

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Jennifer B. McCoy, Circuit Court Judge

JOE LEWIS HOLMES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-001493

APPENDIX

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STATE OF SOUTH CAROLINA) COURT OF GENERAL SESSIONS
:
COUNTY OF CHARLESTON) CASE NO. 97-GS-10-606

STATE OF SOUTH CAROLINA) VOLUME I
)
-versus-) TRANSCRIPT OF RECORD
)
JOE LEWIS HOLMES,) JURY TRIAL
)
Defendant.) October 20, 1997

B E F O R E:

The Honorable Daniel F. Pieper

A P P E A R A N C E S:

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<u>WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
STEVEN MARK O'BRIEN				
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1 (October 20, 1997.)

2 THE COURT: Okay. Are you all ready to
3 call the first case?

4 MR. MARSHALL: Yes, your Honor.

5 THE COURT: Defense ready to proceed?

6 MR. FELDMAN: Yes, your Honor. Thank
7 you.

8 THE COURT: Okay. Call your case, Mr.
9 Solicitor.

10 MR. MARSHALL: Indictment 97-GS-10-0606,
11 State of South Carolina versus Joe Lewis Holmes,
12 indicted for murder.

13 MR. FELDMAN: Okay. May we approach
14 briefly, your Honor?

15 THE COURT: Yes, sir.

16 (Whereupon, a conference was held at
17 side bar.)

18 THE COURT: Okay. At this time if the
19 defendant could please stand and face the panel,
20 please. (The defendant stands and faces the jury
21 panel.) Ladies and gentlemen, again I'm going to
22 ask you a series of questions. Should any of these
23 questions be applicable to you, please stand and
24 identify yourselves by name and number. I'll also
25 go ahead to use this opportunity, ladies and

1 gentlemen, to tell you throughout the week we have
2 to go through a series of questions for each case,
3 it's not the Court's forgetting your answers. And
4 you may see there's a lot of overlap, the same kind
5 of questions asked, even though they're different
6 kinds of cases, all the parties participating in
7 each case have a right to hear your response. There
8 will be different people involved in different
9 cases, but the Court has to go through these
10 inquiries with you and place your answers on the
11 record.

12 Okay. Are any of you related by blood,
13 connected by marriage, or have any social, business,
14 or professional relationship with Mr. Joe Lewis
15 Holmes? If so, please stand. Yes, sir. Your name
16 and number?

17 **THE JUROR:** Robert Brown, Juror 22.

18 **THE COURT:** What is your connection?

19 **THE JUROR:** I was raised -- his sister
20 used to be my best friend in elementary and high
21 school.

22 **THE COURT:** Would this in any way affect
23 your ability to give all the parties in this case a
24 fair and impartial trial?

25 **THE JUROR:** No, sir.

1 **THE COURT:** Okay. Thank you, sir.

2 Anyone else?

3 Okay. If defense counsel could please
4 introduce yourselves to the panel. Thank you, sir,
5 you may be seated. And tell us a little bit about
6 your firm.

7 **MR. FELDMAN:** Thank you very much. My
8 name is Stanley Feldman, I'm a sole practitioner.
9 My office is up on Paramount Drive which is right
10 near Dorchester and the Mark Clark. I practice
11 general law with emphasis in criminal law and family
12 court. I'm up in the building with Mike Bowler,
13 Sonny Rozier and Jim Huffman. Your Honor, may I
14 also introduce my law clerk?

15 **THE COURT:** Yes.

16 **MR. FELDMAN:** This is Nicolle Jamison
17 who will be here assisting me. You say see me talk
18 to her or she may come in and out during the
19 proceedings depending on what we need. Thank you
20 very much, your Honor.

21 **THE COURT:** Are any of you related by
22 blood, connected by marriage, or have any social,
23 business or professional relationship with
24 Mr. Feldman or any dealings with his firm? If so,
25 please stand.

1 Yes, ma'am. Your name and number?

2 **THE JUROR:** Elizabeth D. Johnson, 94.

3 He's our family lawyer.

4 **THE COURT:** Would this in any way affect
5 your ability to give all the parties in the case a
6 fair and impartial trial after hearing the facts and
7 the law as charged to you?

8 **THE JUROR:** No.

9 **THE COURT:** Thank you. If you all would
10 please stand. Thank you. Yes, sir.

11 **THE JUROR:** His firm has my lawyer,
12 Sonny Rozier.

13 **THE COURT:** Okay. Would this in any way
14 affect your ability to give all the parties in the
15 case a fair and impartial trial after hearing all
16 the facts and the law charged to you?

17 **THE JUROR:** No, sir.

18 **MR. MARSHALL:** May we have your number,
19 please, sir?

20 **THE JUROR:** Number 1.

21 **THE COURT:** Thank you. Anyone else?

22 Yes, ma'am.

23 **THE JUROR:** 101. Mr. Feldman has served
24 as my attorney on several occasions in the past.

25 **THE COURT:** Would this in any way affect

1 your ability to give all the parties in the case a
2 fair and impartial trial after hearing all the facts
3 and the law charged to you at the conclusion of the
4 case?

5 **THE JUROR:** No, your Honor.

6 **THE COURT:** Thank you. Anyone else?

7 Prosecuting the case on behalf of the State
8 is the solicitor's office. Appearing on behalf of
9 the solicitor are two assistant solicitors. If you
10 would please stand, introduce yourself to the panel.

11 **MR. MARSHALL:** Ladies and gentlemen, I'm
12 Cameron Marshall.

13 **MR. CHURCHILL:** My name is Glenn
14 Churchill.

15 **THE COURT:** Are any of you related by
16 blood, connected by marriage or have any social,
17 business or professional relationship with
18 Mr. Marshall or Mr. Churchill or anyone connected
19 with the solicitor's office? If so, please stand.

20 Yes, sir. Your name and number?

21 **THE JUROR:** 180. I know Mr. Churchill
22 socially.

23 **THE COURT:** Would this in any way affect
24 your ability to give all the parties in the case a
25 fair and impartial trial after hearing all the facts

1 and the law charged to you at the conclusion of the
2 case?

3 **THE JUROR:** No, it wouldn't.

4 **THE COURT:** Thank you. Anyone else?

5 At this time I'm going to call out a list of
6 individuals who may or may not be called to testify
7 in this case. If any of you are related by blood,
8 connected by marriage or have any social, business
9 or professional relationship with any of these
10 individuals, please stand. If any of these
11 individuals happen to be in the courtroom also, as
12 your name is called if you would please stand for
13 the panel to see you.

14 Steven Mark O'Brien? Thank you, sir. Antwan
15 (pronunciation) Venning? May be Antwan
16 (pronunciation) Venning. Is that Antwan Venning?

17 **MR. MARSHALL:** Yes, sir. It is Antwan.

18 **MR. FELDMAN:** Thank you. Maurice
19 Simmons, anybody? Thank you, sir. Alexander
20 Gaillard? Thank you, sir. William Phillips?
21 Patrick O'Neal of the North Charleston Police
22 Department? Ken Hagge of the North Charleston
23 Police Department? Ray Garrison of the North
24 Charleston Police Department? Probably none of the
25 officers are here yet, ladies and gentlemen. Dusty

1 Poole of the North Charleston Police Department?
2 Harry Roper of the north Charleston Police
3 Department? Mr. Roper is standing over here. Thank
4 you, sir. Paul Hernandez of the same department?
5 Larry Harmon of the same department? Vello Paavel
6 of SLED? Did I pronounce that correctly?

7 MR. MARSHALL: Vello Paavel, yes, sir.

8 THE COURT: John Ortuno of SLED?
9 Earlice Harrison of SLED? Dr. Leigh Thorne?
10 Were any of you a member of the grand jury
11 which returned an indictment in this case? If so,
12 please stand.

13 Do any of you have any connection by blood,
14 marriage or social, business, professional
15 connection to the deceased in this case, Kenneth
16 Washington? If so, please stand.

17 You aren't a juror, were you, ma'am? Okay.
18 Thank you.

19 Is there any member of the panel, or any
20 member of the panel who has a close friend or
21 relative who has any connection to any law
22 enforcement officer, state constable or any other
23 person having authority to enforce the laws of the
24 state, county or city?

25 Yes, sir. Your name and number?

1 **THE JUROR:** Ninety-eight, Terry William
2 Lambert, Jr. I was a correctional officer.

3 **THE COURT:** Would this in any way affect
4 your ability to give all the parties in the case a
5 fair and impartial trial?

6 **THE JUROR:** No, sir.

7 **THE COURT:** Thank you. Anyone else?

8 Does anyone have any -- is there any member
9 of the panel or any family member of a member of the
10 panel who has been, or is currently enlisted in any
11 branch of the armed forces in the United States,
12 including reserves and ROTC?

13 Has any member, family member or close
14 acquaintance of the panel ever sought employment or
15 been employed by any of the following: Federal
16 Bureau of Investigation -- I'm going to call out a
17 list, and as I call out this list if you would
18 please stand I'll make inquiry of you. Federal
19 Bureau of Investigation, Central Intelligence
20 Agency, Drug Enforcement Administration, Department
21 of Justice, Department of Treasury, US Customs
22 Service. Just as I call them out if you'd all stand
23 I'll take them up after I'm done. Internal Revenue
24 Service, Bureau of Alcohol, Tobacco and Firearms,
25 solicitor's office I've already asked you about, US

1 attorney's office, US District Court or Court of
2 Appeals, National Security Agency, Secret Service,
3 Department of State, Department of the Defense,
4 Defense Intelligence Agency.

5 Yes, sir. Your name and number again?

6 THE JUROR: Ninety-eight, Terry William
7 Lambert, Jr. That was at MacDougall where I was
8 employed.

9 THE COURT: All right. And I've already
10 asked you if that would affect you and said no.

11 Okay. Yes, sir.

12 THE JUROR: General service technician
13 for the Department of Defense.

14 THE COURT: Would this in any way affect
15 your ability to give all the parties in the case a
16 fair and impartial trial?

17 THE JUROR: No, sir.

18 THE COURT: Thank you. Anyone else?

19 Has any member of the panel previously served
20 in court on a jury such that it would affect your
21 ability to give all the parties in the case a fair
22 and impartial trial?

23 Is there any member of the panel who is
24 acquainted with any person who is currently on call
25 for jury duty in this court?

1 To the best of your knowledge, is there any
2 member of the panel who has ever been a victim of,
3 or a witness to, or accused of the commission of a
4 crime? If so, please stand. And if you would
5 prefer to take that up with me privately you may do
6 so.

7 Yes, sir. Would you prefer to do it? Okay.
8 Come forward. Counsel may approach. Yes, sir.
9 Your name and number?

10 **THE JUROR:** 152, Kevin Smith. I've been
11 charged with grand larceny, two grand larcenies, a B
12 and E and burglary second degree.

13 **THE COURT:** These are all pending?

14 **THE JUROR:** Uh-huh.

15 **THE COURT:** Would this in any way affect
16 your ability to give all the parties in the case a
17 fair and impartial trial?

18 **THE JUROR:** (Nonverbal negative
19 response.)

20 **THE COURT:** Okay. Thank you, sir.

21 Yes, sir. Come forward.

22 **THE JUROR:** Your Honor, I've witnessed
23 and investigated crimes in the military, part of my
24 military duties.

25 **THE COURT:** Your name and number?

1 **THE JUROR:** 108, Martin.

2 **THE COURT:** Would this in any way affect
3 your ability to give all the parties in this case a
4 fair and impartial trial?

5 **THE JUROR:** No.

6 **MR. FELDMAN:** Your Honor, could I ask
7 you if you would voir dire him if he was a police
8 officer the military?

9 **THE COURT:** What was the exact nature of
10 your job?

11 **THE JUROR:** I was a naval officer, I did
12 several JAG investigations and that type thing.

13 **MR. FELDMAN:** I appreciate that. Thank
14 you.

15 **THE COURT:** Thank you. Okay. Anyone
16 else?

17 Has any member of the panel expressed or
18 formed any opinion about this case, or as to the
19 guilt or innocence of the defendant?

20 Does any member of the panel have any bias or
21 prejudice in connection with this case or any of the
22 parties involved herein? If so, please stand.

23 Does any member of the panel know of any
24 reason why they could not give both the State and
25 the defendant a fair and impartial trial in this

1 case?

2 Give us a jury, Madam Clerk.

3 MR. FELDMAN: Could I just ask for one
4 addition?

5 THE COURT: Yes. Hold on, please.

6 MR. FELDMAN: Number 5.

7 THE COURT: No. I don't ask questions
8 on the law, I charge on the law.

9 MR. FELDMAN: Thank you, your Honor.

10 THE CLERK: When I call your name,
11 please come forward and stand in front of the table
12 I'm behind and face the parties.

13 Juror Number 115, Louis V. Melendez. What
14 say you for the State?

15 MR. MARSHALL: Please present Mr.
16 Melendez.

17 THE CLERK: What say you for the
18 defendant?

19 MR. FELDMAN: Please seat the juror.

20 THE CLERK: Mr. Juror, please have a
21 seat in the jury box to my right.

22 Juror Number 93, Queene J. Jenkins. What say-
23 you for the State?

24 MR. MARSHALL: Please present Ms.
25 Jenkins.

1 **THE CLERK:** What say you for the
2 defendant?

3 **MR. FELDMAN:** Please seat this juror.

4 **THE CLERK:** Madam Juror, please have a
5 seat in the jury box to my right.

6 Juror Number 4, Hal M. Armstrong. What say
7 you for the State?

8 **MR. MARSHALL:** Please present Mr.
9 Armstrong.

10 **THE CLERK:** What say you for the
11 defendant?

12 **MR. FELDMAN:** Please excuse the juror.

13 **THE CLERK:** Mr. Juror, you've been
14 excused from the trial of this case. You can have a
15 seat with the rest of the panel.

16 Juror Number 40, Leroy Dingle. What say you
17 for the State?

18 **MR. MARSHALL:** Please excuse Mr. Dingle.

19 **THE CLERK:** Mr. Juror, you've been
20 excused from this trial of this case.

21 Juror Number 89, Eliza Jackson. What say you
22 for the State?

23 **THE COURT:** Counsel approach.

24 (Whereupon, a conference was held at
25 side bar.)

1 THE CLERK: What say you for the State?

2 MR. MARSHALL: Please present Ms.

3 Jackson. Thank you.

4 THE CLERK: What say you for the
5 defendant?

6 MR. FELDMAN: Please seat the juror.

7 THE CLERK: Madam Juror, please have a
8 seat in the jury box to my right.

9 Juror Number 11, Sheryl W. Benton. What say
10 you for the State?

11 MR. MARSHALL: Please present Ms.

12 Benton.

13 THE CLERK: What say you for the
14 defendant?

15 MR. FELDMAN: Please excuse the juror.

16 THE CLERK: Madam Juror, you've been
17 excused from the trial of this case.

18 Juror Number 82, Sarah M. Houle. What say
19 you for the State?

20 MR. MARSHALL: Please present Ms. Houle.

21 THE CLERK: What say you for the
22 defendant?

23 MR. FELDMAN: Please seat the juror.

24 THE CLERK: Madam Juror, please have a
25 seat in the jury box to my right.

1 Juror Number 86, Howard G. Hughes. What say
2 you for the State?

3 MR. MARSHALL: Please excuse Mr. Hughes.

4 THE CLERK: Mr. Juror, you've been
5 excused from the trial of this case.

6 Juror Number 152, Kevin T. Smith. What say
7 you for the State?

8 MR. MARSHALL: Please excuse Mr. Smith.

9 THE CLERK: Mr. Juror, you've been
10 excused from the trial of this case.

11 Juror Number 94, Elizabeth D. Johnson. What
12 say you for the State?

13 MR. MARSHALL: Please excuse Ms.
14 Johnson.

15 THE CLERK: Madam Juror, you've been
16 excused from the trial of this case.

17 The State has one strike remaining except for
18 cause.

19 Juror Number 49, Marybeth Fensterle. What
20 say you for the State?

21 MR. MARSHALL: Please present Ms.
22 Fensterle.

23 THE CLERK: What say you for the
24 defendant?

25 MR. FELDMAN: Please seat the juror.

1 THE CLERK: Madam Juror, please have a
2 seat in the jury box to my right.

3 Juror Number 32, Mary A. Constantin. What
4 say you for the State?

5 MR. MARSHALL: Please present Ms.
6 Constantin.

7 THE CLERK: What say you for the
8 defendant?

9 MR. FELDMAN: Please seat the juror.

10 THE CLERK: Madam Juror, please have a
11 seat in the jury box to my right.

12 Juror Number 13, Mary J. Deale, formerly
13 Blakely. What say you for the State?

14 MR. MARSHALL: Please present Ms. Deale.

15 THE CLERK: What say you for the
16 defendant?

17 MR. FELDMAN: Please seat the juror.

18 THE CLERK: Madam Juror, please have a
19 seat in the jury box to my right.

20 Juror Number 158, Harriet S. Thomas. What
21 say you for the State?

22 MR. MARSHALL: Please present Ms.
23 Thomas.

24 THE CLERK: What say you for the
25 defendant?

1 MR. FELDMAN: Please seat the juror.

2 THE CLERK: Madam Juror, please have a
3 seat in the jury box to my right.

4 Juror Number 85, Irene G. Huckabee. What say
5 you for the State?

6 MR. MARSHALL: Please present Ms.
7 Huckabee.

8 THE CLERK: What say you for the
9 defendant?

10 MR. FELDMAN: Please excuse the juror.

11 THE CLERK: Madam Juror, you've been
12 excused from the trial of this case.

13 MR. FELDMAN: Madam Clerk, is it three
14 or four?

15 THE CLERK: Three strikes.

16 Juror Number 194, Elizabeth D. Williams.
17 What say you for the State?

18 MR. MARSHALL: Please present Ms.
19 Williams.

20 THE CLERK: What say you for the
21 defendant?

22 MR. FELDMAN: Please seat the juror.

23 THE CLERK: Madam Juror, please have a
24 seat in the jury box to my right.

25 Juror Number 3, Ruth M. Appel. What say you

1 for the State?

2 MR. MARSHALL: Please present Ms. Appel.

3 THE CLERK: What say you for the
4 defendant?

5 MR. FELDMAN: Please seat the juror.

6 THE CLERK: Madam Juror, please have a
7 seat in the jury box to my right.

8 Juror Number 88, Charles G. Jackson. What
9 say you for the State?

10 MR. MARSHALL: Please excuse Mr.
11 Jackson.

12 THE CLERK: Mr. Juror, you've been
13 excused from the trial of this case.

14 The State has exhausted its strikes except
15 for cause.

16 Juror Number 72, Adrina Grippon. Any
17 challenge from the State?

18 MR. MARSHALL: No, ma'am.

19 THE CLERK: What say you for the
20 defendant?

21 MR. FELDMAN: Please seat the juror.

22 THE CLERK: Madam Juror, please have a
23 seat in the jury box to my right.

24 Juror Number 22, Robert J. Lewis Brown. Any
25 challenge from the State?

1 **MR. MARSHALL:** May we approach, your
2 Honor?

3 (Whereupon, a conference was held at
4 side bar outside the hearing of the jury
5 panel but within their presence.)

6 **MR. MARSHALL:** Your Honor, this is the
7 juror that stated that he is best friends with the
8 defendant's sister. And I know he's going to say
9 that he can set that aside, but I think common sense
10 dictates that he would not be able to set a
11 relationship that close aside. They were best
12 friends, your Honor.

13 **THE COURT:** You said that you had
14 connection to the defendant's sister during was it
15 elementary and high school?

16 **THE JUROR:** Elementary up to high school
17 days and know her mother and everything.

18 **THE COURT:** Do you still have any
19 connection to her?

20 **THE JUROR:** Well, we talk every time we
21 see each other.

22 **MR. FELDMAN:** But he indicated to your
23 Honor that that would not interfere with his, you
24 know....

25 **MR. MARSHALL:** Let the Judge ask the

1 questions.

2 MR. FELDMAN: I'm sorry.

3 THE COURT: You said you just talk to
4 her, that's the extent your relationship?

5 THE JUROR: Best friends, get together,
6 visit her house, visit her church.

7 THE COURT: I'm talking about now,
8 currently.

9 THE JUROR: Currently I visit her church
10 every now and then.

11 THE COURT: How often do you see her?

12 THE JUROR: Not that often. We go to
13 different churches.

14 THE COURT: So that's the extent of your
15 involvement, you see her at church periodically?

16 THE JUROR: Whenever I see her in the
17 store or anything.

18 THE COURT: It's just a hello situation?

19 THE JUROR: Hello, how are you doing,
20 how is everything going.

21 THE COURT: And you don't -- you
22 still -- you do not feel that this in any way would
23 affect your ability to give the State and the
24 defense a fair and impartial trial?

25 THE JUROR: No, it shouldn't.

1 **THE COURT:** Okay. You'll have to
2 exercise your strike for that, sir.

3 **MR. MARSHALL:** Your Honor, I don't have
4 any strikes left, that's why I'm up here. The
5 answer is not definitive, he said it should not.

6 **THE COURT:** Would it, sir, affect your
7 ability? Earlier you said it would not. Are you
8 saying you don't think it would?

9 **THE JUROR:** No, I don't think it would.

10 **THE COURT:** I'm going to allow him to
11 stay. You could have anticipated that in your
12 striking process. You may stand, sir.

13 **MR. MARSHALL:** Your Honor, I --

14 **THE COURT:** I've made my ruling, sir.

15 (Whereupon, the following is within the
16 hearing of the jury panel.)

17 **THE CLERK:** What say you for the
18 defendant?

19 **MR. FELDMAN:** Please seat the juror.

20 **THE CLERK:** Mr. Juror, please have a
21 seat in the jury box to my right.

22 Alternate, your Honor?

23 **THE COURT:** Yes.

24 **THE CLERK:** Yes, sir. Strikes are two
25 and one on the alternate.

1 Juror Number 129, Susan H. Prioleau. What
2 say you for the State?

3 MR. MARSHALL: Please present the juror.

4 THE CLERK: What say you for the
5 defendant?

6 MR. FELDMAN: Please seat the juror.

7 THE CLERK: Madam Juror, please have a
8 seat in the jury box to my right.

9 THE COURT: Okay. Any matters or
10 motions pertaining to the jury selected or the jury
11 selection process from the State?

12 MR. MARSHALL: Yes, your Honor. May we
13 approach, your Honor?

14 THE COURT: Yes.

15 (Whereupon, a conference was held at
16 side bar outside the hearing of the jury
17 panel but within their presence.)

18 MR. MARSHALL: Judge, on Juror 22 I
19 understand your ruling as it pertains to his sister,
20 but I'm requesting that you specifically ask him
21 about his relationship with the defendant because
22 that has not been done up to this point.

23 THE COURT: I asked the panel at-large.
24 What was his number?

25 MR. MARSHALL: Twenty-two.

1 **THE COURT:** Sir, can you come back? Do
2 you have any connection to the defendant?

3 **THE JUROR:** No. We never used to hang
4 out or anything, if that's what you mean.

5 **THE COURT:** That's what I'm asking. Do
6 you have any connection to him whatsoever?

7 **THE JUROR:** No. Me and his sister used
8 to be best friends.

9 **THE COURT:** Okay. Again I'll just ask
10 you for you record, you don't think in any way
11 whatsoever that your connection with the defendant's
12 sister would affect your ability to give the State
13 and the defendant a fair and impartial trial?

14 **THE JUROR:** No.

15 **THE COURT:** Okay. Thank you, sir.

16 (Whereupon, the following is within the
17 hearing of the jury panel.)

18 **THE COURT:** Okay. Any further matters
19 from the State --

20 **MR. MARSHALL:** None from the State, your
21 Honor.

22 **THE COURT:** -- or the defense?

23 **MR. FELDMAN:** No, your Honor. Thank
24 you.

25 **THE COURT:** -- about the jury or jury

1 selection process?

2 Okay. Ms. Fensterle, I'm going to designate :
3 you the foreperson. When we reconvene if you'll sit
4 in the foreperson's chair throughout this trial.

5 Swear the jury, Madam Clerk.

6 **THE CLERK:** Yes, sir. Please stand and
7 raise your right hands to be sworn. Please have the
8 defendant stand.

9 (The defendant stands.)

10 (Jury sworn.)

11 **THE CLERK:** Thank you. Please be
12 seated.

13 **THE COURT:** Okay. Counsel approach,
14 please.

15 (Whereupon, a conference was held at
16 side bar.)

17 **THE COURT:** Okay. Ladies and gentlemen,
18 the rest of you on the panel, if you will call in
19 after 6:00 tonight for any instructions about
20 tomorrow. At this point I'm going to excuse you for
21 the remainder of the day. Thank you very much and
22 have a good day. But please call in after 6:00 for
23 your instructions.

24 (Jury panel excused.)

25 **THE COURT:** Okay. Ladies and gentlemen,

1 generally as we begin the actual trial of each case
2 I try to explain to you a little bit about overview
3 of what the process will be like. First each side
4 will make an opening statement. Now, an opening
5 statement is not evidence. It is simply an outline
6 to help you understand what that party expects the
7 evidence will show.

8 Following the opening statements you will
9 then hear the testimony and evidence in the case.
10 This will consist of evidence from the witnesses as
11 well as any physical exhibits which may be
12 introduced into evidence during the course of the
13 trial.

14 There are rules of evidence which control
15 what can be received into evidence during the course
16 of the trial. When a lawyer asks a question or
17 offers an exhibit into evidence and a lawyer on the
18 other side thinks that it is not permitted by the
19 rules of evidence, that lawyer may object. If I
20 overrule the objection, the question may be answered
21 or the exhibit received. If I sustain the
22 objection, the question cannot be answered or the
23 exhibit cannot be received.

24 When I sustain an objection to a question or
25 deny a motion to admit an exhibit into evidence, you

1 must ignore the question or the existence of the
2 exhibit, and you must not guess or speculate what
3 the answer would have been or what the exhibit would
4 have shown. If the answer was somehow indicated
5 during the process of an objection, you must also
6 ignore the answer if I sustained the objection, and
7 you should not consider such answer during your
8 deliberations.

9 Again I remind you, as I indicated earlier,
10 the parties are entitled to have the case presented
11 to you in accordance with the rules of court and
12 procedure that we operate by. It's no attempt to
13 hide anything from you, it's just that the rules are
14 designed so that cases are presented to you in an
15 orderly fashion.

16 Now, as I previously indicated just as a
17 reminder, there may be times when I try to bring
18 counsel up to the bench instead of sending you out.
19 We try to resolve matters at the bench so that we
20 can save you the inconvenience, I suppose, of
21 getting up and then coming back -- leaving, coming
22 back in. If it's going to be an extended kind of
23 discussion, of course I'll need to send you out and
24 bring you back in after we have completed our
25 discussions.

1 Now, following the completion of the
2 testimony, the attorneys will again have an
3 opportunity to make what is called a closing
4 statement or closing argument to you. This is an
5 opportunity for counsel to summarize the evidence
6 from their respective points of view, to put the
7 pieces of the puzzle together, so to speak. Again,
8 these arguments by counsel are not to be considered
9 as evidence.

10 Following the closing statements by the
11 attorneys I will then instruct you on the law of
12 South Carolina as it pertains to the issues that
13 have arisen in this case. When I have completed my
14 instructions to you, you will then be permitted
15 begin your deliberations in order to reach a
16 verdict.

17 As indicated, I will instruct you on the law
18 at the conclusion of the case. As a preliminary
19 matter, I now instruct you that the defendant is
20 presumed in law innocent of any charges contained in
21 an indictment. An indictment is not evidence. The
22 fact that a grand jury returned an indictment is of
23 no consequence to you, it is merely the method by
24 which the State brings the case to court for your
25 review.

1 The State has the burden of proof in this
2 case and must prove the defendant's guilt beyond a
3 reasonable doubt. Consistent with the State's
4 burden, the presumption of the defendant's innocence
5 is sufficient to compel a verdict of not guilty
6 unless the jury concludes that the State has
7 satisfied its obligation to prove the defendant
8 guilty beyond a reasonable doubt, which is a doubt
9 that would cause a reasonable person to hesitate to
10 act.

11 Now, it is very important for you to pay
12 close attention because it will be your job, and
13 your job alone, to decide what the facts are in this
14 case and then to apply those facts to the law that I
15 will give to you.

16 I tell you this from the outset because from
17 time to time once a jury begins its deliberations it
18 will send out a question asking the Court, did this
19 happen on this date, or did this person do this, or
20 what time did this happen. The Court cannot answer
21 those questions, ladies and gentlemen, so I urge you
22 to please pay close attention to the facts as the
23 case is presented to you.

24 Of course, if it's necessary you may request
25 that a person's testimony be played back to you, but

1 the Court can't pick and choose pieces of that
2 testimony selectively for you because that would be
3 some indication, or may be construed as some attempt
4 by the Court as indicating the facts and I cannot do
5 that in any way. So please pay close attention.

6 Throughout this trial you are specifically
7 instructed that you should not discuss this case in
8 any way whatsoever with anyone, including amongst
9 yourselves, until such time as I direct you to begin
10 your deliberations.

11 Now, ladies and gentlemen, I've been informed
12 that there's various matters that counsel would like
13 to take up with the Court, so at this time I'm going
14 to send you out to take what would be normal -- a
15 little bit longer than normal lunch break. We're
16 going to be tied up probably until about noon, so I
17 ask that you report back and be ready to go at about
18 1:15. And the bailiff will show you on the way out
19 where you're to report back to. Please do not
20 discuss this case in any way. Thank you very much.

21 (Jury excused.)

22 **THE COURT:** Okay. Any matters for the
23 Court?

24 **MR. FELDMAN:** Your Honor, before we do
25 any preliminary matters, may I ask that the

1 prosecution's fact witnesses be excluded from the
2 court? I don't really care if the police officers
3 and SLED agents stay.

4 THE COURT: Okay. Any problem with
5 that?

6 MR. MARSHALL: You're asking for a
7 sequestration during the trial?

8 MR. FELDMAN: Yeah. But mainly -- yeah,
9 the fact witnesses. Yeah.

10 MR. MARSHALL: Well, I think the case is
11 Sullivan, your Honor, that states that just a mere
12 opportunity to compare testimony without any further
13 showing is not enough to warrant sequestration.

14 MR. FELDMAN: Well, here's the thing,
15 your Honor. In this particular case these are
16 individuals who have been convicted of other crimes
17 affecting credibility and they have prepared and
18 prepared. And I don't want them to hear some of
19 what we're discussing here today in order to educate
20 them further over how their testimony should go.

21 THE COURT: I grant your motion.

22 MR. FELDMAN: Thank you, your Honor.

23 THE COURT: Please have your
24 witnesses --

25 MR. MARSHALL: Would that be a

1 reciprocal order, your Honor?

2 THE COURT: Yes, sir. You're asking for
3 sequestration, always make it reciprocal, sir.

4 MR. FELDMAN: I don't have any
5 objection, your Honor.

6 THE COURT: Please ask your witnesses to
7 leave also.

8 MR. FELDMAN: Your Honor, mine aren't
9 here yet.

10 THE COURT: Okay. You're going to have
11 to have someone guard for them if they come in.

12 MR. FELDMAN: Yes. Yes.

13 THE COURT: Please ask your witnesses to
14 leave, Mr. Solicitor.

15 MR. MARSHALL: I'm sorry, your Honor?

16 THE COURT: Please have your witnesses
17 leave at this time.

18 MR. MARSHALL: Okay. Mr. Simmons,
19 Mr. O'Brien, if you all could be seated downstairs
20 in the solicitor's office and I'll talk to you in
21 just a little bit.

22 MR. FELDMAN: Is that Mr. Gilliard?

23 MR. MARSHALL: And Mr. Gilliard as well,
24 could you please be seated down in the solicitor's
25 office?

1 **MR. FELDMAN:** Your Honor, one
2 housekeeping matter. There was a name on the list
3 you called out as the witness list that had not been
4 on the previous witness list, it's a SLED agent, and
5 maybe it's no big deal, Earlice Harrison. I just
6 want to know -- in other words, I had been given a
7 witness list and that name does not appear on it. I
8 don't know.

9 **MR. MARSHALL:** She's the one that
10 analyzed the substance that was in Kenneth's pocket.

11 **MR. FELDMAN:** Okay. Yeah. Yeah.

12 **THE COURT:** Okay. I'll hear you out on
13 any motions.

14 **MR. FELDMAN:** Your Honor, thank you.
15 Your Honor, one of the things that we discussed
16 informally in chambers has to do with notification
17 by the solicitor that he intended to use certain
18 evidence as res gestae evidence. And I would object
19 to the use of that. I think basically it had to do
20 with a -- what had gone on like over the period of
21 the night. I can't remember the specifics, the
22 letter said had to do with theft and drug use. And
23 I would object saying that that is not part of the
24 res gestae. I can't be any more specific because I
25 don't know really specifically what the solicitor

1 wants to present as res gestae.

2 THE COURT: Yes, sir.

3 MR. MARSHALL: Your Honor, as we
4 discussed in chambers last week that the testimony
5 from at least one of the State's witnesses is that
6 this defendant had been engaged in what this witness
7 describes as hustling activity throughout the night
8 which did include theft in order to get money to buy
9 and do crack cocaine. And they had been doing crack
10 cocaine throughout the night leading up to this
11 murder at about 6:00 in the morning.

12 And the State does intend to introduce
13 through that witness the testimony that they had
14 been doing crack cocaine all night, I think that's
15 relevant because --

16 THE COURT: What is the relationship
17 between the crime and the drug use in this case?

18 MR. MARSHALL: Well, the crime was over
19 the drug use, it was about the drug use, and that's
20 why the night's activities -- that the murder is not
21 going to be properly understood by a jury in a
22 vacuum, it's got to be understood in the context of
23 the entire night's activities. And the hustling
24 activities in order to get the money was theft.

25 Now, I've instructed that juror (sic), his

1 term is hustling, I've told him not to elaborate on
2 that any more, not to mention that Mr. Holmes
3 committed theft crimes in order to get crack, to
4 state simply he and Mr. Holmes were hustling to get
5 money for crack. But I do intend to elicit the
6 testimony that they had been doing crack throughout
7 the night because I think it goes to their state of
8 mind, it goes to his aggressive tendency, and any
9 doctor will tell you that the ingestion of crack
10 cocaine tends to make the average person more
11 aggressive.

12 And it also goes to this question of whether,
13 in fact, the victim, Kenneth Washington, was
14 attempting to rip Joe Holmes off for \$20 or whether
15 Joe Holmes was attempting to rip Kenneth Washington
16 off for \$20. Which from a legal standpoint is
17 irrelevant. It appears that one of them was trying
18 to steal \$20 from the other, and I don't know that
19 this case is ever going to tell us which was
20 attempting to steal \$20 and legally it doesn't
21 matter. But from the jury's perspective of
22 understanding, they may want to know which of these
23 guys was trying to steal \$20 from the other.

24 And the usage throughout the night of the
25 crack in hustling to get the crack, it's the State's

1 position that this attempt to steal \$20 from Kenneth
2 Washington was a furtheration of that hustling
3 activity to get crack which had occurred all
4 throughout the night.

5 THE COURT: Yes, sir.

6 MR. FELDMAN: Your Honor, may I first
7 ask are we talking about Steven Mark O'Brien?

8 MR. MARSHALL: Right.

9 MR. FELDMAN: Okay. Because I want
10 to -- in a way that's a stipulation that's important
11 factually that Steven Mark O'Brien was smoking crack
12 cocaine.

13 Your Honor, the thing in this case, and these
14 are the undisputed facts, or at least this is the
15 prosecutor's theory of the case, is what I meant to
16 say. The prosecutor's theory is that my client
17 didn't know that White Boy had a gun, that White Boy
18 handed Joe Holmes the gun, prosecutor's theory, and
19 said, "I think they're going to get their guns," or
20 something of the sort. In other words, it was a
21 sudden immediate kind of a thing. And so this --
22 the focus, the time line focus of this crime is
23 extremely narrow.

24 And where he was or where he came from
25 earlier is really irrelevant, 'cause he didn't bring

1 the gun, he didn't even know it was thrust upon him.
2 And they said, "I think they're going to get the
3 guns," and right when the boy stepped to the car
4 where the gun was located, a shotgun, is when the
5 shooting occurred. That's the prosecutor's theory.

6 So I don't see what -- how what went on
7 before would be relevant. And if it were considered
8 to be borderline relevant, it's certainly
9 prejudicial beyond I think what law would allow.

10 **THE COURT:** Why is that not part of the
11 setting of the case or its environment so that it's
12 necessary -- not necessary, I don't like to use the
13 word necessary, but it's appropriate to complete the
14 story that they're trying to present as the theory
15 of their case? Why wouldn't it be appropriate, an
16 appropriate theory to say that that all arose out of
17 money that came from the drug situation?

18 **MR. FELDMAN:** I think -- well -- well, I
19 think that what would be relevant, I think that some
20 of that comes in, I think that the scene that was
21 set at the time was they were out here, 'cause I
22 think everybody was doing some substance, smoking
23 pot, smoking crack, drinking, carrying on. I think
24 that's probably going to come in and they're
25 probably going to testify that this was a drug deal

1 and that something happened and it went bad.

2 I would, you know, concede that that's part
3 of the res gestae. I don't know that what went on
4 yesterday, if it did go on, is part of the res
5 gestae.

6 THE COURT: What about that,
7 Mr. Solicitor? I mean, why do you need anything
8 other than what's in the day's events?

9 MR. MARSHALL: I'm not talking about
10 anything other than in the day's events. I'm
11 talking about the hours leading up to this murder.
12 We know exactly what he was doing, we intend to
13 introduce that evidence of what he was doing, the
14 fact that he had been under the influence of cocaine
15 all night; he wanted more cocaine.

16 THE COURT: Why are you making reference
17 to what happened yesterday, Mr. Feldman? He's
18 talking about the hours before the incident.

19 MR. FELDMAN: I thought -- all I
20 understood from what he was presenting that where
21 they had been previous -- see, I don't even think
22 they were together. I mean, at least his statement
23 doesn't say that. And I understand that, you know,
24 a certain amount of this is impeachment, but I don't
25 think they were together.

1 **THE COURT:** You mean previously or on
2 the --

3 **MR. FELDMAN:** Before the incident.

4 **THE COURT:** Before the incident.

5 **MR. FELDMAN:** Before the incident that I
6 just described to you.

7 **MR. MARSHALL:** You can cross-examine the
8 witness about that, Mr. Feldman, but just because
9 you don't think they were together doesn't mean that
10 he should be excluded from saying that they were
11 together. I mean, that's a subject for
12 cross-examination. His testimony is that they were
13 together and that they were hustling for crack
14 cocaine and this murder was a continuation of
15 hustling for crack cocaine.

16 **THE COURT:** I'm inclined to let that in
17 under the context of presenting the whole picture,
18 the whole environment for purposes of the analysis
19 of the res gestae rule. I think that that is
20 appropriate. I think you acknowledge that the
21 information within hours of the incident as cited by
22 the solicitor may be relevant under that analysis.
23 I'm going to allow that in.

24 **MR. FELDMAN:** I know I don't have to say
25 this, your Honor, I won't do it again, but if the

1 Court would note for the record my objection.

2 THE COURT: Certainly.

3 MR. FELDMAN: Thank you, your Honor.

4 THE COURT: Anything else?

5 MR. FELDMAN: Judge, the solicitor when
6 he -- when the solicitor interviewed White Boy,
7 William Phillips, he did it in the presence of Pat
8 Evans, the solicitor's investigator, and Chris
9 Adams, who represents William Wade Phillips. They
10 gave me a tape, I took it, made a tape, and I had it
11 transcribed by Clark and Lloyd Court Reporters.
12 They did it just like they would any other
13 deposition or something.

14 What I've done is I've given the solicitor a
15 copy, I've got a copy for the Court that's sealed.
16 Let me tell the Court that the tape is pretty clear
17 in terms of what was said. Where it says "Q" on the
18 questions is not always Mr. Marshall, sometime it's
19 Pat Evans and it's not -- it's not a perfect
20 transcription like would you want in a deposition.

21 However, I am asking the Court for permission
22 to use the transcript to impeach, it's a statement,
23 without risk of it coming in, in its entirety. Let
24 me give you an example. The solicitor asked White
25 Boy about some charges against my client that were

1 dismissed and are not coming in today, wouldn't be
2 admissible under any circumstances, and I'm not
3 criticizing that he asked, only I don't want to --
4 this was almost like a discovery type thing and I
5 don't want to risk -- by needing to use it to
6 cross-examine, I don't want to risk that something
7 of that nature is going to be allowed when it's
8 otherwise inadmissible.

9 **THE COURT:** Yes, sir. I don't think you
10 lose your right to object to certain information.

11 Yes, sir. Do you have any problem with that?

12 **MR. MARSHALL:** Well, no. I would agree
13 that something like previous charges, certainly no
14 reference should be made to that. If there are, if
15 it does get to the point where enough of this has
16 come in that in fairness to the State the whole
17 thing needs to come in, then certainly I would agree
18 that parts like that should be redacted, anything
19 that's clearly not admissible.

20 **THE COURT:** Okay.

21 **MR. MARSHALL:** But certainly I think
22 that if this transcript is used enough by the
23 defense, then we are going to make a motion in
24 fairness, so that the jury can understand the whole
25 context, that the jury be allowed to examine the

1 whole interview whether that's on the videotape or
2 in the transcript.

3 MR. FELDMAN: I have no objection to
4 that. You know, I wanted to be sure that I can make
5 my objections, that I'm not waiving, and all of a
6 sudden, Mr. Feldman, you opened the door. You know,
7 we lawyers hate to hear that. Also, your Honor, I
8 have indexed the tape.

9 THE COURT: I can't anticipate what he's
10 going to do in response to your question, how he's
11 going to use that transcript in response to your use
12 of that transcript. I mean, you're going to have to
13 object at the time, I presume.

14 MR. FELDMAN: Yes, sir.

15 THE COURT: But I'm sure he's going to
16 operate within some appropriate guidelines in his
17 mind as to what he feels the Court is going to
18 allow. I mean, there's no need to proceed
19 otherwise.

20 MR. FELDMAN: Okay. Your Honor, also
21 let me tell the Court I have indexed the tape,
22 although the numbers don't appear on your copy or
23 the solicitor's, I'm happy to provide that. And if
24 you need to listen to it for any reason to hear what
25 was said in order to make more sense of the

1 transcript, that's available, if I could just hand
2 this up to the Court.

3 THE COURT: Okay.

4 MR. FELDMAN: We talked about this
5 briefly, your Honor, and I asked Mr. Marshall, that
6 there was a Miranda waiver given by a Michael Carson
7 who is an alias for White Boy, William Wade
8 Phillips, and he has indicated that there is no
9 statement, there was a Miranda waiver, but no
10 statement followed. That's fine.

11 Your Honor, I would also move to prohibit --
12 we talked about this, too -- to prohibit Antwan
13 Venning from testifying about alleged threats made
14 by Joe Holmes in August or September of '96. This
15 is the -- this is the person who was up in Virginia
16 and they brought him back, I think he had been on
17 parole or something, and when he got back he said,
18 Well, I was up there because I was threatened. Now,
19 I talked to the solicitor and we may be okay on
20 that, there may not even be a dispute.

21 MR. MARSHALL: I don't intend to ask him
22 about any prior threats, your Honor. In fact, I
23 don't mind instructing him not to mention these
24 threats. He was -- he says that he was threatened
25 by a couple of men that were there on behalf of the

1 defendant. But he doesn't know who those men were,
2 and those men didn't specifically say to him, "We're
3 here for Joe." That being the case, I don't intend
4 to ask him about that.

5 THE COURT: Okay.

6 MR. FELDMAN: Judge, in preparing for
7 the case, I don't know why, sometimes you see things
8 you didn't see yesterday. One of the things we've
9 done prior to today is we've gone over records,
10 we've gone over deals, and we've gone over pretty
11 much everything of that ilk. One of the things I
12 noticed yesterday is that Alexander Gaillard, who is
13 one of the witnesses, I think he's the one known as
14 Mookie, was arrested after this offense. In other
15 words, he was already, I suppose, a witness in the
16 case but he was arrested on November 17 of '96 for
17 armed robbery.

18 On June 23rd of '97 -- and let me tell the
19 Court that at that time I still didn't know who the
20 witnesses -- you know, who the witnesses were -- on
21 June 23rd of '97 he either pled or was convicted of
22 assault and battery of a high and aggravated nature.

23 Now, what I'd like to see, and during the
24 lunch hour would be fine if possible, I discussed it
25 with the solicitor, is I would like to see the file,

1 I would like to look at the incident report, I would
2 like to look at statements to see exactly what it is.
3 that went on in the prosecution. I don't know who
4 the solicitor was, I don't know anything about the
5 decision to drop it from an armed robbery to an
6 ABHAN, but it was a pending -- but this case was
7 pending, he was a witness, and the charge was
8 lowered.

9 And, for example, if it were by jury verdict,
10 went to trial on armed robbery and he was convicted,
11 that would answer my question. But otherwise I
12 would like to look at the --

13 THE COURT: Any problem letting him see
14 that information?

15 MR. MARSHALL: Well, what he wants to
16 know is whether there was a deal made. And to my
17 knowledge, there was not. The first time I talked
18 to Mr. Alexander he had already been sentenced and I
19 knew nothing about that sentencing. So there was --
20 there was -- I was certainly not a party to any
21 deal. I think what he really needs to do is
22 probably talk to maybe the defense attorney who
23 represented Mr. Alexander and the prosecutor who
24 prosecuted Mr. Alexander, and ask them if there was
25 one. I don't know that the file is going to answer

1 that for him because --

2 THE COURT: Well, why can't you find
3 that out?

4 MR. MARSHALL: I can try to help him
5 find that out, sure. I mean, I can talk to the
6 solicitor. I don't know who the defense attorney
7 was.

8 THE COURT: You can talk to the
9 solicitor.

10 MR. MARSHALL: Sure.

11 THE COURT: I mean, it's not -- it's
12 not -- as far as you know there's no deal made.

13 MR. MARSHALL: As far as I know, but
14 I'll ask that prosecutor who handled that.

15 THE COURT: Okay. You check into that.
16 I don't see any problem with you finding out that
17 information. Make sure that issue is resolved in
18 one way or another or bring it back to my attention
19 at the appropriate time.

20 MR. FELDMAN: Okay. Your Honor, thank
21 you very much.

22 THE COURT: Anything else, State?

23 MR. FELDMAN: Oh, there is something
24 else. I may have -- I may have a witness that I
25 want to bring over from the jail. And is that

1 something that I can just ask the Court to order be
2 done at the appropriate time?

3 THE COURT: Are you talking about during
4 the lunch break?

5 MR. FELDMAN: Oh, no, no, no. I'm just
6 talking -- it won't be today.

7 THE COURT: Okay. Just give us a little
8 bit of notice so we can let the appropriate officers
9 know about getting him over here.

10 MR. FELDMAN: Okay. I'll ask the
11 sheriff, if it's possible tomorrow, they may want it
12 first thing in the morning to know, and I'll talk to
13 him about that. Thank you very much.

14 THE COURT: Okay. Just get with him on
15 that and he'll ask me about it.

16 MR. FELDMAN: Thank you very much, your
17 Honor.

18 THE COURT: Now, what's the status of --
19 your client is out on bond?

20 MR. FELDMAN: He was, but when we had
21 all the stuff last time with Judge Cottingham he
22 revoked.

23 THE COURT: Okay.

24 MR. FELDMAN: So he's not.

25 THE COURT: You understand during breaks

1 and everything he's taken back in?

2 **MR. MARSHALL:** Your Honor, I just got a
3 couple things. These first five witnesses of the
4 State all have criminal histories and I would like
5 to go over that and make sure that we're in
6 agreement as to which convictions are permissible
7 for impeachment purposes and which are not.

8 **THE COURT:** Okay. Have you all been
9 over this already?

10 **MR. FELDMAN:** We have.

11 **THE COURT:** Are you in agreement?

12 **MR. MARSHALL:** I can't remember exactly
13 now what we --

14 **MR. FELDMAN:** Well, Judge Cottingham
15 kind of cut us off. It got kind of crazy, and so we
16 never really did that. And, I'll tell you, I was a
17 little scared because here was a guy who had an
18 arrest charge with no disposition, and I've got a
19 couple of those that I had noted, so, no, I don't
20 think we're in agreement.

21 **THE COURT:** Okay. Let's hear them.

22 **MR. MARSHALL:** Well, the first witness
23 is Steven Mark O'Brien. I would just inquire as to
24 what convictions you intend to use for impeachment
25 purposes with him.

1 THE COURT: Steven O'Brien?

2 MR. MARSHALL: Yes, sir.

3 THE COURT: Okay.

4 MR. FELDMAN: Your Honor, he has a
5 conviction for a concealed weapon from '85, and I
6 know that's over the ten-year rule, but I would like
7 to argue to the Court that in circumstances where
8 there is a continuing pattern of this kind of
9 behavior it is less prejudicial to that side than it
10 would be if it was just a person with something in
11 '75, been clean ever since. That's a different
12 story. So I would argue that I be permitted to use
13 that '85.

14 MR. MARSHALL: Well, on that one, your
15 Honor, I think -- I don't believe that's a
16 conviction that carries over a year, I don't believe
17 it is a crime of moral turpitude, and it is over the
18 ten-year mark, so we object on all those grounds.

19 THE COURT: I don't see a reason to let
20 that in, Mr. Feldman.

21 MR. FELDMAN: All right. In '88, your
22 Honor -- in '88, your Honor, there was unlawful
23 possession of a weapon charge, court date of
24 5-27-88.

25 THE COURT: What's the solicitor's

1 position?

2 MR. MARSHALL: That, your Honor, was --
3 I don't have any objection to that, your Honor.

4 THE COURT: Okay. You can use that,
5 sir.

6 MR. FELDMAN: 1992. See, here's one,
7 it's shoplifting, but there's no disposition.

8 THE COURT: Do you have a disposition
9 for that?

10 MR. FELDMAN: Well, these rap sheets are
11 so hard to read. Here's a shoplifting from 12-3 of
12 '92 where he was convicted.

13 THE COURT: If he was convicted, that's
14 a crime of dishonesty, it can come in.

15 MR. MARSHALL: I see two 1992
16 shoplifting convictions. I'm in agreement with
17 that.

18 MR. FELDMAN: Okay.

19 THE COURT: Those can come in. Okay.
20 You're only using convictions?

21 MR. MARSHALL: Correct.

22 THE COURT: Okay.

23 MR. FELDMAN: Here's a possession of
24 drug paraphernalia from '93.

25 MR. MARSHALL: I object to that, your

1 Honor. It's not moral turpitude, it's not over a
2 year.

3 THE COURT: What are you trying to get
4 at with that?

5 MR. FELDMAN: Oh, I don't know. You
6 know, solicitors are calling them a bunch of bad
7 guys and I just want to, you know, show it as much
8 as I can. You know -- I mean, they stipulate that
9 they was smoking crack that night, you know, I don't
10 suppose whether he had some -- a pipe three years
11 ago is all that important.

