

Richland General Sessions
 1701 Main Street
 P O Box 192
 Columbia, SC 29202

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Richland Bond Court

Personally appeared before me the affiant, David Linfert

being duly sworn deposes and says that defendant Dewain H Herring

did within this county and state on 01/29/2006

State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of Richland Bond Court

in the following particulars:

DESCRIPTION OF OFFENSE: Murder

I further state that there is probable cause to believe that the defendant named above did commit
 the crime set forth and that probable cause is based on the following facts:

That on 01/29/06 while at 3722 River Dr in the Dutch Fork Magisterial District of Richland County, one Dewain H.
 Herring did commit the crime of Murder in that it is believed the defendant, with malice and aforethought, did cause
 the death of one John Johnson by shooting him in the head with a firearm immediately after a verbal altercation. The
 defendant was captured on video and identified by witnesses. Affiant and others are witness to prove the same.

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Richland Bond Court

Affiant's Address 5623 Two Notch Road

Columbia, SC 29223-

Affiant's Telephone (803)576-3000

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY

It appearing from the above affidavit that there are reasonable grounds to believe that

on 1/29/2006 defendant Dewain H Herring

did violate the criminal laws of the State of South Carolina (or ordinance of

☒ County/ ☐ Municipality of Richland Bond Court

) as set forth below:

DESCRIPTION OF OFFENSE: Murder

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or
 her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as
 soon thereafter as is practicable

Sworn to and subscribed before me

on 01/30/2006

Signature of Issuing Judge (L.S.)

Clevette L. Hudnell

Judge Code: 5959

Judge's Address 201 John Mark Dial Drive

Columbia, SC 29203-5159

Judge's Telephone (803)695-3546

Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

Approved by
Attorney General
April 21, 2003
SCCA 518

CERTIFIED TRUE COPY
 OF
 THE
 ORIGINAL
 FILED
 IN
 THE
 CLERK'S
 OFFICE
 OF
 RICHLAND
 COUNTY
 SOUTH CAROLINA

2355

BAIL set by

WITNESSES

Judge _____
on _____
Type and Amount: _____
Name of Surety: _____

Name: _____
Address: _____
Telephone: _____

PRELIMINARY HEARING held by

Judge _____
on _____
Defendant Attorney: _____

Name: _____
Address: _____
Telephone: _____

Decision: _____

Name: _____
Address: _____
Telephone: _____

DISPOSITION before

Judge _____
on _____
by _____
(Indicate jury trial, bench trial, plea, not pros., etc.)

Name: _____
Address: _____
Telephone: _____

Disposition: _____

Name: _____
Address: _____
Telephone: _____

Sentence: _____

JURORS

Name: _____
Address: _____
Telephone: _____

Name: _____
Address: _____
Telephone: _____

CODEFENDANTS

2356

WITNESSES

(S) David Linfert - RCSD

ARREST WARRANT NUMBER

1975787

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date:

FEB 16 2006

VERDICT

Foreperson of Petit Jury

Date:

SCANNED
APR 25 2016

DOCKET NO. 2006-GS-40-00881

The State of South Carolina

County of Richland

COURT OF GENERAL SESSIONS

FEBRUARY TERM 2006

52

THE STATE

VS.

H. DEWAIN HERRING

Indictment for

MURDER

SC Code: 16-3-10

CDR Code: 0116

Class FEL/EXM(V)

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

CERTIFIED TRUE COPY
OF ORIGINAL FILED,
FILED IN 107-1-10-10
CLERK OF COURT
RICHLAND COUNTY
SOUTH CAROLINA

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

INDICTMENT

At a Court of General Sessions, convened on February 15, 2006, the Grand Jurors of Richland County present upon their oath:

MURDER

That H. Dewain Herring did in Richland County on or about January 29, 2006, feloniously, willfully and with malice aforethought, kill one John Johnson by means of a firearm and that the said victim died as a proximate result thereof. All in violation of SC Code of Laws § 16-3-10

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


Warren B. Giese, SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF Richland
STATE VS.

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:

06 - GS - 40 - 00881

AKA:

Race: W Sex: M Age: _____

DOB: _____ SS#: _____

Address: _____

City, State, Zip _____

DL# _____ SID# _____

A/W#:

1975787

Date of Offense:

January 29, 2006

S.C. Code §:

16-3-10

CDR Code #:

011116☐ CASE RESTORED

SENTENCE SHEET

☐ PLEA☒ TRIALIn disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTO: Murderin violation of § 16-3-10 of the S.C. Code of Laws, bearing CDR Code # 011116☐ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS (CSC ☐ §17-25-45
w/minor 1st or Lewd Act)The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (Defendant initial)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

W. B. [Signature]
Solicitor[Signature]
Defendant[Signature]
Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of
\$ _____; plus costs and assessments as applicable; the balance is suspended with probation for _____ months/years
and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which
are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the
State Department of Corrections.☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine: \$ _____

\$14-1-206 (Assessments 107.5%) \$ _____

\$14-1-211(A)(1) (Conv. Surcharge) \$100 \$ _____

\$14-1-211(A)(2) (DUI Surcharge) \$100 \$ _____

\$56-5-2995 (DUI Assessment) \$12 \$ _____

\$35.13 (Public Def/Prob) \$500 \$ _____

\$73.3, 1B TP (Law Enforce. Funding) \$25 \$ _____

\$33.7, 1B TP (Drug Court Surcharge) \$100 \$ _____

\$50-21-114(BUI Breath Test Fee) \$50 \$ _____

\$56-5-2942(J) (Vehicle Assessment) \$40/ea \$ _____

3% to County (if paid in installments) \$ _____

TOTAL \$ _____

PTUP _____

days/hours Public Service Employment

Obtain GED _____

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, \$35.13 TP
Requires \$500 be paid to Clerk during probation.PRESIDING JUDGE [Signature]Judge Code: 2Sentence Date: 5-21-07RICHLAND COUNTY
SOUTH CAROLINA

2360

ARREST WARRANT

1-975805

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Richland Bond Court

THE STATE

RCSD#0801256929

against

Dewain H Herring

Address: [REDACTED]

Columbia, SC [REDACTED]

Phone: [REDACTED] X SSN: [REDACTED]

Sex: M Race: W Height: 5 11 Weight: 220

DL State: DL #:

DOB: [REDACTED] Agency ORI #: 04000

Prosecuting Agency: Richland County Sheriff Department

Prosecuting Officer: James Smith

Offense: Pointing and Presenting a Firearm

Offense Code: 0122

Code/Ordinance Sec: 16-23-0410

This warrant is CERTIFIED FOR SERVICE in the

☒ County/ ☐ Municipality of

The accused

is to be arrested and brought before me to be dealt with according to the law.

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to

defendant DEWAIN H. HERRING

on 02/11/06

RCSD

Gillevs Sr (5479)
Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

Richland General Sessions
1701 Main Street
P O Box 192
Columbia, SC 29202

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Richland Bond Court

Personally appeared before me the affiant James Smith

being duly sworn deposes and says that defendant Dewain H Herring

did within this county and state on 01/29/2006

State of South Carolina for ordinance of ☒ County/ ☐ Municipality of

Richland Bond Court

in the following particulars:

DESCRIPTION OF OFFENSE: Pointing and Presenting a Firearm

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

That on 01/29/06 while at [REDACTED] in Richland County, one Dewain H. Herring did commit the crime of Pointing and Presenting a Firearm in that it is believed the defendant committed the crime because he did produce and point a chrome plated revolver (believed to be .357 Smith & Wesson revolver, which was recovered at the scene) at Sgt. David Linfert and Officer Brien Gwynn (officers with RCSD). The officers were attempting to serve a lawful search warrant at the location, which is the def's residence. The search warrant was being executed in conjunction with the investigation of a freshly committed murder. As a result of the def's actions, which were observed by Linfert and Gwynn, he was shot and wounded by one the officers. The def. was subsequently arrested at the scene. Affiant and others are witness to prove the same.

Signature of Affiant

G. GALLEGOS FOR J. SMITH

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Richland Bond Court

Affiant's Address 5623 Two Notch Road

Columbia, SC 29223-

Affiant's Telephone (803)576-3000

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that

on 1/29/2006

defendant Dewain H Herring

did violate the criminal laws of the State of South Carolina (or ordinance of

☒ County/ ☐ Municipality of Richland Bond Court

) as set forth below:

DESCRIPTION OF OFFENSE:

Pointing and Presenting a Firearm

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable

Sworn to and subscribed before me

on 01/30/2006

C. L. Hudnell (L.S.)
Signature of Issuing Judge

Clevette L. Hudnell

Judge Code: 5959

Judge's Address 201 John Mark Dial Drive

Columbia, SC 29203-5159

Judge's Telephone (803)695-3546

Issuing Court: ☒ Magistrate

☐ Municipal

☐ Circuit

ORIGINAL

TRUE COPY
OF ORIGINAL FILED
JAN 31 2006
C.C.F.G.S.
RICHLAND COUNTY
SOUTH CAROLINA

Approved by
S. [REDACTED]
April 21, 2006
SCCA 318

RECEIVED - 1 PM 2:28
JUL 11 2006
C.C.F.G.S.

BAIL set by

Judge _____
on _____
Type and Amount: _____
Name of Surety: _____

PRELIMINARY HEARING held by

Judge _____
on _____
Defendant Attorney: _____
Decision: _____

DISPOSITION before

Judge _____
on _____
by _____
(indicate jury trial, bench trial, plea, nol. pros., etc.)
Disposition: _____
Sentence: _____

JURORS

WITNESSES

Name: _____
Address: _____
Telephone: _____

Name: _____
Address: _____
Telephone: _____

Name: _____
Address: _____
Telephone: _____

Name: _____
Address: _____
Telephone: _____

Name: _____
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Telephone: _____

Name: _____
Address: _____
Telephone: _____

Name: _____
Address: _____
Telephone: _____

Name: _____
Address: _____
Telephone: _____

CODEFENDANTS

WITNESSES

⑤ David Linfert RCSD
STAN SMITH - RCSD

ARREST WARRANT NUMBER

1975805

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date: FEB 16 2006

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2006-GS-40-00914

The State of South Carolina

County of Richland

COURT OF GENERAL SESSIONS

FEBRUARY TERM 2006

52

THE STATE
vs.

H. DEWAIN HERRING

Indictment for
POINTING AND PRESENTING A
FIREARM

SC Code: 16-23-410

CDR Code: 0122

Class FEL-F

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

CERTIFIED TRUE COPY
OF ORIGINAL FILED
JAN 16 2006
C.C.C. P&G.S.
RICHLAND COUNTY
SOUTH CAROLINA

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

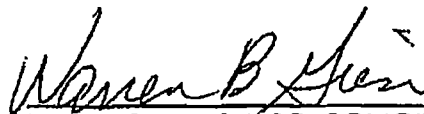
INDICTMENT

At a Court of General Sessions, convened on February 15, 2006, 2006, the
Grand Jurors of Richland County present upon their oath:

POINTING AND PRESENTING FIREARM

That H. Dewain Herring did in Richland County on or about January 29, 2006
knowingly point and/or present a firearm, to wit: a revolver, at the victim, Sgt. David
Linfert and/or Officer Brien Gwyn, all in violation of Section 16-23-410, Code of Laws of
South Carolina, (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such
case made and provided.


WARREN B. GIESE, SOLICITOR

RECEIVED
CLERK OF COURT
RICHLAND COUNTY
SOUTH CAROLINA
2006 FEB 15

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Richland
STATE VS.

INDICTMENT/CASE#:

06 - GS - 40 - 00914H. Dewain Herring

AW#:

I975805

Date of Offense:

January 29, 2006

S.C. Code §:

16-23-410

CDR Code #:

0111212

AKA:

Race:

W

Sex:

M

Age:

DOB:

SS#:

Address:

City, State, Zip

DL#

SID#

☐ CASE RESTORED

SENTENCE SHEET

☐ PLEA☒ TRIALIn disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTO: Pointing and presenting a firearmin violation of § 16-23-410of the S.C. Code of Laws, bearing CDR Code # 0111212☐ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS (CSC ☐ §17-25-45
w/minor 1st or Lewd Act)The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (Defendant initial)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

J. Meador
SolicitorH. Dewain Herring
Defendant[Signature]
Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 5 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of
\$ _____; plus costs and assessments as applicable; the balance is suspended with probation for _____ months/years
and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which
are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the
State Department of Corrections.☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms:

☐ set by SCDPPPS

Recipient:

*Fine:

§14-1-206 (Assessments 107.5%)	\$	\$
§14-1-211(A)(1) (Conv. Surcharge)	\$100	\$
§14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§56-5-2995 (DUI Assessment)	\$12	\$
§35.13 (Public Def/Prob)	\$500	\$
§73.3, 1B TP (Law Enforce. Funding)	\$25	\$
§33.7, 1B TP (Drug Court Surcharge)	\$100	\$
§50-21-114(BUI Breath Test Fee)	\$50	\$
§56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
3% to County (if paid in Installments)	\$	\$
TOTAL	\$	\$

Barbara A. Scott

Clerk of Court/Deputy Clerk

Court Reporter: J. Williams

PTUP

_____ days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol Testing

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, \$35.13 TP

Requires \$500 be paid to Clerk during probation

PRESIDING JUDGE

Judge Code:

Sentence Date:

OF ORIGINAL FILED

2 1/31/062 1/31/062 1/31/06

RICHLAND COUNTY

SOUTH CAROLINA

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of General Sessions
G. Thomas Cooper, Jr., Circuit Court Judge

2006-GS-40-00881
2006-GS-40-00914

State of South Carolina,

Respondent,

v.

H. Dewain Herring,

Appellant

FINAL BRIEF OF APPELLANT

Richard A. Harpootlian
Graham L. Newman
Richard A. Harpootlian, P.A.
1410 Laurel Street
Columbia, South Carolina 29201
Telephone: 803-252-4848

Katherine Carruth Goode
1079 Old Camden Road
Winnsboro, South Carolina 29180
Telephone: 803-799-4440

Attorneys for Appellant

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in denying the defense motions to suppress the three searches of appellant's residence and the fruits of those searches?
2. Did the trial court abuse its discretion in allowing lay witnesses to give their opinion of what could be seen on the video, when those witnesses did not personally observe the actual events depicted in that portion of the video?
3. Did the trial court abuse its discretion in denying the defense mistrial motion based on the admission of improper lay opinion testimony?
4. Did the trial court commit reversible error in denying the requested charge on accident?
5. Did the trial court commit reversible error in denying the requested charges on involuntary manslaughter based on negligent use of a deadly weapon?
6. Did the trial court commit reversible error in granting the State's request to charge based on *State v. Mouzon*?
7. Did the trial court err in denying the motion for directed verdict with respect to the charge of pointing and presenting a firearm?
8. Was the cumulative prejudice that resulted from all the erroneous rulings such that appellant is entitled to a new trial?

STATEMENT OF THE CASE

Appellant, H. Dewain Herring, was indicted February 16, 2006, in Richland County on charges of murder and pointing a presenting a firearm. R. pp. 4-7. He entered a plea of not guilty and was tried by a jury in the Richland County Court of General Sessions May 7-11, 14-18, 21, 2007, with Judge G. Thomas Cooper, Jr., presiding. R. pp. 14-15. He was convicted of both offenses and was sentenced on May 21, 2007, to concurrent terms of 30 years and 5 years, respectively. R. pp. 2-3, 1318-19. On May 29, 2007, he served a notice of appeal and filed it in both the lower court and the Court of Appeals. R. p.1.

STATEMENT OF FACTS

Just after midnight on January 29, 2006, a shooting occurred at Chastity's Gold nightclub on River Drive in Columbia, South Carolina. A single shot was fired through the closed, opaque front door of the establishment and struck John Johnson, resulting in his death. The club had several security cameras in operation on that night, and a compact disk containing the video recordings from those cameras between 11:00 p.m. January 28 and 1:59:59 a.m. January 29 was introduced into evidence. State's Exhibit 54. The executive vice-president of Chastity's, who created the disk at the State's request, did not include the video from a camera positioned in the hallway. R. pp. 361, 376-79. The State failed to verify in a timely manner that the disk had all the camera views and failed to take custody of the computer's hard drive, and three months later the club's computer recorded over the January 28-29 video recording made from the hall camera. R. pp. 382-86, 409-11.

The videos depict appellant coming to the club at 11:00 p.m. and leaving just before midnight. They show him getting into a vehicle and driving away. After his car had left, the outside videos depict a car of the same color and style as his pulling to the front of the club.

The vehicle paused, then moved slightly forward, paused again, and then departed. At approximately the same time, Johnson fell to the floor inside the club. The State charged appellant with murder in connection with his death.

Between 4:00 and 4:30 a.m., appellant was awakened when at least six officers from the Richland County Sheriff's Department, ostensibly there to execute a search warrant, broke open the metal front door of his home with a battering ram, burst in with guns drawn, and opened fire. R. pp. 549, 552, 556-58. They shot 17 bullets into the walls and furnishings. R. pp. 558-59, 653-54. One bullet struck appellant, passing through his arm and leaving his blood and tissue on the wall that it penetrated. R. pp. 563, 654-55, 669-71. Two of the officers claimed appellant pointed a gun at them. R. pp. 522, 612. The State charged appellant with pointing and presenting a firearm in connection with this incident.

A number of people who were working at Chastity's (collectively referred to in this brief as "the club witnesses") testified at trial. They revealed astounding information about the operations of the club and the activities that occur there.

Chastity's is a strip club at which dancers, also referred to as entertainers, perform totally in the nude. R. pp. 274, 327, 394. It is the only totally nude club in Columbia. R. pp. 274, 935. The dancers use stage names, not their real names. R. pp. 397, 444-45. The club charges the customers an entrance fee and makes additional money from sales of drinks, from fees dancers collect from the customers, and from costumes customers buy for the dancers. R. pp. 156-57, 166, 398, 403-05, 412, 460-61. The dancers are not employees of the club and are not paid by the club; instead, they pay the club a fee for the privilege of dancing there. R. pp. 274, 338, 396-97, 936. They earn money in the form of tips, but they also charge fees to provide personal dances for individual patrons, a portion of which they

must pay to the club. R. pp. 166, 221, 274, 936. The dancers also routinely tip the club's paid employees, whom they rely on to look out for them and provide "protection." R. pp. 211, 220, 277, 396, 451-53.

The individual dances occur in two formats. Some take place in a room called the VIP room, which contains a number of couches. R. p. 168. There, dancers provide individual five-minute dances, often involving "lap dances" by which the nude dancer sits on the clothed lap of the customer, grinding her nude genitalia on his clothed genitalia. R. pp. 214-15, 221, 332-33, 407, 1164, 1199-200. This room is not private, and more than one dancer can be servicing an individual customer simultaneously. R. pp. 168-69. The other kind of individual dance is a more private one, for which the customer pays a much higher fee to be entertained by the dancer, alone, for 30 minutes, in a room called the champagne room. R. pp. 215-17, 1164. The doorway to this room is beaded, people can see into it, and the bouncers, also called floormen, check the room regularly. R. pp. 165, 169, 347, 416. Customers are not allowed to take their drinks from the bar into the VIP and champagne rooms, although they may purchase champagne and have it brought to the champagne room. R. pp. 278, 303-04, 344, 394. A dance in the VIP room costs \$30. R. p. 215. One in the champagne room costs from \$265 to \$300 (champagne extra). R. pp. 221, 307, 413, 453-54. The dancer must pay the club \$5 to \$10 of the fee paid for a dance in the VIP room and \$65 of what she collects for a private session in the champagne room. R. pp. 302, 308, 346, 399, 413. Under the club's rules, the dancers can touch and rub their breasts and genitalia on the customer, but the customer is not allowed to touch the dancer. R. pp. 225-26, 313, 327-28. Although the club's rules purport to require the men to remain clothed and purport to prohibit sexual activity between the entertainers and the customers, club witnesses

acknowledged that men lower their pants or otherwise expose themselves and that sex is provided to customers on occasion in the champagne room. R. pp. 218, 318, 947.

The club witnesses testified that appellant came to the club on January 28, ordered a drink at the bar, and purchased a drink for one of the dancers, "Mia." R. p. 299. She gave him a \$30 lap dance in the VIP room. R. pp. 301-03. Thereafter, they returned to the bar, where they had left their drinks. R. pp. 303-04. She offered him a \$300 dance in the champagne room, which he paid for, and she escorted him there. R. pp. 305-06, 309, 334, 414. She left him there, saying she wanted to freshen up, and she let the bouncer know she was doing so. R. pp. 311, 334, 415. She went to the dressing room and stayed there five to 15 minutes, "killing time" and smoking a cigarette. R. pp. 317, 335. Mia had consumed alcohol and drugs, and she admitted she was addicted to cocaine and was high on cocaine that night. R. pp. 315-16, 325. While she was away, a bouncer went to the champagne room, where he claimed he found appellant completely naked and engaging in sexual activity. R. pp. 318, 417-18. He ordered appellant to stop and get dressed. R. pp. 418-19.

None of this alleged activity is reflected on the videos from the club's security cameras. The hall camera was positioned facing the champagne room, and it was the video recording from this camera which was omitted from the disk offered into evidence by the State. R. pp. 243, 382-86. The State could have ensured that this recording was preserved but failed to do so. R. pp. 409-11.

Club witnesses testified appellant was upset. He wanted his money back, but it was not refunded, and he was required to leave. R. pp. 175-76. Mia acknowledged that it is "a great thing" when she is able to get the money from a customer without performing the services, and she was happy that happened with appellant. R. pp. 319, 324, 334. She had

told him they would have complete privacy, even though she knew people would be looking in the room all the time. R. pp. 165, 306, 354, 457. The club regularly ejected patrons who violated the rules concerning touching or engaging in sexual activity, and it received complaints from customers who did not get what they paid for. R. pp. 220-21, 406-08, 449-50. Mia denied that she set appellant up by inviting him to take his clothes off and telling the bouncer to check on him in five minutes, but she and another dancer acknowledged that this practice occurs at Chastity's. R. pp. 336-37, 341, 359, 942-44.

The security camera videos which were preserved depict appellant, fully clothed, walking through the lobby to the front door and leaving, followed by Johnson and another employee of the club, Donnie Hawkins. The outdoor cameras depict him in the parking lot, initially talking with Johnson, then going toward his car, then returning to talk with Johnson and Hawkins. Ultimately, he got into his car and left.

The State contended that appellant returned in his car, obtained his gun from the glove compartment, aimed it through the passenger window to the door of the club, and intentionally fired. Neither appellant nor the gun can be seen on any of the security videos of the car that pulled up to the entryway. The defense offered expert forensic testimony concerning the substantial flash appellant's gun would have made – "a fire ball" – and the absence of any flash on the video. R. pp. 893-95. It was the expert's opinion based on his review of the video and the scene that a sizable flash – a plume several feet in length in the shape of a cone, with a diameter of one to one-and-a-half feet – would be visible if the State's theory of the case were correct. R. pp. 893-94, 923-24. The absence of such a flash was indicative of the weapon's discharging from below the bottom of the window. R. p.

895. It was his opinion, based on the video and measurements he took at the scene, that the driver was not pointing the gun and aiming it at the door. R. pp. 886-92.

The defense established that the officers who conducted the processing of the crime scene for the Sheriff's Department did not take any measurements or conduct trajectory analysis with respect to the bullet entry and exit holes in the club's door. R. pp. 477, 479-83, 878-79. They did not take the door into custody for further analysis of the bullet hole, and the door was replaced by Chastity's and thrown away over a month later. R. pp. 386-88, 491. Although they were capable of determining the angle of the bullet as it passed through the door, they did not make any effort to do so. R. pp. 483-86, 489-90, 494, 878-82. Nor did they look for any marks, dents, or other scars that would have been left by a bullet had it ricocheted from the brick pillars, metal poles, or metal frame of the overhang that protrudes over the walkway approaching the door, something normally done in processing a crime scene involving a gunshot. R. pp. 486-88, 494-96, 661-68, 882-85. Such evidence could have established that the gun discharged from below the window level, ricocheted off some part of the structure's exterior surroundings, and entered the front door at an angle, to support appellant's defense of accident or to support a conviction of a lesser offense involving recklessness. R. pp. 895-98, 928-29, 931-32.

The expert estimated the hole in the door was approximately five feet, eight inches above the floor line. R. p. 925. Because of the steps and the slope of the entryway, the bottom of the door was three-and-one-half feet above the level of the ground where the vehicle was. R. pp. 880-81, 925. The car window would have been approximately six inches above the bottom of the door. R. pp. 925-26, 929.

The expert believed the gun discharged from down near the glove box, and he testified that the gunshot residue found in the car was located in areas consistent with discharge of the firearm from the area of the glove compartment below the level of the window. R. pp. 899, 901-03. He noted the failure of the investigators to test for residue on the passenger seat, the glove box, or the floor of the passenger side, areas where the presence of residue would have provided evidence of where the gun was when it was discharged. R. pp. 820, 903-04.

Appellant testified that he had no memory of the events that occurred from the time when he was at the bar after his arrival at Chastity's until he was awakened by the officers storming into his home. R. pp. 965-66. His only memory during that period was of a gunshot firing, but he did not remember any of the surrounding circumstances. R. pp. 999-1000, 1010-13. He had consumed a significant amount of alcohol throughout the day, drinking a number of beers during the day while playing golf in Aiken, drinking mixed drinks at an Aiken establishment after golf and later at his home, then drinking more scotch at Chastity's. R. pp. 957-59, 1218-20.

Dr. John Holbrook, an expert in pharmacology and the effects of certain drugs commonly known as date rape drugs, testified concerning the effects of such drugs, including Rohypnol and Gamahydroxyalbuterate. R. pp. 1051-67. These drugs are in powder form and are clear, odorless, and almost tasteless; they are especially tasteless when dissolved in an alcoholic drink. R. p. 1072. These drugs are central nervous system depressants and, among other effects, they cause both behavioral disinhibition and anterograde amnesia. R. pp. 1067-70. Anterograde amnesia is an inability of the brain to store memory or form memory during the time the drug is having its effect. R. p. 1068.

When these drugs are used in combination with alcohol, the amnesia effect can be increased. R. p. 1071. The drugs can also cause automatism, by which a person is not incapacitated but instead functions at an almost subconscious level without having any memory of it. R. p. 1082. In addition to lowering inhibitions, these drugs reduce the ability to think, reason, and make rational decisions, and they affect a person's ability to distinguish right from wrong. R. p. 1085.

Had the State drawn blood from appellant that morning, a blood test could have revealed the presence of such a drug. R. p. 1090. The State's own expert so acknowledged. R. p. 1285. Numerous law enforcement officials involved with this case testified about the ability to obtain blood from a suspect, the fact that it is commonly done, but the failure of anyone involved in this investigation to attempt to have it done in this case. R. pp. 721-22, 802-03, 823, 841-42, 858-63, 866, 1280-86, 1293.

Two former Chastity's dancers, Ms. Cummings and Ms. McClendon, testified concerning an instance in which they both believed they had been drugged at the club, and Ms. Cummings testified concerning a second occasion when she believed she had been drugged there. R. pp. 1165-1213. Mia and another dancer acknowledged the practice in strip clubs of people putting something in other's drinks. R. pp. 344-46, 944-46. Mia testified that appellant drank from his drink at the bar, both before and after the lap dance she gave him. R. pp. 351-52. The club witnesses acknowledged that appellant's behavior was highly unusual, even bizarre. R. pp. 287, 402, 455. The club witnesses acknowledged they all were laughing about what appellant was alleged to have done in the champagne room. R. pp. 282, 287, 318, 360, 402, 424.

Dr. Holbrook viewed the Chastity's videos both in and out of the courtroom, viewed a video of appellant driving into his gated subdivision, heard the 911 recording, read appellant's statements, heard appellant testify, spoke with Ms. Cummings and Ms. McClendon, and reviewed a number of the exhibits introduced into evidence. R. pp. 1074-77. In his expert opinion, appellant ingested a date rape drug or something similar on that night. R. pp. 1073-74, 1159-60. Appellant's conduct and statements were consistent with having ingested such a drug. R. pp. 1080-88. His loss of all memory except an awareness of a gunshot was also consistent with the amnesia that such drugs cause, because it is possible to form a very sharp memory while not forming a memory of other more common things. R. pp. 1083-84, 1131.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTIONS TO SUPPRESS THREE SEARCHES OF APPELLANT'S RESIDENCE AND THE FRUITS OF THOSE SEARCHES (Issue 1).

The defense made motions challenging the legality of three separate searches of the defendant's residence and seeking to have the fruits of those searches suppressed. Officers from the Richland County Sheriff's Department went to the home of appellant at

in the early hours of January 29 and made a warrantless entry into the curtilage of his house, to peek into the windows of his garage. On the basis of what they observed, they obtained a warrant to search the house, vehicles, and outbuildings. This warrant served as the basis for the entry in which they randomly "shot up" the house and shot and wounded appellant. The State Law Enforcement Division (SLED) was called to investigate this shooting. A SLED agent obtained a second warrant authorizing a search of the house.

The United States and South Carolina Constitutions guarantee the right of the people to be free from unreasonable searches and seizures. *See* U.S. Const. amends. IV, XIV; S.C. Const. art. I, § 10. The South Carolina Constitution provides an additional and separate protection, a guarantee of the right to be free from unreasonable invasions of privacy. *See* S.C. Const. art. I, § 10. Our Supreme Court has held that, by articulating this specific prohibition against unreasonable invasions of privacy, the people of South Carolina have determined that searches which do not offend the federal Constitution may nonetheless offend the South Carolina Constitution. *See State v. Weaver*, 374 S.C. 313, 321-22, 649 S.E.2d 479, 483 (2007). Moreover, the South Carolina Code provides additional protections, setting forth stringent requirements that must be met for a search warrant to be legal. *See* S.C. Code Ann. § 17-13-140. Evidence obtained as the result of an illegal search is generally inadmissible. *Wong Sun v. United States*, 371 U.S. 471, 484 (1963); *State v. Freiburger*, 366 S.C. 125, 131, 620 S.E.2d 737, 740 (2005), *cert. denied*, 547 U.S. 1147 (2006).

The burden rests on the State to establish the lawfulness of a search. *See Freiburger*, 366 S.C. at 132, 620 S.E.2d at 740; *State v. Dupree*, 319 S.C. 454, 456, 462 S.E.2d 279, 281 (1995), *cert. denied*, 516 U.S. 1131 (1996); *State v. Bailey*, 276 S.C. 32, 35, 274 S.E.2d 913, 915 (1981); *State v. Abdullah*, 357 S.C. 344, 350, 592 S.E.2d 344, 348 (Cl. App. 2004), *cert. denied*, November 19, 2004. Here, the State failed to prove that these three searches were lawful, and the fruits of these searches should have been excluded from evidence.

A. Warrantless entry.

Richland County deputies went to appellant's residence following the Chastity's shooting and entered his yard without a warrant. R. p. 19. They reported to David Linfert that they saw a black Toyota 4Runner in his garage. R. pp. 19, 39. Linfert then went there

as well, peered in the windows to the left of the front door of the house, and saw the vehicle in the closed garage. R. pp. 19-20, 39. The garage doors were closed and there were no windows in the doors. R. pp. 20-21, 42. The windows were on the side, and the officers could not get to those windows from the driveway or sidewalk but had to enter a graveled landscaped area of the yard and get within six feet of the windows in order to see the vehicle. R. pp. 22, 40-42.

Appellant's wife testified concerning the residence and its grounds. There had been no changes in the layout or the landscaping since January 29, 2006. R. p. 45. Photographs were introduced depicting the garage and its surroundings. Mrs. Herring and the photographs confirmed that there are no windows in the garage doors. R. pp. 45-46. They confirmed that it was impossible to see a vehicle in the garage from either the sidewalk in front of the house or from the driveway. R. p. 47. The floor of the garage is significantly lower, and the top of the vehicle would be even with or below the bottom of the windows. R. pp. 46-47. Because of the grade of the yard, the vehicle could not be seen from the front windows, even if the blinds were open. R. p. 48. The blinds on the front windows were closed, and the blinds on the side windows were open only slightly. R. p. 55. The side window is more than 15 feet from the sidewalk. R. p. 49. To be within six feet of the window, a person must get off the sidewalk or driveway and be on the grass or gravel of the yard, where the Herrings would not want people to walk. R. pp. 49-50.

The defense argued the warrantless entry of the police into the curtilage was illegal because the police left the public space where they had the right to be without a warrant -- the sidewalk and driveway. R. pp. 56-59, 126-28. The court agreed the officers entered the curtilage. R. p. 128. The court found that this search did not fit within any of the

recognized exceptions to the warrant requirement. R. pp. 149-50. The court held the warrantless search "clearly violated the defendant's expectation of privacy within his home" and "could not support the seizure of evidence or be the basis for a later search warrant." R. p. 150.

A warrantless search is *per se* unreasonable unless it fits into one of the well-defined exceptions to the warrant requirement. *See Weaver*, 374 S.C. at 319, 649 S.E.2d at 482; *Freiburger*, 366 S.C. at 131-32, 620 S.E.2d at 740. The court correctly ruled this warrantless search of appellant's home was unreasonable. The State did not establish that it fit within any exception to the warrant requirement. The court also correctly ruled that this entry violated the constitutional protection of appellant's right to privacy in his home. *See S.C. Const. art. I, § 10*. The warrants later obtained were both the product of this illegal search and were invalid.

Notwithstanding the court's correct finding that the warrantless entry was unlawful, the court denied the defense motions to suppress the two subsequent warrants and their fruits on the basis that both warrants were supported by probable cause and that the evidence found in the searches pursuant to those warrants would inevitably have been discovered.

B. Search warrant obtained by Richland County.

The court's finding of probable cause for the search of the appellant's residence is erroneous. Without the information learned in the warrantless search of the property in which officers peered into the windows of appellant's home, they had no evidence linking the appellant's residence to any crime. The license number they had obtained was registered to a different address. R. p. 29. Excising from the affidavit the information concerning

seeing a black Toyota 4Runner inside the garage, there is nothing left in the affidavit that gives probable cause to search the home at [REDACTED] Street.

In reviewing a magistrate's determination of probable cause, it is the duty of the appellate court "to ensure the issuing magistrate had a substantial basis upon which to conclude that probable cause existed." *State v. Baccus*, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006); *State v. Gentile*, 373 S.C. 506, 513, 646 S.E.2d 171, 174 (Ct. App. 2007), *cert. denied*, April 4, 2008. Residential searches are upheld "only where some information links the criminal activity to the defendant's residence." *United States v. Lalor*, 996 F.2d 1578, 1583 (4th Cir.), *cert. denied*, 510 U.S. 983 (1993). Statements which are merely conclusory and lacking in specificity will not support the probable cause determination. *See Baccus*, 367 S.C. at 52, 625 S.E.2d at 222; *State v. Weston*, 329 S.C. 287, 291-92, 494 S.E.2d 801, 803 (1997); *State v. Smith*, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990).

The first six sentences of the affidavit's basis for seeking a warrant do not have any link to this residence. The next two sentences actually link the vehicle to a different address, 3612 Landmark Drive, a business location. The only sentence in the affidavit pertaining to the [REDACTED] address states, "A search of Richland County records also provided an additional address of [REDACTED] in Columbia, SC." R. p. 1322 (Reason for Affiant's Belief) This statement is so lacking in specificity that it does not provide any basis upon which the magistrate could conclude there was any connection between the Alexander Circle address and the incident at Chastity's. *Cf. Baccus*, 367 S.C. at 51-52, 625 S.E.2d at 221-22; *Smith*, 301 S.C. at 372-73, 392 S.E.2d at 182-83. It does not provide probable cause to believe evidence of the Chastity's incident will be found in that location. There is absolutely nothing in this warrant linking [REDACTED] to the Chastity's incident,

and no reason on the basis of the information in this affidavit to believe that location would yield evidence related to that incident, apart from the statement that the investigators "observed a black Toyota Forerunner parked in the garage" — observations that were illegally made and could not serve as the basis for this warrant. *Cf. United States v. Dickerson*, 975 F.2d 1245, 1249-50 (7th Cir. 1992) (affidavit was not sufficient to support probable cause determination where only link was registration of car to address to be searched, without allegation that car was parked at that location), *cert. denied*, 507 U.S. 932 (1993). The officer who appeared before the magistrate did not supplement the information contained in the affidavit. R. pp. 98-99, 103. The court erred in its conclusion that the warrant was supported by probable cause to search this residence.

This warrant was tainted for other reasons as well. The evidence established that information provided in the warrant was false. The warrant listed the officer as "Sgt. D.M. Linfert." R. p. 1321. The affidavit recited, "personally appeared before me, one D. Linfert who, being duly sworn, says that there is probable cause to believe . . ." R. p. 1322. This was not true. Linfert testified he prepared the affidavit, reflecting himself as the affiant, but he sent a different officer, Morris Davis, to the magistrate to sign it. R. pp. 24-26. Linfert faxed the warrant to the magistrate, and Davis met the magistrate to sign it. R. pp. 94-95. Davis did not supplement the information in Linfert's affidavit but merely swore to Linfert's affidavit and signed it. R. pp. 98-99, 103. Linfert spoke to the magistrate by telephone, but he did not appear before the magistrate and did not swear to the information contained in his affidavit. R. pp. 25-26. His providing *unsworn* information to the magistrate over the telephone could not serve to supplement the information contained in the affidavit taken to

the magistrate by Davis. *Cf. State v. McKnight*, 291 S.C. 110, 112-13, 352 S.E.2d 471, 472-73 (1987) (finding oral sworn testimony insufficient in absence of sworn affidavit).

This affidavit does not meet the affidavit requirement of the South Carolina warrant statute. *See* S.C. Code Ann. § 17-13-140 (discussed more fully in section C of this argument, *infra* at 17-21). Allowing one officer to provide the information in the affidavit and another to swear to his colleague's affidavit before the magistrate defeats the purpose of the statutory requirement that the affiant appear and be sworn before the magistrate. Such a procedure does not allow the magistrate to perform the required assessment of the veracity and basis of knowledge of the person supplying the information. *See Baccus*, 367 S.C. at 50, 625 S.E.2d at 221; *Weston*, 329 S.C. at 292, 494 S.E.2d at 803; *Gentile*, 373 S.C. at 512-13, 646 S.E.2d at 174.

Although Davis knew about the investigation, his involvement had been at the Chastity's location, and he did not have personal knowledge of the information contained in the affidavit, which had been gathered by Linfert and other officers who had attempted to track down the suspected vehicle. R. pp. 28-31, 38-39, 43, 95-96, 101-02. While certain hearsay may in part support a finding of probable cause, the affiant must have *some personal knowledge* of the facts on which the probable cause determination is based. This case is like *State v. Dunbar*, 361 S.C. 240, 249-50, 603 S.E.2d 615, 620 (Ct. App. 2004), *cert. dismissed as improvidently granted*, 371 S.C. 594, 641 S.E.2d 435 (2007), in which the person appearing before the magistrate knew only of the crime, not of the other information in the warrant purporting to link the crime to the location to be searched. As in *Dunbar*, it was insufficient and improper for Davis to go to the magistrate and take an oath concerning information provided by Linfert, who by his own admission was never placed under oath.

This warrant is also invalid because the magistrate failed in his duty to remain neutral and detached and not merely serve as a "rubber stamp" for the police. *See Dunbar*, 361 S.C. at 250, 603 S.E.2d at 620-21. Here, with the knowledge that the affidavit was prepared by Linfert, not Davis, upon information obtained by Linfert, not Davis, and with the knowledge of the falsity showing on the face of the affidavit that Linfert, not Davis, was the affiant, the magistrate nonetheless signed this warrant based on Davis's oath to Linfert's affidavit. This magistrate did not meet his obligation to review the information presented and independently determine the existence of probable cause, with neutrality and detachment from the law enforcement officials seeking the warrant. Here, the magistrate was nothing more than a rubber stamp for the officers, and this warrant is invalid.

For these many reasons -- that the warrant was the fruit of an unlawful warrantless search, that it was not supported by probable cause, that it did not comply with Section 17-13-140, that it was based on unsworn information given over the telephone, that it was not based on personal knowledge of the person who appeared before the magistrate, and that the magistrate was not neutral and detached but signed the warrant with knowledge of the falsity of information contained within it -- the warrant obtained by the Richland County Sheriff's Department was unlawful, and the fruits of that search, including the later search by SLED, were inadmissible.

C. Search warrant obtained by SLED.

SLED agents Dave Lawrence and Paul LaRosa were assigned to investigate the Richland County officers' shooting of appellant and his home. Lawrence prepared a search warrant to authorize SLED's entry into the residence. R. pp. 70, 1326-28. He contacted Magistrate Mildred McDuffie, who was on duty at bond court, by telephone. R. p. 70. He

did not appear before her in person, instead faxing the warrant affidavit to her and receiving a return fax with the signed warrant. R. pp. 70-72. Lawrence testified that he handled this warrant the way the magistrate instructed him, pursuant to an order of South Carolina Supreme Court Chief Justice Toal. R. pp. 72, 89. He testified he telephoned the magistrate and was sworn over the phone. R. pp. 70-71, 73, 89. He signed the affidavit, and the warrant was sent back by the magistrate. R. p. 90.

The defense moved to suppress the evidence obtained in this search because the warrant was the fruit of the initial illegal search, it was not supported by probable cause, and the search exceeded the scope of the warrant. In addition, the defense argued multiple other reasons this warrant was invalid, including that (1) the procedure used violated requirements of South Carolina's warrant statute, S.C. Code Ann. § 17-13-140; (2) the order of the Chief Justice was in contravention of the warrant statute, prior decisions of the South Carolina Supreme Court, and the South Carolina Constitution; and (3) the procedure used did not comply with the procedures mandated by the Chief Justice's order. The court denied the motion to suppress with respect to the SLED warrant, as it did with the Richland County warrant, upon a finding that it was supported by probable cause and that the evidence seized would have inevitably been discovered. R. p. 152. These findings, even if they had not been erroneous, cannot override the paramount illegality of the SLED warrant – that it did not comply with South Carolina law which requires that the affiant appear before the magistrate and swear in person to the information contained in the affidavit supporting the warrant.

The warrant requirement of Section 17-13-140 is separate and distinct from the federal and state constitutional protections against unreasonable searches and seizures. *See*

U.S. Const. amends. IV, XIV; S.C. Const. art. I, § 10. In fact, as our Supreme Court recognizes, Section 17-13-140 actually imposes stricter warrant requirements and more far-reaching protections than the constitutional provisions. See *State v. Jones*, 342 S.C. 121, 128, 536 S.E.2d 675, 678 (2000); *McKnight*, 291 S.C. at 112-13, 352 S.E.2d at 472. The rules governing the validity of searches under the federal and state constitutions do not control the question of the validity of a warrant, and a search pursuant thereto, under the state's statutory warrant requirement. As the *McKnight* Court observed, "A search warrant that would survive constitutional scrutiny may still be defective under the statute." See *McKnight*, 291 S.C. at 113, 352 S.E.2d at 472.

Section 17-13-140 provides: "A warrant issued hereunder *shall be issued only upon affidavit sworn to before the magistrate . . .*" (emphasis added). In *McKnight*, the Supreme Court by unanimous decision addressed a situation in which no affidavit was ever executed but the warrant was supported by sworn oral testimony given by one of two officers who appeared before the magistrate. *Id.*, 291 S.C. at 112, 352 S.E.2d at 472. The Court explained that "[a]n affidavit is a voluntary *ex parte* statement reduced to writing and sworn to or affirmed before some person legally authorized to administer an oath or affirmation." *Id.*, 291 S.C. at 113, 352 S.E.2d at 472 (emphasis added). The Court found that sworn oral testimony, standing alone, did not satisfy the strict affidavit requirement of the statute:

The mandate of the statute is clear. The Court cannot, under the guise of statutory interpretation, overlook plain meaning of the statute to imply instead a wholly different meaning than was intended by the legislature. We agree with the trial judge's ruling that the search warrant was defective under Section 17-13-140.

Id., 291 S.C. at 113, 352 S.E.2d at 473.

The *McKnight* analysis applies with equal force to the statute's requirement that the affiant *appear and be sworn before the magistrate*. The General Assembly imposed this requirement for good reason. Before a magistrate authorizes an intrusion into a person's home, the magistrate must have the opportunity to place the officer under oath, look him in the eye, hear his words, observe his demeanor, and thereby evaluate the credibility of the officer before making a determination of the existence of probable cause. If the General Assembly believed the credibility evaluation could be effectively carried out remotely, over the telephone, without a personal appearance, it could have so provided in the statute. This Court, under the guise of statutory construction, may not overlook the plain language of the statute, imply a wholly different meaning than was intended by the General Assembly, and thereby validate a warrant that does not comply with the strict requirement that the affiant appear and be sworn before the magistrate.

A change in the statutory law of this State can be made only by the General Assembly, not by the courts. *See State v. Burdette*, 335 S.C. 34, 41, 515 S.E.2d 525, 529 (1999) (courts will not disturb legislature's judgment on matters that are purely the prerogative of the legislature); *State v. Blackmon*, 304 S.C. 270, 274, 403 S.E.2d 660, 662 (1991) (it was not within Supreme Court's province to amend a statute that allowed seemingly unlawful activity to go unpunished, as such a decision was appropriately left to the legislature). As the dissenting opinion in *State v. McAteer*, 333 S.C. 615, 641, 511 S.E.2d 79, 93 (Ct. App. 1998), explained, "When the Legislature has enacted a rule embodying a particular policy choice, the courts have no power to annul the Legislature's judgment by substituting their own views of sound public policy." (citation omitted) Consistent with that dissent, the Supreme Court reversed the prevailing opinion of the *en*

hanc Court of Appeals in *McAteer*, deferring to the judgment of the General Assembly concerning limitations on a citizen's right to make a warrantless arrest. *State v. McAteer*, 340 S.C. 644, 532 S.E.2d 865 (2000). The Court should do the same in this case, deferring to the judgment of the General Assembly that a warrant may be issued only upon an affidavit sworn to before the magistrate.

An order of the Chief Justice dated July 26, 2001, purports to authorize a different procedure than that mandated by statute, outlining circumstances under which and procedures by which law enforcement officials of Richland County may obtain search warrants by facsimile transmissions, without appearing before a magistrate. R. pp. 1338-40. The warrant in this case was obtained without the officer's personal appearance before the magistrate and without his affidavit being sworn to before the magistrate, ostensibly under the authority of the Chief Justice's order dated July 26, 2001. This order is invalid and should be vacated, because it violates multiple constitutional provisions and Supreme Court precedents.

Article I, Section 8, of the South Carolina Constitution establishes the doctrine of separation of powers:

In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.

See S.C. Const. art. I, § 8. The South Carolina Constitution very clearly vests the legislative power of the State in the General Assembly, executive power in the executive department, of which law enforcement agencies are a part, and judicial power in the judiciary, including the Supreme Court. *See* S.C. Const. art. III, § 1; S.C. Const. art. IV, § 1; S.C. Const. art. V, § 1. The provisions of Article V of the Constitution outline the authority of the judiciary,

including the Supreme Court and the Chief Justice. Nowhere in Article V is there any provision which authorizes the Chief Justice, or the entire Supreme Court, to amend by judicial order a statute enacted by the General Assembly. The Court may rule a statute unconstitutional, but it may not amend a statute adopted by the General Assembly pursuant to legislative authority. There is no constitutional authority for the Chief Justice or the Supreme Court to alter or amend the procedures for obtaining search warrants mandated by the General Assembly. The Chief Justice's order dated July 26, 2001, which purports to do just that, violates the constitutional separation of powers between the legislative and judicial departments. *See* S.C. Const. art. I, § 8; S.C. Const. art. III, § 1; S.C. Const. art. V, § 1.

The recited basis for the Chief Justice's order is the following finding: "I find that the issuance of search warrants by facsimile under controlled conditions will enhance the ability of law enforcement in Richland County to obtain evidence of criminal activities." R. p. 1338. This finding, however, is outside the authority of the judiciary, whose role is not to assist law enforcement officials in their efforts to carry out the duties of the executive branch. It is not the role of the courts, or of a single judge or justice, to become involved in the work of law enforcement officials and attempt to enhance their capabilities in performing their work. The Chief Justice is not an agent of law enforcement. She is not an agent of the executive branch. She is a member – indeed, the highest member – of the judicial branch. She may not be involved in, encroach upon, or assist the executive branch in carrying out its constitutional duties. *See* S.C. Const. art. I, § 8 ("no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other"). The Chief Justice's order violates the constitutional separation of powers between the executive

and judicial departments. See S.C. Const. art. I, § 8; S.C. Const. art. IV, § 1; S.C. Const. art. V, § 1.

The Chief Justice's order of July 26, 2001, invokes the constitutional authority of Article V, Section 4, of the South Carolina Constitution, but that provision does not confer authority to issue an order of this nature. It provides, in its entirety:

The Chief Justice of the Supreme Court shall be the administrative head of the unified judicial system. He shall appoint an administrator of the courts and such assistants as he deems necessary to aid in the administration of the courts of the State. The Chief Justice shall set the terms of any court and shall have the power to assign any judge to sit in any court within the unified judicial system. Provided, each county shall be entitled to four weeks of court each year and such terms therefore shall be provided for by the General Assembly. Provided, further, that the Chief Justice shall set a term of at least one week in any court of original jurisdiction in any county within sixty days after receipt by him of a resolution of the county bar requesting it. The Supreme Court shall make rules governing the administration of all the courts of the State. Subject to the statutory law, the Supreme Court shall make rules governing the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted.

See S.C. Const. art. V, § 4. Nothing in this constitutional provision authorizes the Chief Justice, acting alone, to issue an order establishing a rule of procedure governing obtaining warrants in Richland County by facsimile.¹

Significantly, Article V, Section 4, authorizes *the entire Court* to adopt rules of procedure, but in so doing it expressly subjects the full Court's ruling-making authority to the statutory law of the State. Thus, under this provision, even the full Supreme Court is without power to issue an order such as the Chief Justice's order. By the explicit language of the Constitution, any rules adopted by the Court are *subject to statutes enacted by the*

¹ One other constitutional provision addresses the jurisdiction of the Supreme Court, but it does not confer authority to issue an order such as the Chief Justice's order dated July 26, 2001. See S.C. Const. art. V, § 5.

General Assembly.² See S.C. Const. art. V, § 4. Here, the Chief Justice's order exceeded her authority. It is invalid and should be vacated. The warrant procured under the authority of this order is also invalid, as it violates the statutory mandate that the affidavit supporting the warrant be sworn to before the magistrate. See S.C. Code Ann. § 17-13-140.