12 THE COURT: How are you prejudiced by
13 that?

14 MR. MARSHALL: Well, because it's
15 another conviction, your Honor, and the rules don't
16 permit it. It's an additional conviction that he
17 can ask him about.

18 THE COURT: I'm not going to allow that
19 one. Go ahead.

20 MR. FELDMAN: Okay. Your Honor, also he
21 gave a false police report in '94.

22 MR. MARSHALL: I agree that should come
23 in.

24 THE COURT: Okay. The next one?

25 MR. FELDMAN: 1995 shoplifting

1 conviction.

2 THE COURT: That's in. Next?

3 MR. FELDMAN: 1996 shoplifting

4 conviction.

5 THE COURT: In. Next?

6 MR. FELDMAN: There's another

7 shoplifting charge, but I don't really see what the
8 resolution is.

9 THE COURT: He's only using convictions
10 he said.

11 MR. FELDMAN: I can't see whether there
12 is one or not.

13 MR. MARSHALL: What year is that?

14 MR. FELDMAN: It was arrest date 3-13 of
15 '96.

16 MR. MARSHALL: The rap sheet doesn't
17 show a conviction.

18 THE COURT: Don't use it.

19 MR. FELDMAN: All right. Failure to
20 stop for a blue light in 1996, convicted.

21 THE COURT: What's your position on
22 that?

23 MR. MARSHALL: I think that's within
24 your discretion to allow that, your Honor.

25 MR. FELDMAN: That's actually from

1 3-24-97.

2 THE COURT: I'll allow it.

3 MR. FELDMAN: And I think when we were
4 in court last time, I think the solicitor said there
5 is a criminal domestic violence that he had pled
6 guilty to in magistrate's court, which is probably
7 the worst crime of the whole bunch, to tell you the
8 truth, and I would want to use that.

9 THE COURT: What's your position?

10 MR. MARSHALL: I don't think that's
11 admissible under the rules, although it is
12 admissible to inquire into that on a different
13 ground, that being that I've entered some sort of
14 hazy negotiations with him, I've had discussions
15 with him about that charge. Now, that's the one
16 you're talking about that just occurred recently?

17 MR. FELDMAN: I believe so, yes.

18 THE COURT: It's going to get in that
19 way.

20 MR. MARSHALL: Right.

21 THE COURT: You can use it.

22 MR. FELDMAN: And I think that would be
23 Steven Mark O'Brien.

24 THE COURT: Okay.

25 MR. FELDMAN: Did I say false name to

1 police in '94?

2 MR. MARSHALL: Right. Yeah, you said
3 that.

4 THE COURT: Anything else?

5 MR. MARSHALL: Well, let's see, Antwan
6 Venning also has a record. I think that these other
7 ones should be easier, Judge. I think this one we
8 agree that armed robbery '93 is the only conviction
9 against him.

10 MR. FELDMAN: Beg the Court's
11 indulgence. I believe that's right, your Honor, if
12 the Court would indulge me one minute.

13 (Brief pause in proceedings.)

14 MR. FELDMAN: I believe that's correct,
15 your Honor.

16 MR. MARSHALL: Okay. Maurice Simmons.
17 He has a larceny conviction from '88 which I agree
18 is proper impeachment, he has a conviction from '92
19 for possession of less than a gram of crack, and he
20 was convicted of using a false name in '97. So I
21 think that each of those are proper impeachment.

22 MR. FELDMAN: Your Honor, here's what I
23 have. I have court date 12-8-87, unlawful position
24 of a weapon, I think that carries over a year. I
25 have November 11th, '88, grand larceny auto. I have

1 1-11-89, grand larceny. I have 2-4-88, disorderly
2 conduct, which I don't propose to use. I've got
3 9-7-93, carrying a pistol unlawfully. I've got
4 9-7-93, possession of crack cocaine.

5 THE COURT: Which ones are you all
6 disagreeing on?

7 MR. MARSHALL: I disagree about the gun
8 charges, your Honor. Possession of a gun does not
9 carry over a year, and that was from '87, so I
10 object to that. And then you said that there's a
11 later one?

12 MR. FELDMAN: Well, there are two gun
13 charges. One is --

14 MR. MARSHALL: One's from '92, right.

15 MR. FELDMAN: One of them was unlawful
16 possession of a weapon and one of them was carrying
17 a pistol unlawfully. And I'll tell you, I can't
18 tell from the rap sheets that have been provided
19 what statute he's charged under anyway. I mean,
20 I --

21 MR. MARSHALL: Well, he got one year. I
22 object to the two gun charges which are both
23 one-year gun charges, it appears. They were, they
24 were general sessions one-year gun charges, and I
25 object to those -- one's from '87, one from '92 --

1 because they don't carry over a year and they're not
2 crimes of moral turpitude.

3 **THE COURT:** Well, you can check on that
4 during the lunch break and see if they were
5 punishable for over a year.

6 **MR. MARSHALL:** So at this point the ones
7 we agree on are the larceny in '88, possession of
8 less than a gram of crack in '92, and the false
9 report in '97. Correct?

10 **MR. FELDMAN:** Well -- well -- well, I
11 got a land larceny auto in November of '88, and then
12 grand larceny 1-11-89, so that's two of those. And
13 then we got possession of crack.

14 **THE COURT:** Hold on. Do you have both
15 of those grand larcenies?

16 **MR. MARSHALL:** I believe that's the same
17 larceny.

18 **MR. FELDMAN:** I think the warrant
19 numbers are different.

20 **THE COURT:** You all are going to have to
21 get this straight. There's no need for me to try to
22 hash this out if you all don't have this
23 information. Get it straightened during the breaks.
24 Before you bring it up, make sure it's straightened
25 out. Go ahead, next one.

1 MR. FELDMAN: Resisting lawful arrest in
2 '95 I'd like to use.

3 THE COURT: Any trouble with that?

4 MR. MARSHALL: Yes, sir. That was a
5 30-day offense, it's not a crime of moral turpitude.

6 MR. FELDMAN: I'm not sure -- I'm not
7 sure -- you know, I think the new rule is that in
8 the Court's discretion if it hinges on someone's
9 credibility, you know, it's kind of a character
10 thing, I think it would be discretionary. And I
11 think that when you are resisting a police officer,
12 you know, he's coming in today as the friend of the
13 police, the friend of the prosecutor. Well, I ought
14 to be able to ask him about that.

15 THE COURT: It has to pertain to
16 dishonesty. I don't have the rule book right up
17 here. Do you all have the rule book with you? I
18 left it back in chambers.

19 MR. MARSHALL: Yes, sir.

20 THE COURT: Involve dishonesty or a
21 false statement.

22 MR. FELDMAN: All right. Then I will
23 not ask about the resisting the lawful arrest. Then
24 there's false information to the police.

25 THE COURT: That's false statement.

1 MR. MARSHALL: I agree with that.

2 MR. FELDMAN: Congregating for unlawful
3 purpose, I'm not sure what that is, but I understand
4 that probably does not involve dishonesty, I won't
5 use that. And he's got some pending charges that
6 I'll just use to impeach based on deals.

7 THE COURT: Any problem with that?

8 MR. MARSHALL: No, sir.

9 THE COURT: Okay. Anything else?

10 MR. FELDMAN: Let me get something
11 straight just so I can -- I mean, I think that
12 Solicitor Marshall is the solicitor on these pending
13 charges and I don't want to -- I don't know if I'm
14 going to say it at all, but I don't want to misstate
15 it, that's my understanding.

16 MR. MARSHALL: No. Actually I think
17 those files are assigned to somebody else, but I've
18 looked at them and I've entered, again, some
19 discussions about the resolution of them.

20 MR. FELDMAN: Okay. I apologize. In
21 the transcript I think the solicitor said, "Yeah, I
22 got some files on him." So that's fine.

23 THE COURT: Okay. Anything else?

24 MR. FELDMAN: No, sir. I think that
25 during the break we will -- the only question I

1 think really is whether or not grand larceny auto
2 and the grand larceny are one or two charges. I had
3 different court dates, so....

4 THE COURT: That, and whether or not
5 those gun offenses were for more than a year.

6 MR. FELDMAN: Oh, right.

7 THE COURT: You all can check that
8 during the break, too. Anything else?

9 MR. MARSHALL: Well, on Alexander
10 Gaillard I think we agree I'm going to try to help
11 him find out if anybody entered any negotiations,
12 and his only conviction is an ABHAN from '96.

13 THE COURT: Okay.

14 MR. FELDMAN: That's the one we talked
15 about with respect to the armed robbery.

16 THE COURT: You don't dispute the ABHAN
17 charge, do you? You're just wanting to find some
18 details.

19 MR. FELDMAN: Right. Right.

20 THE COURT: Okay. He's going to check
21 on that.

22 MR. MARSHALL: And the other witness,
23 William Phillips, has an armed robbery from '92
24 that's his only conviction, your Honor.

25 MR. FELDMAN: I've got a question about

1 him, your Honor. In 1991 he was arrested for
2 possession of cocaine, for distribution, there was
3 no disposition. Usually on the rap sheets it says
4 non-conviction or nolle prosequi. There was no
5 disposition, and much like the person before I don't
6 know. There are two unlawful possession of a weapon
7 charges, sentence on each charge was one year
8 suspended on two years' probation, two separate
9 warrant numbers. I would like to use both of those.

10 THE COURT: What's the State's position?

11 MR. MARSHALL: Two warrants for what?
12 I'm sorry.

13 MR. FELDMAN: There were two warrants
14 for unlawful possession of a weapon.

15 MR. MARSHALL: In '91?

16 MR. FELDMAN: Court date was 9-18 of
17 '91, I think for both.

18 MR. MARSHALL: Right.

19 MR. FELDMAN: But the two warrant
20 numbers, I mean I'm looking at D062135 for one and
21 D120379 for the other. That would be two.

22 MR. MARSHALL: Well, I object to them on
23 the basis that I don't think they're admissible
24 under the rule, don't carry over a year, and they're
25 not crimes involving dishonesty.

1 **THE COURT:** Those were what kind of
2 charges?

3 **MR. FELDMAN:** Unlawful possession of a
4 weapon, one year suspended on two years' probation.

5 **THE COURT:** What is the penalty for that
6 offense? I don't have that statute before me.

7 **MR. MARSHALL:** It's a year, your Honor.

8 **MR. FELDMAN:** See, I don't know what the
9 statute is.

10 **THE COURT:** I'll let you check that
11 during the break also. If it's not punishable by
12 imprisonment for more than a year, I'm not allowing
13 it in. They don't have to receive a year, it just
14 has to be punishable.

15 **MR. FELDMAN:** I'm sorry, your Honor?

16 **THE COURT:** They don't have to receive a
17 year, the statute has to prescribe more than a year.

18 **MR. FELDMAN:** Right. Well, your Honor,
19 one of the things -- one of the things that's going
20 to come up is that -- and this is my understanding,
21 if -- as part of the deal if he were convicted of
22 not just the murder charge, but my understanding is
23 if he were convicted of some violent offense, he
24 would have received life in prison. And the reason
25 is -- and I've got to look into that some more --

1 the reason is he had these previous charges.

2 Now, the solicitor might know better than I
3 what he could have gotten, that's why they had to
4 figure out charges for White Boy to plead to that
5 involved not the automatic penalty, because it
6 wasn't -- in other words, I think a plea to
7 manslaughter would have sent him to jail for life,
8 that's what I think. So how could I do that unless
9 I'm allowed to bring in those other charges? Unless
10 I just cover it -- well....

11 MR. MARSHALL: I can answer that for
12 you. The reason he was looking at life without
13 parole was that he has a previous most serious
14 conviction, that's an armed robbery in '92. It has
15 nothing to do with the gun charges, okay, it's just
16 armed robbery. And if he had gotten a second
17 homicide, a homicide conviction under these
18 scenarios, then he would have been not eligible.
19 But it doesn't have anything to do with the gun
20 charges.

21 MR. FELDMAN: Thank you very much.

22 THE COURT: Does that satisfy you?

23 MR. FELDMAN: Yes, sir.

24 THE COURT: Okay.

25 MR. FELDMAN: Your Honor, can I ask the

1 disposition, if the solicitor knows? There are
2 two -- there are two possession of crack cocaine
3 charges, one from '92 and one from '93 on the -- on
4 Kenneth Washington, the deceased. And I do not know
5 what -- well, I can't really see it, it's off the
6 top of the page, but I think he was convicted and
7 got three years suspended on three years' probation
8 and public service in '95. I can't tell which one
9 that is, or if both.

10 THE COURT: Do you have that
11 information?

12 MR. MARSHALL: I don't right now, your
13 Honor, but I don't know of any scenario under which
14 it would be admissible that the victim had those
15 convictions.

16 MR. FELDMAN: I don't know yet, either,
17 but I'd still -- I'd like to know.

18 THE COURT: How about get that
19 information for him, please, and we'll take that up
20 when you do. Anything else?

21 MR. MARSHALL: I don't have anything,
22 your Honor.

23 MR. FELDMAN: No, your Honor. Thank
24 you.

25 MR. MARSHALL: Your Honor, just so I'm

1 clear, are you requiring me to go research the
2 clerk's files on possible convictions, or would that
3 be Mr. Feldman's -- I mean, the rap sheet doesn't
4 show a conviction, so absent the rap sheet showing a
5 conviction our position is that if he can establish
6 some proof that there is a conviction there, okay.
7 But....

8 MR. FELDMAN: Is that on Kenneth
9 Washington?

10 MR. MARSHALL: Right.

11 MR. FELDMAN: Yeah. Well, I see
12 partially that there's a conviction on one of them,
13 I just don't know if it's a conviction on -- which
14 one it is. You know, you can kind of....

15 MR. MARSHALL: It's the '93 one, and I
16 don't show a disposition. Maybe a conviction on the
17 '92 one, but you would have to go research the
18 clerk's office to find that out.

19 MR. FELDMAN: Right. I mean, that's....

20 THE COURT: Are you going to check with
21 the clerk's office?

22 MR. FELDMAN: I'll do that, your Honor.
23 Check on those gun statutes.

24 THE COURT: Okay. See you all back in
25 an hour.

1 **MR. FELDMAN:** There's a reference on the
2 tape to the solicitor having received a new file
3 from Maurice Simmons. I don't know whether that's
4 new in terms of since the case started, or new
5 September of '97. I think he said something on the
6 tape.

7 **MR. MARSHALL:** Oh, when I was talking to
8 William Phillips, because I had a different Maurice
9 Simmons and I thought it was this Maurice Simmons in
10 this trial, but it's a different Maurice Simmons.

11 **THE COURT:** Okay. See you all then.

12 **MR. FELDMAN:** Thank you, Judge.

13 (Lunch recess taken.)

14 (Marked for identification were
15 State's Exhibits 1 through 59.)

16 **MR. FELDMAN:** I did want to ask you
17 something about those gun charges in terms of
18 impeachment.

19 **THE COURT:** Yes.

20 **MR. FELDMAN:** Your Honor, we have
21 established that they are punishable by a year or
22 less, but here's what I would like to argue in terms
23 of allowing for impeachment. Morry Simmons, the
24 SLED report will show, had gun residue on his hands.
25 And I think the rule these days is that it's

1 discretionary with the Court, so here's a fellow --
2 and I don't know if it's ever going to be explained
3 in this case -- but he's got gun residue on a SLED
4 report in this case and he's got two weapons
5 charges. And I think that it's something that would
6 be probative and not prejudicial. If it's
7 prejudicial, it's because this is a bad guy, he's
8 into guns, and he probably -- he may be the shooter
9 that night. And I would argue the same thing for
10 White Boy, William Wade Phillips' gun charges as
11 well.

12 THE COURT: Yes, sir.

13 MR. MARSHALL: I think that what
14 Mr. Feldman's doing, is he's really making a State
15 versus Lyle type argument, that because Maurice
16 Simmons has been convicted of gun charges before,
17 therefore it's likely he's the real murderer. Well,
18 you know, Lyle would apply if you can show a
19 similarity, common scheme or plan, or the other
20 exceptions that you're familiar with, your Honor. I
21 don't think that in this case it falls within any of
22 those.

23 I think that the only way that the defense
24 should be allowed to get into that, unless they can
25 make a State versus Lyle showing, is under the rules

1 for impeachment which those convictions would not be
2 admissible under the rules.

3 THE COURT: Where is that -- where are
4 you wanting to do that in the testimony?

5 MR. FELDMAN: For impeachment.

6 THE COURT: I mean, is that the first
7 witness or two?

8 MR. FELDMAN: No, sir. No.

9 THE COURT: Well, let's just take that
10 up -- issue up at the appropriate time so we can get
11 started.

12 MR. FELDMAN: Thank you, your Honor.
13 Other than that I'm ready.

14 THE COURT: Are you ready?

15 MR. MARSHALL: Yes, your Honor.

16 THE COURT: Okay. Bring the jury in,
17 please.

18 (Jury present.)

19 THE BAILIFF: Jurors are present, your
20 Honor.

21 THE COURT: Please be seated. Thank
22 you. Okay. Ladies and gentlemen, we're sorry to
23 keep you holding, we were trying to get things taken
24 care of and it took a little bit longer than we
25 expected but we're ready to proceed at this point.

1 As I indicated to you in my preliminary
2 remarks to you, the case will start out with the
3 counsel making what's called an opening statement.
4 Again, please remember these opening statements by
5 counsel are not to be considered as evidence. The
6 jury's requested some note pads. I'll allow them to
7 take notes.

8 **MR. MARSHALL:** Should I proceed, your
9 Honor?

10 **THE COURT:** Yeah. We'll get you some
11 note pads, ladies and gentlemen, but as I indicated
12 these statements by counsel are not to be considered
13 as evidence. Go ahead.

14 **MR. MARSHALL:** Good afternoon, ladies
15 and gentlemen. On behalf of all of the citizens of
16 South Carolina, my co-counsel, Glenn Churchill and
17 I, thank you for your participation in the criminal
18 justice system this week.

19 Murder is murder regardless of the victim's
20 occupation. Presidents are murdered, statesmen of
21 all types are murdered, teachers and preachers are
22 murdered, doctors and millionaire business people are
23 murdered, beggars and thieves are murdered,
24 criminals of all types are murdered, including crack
25 dealers. And that's what we have in this case. A

1 young black male in his early twenties, Kenneth
2 Washington, had been selling crack and he was
3 murdered.

4 Murder is killing another person with malice
5 aforethought. It's not killing a law-abiding
6 citizen with malice aforethought, those words are
7 not in the definition. It's killing another person,
8 a warm-blooded human being, with hopes and dreams
9 and aspirations, with parents, perhaps with
10 children. A person.

11 In this case the evidence that we will
12 present to you will establish that right up Rivers
13 Avenue, a little over a mile away, there's an Amoco
14 station on the left, there's a grocery store on the
15 right, there's a little green house right next to
16 there where people used to sell a lot of crack, [REDACTED]
17 Rivers Avenue.

18 And the early morning, very early morning,
19 around 2:00 on July 19th of last year, Kenneth
20 Washington, the victim in this case and his friend,
21 Antwan Venning, went there to sell crack cocaine.
22 And they did that for a period of several hours to a
23 number of different customers, raised several
24 hundred dollars.

25 And then at about 6 o'clock Kenneth

1 Washington and the defendant, Joe Holmes, got into a
2 disagreement about the quality of a \$20 piece of
3 crack cocaine. Holmes accused Washington of trying
4 to rip him off, selling him wax. Washington said,
5 "You switched it, you're trying to rip me off for 20
6 bucks."

7 This trial may never settle the issue of who
8 was trying to steal from whom, and it doesn't matter
9 at all. It doesn't matter under the law who was
10 trying to rip the other person off. What matters is
11 that after this brief disagreement Kenneth
12 Washington tried to leave the location and began to
13 walk from in front of that house across a vacant lot
14 which is next door to where Antwan Venning, his
15 friend's Jeep was parked. And as he got about
16 35 yards across there and was close to the Jeep, he
17 was shot in the back. And the State alleges that
18 Joe Holmes is the person that shot him in the back.

19 This trial is not about excuses for Kenneth
20 Washington, because there is no excuse or what he
21 was doing out there that night. He was breaking the
22 law in a serious way. And in an ideal world he
23 would have been arrested for it, brought into court,
24 tried to a jury of his peers, convicted of it and
25 punished for it. That's what should have happened

1 to Kenneth Washington. But that will never happen,
2 he doesn't have that opportunity to go through the
3 criminal justice system like the defendant does here
4 today. He doesn't have the opportunity to ever do
5 anything again. So this trial's not about excuses
6 for him, it's about accountability for the
7 defendant.

8 Common sense, ladies and gentlemen, tells you
9 that when an unarmed man is shot in the back after a
10 disagreement about a piece of crack cocaine, that's
11 murder. We're going to get into the technical
12 definition of what malice means, but common sense
13 tells you when you shoot an unarmed man in the back,
14 that's murder.

15 The question that we want to answer in this
16 trial is who murdered Kenneth Washington. And the
17 evidence that we will bring to you will establish
18 beyond a reasonable doubt that it was Joe Holmes.

19 And in what form will that evidence take?
20 Well, mostly it will be testimony. You will hear
21 people. There are five people that we anticipate
22 will testify during this trial who were out there on
23 the scene and saw the whole thing, or saw parts of
24 it, know firsthand what was happening. And they're
25 going to come in here and tell you what they saw.

1 Now, the people that were out there at just
2 before 6 o'clock in the morning involved in drugs
3 have criminal records, as you might expect. They're
4 not teachers and preachers, those aren't the kinds
5 of people that you find out on the street around
6 crack cocaine before 6 o'clock in the morning on a
7 Friday. All the people whose credibility you would
8 not question at all are at home waking up, getting
9 ready for a hard day's work. So these are people
10 that have been involved in the street life, they
11 have convictions. You're going to hear about their
12 convictions.

13 You may not like these witnesses, you may not
14 respect these witnesses, but that's not the
15 question. The question is do you believe that they
16 were out there and that they had the opportunity to
17 see what they say they saw. That's the question.
18 So to some extent as jurors in order to be fair,
19 you'll have to try to separate perhaps what may be
20 personal distaste for some of these witnesses from
21 deciding whether or not you believe they were there
22 and saw what they said they saw.

23 If the State never offered witnesses with
24 criminal records, it would be very rare that we
25 would convict anyone because criminals are the

1 people who are around crime.

2 There are a couple of old sayings in the law.
3 which come to mind in a case like this, and one is
4 crimes conceived in hell do not have angels as
5 witnesses. A similar way of saying that is when you
6 try the devil, you have to go to hell to get your
7 witnesses.

8 Now, you're going to hear that agreements for
9 leniency in one form or another have been offered to
10 some of these witnesses. Certainly you should
11 consider that. Are they lying because of the
12 leniency or the "deal" that they got? You're going
13 to need to decide that. The State submits to you
14 that absolutely none of them are shaving or hedging
15 their testimony in exchange for any --

16 **MR. FELDMAN:** Your Honor, I object.
17 Counsel can't give his opinion.

18 **THE COURT:** You can tell the jury what
19 you think the evidence will show, Counsel. Go
20 ahead.

21 **MR. MARSHALL:** Ladies and gentlemen, the
22 State's position is that once you've heard all the
23 evidence you will not have any doubt, you will not
24 have a reasonable doubt or any doubt, that Joe
25 Holmes shot Kenneth Washington in the back out of

1 malice, out of hatred, out of a wickedness and a
2 total disregard for the well-being of other human
3 beings. Thank you.

4 MR. FELDMAN: If it please the Court.

5 THE COURT: Yes, sir.

6 MR. FELDMAN: Ladies and gentlemen, my
7 name is Stanley Feldman, we met a few minutes ago.
8 Let me tell you that whenever there's a loss of life
9 it's a tragedy. So I want you to know that, because
10 by representing the position that I represent, by
11 representing Joe Holmes, I don't want you to ever
12 think that a death of a person can be taken lightly.

13 Last week I had to drive to Savannah to go to
14 my grandfather's funeral. And although it was sad,
15 it was kind of the way that things should be. He
16 was 93 years old, his great-grandchildren were in
17 attendance. You know, that's sad but, you know,
18 this is kind of what you believe should happen.
19 This is a tragic case, it's a tragic case for a lot
20 of reasons. And I wanted you to know that our
21 position suggests to you to the contrary.

22 Now, you may know this area of town if you've
23 driven on the Mark Clark Expressway or if you've
24 driven on Rivers Avenue. This is -- if you're
25 driving on the Mark Clark from, say, Mount Pleasant

1 to go to the airport, this is on your right, right
2 as you go over Rivers Avenue. A nice little
3 station. The incident is next to the station, but
4 I'm kind of giving you the where it is first. It's
5 off to the right. Across the highway's a Piggly
6 Wiggly, it's a station, Amoco, gas, food, Cokes,
7 Gatorade, whatever you want.

8 If you had been there on the night/morning of
9 July 19th, 1996, here's what you would have
10 observed. You would have observed a crowd, you
11 would have observed people sitting around all night.
12 And what were they doing? They were smoking crack
13 and they were drinking alcohol and they were smoking
14 pot. And they're doing it all night.

15 Now, what if you knew that one of the people
16 out there came to that setting that night with a
17 gun, with a gun in his pocket or in his belt? And
18 what if you knew that this gun was the gun that was
19 the weapon in question? It may not be absolutely
20 shown that that's the case, but what if you knew
21 that for the purpose of my point here? And what if
22 you knew that the person who brought the gun was a
23 convicted armed robber? And what if you knew that
24 this person had purchased it, or obtained it,
25 illegally out in the street? What if you knew that?

1 And what if you knew that that evening --
2 have you ever seen on these police shows like "Law
3 and Order" they always, they want to find the
4 weapon, check for fingerprints, check ballistics to
5 see if this is it. What if you knew they checked for
6 a gunpowder residue, which you may hear today or
7 tomorrow, what if you knew that this person shot the
8 gun that night? What if you knew that he possessed
9 the gun immediately before the shooting and he had
10 it immediately after the shooting? And what if you
11 knew that this same person stole a shotgun from the
12 deceased? And what if you knew that this same
13 person -- I'm talking about one person here -- that
14 this person did everything in his power to dispose
15 of the evidence, of the gun? The person illegally
16 brought it, shot it, had it before, had it after,
17 disposed of it. And what if you knew that this same
18 person had given both the gun and the -- I'm sorry,
19 the handgun and the shotgun to another person? What
20 if you knew all those things? Do you think that's
21 relevant? Does it sound relevant to the kind of
22 case we're having today?

23 I just introduced you to one of the
24 prosecutor's witnesses. I just introduced you to
25 someone who you will come to know as White Boy.

1 William Wade Phillips, White Boy. That's his street
2 name for what will, you know, be obvious. So
3 knowing all of that, White Boy, who's facing life in
4 prison, gets a sweetheart deal. What does that
5 mean? If he will come in here and testify
6 consistently with a statement he worked out with the
7 prosecutor, he gets to walk out of jail. And I
8 can't tell you if he's out today, but he may be.
9 That's his deal if he'll testify against Joe Holmes.

10 Shot the gun, had the gun before and after,
11 and there's more. And there's a lot more, and
12 there's a lot more that I really can't get into here
13 on opening but you'll see it. There's even evidence
14 that someone else had gun residue on his hands. Not
15 Joe Holmes. So you know that White Boy -- the
16 evidence will show that White Boy shot the gun and
17 the evidence will show that yet another person, not
18 Joe Holmes, had residue. So you'll hear from --
19 they'll explain what the residue means. Okay? But
20 Joe Holmes is here on trial today.

21 And when you look at the witness stand at
22 White Boy, you're going to scratch your head and
23 wonder how White Boy gets that kind of deal.

24 Well, there's a lot more. And I thank you
25 for your attention. I don't know how long the trial

1 is going to last, but it's almost as if the
2 suggestion was there's a murder, go punish somebody.
3 No. You need to get it right, and you need to
4 consider deals, and you need to consider whether
5 White Boy who will go into a business and hold
6 somebody up would tell the solicitor what he wants
7 in order to walk out of jail as opposed to being
8 there for the rest of his life.

9 So I appreciate your attention, and it's
10 really a lot more than I told you, but that's the
11 overture. Thank you.

12 **THE COURT:** Okay. Ladies and gentlemen,
13 before we actually call the first witness I want to
14 add an additional note. Since you have requested
15 that you be allowed to take notes during this trial,
16 I've allowed you to do that, sometimes judges
17 approve of it and sometimes they don't, it just
18 depends on the nature of the particular case whether
19 it's that Judge's practice to do it at all, or
20 whatever else the particular judge has come to learn
21 from the experience of allowing jurors to take
22 notes.

23 I do want to emphasize to you that none of
24 you are required to take notes. Indeed, you should
25 not do so if you think that note-taking might

1 distract your attention from the evidence or the
2 testimony of the witnesses in the case. On the
3 other hand, if you think that taking notes might
4 better focus your attention on the witnesses and the
5 evidence or might better help you to recall what
6 went on during the trial, you may feel free to take
7 notes.

8 You should remember that your notes are only
9 intended to be a help to your memory, they should
10 not take prescience over your own independent
11 recollection of the evidence. Moreover, those
12 jurors who do not take notes should rely on their
13 own memory of the evidence and should not be
14 influenced by the fact that another juror has taken
15 notes, since the notes only are for the note-taker's
16 personal use in refreshing his or her memory of the
17 evidence.

18 Whenever we take a break, whether it be
19 throughout the day or overnight, if you'll just,
20 please, leave your notes, your pads and your pencils
21 in your seats throughout the trial.. Thank you very
22 much. Go ahead and call your first witness.

23 MR. MARSHALL: Steven Mark O'Brien.

24 (Steven Mark O'Brien, called as a
25 witness by the State, having first been

1 duly sworn, was examined and testified
2 as follows:)

3 **THE CLERK:** Please state your full name
4 and spell your last name for the record.

5 **THE WITNESS:** Steven Mark O'Brien,
6 O-B-r-i-e-n.

7 **THE CLERK:** Thank you.

8 **DIRECT EXAMINATION**

9 **BY MR. MARSHALL:**

10 Q. Mr. O'Brien, do you live in the area?

11 A. Yes, sir. I live in Hanahan.

12 Q. What sort of educational background do you
13 have?

14 A. I left school in tenth grade and received my
15 GED.

16 Q. What sort of work background do you have?

17 A. I am a painter for 19 years.

18 Q. Are you married?

19 A. No. Divorced, sir.

20 Q. Do you have any children?

21 A. Yes, sir. I have a daughter age 21.

22 Q. Do you have a criminal record?

23 A. Yes, sir. I do.

24 Q. Were you convicted in 1988 of possessing a
25 shotgun?

1 A. Yes, sir.

2 Q. Were you convicted twice in 1992 of
3 shoplifting?

4 A. Yes, sir.

5 Q. And were you convicted in 1994 of giving a
6 false name?

7 A. Yes, sir. I was.

8 Q. Were you convicted in '95 and then in '96
9 again of shoplifting?

10 A. Yes, sir.

11 Q. Were you convicted in '96 of failing to stop
12 for a blue light?

13 A. Yes, sir.

14 Q. And were you convicted in 1997 of a criminal
15 domestic violence charge?

16 A. Yes, sir. I was fined for that.

17 Q. Have you ever been involved in drugs?

18 A. Yes, sir. I have.

19 Q. Are you involved in drugs now?

20 A. Not at the present time.

21 Q. Were you involved in drugs in July, on July
22 the 19th of 1996?

23 A. Yes, sir.

24 Q. Do you know the defendant in this case, Joe
25 Holmes?

1 A. Yes, sir.

2 Q. How do you know Joe?

3 A. I've known Joe from an area I used to
4 frequent, a drug haven. We hung out together, used
5 to get high together.

6 Q. You would see Mr. Holmes -- when did you
7 first come to know him?

8 A. I guess it was around '93 or '94.

9 Q. And between '93 or '94 and July of '96, how
10 frequently would you see him?

11 MR. FELDMAN: Your Honor, I object. May
12 we approach?

13 THE COURT: Yes.

14 (Whereupon, a conference was held at
15 side bar.)

16 BY MR. MARSHALL:

17 Q. Mr. O'Brien, between '93 or '94 when you got
18 to know the defendant and July of '96, about how
19 frequently would you see the defendant?

20 A. Between '93 and '96 I might have saw him two
21 or three times.

22 Q. Two or three times?

23 A. Between '93 and '96.

24 Q. How would you describe you all's
25 relationship?

1 A. Just as passing acquaintances to say hello.

2 Q. Do you recall the night of July the 18th of
3 '96 and the morning of July the 19th?

4 A. Yes, sir. I do.

5 Q. Would you describe, please, for the jury what
6 you were doing the night of the 18th and into the
7 morning of the 19th?

8 A. I was using drugs. I was with the defendant
9 and we were using drugs.

10 Q. You were with Joe Holmes?

11 A. Yes, sir.

12 Q. What type of drugs were you using?

13 A. We were smoking crack cocaine.

14 Q. Where were you doing that?

15 A. Right beside an Amoco on Target Street off
16 Rivers Avenue.

17 Q. About what time that night did you get
18 together with the defendant?

19 A. The evening -- the afternoon of the 18th I
20 stopped by Amoco and I started drinking some beer
21 and started sitting around, you know, having a
22 conversation with some people I knew out there and
23 everything and I started smoking a rock. And I run
24 into Joe about, I don't know, it was sometime before
25 about 10 o'clock, I guess, somewhere in there.

1 Q. 10 o'clock at night?

2 A. Yes, sir.

3 Q. On the 18th?

4 A. Yes, sir.

5 Q. What did you all do once you all got
6 together?

7 A. We got together and hustled money to buy
8 crack cocaine.

9 Q. About how many times during that night and
10 the next morning did you all smoke crack cocaine?

11 A. We probably smoked three, four times.

12 Q. And do you recall going to the location, the
13 green house next to the Amoco on Rivers Avenue at
14 any point on the morning of the 19th?

15 A. Yes, sir. I do.

16 Q. Would you tell the ladies and gentlemen of
17 the jury about that, please?

18 A. Yes, sir. Me and the defendant, we came upon
19 the house, we walked up because there was nobody
20 else in the area selling drugs. So we had \$20 and
21 we walked up to the house and we asked -- we asked
22 the group standing around who had it, I mean, who
23 had the drugs. And William White Boy, he was
24 sitting on the steps, he said, "These boys right
25 here have it." Joe asked him if he was straight, he

1 said, "Yeah, straight." So Joe bought a \$20 rock.

2 And at that time we were standing around
3 talking and another man walked up and bought a \$5
4 rock. When he bought the \$5 rock he said, "Hey,
5 this is not real." Joe looked and said, "Hey, this
6 ain't real, either. I want my money back." About
7 that time, I guess the fellow's friend, Antwan
8 Venning, he had started towards the truck parked on
9 Target Street, he got right about at the truck and
10 the other fellow, Kenneth Washington, he started
11 moving behind Joe and headed towards the truck. And
12 Joe said, "Don't go out like that. I want my money
13 back." So the fellow got, I don't know, maybe 30,
14 40 yards and Joe looked down at White Boy, which was
15 sitting on the steps, he said, "You got your thing
16 on you?" White Boy said, "Yeah." Which he handed
17 him a .38. Joe stepped back three times and shot
18 him.

19 Q. Three times to your recollection?

20 A. Three shots, sir.

21 Q. Were you able to tell whether or not he hit
22 Kenneth Washington?

23 A. Yes, sir. Yes, sir. The deceased flinched,
24 I saw him flinch and move towards the back of the
25 truck like that. I asked the defendant, I said,

1 "Did you hit him?" He said, "No, I missed him.
2 I would've had my gun I would have killed him." I
3 said, "No, you hit him, you grazed him."

4 Q. About how long did the defendant, Mr. Holmes,
5 hold the gun after he got it from William White Boy
6 Phillips and before he fired upon Kenneth
7 Washington?

8 A. He received the gun, he stepped back -- I had
9 to move beside him like that -- he stepped back five
10 or six steps, pointed the gun and fired three shots.
11 I guess he could've had it five to ten seconds.

12 Q. Five to ten seconds?

13 A. Uh-huh. (Affirmative response.)

14 Q. Did you at any time -- at the time that
15 Kenneth Washington was shot, were you able to see
16 his body position clearly, Mr. Washington's?

17 A. Yes, sir. I was.

18 Q. And please describe what you saw at the time
19 that he was shot in terms of his body position.

20 A. He was between the two doors on the truck --
21 it was a four-door Cherokee -- he was between the
22 two doors, and he was moving to grab the door when
23 he was shot. I seen him go like that (indicating)
24 and move to the back of the vehicle. He was in a
25 standing position when he was shot.

1 Q. Was he facing you or facing away?

2 A. He was facing away.

3 Q. And your position in relation to Mr. Holmes,
4 the defendant, at the time that the defendant fired
5 the gun was what? Where were you in relationship to
6 him?

7 A. To Mr. Holmes?

8 Q. Yes.

9 A. I was standing about two or three foot from
10 him, right beside him.

11 Q. On his right side or his left side?

12 A. On his right side.

13 Q. How was the lighting condition out there at
14 the time?

15 A. It was cracking daylight, you could see.

16 Q. Was there any -- was any artificial light
17 aiding you in seeing what was going on?

18 A. No, sir.

19 Q. Was the Amoco projecting any light into the
20 location where you were?

21 A. No, sir.

22 Q. When you say it was starting to crack
23 daylight, what do you mean by that?

24 A. It was good visibility, it was daylight. It
25 had just turned daylight.

1 Q. Now, during the disagreement over the \$20
2 piece of crack, were you present for that entire
3 exchange of words between Kenneth Washington and the
4 defendant?

5 A. Yes, sir. I was.

6 Q. Where were you standing when their words were
7 exchanged?

8 A. Right beside them.

9 Q. The \$20 rock of crack that the defendant was
10 attempting to buy, were you going to participate in
11 smoking that with him?

12 A. Yes, sir. I was.

13 Q. And during that discussion over the quality
14 of the crack, did you hear any threats issued by
15 Kenneth Washington towards Mr. Holmes or towards
16 you?

17 A. No, sir.

18 Q. Did you hear any threats issued by Antwan
19 Venning, Mr. Washington's friend, toward Mr. Holmes
20 or towards you?

21 A. No, sir.

22 Q. Did either Kenneth Washington or Antwan
23 Venning make any moves of physical aggression
24 towards the defendant?

25 A. No, sir.

1 Q. Any moves of physical aggression towards you?

2 A. No, sir. Not at all.

3 Q. Okay. After the shots were fired and you saw
4 Mr. Washington flinch, were you able to tell where
5 he went, Mr. Washington?

6 A. No, sir. When I seen him flinch he go
7 towards the back of the vehicle and we all ran.

8 Q. Okay. And where did you run?

9 A. We jumped the fence at Amoco and ran
10 behind -- there's a metal fence like a railing with
11 a brick wall, we jumped over that, ran through the
12 parking lot, there's a privacy fence in the back of
13 the Amoco station that leads to a big field, we call
14 it the cut, we ran back there.

15 Q. You say "we." Who do you mean "we ran"?

16 A. It was myself, Mr. Holmes, White Boy, Mookie,
17 Poochie, there was a couple other people out there.

18 Q. After you all ran, please tell the ladies and
19 gentlemen of the jury what you did next.

20 A. Ran down, and there's a little cut that goes
21 through the woods and it cuts right back out to
22 Target Street where the victim was shot at, and it
23 was a trailer used to be beside a house there when
24 you cut out. I ran to the end of the trailer and
25 looked down the street towards that Jeep and I saw

1 William White Boy, Mookie and Poochie approach the
2 Jeep again and start shooting at it. Then I got up
3 and ran off.

4 Q. Who was the person who was shooting at the
5 Jeep?

6 A. White Boy, William.

7 Q. And who else was with him?

8 A. Poochie and Mookie.

9 Q. Do you know their real names?

10 A. No, sir. I don't.

11 Q. At the time that William Phillips fired the
12 gun into the tire of the Jeep, were you able to
13 determine where the person you know as Poochie was
14 in relationship to William Phillips?

15 A. Yes, sir. He was squatted down. When
16 William Phillips was shooting the gun he had
17 squatted down.

18 Q. How close was he to William Phillips at the
19 time Phillips fired the gun, were you able to tell?

20 A. Probably five foot, I guess. Recollect about
21 five feet.

22 Q. Did you see anybody go inside the Jeep?

23 A. Yes, sir.

24 Q. Were you able to tell who that was?

25 A. I'm not sure. I'm not sure. I think it was

1 William Phillips or Mookie, they took a shotgun out
2 of the car, out of the truck.

3 Q. Did you see somebody take a shotgun out of
4 the Jeep?

5 A. Yes, sir.

6 Q. And you were observing this activity at the
7 Jeep from a distance of roughly what? Roughly how
8 far away were you?

9 A. It was a good distance, it was a good hundred
10 yards or more.

11 Q. And where exactly were you positioned as you
12 were watching this activity at the Jeep?

13 A. Laying down beside the trailer.

14 Q. Laying down on the ground about 100 yards
15 away?

16 A. Yes, sir.

17 Q. Well, what happened next?

18 A. I got up, and me Mr. Holmes ran back around
19 to the street and went around to his cousin's house,
20 Charlie Wilder's house. And Charles had some shirts
21 hanging on the line in the back on the clothesline.
22 We exchanged shirts and we headed towards
23 Russelldale. We had some more meat to sell and we
24 went and sold it for \$12 and bought a piece of rock
25 cocaine.

1 Q. Why did you change shirts?

2 A. I guess because the police were coming, we
3 knew it.

4 Q. All right. After you smoked the \$12 worth of
5 crack cocaine, then what occurred?

6 A. We walked back to Charlie's house. I left
7 there and walked up past Target Street and I saw
8 Target Street being marked off and it was about a
9 hundred police officers there, so I left the area
10 real quick.

11 Q. Now, you've spoken of Charlie Wilder. Do you
12 know if there's any relationship between Charlie
13 Wilder and the defendant?

14 A. I believe it's his uncle.

15 Q. You think that Charlie Wilder is --

16 A. Is Mr. Holmes' uncle.

17 Q. -- Joe Holmes' uncle. All right. You left
18 the area, where did you go?

19 A. I went to Remount Road where I called the
20 police.

21 Q. Who did you call in particular?

22 A. I called Sergeant Ken Hagge.

23 Q. Why did you do that?

24 A. Because I knew it was wrong. When I saw all
25 the police officers there I knew the boy was shot.

1 Q. Did you make any arrangements with Mr. Hagge?

2 A. No, sir. I didn't.

3 Q. Did you arrange to meet him at any point?

4 A. Oh, yes, sir. I told him I was walking down
5 Remount Road and he said, "I'll be right there to
6 meet you." He came and picked me up.

7 Q. Now, about what time in the morning was the
8 shooting, do you know?

9 A. It had to be right about 6:00 a.m. because it
10 was just daylight.

11 Q. About what time was this that you placed your
12 call to the police?

13 A. Had to be between 8:00 and 9:00, somewhere in
14 there.

15 Q. When you parted company with the defendant,
16 did he tell you what his plans were?

17 A. No, sir. He didn't.

18 Q. So Detective Hagge came and picked you up,
19 correct?

20 A. Yes, sir.

21 Q. What did you all do then?

22 A. He took me back to the police station and
23 started questioning me.

24 Q. Did you give him a statement?

25 A. Yes, sir. I did.

1 Q. Did you tell him what you had seen?

2 A. Yes, sir.

3 Q. Were you truthful with him?

4 A. Yes, sir. I was pretty nervous and scared at
5 the time when I gave that statement.

6 Q. Did you give Detective Hagge a description of
7 the man you had seen shoot Kenneth Washington?

8 A. Yes, sir. I did.

9 Q. Did you reduce your statement to a written
10 format?

11 A. Did he take a written statement?

12 Q. You gave a written statement?

13 A. Yes, sir.

14 Q. If you were to refresh yourself on the
15 statement, would you be able to tell the ladies and
16 gentlemen of the jury exactly how you described the
17 person that you had seen shoot Kenneth Washington?

18 MR. FELDMAN: Your Honor, I object.

19 There's no -- there's nothing -- there's no
20 foundation that he needs any refreshing.

21 BY MR. MARSHALL:

22 Q. Are you able to recite --

23 THE COURT: Sustained.

24 BY MR. MARSHALL:

25 Q. Are you able to recite verbatim, exactly word

1 for word, the description that you gave Detective
2 Hagge of the person that you had seen shoot Kenneth
3 Washington in the back?

4 A. Yes, sir.

5 Q. You're able to do that now?

6 A. Yes, sir. Pretty much so.

7 Q. Go ahead and please tell the jury what -- the
8 description that you gave of the shooter.

9 A. I said he was about five-ten and a half,
10 five-eleven, about 170, 175 pounds with a balding
11 hair cut.

12 Q. Did you use a name?

13 A. Yes, sir. I called him Joe. I didn't know
14 his last name.

15 Q. In just a moment, Mr. O'Brien, I'm going to
16 ask you to come down and with the aid of a
17 photograph explain a little more clearly for the
18 jury what occurred. All right. Why don't you come
19 on down, please.

20 A. (The witness complied.)

21 MR. MARSHALL: Mr. Feldman, you've seen
22 all these photographs.

23 BY MR. MARSHALL:

24 Q. All right. This exhibit's been marked
25 State's Exhibit 2-A. Are you able to identify

1 what's shown in that photograph?

2 A. Yes, sir. That's the little white house we
3 were at on Target Street.

4 Q. Is that a fair and accurate representation of
5 the way it looked at the time that you were out
6 there?

7 A. Yes, sir. Pretty much so.

8 MR. MARSHALL: Move to introduce, your
9 Honor, Exhibit 2, it's actually -- in each of these
10 cases, your Honor, there's a small photo, there's a
11 larger photo, and there is an overhead. And they're
12 labeled as 2, 2-A and 2-B, I believe. I'll refer to
13 them just as by the number.

14 THE COURT: Any objection?

15 MR. FELDMAN: Well, your Honor, I don't
16 object to pictures of the green house, but I'm not
17 sure a proper foundation has been made. The
18 question to the witness was is this how it was on
19 that day. Well, he's admitted he was under the
20 influence of crack cocaine. I'd like to question
21 him, on the other hand, I have no objection to the
22 pictures themselves, just -- but I object if it's
23 coming in because he says that's how it was.

24 THE COURT: Counsel approach.

25 (Whereupon, a conference was held at

1 side bar.)

2 THE COURT: Objection is withdrawn. You
3 may ask the witness about whether or not he may
4 identify that photograph, defense counsel may
5 cross-examine on those.

6 MR. MARSHALL: He's identified this. I
7 move to introduce so that the jury may view State's
8 Exhibit 2, which encompasses 2, 2-A and 2-B.

9 MR. FELDMAN: No objection, your Honor.

10 THE COURT: All right. Two, 2-A, 2-B in
11 evidence without objection, all photographs.

12 (Entered into evidence was

13 State's Exhibit 2.)

14 BY MR. MARSHALL:

15 Q. Okay. You stated this is the location where
16 you and Mr. Holmes were attempting to buy \$20 worth
17 of crack from Kenneth Washington?

18 A. Yes, sir.

19 Q. All right. Let's see if we have a pointer so
20 you can -- using this pointer standing to the side,
21 please describe where the discussion about the
22 quality of the crack occurred between Mr. Holmes and
23 Mr. Washington.

24 THE REPORTER: He's going to have to
25 speak up.

1 **THE COURT:** Speak up please, sir.

2 **THE WITNESS:** Right here. Mr. Holmes
3 was standing here, I was standing beside him,
4 Kenneth Washington was here, Antwan Venning was
5 right beside him (indicating).

6 **BY MR. MARSHALL:**

7 Q. All right. And please recap that
8 conversation and describe where Mr. Antwan Venning
9 and Mr. Kenneth Washington moved after the
10 conversation.

11 A. All right. Mr. Holmes was here, I was beside
12 him and Mr. Washington was here and we were out a
13 little bit further (indicating). Anyway, Antwan
14 Venning was back behind here (indicating). After we
15 purchased the \$20 rock Antwan Venning came around
16 and headed towards this way, which the Cherokee Jeep
17 was parked over here on the side, on the side of the
18 road, Kenneth Washington remained here (indicating).

19 Another man walked up and came around us,
20 bought a \$5 rock from him. When he bought that rock
21 he said, "Hey, this is fake." And Joe looked at
22 Washington and said, "Hey, this is fake, too. I
23 want my money back." Mr. Washington came around Joe
24 like this and Joe went over his shoulder like this
25 (indicating) and said, "Hey, don't go out like

1 that."

2 Q. "Don't go out like that"?

3 A. Yes, sir.

4 Q. Okay. Continue.

5 A. So White Boy William Phillips was sitting
6 right here (indicating), me and Joe were standing
7 here still (indicating). When Washington had done
8 cleared this tree and was moving this way, Joe asked
9 White Boy, he said, "You got your thing on you? You
10 got your thing on you?" meaning the gun. He handed
11 Joe the gun, Joe stepped this way (indicating), I
12 moved out of his way, which he stepped right along
13 in here somewhere, and Joe fired three shots at
14 Kenneth Washington.

15 Q. Okay. Are you able to show on that photo
16 where the Amoco station is?

17 A. The Amoco station is right here off the
18 screen (indicating). This is the little brick wall
19 and the fence we jumped (indicating).

20 Q. This exhibit is marked as State's Exhibit 3.
21 Are you able to identify what is shown in that
22 photograph?

23 A. Yes, sir. The Amoco station.

24 Q. Is that a fair and accurate depiction?

25 A. Yes, sir.

1 MR. MARSHALL: Move to introduce State's
2 Exhibit 3.

3 THE COURT: Any objection?

4 MR. FELDMAN: I don't think so, your
5 Honor. No objection.

6 THE COURT: State's 3 into evidence
7 without objection.

8 (Entered into evidence was
9 State's Exhibit 3.)

10 BY MR. MARSHALL:

11 Q. This has been marked as State's Exhibit 12.
12 Are you able to identify what's shown in State's
13 Exhibit 12?

14 A. Yes, sir.

15 Q. What is that?

16 A. That's the field beside the white house, the
17 street here is Target Street (indicating), and the
18 tree right here, there's a little Cherokee Jeep was
19 parked right behind the tree on the side of it.

20 Q. Is that a fair and accurate representation?

21 A. Yes.

22 MR. FELDMAN: No objection, your Honor.

23 MR. MARSHALL: Move to introduce please,
24 your Honor, State's Exhibit 12.

25 THE COURT: Okay. Twelve into evidence

1 without objection.

2 (Entered into evidence was

3 State's Exhibit 12.)

4 BY MR. MARSHALL:

5 Q. Using State's Exhibit 12, Mr. O'Brien, to aid
6 you, can you describe the movements -- first of all,
7 are you able to identify in that photograph where
8 this Jeep that you've spoken about that
9 Mr. Washington and Mr. Venning were traveling in,
10 where that was located?