The Chief Justice's order also runs afoul of other Supreme Court precedents. The unanimous Court in *McKnight* made clear in 1987 that the warrant statute must be strictly complied with. See *McKnight*, 291 S.C. at 113, 352 S.E.2d at 473. The Chief Justice is not empowered to issue an order that overturns binding Supreme Court precedent. Only the full Court, in the exercise of jurisdiction conferred by the Constitution, may overrule its precedents.

The Chief Justice's order also violates the constitutional principle that criminal laws and procedures be uniform throughout the State. The Constitution requires that "[n]o laws for a specific county shall be enacted and no county shall be exempted from the general laws ..." See S.C. Const. art. VIII, § 7. The order issued by the Chief Justice, pertaining only to Richland County and exempting only Richland County law enforcement officials from the requirements of Section 17-13-140, is in direct contravention of this constitutional mandate.

The Constitution mandates statewide uniformity of criminal laws. See S.C. Const. art. III, § 34; S.C. Const. art. VIII, § 14; *Foothills Brewing Concern, Inc., v. City of Greenville*, 377 S.C. 355, 365, 660 S.E.2d 264, 269 (2008). The Supreme Court has

² In addition to subjecting the Court's rule-making authority to the statutes adopted by the General Assembly, the Constitution also grants the General Assembly the final say with respect to rules proposed by the Supreme Court. All rules and amendments to rules must be submitted to the Judiciary Committee of each House of the General Assembly. Proposed rules do not become effective if they are disapproved by concurrent resolution of the General Assembly, with the concurrence of three-fifths of the members of each House present and voting. See S.C. Const. art. V, § 4A.

enforced these provisions repeatedly, striking down laws criminalizing in isolated counties conduct not prohibited by state law. *See, e.g., Diamonds v. Greenville County*, 325 S.C. 154, 157-59, 480 S.E.2d 718, 719-20 (1997); *Martin v. Condon*, 324 S.C. 183, 187-88, 478 S.E.2d 272, 274-75 (1996).

The Constitution also mandates uniform criminal procedures. "The most important feature of the unified judicial system is its uniformity of practice and procedure." Jean Hoefer Toal *et al.*, *Appellate Practice in South Carolina* 2 (2d ed. 2002). The Court has found unconstitutional special legislation establishing procedures for criminal prosecutions in a single county that differ from the general law of the State. *See, e.g., State v. McIver*, 270 S.C. 242, 243, 241 S.E.2d 747, 748 (1978). The Court has also struck down judge-made local rules of practice that undermine statewide uniformity of practice and procedure. *See, e.g., Spartanburg County Dep't of Soc. Servs. v. Padgett*, 296 S.C. 79, 85, 370 S.E.2d 872, 875-76 (1988); *State v. Duncan*, 274 S.C. 379, 382, 264 S.E.2d 421, 423 (1980). Here, the Chief Justice's order establishing procedures for obtaining search warrants unique to Richland County and not applicable statewide is in direct contravention of these constitutional mandates and the Supreme Court's precedents.

The Chief Justice's order also infringes on appellant's federal and state constitutional rights to due process and equal protection. *See* U.S. Const. amends. V, XIV; S.C. Const. art. I, § 3. Appellant and other residents of Richland County should not be subjected to criminal procedures carried out in a manner that does not meet the higher standard established by the legislature for the remainder of the State, thereby depriving them of the equal protection of the laws. This procedure also implicates the fundamental fairness doctrine embodied in the constitutional right to due process.

Even if the Chief Justice's order did not exceed her constitutional authority and is valid, the warrant procured by SLED in this case is invalid because it failed to comply with that order, in multiple ways. First, the circumstances of this case do not fit the narrow circumstances in which the Chief Justice's order authorizes law enforcement officials to obtain search warrants by fax. The order provides the following "Rules for Obtaining Search Warrants":

- 1) Search warrants should be obtained by law enforcement officers in person before a magistrate judge during usual operating hours whenever possible and when circumstances are practical.
- 2) In extraordinary circumstances or after normal court hours when a law enforcement officer finds it necessary to obtain a search warrant the following procedures will apply in obtaining facsimile search warrants. Law enforcement officers from jurisdiction out of Richland County must obtain facsimile issued search warrants through local law enforcement officers.
- 3) All search warrants issued either in person or by facsimile must fully comply with the language and format established and authorized by statute by the Attorney General of this State.

R. p. 1338.

Here, the officer testified that the magistrate was on duty at bond court when he obtained the warrant through the facsimile procedure. By the order's clear language, he was required to appear in person before the magistrate because she was on duty during usual operating hours and it was both possible and practical for him to go there and swear to the matters contained in the affidavit before the magistrate. No extraordinary circumstances existed to authorize use of the facsimile procedure. There was no necessity whatsoever, because the scene of the shooting at appellant's house had been secured by SLED agents and appellant had been taken into custody. Under these circumstances, the Chief Justice's order, if valid, did not confer authority to use a facsimile procedure. There was simply no

justification for not adhering to the statutory mandate of personally appearing and being sworn before the magistrate.

Second, even if the circumstances had fit within the requirement of the stated rules for obtaining search warrants by telephone and facsimile, the officer and the magistrate did not follow the procedures outlined in the Chief Justice's order, in a number of ways. The order requires that each of the four pages of the Attorney General's approved form shall be initialed or signed by the law enforcement officer. R. p. 1339, ¶ 1. This requirement was not met. R. pp. 1326-28. The order requires that the officer shall sign all pages of the warrant prior to faxing the warrant to the magistrate. R. p. 1339, ¶ 4. This requirement was not met. R. pp. 1326-28. The order requires the magistrate to sign each page of the search warrant and fax it back to the officer. R. p. 1339, ¶ 5. This requirement was not met. R. pp. 1326-28. The order requires the magistrate to confirm the identity of the officer requesting the search warrant in one of three ways and to make a notation on the warrant to identify the method used to identify the officer. Order, ¶ 7. This requirement was not met. R. pp. 1326-28. If the Chief Justice's order is deemed valid, it was not complied with and the warrant obtained and executed by SLED is unlawful. The trial court erred in denying the motion to suppress the fruits of this search.

Even if the court were correct in finding the SLED warrant was valid and supported by probable cause, it nonetheless erred in denying the motion to suppress the items seized in the search of appellant's home that were unrelated to and outside the purview of the warrant's authorization to search for evidence related to the shooting by the Richland County officers in appellant's home. SLED was investigating the officers' shooting of appellant and his home. R. pp. 74, 79. It was not investigating the Chastity's incident. R. pp. 74, 79, 87.

Agent Lawrence had spoken with the officers involved and knew the circumstances of the shooting at appellant's home. R. p. 76. Lawrence obtained the warrant exclusively for the purpose of collecting evidence related to the shooting between Richland County officers and appellant. R. p. 1328. The warrant's authorization to search was limited in scope, allowing a search for "[a]ny firearms, ammunition, spent cartridges, projectiles, blood, any and all other evidence associated to a shooting incident involving Richland County Sheriff's Department officers and the resident of the said address." R. p. 1327. SLED knew from the officers that appellant had obtained a gun after the officers entered but had left it on his bed when he surrendered. R. pp. 83-84. SLED found this gun on his bed where he had placed it before giving himself up. R. p. 668.

Contrary to the limited authorization of the warrant, however, SLED agents entered parts of the home totally unrelated to the shooting incident, which could only have been for the purpose of obtaining evidence unrelated to the officers' shooting but related to the incident at Chastity's. Entering a closed closet, they retrieved another firearm, the one later linked to the Chastity's shooting, under a pile of clothing. R. p. 656. The search and seizure of this firearm and other evidence unrelated to the officers' shooting far exceeded the scope of the search authorized by the warrant, and the gun and other evidence, including ballistics evidence derived therefrom, should have been suppressed.

D. Inevitable discovery exception inapplicable.

The court further erred in admitting the evidence seized from appellant's home under the doctrine of inevitable discovery. While that exception to the exclusionary rule of the Fourth Amendment has been adopted in some jurisdictions, it has never been adopted in South Carolina, and it should not be adopted now. The South Carolina Constitution

provides separate and distinct protections of an individual's right to be free from unreasonable searches and seizures and from unreasonable invasions of privacy. See S.C. Const. art. I, § 10. The privacy protection is greater than the protection afforded under the Fourth Amendment. See *Weaver*, 374 S.C. at 321-22, 649 S.E.2d at 483. Moreover, Section 17-13-140 of the Code provides more protection than the constitutional prohibition of unreasonable searches and seizures. *McKnight*, 291 S.C. at 113-15, 352 S.E.2d at 472-74.

In *McKnight*, the Supreme Court addressed an argument that the good faith exception to the exclusionary rule of the Fourth Amendment, adopted in *United States v. Leon*, 468 U.S. 897 (1984), should allow admission of evidence seized pursuant to a warrant defective under Section 17-13-140. The Court recognized that the *Leon* exception applies only when a search warrant is defective on Fourth Amendment grounds, and it did not reach the separate question whether to adopt such an exception to the requirements of the statute. See *McKnight*, 291 S.C. at 114, 352 S.E.2d at 473. Similarly, whether the doctrine of inevitable discovery applicable to searches that violate the Fourth Amendment should also apply to searches that violate the separate and distinct South Carolina protections of Article I, Section 10, of the Constitution or to searches that violate the stricter warrant requirements of Section 17-13-140 of the Code are separate questions, questions this Court should answer in the negative.

Because the South Carolina provisions provide greater protection and are strictly adhered to, their protections should not be overridden by a court-created doctrine allowing the State to introduce evidence obtained in violation of these provisions. Creating an exception allowing such evidence is exclusively the province of the General Assembly. See *State v. Baucom*, 340 S.C. 339, 346, 531 S.E.2d 922, 925 (2000) (although reluctant to allow

the resulting outcome, Court nonetheless recognized the responsibility of the judicial branch to apply the statute as enacted by the General Assembly). While the United States Supreme Court may adopt an inevitable discovery exception to the rule of exclusion it earlier announced under the federal Constitution, this Court should leave it to the General Assembly to determine whether evidence obtained in violation of the South Carolina Code and Constitution may be admitted in criminal trials. However, if the Court adopts an inevitable discovery exception, it should do so prospectively only.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING LAY WITNESSES TO GIVE THEIR OPINION OF WHAT COULD BE SEEN ON THE VIDEO, WHEN THOSE WITNESSES DID NOT PERSONALLY OBSERVE THE ACTUAL EVENTS DEPICTED IN THAT PORTION OF THE VIDEO, AND FURTHER ABUSED ITS DISCRETION IN DENYING THE RELATED MOTION FOR MISTRIAL (Issues 2 and 3).

The video of the car pulling in front of the entrance was played in conjunction with the testimony of many of the witnesses, who narrated their version of the night's events with references to the videos. Donnie Hawkins, one of the floormen at the club that night, had gone back inside and did not personally observe the car at the front of the club in the period just before the shooting. He was not viewing the video monitors inside the club at that time, having turned away because of something happening elsewhere in the club some 12 to 16 seconds before the shot was fired. R. pp. 208, 244-45, 248-49, 389-91. However, over the defense's objection, the court allowed him to testify that he saw a flashing light on the video from camera 4 at 12:06. R. pp. 195, 200. This testimony was based on seeing the video in the courtroom, not based on what he saw that night. R. pp. 208-09.

With the jury out, the objection and argument were renewed and placed on the record. R. pp. 201-05. The defense objected to having a lay witness give opinion testimony concerning what was depicted on the video, arguing his testimony should be limited to his

that, the court having previously told the jury to disregard such testimony, it should not now allow the testimony to stand. R. p. 597.

The court ruled the witness could say he saw a light or a flash. R. pp. 595-96. The court further indicated it would continue to give "the same caution over and over again." R. p. 597. The defense excepted to the court's ruling, asked that the testimony be stricken, and asked for a mistrial. R. p. 598. The court instructed the State not to ask the question again, but it denied the defense motion for a mistrial. R. p. 599. The court did not strike the testimony and again instructed the jury that it was not to interpret testimony concerning a light or a flash as evidence of a gunshot. R. p. 599. The court abused its discretion in not striking the testimony and in not granting a mistrial.

Rule 701 of the South Carolina Rules of Evidence governs the admissibility of lay opinion testimony:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training.

See Rule 701, SCRE. Moreover, subject to Rule 703 relating to opinion testimony of expert witnesses, a witness must have personal knowledge in order to testify about a matter. Rule 602, SCRE; see *State v. Williams*, 321 S.C. 455, 463, 469 S.E.2d 49, 54 (1996); *Gulledge v. McLaughlin*, 328 S.C. 504, 508, 492 S.E.2d 816, 817 (Cl. App. 1997). Here, none of these witnesses personally observed the car at the time the State alleges that a weapon was discharged from it. As was argued in the court below, the testimony of these witnesses concerning their perception of either a light or flash on the video does not meet the standards of Rule 701 and was inadmissible. They had no perceptions based on first-hand knowledge

for this testimony to be rationally based upon. Had there been no video and had they personally observed the car on the night of the shooting, the court may have allowed them to express an opinion based on their perceptions. Here, however, the video was in evidence and it was exclusively the province of the jury to interpret what it depicted.

Significantly, a review of the video shows that there is no clear indication of a light or flash. *See* State's Exhibit 54. Because of the deficient quality of the video, the Richland County Sheriff's Department's own expert in video analysis took the video to NASA in an attempt to have the video enhanced with the most advanced techniques and equipment available. R. pp. 785-88. The person who did the work was the leading computer scientist with the United Space Alliance at the Kennedy Space Center. R. p. 786. He attempted to enhance the image with the equipment and software available there, but he ultimately concluded he could not see any detail not visible in the original. R. p. 788. The State did not produce a single expert who could testify that the video depicted a flash or light. They did not produce an expert who could testify that whatever was on the video was consistent with the discharge of a firearm. The only expert who did testify with respect to the video, Lawton H. Yates, Jr., stated there was *not* the kind of flash that would be made by the gun the State alleged was used in this shooting. R. pp. 893-95, 923-24.

The State's clear purpose in repeatedly having witnesses tell the jury they saw a flash or light was to, through the power of suggestion, get the jurors to conclude they could see a flash or light, even though one is not clearly visible on the video. Whatever is visible was a fact issue solely for the determination of the jury. The purpose of opinion testimony is to assist the jurors in determining something they cannot determine for themselves. Lay opinions should be rejected when they are superfluous in the sense that they will be of no

value to the jury. *Williams*, 321 S.C. at 463, 469 S.E.2d at 54. Not meeting the requirements of Rule 701, this testimony was inadmissible.

Moreover, this testimony had little, if any, probative value, because it addressed a matter that the jurors could, and should, determine for themselves, without aid of opinion testimony. On the other hand, for the judge to allow lay witness opinion testimony concerning something no expert could say appeared on the video was extremely prejudicial, because this testimony went to the ultimate issue of whether the gunshot that penetrated the door came from that vehicle and, if it did, where the weapon was when it discharged. The prejudicial effect of this testimony far outweighed what probative value it had, if any, and it should have been excluded. *See* Rule 403, SCRE.

The error in the admission of this testimony cannot be deemed harmless. The jurors heard – time and time and time again – that others thought they saw a light or flash on the video. They also heard the court – time and time and time again – repeat what those witnesses said and sanction their giving their opinion. It was the prejudicial nature of this repetition that led the defense to move for a mistrial. Just as improper bolstering of a witness's testimony is prejudicial because of its repetitive, cumulative nature, the repetition of this improper opinion testimony was prejudicial and should have resulted in a mistrial. *Cf. Sanchez v. State*, 351 S.C. 270, 275, 569 S.E.2d 363, 365 (2002); *Dawkins v. State*, 346 S.C. 151, 156-57, 551 S.E.2d 260, 263 (2001); *Jolly v. State*, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994). Here, there is a genuine likelihood that the jurors were induced by the repeated suggestion of a light or flash to believe that a light or flash actually appeared on the video, rather than to reach their own conclusions concerning what did or did not appear there, and the error in admitting this improper opinion testimony was not harmless.

III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING THREE JURY CHARGES REQUESTED BY THE DEFENSE (Issues 4 and 5).

The defense submitted a number of requested jury instructions on the law applicable to the case. One of the refused charges was a proposed charge on accident. R. pp. 1370-71. Two others were involuntary manslaughter charges which addressed negligent use of a deadly weapon resulting in death. R. pp. 1366-69. The court committed reversible error in refusing to give each of these charges.

The law to be charged to the jury is to be determined from the evidence presented at trial. *See State v. Crosby*, 355 S.C. 47, 51, 584 S.E.2d 110, 112 (2003); *State v. Sullivan*, 345 S.C. 169, 172-74, 547 S.E.2d 183, 184-85 (2001); *State v. Burriss*, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999); *State v. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320, 325 (Cl. App. 2002); *State v. Harrison*, 343 S.C. 165, 172, 539 S.E.2d 71, 74 (Cl. App. 2000), *cert. denied*, July 3, 2001. Where a requested instruction correctly states the law applicable to the issues in the case and is supported by the evidence, the court has a duty to give the instruction. *Condrey*, 349 S.C. at 194, 562 S.E.2d at 325; *Harrison*, 343 S.C. at 172, 539 S.E.2d at 74. Moreover, where a defendant requests a charge on a defense that is supported by the evidence, the trial court is required to charge the jury on that defense, and failure to do so is reversible error. *State v. Rye*, 375 S.C. 119, 123, 651 S.E.2d 321, 323 (2007).

A. Accident charge.

The defense requested the following charge on accident:

"If it [is] shown that the killing was unintentional; that it was done while the [defendant] was engaged in a lawful enterprise, and was not the result of negligence, the homicide will be excused [as] accident." The defendant does not bear the burden of proving accident; rather, the State must prove beyond a reasonable doubt that the defendant acted with the intent to kill the deceased.

See R. p. 1370 (citation omitted). This charge was based on *State v. Brown*, 205 S.C. 514, 521, 32 S.E.2d 825, 828 (1945). The first sentence was quoted from that decision, and the second sentence was a paraphrase of additional language from that decision, a decision that has not been overruled. The proposed charge was a correct statement of the law.

The State did not object to this charge on the basis that it was an incorrect statement of the law but argued it was inapplicable to the facts. R. pp. 1372-75. The court refused the charge on the basis that the accident defense is available only when a defendant is involved and engaged in a lawful act. R. pp. 1244-45. Refusal to give this charge was reversible error, because it was supported by the evidence.

The cases on which the State relied in arguing against an accident instruction are not applicable. The question before the court in those cases was whether, notwithstanding that the defendants were in *unlawful* possession of a firearm, they could claim they were entitled to a charge on the defense of accident. See *Burriss*, 334 S.C. at 262-64, 513 S.E.2d at 108-09 (16-year-old in unlawful possession of weapon was entitled to accident charge because facts in evidence supported claim that he was lawfully armed in self-defense); *State v. Goodson*, 312 S.C. 278, 280-81, 440 S.E.2d 370, 372 (1994) (defendant was not lawfully armed in self-defense and therefore could not claim defense of accident). These cases have no application here, because it is undisputed that appellant was *lawfully* in possession of his weapon.

The evidence established that appellant had a valid concealed weapon permit. R. pp. 672, 998-99. He lawfully could carry his firearm in his glove compartment. He lawfully could have it on his person. He lawfully could transfer it from one to the other. See S.C. Code Ann. § 16-23-20 (9), (12). There was no allegation or evidence that he was in a

location at which he was prohibited to have a concealed weapon. See S.C. Code Ann. § 23-31-215(M). Because of the evidence that appellant had a valid concealed weapon permit, the court charged the jury concerning such permits, including that a permittee may transfer the handgun between the permittee's person and an enclosed glove compartment or other closed areas. R. p. 1312. In conjunction with this charge, the court should have given the accident charge, which was supported by evidence in the record. The expert testified concerning the size and shape of the fire ball that would be visible on the video had the weapon been fired as the State alleged, and the absence of such a flash negated the State's theory that appellant was pointing the weapon and aiming at the door. R. pp. 893-95, 923-24. With this testimony in evidence, it was incumbent on the court to give the requested charge on the defense of accident, and its failure to do so was reversible error.

B. Involuntary manslaughter charge.

The defense requested, in addition to the court's own proposed charge on involuntary manslaughter, two charges on involuntary manslaughter which made reference to negligence in the use of a deadly weapon. R. pp. 1366-69. One of the proposed charges contained, in relevant part, the following language:

"[O]ne who causes the death of another by the negligent use of a deadly weapon or instrumentality may be convicted of involuntary manslaughter."

R. p. 1366 (citations omitted). This language is a direct quote from *Brown*, 205 S.C. at 518, 32 S.E.2d at 827, and it is a correct statement of the law. The other charge included another explanation of negligence in the use of a dangerous weapon or instrumentality, language also taken directly from prior decisions of the Supreme Court, *State v. Gilliam*, 66 S.C. 419, 422, 45 S.E. 6, 7 (1903), and *State v. Quick*, 168 S.C. 76, 81, 167 S.E. 19, 21 (1932).

The State argued that the court's charge was adequate and anything more would be a charge on the facts. R. p. 1237. The defense contended that, because the jurors were being told they could infer malice from use of a deadly weapon, they should also be charged that negligent use of a deadly weapon is involuntary manslaughter. R. pp. 1238-39. The State contended that the parties could argue the facts either way but that the court should not give the defense's requested charge. R. pp. 1239-40. The defense argued that, because the jury was being instructed on the inference of malice, the court had to also give its requested charge on the other conclusion that could be drawn where the jury merely found negligence, that there was not malice. R. pp. 1240-41. The court ultimately did not give either of the defense's requested charges. R. pp. 1308-09.

The language in each proposed charge was a correct statement of the law and, like the accident defense, was supported by the testimony of the expert concerning the likely location of the gun when it was discharged and the unlikelihood, based on the absence of the expected flash on the video, that it was being pointed at the door, as the State alleged. R. pp. 893-95, 923-24. It was the court's duty to give the requested charges. They were not a charge on the facts any more than mentioning a deadly weapon in the malice charge is a charge on the facts. Giving the jury an inference-of-malice charge which favored the State's theory of the case without balancing that charge with the alternate conclusion that favored the defense – that the jury could find involuntary manslaughter from the negligent use of a deadly weapon – was fundamentally unfair and a deprivation of appellant's right to due process. *See* U.S. Const. amends. V, XIV; S.C. Const. art. I, § 3.

IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING THE STATE'S REQUEST TO CHARGE BASED ON *STATE V. MOUZON* (Issue 6).

The court held an informal charge conference with counsel for both parties in chambers at the close of the defense case. The following day, Friday, May 18, the court allowed counsel to place on the record the various charge requests and objections. R. pp. 1232-64. On Saturday, the State submitted, with copy to the defense by fax, an additional proposed charge based on *State v. Mouzon*, 231 S.C. 655, 99 S.E.2d 672 (1957). R. p. 1320. On Monday, the defense noted an objection to this charge, which the court had added to the charge it intended to give to the jury, on multiple grounds. R. pp. 1265-66. The court overruled the objection and added the requested language to its charge. R. p. 1266. When the court charged the jury, it included the *Mouzon* language, stating,

An old South Carolina case says that malice does not necessarily impart ill will towards the individual injured but signifies rather a general malignant recklessness of the lives and safety of others or a condition of mind which shows a heart regardless of social duty and fatally bent on mischief.

R. pp. 1305-06. The court committed reversible error in giving this charge.

Factually, this was not an appropriate case for charging the *Mouzon* recklessness language. The State's sole theory of the case was that appellant pointed, aimed, and fired at the door, with actual malice. Recklessness was not in play whatsoever under the evidence offered by the State. The defense theory of the case was that, if the shot came from appellant's vehicle, the weapon discharged from beneath the window level, near the glove compartment, either through accident or recklessness. There is no evidence of some middle ground mental state of "super recklessness" that would warrant a charge of the *Mouzon* language.

In *Mouzon*, a pedestrian crossing a street in the Clarendon County village of Alcolu, where the speed limit was 35 miles per hour, was struck and killed by a car traveling 70 to 80 miles per hour. After hitting the woman, the car braked and slowed to about 20 miles per hour, and the driver looked back but never stopped. On those facts, the Court held that evidence of extraordinary recklessness warranted a murder conviction. See *Mouzon*, 231 S.C. at 658-62, 99 S.E.2d at 673-74. Here, there simply is no evidence of recklessness akin to malice, as contemplated by *Mouzon*. Use of a firearm, alone, does not give rise to "Mouzon murder." If it did, there could never be a conviction for involuntary manslaughter where a person is killed by a gunshot. Something more than use of a firearm was required in the evidence to warrant giving this charge. Here, there was no such evidence, and giving this charge was reversible error.

Substantively, the holding of *Mouzon* has been superseded by later legislation. *Mouzon* was decided in 1957. Thereafter, the General Assembly enacted a statute which establishes that the mental state for the crime of involuntary manslaughter is "criminal negligence," defined as "the reckless disregard of the safety of others." See S.C. Code Ann. § 16-3-60. This statute supplanted the common-law principle espoused in *Mouzon* and earlier cases that recklessness with regard to the lives and safety of others could rise to the level of malice to support a conviction of murder. The General Assembly has weighed in and articulated a different standard – such recklessness is the requisite mental state for involuntary manslaughter, not murder.

If, however, the *Mouzon* form of recklessness is still a viable concept in the law of this State following the enactment of Section 16-3-60, the Court should find that use of this charge violates the federal and state due process clauses, for two reasons. First, the language

of *Mouzon* is unconstitutionally vague. See U.S. Const. amends. V, XIV; S.C. Const. art. I, § 3. There is no articulable means by which to differentiate between the recklessness required for involuntary manslaughter and that which would elevate an offense to murder under *Mouzon*. The concept of vagueness or indefiniteness rests on the principle that procedural due process requires fair notice and proper standards for adjudication. See *Curtis v. State*, 345 S.C. 557, 571, 549 S.E.2d 591, 598 (2001), *cert. denied*, 535 U.S. 926 (2002). Under the due process standard for vagueness, the recklessness standard established by *Mouzon* and its predecessor cases is "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." See *State v. Sullivan*, 362 S.C. 373, 375, 608 S.E.2d 422, 424 (2005); *Curtis*, 345 S.C. at 572, 549 S.E.2d at 598. Because of this vagueness, giving this charge deprived appellant of his federal and state due process rights.

Second, this charge effected an unconstitutional shifting of the burden of proof with respect to the defendant's mental state, also in violation of due process. See U.S. Const. amends. V, XIV; S.C. Const. art. I, § 3; see *Lowry v. State*, 376 S.C. 499, 505-07, 657 S.E.2d 760, 763-64 (2008) (finding counsel ineffective for failure to object to burden-shifting instruction); *Curtis*, 345 S.C. at 570, 549 S.E.2d at 597-98 (finding language in statute creating presumption of intent from certain conduct to be unconstitutional burden shifting). Here, if the jury accepted the defense evidence, that evidence established that appellant acted with recklessness, at most. Giving the *Mouzon* charge – which allowed the jury to find either murder or involuntary manslaughter on the basis of a finding of recklessness – shifted the burden to the defense to prove that the recklessness involved in this case did not rise to the inarticulable, undefined standard of recklessness that could be deemed malice, in violation of due process.

V. THE TRIAL COURT ERRED IN DENYING A DIRECTED VERDICT ON THE CHARGE OF POINTING AND PRESENTING A FIREARM (Issue 7).

The Richland County officers entered appellant's home on the basis of a defective warrant. Their entry was unlawful. *See* Argument I, Sections A and B, *supra* at 11-17 (incorporated herein by reference). They broke down the door and entered with weapons drawn. If appellant pointed a weapon at the officers, as they alleged, he was acting within his lawful right to defend himself and his habitation and to use such force as was reasonably necessary to eject these trespassers. *See Rye*, 375 S.C. at 123, 651 S.E.2d at 323. Under South Carolina law, in defending one's home or premises, a person has the right to end an unwarranted intrusion through the use of reasonably necessary means of ejection. *Id.*; *State v. Bradley*, 126 S.C. 528, 533, 120 S.E. 240, 242 (1923). In defending his own life in his home, he had no duty to retreat. *See State v. Davis*, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984) (setting forth approved instruction on self-defense in South Carolina). His arming himself in self-defense and in defense of habitation was entirely lawful. He was entitled to a directed verdict of acquittal on the charge of pointing and presenting a firearm.

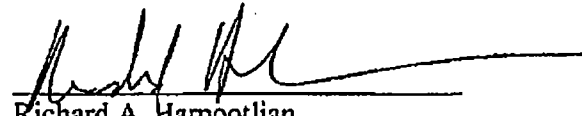
Even if this Court were to affirm the trial court's ruling denying the motion to suppress on the basis of inevitable discovery, that doctrine has no applicability to this issue. It is an exception to the exclusionary rule under the Fourth Amendment. It does not make lawful a search that is unlawful, but rather alters the rules regarding admissibility of the evidence. The Richland County officers entered appellant's home, without lawful authority, and he lawfully and within his rights could point and present a firearm in the face of their intrusion and the danger presented by their drawn weapons. This Court should find he was entitled to a directed-verdict of acquittal and reverse this conviction.

involuntary manslaughter or not guilty on the basis of accident. Under these circumstances, the multiple trial errors viewed together so tainted these proceedings as to deprive the defendant of a fair trial.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's convictions, find him not guilty of the charge of pointing and presenting a firearm, and remand the murder charge for a new trial.

Respectfully submitted,



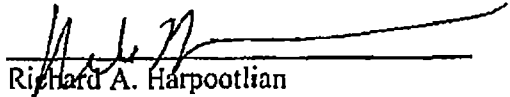
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CERTIFICATE

The undersigned, counsel for appellant, hereby certifies that this final brief
complies with Rule 211(b) of the South Carolina Appellate Court Rules.


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**IN THE STATE OF SOUTH CAROLINA
In the Supreme Court**

Appeal from Richland County
Honorable G. Thomas Cooper, Jr., Circuit Court Judge

STATE OF SOUTH CAROLINA,

Respondent.

v.

H. DEWAIN HERRING,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUES ON APPEAL

I. THE SEARCH WARRANTS WERE VALID UNDER BOTH CONSTITUTIONAL AND STATUTORY LAW, BUT REGARDLESS, NO EVIDENCE SHOULD HAVE BEEN SUPPRESSED.

II AND III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION OR COMMIT REVERSIBLE ERROR IN ALLOWING TESTIMONY FROM A BOUNCER AND TWO OFFICERS AS TO WHAT THEY SAW ON THE VIDEO OF THE SHOOTING, WHERE THE TESTIMONY WAS NOT EXCLUABLE OPINION TESTIMONY, AND WHERE ANY ERROR WAS HARMLESS OR CURED BY INSTRUCTION.

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VII. SINCE THE RCSD WARRANT WAS VALID, APPELLANT HAD NO RIGHT TO ARM HIMSELF IN RESISTANCE; THUS, A MOTION FOR DIRECTED VERDICT WAS PROPERLY DENIED AS TO THE POINTING AND PRESENTING CHARGE.

VIII. THERE IS NO CALL FOR APPLICATION OF THE CUMULATIVE ERROR DOCTRINE IN THIS CASE.

STATEMENT OF THE CASE

At the February 2006 term, the Richland County Grand Jury indicted Appellant, H. Dewain Herring, for murder and pointing and presenting a firearm (06-GS-40-0914 & -0881). Specifically, the murder indictment alleged that, on or about January 29th, 2006, Appellant killed John Johnson with malice aforethought by use of a firearm.

The Honorable G. Thomas Cooper, Jr., conducted a jury trial of Appellant from May 7th through 21st, 2007. At trial, Appellant was represented by Richard A. Harpootlian, Esquire, Graham Newman, Esquire, and Jamie Lindler, Esquire; Solicitor Barney Giese and Deputy Solicitor John Meadors prosecuted the case for the State. On May 21st, 2007, the jury found Appellant guilty as charged, and Judge McKellar sentenced him to thirty (30) years in prison for murder and a five year concurrent sentence for pointing and presenting.

A timely notice of appeal was filed and served on May 29th, 2007. This appeal follows.

STATEMENT OF FACTS

This case concerns the conviction of a Columbia attorney for shooting an employee of Chastity's strip club after the attorney was removed from the club. Appellant did not seriously contend he was not the shooter at trial, but raised the defense of involuntary intoxication.

A. The incident in the "champagne room" and the shooting

At about 11:00 p.m. on Saturday, January 28th, 2008, a well-dressed man arrived at Chastity's all-nude strip club on River Drive in Columbia. Renisha Grainger, or "Mia", was a dancer working that night, and the man signaled her he wanted a private "lap dance" in the Champagne Room. Mia paid a bouncer, Carl Weeks, his cut of the fee and Carl escorted the man back to the Champagne Room. {R. 179; 299-305; 414-16}.

Mia left the room after a couple of minutes to freshen up and planned to return to her customer; however, when Carl checked on the man waiting in the Champagne Room, he found the man completely naked and sitting on the couch masturbating. The man told Carl he was "waiting on a girl", and Carl told the man he could not do that here and needed to leave. The man did not respond and kept masturbating. {R. 305-15; 417-19; 454-55}.

Carl went and got the victim, John Johnson or "John John", who went in the room to talk to the man. Eventually, the man and John John emerged, and Carl told the man he could either leave or they would call the police and report him for solicitation of prostitution. The man responded, "No, I will fucking shoot you", and which point Carl replied, "you're not going to shoot anybody". Another bouncer, Donald Hawkins, over heard the man threaten to kill Carl and John John. At this point, John John pushed Carl back to de-escalate the situation. {R. 166-69; 231; 419-22}.

Carl went off to attend to other duties and Donald came up to assist John John with the unruly man. They escorted the man outside, but did not have to use force or put their hands on him. However, the man was upset, wanting his money back. He told the two strip club employees that they did not want him to come back because someone is going to get "fucked up". A security video played at trial shows the man exiting the club at 11:56 p.m. {R. 169-79; 263-70; 364-70; 423-25}.

The man got in his SUV, leaned over towards the glove compartment, and then very slowly left the parking lot at 12:03 a.m. John John called out the vehicle's license tag over his radio and Carl wrote it down on his hand. Carl told Donald they should step inside in case the man started shooting. They watched as the man drove away until he was totally gone, and Carl went inside to his duties. Donald and John John saw then saw the SUV coming back down River Drive, so they went back in the club. {R. 179-205; 426-27; 431-33; 441}.

John John was at the door of the club peeking out and Donald was watching the monitors. Suddenly, John John said, "oh shit". He then fell to the floor, having been struck in almost directly in the left ear by a bullet that passed through the front door. The security video shows the SUV returning to the parking lot, pausing directly in front of the club before the shot was fired, and then departing. {R. 178-208; 428-31}.

The man who was in the room naked, who was ordered to leave, and who threatened the strip club employees was identified at trial by Renisha, Carl, Donald, bartender Nicole Beran, and club Vice President Jewel Koon as Appellant, Dewain Herring. {R. 200; 271; 305; 375; 435}.

B. Police arrive and Appellant is identified

Of course, police were summoned, and given the license tag Carl had written down from the assailant's SUV. It came back registered to Appellant at his office address. Officers also compared a picture of the man on the club's security video with Appellant's driver's license photograph and his picture on his office website, and it was a match. Of course, officers found no one present at the business address during early morning hours on a Sunday, but they did find in their records Appellant's home address in a gated community. {R. 499-504; 507; 603-05; 608-09; 766-69}.

C. Gunfire at Appellant's home

Officers thus went to Appellant's home in the early morning hours of that Sunday. They knocked on the door, but no one responded. One officer looked in the windows of the garage and saw inside an SUV like the one on the video. {R. 504-07; 765-66}.

Officers then obtained a search warrant. After again knocking on the door, they made a forcible entry. Two officers came down the hall to see Appellant, who retreated into a bedroom. As an officer looked into the bedroom, he saw Appellant pulling a gun from a nightstand. The

officers yelled "gun, gun, drop the gun," but Appellant continued to turn and point the gun towards them. An officer dropped to one knee and fired, and other officers in the house also opened fire. The officer felt debris kicking up around him and retreated. {R. 505; 512-25; 554-59; 609-17; 622; 629; 642-43; 770-78}.

What followed was a standoff between Appellant and the officers that lasted for some time. The officer continued to yell that they were law enforcement and for Appellant to come out, but received no response until he said he had been shot. The officers told him to come out and he would get help. Appellant refused, asking why the officers were there, and when told it was relating to an incident earlier that night, Appellant yelled he had been in bed all night. {R. 526; 617-21}.

The officer heard a gun cock from the bedroom, so they retreated further and call superiors. They were informed that Appellant had called 911 and was on the phone reporting a home invasion. Appellant told 911 he did not believe the people were police officers, and a number of questions were coordinated between 911 and Appellant to satisfy him as to the identity of the officers. Appellant came out and was arrested, and had a gunshot wound to his arm. {R. 527-31}.

D. Appellant's custodial statements to police

Because officers had been involved in a shooting, SLED was called out to investigate pursuant to routine policy. {R. 652; 676-78}. SLED agents interviewed Appellant after advising him of his rights. Appellant gave a statement in which he claimed he went to bed at 11:00 p.m., and was awakened by a loud banging on his door. He asserted he did not recognize the people entering his house as officers, and asked them to speak up because he could not hear them. The men then started shooting at him, so he retreated to his bedroom and got a .357 magnum revolver from his nightstand. Appellant admitted cocking and uncocking the weapon. Appellant called 911 and told

them some men were in the house claiming to be from the sheriff's department, but he was unsure. A supervisor got on the phone with him and told him the men were there to speak to him with regard to an incident on River Drive, but Appellant told the supervisor he did not know anything about an incident on River Drive. Appellant stated he surrendered to the officers and was placed into custody. He claimed he was worried because there had been a number of burglaries in the area and the officers entered with great force. {R. 682-703; 723-38}.

The SLED agent then spoke with Richland County officers and determined a number of inconsistencies between Appellant's version and the facts. He thus spoke to Appellant again, asking him to go back further in the day. Appellant admitted he went to Aiken to play golf with his friend, Chris Isgett, and drank about nine beers. They then went to a bar and grill, where he drank four scotch and sodas. The two men returned to Appellant's house, where they had more drinks, and Isgett left around 8:30 p.m. Appellant then claimed he took a shower and laid down and did not remember going anywhere. He claimed he thought about going to the Tombo Grill, but decided to stay home. {R. 708-10}.

When asked if he went to Chastity's strip club, Appellant stated he knew where it was but did not recall ever going there. The SLED agent then pointed out that the strip club's security cameras had a picture of him entering, at which point Appellant admitted he remembered "the white woman with the big tits". Appellant said he had a scotch there, and while his recollection was "hazy", he did now recall being there. {R. 710-12}.

When asked if he had a problem with anyone at the club, Appellant admitted he went into the back room for a lap dance done by a light-skinned black woman. He admitted driving his black 4Runner SUV, but stated he "typically [did not] go to places like [Chastity's] because the people

who go there have bad attitudes". Appellant admitted owning four handguns and one shotgun, and stated he usually has one in the SUV with him. However, he claimed he did not remember which gun he had in the SUV that night. {R. 712-14}.

When asked if he fired his weapon at Chastity's while leaving, Appellant said he did not recall doing so. When asked if he fired a gun at all, Appellant replied:

If I did, I was not shooting at anyone. I'm not saying that I did not do it. If the gun went off while in my hand, it was harmless error. It was probably the Ruger .357, and if it went off, it was an accident.

Appellant claimed he was not shooting at anyone because "there was nobody to shoot at". Appellant then specifically wrote at the end of the statement that he reserved the right to "edit, add, or delete" from the statement. {R. 714-16; 739-53}.

After the SLED agent took the second statement, a Richland County investigator spoke with Appellant. Appellant told the investigator he remembered having a dispute with the strip club employees, and remembered shooting the gun – although he stated he was not shooting at anyone. Appellant again stated the weapon fired was likely his Ruger handgun, as that was the one he usually kept in his car. Appellant then asked if he was under arrest, and was told he was under arrest for murder. Appellant looked surprised, and the investigator told him the bullet had killed someone. Appellant then put his head into his hands and said, "no, no, no". Appellant said he had not intended to hurt anyone, and requested a lawyer. {R. 794-99}.

E. Evidence recovered from Appellant and his home

SLED agents investigating the shooting of course found evidence of the shootout and standoff between Petitioner and the officers executing the warrant. Sixteen casings and fifteen projectiles were recovered, and it was determined a total of seventeen shots had been fired by the

group of officers who entered the home. {R. 653-55; 661-69; 822}.

A Smith and Wesson .357 revolver was found on Appellant's bed. In a closet under some clothes, officers found a Ruger .357 pistol. The Ruger had one fired casing in its revolver and four unfired cartridges. {R. 656-59; 718; 720; 753-54}.

No gunshot residue was found on Appellant's hands, although that could be explained by the time lapse. No gunshot residue was found on the driver's side of Appellant's 4Runner, but all three swabs from the passenger side showed gunshot residue. {R. 818; 825-36}. In Appellant's 4Runner SUV, officers found six boxes of shotgun shells, one Ruger catalog, one Buckmaster magazine, one Gunhunter magazine, and an Indigo Club clay shooting coupon. {R. 810-13}. The security tape from Appellant's gated community showed someone matching his description and wearing the red sweater similar to the one on the Chastity's tape entering the subdivision at 1:12 a.m. on Sunday morning. {R. 857}.

F. Evidence recovered from Chastity's

Officers at Chastity's did not find any projectiles at the scene but did find a bullet hole in the right top area of the front door to the club. A trajectory analysis was not conducted because officers had the security video of the shooting. {R. 470-74; 477; 543; 586-87}.

An autopsy revealed the bullet struck John John almost directly in his left ear canal, and the bullet fragmented upon hitting bone. The pathologist was able to remove five fragments, but left in others too small for removal. {R. 586-87; 855}.

Bullet fragments were recovered from the victim's head, which were taken to SLED for processing. A SLED expert conclusively matched one of the fragments to the Ruger .357 Appellant owned which was found under clothes in his closet; analysis on the others was inconclusive or

impossible. The expert noted that the weapon could not be fired in its holster without use of some sort of tool, and even then it would need to be manually cocked first. Finally, the SLED expert found no evidence the weapon had been fired while within its holster. {R. 843-54; 856}.

G. The defense case

The defense first began by calling Lawton Yates, who was qualified over State objection in forensics and ballistics. He opined that the forensic evidence was inconsistent with officers' claims that they only fired once when Appellant grabbed the gun from the nightstand and turned toward them. Yates asserted the club video evidence was inconsistent with Appellant aiming at the door and firing through it without some ricochet. Yates stated he would have expected to see a fireball when the weapon was fired, and the alleged absence of that on the video indicates the weapon was fired below the plane of the passenger side window. However, Yates conceded that the SLED expert was correct in concluding Appellant's .Ruger .357 fired the shot that killed John John. {R. 877-904}. On cross, Yates conceded the shot was fired from the car. {R. 910-17}.

Next, the defense called a dancer a Chastity's, who stated some dancers take a fee, tell a customer they would perform oral sex, and then arrange for a bouncer to check on them. She also claimed she had heard of people putting things in other people's drinks at the club. {R. 933-46}. Two other dancers testified later, of which one stated she believed she had once been drugged at Chastity's, and the other said she was with the first dancer and also believed the first dancer had been drugged. {R. 1161-1214}.

Appellant testified at his trial. He stated he played golf with Mr. Isgett in Aiken, and then went to the bar and grill where he had a few drinks. Upon getting back home at about 7:30, he took a shower and laid down, but then got up intending to go to the Tombo Grill. However, supposedly

the kitchen had closed early, so he went to Platinum Plus. Something there made him nervous, so he decided to go home. On the way, though, he stopped at Chastity's, and he admitted on the stand the person in the security video was him. {R. 957-63}. However, Appellant claimed that he does not have a coherent memory of anything that happened after he ordered a drink at Chastity's, which he attributed to being drugged there. {R. 979-82}.

Appellant noted that he wears glasses and is hard of hearing, and also sleeps with a medical device that makes an audible hum. He asserted that while he could hear the officers making noise and yelling, he could not tell they were officers. He denied ever pointing his gun at them. {R. 968-72}. Despite the fact that Appellant remembered the previous point, he claimed he had no memory of being advised of his rights or signing the waiver form. Consequently, he did not believe his first statement was accurate, but said as the officers continued to question him, his memory began to come back "hazily". Appellant claimed that although he said that if the gun went off, it was an accident or "harmless error", he did not actually remember anything happening. {R. 982-1002}.

Appellant was cross-examined on his claim that he did not fire the gun intentionally, his assertion that except for the gun going off he supposedly did not remember anything after he got his drink at Chastity's, the fact that he does not appear to be physically impaired on the video even though he claims he was drugged, the fact that he remembers what happened when police invaded his home but does not remember signing a Miranda waiver some five (5) hours later, and his claim that SLED is setting him up and he does not believe he told the SLED agent he had a dispute with the employees at Chastity's strip club. {R. 1007-49}.

Appellant next called Dr. John Holbrook, who was qualified as an expert in pharmacology. He asserted that date rape drugs can cause amnesia and loosen inhibitions, and claimed that in his

opinion Appellant did ingest a date rape drug that night. Dr. Holbrook arrived at this conclusion because Appellant's behavior was supposedly out of character, he showed behavioral disinhibition when he took his clothes off, and he had no memory after a certain time. The doctor asserted that had Appellant been given a drug test, it would have revealed the presence of such a drug. {R. 1066-90}. The doctor was crossed on the fact that everyone who observed Appellant did not find him obviously intoxicated, and that the effects of any drug should have worn off by the time he signed his advice of rights form at 9:42 a.m. The doctor was also cross-examined on the fact that Appellant never claimed he was drugged on the day of the incident, and on the fact that Appellant stated in his first statement that he had not been out all night and had gone to bed at 11:00 p.m. {R. 1091-1139}.

Appellant's golf partner Chris Isgett testified for the defense that Appellant only had about five beers during the round of golf, and only two scotches at the bar and grill in Aiken. Back in his house here in Columbia, Appellant was just on his second scotch when Isgett left to go home. {R. 1215-20}.

Finally, Appellant called his wife to testify. She also stated that Appellant wears hearing aids and sleeps with a device on that makes a humming sound, and that on many occasions he has slept through the door bell or phone ringing. {R. 1225-28}.

H. State's reply case

In reply, the State first called Dr. Demi Garvin, an expert in forensic toxicology who had analyzed hundreds of cases of drug facilitated sexual assault. She reviewed, among other things, all the incident reports, witness statements, medical records, 911 calls, and Appellant and Dr. Holbrook's trial testimony. She opined to a reasonable degree of scientific and medical certainty that Appellant was NOT involuntarily intoxicated by any such substance. {R. 1267-70}. She stated that

given the alcohol he had voluntarily consumed, any surreptitiously provided drug would render him relatively incapacitated or significantly impaired. She noted that while anterograde amnesia can result from a date rape drug, that would not occur in isolation from significant physical impairment. Further, Appellant's purposeful and goal-directed behavior, and ability to fend for himself, was inconsistent with such a level of intoxication. {R. 1270-74}. Dr. Garvin also concluded based on her review of the evidence that Appellant knew right from wrong at the time of the shooting. {R. 1274-79}.

Indeed, throughout the State's case in chief, many of the witnesses who interacted with Appellant, from the strip club employees to the officers at his house to the officers who interviewed him, testified Appellant was coherent, not overly intoxicated, and responsive to questions. {R. 172; 238; 278; 351; 531-32; 620-21; 716; 757}.

ARGUMENT

I. THE SEARCH WARRANTS WERE VALID UNDER BOTH CONSTITUTIONAL AND STATUTORY LAW, BUT REGARDLESS, NO EVIDENCE SHOULD HAVE BEEN SUPPRESSED.

Appellant first challenges the search warrants obtained by the Richland County Sheriff's Department ("RCSD") and SLED for Appellant's home. As will be seen, no exclusion of evidence is required.

A. The RCSD warrant

A suppression hearing was held before trial. As noted in the Statement of Facts, but also testified to at the suppression hearing, employees at the Chastity's strip club had written down the license plate on the black SUV driven by the assailant and it matched a black Toyota 4Runner SUV registered to Appellant at his business address. Appellant's driver's license picture matched the

individual seen on the security video, and the video reflected the vehicle was parked directly in front of the club when the shot happened, after it had returned to the club minutes after Appellant got into it and left following the altercation with employees in the parking lot. Officers went to the business address, but no one was there during the early morning hours of a Sunday morning. Officers then found Appellant's home address. {R. 18-19; 29-31; 101-06; 111-13}.

Sgt. Linfert went to Appellant's house and knocked on the door, but no one answered. They looked in the garage and saw the 4Runner. Another officer, Morris Davis, had not gone to Appellant's residence but instead was at the club taking statements from witnesses, and was "aware of the whole incident". Sgt. Linfert met with Officer Davis and they prepared a search warrant affidavit. In preparing the statement, the officers used Sgt. Linfert's computer, which automatically puts his name at the top of the affidavit, and it was not changed by mistake. Sgt. Linfert sent Officer Davis over to the Magistrate's residence since Davis already knew where it was. Officer Davis signed the affidavit and swore to it before the magistrate, explaining to the magistrate that although Linfert's name had been placed at the top he was the one who had been asked to come down. {R. 19-26; 31-39; 224-25; 94-99; 101; 106-10}.

The State had contended that the search warrant was valid even if the deputies' entry into the curtilage to look for the 4Runner was improper, and the judge did in fact find that search unjustified. {R. 149-50}. However, the trial judge ruled that even if the portion of the search warrant referring to the 4Runner being in the garage was excluded, "there are sufficient facts sworn to in the affidavit which would lead a disinterested magistrate to conclude that a search warrant should be issued of the defendant's premises". The judge noted that witnesses had described the defendant, the 4Runner, and the license number, and police had identified Appellant's residence. Finally, the court concluded

that the firearms, ammunition, vehicle, and clothing sought by the warrant would in fact be things found in a residence. {R. 151-52}.

Appellant makes two contentions with regard to the RCSD warrant. First, he contends that the warrant was false, and unsworn, inasmuch as Sgt. Linfert's name was at the top of the affidavit but Officer Davis actually signed it and swore to it before the magistrate. As explained in the testimony, this was clearly a scrivener's or ministerial error brought on by the fact that the officers – who prepared the affidavit jointly – used Linfert's computer which automatically placed his name at the top. Davis was clear the magistrate knew who he was. Such a minor error does not affect the validity of the warrant. See, e.g. State v. Shupper, 263 S.C. 53, 207 S.E.2d 799 (1974) (obvious typographical error in the date of a search warrant did not affect the validity).