11 A. Okay. See this blue car here (indicating)?
12 It was parked exactly where the blue car was but on
13 this side of the street (indicating). The blue car
14 was parked on the other side of the street. So it
15 was parked right here (indicating) on the side of
16 the street.

17 Q. And are you able to show on there where it
18 is -- the path that was taken by Mr. Venning and
19 Mr. Washington as they went towards the Jeep?

20 A. Yes, sir. They cut right through here
21 (indicating).

22 Q. Is there a path there?

23 A. There was. This picture doesn't indicate it,
24 at the time it was.

25 Q. And are you able to indicate, or does that

1 photograph show roughly where Mr. Holmes was at the
2 time that he shot Mr. Washington?

3 A. It was a little more this way (indicating).
4 Actually, it would be about right here, you can see
5 it on the screen, it's more this way (indicating).

6 Q. This is marked State's Exhibit 42. Are you
7 able to identify what's shown in that photograph?

8 A. Yes, sir. I am.

9 Q. What is that, please?

10 A. That's the little white house we were at.
11 This is the house beside it, and Target Street runs
12 in front of that house.

13 Q. Is that a fair and accurate representation?

14 A. Yes, sir. It is.

15 MR. FELDMAN: No objection.

16 BY MR. MARSHALL:

17 Q. All right. Using this --

18 THE COURT: Are you moving that?

19 MR. MARSHALL: Move to introduce that,
20 your Honor.

21 THE COURT: What's the exhibit number?

22 MR. MARSHALL: Forty-two.

23 THE COURT: Forty-two into evidence
24 without objection.

25 (Entered into evidence was

1 State's Exhibit 42.)

2 BY MR. MARSHALL:

3 Q. Using this photograph to assist you, are you
4 able to show approximately where Mr. Holmes was at
5 the time that he shot Mr. Washington?

6 A. Yes, sir. I am.

7 Q. Where was that?

8 A. Standing right here by this tree
9 (indicating). In this photo right here it looks
10 like the tree would be in the way, but it's not,
11 it's very deceiving. This tree is way out of the
12 way, you have a clear and accurate shot.

13 Q. This is marked State's Exhibit 27. Are you
14 able to identify what's shown in that photograph?

15 A. Yes, sir. I am.

16 Q. What is that, please?

17 A. A Jeep Cherokee that the boys were in.

18 Q. On the morning of July 19th?

19 A. Yes, sir.

20 Q. Is that a fair and accurate representation?

21 A. Yes, sir. It is.

22 MR. MARSHALL: Move to introduce,
23 please, your Honor, Exhibit 27.

24 MR. FELDMAN: No objection, your Honor.

25 THE COURT: Twenty-seven in evidence

1 without objection.

2 (Entered into evidence was
3 State's Exhibit 27.)

4 THE COURT: Counsel approach.

5 (Whereupon, a conference was held at
6 side bar.)

7 BY MR. MARSHALL:

8 Q. All right. As you were on the ground under
9 the trailer about a hundred yards away, were you
10 able to tell at the time that you saw Mr. Phillips
11 fire into that Jeep which tire he fired into?

12 A. This one right here (indicating), I'm pretty
13 sure. I was a good distance from him.

14 Q. You think it was a back tire?

15 A. Yes, sir.

16 MR. FELDMAN: I didn't hear his last
17 answer, your Honor. I'm sorry.

18 THE COURT: Could you repeat your
19 answer, sir?

20 THE WITNESS: Yes, sir. I believe it
21 was this side of the vehicle. I was a good ways
22 off, I was laying down, I was a hundred yards or so
23 off.

24 BY MR. MARSHALL:

25 Q. Are you not certain which tire it was?

1 A. Not really.

2 Q. Were you able to tell at the time that you
3 saw Mr. William Phillips, Poochie and Mookie at the
4 Jeep whether or not those holes were in the windows
5 as you see them?

6 A. I couldn't tell.

7 Q. Actually I had that picture backwards, that's
8 the way that picture's supposed to look.

9 This is State's Exhibit 55. Are you able to
10 identify that shirt that is shown in this
11 photograph?

12 A. Yes, sir.

13 Q. What is that shirt?

14 A. That's a shirt that he was wearing when he
15 pulled the trigger, when he shot Kenneth Washington.

16 Q. Who was wearing that shirt?

17 A. Joe.

18 Q. All right.

19 A. No, that's my shirt. Excuse me, that's my
20 shirt.

21 Q. That's your shirt?

22 A. Yes, sir.

23 Q. You were wearing that shirt?

24 A. I was wearing that shirt.

25 Q. How did it get on the ground like that?

1 A. I took it off and threw it on the porch.

2 Q. This is marked as State's Exhibit 54. Are
3 you able to identify what that is?

4 A. Yes, sir. That's Joe Holmes' shirt.

5 Q. Is that the one that he was wearing the night
6 he shot Kenneth Washington?

7 A. Yes, sir.

8 Q. Are you positive of that?

9 A. Yes, sir. I am.

10 Q. This is marked as State's Exhibit 53. What's
11 being shown in that photograph?

12 A. Shows Joe's shirt laying there, shows mine
13 under the house. I did not throw mine under the
14 house, I threw it on the porch.

15 Q. Do you know whether or not that's the
16 position in which Mr. Holmes left his shirt when you
17 all went to change?

18 A. I really can't -- I really can't recall. I
19 mean, I wasn't really watching where he threw his
20 shirt. I was, you know, kind of scared.

21 (State's Exhibits 60 and 61
22 marked for identification.)

23 Q. Did you have any role in the police locating
24 the shirts?

25 A. Yes, sir. I did.

1 Q. What was your role in that?

2 A. I told Kenneth Hagge where they was, Sergeant.
3 Hagge.

4 Q. This is marked as State's Exhibit 60. Are
5 you able to identify that?

6 A. Yes, sir.

7 Q. What is that?

8 A. Joe Holmes' shirt.

9 Q. When did you see him wear this shirt?

10 A. The night he shot Kenneth Washington.

11 Q. Is that the same shirt he took off at Charles
12 Wilder's house and changed?

13 A. Yes, sir.

14 Q. This is marked as State's 61. Are you able
15 to identify this exhibit?

16 A. Yes, sir. It's my shirt.

17 Q. When was it that you were wearing this shirt?

18 A. The night Kenneth Washington was shot.

19 Q. Is that the same shirt that you took off at
20 Charles Wilder's and changed?

21 A. Yes.

22 Q. Okay. You may sit down. Thank you.

23 A. (The witness complied.)

24 MR. MARSHALL: If I may have just a
25 moment, your Honor.

1 THE COURT: Yes, sir.

2 (Brief pause in proceedings.)

3 BY MR. MARSHALL:

4 Q. Now, when you went to the police and told
5 them what you'd seen, were you seeking anything in
6 exchange for your information?

7 A. No, sir. I wasn't.

8 Q. Did you ask for any money or any leniency or
9 anything?

10 A. No, sir. I didn't. I was pretty scared, I
11 thought I was in trouble.

12 Q. Why did you think you were in trouble?

13 A. Because I was standing beside him when he
14 shot him.

15 Q. Did it ever come that you were offered any
16 kind of reward in exchange for the information that
17 you gave?

18 A. Yes, sir. They said -- well, he said --
19 Mr. Hagge, Sergeant Hagge said that he told the
20 chief of police, he said, "This is a good man here,
21 he said he didn't want nothing, he didn't ask for
22 anything, he just come and testified, give a
23 statement what happened." He said, "I'll see that
24 you get some money." I said, "No, sir. I don't
25 want no money." I said, "I didn't come here for no

1 money." I said, "I was scared and I figured it was
2 my duty to tell you."

3 Q. Where did that conversation between you and
4 Mr. Hagge occur?

5 A. It occurred in front of the chief of North
6 Charleston police, in the hallway of the North
7 Charleston Police Department. He was bragging to
8 the police officers how that I didn't want anything
9 in exchange or anything, you know, I just came in to
10 testify, to give my statement.

11 Q. And he said that he would like to get you
12 some money. Did he ever get you any money?

13 A. Yes, sir. He did.

14 Q. How much money?

15 A. He gave me \$150.

16 Q. When was that, that you received that?

17 A. About three months down the road. I was
18 walking along Rivers Avenue and he pulled up behind
19 me. And he said, "Come on, get in the vehicle."
20 And I got in the vehicle. He said, "What are you
21 doing?" I said, "I'm hungry, let me see if I can
22 get something to eat." He said, "Here. Here's
23 \$150."

24 Q. The location where this shooting occurred, is-
25 that in Charleston County?

1 A. Yes, sir. North Charleston.

2 Q. In Charleston County?

3 A. Yes, sir.

4 Q. Now, as you all were standing out there as
5 Kenneth Washington and Antwan Venning walked off,
6 who were the other people who remained standing next
7 to the house as they walked towards their Jeep, can
8 you remember?

9 A. It was myself, Joe Holmes, Poochie, William
10 White Boy and Mookie. Also there was another man
11 there, his name was Paul, he's just like a wino, he
12 hangs around there all the time. And the other
13 fellow, he was wearing a blue uniform, he bought a
14 \$5 rock, he remained there too.

15 Q. Now, when you say they were there, do you
16 mean that they were there in the location, or do you
17 know exactly where they were at the time that
18 Mr. Washington and Mr. Venning walked off? Do you
19 mean that they were out there on the scene
20 someplace?

21 A. Yes, sir. They were all standing around,
22 everybody heard the conversation. Everybody was
23 standing around close enough to hear everything that
24 was going on.

25 Q. Prior to Mr. Holmes shooting the gun at

1 Mr. Washington, did anybody run for cover prior to
2 Mr. Holmes shooting the gun?

3 A. No, sir.

4 Q. Did you have any fear that you were about to
5 be fired upon by Mr. Washington or Mr. Venning?

6 A. No, sir.

7 Q. If you had had such a fear, would there have
8 been any way for you to safely escape?

9 A. Oh, yeah, very quickly. I was standing three
10 foot and I could have been gone, I could have been
11 behind the building, beside the building, over the
12 fence.

13 Q. You said, "behind the building." Which
14 building are you referring to?

15 A. The little white house we were all standing
16 around in front of.

17 Q. And then you stated you could have been over
18 the fence?

19 A. Yes, sir. There was no danger to me.

20 Q. This is marked State's Exhibit 9. Are you
21 able to identify what's in that photograph?

22 A. Yes, sir. I am.

23 Q. What is that?

24 A. That's the little house and the brick wall
25 and the metal railing beside the Amoco.

1 Q. Does that aid you in describing how you could
2 have escaped harm had you felt you had been in
3 harm's way?

4 A. Yes, sir. It does.

5 Q. And how is that?

6 A. We were right beside this bush (indicating).
7 I could have stepped four foot, three or foot and I
8 would have been beside this building, they couldn't
9 even have seen where I went.

10 Q. All right. Step down here if you would,
11 please.

12 A. (The witness complied.)

13 Q. Okay. Using that photograph, describe if you
14 had been in fear from Kenneth Washington or Antwan
15 Venning, how you could have escaped.

16 A. We were standing about a foot on this side of
17 this bush right here (indicating). I could have
18 easily just stepped beside this building here and
19 then made it to the wall (indicating). If you step
20 beside this building they couldn't even see from
21 where they were, they wouldn't even know where you
22 went.

23 Q. Is there any room between the corner of this
24 building and where you see that fence there? It's
25 hard to tell on the photograph.

1 A. That's deceiving. Yes, sir. It is a good
2 six or seven foot.

3 Q. Six or seven feet?

4 A. From the corner here to that fence
5 (indicating) it's seven six or seven feet, yeah.

6 Q. Okay. Thank you. You may be seated.

7 A. (The witness complied.)

8 Q. While these events were occurring,
9 Mr. O'Brien, did you see anybody else shoot the
10 victim, Kenneth Washington?

11 A. No, sir.

12 Q. Now, you stated previously when you talked to
13 Detective Hagge that when William White Boy Phillips
14 went over to the Jeep --

15 A. Yes, sir.

16 Q. -- that you thought you saw him fire at
17 Kenneth Washington who you said you thought was on
18 the ground.

19 A. Yes, sir. Like I stated before, I was pretty
20 nervous and scared when I gave that statement. I
21 retraced it in mind a few times. William Phillips
22 was shooting at the Jeep, he was shooting at the
23 tires.

24 Q. Did you hear anybody tell Joe Holmes to
25 shoot?

1 A. No, sir.

2 Q. Who is it that lived at [REDACTED] Flora Street?

3 A. That's Charlie Wilder's address, I believe.

4 Q. Did you ever, during these events, see
5 Kenneth Washington or Antwan Venning with a gun?

6 A. No, sir. I did not.

7 Q. Did you ever see him with any type of weapon?

8 A. No, sir.

9 Q. Please come down in order to show the
10 movements around that neighborhood that you took.

11 A. (The witness complied.)

12 Q. All right. Mr. O'Brien, using what's marked
13 as State's Exhibit 51, please tell the ladies and
14 gentlemen if you're able to identify what is being
15 shown in this diagram?

16 A. Yes, sir.

17 Q. Using the pointer, can you point out the
18 areas you've been speaking about?

19 A. Yes, sir. This is the Amoco station, this is
20 the little white house where it occurred at where
21 Kenneth Washington was shot (indicating).

22 Q. When you say "white house," does it have
23 green on it?

24 A. Yes, sir. The front is white and green. We
25 always called it the little white house.

1 Q. All right.

2 A. Cherokee Jeep was parked here on Target
3 Street (indicating), he shot from here to here when
4 he hit Kenneth Washington. We jumped the fence
5 here, and this is a field back here (indicating).
6 That's a ditch with water running beside of the
7 field back here (indicating). I came out here,
8 there's a little cut that comes back, there's a
9 trail right here (indicating). I cut back to the
10 street here (indicating), laid down, and I could see
11 what's going on back here at the Cherokee.

12 After that I ran back. And when you come
13 through here (indicating), it's like a little path
14 that comes right out to the street here. We jumped
15 a little bridge right here and ran down the street
16 and came around, cut through this little field right
17 over here at Charlie Wilder's house where we changed
18 shirts (indicating).

19 Q. That's where you changed your shirts, Charlie
20 Wilder's house?

21 A. Yes, sir.

22 Q. And the location exactly from where you were
23 watching the activity at the Jeep after the shooting
24 of Kenneth Washington again is where?

25 A. Right here.

1 Q. That's a distance you think of roughly a
2 hundred yards?

3 A. About a hundred yards, yeah.

4 Q. Where was Joe Holmes during that time?

5 A. Joe was standing right back over here.

6 Q. Did you see what Joe Holmes did with the gun
7 after he shot Kenneth Washington?

8 A. He handed it back to William Phillips.

9 Q. You saw him hand it to William Phillips?

10 THE REPORTER: I didn't hear his answer.

11 THE WITNESS: Yes, sir. He handed it
12 back to William Phillips.

13 BY MR. MARSHALL:

14 Q. Did you see that occur?

15 A. Yes, sir. As soon as he shot everybody got
16 up and moved, and the exchange was made then.

17 Q. Okay. When you say everybody got up to move,
18 did they all move in the same direction that you
19 moved?

20 A. Yes, sir. Everybody took to the fence.

21 Q. And point to where the fence is, please.

22 A. The fence would be right here (indicating).

23 Q. That's the iron fence that's seen in the
24 photographs?

25 A. It's a brick wall with the iron fence, yes,

1 sir.

2 Q. Thank you. You may be seated.

3 A. (The witness complied.)

4 Q. Have you received in exchange for your
5 testimony in this trial, have you entered into any
6 agreements with the State, being police officers,
7 prosecutor's office, anybody?

8 A. No, sir. I haven't.

9 Q. Have you had any discussions at all about any
10 of your charges?

11 A. I was charged with a criminal domestic
12 violence. Me and my girlfriend, we were in a verbal
13 argument, and I was told that --

14 MR. FELDMAN: Objection, your Honor.

15 Give me a foundation. I might not even object to
16 the hearsay, but I don't know what he's going to --
17 who he's talking about here.

18 THE COURT: Refrain from discussing what
19 someone else told you, sir.

20 BY MR. MARSHALL:

21 Q. Have you had a discussion with me about your
22 criminal domestic violence charge?

23 A. Yes, sir. I have.

24 Q. Have you been made any promises regarding
25 that charge?

1 A. No, sir. I haven't.

2 Q. Have you been told that I would attempt to
3 act on your behalf regarding that charge?

4 MR. FELDMAN: Your Honor, he's answered
5 that. He said, "No, sir" so the follow-up question
6 is improper. He said, No, there haven't been any
7 discussions. And so I would object to that
8 question.

9 THE COURT: I sustain that if you want
10 to move on, sir.

11 MR. MARSHALL: I'll move on, your Honor.

12 THE COURT: Go ahead.

13 MR. MARSHALL: If I might have just a
14 minute to review my notes, I think I'm just about
15 through, your Honor.

16 (Brief pause in proceedings.)

17 BY MR. MARSHALL:

18 Q. What was your condition, Mr. O'Brien, I mean
19 your physical and mental condition at the time that
20 you were viewing everything that you've told the
21 jury that you viewed? You stated that you were
22 smoking crack cocaine that night with the defendant.
23 What was your mental and physical condition?

24 A. I was fine, I hadn't smoked crack. My last
25 time I smoked crack would have been two or three

1 hours prior to that.

2 Q. Were you under the influence of it at all?

3 A. No, sir. Not at that time. What counsel

4 earlier failed to realize, when you smoke crack

5 cocaine the effects of it last maybe 10 to 15

6 minutes and then you're straight as a board. And

7 also when you smoke it, it enhances the awareness

8 around you, you're aware of more things around you

9 and that's what's going on. It's not like an

10 alcohol where it's depressing and it fogs your

11 vision or anything like that, you know, you're much

12 more aware of things happening around you.

13 Q. Were you in Mr. Holmes' presence without

14 interruption from 10 o'clock until the time that he

15 shot Kenneth Washington?

16 A. Yes, sir. I was.

17 Q. Was there ever a point when you all were

18 apart?

19 A. No, sir.

20 Q. Did he ingest crack cocaine at the same times

21 and in roughly the same quantities that you did?

22 A. Yes, sir.

23 Q. Did you ever hear Joe Holmes prior to

24 shooting Kenneth Washington say that he was scared

25 he was about to be shot?

1 A. No, sir.

2 Q. Before Joe Holmes shot Kenneth Washington,
3 did you see either Kenneth Washington or Antwan
4 Venning make any actions which appeared to you to be
5 an effort to get a weapon?

6 A. No, sir.

7 MR. FELDMAN: Your Honor, I don't really
8 object to the question, only this is a question from
9 15 minutes ago and it's just we're now going over it
10 like the second or third time. In that regard I
11 object.

12 THE COURT: I'll allow it. Go ahead,
13 but please don't --

14 MR. MARSHALL: I apologize if that's the
15 case. I didn't mean to repeat myself, your Honor.

16 THE COURT: Go ahead, sir.

17 BY MR. MARSHALL:

18 Q. Mr. O'Brien, do you see in court today the
19 man that you saw murder Kenneth Washington on the
20 night of July the 19th of '96?

21 A. Yes, sir. I do.

22 Q. Can you point him out, please?

23 A. He's sitting right there with the white shirt
24 and a black striped tie (indicating).

25 Q. Are you positive that's the man?

1 A. Yes, sir. Most certainly.

2 Q. Is his appearance any different today than it
3 was at the time of the murder?

4 A. Yes, sir. It is.

5 Q. How is it different?

6 A. He's heavier.

7 Q. Anything else different?

8 A. Not really. His hair was cut a little lower
9 than that.

10 Q. On the night of the murder, was Mr. Holmes
11 wearing glasses?

12 A. I don't recall.

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

14 MR. FELDMAN: May it please the Court.

15 THE COURT: Yes, sir.

16 CROSS-EXAMINATION

17 BY MR. FELDMAN:

18 Q. Mr. O'Brien, you were on autopilot there for
19 a minute, weren't you? In other words, you thought
20 you were supposed to say that that was Joe Holmes'
21 shirt, didn't you?

22 A. No, sir.

23 Q. You said, "That's Joe Holmes' shirt"?

24 A. And then I thought about it.

25 Q. You caught yourself, didn't you?

1 A. I said it's been thirteen months, it's quite
2 a long time.

3 Q. Kind of like identifying Joe Holmes at the
4 table, there's me, then there's Nicolle?

5 A. I don't think so.

6 Q. You know where he's sitting, don't you?

7 A. Yeah, I know him.

8 Q. Now, Hagge thinks you're a good guy, huh?

9 A. Apparently so, yes, sir.

10 Q. Does he know you're a wife beater?

11 A. Come one more time with that.

12 Q. He know you're a wife beater?

13 A. I don't beat my wife; I don't have a wife.

14 Q. Well, your girlfriend.

15 A. I don't beat my girlfriend.

16 Q. Criminal domestic violence, you pled guilty?

17 A. Yes, sir. I pled guilty. Yes, sir.

18 MR. MARSHALL: Your Honor, I object to
19 characterization of a criminal domestic violence in
20 which there was an argument as beating one's
21 girlfriend. Objection.

22 MR. FELDMAN: I'll withdraw.

23 THE COURT: Okay. Move on. The jury
24 shall disregard that. Go ahead.

25 BY MR. FELDMAN:

1 Q. Now, does Hagge know that you were guilty of
2 failing to stop for a policeman when he was trying
3 to pull you down -- pull you over?

4 A. Yes, sir. He does.

5 Q. Thinks you're a good guy, huh?

6 A. Apparently that's what came out of his mouth.

7 Q. Mr. O'Brien, isn't the truth, isn't the truth
8 that you really weren't with Joe Holmes that night
9 anyway, that you were sitting out at the green house
10 and you were smoking crack, weren't you? Let me
11 just ask you about the crack. You were smoking
12 crack and drinking beer, weren't you?

13 A. I had a couple beers that night and I was
14 smoking crack, yes, sir.

15 Q. Okay. And you were out at the green house
16 kind of just sitting around on -- somewhere near
17 Peter's house on Rivers Avenue, true?

18 A. I sat there and then I went back and found
19 Joe by his cousin's and we started hanging together
20 about 10 o'clock that night.

21 Q. Didn't you tell Hagge that you had been there
22 most of the night?

23 A. Yeah. I hung around there until about 10
24 o'clock.

25 Q. Okay. At Peter's house, you had been at

1 Peter's house most of the night?

2 A. Until about 10:00 p.m., sir.

3 Q. Didn't you tell Mr. Hagge that sometime later
4 Joe came up?

5 A. Yeah. I walked back there and saw Joe at
6 Charlie's house, that was after 10:00 p.m.

7 Q. Didn't you tell him it was about 4:00 a.m.?

8 A. No, sir.

9 Q. Let me show you your statement that you had
10 given. Do you remember making that?

11 A. Yes, sir. I do.

12 Q. Did you not tell Mr. Hagge that sometime
13 after 4:00 a.m., you don't wear a watch?

14 A. Apparently I did, it's in the statement.

15 Q. Apparently you did tell him that, that you
16 were sitting out in front of Peter's house at [REDACTED]
17 Rivers Avenue drinking a beer with Peter, you told
18 him that?

19 A. Yeah. I was sitting there until about
20 10:00 p.m.

21 MR. MARSHALL: Your Honor, may I ask the
22 witness be allowed to have a copy of the statement
23 if he's going to be cross-examined on it?

24 THE COURT: Yes, sir.

25 THE WITNESS: I gave that statement 13

1 months ago.

2 THE COURT: Hold on, sir. Provide him
3 with a copy.

4 THE WITNESS: Thank you.

5 THE COURT: Go ahead.

6 BY MR. FELDMAN:

7 Q. The point is, you said that you and Peter had
8 been there most of the night; isn't that what you
9 said?

10 A. Yes, sir.

11 Q. That's not what you're saying today, is it?
12 Didn't even mention Peter?

13 A. Sir, can I explain one thing?

14 Q. You can answer the question, then you can
15 explain. You didn't say that today.

16 A. That's what I said, but being there most of
17 the night we walk off and all through the
18 neighborhood to buy drugs, okay, sir? We see
19 different people and we hook up with different
20 people, we hang around different people.

21 Q. You said you were there with Peter most of
22 the night?

23 A. That's off and on.

24 Q. And you were there with White Boy, weren't
25 you?

1 A. I saw White Boy, that was after 4 o'clock.

2 Q. You said, "Also present was a white male they
3 call White Boy"; didn't you say that? You got a
4 copy.

5 A. Yeah. That was after 4:00 a.m. in the
6 morning.

7 Q. And didn't you say that you were all sitting
8 around -- look at the third line from the bottom --
9 didn't you say you were all sitting around, you,
10 White Boy, whoever else, the crack dealers, when
11 Joe, a black male, walked up?

12 A. Yeah, I stated that.

13 Q. That's the first time you saw him that night
14 'cause that's what it says, isn't it?

15 A. That's not the first time I saw him that
16 night.

17 Q. But isn't what I just asked you what you
18 said?

19 A. What I stated in this statement I was wrong
20 on it. Okay?

21 Q. Okay.

22 A. I was nervous and I was scared, I explained
23 to the solicitor.

24 Q. Okay. So -- okay. But today you know what --
25 you got to say, don't you?

1 A. Yeah. I've done went over it in my mind a
2 bunch of times.

3 Q. And the truth is, you and White Boy who had
4 been hanging out all that night sitting around --

5 A. No. I wasn't hanging out with White Boy all
6 night. I don't hang around with White Boy.

7 Q. And you figure, isn't it true, it's a lot
8 easier, let's pin it on the black guy, he'll be easy
9 to convict; isn't that your thought? Isn't that how
10 it was all the time?

11 A. What are you smoking? 'Cause that's not
12 true.

13 Q. Because by what you said you aren't even -- I
14 mean, even assuming a part of this is true, you were
15 not with Joe, according to the statement, until he
16 walked up at 4:00. Isn't that what the statement
17 says?

18 A. Yes, sir. But apparently I was wrong on it.
19 Okay? But the fact is, I was still beside that man
20 when he shot and killed that man. You said I'm
21 wrong on that. I was not.

22 Q. You weren't going to pin it on White Boy,
23 were you?

24 A. White Boy didn't do it.

25 Q. You told somebody that White Boy pumped some

1 lead into Kenneth Washington.

2 A. He shot at the Jeep.

3 Q. But you told them that he shot --

4 A. I told you when I made this statement I was
5 scared and nervous.

6 Q. I'm going to ask you a real easy question.
7 You told a policeman that White Boy shot bullets
8 into Kenneth Washington?

9 A. I said he shot in that direction. He must
10 have been shooting at the Jeep.

11 Q. Now, let's get to some more truth. You told
12 the solicitor, the solicitor had asked you a
13 question, whether you had had any discussions with
14 him about leniency or him -- I don't even remember
15 the exact phrase, but him doing something for in you
16 exchange for your testimony and you said, "No,"
17 didn't you?

18 A. Yes, sir.

19 Q. All right. Isn't the truth number one,
20 you're on probation for failure to stop for the blue
21 light?

22 A. Yes, sir.

23 Q. True?

24 A. True.

25 Q. Okay. Number two, he has a deal with you to

1 do everything in his full power to use the
2 solicitor's office full power to keep from you being
3 revoked; isn't that true?

4 A. No, sir. That's not true.

5 Q. That's not true?

6 A. No. That's something that you have come up
7 with. That's not true at all.

8 Q. And -- all right. Because isn't the reason
9 is that criminal domestic violence is a violation of
10 your probation?

11 A. If they choose to make it to violate me on
12 it. A 30-day charge will put me in the
13 penitentiary? I don't think they would violate me
14 on that because it actually did not happen, it was
15 verbal disagreement between me and my girlfriend.

16 Q. I thought you said you pled guilty I to it?

17 A. I did, but it was verbal disagreement, it was
18 not physical. Okay? That man right there has made
19 me no promises to help me whatsoever. So I don't
20 know where you came up with that, but you're wrong
21 on it.

22 Q. He has offered to use their full power to
23 help from you being revoked?

24 A. No, sir. That's not correct.

25 Q. You're lying to the jury right now, aren't

1 you?

2 A. No, sir. That's not correct at all. The
3 solicitor's office hasn't offered me anything or
4 made me any promises or any deals.

5 Q. Oh, that false police report -- I'm sorry,
6 you said you gave a false name. You lied to the
7 police that time, too, that was -- that's what that
8 is, a false police report was the conviction in '94,
9 wasn't it?

10 A. Yes, sir.

11 Q. And if you do good today maybe you don't have
12 to go to the penitentiary for violating parole or
13 probation. How long would you have to go, what was
14 your sentence?

15 A. I don't see where I've been threatened with
16 the penitentiary. I don't see why I have to go for
17 the violation. I haven't been violated. My
18 probation officer knows about what happened and he's
19 not violating me.

20 Q. What would happen, what would the revocation
21 be?

22 A. The remainder of my sentence, four months.
23 Big deal. I can do that standing on my head. Okay?
24 And I haven't been promised any deals.

25 MR. FELDMAN: Nothing further, your

1 Honor.

2 THE COURT: Any follow-up?

3 MR. MARSHALL: I would like to move to
4 introduce those exhibits that were identified and
5 the ones that were not previously introduced, your
6 Honor.

7 THE COURT: Do you want to go through
8 the numbers?

9 MR. MARSHALL: Well, I don't know that I
10 need to do it and hold the jury up. It's in the
11 record, I think I can do it on a break, your Honor.

12 THE COURT: It's my understanding at the
13 bench as to all those that he referred to, that
14 those are all in evidence without objection.

15 MR. FELDMAN: That's correct, your
16 Honor.

17 THE COURT: Okay. Specify the numbers
18 during a break.

19 You may step down, sir.

20 THE WITNESS: Thank you.

21 THE COURT: It's been a while, let's go
22 ahead and take a short break for the jury. I told
23 them we would take it every hour and a half to two
24 hours. Ladies and gentlemen, I'll send you back for
25 a break. Please do not discuss this case in any

1 way. Thank you very much.

2 (Jury excused.)

3 THE COURT: Okay. Please be seated.

4 We'll be at ease, actually. Thank you.

5 (Recess taken.)

6 (Entered into evidence was

7 State's Exhibit 9.)

8 (Entered into evidence was

9 State's Exhibit 51.)

10 (Entered into evidence was

11 State's Exhibit 53.)

12 (Entered into evidence was

13 State's Exhibit 54.)

14 (Entered into evidence was

15 State's Exhibit 55.)

16 (Entered into evidence was

17 State's Exhibit 60.)

18 (Entered into evidence was

19 State's Exhibit 61.)

20 MR. FELDMAN: Your Honor, I have a
21 matter before we bring the jury in, if I may.

22 THE COURT: Yes.

23 MR. FELDMAN: Your Honor, I would like

24 to hand up the formal transcript of record from the
25 Charleston County Court of General Sessions,

1 September 22nd, before the Honorable Edward Benjamin
2 Cottingham. There were detailed discussions in the
3 record concerning agreements and records, and that
4 is the discussion that was had between Judge
5 Cottingham, myself and Mr. Marshall. And I've shown
6 it to counsel and I've asked for a stipulation.
7 Now, I don't know whether even if we discuss it now
8 and the Court would deem it appropriate I still have
9 to wait until my case, but I think that that either
10 needs to be a stipulation or the solicitor may be
11 subject to call about whether there was an
12 agreement. Because he said there wasn't; the
13 solicitor says there is.

14 **THE COURT:** What's your position,
15 Mr. Solicitor? Sounds to me like you're going to
16 have to come up with something, because otherwise
17 you're going to be a witness in this case.

18 **MR. MARSHALL:** Well, your Honor, I don't
19 know that -- I don't think that O'Brien was lying.
20 I've had discussions with O'Brien about his
21 situation which are focussed on his criminal
22 domestic violence charge. Now, the next step from
23 that criminal domestic charge is this probation
24 matter. And I've had discussions with Dirk Kitchel,
25 who represents him. I don't know that Steven

1 O'Brien was ever part of the discussions which took
2 the CDV charge a step further and considered the
3 ramifications potentially upon his probation.

4 So, I mean, now, if he's just forgotten, then
5 he still needs to say, oh, yeah, well, that's right,
6 he needs to be cross-examined on it. But if he
7 wasn't a part of those discussions, then as far as
8 he knows what he said may be absolutely true.

9 MR. FELDMAN: Your Honor, I think when
10 an officer of the Court makes that kind of a
11 statement to the Court, it is at least something
12 that the other side can rely on. So I think that it
13 ought to just be published.

14 MR. MARSHALL: Well, the other thing is
15 when I was trying to question him about discussions
16 we've had, I kept getting objections over here.
17 Finally I just said, "I'll move on." I think when I
18 tried to question him, I forget exactly what's the
19 last thing I was saying when that objection came up
20 and I just said, "Well, I'll move on." But it was
21 drawing objections, that whole line questioning.

22 MR. FELDMAN: And they were sustained.

23 MR. MARSHALL: Right. But I mean....

24 THE COURT: What is your opposition to
25 him publishing that part of the prior proceeding?

1 **MR. MARSHALL:** Well, that's not a prior
2 inconsistent statement from Mark O'Brien, it's a --
3 Mark O'Brien's statement is inconsistent with a
4 prior statement I made, not a prior statement he
5 made.

6 **THE COURT:** We're quibbling over
7 different things, Mr. Marshall. What we're talking
8 about is whether or not you're going to be a witness
9 in this case. Do you choose to be a witness in this
10 case, or do you choose to have something published
11 to the jury?

12 **MR. MARSHALL:** I don't want to be a
13 witness, your Honor.

14 **THE COURT:** Well, that's the problem
15 we're dealing with, not the technicalities of prior
16 inconsistent statements. Obviously Mr. Feldman can
17 choose to call you if he so desires at this point.
18 I mean, it's been placed into evidence that there's
19 no such deal made.

20 **MR. MARSHALL:** Let me just stipulate to
21 that. I mean, the fact that I said that does not
22 impeach Mark O'Brien.

23 **THE COURT:** Well, it's not a question of
24 impeachment. You're looking at it from the wrong
25 way. The question is whether or not Mr. Feldman is

1 going to be able to call you as a witness in this
2 case. He's placed as a record this gentleman
3 testified there was no such deal. You are aware of
4 such a deal, you're an officer of this Court, your
5 understanding of the deal was stated to the Court in
6 a court proceeding. Now, he's asked, to avoid the
7 problem of a conflict with your testifying in this
8 case, that that be published to the jury. If you
9 have an objection to that, then Let's deal with what
10 we're going to do about the fact that you're a
11 witness in this case, whatever you choose.

12 MR. MARSHALL: No, I don't have an
13 objection to it.

14 THE COURT: Okay. There you go, sir.

15 MR. FELDMAN: Thank you, your Honor.

16 MR. MARSHALL: Your Honor, I just ask
17 that I be allowed to in closing argument address
18 that fully because I think there's an explanation
19 for it.

20 THE COURT: Yes, sir. I think he can do
21 that. He can say maybe he just didn't understand
22 all the parameters of that discussion.

23 MR. FELDMAN: Okay. And I certainly
24 would object to any factual, in other words, like
25 testimony in closing about he didn't know. Maybe he

1 was confused, you know, like you said.

2 THE COURT: Do you want him back on the
3 stand to ask some follow-up questions?

4 MR. FELDMAN: No, sir. When would be
5 the appropriate time to publish this? Would now be
6 appropriate?

7 THE COURT: If you so desire I have no
8 problem with that.

9 MR. FELDMAN: I would appreciate that,
10 your Honor.

11 THE COURT: Any problem with that from
12 the solicitor?

13 MR. MARSHALL: I might like to recall
14 him, your Honor, just to clarify this. Now,
15 Mr. O'Brien --

16 THE COURT: I don't have any problem
17 with him being recalled to clarify this issue.

18 MR. FELDMAN: I would like to publish it
19 first. I would like the jury to know the reason
20 he's been recalled is because he's busted.

21 THE COURT: I'll allow that. Okay. Are
22 you all ready to proceed?

23 MR. FELDMAN: Yes, your Honor.

24 THE COURT: It's my understanding he's
25 going to publish the stipulated -- by stipulation

1 he's going to publish this statement from the prior
2 proceeding and then the State's going to recall him
3 to the stand to follow up on that published
4 statement.

5 MR. MARSHALL: He's introducing evidence
6 now at this point, right, your Honor?

7 THE COURT: That's....

8 MR. FELDMAN: Well, we've agreed to do
9 something unusual here, we've agreed that the
10 stipulation will be made here in lieu of calling the
11 solicitor maybe at some other appropriate time.

12 THE COURT: Well, you have to deal with
13 the ramifications of that procedurally. If you want
14 to wait until your part of the case to present the
15 issue of whether or not the solicitor has to be
16 called, then you may do so, but there's procedural
17 implications of this.

18 MR. FELDMAN: There is?

19 THE COURT: Yes. Are you going to
20 introduce that into evidence?

21 MR. FELDMAN: I was just going to read
22 lines 4 through 22. May I have -- may I have --

23 THE COURT: Do you want to approach the
24 bench, please?

25 MR. FELDMAN: Yeah.

1 (Whereupon, the following is held at
2 the bench.)

3 MR. FELDMAN: What we're saying now is
4 even if I don't do it now, I have a right to do it
5 at a later time. We're just talking about the
6 timing now, not whether I have a right to do it.

7 THE COURT: It depends on how you're
8 going to do it.

9 MR. FELDMAN: I was just going to
10 propose to read lines 4 through 20 which is
11 really -- it's fairly concise. I mean, it's got
12 line 17 which I would prefer not to have but, you
13 know, it's nothing I can do about that.

14 MR. CHURCHILL: And then the State can
15 recall Mr. O'Brien?

16 MR. FELDMAN: I wasn't going to do it
17 now. But if you recall him I was going to do it
18 now. If you plan to recall him no matter what, I'll
19 do it now.

20 MR. MARSHALL: What I plan on asking him
21 is do you have personal knowledge of whether -- from
22 your attorney whether or not your attorney has had
23 discussions with the State on your behalf of which
24 you were not privy.

25 MR. FELDMAN: Your Honor, I don't know

1 why it would be considered that I would be
2 presenting testimony, because this is really already
3 in the record.

4 THE COURT: If it's a stipulation
5 between the parties that you've agreed on, I'm not
6 so sure he would lose his right.

7 MR. CHURCHILL: Your Honor, he's
8 introducing evidence that the solicitor agrees not
9 to contest. I mean --

10 THE COURT: It's a stipulation, it's not
11 evidence he agrees not to contest.

12 MR. CHURCHILL: Right. Well, I mean,
13 it's just like if he --

14 THE COURT: It's as if he's introducing
15 it, too, when it's a stipulation.

16 MR. CHURCHILL: It's as if he had an
17 expert, and instead of calling the expert, he got
18 Cameron to stipulate to the expert's report. So
19 it's still defense evidence, it's just a stipulation
20 because Cameron's agreed not to make him call the
21 witness.

22 MR. FELDMAN: But that's the trade-off.
23 I mean, it really shouldn't be evidence when you
24 tell the circuit judge this is the agreement.

25 MR. CHURCHILL: But you're using it as

1 part of the --

2 MR. MARSHALL: To try to show that he's
3 lying.

4 MR. FELDMAN: But, I mean, that's the
5 trade-off. I mean, I know that if I called you I'd
6 have to wait until tomorrow.

7 THE COURT: No. I'm inclined to agree.
8 If you want to wait -- no, you're introducing, I
9 think that's an appropriate analysis.

10 MR. FELDMAN: Okay.

11 MR. MARSHALL: You're going to call
12 witnesses anyway.

13 MR. FELDMAN: Yeah, I'm going to call
14 witnesses. I'm just worried about the directed
15 verdict.

16 THE COURT: Apparently you're not sure
17 what I was talking about anyway, I can tell by
18 looking at your face.

19 MR. MARSHALL: Not on the directed
20 verdict.

21 THE COURT: You might as well forget
22 that issue.

23 MR. FELDMAN: Well, teach us.

24 THE COURT: If you introduce evidence
25 into the case in chief, then that precludes a

1 directed verdict at that stage until after your
2 presentation of the case.

3 MR. FELDMAN: I didn't know that.

4 THE COURT: A lot of people have lost
5 that in the jurisprudence of this state, but that's
6 the law. As a matter of fact, if you present
7 witnesses after the denial of directed verdict then
8 the denial at the conclusion of their case is
9 waived, any challenge that is waived by presenting
10 witnesses on your part.

11 MR. FELDMAN: But I could --

12 THE COURT: So corollary to that is if
13 you introduce evidence into the case during their
14 case, then you're losing the right to contest the
15 denial at that point.

16 MR. FELDMAN: But I think that --

17 THE COURT: But it would be
18 appropriate --

19 MR. FELDMAN: I'm sorry.

20 THE COURT: Go ahead.

21 MR. FELDMAN: But I could make my motion
22 just at a later time in the trial?

23 THE COURT: Absolutely. At the
24 conclusion of your case you have the right to do
25 that.

1 MR. FELDMAN: I would like to publish it
2 now.

3 THE COURT: Okay. You have the right to
4 make the motion now. I mean, at the conclusion of
5 their case you still should make the motion for the
6 record and everything.

7 MR. FELDMAN: And I wouldn't lose the
8 right to make it later?

9 THE COURT: No, absolutely not. But
10 that may be one of the reasons why the motion would
11 be denied.

12 MR. FELDMAN: Thank you. I appreciate
13 that, your Honor.

14 MR. CHURCHILL: The witness is in the
15 courtroom right now. Does that present a problem?

16 THE COURT: I'd ask him to be removed.

17 MR. FELDMAN: There's already a
18 sequestration order.

19 MR. CHURCHILL: I'm talking about Mark
20 O'Brien.

21 THE COURT: No, about the prior witness.

22 MR. CHURCHILL: I just wanted to point
23 that out, make sure we don't have a problem. I
24 would argue that it's not a problem.

25 THE COURT: I think it's probably more

1 appropriate that he hear the publication, as a
2 matter of fact, in light of your recalling him
3 asking questions about that publication.

4 MR. MARSHALL: May I have just a moment
5 to talk to Dirk Kitchel who is Mr. O'Brien's lawyer?
6 It may help clarify some of this. I mean, it may
7 not be necessary to call O'Brien. If Dirk says,
8 "Yeah, he knew that," then, you know, I'll trust
9 Dirk's recollection of the thing.

10 THE COURT: But then are we going to
11 call him?

12 MR. MARSHALL: Probably wouldn't.
13 Probably wouldn't need to. Can I just speak to Dirk
14 for a minute?

15 THE COURT: Is he here?

16 MR. MARSHALL: He's here.

17 THE COURT: Where is he?

18 MR. MARSHALL: He's back there.

19 THE COURT: Okay.

20 (Pause in proceedings)

21 MR. MARSHALL: I talked to Dirk and Dirk
22 said, "Yeah, we had a discussion about you trying to
23 help him before the probation revocation in his
24 presence," so he was there for that. And Dirk was
25 saying, you know, when Stanley was questioning him

1 he was saying, no, I don't have any firm deal. You
2 know, I don't have any firm deal.

3 THE COURT: I just saw him walk out of
4 the courtroom. He knows not to leave, doesn't he?

5 MR. MARSHALL: Who, Mark O'Brien?

6 THE COURT: Yeah.

7 MR. CHURCHILL: He's right there.

8 MR. MARSHALL: So I'm not going --

9 THE COURT: Mr. O'Brien, please don't
10 leave the courtroom until I direct you otherwise.

11 MR. MARSHALL: I don't think recalling
12 is going to do anything. You can go ahead,
13 introduce that down where the Judge says, "But you
14 can't guarantee him anything?" And I said, "No,
15 sir."

16 MR. FELDMAN: Is Dirk still here? I
17 might want to call Dirk to say, yeah, my client was
18 there.

19 THE COURT: Go see if he's out there.
20 Is he still here?

21 (Pause in proceedings.)

22 THE COURT: Are you ready to proceed,
23 Mr. Feldman?

24 MR. FELDMAN: Yes, your Honor. Thank
25 you very much. I'm just going to publish.

1 **THE COURT:** Anything you would do in
2 that regard would be in your case anyway.

3 **MR. FELDMAN:** Yes.

4 **THE COURT:** I mean, you can't do that in
5 their case.

6 **MR. FELDMAN:** Yes, sir. Thank you.

7 **THE COURT:** Okay. Bring the jury in,
8 please.

9 (Jury present.)

10 **THE BAILIFF:** Jurors all present, your
11 Honor.

12 **THE COURT:** Okay. Thank you. Please be
13 seated. Yes, sir, Mr. Feldman.

14 **MR. FELDMAN:** Thank you very much. Your
15 Honor, we have agreed that I will be permitted to
16 read to the jury lines 4 through 22 of a proceeding
17 in this matter in front of Judge Edward Cottingham.
18 And if it please the Court, I'm ready to do that.

19 **THE COURT:** Yes, sir. Go ahead. It's
20 my understanding the parties have stipulated to the
21 publication of this testimony?

22 **MR. MARSHALL:** That's correct, your
23 Honor.

24 **THE COURT:** Okay. Ladies and gentlemen,
25 a stipulation is just an agreement between counsel

1 that certain information is as counsel is going to
2 state. You should treat those facts as having been
3 proved and consider them in any way you so desire
4 and deem appropriate during your deliberations.

5 Go ahead, sir.

6 MR. FELDMAN: Thank you, your Honor.
7 I'm going to do it just like it's in the transcript,
8 I'm going to call out the name of the speaker and
9 then read the lines.

10 "MR. MARSHALL: With Mr. O'Brien there
11 is an agreement that he is on probation now
12 for failure to stop for a blue light. And
13 the agreement that we have with him is that
14 we are going to try to prevent him from
15 being -- his probation being revoked. I
16 think he has four months remaining. He's
17 concerned about a criminal domestic violence
18 guilty plea that he entered, magistrate
19 level, recently. He's afraid that that may
20 cause his probation to be revoked and that he
21 may --

22 "THE COURT: You have offered to use
23 your influences to keep it from being
24 revoked?

25 "MR. MARSHALL: Yes, sir.

1 "THE COURT: But you obviously can't
2 guarantee that?

3 "MR. MARSHALL: No, sir.

4 "THE COURT: That's the judge's
5 decision.

6 "MR. MARSHALL: But I have offered to
7 use our full power."

8 Thank you, your Honor.

9 THE COURT: Okay. Call your next
10 witness, sir.

11 MR. MARSHALL: Antwan Venning.

12 THE CLERK: Please raise your right hand
13 and place your left hand on the Bible.

14 (Antwan Venning, called as a witness by
15 the State, having first been duly sworn,
16 was examined and testified as follows:)

17 THE CLERK: Please be seated. Please
18 state your full name and spell your last name for
19 the record.

20 THE WITNESS: Antwan Venning,
21 V-e-n-n-i-n-g.

22 THE CLERK: Thank you.

23 DIRECT EXAMINATION

24 BY MR. MARSHALL:

25 Q. Mr. Venning, how old are you, sir?

1 A. I'm 22.

2 Q. What's your educational background?

3 A. Well, I got a GED when I was 16. Then I got
4 auto body trade, plus I have a year and a half of
5 college, technical college at Midlands Tech up in
6 Columbia, South Carolina.

7 Q. What sort of work background do you have?

8 A. Well, I worked for Jiffy Lube, I worked for
9 two body shops, one down here in South Carolina on
10 North Meeting Street, and I worked for Denton's
11 Shipyard. And I worked for a company called DDI,
12 Incorporated which we sold wholesale items. I also
13 worked for the Charlotte Coliseum part-time, and I
14 also worked at a Grease Monkey up in Charlotte,
15 North Carolina, also, and worked for my
16 grandfather's company up in Virginia.

17 Q. Are you married?

18 A. No, sir.

19 Q. Do you have any children?

20 A. No, sir.

21 Q. Were you convicted in 1993 of armed robbery?

22 A. Yes, sir.

23 Q. Have you entered into any negotiations with
24 the State, that being the solicitor's office or any
25 state organization, for any agreements to assist you

1 in any way prior to your testimony in this case?

2 MR. FELDMAN: Your Honor, may we
3 approach, please? I've got a matter of law.

4 THE COURT: Yes.

5 (Whereupon, a conference was held at
6 side bar.)

7 BY MR. MARSHALL:

8 Q. What I was asking you before the brief
9 intermission, have you been told prior to your
10 testimony here today that the solicitor's office
11 would request that the parole board not revoke your
12 remaining time on your armed robbery sentence?

13 A. Yes.

14 Q. Have you ever been involved in the sale of
15 drugs, Mr. Venning?

16 A. Yes, sir.

17 Q. What type of drugs?

18 A. Crack.

19 Q. This has been marked State's Exhibit 62. Are
20 you able to identify what is shown in that
21 photograph?

22 A. Yes, sir.

23 Q. What is shown in that photograph?

24 A. It's my friend, Peanut, Kenneth Washington.

25 MR. MARSHALL: Move to introduce Exhibit

1 62. May I publish it to the jury, your Honor?

2 MR. FELDMAN: No objection, your Honor.

3 THE COURT: Exhibit 62 into evidence
4 without objection, photograph.

5 (Entered into evidence was
6 State's Exhibit 62.)

7 BY MR. MARSHALL:

8 Q. The person you identified, your friend,
9 Peanut, Kenneth Washington, was he ever involved
10 with you in the sale of drugs?

11 A. Yes, sir.

12 Q. What type of drug?

13 A. Crack cocaine.

14 Q. Take yourself back, please, to the night of
15 July the 18th, the Thursday night, and morning of
16 July 19th, which was a Friday morning, 1996. Can
17 you tell the ladies and gentlemen of the jury what
18 you were doing in the late night and early morning
19 of those two days?

20 A. Well, late night that night we was at home
21 'cause we stayed together, me and Peanut and his
22 girlfriend and my girlfriend, all four of us lived
23 together in an apartment. And prior to us leaving
24 the apartment we all had dinner together, you know,
25 we talked and, you know, did the usual thing that we

1 did at night, you know, before we left.

2 But that night we didn't leave until about 2
3 o'clock, 2:30 that morning. And then we went --
4 first we left and went down to Star Road in
5 Driftwood Apartments and we stayed down there for a
6 little while. Nothing was happening, so we went to
7 Liberty Park off Rivers Avenue to that little green
8 house where we always go at late night. And so we
9 went there, we got there about -- I'd say about 3
10 o'clock. And we was out there all night until
11 about -- I'd say about 5:45, we was out there
12 hustling, selling crack.

13 And this car, this white fellow pulled up in
14 the Amoco and I went to serve him, sell him some
15 crack. And so when I left I went down the street
16 and I sold him the crack. And I came back, he
17 dropped me off on Rivers Avenue, and when I came
18 back I didn't have any more crack, so being that I
19 didn't have any more I knew that Peanut -- I didn't
20 know if Peanut had any more or not, but I knew I
21 didn't have any more. And so I called him from
22 Rivers Avenue. And he didn't answer me. So I
23 called him again. He still didn't answer me, which
24 I know he had -- I know he heard me.