Moreover, there was no false information, and this case is distinguishable from State v. Dunbar, 361 S.C. 240, 603 S.E.2d 615, 620 (Ct. App. 2004). In Dunbar, the officer who was sworn for the affidavit had no knowledge of the facts of the case, and he could not make the oath required for the search warrant. Thus, he could not relay any information required to support probable cause. Here, Davis, who was sworn by the magistrate and signed the affidavit, testified that he was well aware of the facts of the case. He was involved in the investigation at Chasity's. He also worked with Sergeant Linfert in putting together the affidavit. Davis knew the defendant's address, that he drove a 4Runner, and that the individual on the driver's license was the same as on the surveillance video at Chastity's before anyone ever went to the defendant's residence. {R. 109}. Further, Davis conveyed that information to the magistrate judge. {R. 110}. There was no defect.

Second, Appellant contends the affidavit was insufficient if one excludes the reference to observation of the 4Runner in the garage of Appellant's residence, which was found improper by the

judge. This also is meritless. Of course, in Illinois v. Gates, 462 U.S. 213, 238, (1983), the United States Supreme Court adopted a "totality-of-the-circumstances" test for probable cause determinations, noting that the magistrate must make a practical, common-sense decision whether there is a "fair probability that contraband or evidence of a crime will be found in a particular place". Removing any reference to the observation of the 4Runner in the garage, the affidavit notes that a victim had been killed by a firearm, that witnesses had described the defendant and the license plate of his vehicle, that the tag was registered to Appellant's business, that the business was closed, and that a search of the residence and vehicle was necessary for the investigation. {R. 1322}.

Appellant's primary contention seems to be that since the SUV was registered to the business, there was nothing to link the residence to the crime absent the suppressed observation of the SUV in the garage. However, "the nexus between the place to be searched and the items to be seized may be established by the nature of the item and the normal inferences of where one would likely keep such evidence." U.S. v. Anderson, 851 F.2d 727, 729 (4th Cir. 1988). Especially given that the officers had determined no one was at the business, it was certainly a reasonable and normal inference that the owner was likely home during the early hours of darkness on a Sunday morning. The inference is even more valid given that they had video evidence of him being at a nearby club in the city a few hours earlier. See United States v. Anderson, 851 F.2d 727, 729 (4th Cir. 1988) (even if a search warrant affidavit contains no facts that the item to be searched for is in the place to be searched, a magistrate may draw reasonable inferences that the place to be searched is a likely place for the item to be located). Thus, the warrant had ample probable cause even if the observation of the 4Runner in the garage is excluded. See, e.g. State v. Davis, 371 S.C. 412, 639 S.E.2d 457 (Ct. App. 2006) (remaining information in affidavit after false statement was excluded was sufficient).

Further, given the lack of any bad faith on the part of the officers and the overwhelming evidence already gathered of Appellant's guilt – including a video – suppression would not be warranted under the good faith exception in United States v. Leon, 468 U.S. 897 (1984), which precludes application of the exclusionary rule where officers acted in reasonable reliance on a search warrant issued by a detached and neutral magistrate ultimately found to be invalid.

Finally, even if the warrant was invalid and evidence should have been suppressed, any error was harmless. In New York v. Harris, 495 U.S. 14 (1990), the United States Supreme Court held that the exclusionary rule would not bar introduction of statements made outside of the defendant's home after Miranda warnings, where the arrest was supported by probable cause but had been effected after a warrantless entry into the person's home. The only thing of consequence resulting from the RCSD warrant was Appellant's arrest, and his subsequent custodial statements were all made outside of his home. And, even if evidence of the discussions during the standoff were excluded, and even if also the discovery of the murder weapon by the SLED warrant was excluded, the evidence was more than overwhelming given the video, the witness, testimony, the license tag and registration, and Appellant's custodial admissions. See State v. Woods, 376 S.C. 125, 654 S.E.2d 867 (Ct. App. 2007) (denial of motion to suppress harmless given overwhelming evidence).

B. The SLED Warrant

Next, Appellant challenges the SLED warrant, obtained after SLED was called to investigate the shootout in Appellant's home.

At the hearing, Agent Lawrence testified he contacted the magistrate on call at bond court, and was instructed to follow the telephonic procedure authorized in Richland County by Chief Justice Toal in her Order of July 26th, 2001. Agent Lawrence typed out the warrant, faxed it to the

magistrate, and was sworn over the phone. During the course of this search, officers found the murder weapon in a closet; however, the warrant's language covered any firearms on the premises. {R. 69-89}.

The trial court found the warrant supported by probable cause, and added that the inevitable discovery doctrine would support admission of evidence seized from the automobile, which would have eventually been discovered in the course of the investigation into the homicide. {R. 152}.

1. Preservation

First, it is questionable whether any issues other than probable cause are preserved. The trial court did not expressly address Appellant's arguments other than that. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) (in order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial court).

2. Failure to comply with section 17-13-140

Appellant first contends the SLED warrant failed to comply with S.C. Code Ann. § 17-13-140 (Rev. 2003), which requires that a warrant "issued hereunder shall be issued only upon affidavit sworn to before the magistrate". Appellant contends that the telephonic procedure in this case violated the statute, regardless of the Chief Justice's Order.

First, he points to State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987), which found a search warrant supported only by an officer's sworn oral testimony defective under the statute. Appellant contends that McKnight's interpretation of the statutory requirement of an affidavit "reduced to writing and sworn to or affirmed before some person legally authorized to administer an oath", means that the attesting officer had to appear in person before the magistrate rather than telephonically. He then makes a number of constitutional and statutory arguments as to the inability

of the Chief Justice alone to amend a statute to allow a telephonic procedure.

As a general matter, there can be no quarrel with much of Appellant's exposition on separation of powers and other constitutional provisions. However, he overlooks the fact that nothing in the statute or McKnight mandates swearing "before" the magistrate has to be done in person, as opposed to by telephone, webcam, or any other of the wonders of modern communication. The Chief Justice, in her power as the administrative head of the courts, has simply interpreted "before" as allowing an officer to be sworn over the phone and the affidavit to be transmitted by fax. There is nothing to indicate that this conclusion is judicially incorrect as a matter of law. See, e.g., United States v. Beasley, No. 00-20151 MI/BRE, 2000 W.L. 33725116 (W.D. Tenn. December 19, 2000) (in applying state rule also requiring swearing "before" the magistrate, noting that while the rule "does not expressly permit the procurement of a search warrant by electronic means, it does not prohibit it," and no law was cited to the contrary). Here, albeit over the telephone, the officer was sworn, and he did submit a signed affidavit. There was no violation of the statute.

Appellant makes one interesting argument that this order violates the constitutional requirements of the statewide uniformity of criminal laws. As an initial matter, this claim is not preserved as it was not raised to (nor ruled upon) by the judge. Dunbar, infra. Regardless, the constitutional provisions cited only speak to the ability of the General Assembly to enact special or local laws, and say nothing about judicial development of procedural mechanisms with regard to search warrants and consistent with the statute – as opposed to enactment of different substantive criminal laws. See S.C. CONST Art. III, § 34. The cases cited by Appellant support the Chief Justice's prerogative to make procedural orders, in that they reversed local rules of procedure enacted by circuit court judges that were not approved in advance by the Chief Justice. See Spartanburg

County of Social Services v. Padgett, 296 S.C. 79, 370 S.E.2d 872 (1988) (chief administrative judge exceeded scope of authority by enacting contempt rule without prior approval by Chief Justice); State v. Duncan, 274 S.C. 379, 264 S.E.2d 421 (1980) (circuit court rule promulgated by individual circuit void). Indeed, a search of the South Carolina Judicial Department website reveals a number of orders approving local rules for the processing of criminal cases in various counties. See, e.g. 2008-03-31-01 "Local Rules for the Processing of Criminal Cases in Calhoun County".

3. Failure to comply with the order allowing use of the telephone

Next, Appellant contends that even if the Chief Justice's Order allowing telephonic warrants is valid, the search warrant in this case was defective because there was not perfect compliance with the order. Apparently, the magistrate was on duty, all pages were not initialed by the officer when faxed, all pages were not initialed by the magistrate when faxed back, and the magistrate did not notate on the warrant one of three ways in which he confirmed the officer's identity.

All of these are insufficient to invalidate the warrant. First, even though a magistrate was on duty, the order allows use of the procedure in extraordinary circumstances. {R. 1338}. Here, such circumstances existed, as the magistrate was in bond court, there had been a standoff in which a local attorney had been shot by police, and it was major case involving a homicide in which evidence needed to be preserved and collected as soon as possible. With regard to initialing each page, the warrant reflects that both the judge and the officer signed the affidavit, and the judge signed the warrant, and obviously these are the significant portions of the warrant. There is no contention that forgeries or other irregularities occurred with the cover sheet, and accordingly any such defect is a scrivener's error or ministerial. See, e.g. State v. Shupper, 263 S.C. 53, 207 S.E.2d 799 (1974) (obvious typographical error in the date of a search warrant did not affect the validity); State v.

Mollison, 319 S.C. 41, 459 S.E.2d 88 (Ct.App.1995) (failure to comply with inconsequential ministerial requirements of the statute does not require suppression in the absence of prejudice to the defendant). With regard to failure to notate the manner in which identity was confirmed, again, there is no contention of foul play and the officer and magistrate signed the important and necessary parts of the affidavit. Shupper, supra.

4. Probable cause and scope

Appellant asserts that the SLED warrant was improper as it was not supported by probable cause, and the officers seized the murder weapon which was not displayed in the shootout. As to probable cause, the SLED officers were undoubtedly there to investigate the shootout at Appellant's house, but as Agent Lawrence said, as a technical matter he was to treat Appellant as the victim and the officers as the suspects, since Appellant had been shot. {R. 79}. The affidavit clearly reflected that there had been a shooting by officers during execution of a search warrant which wounded the suspect, and SLED had been summoned by the Sheriff to conduct this investigation. Probable cause was clearly present that evidence related to this shooting was in the house.

As to a contention that officers exceeded the scope by retrieving the murder weapon found in the closet, the SLED warrant authorized obtainment of any firearms associated with the shootout, and as Agent Lawrence noted, both weapons recovered were .357s. It was not unreasonable for SLED to seize both in determining which had been used or displayed in the event.

5. Good faith and inevitable discovery

Finally, Appellant asserts that the doctrines of good faith and inevitable discovery should not apply to this situation. Of course, in United States v. Leon, 468 U.S. 897 (1984), the Supreme Court precluded application of the exclusionary rule where officers acted in reasonable reliance on a search

warrant issued by a detached and neutral magistrate but ultimately found to be invalid. There can be no doubt that as a federal constitutional matter, the good faith doctrine should apply. The SLED agent was relying on what the magistrate told him to do, and on an Order of the Chief Justice. There is no evidence of foul play or that the magistrate was not neutral and detached.

However, as a statutory matter, the issue is trickier. In State v. Covert, 368 S.C. 188, 628 S.E.2d 482 (Ct. App. 2006), the court noted that defects under the statute will not be overlooked unless officers make a good faith effort to comply with it. In State v. Sachs, 264 S.C. 541, 559, 216 S.E.2d 501, 510 (1975), the court found such an effort where the misstatements were the result of a joint federal/state investigation. However, in State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987), the court found no such effort where the officer only offered sworn *oral* testimony, and no written affidavit. Covert found no good faith effort where the date the magistrate signed the affidavit was two days after the search – and there was no evidence offered the error was typographical.

Here, though, the officers did testify, and there is no evidence of anything but that the officer was sworn, signed the affidavit, and the magistrate signed the warrant after review, before the search was conducted. There was a good faith effort. Indeed, even if there is a higher standard of privacy under the state constitution, no valid policy reason would be served by suppression in this case where there was no bad faith and officers were acting in accordance with judicial orders. Suppression would do nothing to deter improper police conduct. The same goes for application of the doctrine of inevitable discovery. See Nix v. Williams, 467 U.S. 431 (1984).

Finally, any error in failing to suppress the SLED warrant is harmless. Even if the murder weapon had not been discovered, the evidence was overwhelming, given the video, the witness identifications, the automobile tag and registration, and Appellant's custodial statements. Indeed,

nothing about the weapon would affect Appellant's defenses at trial. See State v. Woods, 376 S.C. 125, 654 S.E.2d 867 (Ct. App. 2007).

II AND III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION OR COMMIT REVERSIBLE ERROR IN ALLOWING TESTIMONY FROM A BOUNCER AND TWO OFFICERS AS TO WHAT THEY SAW ON THE VIDEO OF THE SHOOTING, WHERE THE TESTIMONY WAS NOT EXCLUDABLE OPINION TESTIMONY, AND WHERE ANY ERROR WAS HARMLESS OR CURED BY INSTRUCTION.

Appellant next contends the trial court erred in letting a bouncer and two officers testify to seeing a flash on the video at the moment the bullet left the car and struck John John. However, it was not an abuse of discretion to admit the testimony, which was not excludable opinion testimony, but was either basic statements of fact, obvious conclusions, or relevant to the actions taken by police officers.

A. Events at trial

At trial, bouncer Donald Hawkins was asked what he observed "coming from the side of the video". After the defense objection was overruled, the solicitor asked Donald if he observed anything coming from the side of the vehicle. The defense objected to any question on Donald's opinion "of what's on that video", and the objection was overruled after a bench conference. Donald then testified he saw a "flashing light". {R. 195}. The defense also objected when the solicitor mentioned the "flash" or "light" as part of his general question asking Donald to identify Appellant as the man who left and went out on River Drive in the 4Runner. {R. 200}.

During a break, the defense put on the record its objection that Donald was not an expert and thus could not give an opinion as to what was on the tape. {R. 201}. The State replied that under Rule 701 a witness could give testimony rationally based on his perceptions, and thus the witness could give the simple answer he "sees some light". The defense countered that the issue was not

what he saw in the courtroom, and made clear Donald was not testifying as to what he saw on the monitor on the night of the incident. The State responded that under Rule 701(a), SCRE, it could ask the witness if he saw anything on the video, as "every person could do that". Indeed, even the defense then agreed there was "something" on the video at that point.¹ {R. 201-04}.

The defense then asked that the judge strike the testimony and instruct the jury to disregard it. The court denied the motion, noting the witness said he saw a light. {R. 204}.

During cross, Donald said that when he stated he saw a light, it was from looking at the video in the courtroom, not from that night. {R. 208-09}.

The next morning, the defense moved for a mistrial or in the alternative requested a curative instruction on the issue, asserting – erroneously – that Donald had given an opinion that the "streak" was a gun being fired. The defense asserted that lay opinions are only admissible where they would assist the jurors in something they could not determine themselves. The State pointed out Donald never said it was a gunshot, but stated he only saw a light. The court indicated it would clarify that for the jury. {R. 289-91}.

The judge then instructed the jury that when Hawkins was testifying the previous day, from a screen accessible to everyone in the courtroom, he stated he saw a flash of light on the video. The judge pointed out that Hawkins was not an expert and not entitled to give opinions, and continued:

What he did or didn't see, if he tried to give you an opinion that would make you think it was a gunshot wound, I'm going to ask you to strike that from the testimony in this case and strike it from your memory as to what he said, because he is not supposed to be giving opinions.

¹ The "something" that everyone agrees is there is visible on the video reflecting a view from the front door out roughly at 12:06:05 to 12:06:06 a.m. {R. S54; S60; R. 454}. This is the same time that John John and Donald are observed to hit the floor in the video of the lobby. {R. S54; S60; R. 197-99}.

You are the only ones who can draw conclusions from what you saw on the tape and his testimony with regard -- he can say he's looking at a light. I'm looking at a light, that's not an opinion. But if I say the light is coming from so-and-so and so-and-so, then that may be an opinion.

{R. 292-94}.

Later, Sgt. Linfert was asked about viewing the video at the scene in the early morning of the incident. Linfert stated he watched the video, and saw the "vehicle leaving and coming back to the location just minutes just before the shot is fired". The solicitor asked if Linfert saw the shot fired, and he answered affirmatively. Only after two more questions were asked did the defense object. The judge overruled the objection, but after a bench conference, gave another curative instruction:

The last question: "Did you see a shot fired? I did, yes"; it's the same instruction that I gave you with regard to another witness that looked at the same video and saw what he thought was -- one said a light, one said a shot. That's an opinion. Just take it as that. Nobody saw the shot fired based on the testimony we've heard so far. It's all from the video. You are going to have the video. You can look at it. You can determine whatever you choose to determine from it.

{R. 501-02}. On cross, when Linfert was asked about conducting a trajectory analysis or looking for ricochets, Linfert noted "obviously we saw the video where the shot was fired from inside the vehicle". {R. 543}.

Officer Gwyn was also testifying about his investigation in the immediate aftermath, and stated he went with Koon to view the video. Gwyn stated he "saw a flash from the passenger's side door from the window". The defense objected, and argued the opinion was not helpful to the jury, and that even though the video was analyzed by NASA, the defense was not aware of any opinion any NASA expert had given as to the flash. The defense contended Gwyn was not trained in analyzing videotapes, and asserted the evidence was not admissible under Rule 701, SCRE. The

State contended it was simply a lay witness giving admissible observations. {R. 592-95}.

The court noted Gwyn could not say it was a shot, but that he could say he saw a light. The judge concluded that anyone could say they saw a light on the video, but it was up to the jury to conclude whether they did or not. The judge analogized it to someone going outside and stating that it was sunny. The judge indicated he was going to give another curative instruction, but agreed that if it continued over and over there might be an issue under Rule 403, SCRE. The judge instructed the solicitor not to ask the question again, and denied the motion for mistrial. The judge then gave the following instruction:

Similar to my prior cautions, this witness has repeated something that another witness said regarding a light or a flash. You are not to interpret that as any evidence of a gunshot wound again or a gunshot. It is your responsibility to see what you see on the video, if you see anything.

{R. 595-98}.

The defense expert argued the video evidence was inconsistent with the defendant aiming at the door and firing without a ricochet, and asserted the absence of a larger fireball meant the gun was fired below the plane of the passenger door. {R. 888-97}. The defense expert thought the light was a reflection. {R. 922}.

B. The evidence was admissible as it was not excludable opinion testimony.

As an initial matter, the judge was correct that it was not improper to admit from Donald the simple undisputed observation that there was some sort of flash on the video, despite the fact that he did not observe it at the time it happened. Rule 701, SCRE, provides:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and

(c) do not require special knowledge, skill, experience or training.

Here, the testimony from Donald and Gwyn that there was a flash on the video "was not 'expert testimony' in the strict sense of the term, but a statement of a conclusion of fact, such as men who use their senses constantly draw from what they see and hear in the daily concerns of life." State v. Sullivan, 43 S.C. 205, 209, 21 S.E. 4, 6 (1895) (quoting Hopt v. Utah, 120 U.S. 430, 7 S.Ct. 614, 30 L.Ed. 708 (1887)). As the judge noted, pointing out the undisputed fact that there is a flash or streak on the tape at 12:06:05 to :06 is no different than one testifying it is sunny – it is not an opinion. Thus, this case is different from State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001), in which an officer was allowed to give an opinion as to the positioning of the victim when he was shot based on the bullet holes in the pants and the victim's wounds.

This is not to say that the prosecution could simply call people from off the street to testify there is a flash on the video – that would be excludable under Rule 403, SCRE. However, it is not inappropriate or an abuse of discretion to allow the prosecution to use a person like Donald who was part of the events in question, who was depicted on the video, and who was familiar with the security video system, to introduce the video and to catalogue before the jury the events of the evening. The same goes for an investigating officer at the scene in the immediate aftermath like Gwyn, who first saw the video.

As to Linfert, his testimony about the shot on the tape was admissible for a different reason. As held in State v. Williams, 321 S.C. 455, 469 S.E.2d 49 (1996), "some statements are not mere opinions but are impressions drawn from collected, observed facts", and "a natural inference based on stated facts is not opinion evidence". Where the distinction is blurred, it is best to leave the issue to the discretion of the trial judge. With regard to Linfert, as well as Gwyn, their testimony centered

on the investigation at the scene which led to the obtaining of a search warrant and arrest of Appellant in his home – which were issues in the case. In this regard, Linfert's conclusion that he saw the shot on the video was and admissible part of the description of the reasonableness of the police investigation and the actions they took during the course of that early morning in concluding Appellant was the guilty party. See generally Williams, 321 S.C. 455, 469 S.E.2d 49 (witness's belief victim stole defendant's crack was reasonably based on her observations of the transaction); Lafon v. Commonwealth, 438 S.E.2d 279 (Va. Ct. App. 1993) ("collective facts rule" allowed testimony as to witnesses's conclusion as to another's guilt as it explain witness's actions in coming forward) (cited in Williams). Cf. State v. Weaver, 361 S.C. 73, 86, 602 S.E.2d 786, 792 (Ct.App. 2004) (cert. granted, March 23, 2006) (testimony of a police officer about conclusions he made based on his investigation was not hearsay).

Indeed, Linfert's conclusion as to the shot was later elicited by the defense on the reasonableness of the investigation as to why no trajectory analysis or search for evidence of ricochet was ordered. {R. 543}. The testimony was admissible.

C. Any error was harmless or cured by the judge's instruction.

In any event, any error with the testimony was harmless. The defense conceded at trial that there was "something" on the screen at the moment in dispute. {R. 204}. This "something" also matches in time on the video of the lobby when John John and Donald drop to the floor. {S54; S60}.

As to Donald, he was limited to saying he saw a "flashing light", and never once opined it was a gunshot. Given that the defense conceded there was something there at that point, it is hard to conceive how that testimony could be prejudicial. Indeed, even the defense expert conceded it was present on the video, but he contended it was not the gunshot. {R. 912-13}. The judge

specifically charged the jury that Donald was not to be giving opinions and to disregard anything other than the observation that no one disputes. There could be no error.

As to Gwyn, the same points are applicable. All Gwyn stated was seeing a "flash", and the judge also specifically told the jury that was not to be interpreted as an opinion of a gunshot. Given the undisputed agreement that something is in fact there and the curative instruction, there could be no prejudice.

Obviously, it is a bit touchier with Linfert, who did say he saw the shot fired on the video. However, while Linfert did call it a shot, again the judge in his curative charge expressly discounted Linfert's opinion as having any weight, by noting that no one had seen the shot fired, and the jury was going to have to make the determination from the video itself.²

Next, as to all three is the overwhelming evidence on the issue. The flash comes at the same time John John is observed to fall on the other video, and the car then immediately pulls away. Even the defense expert conceded the bullet that killed John John came from Appellant's gun in his car. {R. 910}. Further, any error was harmless because, as will be argued in sections IV and V; *infra*, Appellant was not entitled to a charge on accident and involuntary manslaughter in any event.

IV. THERE WAS NO REVERSIBLE ERROR IN THE TRIAL COURT'S DECISION TO REFUSE TO CHARGE ACCIDENT, WHERE THE CHARGE AS REQUESTED WAS AN INCORRECT STATEMENT OF LAW, AND WHERE ACCIDENT WAS NOT VIABLE

² It is questionable whether this issue as to Linfert is preserved as two questions were asked an answered before the objection was made. {R. 501-02}. See *State v. Page*, 378 S.C. 476, 663 S.E.2d 357 (Ct. App. 2008) (no objection at time testimony entered, and a contemporaneous objection is required). Further, any error would be cumulative to evidence later admitted without objection, as in questioning Linfert on why trajectory tests were not order, the defense later elicited from Linfert that the shot was on the video. {R. 543}. *State v. Kirby*, 325 S.C. 390, 396-97, 481 S.E.2d 150, 153 (Ct.App.1996) (finding even if officer's testimony regarding information radioed by the police dispatcher constituted hearsay, its admission was harmless given it was cumulative to similar testimony that was admitted without objection).

ANYWAY SINCE AS A MATTER OF LAW APPELLANT WAS NEITHER ACTING WITH DUE CARE NOR IN A LAWFUL MANNER.

Appellant next contends the trial court erred in denying his jury charge request for a charge on accident. However, the charge was properly denied as it was an incomplete and thus incorrect statement of law. In any event, as a matter of law Appellant was acting neither with due care nor in a lawful manner when the gun went off; as such, accident was not a viable defense.

A. Events at trial

At trial, the defense submitted a written proposed instruction on accident. {R. 1370}. The State submitted a responsive memorandum, in which it argued that Appellant's unlawful arming of himself precluded a charge on accident. {R. 1372}. The judge ruled that accident is only viable as a defense when the defendant is engaged in a lawful act, and the judge did not believe the defense was appropriate in Appellant's case. The defense argued that because he had a concealed weapons permit, he had the right to have the weapon out in the car. The court was unpersuaded this made a difference. {R. 1244-46}.

B. The charge was properly denied because it contained an incomplete and thus incorrect statement of law.

As an initial matter, the charge was properly denied as it was an incorrect statement of the law. It is true that for a homicide to be excusable on the ground of accident, it must be shown (1) that the killing was unintentional, (2) that the defendant was acting lawfully, and (3) that due care was exercised in the handling of the weapon. State v. Goodson, 312 S.C. 278, 280 440 S.E.2d 370, 372 (1994). However, the charge goes on to add the passage: "The defendant does not bear the burden of proving accident; rather, the State must prove beyond a reasonable doubt that the defendant acted with the intent to kill the deceased." {R. 1370}. This is incomplete and thus

incorrect. While it is true that accident is not an affirmative defense and the state must establish the appropriate mental state for the crime, the second clause of the sentence, requiring the State to prove "the defendant acted with the intent to kill the deceased", is simply not the law. Our state supreme court has held that murder is not a specific intent crime; all that must be shown is the element of malice. State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996) (in ruling that a specific intent to kill was not necessary for the crime of assault and battery with intent to kill, noting that "we hold that it is sufficient if there is shown some general intent, such as that heretofore applied in cases of murder in this State", and citing a treatise for the proposition that a specific intent to take life is not necessary for murder). See also State v. Kinard, 373 S.C. 500, 646 S.E.2d 168 (Ct. App. 2007) (noting that malice can be established four ways, by "intent to kill, intent to inflict grievous bodily harm, extremely reckless indifference to the value of human life (abandoned and malignant heart), and intent to commit a felony (felony murder rule)").

Appellant contends this erroneous second clause is a "paraphrase of additional language" in the decision of State v. Brown, 205 S.C. 514, 32 S.E.2d 825 (1945), which "has not been overruled". {Brief of Appellant p. 36}. There are two problems here. First, of course, is Foust and its progeny are recent and clear on the issue, regardless of what Brown says. But more importantly, the requested second clause is not, in fact, a paraphrase of language in Brown. Instead of noting, as in Appellant's request, that "the State must prove beyond a reasonable doubt that the defendant acted with the intent to kill the deceased", the opinion states "the State to prove beyond a reasonable doubt that the unlawful act in which the accused was engaged was at least the proximate cause of the homicide". That is a far cry from Appellant's direct expression of a specific intent to kill, which is

but only one way in which the State may establish the necessary intent for murder.³

Since Appellant's request to charge contained an incomplete and thus incorrect statement of the law, it was not error to refuse to charge the whole thing. See Floyd v. Country Squire Mobile Homes, Inc., 287 S.C. 51, 336 S.E.2d 502 (Ct. App. 1985) (where charge, if given in exact language of request, would be incorrect, it is not error to refuse it).

C. In any event, as a matter of law Appellant was acting neither with due care nor in a lawful manner when the gun went off; as such, accident was not a viable defense.

In any event, the trial court was correct that a charge on accident was not warranted by the evidence presented. One claiming accident must act not only with due care but also lawfully, and as a matter of law it cannot be said Appellant was so acting either with due care or lawfully when the bullet from his gun was fired into the club.

It is true that in one statement to police Appellant claimed "if the gun went off while in my hand, it was harmless error. It was probably the Ruger .357, and if it went off, it was an accident." {R. 714-15}. However, it is undisputed – by way of the video – that after leaving the club once, Appellant returned, drove up before the door, and lowered the windows – before a gunshot left his car killing the victim. Even assuming a lack of intention, as a matter of law one cannot be said to be acting with due care in handling a weapon if, after drinking all day, he returns to the scene of an altercation, pulls in the parking lot right in front of the door, rolls down the window, and starts playing around with his loaded .357 magnum revolver. If in fact he was involuntarily intoxicated

³ Appellant seems to recognize this problem by stating in passing that the State "did not object to this charge on the basis that it was an incorrect statement of law". {Brief of Appellant p. 36}. This is of no consequence, as this Court can affirm for any ground apparent in the record, see Rule 220(c), SCACR, and it would certainly be bad policy to endure the extreme social cost of reversal for failure to charge something that is not the law anyway.

and the weapon went off because the involuntary intoxication rendered him incapable of criminal responsibility from such acts, that would be a complete defense, but of course the jury was charged on that and rejected it. That has nothing to do with accident.

Similarly, as a matter of law Appellant cannot be said to have been acting lawfully. Of course, as Appellant points out, statutory law permits one to possess a handgun in a "closed glove compartment, closed console, closed trunk, or in a closed container" in the trunk, and also permits one with a valid concealed weapons permit to have a handgun "concealed on or about his person" in a vehicle. S.C. Code Ann. § 16-23-20(9) (Rev. 2003). Moreover, the statute also allows one to transfer "a handgun directly from or to a vehicle and a location specified where one may legally possess a handgun". S.C. Code Ann. § 16-23-20(15) (Rev. 2003). Appellant had a concealed weapons permit, and thus as a general matter he would have been allowed to transfer a handgun from his glove box to a place of concealment about his person. It should be noted, though, that only the act of transferring the weapon from the glove box to a concealed location on the person, and vice versa, is lawful conduct.

While at first blush this might seem to aid Appellant, upon closer inspection it clearly does not. While Petitioner attempted to claim accident in the statement to SLED, the statement was clear he did not actually remember anything. {R. 714}. And Appellant repeatedly claimed in his trial testimony that he has no coherent memory after he had a drink at Chastity's {R. 966}., that he has no recollection of leaving Chastity's on the night of the incident, which he attributed to being involuntarily drugged {R. 979}., that while he remembered the gun going off, he was not sure if it was in his hand or even if he was in his car {R. 1010-12}., and – most importantly – that when he claimed accident or "harmless error" in his statement to police he did not actually remember

anything like that happening {R. 999}.

The only differing evidence from Appellant was his statement to Deputy Chief Wilson, in which he admitted he remembered having a dispute with the employees, and said that "when he fired the gun he wasn't shooting at anyone". Wilson was clear Appellant stated he fired the gun. {R. 769-98}. This expression of an intentional act in firing the weapon would not suffice for accident, as obviously it could be neither due care nor acting lawfully. See, e.g. S.C. Code Ann. § 16-23-440 (Rev. 2003) (unlawful to discharge firearm into a building regularly occupied by persons); S.C. Code Ann. § 23-31-400 (Rev. 2003) (unlawful for person under influence of alcohol or controlled substances to discharge a firearm); City of Columbia Code § 14-101 (unlawful to discharge firearm in city limits).

Thus, there was never any testimony from Appellant that he was transferring the weapon from his person to the glove box or vice versa pursuant to his rights under the pistol possession statute or the concealed weapons statute, when the gun accidentally discharged. In his statements to SLED and trial testimony, Appellant never remembered doing anything. His self-serving theory as to what *may* have happened is by admission without any basis in actual known facts, and thus cannot be evidence justifying a jury charge on a legal doctrine where there was no other actual evidence establishing that Appellant was exercising due care while merely transferring the gun in accordance with his rights under the statute. See State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007) (although appellant there argues the shootings were unintentional and reckless due to Zolof ingestion, there was no evidence submitted to support that finding). Nothing in those statutes provides that just because you have a concealed weapon permit you can pull out the gun and play with it at your leisure in your car while intoxicated in a public place. And, of course, Appellant's

alternate version of an intentional shooting at no one clearly would not justify the charge, as by no means could that be lawful or in the exercise of due care. Indeed, because of these conclusions, it simply does not matter what Appellant's paid expert thought about whether the video evidence supported a conclusion Appellant deliberately aimed at the door and fired, as even if the weapon did go off accidentally or ricochet under any view of the evidence it was still being handled under circumstances that were unlawful and negligent.

Finally is the question of proximate cause. It seems to go without saying that if Appellant had been drinking all day, gets into an altercation at a strip club, is ordered to leave, does so, but then returns to the front door, where he rolls down his SUV's windows and starts playing with his firearm, such conduct clearly is the proximate cause of the shooting. State v. Goodson, 321 S.C. 278, 440 S.E.2d 370 (1994) (Toal, J., concurring) (where defendant unlawfully possesses a firearm, has been drinking all day, and kills a bartender with an unlawful firearm when it goes off accidentally, the unlawful possession of the gun is the proximate cause of the injury – thus, accident was not warranted) (reasoning adopted in State v. Burris, 334 S.C. 256, 513 S.E.2d 104 (1999)).

Again, the jury was charged that if it believed Appellant's judgment had been so compromised by alleged involuntary intoxication that he was not criminally responsible, then it should acquit. However, since there was no actual evidence in the record from which it could be concluded Appellant was behaving with due care and lawfully when he returned to the scene of an altercation, rolled down his windows, and began to handle his firearm, the judge properly denied the charge on accident.

V. THERE WAS NO REVERSIBLE ERROR FROM THE JUDGE'S REFUSAL TO GIVE CERTAIN SUPPLEMENTAL CHARGES RELATING TO INVOLUNTARY MANSLAUGHTER, WHERE THE CHARGES WERE INCOMPLETE OR INCORRECT

STATEMENTS OF LAW AND THE JUDGE'S CHARGE CORRECTLY SET FORTH THE CONCEPTS IN ISSUE, AND WHERE APPELLANT WAS NOT ENTITLED TO AN INVOLUNTARY MANSLAUGHTER CHARGE IN ANY EVENT.

Appellant next contends that, although the trial court did charge involuntary manslaughter, it erred in failing to charge some specific language on the doctrine found in some defense requests. It is questionable whether the issue is preserved; in any event, the issue to the second request is clearly not preserved. Regardless, the charges were properly denied because as requested they were incorrect and incomplete statements of law, and the judge's charge correctly set forth the concepts in issue. And, Appellant could not have been prejudiced, as he was not entitled to an involuntary manslaughter instruction anyway.

A. Events at trial

Applicant proposed two jury charges at trial on the issue of involuntary manslaughter. His first instruction set forth the commonly accepted modern two part definition of involuntary manslaughter in the first sentence, but then added the following:

One who causes the death of another by the negligent use of a deadly weapon or instrumentality may be convicted of involuntary manslaughter.

His second request was a verbatim instruction given by a trial judge in a 1903 case, as follows:

"How do you, gentlemen, as jurors, think that a man of average sense in this position would handle a dangerous weapon or implement. under given circumstances generally? Then, under the testimony of the case you are trying, has the state shown beyond a reasonable doubt that the defendant was guilty of negligence-that is, he did act in that manner with the dangerous weapon or implement as a man of average sense and disposition, under the circumstances which the testimony shows to have existed in the case-he did act in that way, and, as a result of that, he did inflict the mortal wound, as alleged in the indictment, which caused the death of the defendant, as charged, if you find it so, then that will be a case of manslaughter." State v. Gilliam, 66 S.C. 419, 45 S.E. 6 (1903).

{R. 1366}.

During the charge conference, the defense first asked for the second sentence of its first request, which it asserted was a modern rephrase of that within the Gilliam case. When the judge asked if the defense wanted both, the defense initially stated yes, but then conceded that given its position that the second sentence of the first request was a "modern summary of what they say in Gilliam, the 1903 case", a charge of just the second sentence would be satisfactory. {R. 1236-37}.

The State asserted the judge's proposed charge was a direct and concise statement of the law and anything else should be left to the parties for argument. At this point, the defense contended that the second sentence of the first request was necessary to "balance" the fact that the judge was going to give the normal charge on the permissive inference of malice from use of a deadly weapon. {R. 1237-38}. The court responded that criminal negligence for involuntary manslaughter had been statutorily defined as reckless disregard, and "it just doesn't have that following sentence that you [the defense] had". {R. 1239}. The defense responded that it wanted clarification that while the jury may infer malice from use of a deadly weapon, malice does not necessarily result from negligent use of such a weapon. {R. 1240}. Importantly, the defense again stated that the only reason it included the quote from Gilliam in the second request was to show a "continuum of cases", and the defense responded "absolutely" when the trial court specifically asked if all the defense wanted was the second sentence of the first request. The court indicated it would take the matter under consideration. {R. 1241}. Ultimately, it faxed both parties a copy of its final charge once it had considered a number of charging issues raised. {R. 1263-65}.

The trial court ultimately gave the following instruction, relevant to the issues:

Involuntary manslaughter is the killing of another without malice and unintentionally while engaged in either an unlawful act not amounting to a felony and not naturally intending to cause death or great bodily harm, or, a lawful act with

reckless disregard for the safety of others.

Unintentional means the defendant did not intend for anyone to be killed or seriously injured. Reckless disregard for the safety of others is more than mere negligence or carelessness. Mere negligence or carelessness is the failure to use care that a person of ordinary reason would use under the circumstances.

Recklessness is a conscious failure to use ordinary care. A reckless disregard for the safety of others means that you are not interested in the consequences of your acts or the rights and safety of others. If a person knows or should know that ordinary care requires certain precautions be taken for the safety of others when using a dangerous instrumentality such as a gun or a car but that person fails to use those precautions without concern, the person's actions are considered reckless.

{R. 1308-09}. The defense did not renew its objection on this particular issue after the charge. {R. 1316-17}.

B. Any issue as to the second request is not preserved.

It is arguable that the issue is preserved as to either charge.⁴ Certainly, however, the issue is not preserved as to the second request. Although the defense at one point stated it wanted both requests {R. 1236-37}, it then stated under specific questioning by the judge that all it really wanted was the second sentence of the first request, which it considered was the modern expression of the old language in the second request. {R. 1241}. Any issue as to the second request is not preserved.

C. The requests were properly denied as incorrect or incomplete statements of law.

In any event, the requests were properly denied as they were incorrect or incomplete statements of law. The real debate centers around the second sentence of the first request: "One who

⁴ Of course, in State v. Johnson, 333 S.C. 62, 66, 508 S.E.2d 29, 31 (1998) stated: "[W]here a party requests a jury charge and, after opportunity for discussion, the trial judge declines the charge, it is unnecessary to preserve the point on appeal, to renew the request at conclusion of the court's instructions." However, Johnson also noted there was an on-the-record denial of the charge. There was no such on-the-record denial here.

causes the death of another *by the negligent use of a deadly weapon* or instrumentality may be convicted of involuntary manslaughter." (Emphasis added). {R. 1366}. Professor McAninch's Fifth Edition has an excellent explanation of the development of the law in this area. He notes that for years in South Carolina an involuntary manslaughter conviction could be sustained by a finding of simple negligence. See McAninch, Fairey, and Coggiola, The Criminal Law of South Carolina p. 12, 195-96 (5th ed. 2007) (citing State v. Caldwell, 231 S.C. 184, 98 S.E.2d 259 (1957)). However, in 1968, the General Assembly passed S.C. Code Ann. § 16-3-60 (Rev. 2003), which made the criminal negligence necessary for involuntary manslaughter a more culpable state of mind than the mere tort version of negligence, by defining *criminal* negligence as the "reckless disregard for the safety of others". McAninch, et. al., *supra*. As the trial judge noted, the primary distinction between the two is that the reckless person is conscious of the manner in which he is acting negligently, but disregards this risk. *Id.* See also State v. Rowell, 326 S.C. 313, 487 S.E.2d 185 (1997). Finally, McAninch notes that while there are some crimes remaining where simple tort negligence is sufficient, for policy reasons the common law is reluctant to impose criminal liability on one who merely fails to use due care. *Id.* at 13.

Indeed, the South Carolina Supreme Court has recently reiterated the same concepts:

We clarify today that in a criminal case, the State cannot rely on civil concepts of negligence and recklessness, that is, statutory violations, to meet its burden of proving the defendant's state of mind. The import of the terms negligence and recklessness as used in the civil law and in the criminal law are neither equivalent nor interchangeable.

State v. Rowell, 326 S.C. 313, 487 S.E.2d 185 (1997) (citing McAninch).

Thus, the second sentence of the first request is incorrect and incomplete. It only refers to "negligence", and is based in old caselaw that has been superseded by statute. While "criminal

negligence" is a viable term, the requested charge does not use that term, nor does it explain the difference between negligence and criminal negligence as defined in S.C. Code Ann. § 16-3-60 (Rev. 2003).

On the other hand, the trial court's charge clearly did correctly and expressly define the appropriate mental state, and explain the difference between it and simple negligence. {R. 1309}. The judge specifically noted that "[i]f a person knows or should know that ordinary care requires certain precautions be taken for the safety of others when using a dangerous instrumentality such as a gun or a car, but that person fails to use those precautions without concern, the person's actions are considered reckless" – which is essentially the legally correct version of the second sentence of Appellant's first request. See generally State v. Weaver, 265 S.C. 10, 217 S.E.2d 31 (1975) (no reversible error where charge given by judge was essentially the same as requested by appellant). See, e.g. State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998) (viewing charge as a whole, judge's charge was sufficient to convey the applicable law).

As to Appellant's concern that the second sentence was necessary to "balance" the standard permissive inference of malice from use of a deadly weapon, there is no caselaw of which the State is aware that requires such linkage between two distinct concepts under the two different crimes, where the jury was otherwise correctly charged on the law. The judge carefully explained that the inference was permissive only and did not lessen the burden of the State to prove malice {R. 1307}, and there is no indication of an undue emphasis on the permissive inference where the judge later carefully and accurately explained the mental state necessary for involuntary manslaughter. Weaver, Kelsey, *supra*. Indeed, the judge specifically told the jury to only consider involuntary manslaughter if it found that State failed to prove murder {R. 1308}, which necessarily means it would have

rejected application of the far more culpable mental state the judge earlier described in defining malice {R. 1305-06}.

As to the second request, it is incorrect and incomplete for the same reasons as expressed in Professor McAninch's book. See Floyd v. Country Squire Mobile Homes, Inc., 287 S.C. 51, 336 S.E.2d 502 (Ct. App. 1985) (where charge, if given in exact language of request, would be incorrect, it is not error to refuse it).

D. There is no error because, although given, involuntary manslaughter was not warranted under these facts.

In any event, there could be no error because, although involuntary manslaughter was charged, it was not warranted under these facts.

Again, involuntary manslaughter is the killing of another without malice and unintentionally while engaged in either: (1) an unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) a lawful act with reckless disregard for the safety of others. State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996).

If, as Appellant contended in his statement to Chief Wilson, he intentionally fired the gun at the building but not at anyone in particular, he clearly committed an unlawful act that not only amounted to a felony but would naturally tend to cause harm, given the building was occupied. See, e.g. S.C. Code Ann. § 16-23-440 (Rev. 2003) (felony to discharge firearm into a building regularly occupied by persons).

If, as argued in section IV, *supra*, relating to accident, one looks at the rest of Appellant's statements, there is no actual evidence that pursuant to his concealed weapons permit he was merely transferring his firearm from his person to the glove box or vice versa and it unintentionally went

off.

Appellant cannot satisfy either version of the definition of involuntary manslaughter; as such, he cannot suffer any prejudice from the denial of his specific charges on the issue.

VI. THE TRIAL COURT DID NOT ERR IN GIVING A CHARGE ON THE DEFINITION OF *MOUZON* OR "DEPRAVED HEART MURDER, WHERE (1) THE LONGSTANDING CONCEPT WAS NOT ABROGATED BY PASSAGE OF THE STATUTE DEFINING CRIMINAL NEGLIGENCE FOR PURPOSES OF INVOLUNTARY MANSLAUGHTER, (2) THIS CASE WAS A CLASSIC EXAMPLE FOR APPLICATION OF THE DOCTRINE, AND (3) DEPRAVED HEART MURDER AND INVOLUNTARY MANSLAUGHTER ARE SUFFICIENTLY DISTINCT THAT THE CHARGE COULD NEITHER BE UNCONSTITUTIONALLY VAGUE NOR BURDEN SHIFTING.

Appellant next contends the trial court erred in granting the State's request to charge the version of malice found in State v. Mouzon, 231 S.C. 655, 99 S.E.2d 672 (1957). The charge was properly given, as the General Assembly's statutory definition of "criminal negligence" did not abrogate the longstanding concept of depraved heart murder, and this case is indeed a classic example for application of the doctrine. Because depraved heart or Mouzon murder is obviously distinct from the mere conscious negligence for involuntary manslaughter, the charge was neither unconstitutionally vague nor burden-shifting.

A. Events at trial

After a charge conference prior to the weekend, the trial court received a request from the State to charge the commonly known and used language of "malignant heart" malice based in Mouzon. The defense objected, first contending the language was burden-shifting. The defense next argued that Mouzon was an old case that had been subsumed by the General Assembly's definition of the criminal negligence necessary for involuntary manslaughter as "reckless disregard of the safety of others". While asserting that having the jury distinguish between the recklessness required for

murder as opposed to the recklessness required for involuntary manslaughter would be confusing, the defense also contended that there was no evidence from which the jury could infer Appellant pointed the gun at anyone. The court noted it had considered the issue all weekend and felt the charge was appropriate. {R. 1265-66}. The defense renewed the objection after the charge. {R. 1317}.

B. The General Assembly did not abrogate *Mouzon* malice by its passage of the involuntary manslaughter statute defining criminal negligence, and the doctrine is clearly applicable to the facts of this case.

As Appellant notes, Mouzon was a case in which a conviction for murder was found appropriate in a case of vehicular homicide, in which the defendant had been driving recklessly despite his passenger's protests and struck a pedestrian at an extremely high rate of speed with no effort to avoid her. The Court affirmed the murder conviction, finding that malice could be found even without a specific intent to kill the victim, where there "is evidence of such recklessness and wantonness as to indicate a depravity of mind and disregard of human life." Mouzon cited an earlier case which noted that malice does not "necessarily import ill-will toward the individual injured, 'but signifies rather a general malignant recklessness of the lives and safety of others, or a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief'. State v. Mouzon, 231 S.C. 655, 99 S.E.2d 672, 675-76 (1957) (quoting State v. Heyward, 197 S.C. 371, 15 S.E.2d 669 (1941)). It was this language that the trial judge charged. {R. 1305-06}.

Appellant contends that the Mouzon form of malignant or depraved heart murder was superseded by the General Assembly when in 1968 it passed S.C. Code Ann. § 16-3-60 (Rev. 2003), defining the "criminal negligence" necessary for involuntary manslaughter as "reckless disregard for the safety of others". This is incorrect. As explained in the section V, *supra*, by passage of § 16-

3-60 the General Assembly was simply overruling years of preexisting caselaw sustaining involuntary manslaughter convictions upon a finding of simple negligence, by setting the bar higher for the general policy rationale that simple negligence is typically not enough for criminal liability. See McAninch, Fairey, and Coggiola, The Criminal Law of South Carolina p. 12, 195-96 (5th ed. 2007).

However, setting the bar higher than simple tort-style negligence for involuntary manslaughter had nothing to do with overruling the longstanding Mouzon inference of malice for murder in situations where a particularly egregious actor had no specific intent to kill the victim. First, of course, is the obvious point that neither § 16-3-60 nor any other statute expressly disavows the Mouzon inference of malice.

Second, while both § 16-3-60's definition of criminal negligence and Mouzon might share the word "recklessness", it is clear, as McAninch notes, that "the degree of recklessness must involve more egregious conduct than that 'reckless disregard for the safety of others' which is the statutory definition of the criminal negligence predicate to an involuntary manslaughter prosecution." McAninch, *supra*, at 94-95. Indeed, this is obvious from the language itself, as while § 16-3-60 merely refers to "reckless disregard for the safety of others", which is, as the trial judge correctly pointed out, a *conscious* failure to use ordinary care, Mouzon's definition of malice focuses on the fact that a specific intent to kill the victim is not required, and malice may exist where there is a "general malignant recklessness", or a "heart regardless of social duty and fatally bent on mischief". 231 S.C. at ___, 99 S.E.2d at 675.

However expressed, the difference between the two is not hard to understand. The lesser standard simply refers to one who consciously fails to exercise due care; the Mouzon standard is met

when the conduct is so egregious that it crossed the line and "is evidence of such recklessness and wantonness as to indicate a depravity of mind and disregard of human life". 231 S.C. at 675, 99 S.E.2d at 675. Consciously engaging in mere negligence is not the same as conduct so egregious and dangerous that it is the functional equivalent of an intent to kill. They are two degrees of recklessness, but simply because they share that same word does not mean either that the Legislature intended with § 16-3-60 to redefine Mouzon murder as mere involuntary manslaughter (punishable by only five years),

Appellant's argument that there could never be a conviction of involuntary manslaughter if Mouzon murder is applied to firearms is simply without merit. The spate of cases involving those who arm themselves in self defense but have the gun go off unintentionally provide just such an example. See, e.g., State v. Mekler, 379 S.C. 12, 664 S.E.2d 477 (2008); State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008). Moreover, Appellant is also incorrect that the facts of this case do not warrant application of the doctrine. Assuming the jury believed he did not have a specific intent to kill John John, the jury could still find that what Appellant did in this case is the perfect analogy with use of firearms for the vehicular homicide in Mouzon – like the defendant there, who blazed through a small community at nearly four times the speed limit and predictably struck a pedestrian with no effort to avoid her, Appellant here fired a bullet into a structure he knew was full of people, and predictably struck an occupant who had no chance to avoid the bullet. Both the defendant in Mouzon and Appellant then fled the scene. That certainly displays an extreme heedlessness of the deadly consequences of actions so obviously dangerous to others that malice could be inferred; even if the jury believed he was not specifically aiming for John John, he did not specifically care one way or the other whether it was John John, Carl, Donald, or any other employee or customer that was hit.

See Brown, 975 S.W.2d at 924 (citing treatise pointing out that *shooting into a crowd or occupied building*, or driving into a crowd, are classic examples of depraved heart or "wanton murder").