25 So being that he didn't answer me, I walked

1 over there toward him and there was little crowd
2 over there. So when I got over there he was talking.
3 to this fellow, and he was talking about -- when I
4 got up to him I said, "Man, I ain't got no more
5 crack. What's going on?" You know, "I'm ready to
6 go." He was like, "Man, that fellow right there,"
7 right there, he was talking to him. He said, "Man,
8 this fellow right here talking about I sold him some
9 bad crack." I'm like, "Man, you know we been out
10 here all night long. If we going to do something
11 like that, we would have sold it and left right then
12 before anybody came back, you know, nobody's stupid
13 doing anything like that." So he was like -- he had
14 \$20 in his hand. So I'm like, "Man, let's go, man,
15 let's get from 'round here." So I took the \$20 out
16 of his hand.

17 And then when I took the \$20 out of his hand
18 I tried to walk off. That's when that fellow right
19 there, he pushed me. And he said, "You all ain't
20 going nowhere. You give me my money because you
21 sold me some bad dope." So I'm like, "Man, I don't
22 know what you talking about, man." I said, "I ain't
23 let nobody sell you no bad dope, because we been
24 selling dope, we've been down here all night long."
25 So when I was walking that's when I told Peanut, I

1 said, "Man, let's go, man."

2 When I told him that, that's when I walked
3 off and I was getting -- I got in my truck. When I
4 got in my truck, I was getting ready to open the
5 door and I looked up, that's when I -- when I looked
6 up, Peanut was almost to the door. And when I
7 looked up getting ready to press the unlock button I
8 saw him shoot and he started firing the gun. He
9 shot two rounds. When he shot two rounds -- when he
10 shot the rounds, I jumped out of my truck and I fell
11 on the ground in the middle of Target Street and I
12 dropped my car keys on the ground.

13 Then when I jumped up and looked back I saw
14 Peanut, he went toward the end -- the other way to
15 like the south end of Target Street, running toward
16 the south end. And that was the last time I saw him
17 because after that I started running and I jumped
18 the gate. And I ended up running behind this house.
19 And I ended up when I went behind that house I
20 jumped another gate and ended up into an empty lot.

21 And so when I got in the empty lot I started
22 running towards Rivers Avenue. When I got towards
23 Rivers Avenue, I ran across Rivers Avenue across
24 where the -- where there used to be like I guess it
25 was an old supermarket or something over there, it's

1 closed down. And so when I got over there, as soon
2 as I got across the street I heard two more shots.
3 And then I started running faster then 'cause I
4 thought, you know, the person whoever was shooting
5 was probably still behind me. So that's when I ran
6 behind -- there's a little video store over there, I
7 can't remember the name of it, but I ran behind it.

8 And then I came back out from -- I stayed
9 back there for about two minutes and I came back
10 from behind the video store and that's when I ran
11 into the open parking lot going towards back where
12 everything happened, but I was on the other side of
13 Rivers Avenue.

14 And when I got like into the middle of the
15 parking lot I seen a fellow that was out there, his
16 name was Peter and, you know, we always used -- we
17 knew him, I knew him, 'cause, you know, I guess it
18 was his yard. But he saw -- he saw me, he waved me
19 back across. He said, "Come on back across, man,
20 they're gone." So when I ran back across and got
21 over there I said, "Man, I'm going to call the
22 police." And he said -- well, somebody -- he told
23 me somebody had done called the police, but I was
24 going to make sure that they was coming.

25 So I ran in the Amoco gas station, and I had

1 my shirt off because I had took my shirt off because
2 I had a white striped shirt, and when I was running
3 I took it off because I know that being that it was
4 white, you know, if they was chasing me they would
5 be able to see me in the dark so I took it off so I
6 could kind of camouflage myself. So I ran in the
7 Amoco, I had my shirt off. And then I told the lady
8 there, you know, asked her if I could use the
9 telephone because somebody tried to rob us, you
10 know, they was shooting at us. So she gave me the
11 phone. Well, she dialed the phone, she dialed 911,
12 and gave me the phone. And I talked to the police
13 dispatcher, I gave her my name and everything and I
14 told her what was going on.

15 So after that I left and you ran back over
16 there towards Peter and them in the little yard
17 where the green house is at. And Peter told me,
18 "You going to wait for the police?" I said, "Man,
19 I'm not waiting for the police, I'm getting from
20 'round here." That's when he told me "Man, I think
21 they shot your tire out on your truck."

22 So I ain't really paying attention to him, so
23 I just ran. And when I got to the truck, I heard my
24 left -- my right back tire, I heard air leaking out
25 of it. I looked at it, but I couldn't see no hole.

1 And I looked at my window, that's when I realized my
2 window had bullet holes in it, my side window. Then
3 I ran to the back of the truck to go get back into
4 the passenger side -- I mean, to the driver's side,
5 'cause that's when I realized my back window had
6 bullet holes in it, too.

7 And then I was looking for my keys, I
8 couldn't find them. I looked inside the truck, they
9 wasn't in there. I realized when I had jumped out
10 the truck I had fell in the middle of the road, so
11 when I looked in the road the keys was still there.
12 So I picked the keys up, I got in my truck and I
13 left.

14 Then when I got home my girlfriend and
15 Peanut's girlfriend was there and she asked us --

16 MR. FELDMAN: Objection, your Honor.
17 Hearsay.

18 THE COURT: Sustained.

19 BY MR. MARSHALL:

20 Q. Don't state what anybody told you. You can
21 say what you did as a result of any conversations.

22 A. Huh?

23 THE COURT: Please refrain from stating
24 what someone else told you, sir, but you can testify
25 as to what you did as a result of some conversation

1 without referring to that conversation. Go ahead,
2 sir.

3 BY MR. MARSHALL:

4 Q. Go ahead and continue.

5 A. I don't understand.

6 THE COURT: Just don't refer to what
7 someone told you.

8 THE WITNESS: I didn't say anything.

9 THE COURT: He objected because he felt
10 you were about to. So just refrain from saying
11 anything that anyone told you. But you can say why
12 you acted as you did.

13 BY MR. MARSHALL:

14 Q. What did you say when you got home?

15 A. I got in the house and they were like, "Where
16 Peanut at?" And when they looked at me they knew
17 something had happened because I had my shirt on
18 backwards and I was sweating. "What happened?"

19 MR. FELDMAN: Your Honor, same
20 objection. I mean, he's just not....

21 THE COURT: Sustained.

22 BY MR. MARSHALL:

23 Q. Don't state what anybody else said, but you
24 can state what you did when you got home. Okay?

25 A. Oh, okay. All right.

1 **THE WITNESS:** That's what I was saying I
2 didn't understand.

3 **THE COURT:** Okay. Go ahead.

4 **THE WITNESS:** So, well, after that,
5 after I got home I talked to them and then I took --
6 I was -- I had left and I went and called a friend
7 of mine, see if he can come around and pick me up to
8 see if we can find him because I didn't want to take
9 my truck back around there.

10 **BY MR. MARSHALL:**

11 Q. Go find who?

12 A. Peanut.

13 Q. Did you not realize that Kenneth had been
14 shot?

15 A. No, I didn't know. Because we had been in
16 stuff like this before, not shootouts or nothing
17 like this but, you know, we had did stuff and had
18 split up at certain times and ended up meeting up,
19 you know.

20 Q. So you were going to go back and look for him
21 with somebody else. Okay. Continue.

22 A. So a person that showed up, I waited for that
23 person for about -- from about -- for about four
24 hours because he never showed up. So it was
25 about -- I'd say about 12:00, 11:30, 12 o'clock I

1 ran some bath water for myself and I got in the
2 bathtub. And my girlfriend was in the bathtub.
3 Well, I was in the bathtub and she was in the
4 bathroom with me and she was talking to me, she was
5 trying to calm me down because I was -- you know, I
6 just didn't know what to really do, you know, I was
7 still scared, I was still nervous. And she was
8 trying to calm me down.

9 And we was in there for about ten minutes and
10 that's when Peanut's girlfriend knocked on the door
11 and said that she saw on the news --

12 MR. FELDMAN: Objection, your Honor.

13 THE COURT: Sustained.

14 BY MR. MARSHALL:

15 Q. Don't state what anybody else told you. You
16 can state what you learned while you were in the
17 bathroom.

18 A. Well, I learned that somebody had got shot
19 on -- in North Charleston, but they didn't say what
20 part, what area it was in. And so when I realized
21 that, that's when I immediately, you know, went
22 outside. And being that my tire was flat I had to
23 change it. Well, I didn't change it, I put on my
24 clothes and everything before I went outside, after
25 I found out somebody had got shot. So I put on my

1 clothes, went outside and changed my tire on my
2 truck and put the spare on it.

3 And then after I put the spare on it, that's
4 when I told my girlfriend and his girlfriend come on
5 with me 'cause I was going to his grandmother house
6 at first, but I remembered that, you know, you
7 shouldn't do that, you should always go straight to
8 the police.

9 You know -- let me start now. First I
10 went -- after I changed the tire I went straight to
11 the area where the scene happened, where the crime
12 scene happened, and took my truck down there 'cause
13 it was already shot up and everything, I didn't
14 care. But I just had to find out if it was him for
15 sure, or if it was him or not, you know, so I went
16 'round there.

17 And when I got 'round there I seen this
18 fellow, I can't remember his name, I think his name
19 was Lenny, and when I got 'round there I asked him
20 if somebody had got shot.

21 MR. FELDMAN: Objection.

22 THE COURT: Sustained. Don't refer to
23 anything anyone said.

24 BY MR. MARSHALL:

25 Q. What did you learn while you were there?

1 A. I learned that Peanut was the one that had
2 got shot and I learned that he had died, he had got
3 killed. So immediately when I learned that I really
4 was in shock then 'cause I couldn't believe it. So
5 after that I went and got on the Mark Clark and I
6 was going straight to his grandmother house to let
7 them know what had happened. Then I remember that
8 you shouldn't do that, you know, always go to the
9 police first before, you know, you go and tell their
10 family. So before I got off -- before I got across
11 the bridge to go to Mt. Pleasant on the Mark Clark,
12 I jumped off on the Virginia Avenue exit and I went
13 and I got off and went straight to Charleston County
14 Police Department.

15 And when I got there I asked them if they
16 were handling the case and I found out that they
17 weren't, that they were not, and so they referred me
18 to the North Charleston Police Department. And so I
19 went up there, and when I got up there I seen, you
20 know, a lot of people that was out there that was
21 leaving, I guess they had gave their statements or
22 whatever. I seen one fellow, he told me --

23 MR. FELDMAN: Objection, your Honor.

24 THE COURT: Sustained.

25 THE WITNESS: I learned that they were

1 looking for me, that the North Charleston Police
2 Department were looking for me. So I went in there,
3 I went and parked my truck and went inside and
4 that's when I gave my statement.

5 **BY MR. MARSHALL:**

6 Q. When you gave that statement, did you give
7 the police an identification of the man, a
8 description of the man that you had seen shoot
9 Kenneth Washington?

10 A. Yes, sir.

11 Q. Are you able to remember without looking at
12 your statement exactly what that description was, or
13 do you need a copy of your statement?

14 A. I might need a copy of the statement.

15 Q. Take a look at that and tell the judge if
16 that is in fact the statement that you gave on July
17 the 19th regarding the murder of Kenneth Washington.

18 A. Yes, this is the statement.

19 **THE COURT:** Okay.

20 **BY MR. MARSHALL:**

21 Q. What is -- go just to the part where you give
22 the description of the murderer and state what you
23 told the police the description of the murderer was.

24 A. This man is a black male about 30 to 35 years
25 of age, five-nine to five-ten in height weighing

1 about 180 to 190 pounds. He was wearing a
2 multicolored rainbow striped shirt and dark pants.
3 He has a mustache and light beard around his face.
4 That's it.

5 Q. Did you tell the police that murderer's name?

6 A. No, 'cause I didn't know his name.

7 Q. Do you see here in court today the person
8 that you saw shoot Kenneth Washington?

9 A. Yes, sir.

10 Q. Where is that person?

11 A. Right there (indicating).

12 Q. Do you have any doubt about that?

13 A. No, sir.

14 Q. You gave the police a description, in your
15 description you also described a shirt. This is
16 what's been marked State's Exhibit 60. Are you able
17 to identify this exhibit?

18 A. Yes, sir.

19 Q. What is that?

20 A. That's the shirt that the suspect was wearing
21 the night.

22 Q. At the time that he shot Kenneth?

23 A. Yes, sir.

24 Q. How was the lighting out there -- take your
25 time, Mr. Venning.

1 (Brief pause in proceedings.)

2 Q. Are you able to go forward now?

3 A. Yes, sir.

4 Q. How was the lighting out there at the murder
5 scene?

6 A. There was a lot of light out there because
7 the Amoco, the Amoco light shine on the yard, you
8 know.

9 Q. Was there any natural lighting, had the sun
10 started to come up at all yet?

11 MR. FELDMAN: Objection, leading.

12 THE COURT: Sustained.

13 BY MR. MARSHALL:

14 Q. Was there any natural lighting?

15 A. It was dark.

16 Q. No natural lighting?

17 A. No, sir.

18 Q. About how much time, if you're able to
19 estimate with any accuracy, if you're not then don't
20 try, but about how much time passed between you
21 walking from the location of this disagreement over
22 the crack until the shots rang out?

23 A. About -- I'd say about a minute and a half.

24 Q. A minute and a half you think?

25 A. Yeah.

1 Q. Think closely now. Are you sure?

2 A. Well, that's how long it took -- I'm not
3 really sure. It wasn't that long. It wasn't no
4 minute and a half, it couldn't have been no longer
5 than -- when I walked off Peanut came right behind
6 me, so it couldn't have been no more than about 15
7 seconds, but everything happened -- when I got there
8 and the argument was going on I stood there, you
9 know, everything jumped off like in a minute and a
10 half before I started running, before the shots hit.

11 Q. From the time that you walked away from the
12 location of this disagreement to the time that you
13 got over to your Jeep, did you stop at all?

14 A. No, sir.

15 Q. At what pace did you walk to your Jeep?

16 A. I kind of like -- I walked fast because, you
17 know, I seen all the fellows out there and I didn't
18 know who was down with who. So kind of like -- I
19 walked and kind of like trotted, you know.

20 Q. How long was it after you arrived at your
21 Jeep that the shots rang out?

22 A. I got in, I got in my truck, it wasn't about
23 five, ten seconds, 15 seconds. Between five, ten
24 seconds.

25 Q. And where was Kenneth at the time that the

1 shots rang out?

2 A. He was right -- he was approaching the
3 passenger door on my truck.

4 Q. And your car -- are you able to identify
5 what --

6 MR. MARSHALL: This is a copy of 51. Do
7 we need to get it remarked, do you think? Judge,
8 this is a copy of 51 that I was using on the
9 overhead, it's the same as 51. I was going to
10 question him about it. I don't know if we need to
11 have it remarked or not.

12 THE COURT: If you're just using it for
13 demonstrative purposes at this point that's fine.

14 MR. MARSHALL: Yeah, okay.

15 BY MR. MARSHALL:

16 Q. All right. Are you able to identify what's
17 shown on this diagram?

18 A. Uh-huh. (Affirmative response.)

19 Q. Okay. All right. Are you able to show on
20 this diagram where your Jeep was parked?

21 A. It was parked up in this area right here
22 (indicating).

23 Q. Okay. Which way was it facing?

24 A. It was facing this way towards Rivers
25 (indicating).

1 Q. So the head was facing towards Rivers Avenue?

2 A. Yes.

3 Q. The site of this disagreement over the
4 quality of this crack was approximately where?

5 A. The house right here (indicating).

6 Q. Right in front of that house?

7 A. (Nonverbal affirmative response.)

8 Q. And then point for the jury where it is that
9 you walked to your Jeep.

10 A. There's a little path right up in there. I
11 walked straight to the Jeep.

12 Q. You went around and got in on the driver's
13 side?

14 A. Yes, sir.

15 Q. Were you present for the entire discussion
16 over the disagreement on the quality of this crack
17 cocaine that took place?

18 A. I believe I got there at the tail end of it,
19 because when I called him he didn't answer. Because
20 when the fellow dropped me off and I got out the car
21 I had called him and he didn't answer me, so I
22 called him again, he still didn't answer me. That's
23 when I walked over there. And when I got over there
24 they were -- I guess they were arguing and I was
25 like "What's going on?" He's like "Man, this fellow

1 come up, he telling me I sold him some bad dope."
2 I'm like "Man, you all, you know better than that,
3 man, we didn't sell you no bad dope. We been out
4 here all night long." So he had the money in his
5 hand and I took the \$20 out of his hand. And then
6 when I was getting ready to walk off with the \$20
7 that's when that fellow right there pushed me, told
8 me "You ain't going nowhere until I get my money."
9 And that's when I was like "Man, let's go, man,
10 let's get from 'round here." So when I walked off I
11 kind of like trotted off, you know, is when it
12 happened.

13 Q. Did you hear Kenneth Washington make any
14 threats to Joe Holmes?

15 A. No, sir. 'Cause I had walked off, he was
16 behind me, and I wasn't paying attention. I was
17 just scrambling to get from 'round there. I didn't
18 hear him say nothing.

19 Q. So you didn't make any threats?

20 A. Who?

21 Q. You.

22 A. No.

23 Q. Did you see Kenneth Washington make any
24 physical movements while he was in this discussion
25 with Joe Holmes?

1 A. He was just standing there. He was just
2 standing there, he had the money in his hand, and he
3 had a piece of I guess the fake crack in his hand
4 'cause he had showed it to me. I took the money. I
5 was, "Man, nobody ain't selling no fake crack out
6 here 'cause we been out here all night." I was
7 like -- people was out there, it was more than just
8 us out there, you know, that was buying from us and
9 they was telling them, they were saying the same
10 thing. "Them boys been out here all night selling
11 real dope," you know.

12 Q. After Joe Holmes pushed you, did you respond
13 to him in any way?

14 A. I just said, "Man...." I just looked at him,
15 I backed up. That's when I went to Peanut and I
16 said, "Let's get from 'round here." You know,
17 that's when I walked off. I didn't respond to him
18 in no kind of way.

19 Q. Let's back just up a minute. You stated you
20 took the \$20. Who was holding the \$20 at the time
21 you took it?

22 A. Peanut.

23 Q. Kenneth Washington?

24 A. Yes, sir.

25 Q. Why did you take it?

1 A. Because I thought he was trying to give it
2 back to them, you know, so I took it. I didn't know
3 what was going on. I just seen the money and I took
4 it. That's what I thought in my mind, that they was
5 trying to, you know, take our money.

6 Q. Were you and Kenneth sharing your money that
7 night?

8 A. Well --

9 Q. Sharing your drugs and money?

10 A. We don't normally do that, but being that we
11 was in -- we had to pay rent that next day, we
12 combined what we had together. And being that I had
13 more than him, you know, I was kind of like running
14 the show, you know.

15 Q. Do you know whether Kenneth had a handgun
16 that night?

17 A. No, he didn't have no handgun. At least I
18 didn't know he did. When we went out there he
19 didn't have no gun because he would have let me knew
20 if he did have one. He didn't have one.

21 Q. At the time that you saw -- let's use some
22 photographs. If you can come on down, Mr. Venning.

23 A. (The witness complied.)

24 Q. This is marked as State's Exhibit 19. Stand
25 over on this side, please. All right. Using this

1 pointer, can you describe where Kenneth Washington
2 and Joe Holmes -- and was there anybody else
3 standing there?

4 A. I seen White Boy, some more other people,
5 young boys there that didn't need to be 'round
6 there.

7 Q. Several people standing out there?

8 A. Yeah.

9 Q. Did you know anybody else's name besides
10 White Boy?

11 A. I didn't know any of them until, you know,
12 that night. That's it.

13 Q. All right. Using this photograph, are you
14 able to describe where the defendant and Kenneth
15 Washington were standing at the time they were
16 talking about the quality of the crack?

17 A. This exactly how it look when I got out of
18 the car. When I called him this how far, it's about
19 the same distance from my car when he didn't answer.

20 Q. You got out of the car on Rivers Avenue?

21 A. Uh-huh. (Affirmative response.)

22 Q. And this picture is taken -- basically taken
23 from Rivers Avenue?

24 A. This how it look when I call him. They was
25 standing right up in here, in this area in here

1 (indicating), talking. But I didn't know what they
2 was talking about, I just got out of the car.

3 Q. As you walked across there, about how far,
4 how many steps behind you would you estimate that
5 Kenneth was?

6 A. When?

7 Q. As you stated that you started to walk
8 towards your Jeep, you stated that you started to
9 walk first; is that correct?

10 A. Yes, sir.

11 Q. Did you look back to see about how far behind
12 you --

13 A. At first when I walked off he was still
14 standing there. And then when I got to my Jeep -- I
15 never looked back, really, I never looked back. I
16 didn't see him coming until I looked out the window
17 of my Jeep, then when I looked out the window, as
18 soon as I looked out the window he was approaching,
19 that's when the -- that fellow right there start
20 shooting.

21 Q. Are you able to tell where Mr. Holmes was
22 standing approximately at the time that he opened
23 fire?

24 A. Not from this picture here. It was like up
25 in here.

1 Q. All right. Mr. Venning, you stated that that
2 photograph does not really show the location where
3 you remember Mr. Holmes standing at the time he was
4 firing. This photograph is marked as State's 63.

5 Does this --

6 A. He was in this corner here (indicating).

7 Q. You think he was standing in that area?

8 A. Because the path right over there, 'cause my
9 truck was parked right there by that tree right here
10 (indicating).

11 Q. Okay. At the time that you were out there,
12 was the condition of the grass as this is or was it
13 any different?

14 A. It didn't look like that at night. It wasn't
15 that high, it was a little lower.

16 Q. Okay. This photograph is marked State's 46.
17 Are you able to determine on this photograph the
18 approximate location of where your Jeep was parked?

19 A. Right there (indicating). When I jumped out
20 of the road, I fell right there. When he started
21 shooting I jumped out and fell right in over here in
22 the road because I broke my keys, I had a lock, an
23 electronic lock I used to lock my doors with, and it
24 had broke when I fell on it. I had the keys in my
25 hand, they broke in the middle of the road.

1 Q. At the time that the shots rang out, did you
2 see Kenneth Washington move in any direction?

3 A. He went towards this way (indicating) and
4 shots rang out. I didn't -- when the shots rang
5 out, I jumped out. When I hit the ground, that's
6 when I seen him -- when I got up, that's when I seen
7 him going that way.

8 Q. Was he running or was he walking or what was
9 he doing?

10 A. He was running.

11 Q. This is marked State's Exhibit 47. Do you
12 see in that photograph the path that you referred to
13 earlier?

14 A. Right there.

15 Q. Is that the path you all followed back to the
16 Jeep?

17 A. Yes, sir.

18 Q. On that photograph the Jeep would have been
19 where?

20 A. Right there (indicating).

21 Q. This is marked State's Exhibit 27. Are you
22 able to identify what's shown in this photograph?

23 A. It's my truck.

24 Q. That's your Jeep?

25 A. Yeah.

1 Q. When you got back to the Jeep after you had
2 been running and called the police and you got back
3 to it, do you remember seeing -- do you know whether
4 or not there were bullet holes in the glass?

5 A. When I got -- I didn't realize bullet holes
6 was in it until I got in it, until I got close to it
7 and I heard the air leaking out of the tire. When I
8 saw this hole, I saw -- I realized -- that's when I
9 looked and I saw this window had a bullet hole in
10 it. But I didn't know the back window was broken
11 out until I walked around to go get in the front. I
12 looked at it, I was hurt, but I didn't even care
13 because I was still scared.

14 Q. Now, which tire is it that had the bullet in
15 it?

16 A. This one (indicating). This is the tire.
17 But it's got the spare on it now, I had changed it.

18 Q. Did the police inspect -- do you know whether
19 the police inspected your Jeep when you drove it to
20 the police station?

21 A. Yes, sir. I believe so. I believe this is
22 at the police station.

23 MR. FELDMAN: Your Honor, may I ask what
24 number that Exhibit was that was just taken off?

25 THE COURT: Yes, sir.

1 MR. MARSHALL: That's 27.

2 MR. FELDMAN: Thank you very much.

3 BY MR. MARSHALL:

4 Q. All right. Are you able to orient yourself
5 on this diagram as to where things are located?

6 A. Uh-huh. (Affirmative response.)

7 Q. All right. Can you describe, please, where
8 your Jeep was?

9 A. Right here (indicating).

10 Q. With the nose facing towards Rivers?

11 A. Yeah.

12 Q. Okay. And as the shots rang out, describe
13 where it is that you went.

14 A. I went and jumped this gate right up in here
15 (indicating) and I ran through here (indicating) and
16 jumped that gate right there (indicating) and kept
17 running.

18 Q. Speak up a little bit, please.

19 A. I kept running and jumped that gate. I don't
20 know if there's a gate right there because there's
21 an empty lot, that's where I ran out this way
22 (indicating) towards the video store where I was
23 going across Rivers. I ran in this same direction
24 right here (indicating) and I got -- when I got
25 across Rivers I ran behind the video store, then

1 when I ran behind the video store that's when I
2 heard two more shots and I stayed behind the video
3 store for about --

4 Q. Speak up.

5 A. I stayed to the video store for about a
6 minute and a half to two minutes, that's when I ran
7 back in the middle of the parking lot of the -- of
8 where the video store was where the old Bi Lo -- I
9 don't know what it was, I can't really say, but
10 that's when I ran in that middle of the parking lot
11 and I looked across the street and I saw the fellow,
12 Peter, he was waving me back across the street
13 saying "Man, come on back across because they gone."

14 MR. FELDMAN: Objection, your Honor.

15 THE COURT: Sustained.

16 THE WITNESS: That's when I find out
17 that the people were gone that was trying to kill
18 us, I mean, killed my friend, because he was
19 standing right here (indicating).

20 BY MR. MARSHALL:

21 Q. Peter was?

22 A. Yeah. He was standing right here
23 (indicating) when I saw him, 'cause I was right
24 directly across the street from him.

25 Q. And where is it that you used the telephone

1 to call the police?

2 A. I ran right here in this Amoco right here
3 (indicating). I ran across the street and went
4 straight over there.

5 Q. Okay. You may sit down again. Thank you.

6 A. (The witness complied).

7 MR. MARSHALL: Your Honor, I move that
8 those exhibits that we just covered be introduced
9 into evidence.

10 MR. FELDMAN: No objection, your Honor.

11 THE COURT: Okay. Into evidence without
12 objection.

13 (Entered into evidence was
14 State's Exhibit 19.)

15 (Entered into evidence was
16 State's Exhibit 46.)

17 (Entered into evidence was
18 State's Exhibit 47.)

19 (Entered into evidence was
20 State's Exhibit 63.)

21 BY MR. MARSHALL:

22 Q. Did you see anybody else fire any shots at
23 Kenneth other than Joe Holmes?

24 A. No, sir.

25 MR. MARSHALL: If I might have just a

1 minute, your Honor, to review my notes, I think I'm
2 about done.

3 (Brief pause in proceedings.)

4 **BY MR. MARSHALL:**

5 Q. Let me ask you this: Were you -- did you
6 have knowledge that there was a shotgun in the back
7 of that Jeep?

8 A. Yes, sir. In the back, all the way in the
9 back.

10 Q. What did you know about that? How did that
11 come to be in your Jeep?

12 A. Well, earlier that night he purchased it and
13 we put it in the back of my truck.

14 Q. "He" being who?

15 A. Kenny. He purchased it for \$20; we put it in
16 the back of my truck.

17 Q. And when you state "the back," do you mean
18 close to the rear hatch?

19 A. Yeah, in the back. That's where you open it.

20 Q. Do you mean the back seat, or do you mean the
21 far back?

22 A. The back, in the back, the far back.

23 Q. Do you have any knowledge as to whether or
24 not the shotgun was loaded?

25 A. It wasn't loaded, I know it wasn't.

1 Q. When you got into the car, were you making
2 any kind of moves for that shotgun?

3 A. No, sir. I was trying to escape.

4 Q. What was on your mind at the time you got
5 into your Jeep?

6 A. Get from 'round there, get from 'round there.
7 'Cause I could feel the tension, and all them was
8 'round there, all them live around there together
9 that was out there. There was real young boys, some
10 old fellow, some young fellows, and other fellows.
11 There was a fellow that walked up with him, that was
12 up there with him talking, I don't know who he was.
13 I wasn't taking no chances to get beat down, you
14 know.

15 Q. Do you know from your personal observations
16 how it is that Joe Holmes came to possess that
17 handgun in the first place?

18 A. No, sir.

19 Q. At the time that you walked off and said,
20 "Man, let's go," did you see him holding a gun at
21 that time?

22 A. No, sir.

23 Q. When you went back to your Jeep to get into
24 it to drive off after you had called the police, did
25 you see anybody on the ground around your Jeep?

1 A. No, sir.

2 Q. Did you notice whether or not the shotgun was
3 in your Jeep?

4 A. No, sir.

5 Q. Did you sell any fake crack that night?

6 A. No, sir.

7 Q. Did you see Kenneth sell any, to what was
8 your knowledge, fake crack that night?

9 A. No, sir.

10 Q. Okay. Thank you. They'll be some more
11 questions for you.

12 MR. FELDMAN: May it please the Court.

13 THE COURT: Yes, sir.

14 THE WITNESS: Thank you, your Honor.

15 CROSS-EXAMINATION

16 BY MR. FELDMAN:

17 Q. Mr. Venning, I'm sorry about your best
18 friend's death, I know that's not easy. That night
19 you and he, among other things, were out there
20 drinking some beer or malt liquor?

21 A. I was drinking 7-Up, he was drinking
22 Budweiser.

23 Q. All right. Kenneth was?

24 A. Yeah.

25 Q. And you all were smoking a little crack?

1 A. I don't smoke no crack.

2 Q. Neither -- Kenneth wasn't smoking crack
3 either?

4 A. Wasn't smoking no crack.

5 Q. Kenneth doesn't smoke crack?

6 A. Not to my knowledge he wasn't smoking crack.

7 Q. And you don't smoke crack?

8 A. No.

9 Q. You just deal crack?

10 A. Yeah. I dealt crack.

11 Q. Now --

12 A. I don't deal crack.

13 Q. Now, and as I understand it you were the head
14 crack dealer?

15 A. Far as I had more. If you want to put it
16 like that, yeah.

17 Q. All right.

18 MR. FELDMAN: Your Honor, may I address
19 counsel for just one second? I just want to ask him
20 something.

21 (Brief pause in proceedings.)

22 BY MR. FELDMAN:

23 Q. Now, isn't it true that you traded crack for
24 the shotgun?

25 A. Yes, sir.

- 1 Q. Pardon me?
- 2 A. Yes, sir. A \$20 rock.
- 3 Q. But that's not what you said. You said you
- 4 paid \$20 for it.
- 5 A. It's equivalent, that's -- it was equivalent
- 6 \$20, if I would have sold it I would have got \$20
- 7 for it.
- 8 Q. All right. Okay. And you put the shotgun in
- 9 the Jeep?
- 10 A. In the back.
- 11 Q. Well, how long had you had that Jeep?
- 12 A. I had it since I think it was April. I got
- 13 it last winter, April. I don't have it anymore.
- 14 Q. So you had it about three months?
- 15 A. Yeah.
- 16 Q. Did you ever register it? 'Cause there was
- 17 not a license plate on.
- 18 A. No. I didn't have any insurance on it.
- 19 Q. Okay.
- 20 A. I registered it, I had, you know, I just
- 21 didn't have insurance on it yet.
- 22 Q. How many people were out there arguing about
- 23 the quality of the crack cocaine?
- 24 A. He was the only one.
- 25 Q. Now, I believe you stated, but correct me if

1 I'm wrong, you had gotten to the driver's side of
2 the car and then you saw that Kenneth was about to
3 get to the door so you flicked the automatic locks?

4 A. I was about to flick the automobile lock.

5 Q. That's what I'm asking you, what you did.

6 A. You said I flicked. It I said I was about
7 to.

8 Q. All right. All right. Kenneth was about to
9 reach your car?

10 A. Yeah, he was almost there.

11 Q. All right. Now, isn't it true that one of
12 you yelled to the other something like "five-oh"?
13 That's your signal, isn't it?

14 A. I don't know what you're talking about.

15 Q. Let me change gears a little bit. When you
16 were brought in to be a witness here the police
17 showed you a photo lineup; is that correct?

18 A. Yes, sir.

19 Q. And you did not identify -- you did not pick
20 anyone out of the photo lineup, did you?

21 A. I picked someone, but they told me don't say
22 it's the person unless you was a hundred percent
23 sure. And when I was looking at the photo lineup I
24 was crying, man, I was in shock. My friend got
25 killed.

1 Q. All right. You picked the wrong person,
2 didn't you?

3 A. I didn't pick nobody, 'cause they told me
4 don't say yes that's him if you're not a hundred
5 percent sure. And at the time I was crying and I
6 wasn't even probably about 75 percent sure, so I
7 just said, "We'll just do it at another time."

8 Q. Okay. Now, I want to talk to you about
9 deals. The solicitor -- you admitted that you have
10 a deal that the solicitor will ask that your
11 probation not be revoked; is that your understanding
12 of the deal?

13 A. Yes, sir.

14 Q. Okay. That's not really the whole deal
15 though, is it? There's more. Isn't it true that
16 you have an agreement -- well, strike that. Let me
17 go back just a little bit.

18 You were convicted in -- when you were 16
19 years old of armed robbery; is that correct?

20 A. I was 17.

21 Q. Well, 16 or 17. But of armed robbery?

22 A. Yes, sir.

23 Q. Pardon me?

24 A. Yes, sir.

25 Q. Okay. And you were on probation, and selling

1 crack is a clear violation of your probation, wasn't
2 it?

3 A. Yes, sir. If I got caught.

4 Q. Okay.

5 A. Then I would get violated.

6 MR. MARSHALL: I believe parole, just to
7 clarify the record.

8 MR. FELDMAN: Thank you very much.

9 THE COURT: Okay.

10 BY MR. FELDMAN:

11 Q. And if you revoked, how much time do you have
12 to serve, if you know?

13 A. Well, I can't really say.

14 Q. Okay. But, whatever it is that you have to
15 serve if you're revoked, is a lot less than if you
16 were prosecuted for distribution of crack cocaine,
17 isn't it?

18 A. I can't really say that neither.

19 Q. Well, you have an agreement that the -- that
20 you will not be prosecuted for distribution of crack
21 cocaine; do you not?

22 A. I have immunity, if that's an agreement.

23 Q. Yeah, that's fine. All right. And you have
24 immunity, or an agreement, that you won't be
25 prosecuted for illegal possession of a shotgun by a

1 felon; isn't that true?

2 A. I wasn't caught with the gun.

3 Q. You just admitted on the stand --

4 A. It was in my truck. I was --

5 Q. That was your truck.

6 A. Yeah.

7 Q. And the shotgun was in the -- your truck. I
8 mean, you're admitting all that.

9 A. But I didn't get caught. I can't get
10 prosecuted until I get caught.

11 Q. Isn't it true you're caught now but it
12 doesn't matter because you have an agreement that
13 you won't be prosecuted?

14 A. Yeah.

15 Q. So in exchange for your testimony, you --
16 you, number one, get a recommendation from the
17 solicitor to not revoke you, and you don't have to
18 get prosecuted for offenses that probably would put
19 you away for years and years and years and years.
20 True?

21 MR. MARSHALL: May we approach for just
22 a moment, your Honor?

23 THE COURT: Yes.

24 (Whereupon, a conference was held at
25 side bar.)

1 BY MR. FELDMAN:

2 Q. You said the weather was dark night. Not the
3 weather, but the lighting conditions.

4 A. It was light. It was light in the Amoco
5 station.

6 Q. I'm sorry, but I meant the nighttime, other
7 than the Amoco light.

8 A. The sun wasn't out yet.

9 Q. All right.

10 MR. FELDMAN: Nothing further, your
11 Honor.

12 REDIRECT EXAMINATION

13 BY MR. MARSHALL:

14 Q. Mr. Venning, you stated that to your
15 knowledge Mr. Washington did not -- did not do any
16 crack cocaine?

17 A. Huh?

18 Q. That Mr. Washington did not do any crack
19 cocaine on the night or the morning that he was
20 murdered; is that correct?

21 A. Yes.

22 Q. Did he do, did you see him do any kind of
23 drugs? You stated that he was drinking beer?

24 A. Sniff a little bit of cocaine, didn't smoke
25 no crack though.

1 Q. Sniffed some cocaine?

2 A. Yeah.

3 Q. Did you sniff any cocaine?

4 A. Yes.

5 Q. At the time you witnessed this murder, were
6 you under the influence of cocaine at that time?

7 A. No.

8 Q. How long had it been since you had sniffed
9 any cocaine?

10 A. Since before we first got out there. When we
11 had first got out there it was about 2 o'clock when
12 we did it. When we got out there is he we did it.

13 Q. So it had been several hours?

14 A. Yeah.

15 Q. To your knowledge, had it also been several
16 hours since Mr. Washington had snorted any cocaine?

17 A. Yes.

18 Q. Did you see him do any later after you all
19 did it when you first got out there?

20 A. No.

21 Q. Now, part of the agreement which you've
22 reached prior to giving your testimony in the case
23 is that the solicitor's office will make a
24 recommendation to the parole board that you not have
25 your parole revoked --

1 A. Yes, sir.

2 Q. -- for the actions that you took on the
3 morning of July 19th, correct, or that you not have
4 your parole revoked period --

5 A. Yeah.

6 Q. -- correct?

7 A. Yes, sir.

8 Q. Do you have any guarantee that your parole
9 will not be revoked?

10 A. No. It looks to me it's going to be revoked
11 anyway, you know.

12 Q. How much time did you do for your armed
13 robbery conviction for which you're now on parole?

14 A. Three years.

15 Q. Served three years?

16 A. (Nonverbal affirmative response.)

17 Q. Are you currently in custody?

18 A. Yes, sir.

19 Q. And why are you currently in custody now, are
20 you awaiting any hearings?

21 A. Just the parole hearing and this trial.

22 Q. Okay. All right. That's -- one second,
23 please.

24 (Brief pause in proceedings.)

25 MR. MARSHALL: That's all I have. Thank

1 you.

2 MR. FELDMAN: Nothing further, your
3 Honor.

4 THE COURT: Okay. You may step down,
5 sir.

6 Okay. Counsel approach.

7 (Whereupon, a conference was held at
8 side bar.)

9 THE COURT: Okay. Ladies and gentlemen,
10 we've reached a good stopping point in the case at
11 this time. I've got another proceeding in the
12 morning at 9:15, so I'm going to ask that you be
13 ready to go at 9:30, if you could get here a few
14 minutes before that time so we can be ready to go at
15 9:30. Please do not discuss this case in any way
16 whatsoever with anyone during the overnight. Thank
17 you and have a good night.

18 (Jury excused.)

19 THE COURT: Okay. Ill see you all
20 tomorrow. Let me know a few minutes beforehand if
21 you find anything on that firearm issue.

22 MR. FELDMAN: Yes, your Honor. Thank
23 you.

24 - - - o0o - - -

25

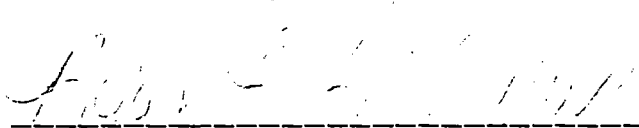
STATE OF SOUTH CAROLINA)
: C E R T I F I C A T E
COUNTY OF DORCHESTER)

I, Robin L. Keil, Registered Merit Reporter and Circuit Court Reporter, certify that the preceding pages are a true and correct transcript of the proceedings had at the aforesaid time and place.

I certify that the same was reduced to typewritten form from my original stenograph notes by computer-aided transcription.

I further certify that I am not of counsel or kin to any of the parties to this cause of action, nor am I interested in any manner in its outcome.

IN WITNESS WHEREOF I have hereunto set my hand this the 23rd day of April 1998.



Robin L. Keil, RMR
Circuit Court Reporter

STATE OF SOUTH CAROLINA) COURT OF GENERAL SESSIONS
 :
 COUNTY OF CHARLESTON) CASE NO. 97-GS-10-606

STATE OF SOUTH CAROLINA) VOLUME II
)
 -versus-) TRANSCRIPT OF RECORD
)
 JOE LEWIS HOLMES,) JURY TRIAL
)
 Defendant.) October 21, 1997

B E F O R E:

The Honorable Daniel F. Pieper

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1 (October 21, 1997.)

2 MR. FELDMAN: Your Honor, through the
3 magic of Lexus nexus I believe I have the answer for
4 you.

5 THE COURT: Okay.

6 MR. FELDMAN: Section 16-1-60 includes,
7 among other things, the crime of drug trafficking as
8 described in 44-53-370(e) 44-53-375(c) as violent
9 crimes.

10 THE COURT: Drug trafficking, yes.

11 MR. FELDMAN: Drug trafficking. Well,
12 you know, you get to some questions. I doubt that
13 this was this young man's first night out, and I
14 wouldn't mind being a solicitor on a trafficking
15 case against -- based on what I heard as the first
16 bit of evidence of what he does. Yeah, it sounded
17 all right, you can make a case for drug trafficking,
18 but the statute that refers -- that I'm going to
19 refer to next is Section 16-23-490. Additional
20 punishment for possession of firearm or knife during
21 the commission of, or attempt to commit a violent
22 crime.

23 I don't mind arguing the question of whether
24 what he is doing, what he does, is drug trafficking.
25 But this is a mandatory five-year add-on sentence

1 for possession of a firearm which specifically
2 includes a machine gun, automatic rifle, revolver,
3 pistol or any weapon which will, or is designed to,
4 or may readily be converted to expel a projectile.
5 And I would stand on that. I think I can make that
6 case. I'm happy to hand a copy up.

7 THE COURT: I'm familiar with that
8 section. Any response?

9 MR. MARSHALL: I think there's two
10 points to be made. First of all, there is no
11 evidence that he was trafficking drugs. The
12 testimony was that he and his buddy were sharing and
13 that they -- their profit that night, not counting
14 what they had paid for the drugs, that what they had
15 taken away on that was 300 bucks. His share of that
16 may be more than 150 bucks, but they were not
17 trafficking drugs that night according to his
18 testimony.

19 The other thing is that there's no evidence,
20 your Honor, that he was in possession, constructive
21 or actual possession of that shotgun while he was
22 doing this. The testimony is that that shotgun was
23 across a double vacant lot in a car, in the back of
24 a car while he was in the process of selling his
25 drugs. So I think on both counts there needs to be

1 a curative instruction on this.

2 MR. FELDMAN: Your Honor, may I be heard
3 on that?

4 THE COURT: Yes.

5 MR. FELDMAN: Your Honor, back in the
6 '80s when prosecutors started prosecuting what they
7 would call dopeless dope cases, the questions of
8 trafficking were not what you do or what you did
9 that particular night, the question was let's get
10 into the facts, and to determine what your activity
11 was and what your crime was we're going to look at
12 your past record and we're going to determine a
13 weight and what your history is. Okay? And they
14 started that with Operation Jackpot and they went on
15 and on.

16 And so the question here, and I feel like the
17 solicitor, because I'm sitting here telling you the
18 question of what he was doing that night is not a
19 question of an isolated one-night event, the
20 question is, was what this guy was doing that night
21 part of an ongoing --

22 THE COURT: Are you wanting to get into
23 that for everybody?

24 MR. FELDMAN: You mean the other
25 witnesses? No, sir.

1 THE COURT: Well, would it be
2 appropriate to do so if that's your argument?

3 MR. FELDMAN: Well, what the solicitor
4 is saying, that even though he was selling crack
5 cocaine that night, he was not trafficking. I would
6 beg to differ. I think that it was, and I think he
7 was in possession and I think --

8 THE COURT: But it was you who suggested
9 that we shouldn't get into all this other testimony
10 about what was happening other than on the day of
11 the incident.

12 MR. FELDMAN: Well, I'm just --

13 THE COURT: Are we going to get into
14 that now?

15 MR. FELDMAN: No, sir.

16 THE COURT: Would it be fair to do so if
17 you're going to interject that?

18 MR. FELDMAN: Well, maybe it wouldn't.
19 But, okay, then I will back off that and say still
20 what he was doing that night sounds like trafficking
21 in cocaine to me, trafficking crack cocaine. You
22 know, he's multiple sales all night. I mean, that's
23 a great argument and somebody ought to order the
24 transcript so that --

25 THE COURT: And you're trying to suggest

1 that he was possessing a shot -- a weapon when he
2 should not have been based on the fact that he was
3 trafficking then?

4 MR. FELDMAN: Yes, sir.

5 THE COURT: Just seems a little tenuous
6 to me. I --

7 MR. FELDMAN: Well, that was all I could
8 find.

9 THE COURT: I just don't see that that
10 would you be appropriate without revisiting our
11 earlier discussion about any activities the day
12 before also. I don't know that that much can be
13 attributed to that night's activity.

14 What kind of instruction are you looking for?
15 I might not -- it might be best just to leave it --
16 I don't know. What are you looking for?

17 MR. MARSHALL: Yeah. I think
18 something -- you know, the substance of
19 Mr. Feldman's cross-examination was that part of the
20 deal he was getting was I was foregoing a
21 prosecution of him for possession of that shotgun.
22 I think a simple statement that regarding the
23 testimony of Antwan Venning yesterday you are hereby
24 instructed that there is no law which prevented
25 Antwan Venning from possessing a shotgun.

1 **MR. FELDMAN:** Your Honor, I don't mind
2 that. May I make a suggestion as to what would be a
3 curative instruction?

4 **THE COURT:** Yes.

5 **MR. FELDMAN:** During cross-examination
6 it was brought out that part of the deal with the
7 solicitor was that they would not prosecute on the
8 distribution of crack cocaine and the possession of
9 a shotgun. Although the possession -- although the
10 distribution of cocaine is an offense that could
11 have been prosecuted, the possession by Mr. Venning
12 under our state laws was not, and I would advise you
13 to disregard that portion of the testimony.

14 **MR. MARSHALL:** I object to that, your
15 Honor, because that allows him to make an error and
16 then to reiterate a proper point because of an error
17 that he made. I think that what needs to be
18 corrected is the error. There needs to be no
19 reiteration of the proper point that he made, there
20 needs to be simply a correction of the improper
21 point which he tried to make.

22 **MR. FELDMAN:** Well, I don't want them
23 thinking that the whole thing was -- you know, it is
24 what it is. And the curative instruction needs to
25 be very specific as to the point in particular but

1 not as to the distribution.

2 THE COURT: Why don't I just say you may
3 have heard some testimony about possession of a
4 shotgun by Mr. Venning, state law would not have
5 prevented such possession?

6 MR. MARSHALL: Yes, sir. That's okay
7 with me.

8 MR. FELDMAN: Yes, sir. Thank you.

9 THE COURT: Okay. Bring the jury in,
10 please.

11 MR. CHURCHILL: Your Honor, if the late
12 juror is Mr. Robert Brown, and I don't know that it
13 is.

14 THE COURT: Who is it, Madam Clerk?

15 THE CLERK: That's him.

16 THE COURT: It's Mr. Robert Brown.

17 MR. CHURCHILL: If the late juror is
18 Robert Brown we would renew our motion that the
19 Court in its discretion remove him from this case,
20 it's early in the case, there's been no
21 deliberations, and replace him with the alternate.

22 The grounds for our motion are to ensure the
23 fairness of the trial for both sides, the State and
24 defense, that Mr. Brown be removed. He's an
25 acquaintance, a good friend with the defendant's

1 sister.

2 THE COURT: I'm prepared to go -- I'm
3 not revisiting that issue again, but I'm prepared to
4 go ahead with the alternate just because it's
5 already been 30 minutes and I'm not prepared to wait
6 any longer. I've waited 30 minutes.

7 MR. FELDMAN: Your Honor, well, you
8 know, I don't know --

9 THE COURT: I'm not revisiting it for
10 the reason they just said.

11 MR. FELDMAN: No, I understand.

12 THE COURT: I don't think that's
13 appropriate at this point.

14 MR. FELDMAN: Judge, I don't know what
15 the reason is either. I think that the selection of
16 a jury process is so important that all I would
17 offer is this: You know, Charleston's kind of a
18 strange city for traffic and bridges and things and
19 there may be a legitimate reason. You know, and I
20 think it would be unfair to upset the selected
21 jury --

22 THE COURT: Well, that's why you get to
23 make a clear and careful choice as to the alternate
24 juror also.

25 MR. FELDMAN: I understand.

1 **THE COURT:** I'm just not prepared to
2 wait. I'm not doing it for the reasons they
3 articulate, it's just that I told myself I would
4 wait 30 minutes and it's time to move on. And the
5 State knows that if somebody else has to be excused
6 because of some other problem, then the case will
7 have to be retried at another point. I'm ready to
8 go.

9 **MR. FELDMAN:** I don't want to be
10 hypertechnical with the Court. Give him three more
11 minutes.

12 **THE COURT:** I'm just ready to go. We've
13 got "X" number of witnesses that I want done by
14 12:00 and I want to keep this case moving. I want
15 your client to get his day in court, but I don't see
16 any interest advanced by waiting for a juror that's
17 not here by this point. Not only that, I have some
18 concern, this juror apparently worked all night long
19 and that raises a whole set of some concerns in my
20 mind. I mean, we want jurors that are going to pay
21 attention and be alert during the court process.
22 And that doesn't serve your client any benefit if
23 the juror's not paying attention. I'm prepared -- I
24 note what you are saying and it's been noted for the
25 record, but I'm prepared to move on.

1 Bring the jury in, please.

2 **MR. FELDMAN:** Thank you for hearing me,
3 your Honor.

4 **THE COURT:** I would note also insofar as
5 waiting, I mean I asked all the jurors to be here
6 before 9:30.

7 (Jury present.)

8 **THE COURT:** Please be seated. Thank
9 you. Ms. Prioleau, you were originally designated
10 as an alternate; however, we have been waiting for
11 one of the jurors who has yet to show, so you will
12 just assume the status of a regular juror from this
13 point on. Okay?

14 **THE JUROR:** Yes, sir.

15 **THE COURT:** Then we're ready to proceed.
16 Sorry to keep you waiting, ladies and gentlemen. Go
17 ahead.

18 **MR. MARSHALL:** Maurice Simmons.

19 **THE COURT:** Before we do this, as he's
20 coming to the stand, I want to add something further
21 about yesterday. You may have heard some testimony
22 about the possession of a shotgun by Mr. Venning.
23 State law would not have prevented such possession.

24 Come forward, sir.

25 **THE CLERK:** Place your left hand on the

1 Bible and raise your right hand.

2 (Maurice Simmons, called as a witness by
3 the State, having first been duly sworn,
4 testified as follows:)

5 THE CLERK: Please be seated. Please
6 state your full name and spell your last name for
7 the record.

8 THE WITNESS: Maurice Simmons,
9 S-i-m-m-o-n-s.

10 THE CLERK: Thank you.

11 DIRECT EXAMINATION

12 BY MR. MARSHALL:

13 Q. Mr. Simmons, how old are you, sir?

14 A. Twenty-seven.

15 Q. What's your educational background?

16 A. I finished school, high school.

17 Q. Have you lived in the Charleston area your
18 whole life?

19 A. Yes, sir.

20 Q. Do you still live in the Charleston area?

21 A. Yes, sir.

22 Q. What's your work background?

23 A. Detail work, auto detail and construction. A
24 little of everything.

25 Q. Are you married?

- 1 A. No, sir.
- 2 Q. Do you have any children?
- 3 A. Yes, sir.
- 4 Q. How many children?
- 5 A. Four.
- 6 Q. What are their ages?
- 7 A. Eight, six, four and three.
- 8 Q. Were you convicted in 1988 of stealing a car?
- 9 A. Yes, sir.
- 10 Q. Were you convicted again of that charge in
- 11 '89?
- 12 A. Yes, sir.
- 13 Q. Were you convicted in '92 of possessing less
- 14 than a gram of crack cocaine?
- 15 A. Yes, sir.
- 16 Q. Were you convicted this year of giving the
- 17 police a false name?
- 18 A. Yes, sir.
- 19 Q. Do you know the defendant in this case, Joe
- 20 Holmes?
- 21 A. Yes, sir.
- 22 Q. How do you know Joe Holmes?
- 23 A. From growing up.
- 24 Q. When did you first come to know him?
- 25 A. Ah, back in the '80s.

1 Q. Do you have any relationship with him? How
2 would you describe your knowledge of him?

3 A. Ah, hi and bye.

4 Q. Hi and bye when you would see him?

5 A. Yeah. I grow up around him, I mean....

6 Q. How frequently would you see him during the
7 course of growing up?

8 A. Not too often.

9 Q. Do you recall the night of July the 18th of
10 last year, 1996, and into the morning, that would be
11 a Friday morning, July the 19th of 1996? Can you
12 recall what you were doing at those times?

13 A. Yes, sir.

14 Q. Could you tell the ladies and gentlemen of
15 the jury, please, what you were doing the night of
16 the 18th and into the morning of the 19th?

17 A. Ah, about 3:30, 4:00 I went out to the Amoco
18 gas station on Rivers Avenue to purchase a pack of
19 cigarettes. Once I got out there, ah, I ran into a
20 couple of friends of mine and, ah, when I walked up
21 at the gas station, ah, the victim, ah, Kenneth
22 Washington, he was my home boy, Poochie. I walked
23 over, I told him, "What's up?" And we sat out
24 there, talked, drinking, whatever, cutting food.

25 And the defendant came up, purchased some

1 crack cocaine, ah, left. I would say about five
2 minutes later he came back, said it wasn't real.
3 They got in an altercation, you know, so I to broke
4 it up. At this time, ah, I left, went inside the
5 Amoco to handle a transaction. By the time I got to
6 the front door I heard some shots.

7 I went over there, I came back out, a friend
8 of mine was on the side of the building. Ah, I gave
9 him his half of the money. We went in back,
10 somebody said he had a shotgun in the back of the
11 truck. We went over to the truck, ah, one of my
12 friends went inside the truck, took the shotgun out,
13 another one shot the tire out. We went back to one
14 of my friend's house, put the shotgun up, went back
15 out to the store, got some beer, on the way back the
16 police grabbed us.

17 Q. Okay. So you got out there about you said,
18 what, 3:30 or 4:00 in the morning?

19 A. Yes, sir.

20 Q. And you said there was some of your friends
21 out there. Who would they have been?

22 A. Alexander Gaillard, William Phillips, ah,
23 Kenneth Washington, ah, a few others.

24 Q. You and Kenneth, the victim, were friends?

25 A. Yeah.

1 Q. All right. Let me show you some photographs.
2 This one's marked as State's Exhibit 66. Are you
3 able to identify the person shown in that
4 photograph?

5 A. Yes, sir. It's Alexander Gaillard.

6 Q. Okay. Does he go by any other name?

7 A. Yes, sir.

8 Q. What's that?

9 A. Mookie.

10 MR. MARSHALL: Move to introduce State's
11 66.

12 MR. FELDMAN: No objection.

13 THE COURT: State's Exhibit 66 in
14 evidence without objection.

15 (Entered into evidence was

16 State's Exhibit 66.)

17 BY MR. MARSHALL:

18 Q. This is State's Exhibit 64. Are you able to
19 identify that person?

20 A. Yes, sir.

21 Q. Who is that person?

22 A. William Phillips.

23 Q. Does he go by any other name?

24 A. Yes, sir.

25 Q. What's that name?

1 A. White Boy.

2 MR. MARSHALL: Move to enter State's 64.

3 MR. FELDMAN: No objection.

4 THE COURT: State's 64 in evidence
5 without objection. Counsel approach.

6 (Whereupon, a conference was held at
7 side bar.)

8 (Entered into evidence was
9 State's Exhibit 64.)

10 BY MR. MARSHALL:

11 Q. This is marked as State's Exhibit 65. Are
12 you able to identify the person in that photograph?

13 A. Ah, yes, sir.

14 Q. Who is that?

15 A. Antwan.

16 MR. MARSHALL: Move to introduce State's
17 65, your Honor.

18 MR. FELDMAN: Can I look at that, your
19 Honor?

20 No objection, Judge.

21 THE COURT: State's 65 in evidence
22 without objection.

23 (Entered into evidence was
24 State's Exhibit 65.)

25 BY MR. MARSHALL:

1 Q. This exhibit's marked State's 67. Are you
2 able to identify that person?

3 A. Yes, sir.

4 Q. Who is that person?

5 A. Mark.

6 MR. MARSHALL: Move to introduce State's
7 67.

8 THE COURT: Any objection?

9 MR. FELDMAN: No, your Honor.

10 THE COURT: State's 67 into evidence
11 without objection.

12 (Entered into evidence was
13 State's Exhibit 67.)

14 BY MR. MARSHALL:

15 Q. Now, you stated some people were out there in
16 the location of the Amoco and the house next door
17 when you got out there at 3:30 or 4:00?

18 A. Yes, sir.

19 Q. Were any of those people out there?

20 A. Yes, sir.

21 Q. Which ones, or all of them?

22 A. When I arrived there was William Phillips,
23 Alexander Gaillard and Antwan.

24 Q. What was your condition out there? Were you
25 doing any drugs and drinking?

1 A. Ah, I wasn't doing any drugs. I had a little
2 something to drink.

3 Q. What did you have to drink?

4 A. A beer or two.

5 Q. Now, how long had you been out there when you
6 saw this conversation between the defendant and
7 Kenneth?

8 A. Ah, it was like, um, hour, hour and a half,
9 something.

10 Q. At the time that you -- were you a witness to
11 this full conversation between the defendant and
12 Kenneth?

13 A. Yes, sir.

14 Q. And where were you positioned as you
15 witnessed the conversation?

16 A. When the argument first started I was
17 standing on the opposite side of the railing there
18 at the Amoco station.

19 Q. You were standing on the other side of the
20 rail --

21 A. Yeah.

22 Q. -- that runs between the Amoco and the house?

23 A. Yes, sir. Yeah. At the time I was standing
24 basically in the yard of the green house when the
25 argument took place, at which time words was said, I

1 tried to broke it up, and I stepped back over the
2 railing to handle my business and I heard some
3 shots.

4 Q. So at the time that this discussion was going
5 on, initially you were standing right there in the
6 presence of --

7 A. Yeah, right there.

8 Q. And then you moved over the railing?

9 A. Yes, sir.

10 Q. What did you hear said between the two
11 parties, exactly?

12 A. That the merchandise wasn't real that the
13 defendant purchased.

14 Q. You stated that you tried to break it up.
15 How did you go about trying to break it up?

16 A. I made a statement saying that he was out
17 there, you know, from the time I got out there he
18 was out there and he was doing transaction and he
19 didn't have no complaints with no other customers
20 but him, so....

21 Q. You told Mr. Holmes that?

22 A. Yeah.

23 Q. What was his response?

24 A. What I got to do with this, you know what I'm
25 saying? It was like what do I have to do with this?

1 It ain't between me and him, it's between him and
2 him, him and Peanut. And I just went on about my
3 business.

4 Q. And that's when you went over the rail?

5 A. Yes, sir.

6 Q. You say "Peanut." Who do you mean when you
7 say "Peanut"?

8 A. Kenneth Washington.

9 Q. So once you got over the rail and then you
10 turned to go into the Amoco to do a transaction as
11 you stated.

12 A. Yes, sir.

13 Q. What was going on between the defendant and
14 Mr. Washington at the time that you turned your
15 back?

16 A. Well, time I -- when I left -- when I left
17 they was still arguing, you know. I turned my back,
18 walked off, time I opened the door I heard the
19 shots.

20 Q. As you opened the door to the Amoco?

21 A. Yes, sir.

22 Q. And you stated that you went inside to do a
23 "transaction." What do you mean by that?

24 A. Drug transaction.

25 Q. Were you selling or buying?

1 A. Selling.

2 Q. What were you selling?

3 A. Crack cocaine.

4 Q. And you stated that when you came out you had
5 a friend waiting on you. Who was that friend?

6 A. Alexander Gaillard, Mookie.

7 Q. Why was he waiting on you?

8 A. Hum?

9 Q. Why was he waiting on you?

10 A. We went half and half in the transaction.

11 Q. How long did you stay in the store?

12 A. It was like five, six seconds at the most. I
13 can't recall.

14 Q. When you came out, what did you see as you
15 came out the door of the Amoco?

16 A. When I came out, I came out, walked beside
17 the building, Alexander was standing there waiting
18 on me, went behind the store, I gave him his half of
19 the money. Standing off of the cut was White Boy,
20 two other people I can't recall their names, but one
21 of them said he had a shotgun in the truck, let's go
22 get it.

23 We went over there, through this cut, through
24 this path beside the green house, went over to the
25 truck. Mookie, Alexander Gaillard, went inside the

1 truck, got the shotgun. At that time William
2 Phillips, White Boy, was standing at the rear
3 passenger side, shot out the tire.

4 Q. Where were you in relationship to William
5 Phillips at the time that he shot out the back
6 rear -- the right rear tire?

7 A. Standing at his right. I was standing at his
8 right-hand side right behind him, two to three feet
9 away from him when he shot the gun.

10 Q. Was Mookie going into the Jeep to get the
11 shotgun at the time that William was shooting the
12 tire out?

13 A. Yeah. When he discharged the firearm Mookie
14 was in the truck at the time.

15 Q. Why did you all go over to the Jeep, what was
16 the plan?

17 A. I didn't have no plan at the time. But when
18 I got out there basically my part in the role was
19 just following the crowd at the time. They already
20 had something planned by the time I came out the
21 store and which was to get the shotgun out the truck
22 and whatever else they had in the truck. So I guess
23 it was a robbery attempt or whatever you want to
24 call it.

25 Q. When you got over to the Jeep, was it just

1 you, Mookie, Alexander Gaillard and --

2 A. Yes.

3 MR. FELDMAN: Objection. Leading, your
4 Honor.

5 THE COURT: I sustain that.

6 BY MR. MARSHALL:

7 Q. It was you, and who went with you to the
8 Jeep?

9 A. It was me, William Phillips, Alexander
10 Gaillard. There was another party, I can't recall
11 the name.

12 Q. You think there may have been another person
13 that ran over there with you?

14 A. Yes, sir.

15 Q. When you got over to the Jeep, was anybody at
16 the Jeep?

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

18 Q. Was there anybody inside of it?

19 A. No, sir.

20 Q. Was there anybody standing around it?

21 A. No, sir.

22 Q. Was there anybody lying on the ground around
23 it?

24 A. No, sir.

25 Q. Did you see Kenneth Washington anywhere

1 around the Jeep when you got there?

2 A. No, sir.

3 Q. And about how long after the initial shots
4 which you heard as you went into the Amoco station,
5 about how long after you heard those shots was it
6 that you arrived at the Jeep? Are you able to give
7 any accurate -- if you're not able to give an
8 accurate estimate, don't try, but if you think you
9 are then attempt.

10 A. I can't.

11 Q. Okay. Now, this night and into this morning
12 did you ever have in your possession a gun of any
13 sort?

14 A. No, sir.

15 Q. Did you ever touch the shotgun?

16 A. No, sir.

17 Q. Did you ever touch the gun that William
18 Phillips had?

19 A. No, sir.

20 Q. Did you ever touch any other gun?

21 A. No, sir.

22 Q. So this should go without saying, did you
23 ever fire a gun?

24 A. Never did.

25 Q. Okay. After you were picked up by the

1 police, what happened next? And about how long, if
2 you're able to estimate, about how long after going
3 to the Jeep and getting the shotgun was it that you
4 were stopped by the police?

5 A. I can't recall a time.

6 Q. It was that same morning?

7 A. Yeah, it was the same morning.

8 Q. Let me back up for a second. During the time
9 that you were seeing the discussion about the crack
10 between the defendant and Mr. Washington, how were
11 the lighting conditions?

12 A. It was still dark, dusk dark.

13 Q. Was there any natural light from the sun at
14 all yet?

15 A. No, sir.

16 Q. Was there any artificial light?

17 A. No, sir.

18 Q. Was there any light being shown from the
19 Amoco over to the location of the discussion?

20 A. Yeah. The parking lot was well lit, the
21 Amoco parking lot was well lit so it had light.

22 Q. What effect was that having on the area in
23 the front of the green house, if any?

24 A. It would light it up.

25 Q. It was lighted up?

- 1 A. Yeah.
- 2 Q. All right. Once the police took you into
3 custody, what did they do with you?
- 4 A. They questioned me.
- 5 Q. They questioned you?
- 6 A. Yeah, they questioned me. Took palm samples
7 of my hand, I guess, a gun test on my hand.
- 8 Q. They ran some powder samples on your hand?
- 9 A. Yes, sir.
- 10 Q. And where did this occur?
- 11 A. North Charleston Police Department.
- 12 Q. Did you give them a statement?
- 13 A. Yes, sir.
- 14 Q. In that statement, were you completely honest
15 with the police about what you had done and what you
16 had seen?
- 17 A. No, sir.
- 18 Q. In what way were you less than fully honest
19 with them?
- 20 A. Well, I gave them a false name, um, I told
21 them half the story. I didn't tell them the whole
22 story and I gave them a false name.
- 23 Q. Why is it that you were not completely honest
24 with the police at that time?
- 25 A. Scared. I was afraid.. I had other charges I

1 was running from at the time.

2 Q. What charge were you scared about?

3 A. I had some family court charges I was running
4 from at the time.

5 Q. Is that child support you're talking about?

6 A. Yes, sir.

7 Q. Are you supporting your children now?

8 A. Yes, sir.

9 Q. Okay. In just a minute, Mr. Simmons, I'm
10 going to ask you to come down and use these photos
11 to help you explain.

12 (Brief pause in proceedings.)

13 Q. All right. Why don't you come down, please.

14 A. (The witness complied.)

15 Q. Okay. This exhibit is marked as State's
16 Exhibit 2, it's in evidence. All right. Are you
17 able to identify what's shown in that picture?

18 A. Yes, sir.

19 Q. What is that?

20 A. That's the green house where the incident
21 took place.

22 Q. All right. With the aid of this pointer, are
23 you able to identify the approximate location of
24 where this discussion between the defendant and
25 Kenneth Washington occurred?

1 A. Yes, sir. Right up in this area right here
2 (indicating).

3 Q. Now, where is it, if you're able to tell on
4 that photo -- let me show you a different photo.
5 This is State's Exhibit 19 which is in evidence.
6 Using that photo, are you able to identify about
7 where it was that you jumped over the railing?

8 A. Yes, sir.

9 Q. Where is that?

10 A. Right over here (indicating).

11 Q. Okay. And once you jumped over that railing,
12 did you pause and again observe a discussion between
13 the defendant and the victim, or did you walk
14 straight into the Amoco?

15 A. I paused at the argument, that's when I just
16 went on, walked in the store.

17 Q. Did you say anything else to them once you
18 got up there?

19 A. No, sir.

20 Q. Now, where is it as you walked into the --
21 where would the door on the Amoco be on there? I
22 know it's not pictured, but can you point to where
23 it would be if it were pictured?

24 A. This right here, the side of the building,
25 walking down the sidewalk right here, this is the

1 front and the door's located in the front of the
2 building (indicating).

3 Q. All right. When you walked in, where was
4 Alexander Gaillard, Mookie?

5 A. I left him standing here (indicating).

6 Q. And he was waiting on you to come back out
7 with some money for him?

8 A. Yes, sir.

9 Q. All right. And as you came out, what did you
10 see? Did you see any people moving?

11 A. No, sir.

12 Q. What did you do after you came out, where did
13 you go?

14 A. When I came out I walked, came out of there
15 (indicating), Alexander standing right here
16 (indicating), gave him his \$20, we walked. And
17 William Phillips and some other guys was standing
18 right up in here (indicating).

19 Q. Okay. This is State's Exhibit 16 which is
20 not yet in evidence. Are you able to identify what
21 is being shown there?

22 A. Yes, sir.

23 Q. Now, what is that?

24 A. This is the path we took when we went back to
25 the truck right here (indicating).

1 Q. And in relationship to that fence, where is
2 the Amoco station?

3 A. Well, this fence is located right behind the
4 Amoco station (indicating).

5 Q. So the Amoco station is in which direction?

6 A. Right this way (indicating).

7 Q. So that's the path that you took to go over
8 to the Jeep?

9 A. Yes, sir.

10 MR. MARSHALL: Move to have State's 16
11 admitted, your Honor.

12 MR. FELDMAN: No objection.

13 THE COURT: State's 16 in evidence
14 without objection.

15 (Entered into evidence was

16 State's Exhibit 16.)

17 BY MR. MARSHALL:

18 Q. This is State's Exhibit 27 which is in
19 evidence. Are you able to identify this?

20 A. Yeah. This is the truck we entered.

21 Q. Okay. And which tire is it that William
22 Phillips shot out with his handgun?

23 A. The right passenger side.

24 Q. Could you point to it, please?

25 A. It's right here (indicating).

1 Q. And at the time that he did that, where were
2 you positioned?

3 A. I was standing right behind him.

4 Q. This is State's Exhibit 46. Are you able to
5 identify what's shown there?

6 A. Yes. This is where the truck was parked,
7 right over here (indicating).

8 Q. When you say "the truck," are you talking
9 about the Jeep you just identified?

10 A. Yes, sir.

11 Q. That's where it was parked at the time that
12 you all went and William shot the tire out?

13 A. Yes, sir.

14 Q. All right. Are you able to orient yourself
15 on that diagram as to where these events were
16 occurring?

17 A. Yes, sir.

18 Q. All right. Starting at the Amoco station
19 from the point where you walked out of the Amoco
20 station, can you show the ladies and gentlemen of
21 the jury what your movements were from the time that
22 you went to the Jeep and then went to -- you stated
23 to Mookie's house, can you show them what path you
24 traveled?

25 A. That's the Amoco station right here

1 (indicating).

2 Q. Speak up, please.

3 A. This is the Amoco gas station right here

4 (indicating), right here is Rivers Avenue, so we

5 went behind the building. And here's Target Street

6 right here (indicating) where the truck was located.

7 We went inside the truck.

8 Q. Where's the path that you showed that you

9 took over to the Jeep?

10 A. Right over here (indicating).

11 Q. And where is it that -- once the shotgun was

12 out of the Jeep, who carried the shotgun?

13 A. Mookie.

14 Q. And what path did you next take, and where

15 did you go?

16 A. We took a path leading from Amoco straight on

17 through the fence. - It took us to his house.

18 Q. Where is his house?

19 A. Right up over here (indicating).

20 Q. This is State's Exhibit 28, not yet into

21 evidence. Using that, do you know the name of that

22 street that's shown in that photograph?

23 A. No, sir.

24 Q. You don't?

25 A. No, sir.

1 Q. Are you able to identify anyplace that you
2 traveled on this morning from that photograph?

3 A. Yes, sir.

4 Q. What are you able to point out?

5 A. Well, the path that leads from behind Amoco
6 leads right through here (indicating), and we came
7 up on the bridge right here (indicating), Mookie's
8 house is located right -- well, you can't see it,
9 but it's located right over here (indicating),
10 that's where we took the shotgun at.

11 Q. Do you know what's shown in that photograph
12 right over here (indicating), do you know what that
13 location is?

14 A. Yes, sir.

15 Q. What is that?

16 A. I don't know the name of the street, but once
17 the police had us in custody right over in here
18 (indicating), the defendant and Mark came from back
19 here (indicating), ran over this side right here
20 (indicating), jumped the fence, jumped this fence
21 (indicating), there's a fence right here, they
22 jumped the fence, and they was right there behind
23 the apartment building.

24 Q. You saw the defendant and Mark travel from
25 over here over to here (indicating)?

- 1 A. Yes, sir.
- 2 Q. And where were you at the time that you saw
3 them traveling in that direction?
- 4 A. I was on the bridge. The cops had me on the
5 bridge right here (indicating).
- 6 Q. That's where the police stopped you?
- 7 A. Yes, sir.
- 8 Q. Who was with you at the time the police
9 stopped you?
- 10 A. William Phillips, Alexander Gaillard and me.
- 11 Q. Just the three of you all?
- 12 A. Yes, sir. The three of us.
- 13 Q. Were all three of you all arrested?
- 14 A. No. They took us down for questioning.
- 15 Q. Could you all see -- or could you see what
16 was occurring over here after Mark O'Brien and Joe
17 Holmes traveled over there, could you see what they
18 were doing?
- 19 A. Basically, no. I mean, no.
- 20 Q. Couldn't see them?
- 21 A. I could see them, but I mean --
- 22 Q. Not sure what they were doing?
- 23 A. No, sir.
- 24 Q. Okay. You may have a seat, Mr. Simmons.
- 25 A. (The witness complied.)

1 MR. MARSHALL: Move to introduce State's
2 28.

3 MR. FELDMAN: No objection, your Honor.

4 THE COURT: What number was that?

5 MR. MARSHALL: Twenty-eight, your Honor.

6 THE COURT: Twenty-eight into evidence
7 without objection.

8 (Entered into evidence was
9 State's Exhibit 28.)

10 MR. MARSHALL: If I could just have one
11 moment to review my notes, your Honor, I think I'm
12 about through with this witness.

13 (Brief pause in proceedings.)

14 MR. MARSHALL: May we approach prior to
15 cross-examination, your Honor?

16 THE COURT: Yes, sir.

17 (Whereupon, a conference was held at
18 side bar.)

19 CROSS-EXAMINATION

20 BY MR. FELDMAN:

21 Q. Mr. Simmons, you said the path, when you
22 pointed on the screen you pointed to the lot right
23 next to the green house is where the path was?

24 A. No. The path we took was located right
25 behind the fence.

1 Q. Behind the green house?

2 A. Yes, sir.

3 Q. Okay. In other words --

4 MR. MARSHALL: Do you want to use this
5 big diagram?

6 MR. FELDMAN: Yeah.

7 BY MR. FELDMAN:

8 Q. When you pointed with the pointer, you
9 pointed -- this is the Amoco, Rivers (indicating)?

10 A. Side of Amoco.

11 Q. You pointed back here (indicating)?

12 A. Yeah.

13 Q. Where it says 2109?

14 A. Yes. The fence.

15 Q. Fence goes up here?

16 A. Yeah.

17 Q. And it was behind the fence?

18 A. Yeah. The path leads right behind the fence.

19 Q. Okay. That's the path that goes from the
20 Amoco over to Target?

21 A. Yes.

22 Q. All right. So it's actually two lots away?

23 A. Yeah.

24 Q. Well, it doesn't have a number by it, but
25 it's this blank one right here (indicating)?

1 A. Yes, sir.

2 Q. All right. That's the path from, okay.

3 Mr. Simmons, I may be confused, but at the
4 beginning of your testimony --

5 A. Yes, sir.

6 Q. -- you referred to -- it sounded to me like
7 you referred to another person as Poochie?

8 A. Sir.

9 Q. Are you Poochie?

10 A. Yes, sir.

11 Q. That's your nickname?

12 A. Yes, sir.

13 Q. Okay. You also go by Julius Cuttino?

14 A. Yeah. That's the false name I gave on my
15 statement.

16 Q. You have also gone by Montray Shell
17 Robertson, haven't you?

18 A. Yes, sir.

19 Q. You have also gone by Mentravay Robinson?

20 A. Yes, sir.

21 Q. Beg your pardon?

22 A. Huh? I mean, all those is the same thing.
23 Montray Robinson.

24 Q. Okay. You've gone by that, that's been your
25 alias?

- 1 A. Yes, sir.
- 2 Q. And you go by Poochie Simmons, correct?
- 3 A. Yes, sir.
- 4 Q. And Tray Robertson?
- 5 A. Yes, sir. I do.
- 6 Q. And Maurice Cuttino?
- 7 A. Yes, sir.
- 8 Q. And we already said Julius Cuttino?
- 9 A. Yes, sir.
- 10 Q. All those are the false names you use and
11 give to people depending on what you need, correct?
- 12 A. Hum?
- 13 Q. Depending on the circumstance, those are the
14 false names you give to people, correct?
- 15 A. Yes, sir.
- 16 Q. Including the police?
- 17 A. Yes, sir.
- 18 Q. Now, when you went in, talked to the police,
19 number one you told them your name was Julius
20 Cuttino?
- 21 A. Yes, sir.
- 22 Q. And Julius Cuttino is your cousin, right?
- 23 A. Wrong. That's my brother.
- 24 Q. That's your brother?
- 25 A. Yeah.

1 Q. It's your brother, your blood brother, right?

2 A. Yes.

3 Q. And it didn't matter if you were going to get
4 him in trouble, you gave them that name to protect
5 yourself, didn't you?

6 A. Yes, sir.

7 Q. Your brother. And didn't you tell the police
8 that you were at the Amoco and you had talked to a
9 security guard and then you heard shots ring out?

10 A. Yes, sir.

11 Q. You told them that?

12 A. Yes, sir.

13 Q. Then you walked out of the station, you told
14 them, and went to the path that goes to the bridge;
15 isn't that true?

16 A. Yes, sir.

17 Q. And didn't you tell them that at the bridge
18 you saw White Boy?

19 A. Yes, sir.

20 Q. And White Boy gave you a beer is what you
21 told them?

22 A. Yes, sir.

23 Q. And that's when the police came up; isn't
24 that right?

25 A. Yes, sir.

1 Q. And that's your story?

2 A. Yes, sir.

3 Q. Okay. Then you started getting a little heat
4 from the police, didn't you, you had new charges
5 brought, didn't you?

6 A. Sir?

7 Q. Had new charges brought?

8 A. New charges brought where?

9 Q. Don't you have some charges pending?

10 A. Yes, sir. I have charges pending.

11 Q. And then your story started changing after
12 you got new charges against you, didn't it?

13 A. Not really.

14 Q. Well, let me go back a little. First of all,
15 you never saw the shooting?

16 A. Hum?

17 Q. You never saw the shooting?

18 A. No, sir. I never did say I saw the shooting.

19 Q. Now, you and the solicitor have a deal, don't
20 you?

21 A. No, sir.

22 Q. You don't have a deal he's going to look out
23 for you and help you with charges and not prosecute
24 you? Don't you have a deal?

25 A. No, sir. What I was told was it would be in

1 my best interest if I did tell the truth.

2 Q. Didn't the solicitor tell you that for your
3 testimony he would review the reports and try to
4 work towards a favorable disposition of your
5 charges, your criminal charges?

6 A. I can't recall that.

7 Q. And isn't it also true that not only -- first
8 of all, the charges that are pending are breaking
9 and entering an auto, correct?

10 A. Yes, sir.

11 Q. Receiving stolen goods, correct?

12 A. No, sir.

13 Q. No, sir?

14 A. No, sir.

15 Q. You're not charged with receiving stolen
16 goods?

17 A. No, sir. The charges are three breaking
18 motor vehicle and a grand larceny charge.

19 Q. Okay. Three breaking and entering a motor
20 vehicle and a grand larceny charge?

21 A. Yes, sir.

22 Q. Okay. You know how much time you could get
23 if you're convicted of all those?

24 A. Yes, sir. Each of breaking and entering
25 carry five years, the grand larceny carry ten, so

1 that's 15 -- 25 years.

2 Q. And the solicitor's going to work for a
3 favorable resolution of your charges, isn't he?

4 A. Excuse me?

5 Q. In addition to that, in addition to working
6 toward a favorable resolution of your charges, he's
7 also not going to prosecute you for the false police
8 report you gave under the name of Julius Cuttino;
9 isn't that true?

10 A. I have no recollection of that. I wasn't
11 charged with anything.

12 Q. That's what I'm saying. You're not being
13 charged under false police report. And isn't it
14 also true that in exchange for your testimony you're
15 not going to be charged with distribution of crack
16 cocaine; isn't that true?

17 A. I wasn't initially charged with that.

18 Q. You haven't been charged, have you?

19 A. No, sir.

20 Q. And isn't it also true that in exchange for
21 your testimony, in addition to all that we've just
22 said, that you won't be charged with breaking and
23 entering a motor vehicle for breaking into that
24 Jeep?

25 A. No, sir.

1 Q. No, sir? That's not true?

2 A. No, sir.

3 Q. You haven't been charged with that?

4 A. No, sir.

5 Q. And isn't it also true that in exchange for
6 your testimony, in addition to the others, you won't
7 be charged with the theft of that shotgun?

8 A. No, sir.

9 Q. You're not being charged with that, are you?

10 A. No, sir.

11 Q. Okay. You all stole the shotgun? Sir?

12 A. Yes.

13 Q. One of the three of you all, you, Mookie --
14 or one of the four of you, you, Mookie, Mark or
15 White Boy unloaded the shotgun, right?

16 A. Sir?

17 Q. Somebody unloaded the shotgun?

18 A. I can't recall that.

19 Q. And you, Mookie and White Boy, you took the
20 shotgun and you went to Mookie's house to hide the
21 guns; did you not?

22 A. Yeah. We already went through that.

23 Q. All right. Go through it again.

24 A. All right.

25 Q. And when you got to Mookie's, you, Mookie and

1 White Boy hid both the shotgun and White Boy's
2 pistol, true?

3 A. I have no recall -- recollection of that.
4 The only thing I know, we hid the shotgun.

5 Q. Is the solicitor going to help you with your
6 family court charges? You don't support your
7 children?

8 A. I handled it myself. It's already resolved,
9 I handled that myself. Those are my kids.

10 Q. You weren't supporting them though, were you?

11 A. Hum?

12 Q. You weren't supporting them?

13 A. I fell behind in child support payments, I
14 fell behind.

15 Q. Now, Mr. Simmons, you -- you shot that pistol
16 that night, didn't you?

17 A. Sir?

18 Q. You shot that pistol that night, didn't you?

19 A. No, sir.

20 Q. That's how you got gun residue on your hand,
21 isn't it?

22 A. I can't tell you how I got the gun residue on
23 my hand. I don't know if I did or not. I know I
24 ain't shot no pistol.

25 Q. What did you say, you can't tell me how you

1 got the gun residue on your hand?

2 A. I said I can't recall having gun residue on
3 my hand.

4 Q. Do you deny it? You're under oath, do you
5 deny it?

6 A. I don't know.

7 Q. You haven't talked to anybody about that?

8 A. I don't know. I ain't seen no tests, I ain't
9 talked to nobody about that.

10 Q. You got arrested for the new charges in June
11 of 1997; Is that correct?

12 A. June 25th, 1997.

13 Q. Three B and E autos and one grand larceny.

14 A. Yes, sir.

15 Q. Twenty-five years, right?

16 A. Yes, sir.

17 Q. Then you started giving new statements, true?

18 A. Yes, sir.

19 Q. You gave a new statement on August 19th, '97,
20 true?

21 A. I can't recall the date.

22 Q. Then you gave a newer statement on
23 September 24th of '97? Huh?

24 A. Yes, sir.

25 Q. That night you were out there drinking beer?

- 1 A. Yes, sir.
- 2 Q. Doing a little cocaine?
- 3 A. No, sir.
- 4 Q. A little crack cocaine?
- 5 A. No, sir.
- 6 Q. You're selling it though?
- 7 A. Yes, sir.
- 8 Q. You did a number of transactions?
- 9 A. Yes, sir.
- 10 Q. And you were partners with Mookie, that's
- 11 right?
- 12 A. Hum?
- 13 Q. Partners with Mookie?
- 14 A. We're friends.
- 15 Q. How old is Mookie?
- 16 A. I have no idea.
- 17 Q. At the time that this all happened he's 16
- 18 years old; isn't that right?
- 19 A. I don't know.
- 20 Q. You don't know?
- 21 A. No.
- 22 Q. How old are you now?
- 23 A. Hum?
- 24 Q. How old are you?
- 25 A. Twenty-seven.

1 Q. Okay. So you were 26 last year in June?

2 A. Yeah.

3 Q. Whatever. And so here you're a 26-year-old
4 man and you're selling crack cocaine in the middle
5 of the night with a 16 year old as your partner?

6 A. Yes, sir.

7 MR. FELDMAN: Nothing further, your
8 Honor.

9 THE COURT: Any follow-ups?

10 MR. MARSHALL: I don't have anything.
11 Thank you.

12 THE COURT: You may step down, sir.

13 MR. FELDMAN: Your Honor, I have a
14 matter of law.

15 THE COURT: Ladies and gentlemen, I'll
16 send you back to the jury room. Please do not
17 discuss this case during this break. Thank you very
18 much.

19 (Jury excused.)

20 MR. FELDMAN: Your Honor, thank you very
21 much. I have the same issue that came up yesterday,
22 and that is the witness has said that there was no
23 agreement with the solicitor. And I'd like to
24 publish from Judge Cottingham's transcript what the
25 solicitor said. And I'll tell you what the

1 solicitor said is, "In exchange for his truthful
2 testimony we will review -- I haven't even seen the
3 reports on those yet, but I have told him that I
4 will review the report and try to work with him
5 towards a favorable disposition of those charges."

6 THE COURT: Okay.

7 MR. FELDMAN: I would like to do it the
8 same way, under the same conditions.

9 THE COURT: Okay. Any objection?

10 MR. MARSHALL: Can I see that just for a
11 minute?

12 MR. FELDMAN: (Mr. Feldman complied.)

13 (Brief pause in proceedings.)

14 MR. MARSHALL: No objection to that,
15 your Honor.

16 THE COURT: Okay. Bring the jury back
17 in.

18 (Jury present.)

19 THE BAILIFF: All seated, your Honor.

20 THE COURT: Thank you. Please be
21 seated.

22 Anything further from the defense on that
23 last witness?

24 MR. FELDMAN: Yes, your Honor. Thank
25 you very much. Your Honor, we have stipulated that

1 I would read from the transcript of the formal court
2 proceedings in front of judge Cottingham what
3 Mr. Marshall, the solicitor, said to Mr. Maurice
4 Simmons.

5 THE COURT: Okay.

6 MR. FELDMAN: And I've discussed with
7 the solicitor what this is.

8 "MR. MARSHALL: What I have told him is
9 that in exchange for his truthful testimony
10 we will review -- I haven't even seen the
11 reports on those yet, but I have told him
12 that I will review the report and try to work
13 with him towards a favorable disposition of
14 those charges."

15 Thank you very much, your Honor.

16 THE COURT: Okay. Call your next
17 witness, sir.

18 MR. MARSHALL: Alexander Gaillard.

19 MR. FELDMAN: I'm sorry. May we
20 approach, your Honor?

21 (Whereupon, a conference was held at
22 side bar.)

23 THE COURT: Ladies and gentlemen, I'm
24 sorry, counsel has another matter they want to take
25 up. I have to send you back to the jury room.

1 We'll be with you shortly. Please do not discuss
2 the case in any way.

3 (Jury excused.)

4 THE COURT: Yes, sir. You say he's been
5 convicted of ABHAN?

6 MR. FELDMAN: Yes, your Honor.

7 THE COURT: And why wouldn't that just
8 fall under the parameters of 609?

9 MR. FELDMAN: Well, I think it actually
10 would fall under both, in a way, because I think
11 that with respect to the conviction itself, I think
12 that that's kind of the easy rule that you're
13 allowed to use it for impeachment, you're allowed to
14 ask him about it.

15 Here's the problem with 608. I think that
16 608(b) and (c) would be appropriate here, and here's
17 why. And of course -- well, as background, your
18 Honor, I went into -- well, I'm holding the arrest
19 warrant affidavit and it says that "Alexander Jamal
20 Gaillard did produce a black" -- your Honor, can I
21 have this outside of the witness's hearing?

22 THE COURT: Yes, that will be fine. You
23 may step down, sir.

24 (Witness steps down from witness stand
25 and leaves the courtroom.)

1 **THE COURT:** Go ahead.

2 **MR. FELDMAN:** Thank you very much, your
3 Honor. It says that "Alexander Jamal Gaillard did
4 produce a black in color handgun and point it at the
5 victim demanding the victim's possessions" in the
6 warrant.

7 Now, under 608 I'm allowed to go into
8 specific instances of conduct of a witness for the
9 purpose of attaching or supporting the witness's
10 credibility, other than a conviction of a crime as
11 per 609. And it says further that I can't use
12 extrinsic evidence. However, in (c), may even be
13 more important. Of course, there's a limit to how
14 far I can go into this issue, but here it is. Bias,
15 prejudice or other motive. And I think bias is
16 never collateral, I could actually go into that
17 through extrinsic evidence, this -- this -- the
18 disposition of this charge was made during the
19 pendency of these charges.

20 Now, the jury, I think, is entitled to hear
21 and do whatever conclusions they want. I don't plan
22 to call any other witnesses and I don't care -- I
23 don't care to go real deep into how these charges
24 got lowered from armed robbery to ABHAN. All I know
25 is that it was resolved while my charges here were

1 pending, and in fact it was during that period
2 before we were allowed to know who the witnesses
3 were.

4 So, you know, I think that that's relevant on
5 both bias, but certainly it's relevant under
6 specific instances of conduct. And I don't think --
7 I don't think that the fact that he was charged such
8 that I can now impeach on under 609, I don't think
9 that that would disqualify me from using 608 which
10 is really just as important in this case, because if
11 he had just committed the act, hadn't been charged,
12 I believe I could have used it. So I don't think
13 the fact that he was actually charged with it would
14 preclude me. I don't think that they have mutually
15 exclusive.

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

17 **MR. MARSHALL:** Well, your Honor, he
18 doesn't want to go real deep into it as he stated
19 because he doesn't have any evidence to support his
20 position. I mean, yesterday we went at the Court's
21 urging and talked to the solicitor who handled the
22 case and he had opportunity, I guess, to talk to the
23 defense attorney who handled the case. And as an
24 officer of the Court, the solicitor stated he didn't
25 even know this guy was a witness in this case. And

1 now Alexander Gaillard has legally been acquitted of
2 armed robbery and he wants to bring up something on
3 which he's been acquitted.

4 You know, the rule is clear that he can bring
5 up a conviction if it falls under the parameters of
6 the rule and that's what we have here, a conviction.

7 You know, charges, if his client chooses to
8 take the stand, does he want me to cross-examine his
9 client about being charged with murder before? I
10 don't think so. I don't think so. So if he wants
11 to take that route then, you know, the street goes
12 both ways. But it's clearly outside of the rules.
13 He should be able to ask him simply about whether he
14 was convicted of assault and battery of a high and
15 aggravated nature and that's it.

16 **MR. FELDMAN:** You know, your Honor, one
17 of the reasons why -- why the bias issue is so
18 important in this case is because, I mean, these
19 deals -- and the Court hasn't even heard the most
20 shocking deal of them all. You know, there is a
21 pattern here. Now, I'm not saying any more in that
22 regard, all I know is that --

23 **THE COURT:** He was -- he pled guilty to
24 assault and battery of a high and aggravated nature?

25 **MR. FELDMAN:** Yes, sir.

1 **THE COURT:** And you're saying, you're
2 suggesting that that plea was the result of the
3 deal?

4 **MR. FELDMAN:** What I'm saying is that
5 even if you thought that my bias position under (c)
6 would be maybe a little off --

7 **THE COURT:** What I'm trying to
8 ascertain, is that bias the result of a deal?

9 **MR. FELDMAN:** Well, I don't know, your
10 Honor, because if you remember with the hearing in
11 front of you back in August, that in June -- and I
12 have had this case since November and had tried to
13 get information -- we didn't even know that
14 Alexander Gaillard -- talk about exculpatory
15 evidence, if we had known that Alexander Gaillard
16 had been charged with armed robbery as an adult, we
17 would have been all over that as defense counsel to
18 see what was going on.

19 In retrospect, I think that would have been
20 exculpatory, we needed those names. He cut a pretty
21 sweet deal. And even if you thought that my biased
22 position based on what I just said is a little bit
23 out, certainly I'm allowed to ask him whether or not
24 he pointed a gun at a victim on such and such a
25 date, and if he says no, then I'm done. But if he

1 says yes, I think that would -- that's what 608 is
2 for.

3 THE COURT: Well, if I were to accept
4 your interpretation wouldn't you always be able to
5 get the details of a conviction in under 608 that
6 would come in under 609?

7 MR. FELDMAN: You know, Judge, that's a
8 good point. But, you know, we all learn about this
9 other bad act stuff from the feds. They were always
10 bringing in just every imaginable thing. And, yeah,
11 they were going back behind these things. And I
12 don't think you can -- let me just look at it in the
13 abstract. I don't think that you can imagine saying
14 you're going to clean the witness up by giving him
15 an ABHAN.

16 THE COURT: Well, I don't have any
17 problem getting into that if you're suggesting they
18 had some kind of deal with him, I do think that
19 possibly suggests potential bias and I think under
20 608 (c) you can do that. But how are you going to
21 show that? If the witness says I had no deal, then
22 the inquiry ends in my opinion.

23 MR. FELDMAN: But the way I would ask
24 him, Judge --

25 THE COURT: Do you have some statements

1 in the transcript in this situation like you did in
2 the others?

3 MR. FELDMAN: I don't think it relates
4 exactly to this. No deals with Gaillard.

5 THE COURT: I mean, if you -- I don't
6 think you would be prohibited from asking him was
7 that plea the result of any deal with the
8 solicitor's office.

9 MR. FELDMAN: And I think actually what
10 I would ask him is, you know, is that -- is that he
11 was a witness and these charges were pending and the
12 solicitor offered to dismiss. If he wants to call
13 Mr. Modica to say there was no deal, then he can
14 call him. But I think the implication based on what
15 they've already heard would be pretty strong that,
16 you know -- you know, something needs to be
17 answered.

18 THE COURT: Well, you're wanting to ask
19 him were other charges dismissed as a result of this
20 plea, included within that plea were other charges
21 dismissed?

22 MR. FELDMAN: I mean, that's the nature
23 of my question.

24 THE COURT: What is your exact question?

25 MR. FELDMAN: Well, I had planned to ask

1 him specifically about the facts to get him to admit
2 that he had a handgun and he pointed it at a victim
3 during the summer of -- summer of '96 and that --
4 you know, and hopefully he would answer yes. If he
5 answers no, I would then ask him isn't it true that
6 while this case was pending you made a deal to -- or
7 the solicitor dismissed armed robbery charges
8 against you to allow you to plead to assault and
9 battery of a high and aggravated nature to which he
10 would have to answer -- I mean, no matter what he
11 answered to the first question --

12 **THE COURT:** I don't think I have a
13 problem with the second question, but I don't see
14 you going into the facts with the first question.
15 I'm just not -- I don't see a basis for your doing
16 that.

17 **MR. FELDMAN:** I would limit it.

18 **THE COURT:** And otherwise, you're
19 suggesting to me that -- I'm just not prepared to
20 allow that. I'm not prepared to allow that.

21 **MR. FELDMAN:** Yes, your Honor.

22 **MR. MARSHALL:** Judge, I think he's got
23 to have a prima facie showing, a good faith belief
24 as an officer of the Court that some deal was
25 struck. And he knows no deal was struck, and so

1 what he wants to do is it throw it out there, A deal
2 was struck, wasn't it? Yeah, well you disprove it,
3 solicitor, that a deal -- you prove that a deal
4 wasn't struck. And that's not the way it works.
5 He's got to have the prima facie belief. And he
6 admits he doesn't have it and he just wants to --
7 you know, this trial is a search for the truth, this
8 isn't to mislead a jury.

9 **THE COURT:** Cross-examination serves the
10 purpose of finding that out. He's entitled to ask
11 that question, I think, and I can't limit it.

12 **MR. MARSHALL:** He can ask did you get
13 any deal when you pled to your ABHAN, period.
14 That's the question.

15 **MR. FELDMAN:** I'll tell the Court what
16 I'm going to ask. I'm going to ask, Isn't it true
17 that in June of '97 you had armed robbery charges
18 lowered to assault and battery of a high and
19 aggravated nature?

20 **MR. MARSHALL:** No, sir. No, sir. You
21 were convicted of ABHAN, that's the question.
22 Period.

23 **MR. FELDMAN:** Well, but the Court has
24 already ruled that I could -- I believe that I can
25 at least ask that. I thought that was a nice

1 limitation. I wasn't going to ask him whether there
2 was a deal, I was just going to ask him whether or
3 not that happened while this case was pending.

4 **MR. MARSHALL:** No. That's not
5 permissible under the rules, your Honor. The fact
6 that he was convicted of ABHAN, that's what
7 admissible.

8 **MR. FELDMAN:** See, Judge, it's
9 interesting because having the background that you
10 had in that Brady hearing that we had or whatever it
11 was, the evidentiary hearing, the Court now can see
12 that in August when we couldn't get the names of the
13 witnesses, having asked for them in November of '96,
14 how important that would have been because these
15 charges were pending against this witness when the
16 events that bring us here today happened. And --

17 **THE COURT:** I'm going to allow you to
18 ask whether the armed robbery was dropped as a
19 result of any plea with the solicitor. If he says
20 no, that's the end of the inquiry. Okay?

21 **MR. FELDMAN:** Okay. I'll ask it --

22 **THE COURT:** I think that because there
23 are suggestions of deals with some of these other
24 people I'm going to allow you to consistently pursue
25 that issue; you're entitled to elicit whether or not

1 that fact exists on cross-examination. I'm not
2 depriving you of your ability to utilize
3 cross-examination. That would fall within the
4 parameters of 608(c). I'm not going to let you get
5 into any of the details as you suggest.

6 MR. MARSHALL: Your Honor, I still think
7 that he has to make a prima facie showing through
8 Matthew Modica, the defense attorney, or Alexander
9 Gaillard that maybe there was some deal. He knows
10 good and well that there was no deal and so what he
11 wants to do is get in the fact that this man was
12 once charged with armed robbery, of which he has
13 been found innocent.

14 THE COURT: You don't think he can ask
15 this witness whether there was any deals?

16 MR. MARSHALL: I think he certainly can.
17 When you pled guilty to ABHAN, did you get any deal
18 in that plea? But he can't say when your armed
19 robbery was reduced to ABHAN, that's the whole point
20 that he wants to get in, that the man was charged
21 with armed robbery.

22 THE COURT: I'm going to allow it.

23 MR. MARSHALL: Under what rule, your
24 Honor?

25 THE COURT: I just said it. I think

1 that 608(c) -- there's been other instances where
2 you've made deals with people, he's already
3 established that.

4 MR. MARSHALL: That's correct.

5 THE COURT: And he can pursue that with
6 this witness.

7 MR. MARSHALL: In those cases he made a
8 prima facie showing. In this case he can make no
9 prima facie showing.

10 THE COURT: What you want the Court to
11 say, Mr. Marshall, is that you're entitled to tell
12 the Court and the defense counsel what every witness
13 is going to say. And unless they've got something
14 to contradict what that witness may or may not say,
15 then he can't ask the witness any questions.

16 Now, that would be nice in an ideal world for
17 the solicitor's office for to you dictate to the
18 Court what you think every person were to say and
19 for me to base my decisions based on those
20 interpretations. But he's entitled to ask a witness
21 on cross-examination anything that might suggest
22 bias on the part of that witness. If the witness
23 says no, that's the end of the inquiry, and you're
24 not prejudiced in any way whatsoever.

25 MR. MARSHALL: Well, I'm prejudiced

1 insofar as that the jury now knows he was once
2 charged with an armed robbery of which he was found
3 not guilty.

4 **THE COURT:** And you're entitled on your
5 examination of the witness say -- if he says -- to
6 probe that in any way you want. It had nothing to
7 do with it, or whatever you want to bring out to the
8 jury about that charge. But there's already been
9 several examples of deals which suggest potential
10 bias, and I think he's entitled to ask this witness
11 that question. And I'm going to allow it.

12 **MR. MARSHALL:** But, see, the question
13 could be asked, your Honor, without having to bring
14 in the objectionable part and the part that's not
15 admissible under the rules. It could be asked in
16 the same way, his same result could be reached by
17 saying did you get any deal when you pled to ABHAN.

18 **THE COURT:** I'll going to allow him to
19 ask that question because we've already had other
20 witnesses who denied that there was any deals, that
21 we had to subsequently come forth by stipulation
22 that there was indeed a deal. I'm going to let him
23 have a little bit of leeway in defining that process
24 in his question to see if that triggers anything in
25 the witness's mind about any possible deals. If he

1 says no, that's the end of it.

2 MR. MARSHALL: Okay. Well, what
3 exactly -- I would like to know exactly what the
4 wording of question is, please.

5 MR. FELDMAN: I'm happy to tell him.
6 Right now what I plan to do is ask in a leading
7 fashion, Isn't it true that you had a deal with the
8 solicitor to have armed robbery charges dropped and
9 plead guilty to assault and battery of a high and
10 aggravated nature, and this happened in, and I'll
11 check the date, June of '97.

12 THE COURT: Okay. Bring the jury back.

13 MR. MARSHALL: I don't think that should
14 be --

15 THE COURT: I've made my ruling. Bring
16 the jury back in.

17 MR. MARSHALL: I'm objecting to the
18 leading fashion. If he wants to --

19 MR. FELDMAN: It's cross-examination.

20 THE COURT: It's cross-examination,
21 Mr. Marshall. Unless you've got a basis for saying
22 that the rule about leading questions on
23 cross-examination has changed, I'll be happy to hear
24 from you.

25 MR. MARSHALL: Well, no, sir. This is

1 just a different situation other than a standard
2 question. Okay. We're ready.

3 THE COURT: Bring the jury in.

4 (Jury present.)