Indeed, if Appellant is correct that § 16-3-60 made the mental state in Mouzon the standard for involuntary manslaughter, then to the contrary there could never be a conviction for murder unless the individual had a specific intent to kill or do bodily harm. Mouzon is in fact the manner, aside from the felony murder rule, in which malice can be found without a specific intent to kill or injure the actual victim killed; otherwise, a person could open fire into an occupied building, or close his eyes and swerve while driving at a high rate of speed on a street crowded with pedestrians, and at worst be guilty only of a five year sentence for involuntary manslaughter. Cf. Brown, 975 S.W.2d at 924 (citing those as classic examples of depraved heart murder). To the contrary, Foust specifically rejected that malice required a specific intent to kill the victim, and cited Mouzon as a prime example. State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996) (citing a treatise for the proposition that a specific intent to take life is not necessary for murder, and citing cases including Mouzon showing that principle).⁵

Said another way, if Appellant intentionally fired his weapon but it unintentionally went into a building and killed someone, possibly involuntary manslaughter could result. But if Appellant intentionally fires his weapon and intentionally aims it at an occupied building, he can be guilty of murder even if he did not specifically intend to kill the person behind the door that was ultimately struck.

⁵ See also State v. Kinard, 373 S.C. 500, 646 S.E.2d 168 (Ct. App. 2007) (noting that malice can be established four ways, by "intent to kill, intent to inflict grievous bodily harm, extremely reckless indifference to the value of human life (abandoned and malignant heart), and intent to commit a felony (felony murder rule)").

C. The two concepts are distinct, and the fact that the two share the word "recklessness" does not make the *Mouzon* standard unconstitutionally vague, confusing, or burden shifting.

Since, as expressed above, the difference between the two concepts is obvious, it cannot be said the two mental states are so inseparable as to be confusing and unconstitutionally vague.⁶ Indeed, a number of courts have so held. See, e.g. *People v. Cole*, 85 N.Y.S.2d 990 (1995) (noting that the concept of depraved indifference to human life is one "rather well understood at common law", and rejecting vagueness arguments because the conduct fit within the "accepted understanding of the kind of recklessness" rising to such depraved indifference); *State v. Robinson*, 934 P.2d 38 (Kan. 1997) (wanton murder statute not unconstitutionally vague as compared to manslaughter, where the question is one of degree, and less extreme recklessness is punished as manslaughter); *Brown v. Commonwealth*, 975 S.W.2d 922 (Ky. 1998) ("wanton murder" in circumstances manifesting extreme indifference to human life not unconstitutionally vague in distinction from second degree manslaughter; the question between the two is one for the trier of fact); *State v. Dow*, 489 A.2d 650 (Del. 1985) (extreme indifference to human life is "easily understood" and is equivalent to "depraved heart murder", which has long been part of the law).

Moreover, for the same reasons, it cannot be said that the instruction was burden shifting simply because defense counsel might attempt to persuade the jury that his client only had the lesser mental state. And, of course, in addition to the general discussion on the State's burden of proof,

⁶ Any contention that the *Mouzon* standard violates the due process clause because of vagueness is not preserved. While defense counsel did argue that charge would create confusion between the standard for involuntary manslaughter and *Mouzon* malice, and did at one point ask whether the charge was constitutional, he never once asserted it was unconstitutionally vague in violation of the due process clause. See, e.g. *State v. McWee*, 322 S.C. 387, 472 S.E.2d 235 (1996) (Eighth Amendment challenge to parole eligibility not preserved because no constitutional basis was raised at trial).

the judge charged the jury that it was up to the State to prove malice, and the jury should only consider involuntary manslaughter if it had determined the State failed to establish a case for murder. {R. 1305; 1307-08}.

VII. SINCE THE RCSD WARRANT WAS VALID, APPELLANT HAD NO RIGHT TO ARM HIMSELF IN RESISTANCE; THUS, A MOTION FOR DIRECTED VERDICT WAS PROPERLY DENIED AS TO THE POINTING AND PRESENTING CHARGE.

Appellant asserts the judge erred in failing to direct a verdict on the charge of pointing a presenting relating to the shootout at his home, by contending that since the search warrants were unlawful, he had a right to arm himself in self defense against the threat. Further, he asserts that the good faith exception has no applicability to his right to defense against the invasion of his home.

Appellant made generic motions as for directed verdict at the close of the state's case and at the end of all evidence. At neither time did he make the specific argument he makes now. As such, the issue is not preserved. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) (in order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial court).

In any event, only the RCSD warrant is at issue here. Since it was valid, as argued in section I, then he could have no right to resist.

VIII. THERE IS NO CALL FOR APPLICATION OF THE CUMULATIVE ERROR DOCTRINE IN THIS CASE.

Finally, Appellant asserts that if this Court finds harmless error with one of the issues, this Court should still find the errors cumulatively denied him a fair trial.

This argument is impossible to which to respond with specificity since Respondent asserts there was no error with any of the issues. In general, though, Respondent would point out that the

doctrine could have no application in this case.

The cumulative error doctrine provides relief when a combination of errors that are insignificant by themselves have the effect of: (1) preventing the party from receiving a fair trial, and (2) the cumulative effect of the errors actually affected the outcome of the trial. State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999) (finding, however, that the defendant had not demonstrated an affect on the trial from a cumulation of alleged errors). However, one thing is clear -- the individual errors must actually have been error before they are considered with other errors. See Lorenzen v. State, 376 S.C. 521, 657 S.E.2d 771 (2008) (although not deciding whether there is a cumulative error doctrine with regard to ineffective assistance, finding nothing cumulative because the individual incidents were not error in the first place).

Thus, even if a cumulative error analysis is undertaken, it should be done so carefully, and things which were not in fact error should not be included if the reviewing court merely finds them "troubling". Moreover, errors often have nothing to do with one another in a manner that would be cumulative -- for example, whether lay witnesses saw a flash could not possibly be cumulative to whether the search warrant was valid. For example, in Appellant's cited case of State v. Freeman, 319 S.C. 110, 459 S.E.2d 867 (Ct. App. 1995), the errors cumulated were various instances of conduct of the trial judge in the case, which are the same sort of error that really could only ever rise to prejudice if they were repeated to a point that they infected the trial with unfairness. Similarly, in State v. Blurton, 3432 S.C. 500, 537 S.E.2d 291 (2000), improper prosecutorial argument calling the defendant a liar was cumulated with the fact that evidence supporting his story was improperly excluded -- but of course, there, the errors all related to the same point.

Without knowing if this Court will find error as to any ground, all Respondent can do is

address Appellant's general complaints about the case. Despite Appellant's assertion the physical evidence is consistent with involuntary manslaughter or accident, Respondent would point out, as argued in sections IV and V, *supra*, that Appellant was not even entitled to those charges anyway. Even if he was, the evidence was overwhelming. Identity was not an issue. The video tape is particularly damning. Despite Appellant's contentions as to accident or involuntary manslaughter, the video unmistakably shows him returning to the scene minutes before an altercation, and pulling his vehicle directly and evenly in front of the entrance of the strip club, after which a bullet goes through the door and kills the man with whom he was just arguing. Involuntary intoxication is the only thing in the defense's favor with which these circumstances might reasonably be consistent, but the jury was charged on that issue and rejected it, and evidence as to whether the bullet's trajectory has nothing to do with whether the jury believed Appellant was slipped a mickey for some reason.

As to the other aspects of the investigation mentioned by Appellant, these are great jury arguments but have nothing to do with cumulative error. It was inadvertent a video of the champagne room was not recovered, but there was no serious dispute from the defense as to the fact that Appellant's misbehavior got him kicked out. {R. 383-86}. While in hindsight it might have been nice to have the door and do a trajectory analysis, the officers at the time reasonably concluded that there was no need since they had a video of the shooting. {R. 543-44}. Respondent is at a loss how Appellant blames the lack of a contemporaneous blood sample on the State – the State would have had to go through legal hoops to get such a sample, and Appellant's intoxication was not at all relevant to officers at the time as Appellant had not claimed to them he must have been involuntarily drugged. In any event, Appellant's blood was within his own control and he could have easily preserved his own sample.

There was no error, and certainly no cumulative error.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment and conviction of the trial court should be affirmed.

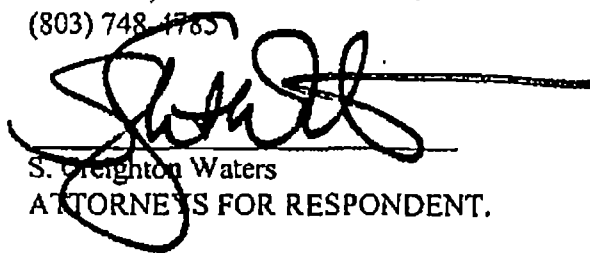
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March 10, 2009

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from Richland County
Honorable G. Thomas Cooper, Jr., Circuit Court Judge

STATE OF SOUTH CAROLINA,

Respondent,

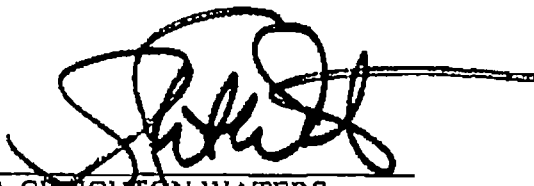
v.

H. DEWAIN HERRING,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR. The undersigned also certifies that the Final Brief is in compliance with the South Carolina Supreme Court's Order of August 13, 2007.



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March 10, 2009.

IN THE STATE OF SOUTH CAROLINA
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Appeal from Richland County
Honorable G. Thomas Cooper, Jr., Circuit Court Judge

STATE OF SOUTH CAROLINA,

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Appellant.

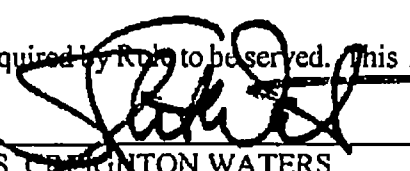
PROOF OF SERVICE

I, S. Creighton Waters, Counsel for Respondent, certify that I have this date served the *Final Brief of Respondent and Designation of Matter*, dated March 10, 2009, on Appellant by depositing three copies of the same in the United States mail, first class postage prepaid, addressed to his attorneyS of record:

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I further certify that I have served all parties required by Rule to be served. This 10th day of March, 2009.


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STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of General Sessions
G. Thomas Cooper, Jr., Circuit Court Judge

2006-GS-40-00881
2006-GS-40-00914

State of South Carolina,

Respondent,

v.

H. Dewain Herring,

Appellant

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SUPPLEMENTAL STATEMENT OF THE CASE

Appellant, H. Dewain Herring, brought this appeal, raising eight claims of error occurring in his 2007 trial on charges of murder and pointing a presenting a firearm. He files this reply brief not to repeat those arguments but to address certain factual assertions and legal arguments made by the State in its brief of respondent. He respectfully relies on all arguments raised and authorities cited in his opening brief.

REPLY TO STATE'S MISCHARACTERIZATION OF THE EVIDENCE

Throughout its brief, the State mischaracterizes a significant piece of the evidence in this case – the video of the car that pulled up to the entrance of Chastity's Gold Club moments before the shooting which occurred on January 29, 2006. While the video depicts a car similar to the one appellant had previously driven away in, it does not depict the driver or the license tag of the vehicle. The State's characterization of the evidence – that the video shows appellant and appellant's vehicle returning to the club – is simply not correct. The notation of a license number was made earlier, when appellant was leaving the club in his vehicle. No one identified the license number of the vehicle that arrived just prior to the shooting. The only evidence linking appellant to this shooting was a firearm found in the unlawful search by SLED of his home, a search whose validity is challenged as one of the issues on appeal.

The State further mischaracterizes the video by repeatedly asserting that the video depicts a gunshot coming from the car. What is visible on the video is very much in dispute, and one of the issues in this appeal is appellant's challenge to the admission of opinion testimony from lay witnesses, who did not actually observe the car, concerning what they believed could be seen on the video recording.

ARGUMENT IN REPLY

I. THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTIONS TO SUPPRESS THREE SEARCHES OF APPELLANT'S RESIDENCE AND THE FRUITS OF THOSE SEARCHES (Issue 1).

Appellant's opening brief addresses the illegality of three searches of the defendant's residence: (1) a warrantless entry of the curtilage of the home which the trial court found to be illegal, (2) an entry by Richland County officers pursuant to a warrant, during which they shot appellant, and (3) an entry by SLED agents pursuant to a warrant obtained without an appearance and oath before a magistrate and solely for the purpose of investigating the shooting of appellant by the Richland County officers.

The State does not argue that the warrantless entry of the curtilage was valid. As the trial court correctly held, this entry was unlawful. Accordingly, the information discovered as the result of this entry – the presence in the garage of a vehicle similar to the one driven by appellant earlier in the evening – could not serve as the basis for issuance of a warrant to search appellant's home. See *Wong Sun v. United States*, 371 U.S. 471, 484 (1963) (fruit of the poisonous tree doctrine). Excising this information from the purported affidavit of the warrant application, there is nothing remaining in the affidavit which provides the necessary link between the residence address and the incident at Chastity's.

The State does not address the fact that is at the heart of the argument concerning the lack of probable cause. Only one sentence in the affidavit made reference to the address of 460 Alexander Circle: "A search of Richland County records also provided an additional address of 460 Alexander Circle in Columbia, SC." That conclusory sentence did not provide any specific information concerning why this "additional address" had any connection to the incident at Chastity's. It did not provide any basis for a magistrate to

determine there was probable cause to believe evidence of the Chastity's crime would be found at that location. *Cf. State v. Baccus*, 367 S.C. 41, 51-52, 625 S.E.2d 216, 221-22 (2006); *State v. Smith*, 301 S.C. 371, 372-73, 392 S.E.2d 182, 182-83 (1990).

Addressing the argument that false information was contained in the warrant, the State acknowledges that the warrant erroneously recited that the affiant was D.F. Linfert but then goes on to assert that "there was no false information" in the warrant. This assertion is disingenuous. Regardless of why the erroneous information was there, the fact is that the information was not true. The warrant clearly stated Linfert was the officer, it clearly stated he appeared before the magistrate, and it clearly stated he was sworn, all of which was false. The State's assertion that there was no false information in the warrant is simply not correct.

The State attempts to distinguish this case from *State v. Dunbar*, 361 S.C. 240, 603 S.E.2d 615 (Ct. App. 2004), *cert. dismissed as improvidently granted*, 371 S.C. 594, 641 S.E.2d 435 (2007), but that attempt is hollow in light of the facts. The person who appeared before the magistrate and was sworn was Morris Davis. His only involvement in the investigation had been in gathering information at Chastity's. The information purporting to link the Alexander Drive address to the Chastity's incident was gathered by other officers. Davis did not have personal knowledge of *any* of the information that was gathered away from Chastity's. That information was provided by others and was not within the personal knowledge of Davis. As in *Dunbar*, Davis knew only of the crime; he did not know the other information in the warrant purporting to link the crime to the location to be searched. *See Dunbar*, 361 S.C. at 249-50, 603 S.E.2d at 620.

The State also contends the warrant issued to SLED through the facsimile procedure outlined in an order of the Chief Justice was valid. The State contends it is "questionable" whether appellant's claims are preserved because the trial court's ruling did not specifically refer to each and every argument made by the defense in support of its motion. The issues argued on appeal are clearly preserved. In support of its suppression motion, the defense argued multiple reasons the SLED warrant was invalid. It argued the procedure violated the warrant statute, S.C. Code Ann. § 17-13-140. It argued the Chief Justice's order could not override the warrant statute, prior Supreme Court decisions, or the state Constitution. It argued that the procedure used in this case did not comply with the Chief Justice's order. In denying the motion to suppress, the court rejected *all* of the defense arguments. All that is required to preserve an argument for appellate review is that it be raised to and ruled upon by the trial court. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). It cannot legitimately be argued that the court did not rule on these arguments when it denied the motion to suppress, simply because the court did not specifically refer to every argument that had been made. The claims of error with respect to the court's admission of the evidence seized in the search by SLED are preserved.

Section 17-13-140 provides: "A warrant issued hereunder *shall be issued only upon affidavit sworn to before the magistrate . . .*" (emphasis added). The State contends the word "before" can be given a construction that allows something other than a personal appearance in the presence of the magistrate, something never previously recognized in the decisions of the courts of this State and something not spelled out by the General Assembly. This construction is contrary to the plain meaning of the statute, and it flies in the face of the Supreme Court's recognition in *State v. McKnight*, 291 S.C. 110, 113, 352 S.E.2d 471, 473

(1987), that "[t]he Court cannot, under the guise of statutory interpretation, overlook plain meaning of the statute to imply instead a wholly different meaning than was intended by the legislature." It is impermissible to expand the plain language of this statute and interpret its words to mean something different than what it actually says and what the General Assembly intended.

The State contends the order of the Chief Justice is merely an "interpretation" by her, as the administrative head of the courts, that the word "before" allows an officer to be sworn over the telephone and the affidavit to be transmitted by fax. But this argument ignores the fact that the constitutional authority of the Chief Justice does not include an authorization to issue orders interpreting statutes passed by the General Assembly. Only the full Court, in a case properly before it, can interpret the meaning of the statutes of this State. The South Carolina Constitution does not confer such authority on a single justice nor on the Chief Justice.

The State argues the facsimile procedure is not invalid under the provisions of the Constitution and case law requiring uniformity of laws and procedure. However, the authorities on which it relies do not stand for the proposition that the Chief Justice can unilaterally adopt rules of procedure, without the participation of the full Court or the mandated review by the General Assembly. The fact that the official judicial website may contain other orders is not dispositive of the question whether *this order* exceeds the authority of the Chief Justice and violates the separation of powers provisions of the South Carolina Constitution.

Finally, the State minimizes the significance of the failure to observe the procedures outlined in the Chief Justice's order. In issuing this order, the Chief Justice expressly

recognized that an appearance "in person before a magistrate judge during usual operating hours" is preferred. R. p. 1338. Here, the magistrate was on duty in bond court, and nothing prohibited or made it impractical for the officer to appear in person before the magistrate. There was no exigency or extraordinary circumstance, since the scene was secure and appellant had been arrested and taken away. In issuing this order, the Chief Justice imposed strict procedural requirements for the telephone and fax method of obtaining a warrant in recognition of the absence of the inherent safeguards of a personal appearance before the magistrate. One of the procedures not followed in this case is one of the most significant procedures outlined in the order — documenting that the magistrate actually verified the identity of the person making the oath and further documenting the method by which the person's identity was verified. If, contrary to appellant's contentions, the Chief Justice's order was valid, noncompliance with the procedures outlined in that order invalidates the warrant procured pursuant to the facsimile procedure created by that order.

The State gives short shrift to appellant's argument that the SLED agents exceeded the scope of the warrant by searching the closet and seizing the weapon found there. SLED's authorization was not to search for evidence related to the incident at Chastity's. This warrant authorized only a search for evidence related to the shooting of appellant by the Richland County officers. The agents knew the circumstances of that shooting. They knew it occurred in the bedroom, hall, and foyer of the house. The weapon appellant had obtained from a drawer during the Richland County officers' intrusion was lying on his bed in plain view. There was no reason whatsoever for the officers to enter other parts of the house, including the closet where a different gun was found.

The State contends the Court should apply the inevitable discovery or good faith exceptions to affirm the trial court's admission of the evidence obtained under these invalid searches. Interestingly, the State acknowledges that the issue is "trickier" because these warrants were invalid on state statutory grounds. The reason this issue is a "tricky" one for the State is that the courts of South Carolina have not embraced the good faith and inevitable discovery doctrines as a matter of state law. This Court should find those doctrines do not apply to these warrants issued without probable cause and in violation of state law and state constitutional protections.

Contrary to the State's contention, the searches based on invalid warrants cannot be deemed harmless. Without these warrants, the State would not have recovered the gun which was the only evidence directly linking appellant to this shooting. Without the weapon, the jury would have been left to speculate concerning whether it was appellant and his vehicle that drove to the entrance of Chastity's just prior to the shooting. In light of the reasonable doubt standard, the outcome of the jury's deliberations likely would have been different in the absence of evidence specifically linking appellant to the shooting.. Under these circumstances, the error was not harmless.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING LAY WITNESSES TO GIVE THEIR OPINION OF WHAT COULD BE SEEN ON THE VIDEO, WHEN THOSE WITNESSES DID NOT PERSONALLY OBSERVE THE ACTUAL EVENTS DEPICTED IN THAT PORTION OF THE VIDEO, AND FURTHER ABUSED ITS DISCRETION IN DENYING THE RELATED MOTION FOR MISTRIAL (Issues 2 and 3).

Appellant has challenged the trial court's rulings which allowed lay witnesses to give opinion testimony concerning what they believed they saw on the video of the car that pulled up to the entrance of Chastity's just prior to the shooting.. The State contends this testimony was properly admitted. The witnesses in question did not observe the actual event depicted

in the video nor were they watching the video monitor during the actual event. Their testimony was based solely on viewing the video after the event in question.

The State concedes that the prosecution could not have called people from off the street to testify there was a flash or light on the video. Appellant submits that allowing these witnesses to interpret the video for the jury is no different. Just like any person off the street, these witnesses did not personally observe the event depicted on the video. They were no better situated than the person off the street to give an opinion concerning what appeared on the video. This testimony ran afoul of Rules 403, 602, and 701 of the South Carolina Rules of Evidence, because it was not based on personal knowledge, was not proper lay opinion testimony, and was far more prejudicial than probative. It invaded the province of the jury, whose task it was to make its own factual determination of what was depicted on the video.

Contrary to the State's contention, this testimony was not "a conclusion of fact, such as men who use their senses constantly draw from what they see and hear in the daily concerns of life," *cf. State v. Sullivan*, 43 S.C. 205, 21 S.E. 4 (1895), because it was not an interpretation of events they actually personally saw and heard. Their opinions were not "impressions drawn from collected, observed facts," *cf. State v. Williams*, 321 S.C. 455, 469 S.E.2d 49 (1996), because they had not actually observed the events. This testimony is not like a witness's stating it was sunny—testimony based on the witness's having actually seen the condition of the sky at the time of the event being described. Here, these witnesses, who did not view the actual event in question, were essentially telling the jury how to interpret what was on the video, a role that was uniquely that of the jury, not of these witnesses.

As more fully developed in the appellant's opening brief, this testimony was extremely prejudicial because of the dispute as to what was depicted on the video and

because of the dispute concerning the trajectory of any gunshot. It cannot be deemed harmless, especially in light of one witness's testifying not only to seeing a light or a flash but actually characterizing it as a "shot." A curative charge could not remove the taint of such testimony and the suggestion it carried to the jury. Indeed, the multiple so-called "curative" charges given by the court actually enhanced the prejudicial effect by repeating, over and over and over, the improper testimony.

The State contends that this testimony was cumulative to other testimony elicited by the defense in cross-examination of David Linfert, the witness who characterized what he saw as a "shot." Where the defense properly objected to such testimony when it was first offered, the defense cannot be faulted or deemed to have waived the objection merely because the witness later repeated what had earlier been said. In light of the extensive argument of the objection and mistrial motion related to this objection, argument revisited throughout the trial upon each new infraction, it cannot seriously be contended that this claim of error has somehow been waived.

III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING THREE JURY CHARGES REQUESTED BY THE DEFENSE (Issues 4 and 5).

Appellant has challenged the court's refusal to grant three charges requested by the defense, and the State contends there was no reversible error with respect to these charges. As to each, the opening brief of appellant amply demonstrates the evidence in the record which supports the granting of the three proposed charges, and that discussion is not repeated here. The State's contentions that the evidence did not support these charges is premised on the State's own evidence, its mischaracterization of the video, and its theory of the case, and its contentions ignore the evidence submitted by the defense, in particular, the expert testimony concerning the lack of the kind of flash that would appear on the video if the

weapon had been aimed at the Chastity's door and the expert opinion that the weapon was discharged from below the level of the window, based on the trajectory and gunpowder residue evidence introduced at trial. That evidence supported the requested charges.

A. Accident charge.

The State concedes the correctness of the principles outlined in all but the final phrase of the defense's proposed accident charge. It contends the court properly rejected this charge in its entirety because the last phrase -- "with the intent to kill the deceased" -- is not a complete and correct statement of the current law. The Court should reject this contention and find reversible error in the lower court's refusal to give a charge on the defense of accident.

The lower court's ruling was not premised on a finding that the proposed charge was not a correct statement of the law but on its finding that the evidence did not support giving an accident charge at all. Even if there were error in one phrase of the proposed charge, it was incumbent on the trial judge to give a charge on this defense, either using its own language or using those portions of the proposed charge which the court found to be correct. Had the State interposed an objection to this charge on the basis of the phrase now challenged in this appeal, the defense would have submitted an amended version or asked the court to fashion its own charge. The court could have deleted the final phrase or modified it so as to inform the jury that the defense did not bear the burden to prove accident but the State was required to prove the defendant acted with the requisite intent for the crime under consideration.

Here, the evidence presented was sufficient to support a verdict in favor of the defendant on his claim of accident. He had a permit which made it lawful for him to possess

a weapon. By statute, the defendant could transfer the weapon from his person to the glove compartment of his car and vice versa. The evidence was consistent with the pistol discharging from a location in the vehicle below the level of the window and in close proximity to the glove compartment and thus was consistent with the defense theory of accident. In light of this evidence, the court's failure to give either the correct portions of the proposed charge or its own charge on accident was reversible error.

B. Involuntary manslaughter charge.

The defense challenged the court's failure to give either of two requested charges which would have amplified the explanation of involuntary manslaughter given by the trial court. The State contends the defense waived any claim of error with respect to one of the proposed charges by conceding that one essentially summarized what was stated in the other and that only one needed to be given. Contrary to the State's assertion, opting for one of two correct alternatives is not a waiver of a claim that the court committed error in refusing to charge *either* of the alternatives.