5 THE BAILIFF: All present, your Honor.

6 THE COURT: Okay. Please be seated.

7 (Alexander Jamal Gaillard, called as a
8 witness by the State, having first been
9 duly sworn, was examined and testified
10 as follows:)

11 THE CLERK: Please be seated. Thank
12 you. Please state your full name, and spell your
13 last name for the record.

14 THE WITNESS: Alexander Jamal Gaillard.

15 THE CLERK: Spell the last name, please.

16 THE WITNESS: G-a-i-l-l-a-r-d.

17 THE CLERK: Thank you.

18 DIRECT EXAMINATION

19 BY MR. MARSHALL:

20 Q. Mr. Gaillard, how old are you, sir?

21 A. Seventeen.

22 Q. Do you have a nickname?

23 A. Mookie.

24 Q. How far did you go in school?

25 A. To the seventh grade.

1 Q. Have you ever had any jobs?

2 A. Yes.

3 Q. What type of jobs?

4 A. Ham's Temporary Service.

5 Q. What type of work would you do for Ham's
6 Temporary?

7 A. Laboring.

8 Q. Are you married?

9 A. No, sir.

10 Q. Any children?

11 A. No, sir.

12 Q. Do you live in the Charleston area?

13 A. Yes, sir.

14 Q. Who do you live with?

15 A. My mother.

16 Q. Were you at one time charged with armed
17 robbery in 1996?

18 A. I had an armed robbery charge, but it was
19 dropped to assault and battery of a high and
20 aggravated nature.

21 Q. Was the fact that you pled guilty to assault
22 and battery of a high and aggravated nature, was
23 that the result of any deal with the solicitor's
24 office or was that the result of the fact that there
25 was no evidence that you committed armed robbery?

1 MR. FELDMAN: Objection, your Honor.
2 Objection to the leading question.

3 THE COURT: Sustained.

4 BY MR. MARSHALL:

5 Q. What was the reason that you pled guilty to
6 ABHAN, assault and battery of a high and aggravated
7 nature, and were not convicted of armed robbery?

8 A. They just, to get probation, drop it so I
9 could get probation.

10 Q. Did you have any deal worked out with me --

11 A. No, no deal.

12 Q. -- or anybody in the solicitor's office?

13 A. No deal.

14 Q. Or anybody for the State? At the time that
15 you pled guilty to ABHAN, had you even talked to
16 anybody about this murder case?

17 A. No, sir.

18 Q. You know the defendant in this case?

19 A. Yes, sir.

20 Q. How do you know him?

21 A. Joe. Joe Holmes.

22 Q. And how did you come to know him?

23 A. From around my neighborhood.

24 Q. Did he live around your neighborhood?

25 A. No, but he's been there a lot.

1 Q. How long have you known him?

2 A. Just like it's off and on you see him
3 sometimes then, you know, you don't see him.

4 Q. Do you remember the night of July the 18th,
5 that was a Thursday night in 1996 and into the
6 morning, the Friday morning of July the 19th of last
7 year, do you remember that night and that morning?

8 A. Yes, sir.

9 Q. Can you tell the ladies and gentlemen of the
10 jury what you were doing that night and that
11 morning?

12 A. Yes, sir.

13 Q. Please go ahead.

14 A. Me and my cousin, Myron Ravenel, was walking
15 to the Amoco station. And when we was coming back I
16 had meet up with William and Mikey, they asked us if
17 we wanted a beer. And so we said yeah and walked up
18 to the store, we got the beer and set out there for
19 a little while. That's when we seen Kenneth and
20 Antwan out there.

21 So I was -- it was getting a lot of people,
22 so I didn't want to get in no trouble so I went
23 inside of the Amoco for a little while. And then I
24 heard the shots and ran behind Amoco and I saw Joe
25 Holmes with a gun in his hand, and William had took

1 it from him. And we walked to the Jeep and I went
2 in the back of the Jeep and took out a shotgun.

3 Q. What did you do after you took the shotgun
4 out?

5 A. Ran home with it.

6 Q. Now, you stated that you saw Joe Holmes with
7 a gun in his hand. Can you describe that gun that
8 you saw in his hand?

9 A. It was a black .38 with a brown handle.

10 Q. And about how long after the shots went off
11 did you see him with the gun?

12 A. Ten seconds.

13 Q. How was he holding it?

14 A. He had it like this right here (indicating),
15 like just holding it down, holding it down like this
16 (indicating).

17 Q. And where was this that you saw him holding
18 the gun?

19 A. Right -- excuse me, I got a little problem.
20 But right behind the Amoco station in the back.

21 Q. What is it you saw him do with the gun?

22 A. William had took the gun from him.

23 Q. William being -- do you know his last name?

24 Do you know his nickname?

25 A. White Boy.

1 Q. You saw Joe pass the gun to White Boy?

2 A. No. I saw White Boy took it from him.

3 Q. And then you went on to the Jeep. Who went
4 to the Jeep with you?

5 A. Me, White Boy and Poochie.

6 Q. While you were getting the shotgun out of the
7 Jeep, was there anything else occurring in the area
8 of the Jeep at the time?

9 A. White Boy had shoot at the back tire and
10 shoot something inside like where the gas pedal at,
11 somewhere down in there.

12 Q. When you got over to the Jeep, was there
13 anybody over there or around the Jeep?

14 A. No, sir.

15 Q. Or inside the Jeep?

16 A. No, sir.

17 Q. Was there anybody lying on the ground near
18 the Jeep?

19 A. I didn't see nobody.

20 Q. Now, at the time you saw William Phillips
21 take the gun from Joe Holmes ten seconds after the
22 shots were fired, how was the lighting in the area
23 where you saw that occur?

24 A. Um, it was enough light for me to see.

25 Q. Are you talking about light from the sun, or

1 are you talking about light from artificial
2 lighting?

3 A. From the sun.

4 Q. The sun was starting to come up?

5 A. Yes, sir.

6 Q. Were there any artificial lights still on?

7 A. No, sir.

8 Q. In that location where you saw that transfer
9 of the weapon, tell the ladies and gentlemen of the
10 jury where that is in relationship to the Amoco.

11 A. Like right in back of the parking lot.

12 Q. How many shots do you think you heard?

13 A. Three.

14 Q. At the time that William Phillips took the
15 gun from the defendant, did you hear any words
16 exchanged between them?

17 A. The only words I hear was "Give me the gun."

18 Q. What was your condition out there, were you
19 drinking or doing any drugs?

20 A. I had one beer.

21 Q. Were you doing any drugs?

22 A. No drugs.

23 Q. Where was Poochie when the shots went off?

24 A. Inside the Amoco station.

25 Q. What was he doing in there?

- 1 A. Trying to make a sale.
- 2 Q. Sale of what?
- 3 A. Crack, crack cocaine.
- 4 Q. Were you involved in that?
- 5 A. Yes, sir.
- 6 Q. What was your role in that?
- 7 A. Trying to put in with him to get the sale,
- 8 too.
- 9 Q. You did the sale with him?
- 10 A. Yes, sir.
- 11 Q. And why was it that you were waiting right
- 12 outside the Amoco when he was inside?
- 13 A. For the sale to come back out.
- 14 Q. I'll show you some pictures, see if you can
- 15 identify some people. This is marked State's
- 16 Exhibit 65. Do you know who's shown in that
- 17 photograph?
- 18 A. Yes.
- 19 Q. Who is that?
- 20 A. Antwan Venning.
- 21 Q. Did you see Antwan Venning out at the
- 22 location next to the Amoco the night that Kenneth
- 23 Washington was murdered?
- 24 A. Yes, sir.
- 25 Q. This is State's 64. Do you know who that is?

- 1 A. White Boy.
- 2 Q. Did you see him out there at the time that
3 Kenneth Washington was murdered?
- 4 A. Yes, sir.
- 5 Q. This is State's 67. Do you know who that is?
- 6 A. Mark.
- 7 Q. Was he out there at the time that Kenneth
8 Washington was murdered?
- 9 A. He was out there, but I hadn't seen him
10 afterwards.
- 11 Q. You saw him afterwards?
- 12 A. No, I didn't see him afterwards.
- 13 Q. You didn't see him after the murder.
- 14 A. (Nonverbal response.)
- 15 Q. Did you see him prior to the murder? You
16 have to speak up, okay, you have to answer with a
17 yes. Was that your answer, yes?
- 18 A. Yes.
- 19 Q. Okay. When you got back down -- now, after
20 you took the shotgun out of the Jeep, what happened
21 next?
- 22 A. Ran home, give the shotgun to my cousin,
23 Myron, so I could put it through my window and put
24 it under my bed.
- 25 Q. You passed it to Myron?

1 A. Yes, sir.

2 Q. Prior to passing the shotgun -- where was
3 Myron at the time you passed him the shotgun?

4 A. In my yard.

5 Q. Did you take any -- did you inspect the
6 shotgun?

7 A. Yes, sir.

8 Q. What did you do with it?

9 A. I checked to see if any bullets were in
10 there.

11 Q. Were there any?

12 A. No, sir.

13 Q. Did anybody else check the shotgun?

14 A. Yes, sir.

15 Q. Who?

16 A. White Boy.

17 Q. What did you see him do with the shotgun?

18 A. He just checking to see if something was in
19 there. And he had put it through my window and I
20 put it under my bed.

21 Q. Who checked the shotgun first, you or
22 William?

23 A. I believe I had checked it first.

24 Q. Okay. And you didn't get any shells out of
25 it?

1 A. No, sir.

2 Q. Do you know whether or not for a fact there
3 were any shells in it after you checked it?

4 A. No. There was no shells in there.

5 Q. Did you watch William as he checked it as
6 well?

7 A. Yes, sir.

8 Q. Did you see any shells come out at that time?

9 A. No, sir.

10 Q. What was the idea when you went over to the
11 Jeep, what was your -- what was your thinking?

12 A. I just -- I went over 'cause they went over,
13 you know. I just look in the back, saw a shotgun,
14 so I took it and ran home.

15 Q. What happened after you put the shotgun --
16 passed it to Myron and he hid it in your house, what
17 happened next?

18 A. We walked back down, down the street, and
19 before we could get back on Target the police had
20 already stop us.

21 Q. What did the police do with you?

22 A. Took us to the station to get a statement.

23 Q. Did you give a statement?

24 A. Yes, sir.

25 Q. Did you sign a sworn statement for the

1 police?

2 A. Yes, sir.

3 Q. And in that statement --

4 MR. FELDMAN: Objection, your Honor. Is
5 he asking -- I don't think there's been a foundation
6 that he needs a statement for any legitimate
7 purpose.

8 BY MR. MARSHALL:

9 Q. Did you give a description of the person that
10 you saw pass the handgun to William Phillips in your
11 statement?

12 A. Um, please repeat the question.

13 Q. In your statement that you gave to the
14 police, did you give them a description, physical
15 description and/or name of the person that you saw
16 pass the handgun to William Phillips ten seconds
17 approximately after the shots were fired?

18 A. Joe Holmes.

19 Q. You told them it was Joe?

20 A. Yes, sir.

21 Q. Was that the same day as the murder that you
22 gave your statement?

23 A. Yes, sir.

24 Q. And the person you've identified previously
25 as Joe Holmes who passed the gun off right after the

1 murder, is that person in court today?

2 A. Yes, sir.

3 Q. Where is he?

4 A. Right there (indicating).

5 Q. You got any doubt in your mind that that's
6 the person you saw pass the gun off?

7 A. No, sir.

8 Q. Okay. In just a minute I'm going to ask you
9 to come down. You can stay there for just a moment.

10 (Brief pause in proceedings.)

11 Q. Okay. This is marked State's Exhibit 19,
12 it's in evidence. Okay. Using that photograph and
13 this pointer, and you may depending on how loud your
14 voice is you may need to use that, but are you able
15 to show the location where you were when you heard
16 the shots go off?

17 A. Yes, sir.

18 Q. All right. Could you do that, please?

19 A. It was right here (indicating) beside the
20 Amoco facing towards the store.

21 Q. Were you able to see who it was that fired
22 the shots?

23 A. No, sir.

24 Q. And why is that that you weren't able to see
25 that?

1 A. Because I was facing towards the store.

2 Q. Okay. Immediately after the shots were
3 fired, what did you do then?

4 A. I ran. I ran from right here (indicating),
5 like about the middle right here (indicating),
6 that's when I saw Joe with a gun.

7 Q. Where was Poochie, Maurice Simmons, during
8 that time?

9 A. Inside the store.

10 Q. All right. When you got back there to the
11 back of the Amoco near that fence, who did you see
12 back there?

13 A. Joe Holmes and White Boy.

14 Q. Okay. This is marked as State's Exhibit 16
15 which is in evidence. Using that photograph, are
16 you able to tell the ladies and gentlemen of the
17 jury the approximate location of the transfer of the
18 gun between Joe Holmes and William Phillips?

19 A. It was right here (indicating), in this area
20 right here.

21 Q. Okay. What happened after the transfer?

22 A. Um, White Boy went through this cut
23 (indicating), I went through the next cut and came
24 down and we was at the Jeep that -- when I got the
25 shotgun.

1 Q. What did Maurice Simmons do? Do you know
2 where he was at the time?

3 A. I think he was still in the store.

4 Q. Did you see where the defendant, Joe Holmes,
5 went after he passed the gun off to William
6 Phillips?

7 A. No, sir.

8 Q. Okay. This is marked State's Exhibit 27,
9 it's in evidence. Are you able to identify what's
10 shown there?

11 A. A Jeep with two bullet holes in it.

12 Q. Have you seen that Jeep before?

13 A. Yes.

14 Q. Where?

15 A. In my neighborhood.

16 Q. Does that bear my resemblance to the Jeep
17 that you visited that night?

18 A. Yes, sir.

19 Q. Is that the Jeep?

20 A. Yes, sir.

21 Q. Do you remember which tire it was that
22 William shot out?

23 A. The back right tire.

24 Q. Was Maurice Simmons there at the Jeep at that
25 time that William fired the shots?

1 A. Yes, sir.

2 Q. Do you know exactly where he was?

3 A. Yes, sir.

4 Q. Where was he?

5 A. Like three feet like behind.

6 Q. Point to where William was and point to where
7 Maurice was, if you can, on that photograph.

8 A. Like White Boy was about right here
9 (indicating), Maurice and I was about right here
10 (indicating). I had like scoot up, lean over in
11 back of the Jeep and got the shotgun.

12 Q. How much distance at the time -- were you
13 able to determine how much distance was between
14 Maurice and William at the time that William fired
15 the shots?

16 A. I would say like he was real close behind us,
17 like two, three feet.

18 Q. This is State's Exhibit 46. Do you recognize
19 what's shown in that photo?

20 A. Yes, sir.

21 Q. Does that bear any resemblance to where the
22 Jeep was?

23 A. Yes, sir.

24 Q. Where was the Jeep?

25 A. Right up in this white section right here

1 (indicating) where the white rocks at in this
2 section right here.

3 Q. Okay. This is marked State's 28. Do you
4 recognize that?

5 A. Yes, sir.

6 Q. What is that, and how does it relate to this
7 case?

8 A. That's where I live, up in this area
9 (indicating).

10 Q. State that a little bit louder now so they
11 can hear you.

12 A. I live in this area right here (indicating).

13 Q. Where is your house?

14 A. Right up over here behind these trees
15 (indicating).

16 Q. Behind the tree?

17 A. Yes, sir.

18 Q. All right. Are you able to identify this
19 building over here?

20 A. Yes, sir.

21 Q. What is that?

22 A. That's Joe Holmes' uncle used to live there.

23 Q. Do you know his name?

24 A. Charles Wilder.

25 Q. Joe Holmes' uncle, Charles Wilder. Do you

1 know the name of that street that's shown there?

2 A. Um, Flora.

3 Q. Does that bear any relationship to where you
4 were stopped by the police?

5 A. About right in this area right here
6 (indicating).

7 Q. Who was with you when you were stopped?

8 A. Me, White Boy and Poochie.

9 Q. Did you see anybody else who had been over at
10 the murder scene in that area at the time that the
11 police stopped you?

12 A. No, sir.

13 Q. Did you see whether Mark O'Brien was
14 anywhere?

15 A. No, sir.

16 Q. Did you notice whether Joe Holmes was in that
17 area?

18 A. No, sir.

19 Q. Okay. Using this State's Exhibit 51 which is
20 in evidence, are you able to show the location that
21 you traveled from the time -- are you able to show
22 on there the approximate location of where you saw
23 the defendant pass William Phillips the gun?

24 A. About -- I would say about right up in this
25 area right here (indicating) behind the Amoco, up in

1 there.

2 Q. And after you saw that are you able to
3 describe using that diagram what you did, how you
4 traveled?

5 A. It's another shortcut like right up in the
6 middle. I ran through the other shortcut and came
7 back down to the Jeep, took the shortcut, ran home,
8 my house was right here (indicating).

9 Q. All right. You may have a seat,
10 Mr. Gaillard. Thank you.

11 A. (The witness complied.)

12 MR. FELDMAN: Can you all leave the
13 projector?

14 MR. MARSHALL: Yeah.

15 BY MR. MARSHALL:

16 Q. When you were arrested on that armed robbery
17 charge which you were later convicted of the assault
18 and battery charge, was that before or after you
19 went in on July 19th and told the police what you
20 had seen at the murder scene?

21 A. I think that was after.

22 Q. So you were arrested on that charge after you
23 gave the police your statement, correct?

24 A. Yes, sir.

25 Q. That's all the questions I have. Thank you.

CROSS-EXAMINATION

1

2

BY MR. FELDMAN:

3

Q. Mr. Gaillard, can you step over here, please?

4

A. (The witness complied.)

5

Q. The solicitor asked you where everybody was

6

standing when you, White Boy and Poochie, Maurice

7

Simmons, were at the Jeep. And I think you said --

8

just a minute ago, I think you said White Boy was

9

here (indicating)?

10

A. I didn't say he was right there.

11

Q. Where was White Boy? Use the pointer.

12

A. He was about right like -- the door was open,

13

he was right up in this area right here

14

(indicating).

15

Q. Okay. Where were you?

16

A. I was on the back right here (indicating),

17

Poochie was right there (indicating).

18

Q. Okay. So -- so White Boy was -- White Boy

19

was standing farthest to the front, correct?

20

A. Yes, sir.

21

Q. Poochie, or Maurice Simmons, was standing to

22

his left, correct?

23

A. Yes, sir.

24

Q. And you were standing to Maurice Simmons'

25

left?

1 A. Yes, sir.

2 Q. White Boy on the right, Maurice Simmons to
3 his left, you to Maurice Simmons' left, correct?

4 A. Yes, sir.

5 Q. How close to the car were you?

6 A. I was right on the side of the car like
7 pressed up against the car.

8 Q. Is that when White Boy shot the tire?

9 A. Yes, sir.

10 Q. Okay. You can have a seat.

11 A. (The witness complied.)

12 Q. Mr. Gaillard, you were 16 years old last
13 year, weren't you?

14 A. Yes, sir.

15 Q. Sixteen years old, true?

16 A. Yes, sir.

17 Q. Crack dealer?

18 A. Yes, sir.

19 Q. Selling crack that night?

20 A. Yes, sir.

21 Q. Before you came in here to testify today, who
22 did you speak to about your testimony?

23 A. No one.

24 Q. Didn't you meet with the solicitor to talk
25 about your testimony?

1 A. Yes, sir. Yes, sir.

2 Q. Did anybody tell you what any of the other
3 witnesses said?

4 A. No, sir.

5 Q. You said when you testified you hadn't talked
6 to anybody about the case. Remember the solicitor
7 asked you when you got arrested for armed robbery
8 back in was it June -- well, whenever it was, when
9 you got arrested for armed robbery -- I'm sorry,
10 when you pled guilty -- it was a plea of guilty,
11 right?

12 A. Yes, sir.

13 Q. The solicitor asked, he said, when you were
14 convicted. You didn't go to trial?

15 A. No, sir.

16 Q. Okay. You cut a deal with the solicitor to
17 reduce your charges from armed robbery to assault
18 and battery of a high and aggravated nature?

19 A. No, sir.

20 Q. The charges were reduced; were they not?

21 A. Yes, sir.

22 Q. To use your words, so you can get probation?

23 A. Yes, sir.

24 Q. And you said that at the time you pled guilty
25 you hadn't talked to anybody about this case, had

1 you?

2 A. Yes, sir.

3 Q. And that was a lie, wasn't it?

4 A. No, sir.

5 Q. Okay. So you hadn't given a statement --

6 A. To the police.

7 Q. Right. Before that.

8 A. Yes, sir.

9 Q. Well, you can't remember what you're supposed
10 to say? And you do have --

11 **MR. MARSHALL:** I object to any badgering
12 of this witness. The man's trying to follow
13 convoluted questions that don't make any sense, and
14 now he's being badgered for trying to answer them.

15 **THE COURT:** Sustained. I'll sustain
16 that objection.

17 **BY MR. FELDMAN:**

18 Q. And you do have a deal with the solicitor,
19 don't you?

20 A. No, sir.

21 Q. You don't have a deal?

22 A. No, sir.

23 Q. Don't you have a deal that if you come in and
24 say what you're supposed to say that you won't get
25 prosecuted for selling crack cocaine?

1 A. No, sir.

2 Q. You haven't been prosecuted for selling crack
3 cocaine, have you?

4 A. No, sir.

5 Q. And don't you have a deal that if you come in
6 here and testify that you won't get prosecuted for
7 breaking and entering that auto, that Jeep we showed
8 up on the screen?

9 A. No, sir.

10 Q. You haven't been prosecuted for that?

11 A. No, sir.

12 Q. And don't you have a deal that if you come in
13 here and testify that you won't be prosecuted for
14 grand larceny, for stealing that shotgun?

15 A. No, sir.

16 Q. Have you been prosecuted for it?

17 A. No, sir.

18 Q. Now, the truth of the matter is, is you and
19 White Boy are pretty good friends, aren't you?

20 A. I just know him.

21 Q. But you were out there drinking a beer and
22 smoking some pot or doing cocaine?

23 A. No.

24 Q. Or doing some crack?

25 A. Just a beer.

1 Q. Sixteen years old?

2 A. Yes, sir.

3 Q. And you're telling the Court you did nothing
4 else and you only had one beer?

5 A. One beer.

6 Q. How did you get the beer?

7 A. Someone bought it for me.

8 Q. Who bought it for you?

9 A. White Boy.

10 Q. You're pretty good friends with White Boy,
11 aren't you?

12 A. I just know him around the neighborhood.

13 Q. Good enough friends, you know, to buy you --

14 A. I know him off the basketball court, that's
15 how I know him.

16 Q. All right. Good enough friends to, you know,
17 buy you liquor as a minor.

18 Now, isn't the truth that you and White Boy
19 and Poochie all got together to figure out what to
20 do after the shooting?

21 A. No, sir.

22 Q. Isn't it true that you all went to your house
23 to hide the shotgun and the pistol?

24 A. No, sir.

25 Q. Well, let me handle it one at a time. Are

1 you saying you did not go to your house to hide the
2 shotgun?

3 A. I did hide the shotgun, but I don't know
4 about no pistol.

5 Q. Didn't White Boy give you the pistol?

6 A. No, sir. Just the shotgun. And he didn't
7 give me the shotgun, I got the shotgun from the Jeep
8 myself.

9 Q. Of course, that was the whole idea behind
10 shooting Kenneth Washington?

11 A. No, sir.

12 Q. You all wanted to score that shotgun, you,
13 Poochie, and White Boy?

14 A. No, sir.

15 Q. True?

16 A. No, sir.

17 Q. What, then, did White Boy do with the pistol
18 once he got to your house?

19 A. I don't know what he do with the pistol. I
20 took off running with the shotgun, so I don't know
21 what he do with it.

22 Q. From where did -- from where did you take off
23 running with the shotgun? In other words, did you
24 go from the car with White Boy to your house?

25 A. I took off by myself.

1 Q. Are you saying White Boy was not at your
2 house?

3 A. He was at my house, but he came afterwards.

4 Q. Now, when you entered your plea of guilty,
5 you did not enter your plea of guilty to what was
6 charged to you, did you?

7 A. No, sir.

8 Q. What was that, what had you been charged
9 with?

10 A. Assault and battery of a high and aggravated
11 nature.

12 Q. No. What had you been charged with?

13 A. Assault and battery of a high and aggravated
14 nature.

15 Q. You deny you were charged with arm robbery?

16 A. I didn't get charged with it.

17 Q. You were never charged with armed robbery?
18 You told the solicitor you had been when he asked
19 you the question.

20 A. I did have an armed robbery charge, but it
21 was dropped to assault and battery of a high and
22 aggravated nature.

23 Q. That's all I asked. You were charged with
24 arm robbery. And when you entered the plea, that
25 was in June of '97, you were a witness in this case,

1 weren't you?

2 A. Repeat the question.

3 Q. When you pled guilty in June of '97 you were
4 a witness in this case, weren't you?

5 A. Yes, sir.

6 Q. No other questions, your Honor.

7 THE COURT: Any follow-up?

8 MR. MARSHALL: Yes.

9 REDIRECT EXAMINATION

10 BY MR. MARSHALL:

11 Q. Mr. Gaillard, when you -- when the shots went
12 off over at the Jeep, when William fired the shot
13 into the tire, were you inside the Jeep or outside
14 the Jeep?

15 A. I was like halfway in, half my body was in
16 there reaching for the shotgun when the shot been
17 going off.

18 Q. And which part of the Jeep was the shotgun
19 in?

20 A. In the back.

21 Q. The back seat, or the far back?

22 A. The back seat like on the driver's side. I
23 just lean over and grab it, like stick my body in
24 there.

25 Q. So when the shots went off, were you going in

1 or were you coming out?

2 A. I was like coming out with the shotgun.

3 Q. Well, did you have your eyes focussed on
4 William?

5 MR. FELDMAN: Objection. Leading.

6 THE COURT: Sustained.

7 BY MR. MARSHALL:

8 Q. Where were your eyes directed at the time
9 that William fired the gun?

10 A. I was looking like at him, kind of at him.

11 Q. Straight on, or over your shoulder?

12 A. Like you could say over my shoulders.

13 Q. Okay. So at the time William fired the
14 shots, was the passenger door open or was it closed?

15 A. It was closed.

16 Q. Well, how can it have been closed if you were
17 coming out of it?

18 A. I was coming out -- I was coming out the
19 driver's side.

20 Q. You were on the other side of the Jeep?

21 A. On the driver's side.

22 Q. Let's try to clarify this. Would you come
23 back down, please?

24 A. (The witness complied.)

25 Q. Now, when Mr. Feldman was saying things to

1 you and you were saying yes, yes, yes --

2 MR. FELDMAN: Your Honor, I object to
3 the characterization. I mean, that's just not what
4 happened.

5 THE COURT: Rephrase your question,
6 please.

7 BY MR. MARSHALL:

8 Q. It seems that you stated that you were here
9 (indicating) and William was somewhere over here
10 (indicating) and Poochie was somewhere over here
11 (indicating).

12 MR. FELDMAN: Your Honor, I object.
13 That is -- you know, the solicitor was sitting here
14 and that is not -- that is absolutely backwards.
15 And he's leading the witness anyway.

16 THE COURT: Ask him what he stated, Mr.
17 Marshall.

18 BY MR. MARSHALL:

19 Q. What is it you stated to Mr. Feldman when you
20 were standing up here with him about where you and
21 Maurice were positioned? Use the pointer.

22 A. I told him William was right here
23 (indicating), Poochie was right here (indicating)
24 and I was right there (indicating). But it wasn't
25 on this side, it was on the other side.

1 Q. It was on the other side?

2 A. On the other side of the Jeep.

3 Q. Are those windows tinted or not tinted on
4 that Jeep?

5 A. It looks tinted.

6 Q. Take a look at this hard copy of the photo.
7 Does that refresh your memory of the way the Jeep
8 looked?

9 MR. FELDMAN: Your Honor, I object.

10 THE WITNESS: Yes, sir.

11 THE COURT: Hold on. What is your
12 objection?

13 MR. FELDMAN: I'd like to look at it.

14 MR. MARSHALL: It's the same photo.

15 MR. FELDMAN: Well, if it's the same
16 photo, we're using the overhead, why don't we use
17 the overhead?

18 THE COURT: Is that photo in evidence?

19 MR. MARSHALL: Yes, sir.

20 THE COURT: Objection overruled.

21 BY MR. MARSHALL:

22 Q. All right. So is it your opinion that
23 they're tinted or not tinted?

24 A. It looks tinted.

25 Q. As you were on the other side of the Jeep

1 looking through, were you able --

2 MR. FELDMAN: Objection. Leading.

3 There's no testimony he was looking through.

4 THE COURT: Rephrase your question.

5 BY MR. MARSHALL:

6 Q. You were on the other side of the Jeep, how
7 is it that you were able to see William and Maurice
8 at the time that William fired the gun?

9 A. We all was on the same side, same side of the
10 Jeep, and I just looked over and I saw it.

11 Q. Didn't you just testify that you were on the
12 other side of the Jeep?

13 MR. FELDMAN: Objection. Leading.

14 THE WITNESS: On the passenger's side.

15 THE COURT: No, sir. I'll allow it.

16 THE WITNESS: I mean, on the driver's
17 side.

18 BY MR. MARSHALL:

19 Q. I'm sorry. Just let's start over. Just
20 please explain at the time that the shots were fired
21 where, to the best of your recollection, William was
22 and Maurice and where you were and how it was that
23 you were able to see where they were at the time
24 that the shots were fired.

25 MR. FELDMAN: Your Honor, may I object?

1 He has answered this question twice in the last
2 second. He has said on the other side, and then he
3 clarified it and said on the left side. The
4 solicitor can't ask this until he gets the answer he
5 wants.

6 MR. MARSHALL: I'm just trying to
7 understand it, your Honor.

8 THE COURT: I'll allow it one more time.
9 Go ahead.

10 BY MR. MARSHALL:

11 Q. Please explain as clearly as you can,
12 Mr. Gaillard, where they were positioned and where
13 you were positioned and how it is that you were able
14 to see where they were positioned.

15 A. Okay. He was right here (indicating).

16 Q. Who was right here?

17 A. White Boy, Poochie and me. But it was on the
18 other side, other side of the Jeep, when the back
19 tire was shot out.

20 Q. Oh, I apologize. It was the other side of
21 the Jeep where all of you all were?

22 A. Yeah, the driver's side.

23 Q. Okay. Thank you. I apologize for that.

24 A. (Witness returns back to witness stand.)

25 Q. Mr. Gaillard, if you were all on the driver's

1 side, how is it that Mr. Phillips was able to fire
2 into the tire on the passenger side?

3 A. I don't know. After I got the shotgun I saw
4 him shoot, like I said, like two bullets like in the
5 front where the gas pedal at. I just took off
6 running. I don't know if he shoot the back tire.

7 Q. Did you see him shoot any tire?

8 A. No, sir.

9 Q. Now, when you ran over to the Jeep, did you
10 know at the time that you were on your way over
11 there whether or not there was a shotgun in the car?

12 A. No, sir.

13 Q. Well, why is it that you were running over
14 there?

15 A. To check -- like we went back down to the
16 Jeep, Poochie and White Boy was already down there
17 so I decided to come down there, too, and that's
18 when I look in the back and saw the shotgun and took
19 it out.

20 Q. Okay. That's all the questions I have.
21 Thank you.

22 RECROSS-EXAMINATION

23 BY MR. FELDMAN:

24 Q. Mr. Gaillard, you saw White Boy shoot two
25 bullets at the gas pedal, I think you said, or

1 somewhere like that?

2 A. Somewhere up in that area.

3 Q. All right. Somewhere up towards -- and you
4 don't know how the tire got shot out, do you?

5 A. No, sir.

6 Q. And when these shots happened, you now say it
7 was on the left side of the car?

8 A. It was on the driver's side.

9 MR. FELDMAN: No other questions, your
10 Honor.

11 THE COURT: Anything else?

12 MR. MARSHALL: No, sir.

13 THE COURT: You may step down, sir.
14 Counsel approach.

15 (Whereupon, a conference was held at
16 side bar.)

17 THE COURT: Ladies and gentlemen, we'll
18 just be at ease for a few minutes while they take up
19 a matter. If you need to stand up and stretch or
20 anything, you're free to do so rather than send you
21 in and out again. We've already exercised you
22 enough this morning.

23 (Pause in proceedings.)

24 THE COURT: Are you ready to proceed?

25 MR. MARSHALL: Yes, sir. Your Honor,

1 with the Court's permission I would like to call a
2 witness out of order because this witness will be
3 unavailable later.

4 THE COURT: Okay.

5 MR. FELDMAN: No objection, your Honor.

6 THE COURT: Ladies and gentlemen, we'll
7 probably just take one more witness and then we'll
8 break for lunch. I know I told you generally
9 between 12:00 and 12:30 we'll break for lunch each
10 day.

11 (Harvey Darrell Poole, called as a
12 witness by the State, having first been
13 duly sworn, was examined and testified
14 as follows:)

15 THE CLERK: Please be seated. Please
16 state your full name and spell your last name for
17 the record.

18 THE WITNESS: Harvey Darrell Poole,
19 P-o-o-l-e.

20 THE CLERK: Thank you.

21 DIRECT EXAMINATION

22 BY MR. MARSHALL:

23 Q. Mr. Poole, where do you work, sir?

24 A. North Charleston Police Department.

25 Q. What is your job there?

1 A. At present I'm the supervisor of the Crime
2 Scene Unit.

3 Q. What does that mean? Can you describe what
4 that means?

5 A. Anytime we have a major case such as a rape
6 or homicide my unit responds to take the
7 photographs, video, collect the evidence, process
8 items for fingerprints. And any items that need to
9 go to a lab to be processed we're in charge of doing
10 that.

11 Q. What is your law enforcement background, how
12 long have you been in law enforcement?

13 A. I've been with the city 22 1/2, years the
14 first four years were with the fire department. In
15 August of '79 I went to the police department.
16 Since 1988 I've been with the Crime Scene Unit. I
17 was named supervisor of the Crime Scene Unit three
18 years ago.

19 Q. What -- do you have any other full-time work
20 background?

21 A. Full-time work background?

22 Q. Have you had any other full-time jobs, other
23 types of jobs in your life or has it always been law
24 enforcement?

25 A. It's always been law enforcement.

1 Q. Are you married?

2 A. Yes, sir.

3 Q. Do you have any children?

4 A. Yes, sir.

5 Q. How did you become involved in this case, the
6 State of South Carolina versus Joe Lewis Holmes?

7 A. I was on-duty Crime Scene person that
8 morning, I responded to the scene. I was called to
9 the scene.

10 Q. What did you -- and that scene is what? Can
11 you describe where that is, where it's located?

12 A. I was told to respond to Target Street and
13 Rivers Avenue in reference to the shooting.

14 Q. And what did you find once you got there?

15 A. All the detectives were on the scene, the
16 crime scene had been taped off, and I checked in
17 with Captain Smith on my arrival.

18 Q. That was about what time that you arrived?

19 A. Between 7:00 and 8:00.

20 Q. A.m.?

21 A. Yes, sir.

22 Q. Did you observe the deceased, Kenneth
23 Washington?

24 A. Yes, I did.

25 Q. Can you describe where he was located?

1 A. He was in between the house and the trailer
2 on Target Street. It was behind the trailer off to
3 the corner of the side of the house. And the fire
4 department and EMS had already been in the area and,
5 you know, he was turned over on his back when I got
6 there.

7 Q. Did you make any observations about his
8 condition?

9 A. It was obvious that he'd suffered a gunshot
10 wound. He didn't have a shirt on, I don't believe.

11 Q. Did you inspect -- did you inspect his person
12 and the area around him?

13 A. Yes, I did. As a matter of fact, we
14 photographed the area. Before I did anything, you
15 know, we photographed the whole area.

16 Q. Did you find any weapons on Mr. Washington?

17 A. No, sir.

18 Q. Did you find any weapons around
19 Mr. Washington?

20 A. We recovered a knife off of the porch of the
21 house, later found out that it had nothing to do
22 with the case.

23 Q. Did you attend the autopsy in this case?

24 A. Yes, I did.

25 Q. How many wounds did you observe on

1 Mr. Washington?

2 A. I remember seeing the one wound in the
3 shoulder blade and that was all I observed.

4 Q. How was Mr. Washington identified?

5 A. Through fingerprints in the AVIS computer.

6 Q. Okay. At the time of the autopsy when you
7 attended that, did you receive any items down at the
8 medical examiner's office?

9 A. Yes, sir. I did. The bullet that was
10 recovered from the deceased.

11 Q. Did you receive anything else down there?

12 A. The clothing that the deceased had on and
13 several samples that we'd taken from the deceased.

14 Q. Are you familiar with gunshot residue
15 testing?

16 A. Yes, sir.

17 Q. Was that done on Mr. Washington?

18 A. Yes, sir. I also performed a GSR test on
19 Mr. Washington at the autopsy room.

20 (Marked for identification were

21 State's Exhibits 68 and 69.)

22 Q. Okay. Mr. Poole, this bag contains two
23 State's Exhibits, one is 69 and one is 68. Take
24 your time, inspect the packaging, inspect the
25 contents, and tell the ladies and gentlemen of the

1 jury if you're able to identify the items?

2 A. Is it okay to open them up?

3 Q. Sure.

4 A. (Witness opening small vials.) Okay. This
5 was the bullet that was removed from the tire of the
6 Jeep Cherokee, the one that was shown up on the
7 overhead.

8 Q. You came into possession of that when, and
9 from whom did you receive it?

10 A. I was told to process the vehicle and
11 photograph it while it was at the police station in
12 the parking lot. After photographing it and dusting
13 it for prints, the tire that was in the back of the
14 Jeep had a hole in it, and you could tell there was,
15 you know, an object inside the tire. And I took the
16 tire down to our public works shop where we pulled
17 it off the rim and recovered that bullet.

18 Q. And what did you do with the bullet after you
19 took it out of the tire?

20 A. After I took it out of the tire I placed it
21 in this and turned it in to evidence where it was
22 later forwarded to SLED for analysis.

23 Q. Okay.

24 A. And the second one is the bullet that I
25 obtained from the autopsy when it had ended.

1 Q. You received that from whom?

2 A. Do you have my evidence sheet from the
3 autopsy?

4 Q. Yes, sir. It may take me a minute to find
5 it. Look at that, see if that refreshes your memory
6 as to whom gave you the -- who the person is that
7 gave you the bullet.

8 A. Dr. Thorne, who is with the medical
9 examiner's office.

10 Q. What did you do with that bullet that was
11 taken out of Mr. Washington after you received it?

12 A. That was also taken back to headquarters
13 where it was placed on one of our evidence sheets
14 and turned in to evidence and also forwarded to the
15 SLED lab in Columbia for analysis.

16 Q. Let me show you what are marked as State's
17 Exhibits 61 and 60, you'll need to inspect the
18 packaging, probably open those up, see if you can
19 determine what those are, whether you recognize
20 them.

21 A. Yes, sir. These are two shirts that one of
22 my officers, Officer Garrison, had recovered and
23 photographs, signed over to me back at headquarters
24 so I could forward these to SLED for analysis also.

25 Q. So Detective Garrison gave you those at your

1 headquarters?

2 A. Yes, sir.

3 Q. And then you did what with them?

4 A. I believe I sent both of these to SLED for
5 analysis.

6 Q. Directly, or was there an intermediary step?

7 A. They were placed into evidence first, and
8 then they were later sent.

9 (Marked for identification were

10 State's Exhibits 70, 71, 72 and 73.)

11 Q. Okay. These are marked State's 70, 71, 72
12 and 73. Take a look at those, please, and see if
13 you're able to determine what those are and if
14 you've seen them before.

15 A. Yes, sir. All three of the -- these three
16 are GSR tests done by Officer Garrison, and this is
17 a GSR test I did at the autopsy on the deceased.

18 Q. Okay. Could you give, please, for the
19 record, the numbers? The one that you did on the
20 victim at the autopsy is what number?

21 A. State's 73.

22 Q. Okay. And the numbers on the other three are
23 what?

24 A. Seventy, 71 and 72.

25 Q. Who performed the GSRs on the other three?

1 A. Detective Garrison.

2 Q. Okay. What is a GSR, are you familiar enough
3 with that to describe what that is?

4 A. Yes, sir. It's a gunshot residue test, that
5 our department does it in two different steps. The
6 first one is we use what they call SEM tabs, or
7 scanning electron microscope, that's what it stands
8 for, where we take a vial with a flat metal surface
9 with a -- it's got a sticky substance on there, and
10 we pat the person's hand who we are doing the
11 gunshot residue on and it picks up any trace of
12 gunpowder.

13 Once we finish doing both sides of both
14 hands, you end up with four vials and they're
15 packaged and sent to SLED they're there placed under
16 a scanning electron microscope.

17 And the second part of the test is a 5
18 percent solution of nitric acid that you swab the
19 hands with after you perform the SEM tab test and
20 those are placed in individual vials. You do the
21 front and the back of the hands, you do a control
22 behind the knee where there shouldn't be any
23 gunpowder residue to make sure the test is valid,
24 and that's also sent to SLED for analysis.

25 Q. After you gathered those four samples, what

1 did you do with them?

2 A. All four of these were turned in to evidence
3 where Mr. Harmon transported them to SLED for
4 analysis.

5 Q. When you were examining that tire that had
6 the bullet in it --

7 A. Yes, sir.

8 Q. -- which tire was that off of the Jeep?

9 A. It was the rear tire on the passenger side.

10 Q. Rear passenger.

11 A. But it had been taken off, and I think the
12 spare tire was on there. The tire we're talking
13 about was in the back of the Jeep.

14 Q. From inspecting that tire, were you able to
15 make any determination as to the angle of the entry
16 of that bullet into that tire?

17 A. No, sir. Because it had already been taken
18 off and placed in the back. There's no way to
19 determine where it was while it was, you know, still
20 sitting on the Jeep.

21 Q. The bullet was found inside the tire?

22 A. Yes, sir.

23 Q. Did you become familiar through your
24 investigation with the location of where the Jeep
25 had been parked at the time that the bullet was

1 fired into it?

2 A. When I arrived on Target Street the Jeep
3 wasn't there, but we were told it was in that -- off
4 to the side of the road on the left when you pulled
5 onto Target Street.

6 Q. Now, was the last time that you came -- that
7 you were in possession of any of these items which
8 you've identified was the last time when you put
9 them into evidence?

10 A. Yes, sir.

11 Q. Okay. You haven't handled them since you put
12 them into evidence?

13 A. No, sir.

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

15 MR. FELDMAN: May it please the Court.

16 CROSS-EXAMINATION

17 BY MR. FELDMAN:

18 Q. Corporal Poole, how are you today, sir?

19 A. Fine.

20 Q. Corporal Poole, you now know that the
21 deceased and Antwan Venning had a shotgun in their
22 Jeep. That doesn't seem to be disputed, do you now
23 know that?

24 A. I know that now, yes, sir.

25 Q. Okay. Do you know whether it's a 20 gage or

1 a 12-gage shotgun?

2 A. No.

3 Q. Okay. I thought you might know because you
4 are the evidence custodian, but that's not
5 important.

6 A. I'm not the evidence custodian, Mr. Harmon's
7 the evidence custodian.

8 Q. I'm sorry. The purpose of the GSR test is to
9 determine whether someone recently shot a weapon; is
10 that correct?

11 A. Yes, sir.

12 Q. Okay. And a positive test would mean that
13 that person shot a weapon, wouldn't it?

14 A. Yes, sir.

15 Q. Okay. Julius Cuttino who is -- so many
16 aliases, who is Maurice Simmons, Poochie, Julius
17 Cuttino's test is positive; is that correct?

18 A. I didn't get the test results back from SLED,
19 the investigating detective did.

20 Q. Okay. So you don't know -- I'm sorry.

21 A. I send them off, the reports come back to the
22 investigator.

23 Q. I thought based on the questioning that you
24 knew how they came out as well.

25 A. No, sir. I'm not familiar with the results

1 of the tests. I send them off to be tested. When I
2 type it up the investigating detective's name's on
3 the report, he's the one that gets the results back.

4 Q. Okay. Let me just ask you one other
5 question.

6 A. Yes, sir.

7 Q. If you knew that someone shot a weapon.

8 A. Yes, sir.

9 Q. Okay. And there was no gun residue on their
10 hand, would that mean that they most probably
11 scrubbed their hands and washed them real well? Or
12 whatever you would think, I mean....

13 MR. MARSHALL: Well, wait a minute. I
14 want to know if he's qualified as an expert in this
15 area. I don't know if he is or not, but he's asking
16 for opinions, and also -- he may well be, I just
17 don't know, but I think that there should be some
18 foundation for that if he's going to give opinion.

19 THE COURT: I'll sustained that.

20 BY MR. FELDMAN:

21 Q. Do you know the answer to that question?

22 MR. MARSHALL: Now wait a minute. You
23 asked him for an opinion. If you're going to ask
24 him about an opinion, you need to establish him as
25 an expert.

1 **THE COURT:** I sustain his objection.

2 **MR. FELDMAN:** Thank you very much, your
3 Honor.

4 **BY MR. FELDMAN:**

5 Q. What is your background with the gun residue
6 test? In other words, you perform the test, you
7 were explaining the use of nitric acid and this and
8 that?

9 A. Yes, sir.

10 Q. Okay. Do you know, do you have a background
11 that would let you -- and you answered the question
12 that if they had gun residue on their hand that that
13 meant that they most probably fired the gun?

14 A. If they had it on their hand it's most likely
15 that they fired a gun recently.

16 Q. Okay. All right.

17 **MR. FELDMAN:** I'll leave it there, your
18 Honor. Thank you very much.

19 **THE COURT:** Thank you. Anything else?

20 **MR. MARSHALL:** No, sir. Thank you.

21 **THE COURT:** You may step down, sir.

22 Okay. Ladies and gentlemen, apparently this
23 is a good stopping break. Let's see, it's 12:30
24 now, if you could report back and be ready to go at
25 1:45. Thank you very much. Please do not discuss

1 this case in any way during the break.

2 (Jury excused.)

3 **THE COURT:** Okay. See you back at noon.

4 Mr. Brown, why were you not here this
5 morning?

6 **THE JUROR:** I overslept, I didn't hear
7 the alarm go off.

8 **THE COURT:** You realize it's very
9 important that you be here?

10 **THE JUROR:** Yes.

11 **THE COURT:** It's not just important, but
12 you are under an obligation to be here when the
13 Court tells you to be here throughout this whole
14 week. I've had to excuse you from this case, but
15 you'll need to call in after 6:00. I'm not going to
16 impose any kind of penalty at this point. You'll
17 need to call in after 6:00 as everyone else has to
18 call in about your instructions tomorrow. Please
19 adhere to those instructions. Okay?

20 **THE JUROR:** All right.

21 **THE COURT:** I'm not going to impose any
22 penalty this time. Thank you very much.

23 **MR. FELDMAN:** Your Honor, I have a
24 matter of law, if I may.

25 **THE COURT:** If you're going to have a

1 matter of law, let me know just -- if it's short
2 it's okay, but I like to time things right.

3 MR. FELDMAN: I'm sorry. It's pretty
4 short, Judge.

5 THE COURT: Okay.

6 MR. FELDMAN: I just wanted to ask if
7 the solicitor will stipulate to the GSR test on
8 Cuttino Simmons being positive, or just stipulate to
9 what they gave me in discovery as the SLED test. I
10 mean, I don't mind getting John Ortuno down there,
11 he's on their witness list, but I don't want to fall
12 in the gap. You know, it's not disputed, I mean, it
13 isn't disputed, I would like to know if I need to
14 send somebody to Columbia to serve John Ortuno.

15 THE COURT: Are you just asking if you
16 can admit that into evidence?

17 MR. FELDMAN: Yes, your Honor. If they
18 would stipulate it to.

19 MR. MARSHALL: No, sir. I don't I think
20 Mr. Ortuno needs to testify. I may call him. I'm
21 not sure whether or not I will, but I don't think
22 this is an appropriate area for a stipulation.

23 THE COURT: Is he going to be here?

24 MR. MARSHALL: Well, I've got him
25 subpoenaed. If I tell him to come he will, yes,

1 sir.

2 MR. FELDMAN: Your Honor --

3 THE COURT: Just to save time, would you
4 go ahead and ask him to be sure?

5 MR. MARSHALL: Sure.

6 MR. FELDMAN: Thank you, your Honor.

7 (Lunch recess taken.)

8 THE COURT: Are you all ready to
9 proceed?

10 MR. FELDMAN: Yes, your Honor.

11 MR. MARSHALL: Yes, sir.

12 THE COURT: Bring the jury in, please.

13 MR. FELDMAN: I can't remember what the
14 solicitor said about the two gun charges that
15 William Wade Phillips has.

16 THE COURT: I told you to find out --

17 MR. FELDMAN: No, they don't have over a
18 year. Thank you. I couldn't remember.

19 THE COURT: Okay. Bring the jury in,
20 please.

21 (Jury present.)

22 THE BAILIFF: All seated, your Honor.

23 THE COURT: Okay. Thank you. Please be
24 seated. Okay. Ladies and gentlemen, we're ready to
25 proceed. Call your next witness, sir.

1 **MR. MARSHALL:** William Phillips.
2 Sheriffs have gone to get him, your Honor, he'll be
3 right over.

4 **THE CLERK:** Please place your left hand
5 on the Bible and raise your right hand.

6 (William Wade Phillips, called as a
7 witness by the State, having first been
8 duly sworn, was examined and testified
9 as follows:)

10 **THE CLERK:** Please be seated. Please
11 state your full name and spell your last name for
12 the record.

13 **THE WITNESS:** William wade Phillips,
14 P-h-i-l-l-i-p-s.

15 **THE CLERK:** Thank you.

16 **DIRECT EXAMINATION**

17 **BY MR. MARSHALL:**

18 Q. Mr. Phillips, how old are you, sir?

19 A. Twenty-five.

20 Q. How far did you go in school?

21 A. Eighth grade.

22 Q. Are you from the Charleston area originally?

23 A. Yes, sir.

24 Q. Lived around here your whole life?

25 A. Yes, sir.

1 Q. What sort of jobs have you had during your
2 life?

3 A. Temporary naval jobs.

4 Q. Were you convicted in 1992 of armed robbery?

5 A. Yes, sir.

6 Q. Are you married?

7 A. No.

8 Q. Have any children?

9 A. Unh-unh. (Negative response.)

10 Q. Are you currently -- what's your current
11 custody status?

12 A. Current custody?

13 Q. Are you currently in custody of the
14 Department of Corrections?

15 A. Yes, sir.

16 Q. Do you know the defendant in this case, Joe
17 Lewis Holmes?

18 A. Yes, sir.

19 Q. How do you know him?

20 A. Known him for a while as I was raising up
21 being around the area.

22 Q. About how many years would you say that
23 you've known him?

24 A. Probably about ten or eleven.

25 Q. And are you able to -- if you're able to then

1 do so, if you're not then don't. But are you able
2 to estimate about how frequently you would see him
3 over the last ten years?

4 A. No.

5 Q. Was it with any regularity at all?

6 A. Hum?

7 Q. Would you see him regularly at all?

8 A. Well, within the last two months I seen him a
9 little often, you know, but not throughout the last
10 ten years.

11 Q. Now, in this case, the State of South
12 Carolina versus Joe Lewis Holmes for murder, were
13 you also charged in this case?

14 A. Yes, sir.

15 Q. What were you charged with?

16 A. Murder.

17 Q. Why were you charged with murder?

18 MR. FELDMAN: Your Honor, I would
19 object. But I would be happy to put his indictment
20 in the record if the solicitor would like. That
21 says why he was charged with murder.

22 THE COURT: Counsel approach.

23 (Whereupon, a conference was held at
24 side bar.)

25 THE COURT: Do I understand you withdraw

1 the question?

2 MR. MARSHALL: That's correct, your
3 Honor.

4 THE COURT: Go ahead.

5 BY MR. MARSHALL:

6 Q. You were also charged, originally charged
7 with murder in this case. What plea agreement did
8 you reach with the State of South Carolina?

9 A. I made a plea agreement for obstruction of
10 justice and possession of a pistol by a convicted
11 felon in return for my truthful testimony.

12 Q. So you pled to obstruction of justice and
13 possession of a pistol by a convicted felon?

14 A. Yes, sir.

15 Q. That being you're a convicted felon because
16 of your armed robbery charge?

17 A. Yes, sir.

18 Q. And what are you exposed to, what are the
19 possible sentences on those charges?

20 A. What are the possible? Well, obstruction of
21 justice carry ten, and possession of a pistol carry
22 five.

23 Q. So for a total possible of 15?

24 A. Yes, sir.

25 Q. And what arrangement have you made with the

1 State about what your actual sentence will be?

2 A. Ten suspended with time served with no more
3 than five years' probation.

4 Q. And how much time as of the time that you
5 will be released back into the community, how much
6 time will you have done with this charge hanging
7 over you?

8 A. Nineteen months.

9 Q. Nineteen months.

10 MR. FELDMAN: Your Honor, may we
11 approach?

12 THE COURT: Yes, sir.

13 (Whereupon, a conference was held at
14 side bar.)

15 THE COURT: Is that objection withdrawn?

16 MR. FELDMAN: Yes, your Honor. Thank
17 you.

18 BY MR. MARSHALL:

19 Q. Mr. Phillips, do you recall the night of
20 Thursday, July the 18th of 1996 into the morning of
21 Friday, July the 19th of last year?

22 A. Yes, sir.

23 Q. Can you please tell the ladies and gentlemen
24 of the jury what you did that night and into the
25 morning?

1 A. Well, first off I was at a friend house on
2 Russledale, you know, sitting around drinking a
3 little beer with some friends. And I went 'round
4 the corner to the Amoco gas station and met up with
5 a few fellows. Before got 'round to the Amoco gas
6 station, we was sitting out to the Amoco gas station
7 for a few minutes -- well, a few hours or so, you
8 know, sitting around talking and all.

9 And Mr. Joe Holmes came up, you know, and
10 some transaction were made or whatsoever, you know,
11 and they get in a little argument. And, well, the
12 argument transpired, I gave Joe Lewis Holmes a gun,
13 you know, in which after a few seconds he started
14 shooting.

15 Q. Who is it that he was having this, as you
16 call it, argument with?

17 A. Kenneth Washington.

18 Q. And were you able -- were you present for the
19 entire argument, as you stated?

20 A. Well, to say exactly what was said I couldn't
21 say exactly what was said, but then I was right
22 there present at the whole time, yes, sir.

23 Q. Well, you can't quote it word for word, but
24 did you pick up on the substance of what they were
25 arguing about?

1 A. Basically it revolved around some bad drugs
2 or something.

3 Q. All right. You stated that you handed your
4 gun to Joe Holmes; is that right?

5 A. Yes, sir.

6 Q. At what point in this argument did you do
7 that?

8 A. Well, at the point -- at the point after the
9 transaction were made and at the time when they was
10 walking off, Antwan and Kenneth were walking off and
11 I handed Joe my gun.

12 Q. How long did he hold the gun before he
13 started shooting it?

14 A. I would say about ten seconds or so.

15 Q. Did you see him -- did you see Joe Holmes
16 fire the gun?

17 A. Yes, sir.

18 Q. Where were you in relationship to him when he
19 fired the gun?

20 A. I'd say about five to ten feet away from him.

21 Q. Did the lighting conditions permit you to
22 have a clear view?

23 A. Yes, sir.

24 Q. And where were Kenneth and Antwan at the
25 point when the defendant started to fire your gun?

1 A. Antwan was on the driver's side of the truck
2 by then and Kenneth was getting close to the
3 passenger side of the truck.

4 Q. Could you tell whether or not Kenneth had
5 been hit?

6 A. No, sir.

7 Q. How many shots were fired?

8 A. I'd say about four because I had five shots
9 inside the gun.

10 Q. And after those shots were fired, did you see
11 what Kenneth did and what Antwan did next?

12 A. I see Kenneth ran down Target Street. I
13 couldn't see what Antwan did 'cause the Jeep was
14 blocking my view of him.

15 Q. Did you see Kenneth run immediately, or did
16 he fall first?

17 A. He ran.

18 Q. Now, during this argument that you described
19 between Joe and who was the other person?

20 A. Joe and Kenneth.

21 Q. Joe and Kenneth. During that argument did
22 you see Kenneth Washington with a weapon at all?

23 A. During the argument, no, sir.

24 Q. Prior to him being shot, did you see him with
25 a weapon?

1 A. No, sir.

2 Q. During the argument did you see Antwan
3 Venning with a weapon?

4 A. No, sir.

5 Q. Prior to Kenneth being shot, did you see
6 Antwan Venning with a weapon?

7 A. No, sir.

8 Q. Did you see Kenneth make any physically
9 aggressive moves towards Joe Holmes?

10 A. No, sir.

11 Q. Did you see anyone make any aggressive moves
12 towards Joe Holmes?

13 A. No, sir.

14 Q. Did you have any personal fear for yourself
15 from either Kenneth Washington or Antwan Venning as
16 they were walking off and as they approached and
17 reached the Jeep?

18 A. No, sir.

19 Q. Did you ever see either one of them touch a
20 shotgun at the time they walked across the vacant
21 lot and reached the Jeep? As Antwan reached the
22 Jeep and Kenneth nearly reached the Jeep, did you
23 see either one of them with a shotgun?

24 A. No, sir.

25 Q. Okay. After the defendant fired the shots,

1 what happened next?

2 A. Well, after he fired the shots everybody ran
3 to a little cut in the back of Amoco behind a wooden
4 fence.

5 Q. Did everybody go over that iron railing
6 that's between the house and the Amoco?

7 A. Yes, sir.

8 Q. And you say "everybody." Who are you talking
9 about? Who were some of the people that were out
10 there?

11 A. Ah, let's see, we had Mark, little Mikey,
12 Myron, Mookie, Poochie, another fellow named Mike,
13 me, Joe, there was some females out there but I
14 don't think none of them ran the way we ran.

15 Q. I'll show you some pictures, see if you're
16 able to identify the people that are shown. This is
17 State's Exhibit 74. Do you know who that is?

18 A. Poochie.

19 Q. Do you know his real name?

20 A. Maurice.

21 Q. That's State's 65. Do you know who that is?

22 A. Antwan.

23 Q. That is State's 66. Do you know who that is?

24 A. Mookie.

25 Q. Do you know his real name?

1 A. Alexander.

2 Q. This is State's 67. Do you know who that is?

3 A. Mark.

4 Q. You say they were all out there?

5 A. Yes, sir.

6 Q. Prior to the defendant firing your gun at
7 Kenneth, did anybody who was hanging out in that
8 area where you were, did anybody run prior to him
9 firing the gun?

10 A. No, sir.

11 Q. If you had had a fear for your safety from
12 either Kenneth or Antwan, was there any reasonable
13 means for you to escape and protect yourself?

14 A. Yes, sir.

15 Q. What would you have done if you had been
16 scared?

17 A. Got a little path on the side of the house, I
18 would have ran the same way we ran after the
19 shooting happened.

20 Q. All right. After you all ran over that iron
21 gate and up into the Amoco parking lot, what then
22 happened?

23 A. I retrieved the gun back from Joe.

24 Q. How did that occur?

25 A. We all just met back in the back there and I

1 asked for the gun; he handed it to me.

2 Q. Was that behind the wooden fence?

3 A. Yes, sir.

4 Q. After you got the gun back from the
5 defendant, then what happened?

6 A. Me, Mookie and Poochie, we went to the truck
7 to retrieve the shotgun out of the truck and I shot
8 out the tires out of the Jeep.

9 Q. So what was on your mind as you were headed
10 over towards the Jeep?

11 A. Really just to retrieve the shotgun, ain't
12 too much been on my mind.

13 Q. You knew the shotgun was in there?

14 A. Yes, sir.

15 Q. When you got over to the Jeep, was there
16 anybody else in it or around it?

17 A. No, sir.

18 Q. And you stated that you shot out the tire.
19 Which tire?

20 A. The back passenger tire.

21 Q. Why did you do that?

22 A. Simple fact so the Jeep ain't going nowhere,
23 just to shoot it.

24 Q. When you shot that tire, do you know where
25 Maurice Simmons, Poochie, was?

1 A. To the -- yeah, he was right up in the area,
2 too.

3 Q. Are you able to give any accurate estimate as
4 to how close to you he was?

5 A. Well, he probably about within five feet of
6 me or less.

7 Q. Who got the shotgun?

8 A. Mookie.

9 Q. Did you all take anything else from the Jeep?

10 A. No, sir.

11 Q. After Mookie got the shotgun, then what
12 happened?

13 A. We went back through the cut then head to
14 Mookie house.

15 Q. What happened when you got there?

16 A. Well, we just -- I check the gun to make sure
17 ain't no bullets been in it and gave them the gun,
18 then we was heading back toward the truck.

19 Q. By "the truck," you mean the Jeep?

20 A. Yes, sir.

21 Q. There were no shotgun shells in the shotgun?

22 A. No, sir.

23 Q. What happened on your way back to the Jeep?

24 A. On the way back to the Jeep we saw the police.
25 coming down the street, then we turn back around.

1 Q. Where did the police stop you?

2 A. On -- right there on the bridge on Mark -- on
3 Dorothy Williams Boulevard.

4 Q. And as the police had you detained, did you
5 see the defendant at that time?

6 A. Yes, sir.

7 Q. Where was he?

8 A. Down the street some in front of some
9 apartments.

10 Q. Was anybody with him?

11 A. Yeah, Mark.

12 Q. Now, the man that you state that you saw
13 murder Kenneth Washington, do you see him today?

14 A. Yes, sir.

15 Q. Where is he?

16 A. To my left.

17 Q. With what degree of certainty do you state
18 that it's Joe Holmes that murdered Kenneth
19 Washington?

20 A. One hundred percent.

21 Q. In a minute I'm going to ask you to come down
22 and use some photographs to help you explain what
23 you saw and what you did.

24 Okay. Mr. Phillips, why don't you come on
25 down, please.

1 A. (The witness complied.)

2 Q. Okay. Using this exhibit which is in
3 evidence as State's Number 2, take a look at that
4 and see if you're able to describe to the ladies and
5 gentlemen of the jury where it is that this
6 argument, as you termed it, occurred. You can use
7 this pointer. And you may need to speak into that,
8 I don't know. You can point right on the screen.

9 A. The argument was probably about right here
10 (indicating).

11 Q. And where were you at the time it occurred?

12 A. About right over here somewhere (indicating).

13 Q. Well, where were you at the time that you
14 handed the defendant your gun?

15 A. After they got through arguing --

16 Q. Speak into the microphone, please.

17 A. After they got through arguing, the
18 defendant -- I mean, the victim walked off and I
19 walked over, that's when I hand him the gun.

20 Q. Kenneth and Antwan walked in what direction?

21 A. Back toward the Jeep.

22 Q. And where -- after the shots were fired,
23 where is it that you ran?

24 A. We ran across, came across here (indicating),
25 Then ran around, around a wooden fence back to the

1 back of Amoco.

2 Q. Did the defendant run also?

3 A. Yes, sir.

4 Q. This is marked State's Exhibit 16, it's in
5 evidence. Using this photograph, are you able to
6 tell the jury where it is that you were handed your
7 gun back from the defendant?

8 A. Right back here (indicating), the path that
9 behind the green house.

10 Q. And then after you got the gun back, where
11 did you go?

12 A. Me and two other fellow went through there to
13 where the Jeep at on Target Street.

14 Q. Do you know where the defendant went?

15 A. He went through the old trailer park.

16 Q. This is marked as State's 27 and it's in
17 evidence. Are you able to identify what that is?

18 A. Yeah, that's the Cherokee.

19 Q. Is that the one that you went to on the
20 morning of the 19th of July of '96?

21 A. Yes, sir.

22 Q. And which tire is it that you shot out?

23 A. Back on the passenger right there
24 (indicating).

25 Q. What is your recollection of where you were

1 positioned at the time that you shot that tire out?

2 A. Right up in here in the back part, 'cause I
3 pretty close at the time when I shot it.

4 Q. What is your recollection of where Mookie,
5 Alexander Gaillard, was at the time that you shot
6 the tire out?

7 A. He was already going around to get the gun
8 out the Jeep.

9 Q. And what is your recollection of where
10 Poochie, Maurice Simmons, was at the time you fired
11 into the tire?

12 A. He in the back part standing close to me.

13 Q. When you went up to that Jeep, did you notice
14 whether those holes were in the glass or not?

15 A. Yes, sir.

16 Q. Were they?

17 A. Yes, sir.

18 MR. FELDMAN: Is that 27-B?

19 MR. MARSHALL: Correct.

20 BY MR. MARSHALL:

21 Q. Now, you stated earlier that if you had had a
22 fear for your safety that you had an idea of what
23 you would have done. Using this photograph, can you
24 explain what you would have done?

25 A. I would have ran back here (indicating),

1 jumped the fence --

2 **MR. FELDMAN:** Your Honor, I would
3 object. I'm not the sure what he asked, but I think
4 he gave him a hypothetical and said if something
5 were the case what do you think you would have done.
6 I would object to that.

7 **THE COURT:** Restate your question. You
8 can ask him about what happened.

9 **BY MR. MARSHALL:**

10 Q. Was there a route for you to safely escape
11 had you had a reasonable fear for your safety?

12 A. Yes, sir.

13 Q. What was that route?

14 A. Across this here (indicating) through the
15 back, the same way we ran across the gate right here
16 (indicating), which would have taken you to the same
17 spot in the back of the green house.

18 Q. Is there any space between this corner and
19 this fence? It's hard to tell from the photograph,
20 is there any space there?

21 A. Yes, sir.

22 Q. How much space?

23 A. To be exact, I would probably say about five
24 feet of space.

25 Q. This is marked State's 28, it's in evidence.

1 Did anything occur in that vicinity on the night
2 that Kenneth Washington was murdered?

3 A. That's where we get stopped at by the police
4 up in here at the bridge.

5 MR. MARSHALL: Is everybody able to
6 hear?

7 SOME JURORS: No.

8 MR. MARSHALL: Is that on? Just hold it
9 close to you.

10 BY MR. MARSHALL:

11 Q. All right. What occurred in this vicinity?
12 Speak into the microphone now.

13 A. That's where Mookie live at right here
14 (indicating), this where we left the shotgun and all
15 that. We was coming from here (indicating) through
16 another little path.

17 Q. You got to hold that close.

18 A. To another little path right here
19 (indicating), and this is where the place -- we get
20 halfway through the path we saw the police coming,
21 we turned around, the police stop us right here
22 (indicating) on the bridge.

23 Q. All right. Who was with you at that point?

24 A. Mookie and Poochie.

25 Q. All right. You stated that when you were

1 stopped there you also saw the defendant, you also
2 saw Mark O'Brien?

3 A. Yes, sir.

4 Q. Where were they?

5 A. Over here (indicating) next to a -- right
6 down the street close to the apartments right there
7 (indicating).

8 Q. This is marked State's Exhibit 47, I don't
9 believe it is in evidence yet. Are you able to
10 identify what is shown in this photograph?

11 A. That's the path that goes right by the green
12 house from Target Street.

13 Q. The path that goes to the green house from
14 Target Street?

15 A. Yes, sir.

16 Q. Where would the green house be in that
17 picture?

18 A. Over on this side (indicating).

19 Q. Is that a fair and accurate representation of
20 the way that area looked at the time that Kenneth
21 Washington was murdered?

22 A. Yes, sir.

23 MR. MARSHALL: Move to introduce Number
24 47.

25 MR. FELDMAN: No objection, your Honor.

1 **THE COURT:** Forty-seven into evidence
2 without objection.

3 (Exhibit 47 previously entered into
4 evidence.)

5 **BY MR. MARSHALL:**

6 Q. Are you able to point out for the jury on
7 that photograph where it is that the Jeep was
8 parked, approximately?

9 A. Right up in here (indicating) from the side
10 part.

11 Q. This is State's Exhibit 51 which is in
12 evidence. Using this diagram, are you able to show
13 the jury the path that you took from the time that
14 you saw the defendant shoot Kenneth Washington until
15 you were stopped by the police? Where were you when
16 the shooting occurred?

17 A. In front of the house right here
18 (indicating).

19 Q. Okay.

20 A. If that's the green house.

21 Q. All right. That's the green house and that's
22 where the shooting occurred. What did you do next?

23 A. Ran through the back, came up through the
24 path right here (indicating) which led around here
25 (indicating) to Target Street. After retrieving the

1 gun, I went back -- there's a path all the way
2 behind the Amoco -- to come up right in here by the
3 ditch (indicating) which goes to a path right here
4 that come out on Dorothy Williams Boulevard right
5 here by the bridge (indicating).

6 Q. And once you got on Dorothy Williams, where
7 did you go?

8 A. Over this side to the apartments on Dorothy
9 Williams off Flora.

10 Q. And who lives there?

11 A. Mookie.

12 MR. FELDMAN: What number is that?

13 MR. MARSHALL: That's 51.

14 MR. FELDMAN: Thank you very much.

15 BY MR. MARSHALL:

16 Q. Okay. You may be seated. Thank you.

17 A. (The witness complied.)

18 Q. What type of gun was it that you handed to
19 Joe Holmes that he used to kill Kenneth Washington?

20 A. .38 revolver.

21 Q. What did it look like, what colors?

22 A. Black with a brown handle.

23 Q. What was your condition out there that night,
24 were you drinking alcohol and doing any drugs?

25 A. I was drinking alcohol.

1 Q. What were you drinking?

2 A. Beer.

3 Q. How much beer had you had?

4 A. I would say about two or three cans.

5 Q. How would you describe your condition at the
6 time that you witnessed the murder?

7 A. I was in pretty fair condition.

8 MR. MARSHALL: If I could just have a
9 moment, your Honor, to review my notes I think I'm
10 about through with this witness.

11 (Brief pause in proceedings.)

12 BY MR. MARSHALL:

13 Q. I would like to ask you to come down again in
14 just a minute, please, Mr. Phillips. Well, no,
15 that's not necessary. That's all I have. Thank
16 you.

17 MR. FELDMAN: Your Honor, may I have
18 three minutes to check something, please? Thank
19 you.

20 THE COURT: Okay. Ladies and gentlemen,
21 I'll send you back to the jury room. Please do not
22 discuss this case in any way. Thank you very much.

23 (Jury excused.)

24 MR. FELDMAN: Thank you very much,
25 Judge.

1 THE COURT: We'll be at ease for a few
2 minutes.

3 (Recess taken.)

4 THE COURT: Okay. Are you all ready?

5 MR. FELDMAN: Yes, your Honor.

6 MR. CHURCHILL: Your Honor, Mr. Marshall
7 will be back in here in just a moment.

8 THE COURT: Okay. Are you ready?

9 MR. MARSHALL: Yes, sir.

10 THE COURT: Bring the jury in. Was that
11 need for a break anything I need to know about
12 before I bring the jury in?

13 MR. FELDMAN: No. It was just one of
14 those things, Judge.

15 THE COURT: Okay. Make sure it's not a
16 legal matter or anything.

17 (Jury present.)

18 THE BAILIFF: All seated, your Honor.

19 THE COURT: Okay. Please be seated. Go
20 ahead, sir.

21 MR. FELDMAN: Thank you very much, your
22 Honor.

23 CROSS-EXAMINATION

24 BY MR. FELDMAN:

25 Q. Mr. Phillips, could you step down? I want to

1 do this real quick while it's fresh.

2 A. (The witness complied.)

3 Q. Your testimony not five minutes ago was when
4 you shot the tire you were here (indicating)?

5 A. No. I was in the back part up in that area
6 (indicating) coming out.

7 Q. All right. And your testimony was that
8 Poochie, Maurice Simmons, was to your left?

9 A. To the left side, yeah.

10 Q. Okay. And that he was five feet or less to
11 you?

12 A. Yeah.

13 Q. All right. Now, when you were using the
14 pointer you said that when you retrieved the gun
15 your pointer was over here on the edge of Target
16 Street?

17 A. No. I retrieved the gun behind --

18 Q. But when you were telling it just a moment
19 ago your pointer was up here and then you said you
20 went back over.

21 A. No.

22 Q. You didn't say that?

23 A. I said we ran through here (indicating), come
24 through the back, I retrieved the gun back here
25 (indicating), I went through here (indicating), come

1 out right here where the Jeep at (indicating), we
2 went back, come all the way through going through
3 the path, come out over the bridge over there
4 (indicating)..

5 Q. Have a seat, please.

6 A. (The witness complied.)

7 Q. Mr. Phillips, you go by White Boy; is that
8 correct?

9 A. Yes, sir.

10 Q. That's 'cause you're white, right?

11 A. Yeah.

12 Q. Now, when you testified just a minute ago you
13 didn't exactly tell the whole truth, did you?

14 A. To the best of my knowledge, yeah.

15 Q. Now, isn't it true that you told what you
16 have to say to get your deal from the solicitor;
17 isn't that true?

18 A. No. I told what I had to say 'cause that's
19 what happened. The deal came in the process of what
20 I had to say.

21 Q. But you left a lot out, didn't you? You left
22 a lot out that maybe people would want to hear to
23 know the whole truth, didn't you?

24 A. Ask a thing and I'll tell it.

25 Q. In other words, your deal is that if you

1 testify consistent with your statement that you gave
2 a month ago or whatever --

3 A. No.

4 Q. -- that you get your deal, isn't it?

5 A. Yes, sir.

6 Q. But your statement leaves out a lot of stuff
7 that you told the solicitor, a lot of stuff, doesn't
8 it?

9 A. I don't know what you calling a lot of stuff.
10 I don't know.

11 Q. Let's talk about it. First of all, when you
12 gave your statement the statement was written up by
13 Pat Evans who works for the solicitor; is that
14 right?

15 A. Yes, sir.

16 Q. Is Mr. Evans here in the courtroom?

17 A. No, I ain't seeing him.

18 Q. Okay. Now, on the day you gave your
19 statement, the one that you have to be consistent
20 with here today to get your deal, before you gave
21 your statement you met with the solicitor and you
22 all talked for a little bit, didn't you? It was
23 you, the solicitor, Mr. Evans and your lawyer?

24 A. We talked.

25 Q. Talked a little bit, didn't you?

1 A. We didn't talk about the case. We talked,
2 yeah.

3 Q. You didn't talk about the case?

4 A. No.

5 Q. What did you talk about?

6 A. We didn't talk about the case until after we
7 started recording, so everything I said is on a tape
8 recorder.

9 Q. So you all just kind of shot the bull for a
10 while, then you decided to start the tape; is that
11 right?

12 A. Yeah.

13 Q. All right. And then you gave a tape recorded
14 statement, right?

15 A. Yeah.

16 Q. Okay. And then you got -- or Mr. Evans wrote
17 up a statement and you signed it, didn't you?

18 A. Yes, sir.

19 Q. And he drew a line showing where the end of
20 statement was, didn't he? If you know.

21 A. I can't recall.

22 Q. Okay.

23 MR. MARSHALL: If he's going to be
24 questioned about a statement, your Honor, I ask that
25 he be given a copy of it.

1 THE COURT: Yes, sir.

2 MR. FELDMAN: Well, your Honor, I will.
3 I'm just making a foundation here and I will.

4 THE COURT: Okay. I'll give you a
5 little bit of leeway in asking him if he -- what he
6 remembers about his statement, whether he made it,
7 and then if it gets any further than that then show
8 him the statement.

9 MR. FELDMAN: Thank you, your Honor.

10 BY MR. FELDMAN:

11 Q. And Mr. Evans wrote up the statement and then
12 you signed it, didn't you?

13 A. Yes, sir.

14 Q. I'm not asking you what's in it, I'm just
15 saying that's how it happened. And then you met
16 with the solicitor again, didn't you? And then
17 after talking to the solicitor you changed the
18 statement, didn't you?

19 A. Met with the solicitor again to change my
20 statement? I ain't never changed no statement.

21 Q. All right. Never changed a statement?

22 A. I changed one line on it. One line. I
23 didn't change the whole statement.

24 Q. Now, you were charged with murder in this
25 case? Sir?

1 A. Yes, sir.

2 Q. But you got to plead to something that will
3 walk you out of jail because that's the deal you got
4 with the solicitor?

5 A. Yes, sir.

6 Q. Now, let me talk about some things that you
7 didn't say just now, although you told the solicitor
8 so he knows about it. Number one, is you had been
9 drinking by yourself before 2:00 in the morning.

10 A. Yeah.

11 Q. And you drank all night?

12 A. No, I didn't drink -- I was drinking that
13 night, I didn't say how much that I drank throughout
14 the night or how much or when I get through drinking
15 or whatever.

16 Q. Well, here's something you didn't tell the
17 jury but you told the solicitor. And you were
18 smoking pot all night, weren't you?

19 A. No. I was looking for pot.

20 Q. You were looking for pot?

21 A. Yeah.

22 Q. Do you remember when the solicitor asked you
23 had you been smoking any crack that night? Do you
24 remember when he asked you that that day?

25 A. Yeah.

1 Q. And you said, "No, I don't smoke crack." Do
2 you remember that?

3 A. Yeah.

4 Q. And the solicitor said, "Oh, really? You
5 were just drinking?" And you said, "Yes." You
6 remember that?

7 A. Yeah.

8 Q. And you do you remember the solicitor asked
9 you, "Were you doing anything else?" And you said,
10 "Smoking reefer."

11 A. I didn't buy no reefer that night.

12 Q. You told the solicitor you were spoking
13 reefer that night.

14 A. I might have said it, I can't recall. I
15 might have said it. I could be wrong about certain
16 things.

17 Q. But you know what you're supposed to say to
18 keep your deal? Sir?

19 A. Go ahead, continue.

20 Q. You know what you're supposed to say to keep
21 your deal, you understand, don't you?

22 A. Yeah, I know what I supposed to say.

23 MR. FELDMAN: Your Honor, I have handed
24 up to the Court a transcript, I provided one to the
25 solicitor. May I refer to it at this time? I'll

1 give you the page and line number.

2 THE COURT: Yes, sir.

3 BY MR. FELDMAN:

4 Q. I want to refer to page 11, line 6, and I
5 want you to read that line on line 6, Mr. Phillips.

6 A. "Were you doing anything else?"

7 Q. And what did you tell the solicitor?

8 A. "Smoking reefer."

9 Q. Now, you went to the Amoco to get some more
10 malt liquor beer, whatever you were drinking; is
11 that correct?

12 A. Yes, sir.

13 Q. But you couldn't go into the Amoco because
14 you were barred, weren't you?

15 A. Yes, sir.

16 Q. What were you barred for, stealing?

17 A. No, sir. They said I made a drug transaction
18 in front of the Amoco, I was barred from there.

19 Q. There were a lot of people coming and going
20 that night; is that correct?

21 A. Yes, sir.

22 Q. You all were selling cocaine, you were
23 drinking, you were smoking?

24 A. No. No.

25 Q. Listen to my question before you answer,

1 please.

2 A. You said, "you all."

3 Q. Among the people who were out there, there
4 was cocaine, crack cocaine selling going on?

5 A. Uh-huh. (Affirmative response.)

6 Q. There was crack cocaine usage going on; is
7 that correct?

8 A. I didn't see no usage going on.

9 Q. You didn't see any use all night?

10 A. Didn't see no usage.

11 Q. There was pot smoking that night?

12 A. I didn't see no pot smoking that night,
13 either.

14 Q. You were smoking it 'cause you just said,
15 told the solicitor you did.

16 A. I might have said I was looking for reefer
17 that night. I might have said I was smoking, that
18 probably slipped my mind or whatever, but I was not
19 smoking no reefer.

20 Q. And you all were doing this all night because
21 the boy wasn't shot 'til in the morning.

22 A. Uh-huh. (Affirmative response.)

23 Q. You were drinking, smoking reefer all night,
24 weren't you?

25 A. No.

1 Q. A lot of people coming and going.

2 Now -- okay. You say that Antwan Venning and
3 Kenneth Washington were the crack dealers?

4 A. Yes, sir.

5 Q. And Mookie was a crack dealer?

6 A. He wasn't selling no crack that night.

7 Q. Wasn't he in partners with Poochie to sell
8 crack?

9 A. What they did over there by the store and at
10 the store I do not know. I could not go to the
11 store, I was not on the premises or nothing when I
12 went through the cut.

13 Q. Now, the crack dealers had weapons on them,
14 didn't they?

15 A. Not that I know of.

16 Q. Now, Mr. Phillips, I want you to take your
17 time 'cause you're under oath, and I know you got a
18 deal, but you got to tell the truth here. I'm going
19 to ask you again, did the drug -- you knew that the
20 drug dealers had weapons.

21 A. Yeah. I knew the drug dealers had weapons,
22 yeah.

23 Q. That's what I just asked you.

24 A. No, you said weapons. They had the weapon in
25 the car. We was far away from the car.

1 Q. Thank you. They had a shotgun in the car,
2 didn't you (sic)?

3 A. Yeah.

4 Q. They had traded crack cocaine for the shotgun
5 and you knew all about it, didn't you?

6 A. Yeah.

7 Q. Shotgun was in the Jeep, wasn't it?

8 A. Yeah.

9 Q. Now, you told the solicitor that there was
10 a -- an argument and both crack dealers headed for
11 the car.

12 A. Yeah.

13 Q. Now, let me digress here for one second. As
14 a convicted armed robber you are not allowed under
15 South Carolina law to possess a handgun; is that
16 correct?

17 A. No, sir.

18 Q. You were convicted in, what, '92?

19 A. Yes, sir.

20 Q. When -- when -- when did you get, if you did
21 get off parole?

22 A. I wasn't on parole.

23 Q. What were you on?

24 A. I'm still on parole.

25 Q. So you were on parole back when, right?

1 A. Yes, sir.

2 Q. Okay. And you went somewhere in the street
3 and you obtained a handgun --

4 A. Yes, sir.

5 Q. -- is that correct?

6 A. Yes, sir.

7 Q. And you brought that handgun with you to this
8 gathering that night?

9 A. Yes, sir.

10 Q. And you had the gun immediately before the
11 shooting, didn't you?

12 A. Yes, sir.

13 Q. And you had the gun immediately after the
14 shooting, didn't you?

15 A. Yes, sir.

16 Q. And you fired the gun?

17 A. Yes, sir.

18 Q. And you disposed of the gun?

19 A. Yes, sir.

20 Q. You disposed of the gun so the police
21 couldn't take fingerprints off the gun, didn't you?

22 A. I dispose of the gun by giving the gun to
23 somebody else. I was arrested by the police, I
24 never had time to get rid of no gun.

25 Q. Well, you got rid of it.

1 A. Somebody else got rid of it. Whatever they
2 did with it I don't know.

3 Q. Well, all right. All right. I don't want to
4 belabor the point.

5 A. I was in jail ever since then.

6 Q. You had the gun after the shooting and then
7 you didn't have it, so you got rid of it?

8 A. I didn't have the gun after the shooting.

9 Q. Now, let me go back and talk about the -- a
10 different story you told the police. Let me assume
11 for the purpose of my question that you handed the
12 gun to Joe, okay, for the purpose of my question.
13 Didn't you tell the solicitor that you gave Joe the
14 gun for his protection?

15 A. Yes, sir.

16 Q. But you didn't say that just now, did you?

17 A. He didn't ask that. He asked what happened.
18 I told him I give him the gun; he didn't ask me why
19 did I give him the gun.

20 Q. Well, you told him -- didn't you tell him
21 something like you were afraid for him and you
22 handed him the gun, "They're going to get the gun"?

23 A. I never said I was afraid for him.

24 Q. You told him "They're going to get the gun"?

25 A. I give him the gun for the simple fact that I

1 know that the other fellow had a gun in the Jeep and
2 they was headed toward the Jeep. That's why I gave
3 him my gun.

4 Q. You didn't tell that to the Court.

5 A. Didn't ask that.

6 Q. When you were giving your statement to the
7 solicitor, you told this solicitor and his
8 investigator, "By the time Peanut get to the truck,"
9 I'm quoting, "By the time Peanut get to the truck,
10 Joe started shooting." Did you tell him that?

11 A. No.

12 Q. Peanut was at the truck you told him?

13 A. By the time he got by truck. He wasn't
14 actually to the truck. Antwan Venning was on the
15 other side, he was to the truck. Peanut hadn't make
16 it all the way to the truck yet. I said, "By the
17 time he got to the truck he start shooting."

18 Q. Well, let me draw your attention to page 10,
19 line 4. And I want you to read from line 4 through
20 line 12 what you told the solicitor.

21 **MR. MARSHALL:** Your Honor, I don't think
22 that's proper. I object. I think it's improper
23 impeachment. First of all, he just explained what
24 he meant by the ambiguous statement that's in the
25 transcript. And there needs to be a material

1 difference between what he's saying on the stand and
2 what he said previously for this to even be proper
3 impeachment. He explained what he meant by this
4 ambiguous statement. Let's move on.

5 **MR. FELDMAN:** Your Honor, no. He hasn't
6 admitted that that's what he said. I want to get in
7 the record exactly what he said. And if he's
8 uncertain, I think I'm permitted to use the
9 transcript for that purpose.

10 **THE COURT:** I'll allow it. Go ahead.

11 **THE WITNESS:** What do you want me to
12 read?

13 **BY MR. FELDMAN:**

14 Q. You read from line 4 where it says -- well,
15 why don't you read from -- I'm sorry, read from page
16 9, line 25, and I'll read the part where it comes
17 the question, I'll read what the solicitor asked
18 you.

19 A. I said, "I didn't know he was going to get
20 his gun and I didn't know Peanut, I know Joe, so I
21 had a pistol on me so I handed Joe my gun, you know
22 what I'm saying, not knowing that he was going to
23 shoot, you know what saying, just to protect you in
24 case, in case the man get to his gun. By the time
25 Peanut got to the truck Joe started shooting."

1 Q. The solicitor asked you, "What did you tell
2 Joe when you gave the pistol that you had?"

3 A. What I told him?

4 Q. Yes. Did you say anything to him?

5 A. I asked -- I asked him, "I think that boy's
6 going to get his gun."

7 Q. At the time you didn't know whether it was a
8 rifle or a shotgun or what it was, did you?

9 A. Yeah, I know what it is.

10 Q. Yeah?

11 A. Yeah.

12 Q. What was it?

13 A. A 20-gage shotgun.

14 Q. Well, you had never seen it before that?

15 A. I was right there when he bought it.

16 Q. Now, what you said is your deal is not really
17 just what your deal is, is it?

18 A. I don't understand.

19 Q. There's some more components, there's some
20 more parts to your deal with the solicitor, isn't
21 it?

22 A. Like what?

23 Q. Well, I'm asking you. Are there not more
24 parts to your deal with the solicitor?

25 A. My deal, my deal is for my testimony.

1 Q. And then you get to walk, right? They
2 dropped the murder case?

3 A. Yeah, the murder case gets dropped. I get no
4 more than five year probation.

5 Q. Didn't the solicitor also agree because
6 you -- what was the purpose that your probation was
7 revoked, or parole, or whatever it was? You're in
8 on a revocation now; are you not?

9 A. Yeah, for violation.

10 Q. What was the violation?

11 A. Not reporting.

12 Q. Now, the solicitor has agreed not to
13 prosecute you for stealing that shotgun, hasn't he?

14 A. Can't prosecute me for something I didn't
15 steal. What shotgun did I steal?

16 Q. Didn't you steel the shotgun out of the
17 truck?

18 A. No, I didn't steal. I didn't went inside
19 that truck. I never went inside that truck.

20 Q. Ah, well, the prosecutor is not going to
21 prosecute you for -- you say you shot the car, not
22 going to prosecute you for that, not going to
23 prosecute you for drugs.

24 A. What drugs?

25 Q. Marijuana.

1 A. Where the marijuana at?

2 Q. Well, you told the solicitor you were
3 smoking.

4 A. No. I said I was going to get marijuana.

5 Q. Well, that's not what you said. That's what
6 you're saying today, but that's not what you said.

7 A. I was never caught with marijuana.

8 Q. Now, you knew that the shotgun was loaded;
9 did you not?

10 A. No.

11 Q. The solicitor asked you, "Did you know the
12 shotgun was loaded?" Do you recall that? Do you
13 recall the solicitor asking you that?

14 A. Yes.

15 Q. And you told the solicitor "Yes, because I
16 was right there"?

17 A. Yes. The bullets wasn't in the gun.

18 Q. But you told the solicitor it was loaded?

19 A. I might of said that.

20 MR. MARSHALL: What page is that,
21 please?

22 MR. FELDMAN: I'm sorry, that's page 33,
23 line 20 through 22.

24 BY MR. FELDMAN:

25 Q. Now, you gave the shotgun -- you say you

1 didn't steal the shotgun. You had the shotgun,
2 didn't you?

3 A. I had the shotgun in my possession at the
4 house.

5 Q. All right. And you gave it to Mookie to
6 hide, didn't you?

7 A. No. I gave it to Mookie 'cause that was
8 Mookie gun. Mookie got the gun.

9 Q. Mookie stole the gun, what, while you and
10 Mookie and all were kind of congregating together,
11 didn't he?

12 A. Yeah.

13 Q. You had the gun in your possession and you
14 gave it to Mookie to hide?

15 A. I gave it to Mookie to do whatever he wanted
16 to do with it.

17 Q. Now, you gave not only the shotgun, but you
18 gave the pistol to Mookie, didn't you, to hide?

19 A. Well, to be exact, it was -- out of Mookie or
20 Myron, I don't know which one I give it to.

21 Q. You know, you told the solicitor you gave it
22 to Mookie.

23 A. But then if you would look you would see I
24 changed that on the statement.

25 Q. The truth is you've told the solicitor five

1 different stories about who you gave the gun to,
2 didn't you?

3 A. No.

4 Q. And you've told them a number of times that
5 you gave it to Mookie, didn't you?

6 A. A couple times I might have said that.

7 Q. All right. You told them on page 42, line
8 16, the solicitor asked you, "You took the revolver
9 and you gave it to Mookie at that time when you gave
10 back the shotgun?" And what did you answer him?

11 A. "Yeah."

12 Q. And then moments later the solicitor asked
13 you, or somebody asked you, "At that time that's
14 when you gave Mookie the pistol?" And what did you
15 answer?

16 A. "Yeah."

17 Q. And when you wrote your statement you told
18 them you gave Mookie the shotgun back and the pistol
19 to hide them at his home, didn't you?

20 A. All right. Someplace up there I changed
21 that. I changed that.

22 Q. Well, I'm just asking you a question.

23 A. But I changed that on the statement.

24 Q. That is not on this statement, is it?

25 A. It's on one of them statement where I changed

1 it when I told them I don't know exactly who I gave
2 the pistol to.

3 Q. The line is drawn your and name is signed,
4 right?

5 A. Yeah.

6 Q. Here's the thing --

7 MR. MARSHALL: Your Honor, I'm going to
8 ask that he be allowed to have the statement that
9 he's -- he's referring to in fairness to this
10 witness. Because he's saying that he changed a line
11 and he's trying to claim that he didn't, and the
12 statement's right here with the line changed. So
13 may I hand him this, please?

14 MR. FELDMAN: Your Honor, I have a
15 matter of law to take up.

16 THE COURT: Can you do it at bench?

17 MR. FELDMAN: I'll do it either way.

18 (Whereupon, a bench conference was held
19 on the record in the presence of the
20 jury but out of the hearing of the jury
21 and the following proceedings had:)

22 MR. FELDMAN: Now, Judge, I got lucky on
23 this because this is --

24 THE COURT: Hold it. I better send the
25 jury out. Ladies and gentlemen, I'm going to send

1 you back to the jury room. Please do not discuss
2 the case in any way.

3 (Jury excused.)

4 MR. FELDMAN: May it please the Court.

5 THE COURT: Yes, sir.

6 MR. FELDMAN: Your Honor, what I was
7 going to say is I got lucky because this is the
8 statement that I was given in discovery.

9 THE COURT: Yes.

10 MR. FELDMAN: And this is the statement
11 that I got lucky and ran across, and it was not
12 given to me. And I believe that what happened --
13 I'll kind of proffer what my theory is if you
14 want -- what happened, and this is what I'm asking
15 this witness, is that the witness met with the
16 investigator, they wrote the statement. But after
17 the solicitor met with the witness and they knew
18 what Mookie was going to say, he had to change his
19 statement.

20 And that's why you have -- and so that's
21 why -- and I would have never known, I mean unless
22 I'm a handwriting expert, I would have never known
23 that that statement -- I mean, I would have never
24 known that it was not a contemporaneous change.

25 THE COURT: You're suggesting the

1 statement was changed after?

2 MR. FELDMAN: Well, it was, because
3 that's a copy of where the line was drawn. I mean,
4 there's no question about it. And I was not given
5 the one without the line. I mean, the one without
6 the -- the one that did not have the new stuff.

7 THE COURT: Maybe you'll have to call
8 the investigator.

9 MR. FELDMAN: Yes, sir.

10 THE COURT: The solicitor asked that he
11 be allowed to see this statement. I don't see a
12 reason why he can't be allowed to see the other
13 statement, too, they were both signed by him.

14 MR. FELDMAN: I don't have any problem
15 with that.

16 THE COURT: I'll grant the solicitor's
17 request. You show him the statement you're
18 referring to, ask him why that difference is so.

19 Are they wanting a smoking break?

20 THE BAILIFF: I don't know.

21 THE CLERK: Did you see it?

22 THE COURT: No. (Reading a note from
23 the jury foreperson.) Tell them no, not yet.

24 Bring the jury back in. You don't have any
25 problem with that, do you, Mr. Solicitor?

1 MR. MARSHALL: No.

2 THE COURT: Okay. You'll just have to
3 decide whether or not you're going to call the
4 investigator later during your case.

5 THE BAILIFF: They're ready, your Honor.

6 THE COURT: Bring them in, please.

7 (Jury present.)

8 THE COURT: Okay. We're ready to
9 proceed, ladies and gentlemen.

10 MR. FELDMAN: May it please the Court.

11 THE COURT: Yes, sir.

12 BY MR. FELDMAN:

13 Q. Mr. Phillips, I show you a three-page
14 document with your signature on it. Is that your
15 statement?

16 A. Yes, sir.

17 Q. Okay. Now, is that the statement that you
18 first signed when you were with the investigator?

19 A. Yes, sir.

20 Q. And there's a line drawn to show where the
21 statement ends; is that correct?

22 A. Yes, sir.

23 Q. But then the solicitor came and talked to you
24 and you changed your story to say even though you
25 had told him twice in the statement and once -- I'm

1 sorry, twice in the interview and once in the
2 statement that you gave the gun to Mookie, after
3 talking to the solicitor you changed it to say you
4 weren't sure who you gave the gun to. Didn't you
5 change it?

6 A. Yes, sir.

7 Q. And that's on this statement; is that
8 correct?

9 A. Yes, sir.

10 Q. Look at it.

11 A. Yeah.

12 Q. All right. Because if you gave the gun to
13 Mookie, that's not consistent with the prosecute's
14 theory, is it?

15 A. Yes, sir.

16 Q. That's inconsistent with the other part of
17 the case.

18 Now, when you were brought in -- the other
19 thing he's agreed not to prosecute you for is lying
20 to the police, true?

21 A. I guess that's part of obstruction of
22 justice.

23 Q. You lied to the police about your name,
24 didn't you?

25 A. Yeah.

1 Q. And you signed a waiver and you offered to
2 talk to the police and you told them you didn't know
3 anything about what happened, did you?

4 A. No.

5 Q. You told them you were Michael Wade Carson,
6 didn't you?

7 A. Yeah.

8 Q. And that was your alias because you had a
9 parole violation, didn't you?

10 A. Yes, sir.

11 Q. But once the deal came in you get to walk out
12 of jail, get everything taken care of, and all you
13 got to do is testify against Joe Holmes, that's all
14 you got to do?

15 A. Yeah.

16 Q. And you don't have to spend the rest of your
17 life in prison, do you?

18 A. Yes, sir.

19 Q. And all you got to do is be consistent with
20 your statement, or at least the last one you did.

21 MR. FELDMAN: No other questions, your
22 Honor.

23 REDIRECT EXAMINATION

24 BY MR. MARSHALL:

25 Q. Mr. Phillips, when you stated you pointed out

1 where you were in relationship to the back right
2 tire when you shot it, and you stated that Maurice
3 Simmons was on your left, are you able to estimate
4 with any degree of accuracy approximately how far
5 from the Jeep you were when you shot the tire?

6 A. No, not to be exact. Not really.

7 Q. Can you give any kind of estimate?

8 A. I'd say about two or three feet away from the
9 Jeep, but I'm not sure though.

10 Q. Do you know who you gave the handgun to?

11 A. Not exactly.

12 Q. Do you know who murdered Kenneth Washington?

13 A. Yes, sir.

14 Q. Who did that?

15 A. Joe.

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

17 MR. FELDMAN: Nothing further.

18 THE COURT: You may step down, sir.

19 Call your next witness.

20 MR. MARSHALL: If I may have just a
21 minute with Mr. Feldman.

22 (Brief pause in proceedings.)

23 MR. MARSHALL: Patrick O'Neal.

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

1 (Patrick A. O'Neal, called as a witness
2 by the State, having first been duly
3 sworn, was examined and testified as
4 follows:)

5 THE CLERK: Please be seated. Please
6 state your full name and spell your last name for
7 the record.

8 THE WITNESS: Patrick Ashley O'Neal,
9 O-N-e-a-l.

10 DIRECT EXAMINATION

11 BY MR. MARSHALL:

12 Q. Mr. O'Neal, where do you work, sir?

13 A. North Charleston Police Department.

14 Q. How long have you worked there?

15 A. A little over two years.

16 Q. Have you had any other full-time jobs during
17 your life?

18 A. Yes.

19 Q. What else have you done?

20 A. I made candy at a candy factory before and
21 worked at Piggly Wiggly.

22 Q. What is your educational background?

23 A. Graduated from high school and one year in a
24 technical college.

25 Q. What sort of law enforcement training do you

1 have?

2 A. Prior to being hired with North Charleston,
3 none.

4 Q. Did you go to any school prior to being hired
5 at North Charleston?

6 A. The Criminal Justice Academy in Columbia.

7 Q. How did you become involved in this case, the
8 State of South Carolina versus Joe Holmes?

9 A. I responded to the area of [REDACTED] Target Street
10 in reference to shots being fired in the area. And
11 while I was checking the area the complainant called
12 and stated that she had --

13 MR. FELDMAN: Objection. I mean, I know
14 there was a shooting and everything.

15 BY MR. MARSHALL:

16 Q. Well, without stating what somebody else
17 said.

18 A. Okay.

19 Q. State what you did in response to what
20 somebody else said.

21 A. Okay. I responded to, like I said, in
22 reference to shots being fired. I was signaling the
23 area of where the shots came from; I didn't hear
24 anything. Then I found the victim's body.

25 Q. About what time was that, that you got a call

1 of shots fired?

2 A. 6:03 a.m.

3 Q. And the date was what?

4 A. Let me refer to my report. 7-19 of '96.

5 Q. And what time is it that you are arrived at

6 [REDACTED] Target?

7 A. Approximately 6:06.

8 Q. Three minutes after the call?

9 A. Correct.

10 Q. Where is it that you located a person's body?

11 A. Behind [REDACTED] Target Street, which is a
12 trailer.

13 Q. Did you note how the body was positioned?

14 A. It was laying face down with the head turned
15 to the right-hand side.

16 Q. Was anybody else on the scene yet?

17 A. No, sir. I was the first one.

18 Q. Did you note the condition of the body?

19 A. I observed one what appeared to be a bullet
20 hole in the upper right-hand shoulder of the back,
21 and also I -- I checked for a pulse at which I
22 didn't -- I couldn't get any response from the
23 victim.

24 Q. Did you note any weapons on the person or
25 around the area of this person?

1 A. I didn't notice any around the victim. I
2 couldn't see what was on the front of him because of
3 the way he was face down, but he had none on the
4 back side.

5 Q. Did you alter the position of the body at
6 all?

7 A. No, sir. I didn't.

8 Q. Who was the next person to arrive there on
9 the scene?

10 A. EMS and First Responder arrived shortly
11 after.

12 Q. About how long after you got there?

13 A. I believe it's 24 minutes.

14 Q. Were you there alone for 24 minutes?

15 A. Behind [REDACTED] Target, yes, I was.

16 Q. Did you watch what the First Responder Unit
17 did once they got there?

18 A. Yes, I did.

19 Q. What did they do?

20 A. They turned the body over on its back at
21 which time they tried to revive the subject.

22 Q. In just a minute I'm going to ask you to come
23 down and give some more detail using some photos.

24 Okay. If you would, please, Mr. O'Neal, this
25 exhibit is marked State's 13 and is not yet in

1 evidence.

2 MR. MARSHALL: Mr. Feldman, do you care
3 to take another look at these before I show them?

4 MR. FELDMAN: No. I've seen them and we
5 discussed them.

6 BY MR. MARSHALL:

7 Q. Using this photo, are you able to identify
8 what street that is?

9 A. That's Target Street.

10 Q. Using this pointer, can you tell -- and
11 that's probably not in the best photograph -- but
12 can you tell approximately where it is that [REDACTED]
13 Target is?

14 A. It's -- I believe it's back over off the side
15 (indicating). I'm not sure on this picture here.

16 Q. All right. Let me show you this next
17 picture.

18 MR. MARSHALL: Move to introduce 13,
19 your Honor.

20 THE COURT: Any objection?

21 MR. FELDMAN: No, your Honor.

22 THE COURT: Thirteen into evidence
23 without objection.

24 (Entered into evidence was

25 State's Exhibit 13.)

1 BY MR. MARSHALL:

2 Q. Okay. This one's marked as State's 40, it's
3 not yet in evidence. Are you able to identify what
4 is shown there?

5 A. That's [REDACTED] Target Street.

6 Q. All right. And where, if you can using your
7 pointer, can you point -- even though it may not be
8 pictured, can you point where the body was located
9 when you got there?

10 A. Between the trailer and the house is like a
11 pathway and it was laying right behind the trailer.

12 MR. MARSHALL: Move to introduce this
13 photograph, your Honor, it's Exhibit 40.

14 MR. FELDMAN: No objection.

15 THE COURT: Forty in evidence without
16 objection. Did you say 40?

17 MR. MARSHALL: Yes, sir.

18 THE COURT: Okay.

19 (Entered into evidence was
20 State's Exhibit 40.)