Substantively, the State contends that the requested language – "one who causes the death of another by the negligent use of a deadly weapon or instrumentality may be convicted of involuntary manslaughter" – was an incomplete and incorrect statement of the law, in reliance on a discussion in a criminal law treatise. *See William Shepard McAninch et al., The Criminal Law of South Carolina* (5th ed. 2007). This argument misses the point of the defense's request. The court gave an involuntary manslaughter charge in keeping with the principles discussed by the State and McAninch. The defense did not challenge the portions of the involuntary manslaughter charge the court gave. R. pp. 1234-35. It also did *not* seek this charge *in lieu* of the court's charge, which clearly outlined the distinctions in

the degrees of negligence discussed in the State's brief and in the McAninch treatise. Rather, the defense sought this charge *in addition to* the court's charge. R. p. 1235, lines 21-25. The proposed charge remains a correct statement of a concept in the law, as articulated in *State v. Brown*, 205 S.C. 514, 518, 32 S.E.2d 825, 827 (1945), and it has not been supplanted by the adoption of the statutory criminal negligence standard of S.C. Code Ann. § 16-3-60, which the court clearly articulated for the jury in the charge it actually gave.

The State makes only passing mention of what is at the heart of appellant's argument on this issue – that this charge was needed to balance another charge given to the jury with respect to an inference of malice from the use of a deadly weapon – stating that there is no case law “that requires such linkage between two distinct concepts under the two different crimes.” Implicit in this statement is an acknowledgement of the existence and viability of these two distinct concepts. Both concepts were in issue as the result of the use of a deadly weapon in this case. The absence of any case law addressing the propriety of charging both concepts in a case does not negate the right of the defendant – when he requests it and when the facts support it – to have the court charge a legal concept that is a correct statement of the law.

The State argues there was no error in refusing the supplemental charge requested by the defense because the evidence did not support *any* charge on involuntary manslaughter. This argument is premised solely on the State's theory of the case – that someone pointed the gun, aimed, and intentionally fired at the door. But the defense evidence was sufficient to present a contrary theory, in light of the expert testimony concerning absence on the video of the kind of plume such a shot would have caused and the forensic evidence consistent with discharge from the area of the glove compartment beneath the window level, and that

evidence warranted submitting the lesser-included offense of involuntary manslaughter to the jury. See *State v. Meckler*, 379 S.C. 12, 15-17, 664 S.E.2d 477, 478-79 (2008); *State v. Light*, 378 S.C. 641, 647-49, 664 S.E.2d 465, 469-70 (2008); *State v. Tisdale*, 378 S.C. 122, 125-26, 662 S.E.2d 410, 412 (2008). The court's decision to submit involuntary manslaughter to the jury was proper.

The court's error with respect to its charge, however, was in not also charging the additional language proposed by the defense, language which was not a substitute for the correct statement of the law on involuntary manslaughter given by the trial judge but which was necessary to inform the jury of a legal concept related to use of a deadly weapon, especially where the court charged a separate and competing concept related to use of a deadly weapon. While the jury could infer malice from use of a deadly weapon, it also could find that the negligent use of a deadly weapon was simply involuntary manslaughter, and the jury needed to be so advised. In light of the evidence, the proposed instruction was warranted, and the court's failure to charge it was reversible error.

IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING THE STATE'S REQUEST TO CHARGE BASED ON *STATE V. MOUZON* (Issue 6).

Contrary to the State's contentions, the former concept of murder based on recklessness with respect to the lives and safety of others, recognized in *State v. Mouzon*, 231 S.C. 655, 99 S.E.2d 672 (1957), was supplanted by the General Assembly with the enactment of the involuntary manslaughter statute. See S.C. Code Ann. § 16-3-60. The State argues this statute did not supplant the *Mouzon* form of recklessness. The State relies on a passage from the McAninch treatise which states the *Mouzon* form of murder involves more egregious conduct than the criminal negligence required for involuntary manslaughter under the statute. See McAninch, at 94-95. This conclusion, however, is unsound because it

safety of others is the mental state for involuntary manslaughter, not murder. Thus the court erred in giving the State's requested charge.

As argued in the opening brief, the *Mouzon* standard is unconstitutionally vague and shifts the burden to the defendant to disprove the mental state for murder. Both these arguments are preserved, as both were made in the trial court. R. pp. 1265-66. Indeed, the State acknowledges that the defense challenged the constitutionality of the *Mouzon* language and argued it was confusing, which was sufficient to implicate the vagueness doctrine.

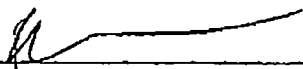
V. THE TRIAL COURT ERRED IN DENYING A DIRECTED VERDICT ON THE CHARGE OF POINTING AND PRESENTING A FIREARM (Issue 7).

Appellant challenges the denial of a directed verdict on the pointing and presenting charge, based on the illegality of the entry of his home by the Richland County officers and the legality of his arming himself in self-defense and defense of habitation. The State contends this argument is not preserved. The defense moved for directed verdict on this charge, both at the close of the State's evidence and at the conclusion of all the evidence. R. pp. 867, 1294-95. Under the circumstances of this case and the applicable rules of procedure, this Court should address this argument and find it appropriate for appellate review.

The South Carolina Rules of Criminal Procedure do not impose a requirement of specific grounds, as do the Rules of Civil Procedure. Compare Rule 19(a), SCRCrimP (grounds for directed verdict motion); Rule 50(a), SCRCP ("A motion for a directed verdict shall state the specific grounds therefor"). Indeed, the criminal directed verdict rule does not even require a motion, instead mandating that the court, *on its own motion*, enter a directed verdict if there is a failure of competent proof:

CERTIFICATE

The undersigned, counsel for appellant, hereby certifies that this final brief complies with Rule 211(b) of the South Carolina Appellate Court Rules.



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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State,

Respondent,

v.

H. Dewain Herring,

Appellant.

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 26750
Heard June 23, 2009 – Filed December 21, 2009

AFFIRMED

Graham L. Newman and Richard A. Harpootlian, both of Columbia, and Katherine Carruth Goode, of Winnsboro, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General S. Creighton Waters, and Solicitor Warren Blair Giese, all of Columbia, for Respondent.

JUSTICE WALLER: Appellant, H. Dewain Herring, was convicted of murder and pointing and presenting a firearm. We affirm.¹

¹ The appeal was certified to this Court from the Court of Appeals on motion of counsel for Herring.

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FACTS

Herring was charged with the January 29, 2006 shooting of an employee of Chastity's Gold Nightclub (Chastity's), a strip club in Columbia. The facts giving rise to the shooting are as follows.

After golfing in Aiken with friends on the day of January 28, 2006, at which he had consumed numerous beers, Herring stopped by a bar for a few drinks on the way home, and then returned home around 7:30 p.m. Herring had a couple more drinks at his home with a golfing buddy before the friend left. Herring laid down intending to go to sleep, but got up and decided to go a Forest Acres restaurant. When the restaurant was closed, Herring changed his mind and went to Platinum Plus, a Columbia strip club. He had a drink and paid a dancer for a lap dance and left Platinum Plus. On his way home, he decided to stop by Chastity's on River Drive; he arrived shortly after 11:00 p.m. According to Herring, he ordered a drink at the bar, but he has very little recall of any events for several hours thereafter.

According to witnesses and employees of Chastity's, Herring purchased a drink and paid for a \$30.00, three minute lap dance from a dancer named Mia. After the lap dance, Herring paid Mia for a \$300 dance in what was known as the Champagne room.

Mia took Herring to the Champagne room and told him to wait while she went to freshen up. A bouncer, Carl Weeks, went to check on Herring a few minutes later and found him naked and masturbating on the sofa. The bouncer told Herring he could not do that and told him he would have to leave. When Herring did not move, the bouncer got the manager, John Johnson (John John). When they returned, Herring was dressed. Weeks told Herring he would either have to leave, or they would call police and have him arrested for solicitation of prostitution. According to Weeks, Herring responded, "No. I will fucking shoot you." John John and a bouncer named Donnie Hawkins escorted Herring to the front door at 11:57 p.m. John John walked outside with Herring and used a two-way radio to call Herring's license plate number out to Weeks, who was standing in the doorway, as

Herring drove away. Weeks and Hawkins watched as Herring backed up his black SUV, and fumbled with his glove compartment with his right hand. Herring slowly pulled away, putting down the passenger side windows as he went. Hawkins, Weeks and John John had just gone inside when they saw Herring's vehicle coming back down River Drive toward Chastity's. According to Hawkins, John John was right inside the door. Hawkins saw a flash of light come from the side of the vehicle, and heard John John say, "Oh shit!" John John fell to the floor, having been hit in the left ear by a bullet which came through the front door. He died a short while later at the hospital.

Upon arriving at the scene of Chastity's, police were given Herring's license tag number, which was registered to his office address in Columbia. Police patrolled the office parking lot, but did not find the vehicle. They then determined Herring's home address and went there at 2:10 a.m. on January 29, 2006. A police officer, seeing a light on in the garage, peeked in the garage window to see if the suspect was there. Although the suspect was not there, the officer did see the vehicle, which they realized was Herring's. They knocked on the door and rang the doorbell several times and, receiving no answer, they returned to the police station and obtained a search warrant for the home.²

Police went back to Herring's residence at approximately 4:00 a.m. to execute the search warrant. They rang the doorbell several times but received no answer. They entered forcibly, announcing they were police with a search warrant. Officer Linfert testified that he saw Herring in the hallway and recognized him from the photo on his driver's license. Linfert told Herring to get down on the ground, but Herring ran back down the hall toward a bedroom. He followed Herring to the bedroom, and saw Herring pull a gun from a nightstand and point it in his direction. Officer Linfert yelled at him to drop the gun and then fired one shot at him. Other officers also opened fire, and Herring was hit in the arm. Herring called 9-1-1 and told them he believed there were intruders in his home. After talking with the 9-1-1 operator, Herring surrendered upon realizing the "intruders" were indeed police officers.

² Several officers remained outside the premises while the warrant was obtained.

Herring initially told police he had not left the house after returning home from Aiken; he did not recall going to Chastity's. When police told him of the video tape which showed him entering and leaving Chastity's, he remembered only being at the bar, having a drink, and a gunshot firing; the next memory he had was of police bursting into his home. He subsequently began remembering more details, such as paying for a lap dance from a light skinned black woman.

Bullet fragments removed from John John's head conclusively matched a .357 Magnum Ruger owned by Herring; the Ruger was found under some clothing in his bedroom closet during a SLED search of the home.³ Gunshot residue was found on the passenger side of Herring's vehicle. A jury convicted Herring of murder and pointing and presenting a firearm.

ISSUES

1. Did the trial court err in denying Herring's motions to suppress evidence found during the search of his residence?

2. Did the trial court err in allowing lay witnesses to testify as to their opinion of what could be seen on a videotape which recorded Herring as he exited Chastity's?

1. SEARCH WARRANTS/SUPPRESSION OF EVIDENCE

Herring contends the trial court erred in denying his motion to suppress evidence seized by police during the searches of his home and automobile. We disagree.

a. Initial Search

Herring contends the initial peek by police into his garage (when his black SUV was seen), was an illegal search, which thereby led to the

³ SLED searched the residence relative to the shooting which occurred between police and Herring at the time of Herring's arrest.

issuance of a search warrant. Accordingly, Herring asserts the subsequent search of his home was the impermissible fruit of the illegal garage search, and that police otherwise had no basis upon which to search the residence. Herring also contends the subsequent SLED search of his home was illegal inasmuch as it a) resulted from the two prior illegal searches, and b) the SLED warrant was invalid as it was not issued in compliance with S.C. Code Ann. § 17-13-140. For numerous reasons, we find the evidence seized by police was properly admitted.

Regarding the initial search, Herring contends that when police crossed the curtilage of his yard and peered into his garage windows, it constituted an illegal search. The trial court agreed with Herring and held Officer Linfert's peek into Herring's garage violated Herring's expectation of privacy. However, the trial court found that since no evidence was seized as a result of that search, there was nothing to suppress; it therefore went on to address the validity of the other searches, which it found permissible.

Initially, as discussed below, we disagree with the trial court's conclusion that Officer Linfert's initial peek into the garage window constituted an illegal search. Regardless, however, we find the peek into the window did not lead to discovery of any further evidence, such that it was not "fruit of the poisonous tree" and therefore did not taint the subsequent searches.

As noted previously, prior to going to Herring's residence, police responded to a shooting at Chastity's nightclub at which the manager of the club was shot and killed. While at Chastity's, police were given a description of Herring's black SUV, as well as the corresponding South Carolina license plate number which was written down by witnesses. Police watched the video which showed the suspect as he entered and departed from the nightclub, and police were given a color photograph of the suspect from the video.

Police obtained Herring's identifying information from the license tag number. When they went to the registered address for the vehicle, a business office, there was no black SUV in the parking lot. Officer Linfert checked the Department of Motor Vehicle website for other addresses listed for

Herring, which revealed his home address. Based upon this information, police went to the address at approximately 2:00 a.m. Officer, seeing a light on in the garage, peeked in the garage window to see if the suspect was there. Although the suspect was not there, Linfert saw the black SUV, and recognized it as the suspect's vehicle. Police knocked on the door and rang the doorbell several times; receiving no answer, they returned to the police station and obtained a search warrant for the home.

Private residences are places in which an individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is one society recognizes as justifiable. Accordingly, searches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances. United States v. Karo, 468 U.S. 705 (1984). The Fourth Amendment extends that same protection to outbuildings in the curtilage of the home. United States v. Dunn, 480 U.S. 294 (1987); Rogers v. Pendleton, 249 F.3d 279, 287 (4th Cir.2001).⁴

However, because the ultimate touchstone of the Fourth Amendment is "reasonableness," the warrant requirement is subject to certain exceptions. Katz v. United States, 389 U.S. 347, 357 (1967). The United States Supreme Court has recognized that one exigency obviating the requirement for a warrant is the need to protect or preserve life or avoid serious injury. Brigham City, Utah v. Stuart, 547 U.S. 398 (2006). An action is "reasonable" under the Fourth Amendment, regardless of the individual officer's state of mind, "as long as the circumstances, viewed objectively, justify [the] action." Scott v. United States, 436 U.S. 128, 138 (1978). A fairly perceived need to act on the spot may justify entry and search under the exigent circumstances exception to the warrant requirement. Schmerber v. California, 384 U.S. 757, 770-771 (1966). The likelihood a suspect will imminently flee is also an exigency warranting such an intrusion. Johnson v. United States, 333 U.S. 10, 15 (1948). Protecting the safety of police officers has also been held an exigent circumstance. Chimel v. California, 395 U.S. 752 (1969). A warrantless search is justified under the exigent circumstances

⁴ It is equally well settled that searches and seizures of property in plain view are presumptively reasonable. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. California v. Ciraolo, 476 U.S. 207, 213 (1986) (quoting Katz v. United States, 389 U.S. 347, 351 (1967)).¹

doctrine to prevent a suspect from fleeing or where there is a risk of danger to police or others inside or outside a dwelling. Minnesota v. Olson, 495 U.S. 91, 100 (1990). In such circumstances, a protective sweep of the premises may be permitted. See Maryland v. Buie, 494 U.S. 325, 337 (1990); cf. State v. Abdullah, 357 S.C. 344, 592 S.E.2d 344 (Ct. App. 2004).

Under the circumstances presented, we find the exigencies of the situation justified Officer Linfert's look into Herring's garage at 2:00 a.m. It is undisputed that police had knowledge of Herring's identity, his residence, the make and model of his vehicle, and his license tag number. Officer Linfert testified that upon arriving at the home, he saw a light on in the garage and therefore looked through the window to see if the suspect was inside. Police officers were looking for a suspected murderer whom they knew was likely to be armed with a deadly weapon.

We find it was objectively reasonable for Officer Linfert to take precautions to protect his own safety, and the safety of the officers around him, by looking into the garage to see if the suspect was there. When nobody was in the garage, police followed proper procedure by knocking on the door and ringing the doorbell. Receiving no answer, they stationed men at the house and went to obtain a warrant. Given the exigent circumstances then and there presenting, we find Officer Linfert's minimal intrusion was objectively reasonable and did not constitute a Fourth Amendment violation. Cf. Chimel v. California.

Moreover, Officer Linfert's peek into the garage yielded no evidence against Herring. Police already had knowledge of the make, model and license plate number of the vehicle the suspect drove; they knew the automobile was registered to Herring, and they knew his residential address was 406 Alexander Circle. Officer Linfert's observation of the vehicle in the garage yielded no evidence which further inculpated Herring. We find the trial court erred in holding this initial "search" violated Herring's Fourth Amendment rights; the *de minimis* intrusion to secure the officers' safety did not necessitate suppression.

b. Search of residence

Herring next asserts the subsequently issued warrant was defective such that the search conducted by the Richland County Sheriff's Department (RCSD) was illegal. He contends the affidavit supporting the warrant failed to connect his residence to the crime at Chastity's; he also contends the information in the affidavit was false because the officer who prepared the affidavit did not actually appear before the magistrate but, instead, sent another officer. We find the warrant was supported by probable cause and was properly issued.

The affidavit states that deputies responded to Chastity's to find the Victim, John Johnson, who had been shot in the head and who subsequently died upon arrival at the hospital. Witnesses at Chastity's described the suspect, the clothing he was wearing, the car he was driving as a black Toyota Forerunner, and gave the license tag number of SC 1891. Department of Motor Vehicle records indicated the car was registered to Dewain Herring, of 1361 Landmark Drive, which was a closed business. A search of Richland County records provided an additional address for Herring at

Based upon this information, the affidavit lists the property sought as "firearms, ammunition, burgundy sweater, white turtleneck shirt, khaki pants, eyeglasses, black 1996 Toyota Forerunner, SC/EU1891, and any and all other evidence associated to a shooting incident."

A search warrant may issue only upon a finding of probable cause. State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006), *cert. denied* 129 S.Ct. 733 (2008). The duty of the reviewing court is to ensure the issuing magistrate had a substantial basis upon which to conclude that probable cause existed. Id.; State v. Adams, 291 S.C. 132, 352 S.E.2d 483 (1987). A "totality-of-the-circumstances" test is utilized in probable cause determinations:

The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair

probability that contraband or evidence of a crime will be found in a particular place.

Illinois v. Gates, 462 U.S. 213, 238 (1983).

We find the affidavit sufficient to establish probable cause for police to look for Herring, a murder weapon, and the Toyota Forerunner at his known residence.

Herring asserts the RCSD warrant was defective because, notwithstanding the affidavit contained the name of Officer Linfert at the top, it was actually Officer Davis who appeared before the Magistrate. However, Officer Linfert clarified that the reason his name was listed is that Officer Davis did not have a search warrant form on his computer, and the form was typed by Linfert on his computer and his name was automatically inserted at the top; Linfert simply forgot to change the name to Davis. Officer Davis personally appeared before the magistrate and swore to the information; he was familiar with the information and background of the case, having been to Chastity's and having interviewed the witnesses. We find the fact that Linfert's name was at the top of the affidavit did not vitiate the validity of the warrant. State v. Shupper, 263 S.C. 53, 207 S.E.2d 799 (1974) (typographical error did not affect validity of search warrant). Accordingly, we find the evidence seized during the RCSD's search of the residence was properly admitted by the trial court.

c. SLED Search

Finally, Herring challenges the search performed by SLED. He contends the SLED warrant, which was obtained by facsimile, was invalid; he also asserts the methodology employed, which was authorized by an order of the Chief Justice,⁵ violates the search warrant statute, S.C. Code Ann § 17-

⁵ See <http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2001-07-26-01>. The order was issued pursuant to Art. V, § 4 of the SC CONST (Chief Justice of the Supreme Court shall be the administrative head of the unified judicial system). The order allows for issuance of search warrants by facsimile under controlled conditions, and sets forth the requirements therefore.

13-140. We find the trial court properly upheld SLED's search of the residence.

SLED was called in to investigate after the sheriff's deputies wounded Herring during their attempt to arrest him at the home. SLED obtained a warrant utilizing the telephone procedure set forth in the Chief Justice's order of July 2001. Agent Lawrence testified that he had prepared the search warrant, and faxed it to Magistrate McDuffie, who was in bond court. The Magistrate swore him over the phone. Although SLED was not directly investigating the murder, they were investigating the shooting by police officers, and were looking for firearms, cartridges, blood, projectiles, blood, and any evidence relating to a shooting incident at that address. As a result of the search, they found the khaki pants, white turtle neck, burgundy sweater Herring was wearing at the time of the shooting, and two weapons, a Smith and Wesson .357 revolver and a Ruger .357 pistol. The Ruger was in the bedroom closet under some clothes.

S.C. Code Ann. § 17-13-140 states, in pertinent part:

A warrant issued hereunder shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record establishing the grounds for the warrant. If the magistrate, municipal judge, or other judicial officer abovementioned is satisfied that the grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched.

(Emphasis supplied). Herring asserts the statute requires the affiant appear before the magistrate in person. We disagree.

Contrary to Herring's contention, the language does not state an affidavit must be sworn in person. It only requires the affidavit be sworn. Officer Lawrence, who prepared the affidavit, was sworn over the telephone by the Magistrate. We find this complies with the literal terms of the statute such that there was no defect in the warrant. Cf. Gay v. Ariail, 381 S.C. 341, 673 S.E.2d 418 (2009) (literal terms of statute prevail); Collins v. Doe, 352

S.C. 462, 574 S.E.2d 739 (2002) (where terms of a statute are clear, there is no room for construction).

Herring cites State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987) as supporting his contention that issuance of a warrant via facsimile was invalid. In McKnight, police officers appeared before a magistrate to obtain a warrant, but did not complete an affidavit in support thereof. Notwithstanding the officers were sworn and gave oral testimony to the magistrate, we held a "search warrant affidavit which itself is insufficient to establish probable cause may be supplemented before the magistrate by sworn oral testimony. . . . However, sworn oral testimony, standing alone, does not satisfy the statute." 291 S.C. at 113, 352 S.E.2d at 473 (internal citations omitted). In McKnight, we found the mandatory requirement of an affidavit lacking, thereby requiring suppression. The Court noted § 17-13-140 imposes stricter requirements than does the Fourth Amendment, and that "[a] search warrant that would survive constitutional scrutiny may still be defective under the statute." Id.

Recently, however, we recognized that there is a "good faith" exception to the statute's [S.C. Code Ann. 17-13-140] requirements where the officers make a good faith attempt to comply with the statute's affidavit procedures." State v. Covert, 382 S.C. 205, 675 S.E.2d 740 (2009), *citing* McKnight.⁶

We find the present circumstances give rise to such a good faith exception. It was 4:00 in the morning, and SLED agents were attempting to obtain a warrant to investigate a shooting by Richland County Sheriff's deputies of a prominent Columbia attorney. We hold the officers made a

⁶ In Covert, we left open the question of whether a good faith exception applies when "the officers reasonably believe the warrant is valid when the search is made, but is subsequently determined to be invalid." Id. at ___, 675 S.E.2d at 742-743. Given our recognition of an exception for officers' good faith attempt to comply with the affidavit requirement, we find no reason not to extend such a good faith exception to a warrant reasonably believed to be valid, but later determined invalid. Accordingly, even if we were to determine the affidavit was improper, we would find the SLED agents acted in good faith and reasonably believed the warrant valid, such that the search should be upheld.

good faith attempt to comply with the affidavit procedures, and accordingly, we affirm the trial court's ruling.

Moreover, even if we were to hold the SLED search illegal, we would hold any error was harmless. A videotape from Chastity's shows Herring entering and leaving the club. Several witnesses identified Herring from the videotape, and his vehicle and license tag number were identified. Two witnesses saw him drive away from the club, and then testified they saw his vehicle returning down River Drive. Donald Hawkins saw Herring's car come back into the parking lot, saw a flash come from the side of the vehicle, heard John John say "oh shit," and then saw that John John had been hit by a bullet. Further, although Herring denied intentionally shooting anyone, he admitted he owns several guns, including a .357 Ruger, which he usually carries with him in his Toyota Forerunner, and he admitted he had some memory of a gun going off. Finally, gunshot residue was found on the passenger side of the vehicle, which was ultimately connected to Herring's Ruger. Accordingly, admission of the evidence seized in the SLED search, even if erroneous, was harmless. State v. Gillian, 373 S.C. 601, 646 S.E.2d 872 (2007); State v. Garner, 304 S.C. 220, 222, 403 S.E.2d 631, 632 (1991) (holding improperly admitted evidence harmless error given overwhelming evidence of guilt). We affirm the trial court's ruling concerning the SLED search.

2. LAY OPINIONS REGARDING VIDEOTAPE

Herring next contends the trial court should not have allowed lay witnesses to testify as to what they could see on the videotape of Herring exiting Chastity's, because they did not personally observe the events in question but only viewed them on a tape; he also asserts reversible error in the denial of his motion for a mistrial.

The admission or exclusion of testimonial evidence falls within the sound discretion of the trial court, whose decision will not be disturbed on appeal absent abuse resulting in prejudice. State v. Holder, 382 S.C. 278, 676 S.E.2d 690 (2009). Similarly, whether to grant or deny a mistrial is within the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. State v. Sweet, 374 S.C. 1, 647 S.E.2d 202 (2007). The