21 BY MR. MARSHALL:

22 Q. Mr. O'Neal, this one is not yet in evidence,
23 it's Number 31, State's 31. Are you able to
24 describe what is shown in this photograph?

25 A. Yes, sir. That's the victim's body.

1 Q. Is that a fair and accurate representation of
2 what you saw when you arrived on the scene at 6:06?

3 A. The victim was turned over in this area here
4 (indicating) laying on his stomach around about
5 right here (indicating).

6 MR. MARSHALL: Move to introduce Exhibit
7 31, your Honor.

8 MR. FELDMAN: No objection.

9 THE COURT: State's 31 in evidence
10 without objection.

11 (Entered into evidence was

12 State's Exhibit 31.)

13 BY MR. MARSHALL:

14 Q. This is State's 32 not yet in evidence. Are
15 you able to identify what's shown there?

16 A. That's all the victim's body after it had
17 been turned over, it was laying right in this area
18 right here (indicating) face down.

19 MR. MARSHALL: Move to introduce Exhibit
20 32.

21 MR. FELDMAN: No objection. Your Honor,
22 I really don't have an objection, you know, we all
23 know what happened that there's somebody dead, but I
24 don't know that it's necessary to present 20 or 30
25 pictures of the same thing just to get everybody all

1 upset.

2 MR. MARSHALL: No. The purpose of
3 showing these pictures, Judge, is to show the
4 location that the body was found. It's relevant in
5 this case.

6 THE COURT: Okay.

7 MR. FELDMAN: I don't have an objection
8 to that exhibit.

9 THE COURT: Thirty-two, was it?

10 MR. MARSHALL: Yes, sir. It's 32.

11 THE COURT: State's 32 in evidence
12 without objection.

13 (Entered into evidence was
14 State's Exhibit 32.)

15 BY MR. MARSHALL:

16 Q. Did you examine with any closeness the wound
17 on the man that was lying on the ground?

18 A. I looked at it, it was just a small hole
19 with -- no blood or anything was coming out of it.
20 It was just an opening.

21 Q. This is marked as Stat's 35 not yet in
22 evidence. Are you able to identify what is shown
23 there?

24 A. That's the upper right-hand shoulder where
25 the entry wound is.

1 Q. Is that the wound that you saw when you
2 arrived at [REDACTED] Target on the 19th?

3 A. Yes, sir.

4 MR. MARSHALL: Move to introduce Exhibit
5 35.

6 MR. FELDMAN: No objection.

7 THE COURT: State's 35 in evidence
8 without objection.

9 (Entered into evidence was
10 State's Exhibit 35.)

11 BY MR. MARSHALL:

12 Q. When you examined the body, did you see on
13 the body any protrusions that looked unusual?

14 A. When EMS and First Responder rolled over the
15 victim, you could see under his left chest, right
16 here (indicating) you could see like a protrusion of
17 what appeared to be maybe a bullet lodged, it hadn't
18 penetrated through the skin.

19 Q. This exhibit is not yet in evidence, it's
20 marked 41, State's 41. Looking at this exhibit, are
21 you able to identify what's shown there?

22 A. That's also the victim. This is where he was
23 laying, where his facial area was when the blood
24 came out of his mouth there.

25 (Woman from the audience stands up and

1 screams.)

2 THE COURT: Hold on a second. Ladies
3 and gentlemen of the jury, I'm going to send you out
4 at this time. Please take the jury out.

5 (Jury excused.)

6 (Pause in proceedings.)

7 MR. MARSHALL: Your Honor, I'm sorry. I
8 did not warn the family about that part of that. I
9 take responsibility for not warning them about that.
10 I apologize.

11 THE COURT: I'd like for you to --

12 MR. FELDMAN: Your Honor, I would move
13 for a mistrial because that is exactly the problem.
14 There's nothing -- but -- but I don't move for a
15 mistrial in itself, I move for a mistrial with
16 prejudice only because that is exactly the kind of
17 thing that -- that -- in fact, picture, picture,
18 picture and you got so many of them to present and I
19 think that is an inappropriate way to have done
20 that. It got the expected reaction and it
21 prejudices my client.

22 I'm not asking for a mistrial where I try it
23 again because that would not be fair to the
24 defendant. I'm asking for a mistrial with prejudice
25 because of what the prosecution has done and the

1 reaction that it's caused.

2 THE COURT: Yes, sir.

3 MR. MARSHALL: Well, the purpose of that
4 photo was he was about to point out what he saw to
5 be, what appeared to him to be a bullet lodged in
6 the man's chest. There's nothing particularly
7 gruesome about it. There's a discolored area on the
8 grass. I asked Mr. Feldman, "Mr. Feldman, have you
9 seen these?" I asked him again on the record,
10 "Would you like to see them again?" He said, "I've
11 seen them." I said, "I'm showing them to show the
12 position of the body." And that was one for the
13 purpose of showing a protrusion which is clearly
14 visible which is a bullet.

15 MR. FELDMAN: Well, I put moments before
16 where we were headed on the record. And that's
17 exactly what happened. And if -- and that is
18 something that should have been -- I don't know
19 who's in the courtroom, I don't know who -- I know
20 who's in here who I know, but --

21 THE COURT: Who was that, that was...?

22 MR. MARSHALL: I don't know who that
23 was, your Honor. I don't know.

24 THE COURT: Well, it's been a good
25 while, we came back at 1:45, we'll go ahead and take

1 a short break. I'll think about it. I would like
2 you to take an opportunity, while I'm doing this, to
3 explain to the family and friends that the presence :
4 here is welcome but any outbursts, we can't have :
5 them here if there are going to be any kind of
6 outbursts. We understand the difficulty they're
7 going through, but I can't allow that. I'll give
8 you an opportunity to do that first. I'll take your
9 motion under advisement.

10 (Recess taken.)

11 **THE COURT:** Please be seated. Thank
12 you. Okay. Does anyone have anything further?

13 **MR. FELDMAN:** No, your Honor.

14 **THE COURT:** Have you had an opportunity
15 too speak with the family members?

16 **MR. MARSHALL:** Your Honor, I haven't,
17 because most of them were outside. I asked the
18 deputies as they came back in to please help me.

19 **THE COURT:** If they're going to come
20 back in, bring them back in, now I'll make it clear
21 for the record.

22 **MR. MARSHALL:** Is any family of the
23 victim out in the hall, family or friends?

24 **THE DEPUTY:** Your Honor, they've gone
25 downstairs to get the rest of them.

1 **THE COURT:** Okay. I'm just going to
2 give anyone else that's coming in a few more
3 minutes.

4 **MR. FELDMAN:** Thank you, your Honor.

5 (Pause in proceedings.)

6 **MR. MARSHALL:** Your Honor, at this time
7 I would like to go ahead, if I may, and introduce
8 the Exhibit 41. I have a proposal for how I'll
9 handle what I was trying to handle, if you'd like to
10 hear me on it.

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

12 **MR. MARSHALL:** I think what I'll do
13 rather than put the photograph back up at this time,
14 is I would like to have it introduced because it's
15 been identified and I'll just have -- I'll just have
16 the police officer identify on himself where he was
17 able to see this protrusion, what it appeared to be
18 to him. Would that be acceptable?

19 **MR. FELDMAN:** I don't have an objection.

20 **THE COURT:** Okay.

21 **MR. FELDMAN:** I mean, somebody shot the
22 guy. I don't know what's so important about it.

23 **MR. MARSHALL:** Your Honor, I believe all
24 the friends and family of the victim are back now.

25 **THE COURT:** Thank you. I would like to

1 use this opportunity for anybody that's here on
2 behalf of the family or friends of the family or
3 anyone connected with either side in this case, that
4 certainly the Court is sympathetic to all the
5 emotional feelings that may be running throughout
6 this trial, but you cannot express those ranges in
7 court in the presence of this jury.

8 While the Court is not unsympathetic to this,
9 the fact of the matter is that all sides in this
10 case are entitled to a fair and impartial trial.
11 And it's the Court's job to make sure that other
12 influences do not impact upon this jury.

13 Now, while your presence here is certainly
14 within your discretion, if you cannot control your
15 emotions, of course the Court is going to have to
16 take steps to not allow you to continue to witness
17 this trial. The Court chooses not to have to take
18 that route, but it would be my duty to do so if any
19 persons in the audience cannot control their
20 emotions. So I ask you at this time to please step
21 out if you cannot control your emotions.

22 Now, in regard to your motion for a mistrial,
23 I'm not going to grant it at this time. I -- I'm
24 going to give a curative instruction to the jury.
25 Although it is probably something that -- the

1 decision as to whether or not to grant a mistrial is
2 certainly within the discretion of this Court, and I
3 have some concerns about the manner in which that
4 just took place, but I don't think it's something
5 that I can't resolve with a curative instruction.

6 I think that it's within the common range of
7 emotions experienced by jurors and everyone here in
8 this courtroom that we're going to feel the
9 emotional aspects of this case, but I think that I
10 can appropriately tell the jury that none of those
11 matters are to be considered by the jury in its
12 deliberations in this case.

13 And that's what I choose to do and your
14 motion is denied, but so noted for the record.

15 MR. FELDMAN: Thank you very much, your
16 Honor, for your consideration.

17 THE COURT: Bring the jury in, please.

18 (Jury present.)

19 THE BAILIFF: All present, your Honor.

20 THE COURT: Please be seated. Thank
21 you. Ladies and gentlemen, at this time I'd like to
22 take a brief opportunity to express to you that a
23 trial of the case always presents a range of
24 emotions by all of those who are affected. This, of
25 course, is a very serious matter that is being

1 presented to you for your review. While it is not
2 unusual to experience the emotional ups and downs
3 that may be projected during a trial, or during a
4 case, your job as jurors is to decide a case based
5 on the facts presented and the law that I give to
6 you without regard to any passion or sympathy for
7 anyone involved in this matter.

8 A defendant is presumed innocent, and the
9 State must prove the defendant's guilt beyond a
10 reasonable doubt. Your decision cannot be based on
11 passion or sympathy. Again, while it would not be
12 unusual for you to experience, feel or sense the
13 emotional ranges expressed during the trial of the
14 case, none of this, none of these expressions or
15 feelings may impact upon your decision. And I
16 instruct you that this is the law in this regard and
17 it is your duty to comply with the law as you have
18 taken an oath to do so in this case. You should
19 disregard any emotional aspects that may have been
20 projected or will be projected throughout the trial
21 of this case.

22 Okay. Go ahead, sir.

23 MR. MARSHALL: Thank you. State moves
24 to introduce Exhibit 41 which was previously
25 identified, your Honor.

1 MR. FELDMAN: No objection.

2 THE COURT: Okay. Forty-one into
3 evidence without objection.

4 (Entered into evidence was
5 State's Exhibit 41.)

6 BY MR. MARSHALL:

7 Q. Mr. O'Neal, before the break the question I
8 had posed to you was did you see any unusual
9 protrusions from the body of the victim that you
10 found at [REDACTED] Target on the 19th of July. Could you
11 answer that question, please?

12 A. Yes, I did.

13 Q. And what did you see?

14 A. What appeared to be a bullet on the left side
15 right up under the breast here (indicating), what
16 appeared to be a bullet protruding not through the
17 skin but poking the skin out.

18 Q. That's all the questions that I have. Thank
19 you.

20 CROSS-EXAMINATION

21 BY MR. FELDMAN:

22 Q. Mr. O'Neal, is your involvement in the case
23 pretty much that you were the first one on the
24 scene, that you secured it, that you did what you
25 just reported, or have you continued to investigate

1 that case after that day?

2 A. After that day I had nothing else to do with
3 it.

4 Q. Okay. Thank you very much, sir.

5 MR. FELDMAN: Thank you, your Honor.

6 THE COURT: You may step down, sir.

7 Call your next witness, please.

8 MR. MARSHALL: Ken Hagge.

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

11 (Kenneth A. Hagge, II, called as a
12 witness by the State, having first been
13 duly sworn, was examined and testified
14 as follows:)

15 THE CLERK: Please state your full name
16 and spell your last name for the record.

17 THE WITNESS: Sergeant Ken A. Hagge, II,
18 H-a-g-g-e.

19 THE CLERK: Thank you.

20 DIRECT EXAMINATION

21 BY MR. MARSHALL:

22 Q. Sergeant Hagge, where do you work, sir?

23 A. City of North Charleston Police Department.

24 Q. What do you do there?

25 A. I am in uniform division in charge of Team

1 One, day shift.

2 Q. How long have you been with the North
3 Charleston Police Department?

4 A. Approximately ten years.

5 Q. What were your duties back in July of '96?

6 A. I was in charge of the narcotics division for
7 the City of North Charleston.

8 Q. Have you had any other full-time jobs during
9 your life other than law enforcement?

10 A. No, sir.

11 Q. What's your educational background?

12 A. Bachelor's degree, business administration.

13 Q. Are you married?

14 A. Yes, I am.

15 Q. Do you have any children?

16 A. Yes, I do.

17 Q. How did you become involved in this case?

18 A. On 7-19-96 at approximately 7:30 in the
19 morning I received a call from Lieutenant Cumbee who
20 was in charge of general investigations, he related
21 that a homicide had just occurred and asked that I
22 respond with an agent from the Narcotics Unit.

23 Q. And he asked that you respond to what
24 location?

25 A. He asked that I respond to Target Street.

1 Q. About what time was that?

2 A. I received the call at 7:30 in the morning.

3 I actually responded at -- I arrived at [REDACTED] Target
4 Street at approximately 756 hours.

5 Q. What did you observe when you got over to
6 Target Street?

7 A. I came in contact with Lieutenant Cumbee and
8 Crime Scene Tech Poole and I witnessed the victim
9 laying behind the trailer face up.

10 Q. Did you take any actions there, or what were
11 the next significant actions that you took in the
12 case?

13 A. At approximately 8:25 Lieutenant Cumbee
14 requested that I call a witness who worked at the
15 Amoco station, which I did, and instructed that
16 witness, Barry Woodward, to respond to the NCPD
17 headquarters so a statement could be obtained from
18 him.

19 Q. Did you take a statement from that witness?

20 A. No, I did not.

21 Q. What was the next actions that you took in
22 the case?

23 A. At approximately 8:45 on the same date,
24 7-19-96, I received a page on my police department
25 pager from one of the general investigation

1 secretaries who related that an individual was on
2 Remount Road and wanted to speak to me in person.

3 Q. And what time was it that you received that
4 message?

5 A. 8:45 in the morning on 7-19-96.

6 Q. What was your response to that message?

7 A. I informed Lieutenant Cumbee, who was in
8 charge of the investigation, he advised me to get
9 another agent to respond to Remount Road to locate
10 the subject.

11 Q. Did you get together with another agent?

12 A. Yes, I did. Detective Reynolds came with me
13 and we got into my narcotics vehicle and rode to the
14 area of Remount Road and Dobson Street.

15 Q. Did you know who you were looking for at the
16 time?

17 A. No, sir. I did not.

18 Q. How were you to meet that individual that
19 wanted to meet you?

20 A. He related to the general investigation
21 secretary to come in my narcotics vehicle, which at
22 the time was a blue Explorer, Ford Explorer.

23 Q. So when you got over on Remount Road, what
24 happened then?

25 A. I was on Remount, myself and Detective

1 Reynolds was on Remount Road approximately 851 hours
2 and observed a white male in the parking lot of
3 Doscher's Grocery Store which is at the corner of
4 Remount and Dobson, flagged me down.

5 Q. Who was that white male?

6 A. Steven O'Brien.

7 Q. Had you known him prior to that time?

8 A. Yes, sir. I did.

9 Q. Does he also go by Mark O'Brien, to your
10 knowledge?

11 A. Yes. It's Steven Mark O'Brien.

12 Q. All right. When you made contact with him,
13 what happened then?

14 A. I had questioned the individual on why he
15 wanted to see me. He -- as a result of the
16 conversation I took him to headquarters to obtain a
17 statement on the shooting that had occurred on
18 Target Street.

19 Q. So it was 8:51 approximately when you made
20 contact with O'Brien. How would you describe his
21 demeanor and his condition?

22 A. Mr. O'Brien was very nervous, wanted to get
23 into the vehicle right away. I have -- the Ford
24 Explorer was a two-door Explorer, and with Detective
25 Reynolds sitting in front, he had to push Detective

1 Reynolds up to get in. He was in a hurry to get in
2 the vehicle, very nervous.

3 Q. What happened once you all arrived at the
4 police station?

5 A. I began to interview Mr. O'Brien on his
6 accounts of the shooting.

7 Q. What did he tell you generally that he had
8 knowledge of?

9 A. That a shooting had occurred on Target
10 Street, he related a victim's name or a victim's
11 nickname, and he also related he knew who shot the
12 victim.

13 Q. What was the nickname of the victim that he
14 related?

15 A. He related it was Peanut.

16 Q. What was the identity of the murderer that he
17 related to you?

18 A. He related the individual's name was Joe who
19 was a black male, late twenties, five-eleven, 175 to
20 180 pounds, close hair style, almost bald, wearing
21 white shorts and a multicolored striped shirt.

22 Q. Did you take a written statement from
23 Mr. O'Brien?

24 A. Yes, I did, but not at that time.

25 Q. Okay. What were the next things that were

1 done?

2 A. As per the conversation with Mr. O'Brien, we
3 responded over to [REDACTED] Flora Street, which is also
4 in the city of North Charleston, and I instructed
5 Lieutenant Cumbee to look behind the apartment at
6 [REDACTED] Flora for Joe's shirt.

7 Q. Did you have any knowledge, personal
8 knowledge, of whether or not anything was recovered
9 there?

10 A. Yes, I do.

11 Q. Did you observe them recover anything there?

12 A. No, sir. I was with Mr. O'Brien in the front
13 of the apartments in my Explorer when they went to
14 the rear, but it was related that they recovered a
15 shirt.

16 Q. Rather than have you come off the stand,
17 perhaps we can use this. Are you able to orient
18 yourself on this, Rivers Avenue and Target being
19 there (indicating)?

20 A. Yes, I am.

21 Q. Are you able to show the location where you
22 went and told detectives to search for a shirt?

23 A. Yes. We came up -- this is the apartment
24 complex right here (indicating), we were parked up
25 front (indicating), and I asked that they search

1 around in the back of it.

2 Q. When you made contact with Mark O'Brien, was
3 he seeking from you or the State or North Charleston
4 Police Department, anybody in any official position,
5 was he seeking anything?

6 MR. FELDMAN: Your Honor, I would
7 object. That calls for hearsay just asked a little
8 differently.

9 THE COURT: You can rephrase your
10 question, please.

11 BY MR. MARSHALL:

12 Q. Did you reach any agreements with Mr. Mark
13 O'Brien for his information in exchange for anything
14 else?

15 A. After I obtained the statement I agreed, or I
16 suggested that we possibly could pay Mr. O'Brien
17 some money.

18 Q. Whose suggestion was that?

19 A. That was my suggestion.

20 Q. How much money were you talking about trying
21 to get him?

22 A. Approximately \$200.

23 Q. Did you, in fact, ever get him any money?

24 A. Yes, sir. I did.

25 Q. When was that?

1 A. Approximately four months later. Anytime we
2 use funds we have to approve it through the chief of
3 police, and it took approximately four months.

4 Q. Did your investigation reveal who the current
5 resident at the time of this murder was at [REDACTED]
6 Flora?

7 A. Yes, sir. It did. A Charles Wilder.

8 Q. That's all the questions I have. Thank you.

9 MR. FELDMAN: May it please the Court.

10 THE COURT: Yes, sir.

11 CROSS-EXAMINATION

12 BY MR. FELDMAN:

13 Q. Sergeant Hagge, you're a narcotics officer;
14 is that correct?

15 A. Not at the present time.

16 Q. I meant then.

17 A. Yes, sir.

18 Q. Yeah. Okay. So didn't your investigation
19 reveal that the -- that Kenneth Washington, the
20 deceased, had fake crack cocaine in his pocket?

21 A. Really my only part in the investigation as
22 it stood, because of Mr. O'Brien calling me, was
23 taking his statement. After that I secured from the
24 investigation, so I don't know.

25 Q. And to this day you don't know that?

1 A. No, sir.

2 Q. Okay. You didn't give Mark O'Brien a drug
3 screen that morning, did you?

4 A. No, sir.

5 Q. Okay. Are you aware he had been smoking
6 crack cocaine that -- the night before?

7 A. He did admit to smoking crack cocaine; he did
8 admit to drinking beer.

9 Q. Thank you. How long have you been a police
10 officer?

11 A. With the City of North Charleston over ten
12 years.

13 Q. When you investigate a shooting, aren't the
14 two most important things -- well -- well, let me
15 ask it that way, you tell me if I'm wrong. Isn't
16 the first thing you want to do is determine the
17 weapon that shot the person, how did the victim die?

18 A. I think it would depend on who was
19 investigating. Our first -- our first actually in
20 this was trying to identify the victim.

21 Q. Okay. Okay. But that's pretty high up there
22 in terms of what's important, the weapon used; is
23 that correct?

24 A. That's correct.

25 Q. Real high up. And in this case actually

1 there was no weapon found; is that correct?

2 A. Like I said, I took the statement from
3 O'Brien and that was my involvement in the case.

4 Q. So you really have no information, don't have
5 any personal knowledge about -- about anything else
6 in this case?

7 A. Nothing that I actually observed or did. A
8 lot of hearsay.

9 Q. Okay. And right up there with getting the
10 weapon is finding out who may have shot the weapon
11 at the time of the shooting; is that correct?

12 That's where that gun residue test comes in, true?

13 A. That would be correct.

14 Q. And those are two pretty high up important
15 things to do?

16 A. Among others, yes.

17 Q. Okay. Thank you very much, Officer.

18 A. Yes.

19 Q. Sergeant.

20 MR. MARSHALL: Nothing else, your Honor.

21 THE COURT: You may step down.

22 MR. MARSHALL: Ray Garrison.

23 Okay if this witness is excused, your Honor?

24 THE COURT: Any objection?

25 MR. FELDMAN: No objection.

1 THE COURT: Okay. You may be excused.

2 THE CLERK: Please place your left hand
3 on the Bible and raise your right hand.

4 (Raymond Lee Garrison, called as a
5 witness by the State, having first been
6 duly sworn, was examined and testified
7 as follows:)

8 THE CLERK: Please be seated. State
9 your full name and spell your last name for the
10 record.

11 THE WITNESS: Raymond Lee Garrison,
12 G-a-r-r-i-s-o-n.

13 THE CLERK: Thank you.

14 DIRECT EXAMINATION

15 BY MR. MARSHALL:

16 Q. Mr. Garrison, where do you work, sir?

17 A. I'm employed by the City of North Charleston
18 Police Department.

19 Q. What do you do there?

20 A. My current assignment is the forensic
21 specialist, also known as a crime scene
22 investigator.

23 Q. Is that the same duties that you had in July
24 of '96?

25 A. Yes, sir.

1 Q. Can you describe generally and basically what
2 that means, what your job title entails?

3 A. The job of crime scene investigator, or more
4 recently as they call us forensic specialist, is to
5 document crime scenes using photographs or video.
6 It's also our job to search for and secure evidence.
7 We also package that evidence for transmittal to the
8 lab for analysis.

9 Q. How long have you been with North Charleston?

10 A. Since March of 1989.

11 Q. Do you have any other law enforcement besides
12 North Charleston?

13 A. I spent four years in the Coast Guard doing
14 drug and illegal alien interdictions.

15 Q. Are you married?

16 A. Yes, I am.

17 Q. Do you have any children?

18 A. Yes, I do.

19 Q. How did you become involved in this case, the
20 State of South Carolina versus Joe Holmes?

21 A. On the 19th of July 1996 I received a phone
22 call at home advising me to report to North
23 Charleston Police Department in reference to a
24 shooting. I responded at approximately 9:45, I had
25 to find a babysitter. And at that time I was

1 notified that I needed to do -- excuse me, needed to
2 perform gunshot residue tests on the hands of three
3 possible suspects.

4 Q. Did you do that?

5 A. Yes, I did.

6 Q. Who were those suspects?

7 A. At the time they were identified as a Michael
8 Carson, white male, and Alexander Gaillard, a black
9 male, and a Julius Cuttino, black male.

10 Q. And in the course of your investigation, have
11 you come to know them by any other names?

12 A. Yes, sir. I've come to know Michael Carson
13 as William Phillips, and the individual that
14 identified himself as Julius Cuttino is known as
15 Maurice Simmons.

16 Q. These three exhibits are State's 70, 71 and
17 72. Take a look at those, please, open them up if
18 you need to, whatever you need to do to see if
19 you're able to identify them.

20 A. State's 70 are the SEM tab portion of the
21 gunshot residue tests that were done on Michael
22 Carson also known as William Phillips.

23 State's Exhibit 71 are the SEM tabs gunshot
24 residue tests done on the hands of one Julius
25 Cuttino, now known as Maurice Simmons.

1 And State's Exhibit 72 are the gunshot
2 residue tests that were done on the hands of
3 Alexander Gaillard. All three of these tests were
4 performed by me.

5 Q. After you performed the tests, what did you
6 do with those exhibits?

7 A. They were sent over to Corporal Poole who was
8 the lead crime scene investigator on the case.

9 Q. Before we get into the specifics of how you
10 went about taking these tests, can you explain
11 generally what the purpose of these tests is, and
12 generally how they're done?

13 A. The SEM tabs, as they're referred to, are --

14 **MR. FELDMAN:** Your Honor, excuse me.
15 Can he just lay a foundation? I don't have any
16 objection to this line of questioning, but a
17 foundation would be appropriate.

18 **THE COURT:** Go ahead, sir.

19 **BY MR. MARSHALL:**

20 Q. How much experience do you have with taking
21 gunshot residue samples?

22 A. I've had several courses, one in special
23 techniques in death investigation given by the Metro
24 Dade Police Department, and that was a 40-hour
25 course in which several gunshot residue tests were

1 covered. I've also had on-the-job training since I
2 was assigned to Crime Scene in 1993.

3 Q. Is it a part of your regular duties to take
4 gunshot residue samples?

5 A. Yes, it is.

6 Q. And about how many cases have you been
7 involved in where you've been required to do this?

8 A. I would say -- I've never kept an exact
9 count, since 1993 I would say between 75 and 100.

10 Q. You've received some advanced schooling on
11 how to do this?

12 A. Yes.

13 Q. What was that again?

14 A. That was the special techniques and death
15 investigation course at Metro Dade Police Department
16 in Miami, Florida.

17 Q. How long a course was that?

18 A. Forty hours.

19 Q. Could you explain to the jury, please, what
20 we're talking about when we're talking about these
21 particular tests?

22 A. May I show one?

23 Q. Certainly.

24 A. This assembly is known as an SE --

25 Q. You may step down if you'd like,

1 Mr. Garrison, I don't know whether it would help or
2 not.

3 A. (The witness steps down from the witness
4 stand.) This entire assembly is known as an S-E-M
5 tab, SEM tab, the SEM stands for scanning electron
6 microscope which is how they're examined. Inside a
7 hole is drilled through the green plastic piece and
8 the metal tab, as you can see, is inserted. That
9 one's pulled up because SLED has analyzed the tab.
10 On the surface of the metal tab is a sticky
11 substance.

12 The way these tests are conducted, the
13 individual that you suspect may have fired a weapon
14 is brought in and the tabs, you do them on the
15 palms, one for the palm, one for the back of the
16 left hand, one for the palm, one for the back of the
17 hand on the right hand. These tests check for
18 barium, antimony and lead. Those are particles left
19 over when you fire a round, comes from the gun, also
20 from the powder that pushes the bullet through the
21 barrel. Those items are deposited on the hand and
22 these will pick them up. And they're sent to SLED
23 for analysis. The particles stick to the sticky
24 surface on the metal tab.

25 Q. Okay. Thank you. Have a seat please.

1 A. (The witness complied.)

2 Q. Do you recall who instructed you to perform
3 the test on these three subjects?

4 A. I believe it was Corporal Poole was the
5 individual I spoke to.

6 Q. Can you tell the jury, please, the specifics
7 of how you went about taking the samples of the
8 three persons you named, Phillips, Simmons and
9 Gaillard?

10 A. Yes, sir. The first test was done on Julius
11 Cuttino, also known as Maurice Simmons. That test
12 was conducted at 10:05 in the morning. Mr. Simmons
13 was brought in, he was sat down at the desk, at that
14 point we filled out the envelope. Also in this
15 envelope we include a little tab of paper that has
16 the suspect's name, the case number, the date, my
17 name, the name of the investigator that's assigned
18 to the case, and the time the test was done. SLED
19 maintains those records after they do the
20 examination.

21 All that is filled out, the tests are done on
22 the suspect's hands, they're sealed, placed into the
23 envelope, the envelope is then sealed. The envelope
24 is filled out with the suspect's name, all the
25 pertinent information, and then it's logged on to a

1 North Charleston Police Department evidence sheet.

2 Q. Can you tell, please, the times that you did
3 the tests on Mr. Phillips and also on Mr. Gaillard?.

4 A. Yes, sir. Mr. Gaillard was done at 10:19 in
5 the morning, and Mr. Phillips was done at 10:56 in
6 the morning.

7 Q. When you were out at the scene, did you
8 inspect -- when you arrived, was there a Jeep there
9 or was there not a Jeep there?

10 A. I didn't respond to the scene until after the
11 SEM tab testing was done. It was sometime later
12 that I responded back to the scene.

13 Q. Do you know about what time you went out to
14 the murder scene?

15 A. I would say approximately at 11:30 or 12:00 I
16 went back out there with Corporal Poole.

17 Q. Did your investigation, your department's
18 investigation, at any time reveal to you where it is
19 that a Jeep had allegedly been parked in the
20 morning?

21 A. Yes, sir. Corporal Poole indicated to me the
22 location where a vehicle had been parked.

23 Q. Did you take any actions in that particular
24 area during your investigation?

25 A. Yes, we searched that entire area. It was

1 near a field, we searched the field, we searched the
2 area where it was indicated to me a vehicle may have
3 been parked. We searched the roadway, we searched
4 the yards on both sides of the street, we went down
5 four or five houses on each side of the street. We
6 searched the yards and we also searched the
7 structures themselves, the exterior of the
8 structures.

9 Q. Did you find anything?

10 A. No, sir.

11 Q. In particular in the area where you learned
12 that the Jeep had allegedly been parked, did you
13 observe anything in particular about that area, did
14 you notice any blood droplets?

15 A. No, sir. Nothing out of the ordinary.

16 Q. Did you see any evidence on that loose dirt
17 and gravel, did you see any evidence that anyone had
18 been on the ground there?

19 A. No, sir. But as I said, I responded after
20 the initial scene had been unsecured and went back
21 and looked.

22 Q. Okay. Other than the SEM tab test, did you
23 recover any other evidence in the case?

24 A. Yes, sir. Later that afternoon -- or later
25 that morning, excuse me, I was advised to respond to

1 [REDACTED] Flora in reference to recovering some evidence.

2 Q. What did you find once you got over there?

3 A. At that point Lieutenant Cumbee pointed out
4 two shirts that were behind the residence, one was
5 on the steps of the residence and the other was
6 underneath the residence.

7 Q. Did you photograph those shirts?

8 A. Yes, sir. Those shirts were photographed and
9 collected as evidence.

10 Q. And in the vicinity of the murder, did you
11 find -- did you collect any other evidence?

12 A. I responded -- upon completing the task at

13 [REDACTED] Flora I responded to [REDACTED] 6-A Flora and
14 recovered -- photographed and recovered a shotgun.

15 Q. This is State's 55 which is already in
16 evidence. Are you able to identify what is shown in
17 that photograph?

18 A. Yes, sir. I am.

19 Q. And what is that, please?

20 A. State's Exhibit 55 is a photograph taken by
21 me of a two-tone blue and white striped shirt that
22 was found underneath the residence at [REDACTED] Flora.

23 Q. This is State's 53. Are you able to identify
24 what's shown in that photograph?

25 A. State's 53 is a photograph at the rear of

1 [REDACTED] Flora showing a multicolored shirt lying on
2 what may have been a porch.

3 Q. Did you discover that shirt?

4 A. No, sir. That had been discovered prior to
5 my arrival.

6 Q. Did you photograph the shirt?

7 A. Yes, I did.

8 Q. And State's 54, what is that?

9 A. State's 54 is a second photograph of that
10 shirt on the wooden deck, I guess you would call it.
11 It also has my tag, my ID tag in the corner.

12 Q. And the location where you photographed it
13 was what?

14 A. At the rear of [REDACTED] Flora.

15 MR. MARSHALL: Just one moment, please,
16 your Honor.

17 (Brief pause in proceedings.)

18 BY MR. MARSHALL:

19 Q. Mr. Garrison, please inspect State's 61, the
20 outside and the inside, and 60, and see if you're
21 able to identify those items.

22 A. (The witness complied.)

23 Q. Could you hold that up, please?

24 A. (The witness complied.) State's 61 is a
25 two-tone blue, there's also some green and white in

1 it, multicolored shirt, one Knight's Bridge shirt,
2 size long, short sleeved. This is the shirt that
3 was photographed and recovered by me.

4 Q. At what location?

5 A. [REDACTED] Flora.

6 Q. Do you recall about what time it was you
7 recovered the shirts?

8 A. I don't have an exact time, no, sir.

9 Q. Okay.

10 A. Excuse me. The time on the bag indicates
11 approximately 11:30 a.m.

12 Q. Thank you.

13 A. State's Exhibit 60 is a multicolored Forest
14 Club extra large shirt, this is the shirt that was
15 recovered off of the wood decking photographed and
16 recovered by me at [REDACTED] Flora.

17 Q. Using this diagram which is a copy of State's
18 Exhibit 51, are you able to identify the location
19 where the shirts were recovered?

20 A. Yes, sir. This is [REDACTED] Flora, the shirts
21 were discovered at the rear (indicating).

22 Q. That's all the questions I have.

23 MR. FELDMAN: May it please the Court.

24 CROSS-EXAMINATION

25 BY MR. FELDMAN:

1 Q. Officer Garrison, how are you today?

2 A. Fine. How are you?

3 Q. The gun residue test on the Julius Cuttino,
4 which we now know as Maurice Simmons, but it was
5 written Julius Cuttino because he lied to you or --
6 did you fill out this?

7 A. Yes, sir. I did.

8 Q. So he lied to you about who he was?

9 A. Yes, he did.

10 Q. Okay. And his report came back positive for
11 gun residue; did it not?

12 A. I wouldn't know. I don't see the reports
13 from SLED. They go straight to the assigned
14 investigator in the case file.

15 Q. I thought by the way that you were describing
16 it so precisely that you would know --

17 A. No, sir. I know how to do the tests, we're
18 usually not privy to the results though.

19 Q. But you say that the reason you do it is to
20 see if you have the residue to see if you maybe shot
21 a gun, that's the reason you do the test?

22 A. Yes, sir. You can also pick up this residue
23 by simply handling a weapon, so if someone has been
24 in possession of a firearm it's possible they might
25 come up positive.

1 MR. FELDMAN: Nothing further, your
2 Honor.

3 THE COURT: Counsel?

4 REDIRECT EXAMINATION

5 BY MR. MARSHALL:

6 Q. Is it also possible that one could pick it up
7 by being in the vicinity of where a weapon was
8 fired?

9 MR. FELDMAN: Foundation, your Honor. I
10 would object.

11 THE COURT: Counsel approach.

12 (Whereupon, a conference was held at
13 side bar.)

14 MR. FELDMAN: I don't object.

15 THE COURT: Okay. Objection is
16 withdrawn. Go ahead.

17 THE WITNESS: Would you repeat the
18 question?

19 BY MR. MARSHALL:

20 Q. Yes, sir. Based on your experience in the
21 field of gunshot residue, do you know whether or not
22 gunshot residue can accumulate on someone if they
23 are near where a weapon is fired?

24 A. It would depend on the proximity to the
25 actual firing of the weapon.

1 Q. Can you elaborate any further?

2 A. It's possible. When weapons are fired
3 there's naturally an explosion, the explosion is the
4 primer which ignites the powder which sends the
5 projectile down the barrel. During the chemical
6 changes during that explosion and ignition it puts
7 off a gas, that if you've ever seen Arts &
8 Entertainment Network where they demonstrate a gun
9 being fired, you can see the cloud that comes out.
10 And that cloud is what contains the particles that
11 the gunshot residue are testing for.

12 Q. Okay. Thank you. That's all I have.

13 THE COURT: Anything further in that
14 regard?

15 MR. FELDMAN: No, your Honor.

16 THE COURT: You may step down, sir.

17 THE WITNESS: Thank you, your Honor.

18 THE COURT: Call your next witness,
19 please.

20 MR. MARSHALL: May he be excused, your
21 Honor?

22 THE COURT: Any objection?

23 MR. FELDMAN: No objection.

24 THE COURT: You may be excused, sir.

25 MR. MARSHALL: Harry Roper.

1 **THE CLERK:** Place your left hand on the
2 Bible and raise your right hand.

3 (Harry Michael Roper, called as a
4 witness by the State, having first been
5 duly sworn, was examined and testified
6 as follows:)

7 **THE CLERK:** Please be seated. Please
8 state your full name and spell your last name for
9 the record.

10 **THE WITNESS:** Detective Corporal Harry
11 Roper, Harry Michael Roper, that is. My last name
12 is spelled R-o-p-e-r.

13 **THE CLERK:** Thank you.

14 **DIRECT EXAMINATION**

15 **BY MR. MARSHALL:**

16 Q. Mr. Roper, where do you work, sir?

17 A. I am currently employed by the North
18 Charleston Police Department.

19 Q. What do you do there?

20 A. Currently I'm assistant supervisor to the
21 detective division.

22 Q. What was your position in July of --
23 July 19th of 1996?

24 A. I was a PFC detective working in the
25 detective division.

1 Q. PFC meaning?

2 A. Private first class.

3 Q. How long have you been with the department?

4 A. Approximately eight years.

5 Q. Do you have any other law enforcement
6 experience prior to North Charleston PD?

7 A. Yes, I do.

8 Q. Where was that?

9 A. United States Customs Service.

10 Q. How long were you with them?

11 A. Approximately two years.

12 Q. What's your educational background?

13 A. Graduated from high school, I have over 150
14 hours of college. I am probably what you call a
15 career student, and....

16 Q. Are you married?

17 A. Yes, I am.

18 Q. Do you have any children?

19 A. One.

20 Q. How did you become involved in this case, the
21 State of South Carolina versus Joe Holmes?

22 A. Being on the detective division I got called
23 out to the location of Target Street.

24 Q. And that was at what time?

25 A. I got called out approximately 6:50 a.m. in

1 the morning.

2 Q. And what was the date?

3 A. 7-19-96.

4 Q. What did you find when you got out there?

5 A. When I arrived, which is approximately 7:40,
6 I noticed that Rivers Avenue was blocked off by a
7 crime scene tape. And to be more specific, it's the
8 area of Target Street and Rivers Avenue, in the area
9 of the aforementioned green and white house.

10 Q. What did you do when you got out there?

11 A. When I got out of my car I started walking
12 towards the particular area where everyone else was,
13 the other law enforcement officers. And I was
14 approached by Lieutenant Cumbee, and he advised of
15 the basic information of what transpired at that
16 location.

17 Q. What did you do as a result of your
18 conversation with Lieutenant Cumbee?

19 A. He directed me to the potential witness and
20 he called her over and I started -- explained to me
21 that she was a potential witness to the incident and
22 that for me to interview her.

23 Q. Did you do that?

24 A. I did.

25 Q. After that interview, what did you do next?

1 A. You mean after the entire interview?

2 Q. After the interview, yes.

3 A. Basically after the interview which took
4 place at North Charleston Police Department
5 headquarters, after I obtained the written and
6 verbal statement from her while discussing matters
7 in the case with other investigators, a subject came
8 to the detective division with some information.

9 Q. And who was that, that came there with some
10 information?

11 A. It was an Antwan Venning.

12 Q. About what time was that, that he arrived at
13 the police station?

14 MR. FELDMAN: Your Honor, the police
15 officer apparently needs to refer. I mean, just
16 make sure that I have a copy of whatever notes he's
17 referring to.

18 THE WITNESS: This is the same notes
19 that you should have gotten.

20 MR. FELDMAN: Okay. I just wanted to
21 make sure. I didn't know -- I didn't know if he was
22 testifying by reading his notes or he's testifying
23 and refreshing his memory. I just wanted to know
24 which it was.

25 THE COURT: Okay. Go ahead, sir.

1 BY MR. MARSHALL:

2 Q. Can you refresh yourself on what time it was
3 that he arrived at the North Charleston Police
4 Department?

5 A. It was sometime in the afternoon, but I would
6 have to look to see exactly what time.

7 Q. Could you look, please?

8 A. Yes, sir.

9 Q. Thank you.

10 A. That's approximately 1245 hours the same day,
11 7-19-96.

12 Q. 12:45 in the afternoon?

13 A. Yes, sir.

14 Q. All right. Once Mr. Venning got to the
15 station, what happened then?

16 A. He had given us information to what
17 transpired at the location of the area of [REDACTED]
18 Target Street and also the area of the green and
19 white house near the Amoco gas station. Also he had
20 stated that his vehicle was outside in the parking
21 lot and it had a -- he was referring to some bullet
22 holes to the vehicle. So myself, Detective
23 Hernandez and Dusty Poole went out with him to his
24 vehicle in the parking lot.

25 Q. How did he get there, did he drive that

1 vehicle you're talking about?

2 A. Yes, sir. He advised us that he did drive it
3 to that location.

4 Q. Did you speak with him in detail before
5 examining his Jeep, or did you go look at the Jeep
6 first?

7 A. I was present when he was being interviewed
8 by Detective Hernandez, but he was speaking to
9 Detective Hernandez, he was speaking to me because I
10 was also present, and I believe it was maybe one or
11 two other persons present.

12 Q. Were the results of that interview with
13 Antwan Venning reduced to writing?

14 A. Yes, it was.

15 Q. And during the interview, did he identify who
16 it was that had murdered Kenneth Washington?

17 A. He had given us a description of the subject
18 involved. I'm not -- I can't recall if there was a
19 name mentioned, but he gave us a description of the
20 guy.

21 Q. What was that description?

22 A. A black male approximately five-eleven in
23 height, approximately 175 to 180 pounds, a real
24 short type haircut, multiple colored shirt, I'm not
25 sure if he mentioned rainbow color or not, but he

1 said a multiple colored shirt. And I'm not sure if
2 he mentioned the color of the pants.

3 Q. After that interview concluded, what did you
4 do next?

5 A. After we had interviewed him and had went to
6 the parking lot to examine his car, when we went
7 into his car we examined the bullet holes that was
8 in his windows and also he had noted that his right
9 rear passenger side vehicle's tire was -- he had
10 changed it as a result of the incident that took
11 place on Target Street.

12 Q. How many holes did you observe to the windows
13 of his Jeep?

14 A. From what I can tell it was two holes to his
15 windows.

16 Q. And which windows had the holes in them?

17 A. His rear window, and also the right rear
18 passenger side window.

19 Q. And did you do any observations in terms of
20 trying to determine whether it was one bullet or
21 more than one that likely made the holes?

22 A. Yes. We were discussing that, sir.

23 Q. What did you conclude?

24 A. Based on discussions that myself and
25 Detective Poole and Hernandez had, we kind of

1 determined based on the angle that we believe --

2 MR. FELDMAN: Your Honor, I object.

3 Because what he's about to do is kind of say what
4 the consensus may have been and I don't think that's
5 really what's -- would be appropriate. If he
6 knows --

7 THE COURT: I'll sustain that. If you
8 want to rephrase your question direct it as to what
9 this witness's --

10 BY MR. MARSHALL:

11 Q. What was your opinion as to whether those two
12 holes had been made by one or more than one bullet?

13 A. One bullet.

14 Q. Now, after Mr. Venning identified this
15 person, when was it that your department developed
16 Joe Holmes as a suspect in this murder?

17 A. Pretty much right after the -- Detective
18 Sergeant Hagge's interview with the person that he
19 interviewed, which was determined to be Mr. O'Brien,
20 I believe.

21 Q. Do you know at what time you all drew an
22 arrest warrant for murder on Joe Holmes?

23 MR. FELDMAN: Objection. Relevance.

24 THE COURT: I'll sustain that at this
25 point.

1 MR. MARSHALL: May we approach, your
2 Honor?

3 THE COURT: Yes.

4 (Whereupon, a conference was held at
5 side bar.)

6 THE COURT: Okay. Ladies and gentlemen,
7 I'm going to send you out at this time. Please do
8 not discuss the case in any way. Thank you very
9 much.

10 (Jury excused.)

11 THE COURT: Okay. Let me hear you out
12 on your objection. As I indicated, I'm sorry, I
13 thought I heard the word "indictment," which I don't
14 think when the indictment came that's relevant to
15 anything, but counsel pointed out to me he said
16 "warrant." I don't know why I heard the word
17 "indictment," so I reserve the right to change my
18 ruling depending on what you'll now present to me.

19 MR. FELDMAN: Oh, I'm sorry.

20 THE COURT: Go ahead, sir.

21 MR. FELDMAN: Your Honor, my objection
22 is this: Basically what the State wants to do is
23 say this: Because the warrant was issued on the
24 19th and because he did not turn himself in until
25 the 31st, or whatever it was, something like that,

1 ten days, therefore he was fleeing. Okay? And I
2 don't care what the North Charleston police were
3 doing, you can't assume that people are watching TV
4 or on the radio, who knows what the reason is. You
5 cannot assume that.

6 And, your Honor, I actually have a case on
7 that, that I'm trying to locate it right now, it's a
8 speedy trial case, and basically it talked about the
9 warrant or the indictment, whatever it was, being
10 entered years before and this guy not knowing --
11 it's a federal case -- and the defendant not knowing
12 that it had been issued had gone here and gone to
13 Panama, gone to Brazil and some many years later he
14 came back. In other words, there was no evidence
15 that he knew anything. And although it was handled
16 on a speedy trial issue -- I've got it somewhere and
17 I would present it to you -- but it doesn't really
18 matter.

19 Officer Roper could have been working
20 diligently, and unless he can come in and say that I
21 saw him, he fled, he ran the blue light, he did
22 something, there's no way to show and to assume that
23 he was fleeing. I just think it's so prejudicial,
24 and that's all it is, that's an assertion and kind
25 of a conclusion. And I think it would be terribly

1 prejudicial, and there's no real basis for it.

2 **THE COURT:** Is that your position, the
3 fact that the warrant was issued suggests flight, he
4 didn't turn himself in for ten days?

5 **MR. MARSHALL:** No, sir. There's more
6 than that.

7 **MR. FELDMAN:** And that the police worked
8 hard.

9 **MR. MARSHALL:** Yeah. I want to get into
10 the specifics of the actions that they took in their
11 effort to secure his arrest, because they had an
12 all-out manhunt for this gut. And think that's
13 relevant. They had his picture --

14 **THE COURT:** Why is it relevant?

15 **MR. MARSHALL:** It's relevant because it
16 goes to whether he was trying to avoid arrest or not
17 on the charge, your Honor. And I think it -- you
18 know, the jury can give it whatever weight they
19 want, but I think that the length of efforts that
20 they went to, that his photograph was all over and
21 his name were all over all three TV stations as most
22 wanted, and that they went to the normal places
23 where he stayed and that he was not available at any
24 of those places during this time period, is
25 extremely relevant. Evidence of flight.

1 **MR. FELDMAN:** Your Honor, and I don't
2 want to knock any police department, North
3 Charleston's a good police department, but it still
4 doesn't make any sense to conclude, as the solicitor
5 wants to do, that because the warrant was issued on
6 the 19th and they worked hard, therefore, the
7 conclusion, the logic is that he avoided process.
8 Then why did he turn himself in?

9 **MR. MARSHALL:** Well, Judge, this is an
10 issue in my opinion clearly for closing argument.
11 He will argue his position as to what it shows and I
12 will argue mine. But I think it definitely should
13 be in and think that Mr. Feldman realizes it's very
14 relevant and it's very telling and that's why he's
15 so scared of the evidence.

16 **MR. FELDMAN:** Well, that's not really a
17 good characterization of how I feel about the
18 evidence. In other words, I think there has to be
19 evidence that he knew. Your Honor, may I take a
20 brief recess and run down? I think I know where my
21 case is.

22 **THE COURT:** Okay. Go ahead.

23 **MR. FELDMAN:** Thank you very much.

24 **THE COURT:** You mean you know where it's
25 at in the federal reporter or something?

1 **MR. FELDMAN:** No, sir. I think I know
2 where it is in my car.

3 **THE COURT:** Oh, okay.

4 **MR. FELDMAN:** And the reason is we had a
5 number of speedy trial issues and I've got one of my
6 speedy trial cases here, but I don't see the other
7 one. And I think the Court required that there be
8 some kind of knowledge by the defendant. In other
9 words, how can the solicitor prove my client knew?
10 He can't. He wants to -- his logic is flawed, that
11 because the warrant was issued and because Harry
12 Roper, who's a good officer, worked hard, which he
13 is and he did; therefore, my guy knew. He didn't
14 know and there's no proof that he knew.

15 **THE COURT:** Okay. Well, I'll let you
16 get that case if it's outside. Go ahead, run and
17 get it.

18 (Pause in proceedings.)

19 **MR. FELDMAN:** Your Honor, do you have
20 the court file? Because I think that may have been
21 turned in to Judge Rawl.

22 **THE COURT:** The clerk has that file.

23 **MR. FELDMAN:** I have the transcript of
24 that hearing. Would the Court permit me to search
25 further to find the case?

1 **THE COURT:** Well, it's not going to do
2 us any good if I don't have the case to read.

3 **MR. FELDMAN:** I was thinking that I
4 turned it in, but I would have referred to it in my
5 transcript.

6 **THE COURT:** Okay. Does the clerk have
7 the file here?

8 **THE CLERK:** I can go get it.

9 **THE COURT:** Okay.

10 (Pause in proceedings)

11 **MR. FELDMAN:** The question was in the
12 speedy trial context, and I can't remember if it's
13 the warrant or the indictment, but one or both had
14 happened years before, and they talked generally
15 about that the guy didn't know about it. In other
16 words, that if the defendant is fleeing and he is
17 avoiding process, he can't come in and argue speedy
18 trial.

19 **THE COURT:** Well, isn't there already
20 testimony that the defendant fled the scene and he
21 changed his shirt?

22 **MR. FELDMAN:** Yes.

23 **THE COURT:** I mean, if that testimony of
24 flight is there, isn't this just adding to that
25 theory of flight? I mean, you take the position

1 that there's no testimony of flight whatsoever and I
2 might be inclined to agree with your analysis, just
3 for the purpose of argument, that what he would be
4 attempting to do absent that additional evidence may
5 raise some concerns in my mind. But isn't there
6 testimony that he ran from the scene and they
7 changed their shirts and --

8 **MR. FELDMAN:** But, your Honor, I would
9 respond this: I would say that with his presumption
10 of innocence he has to know that there is a warrant
11 out for him. Because if these guys -- and forget
12 that they're not the greatest characters in the
13 world.

14 **THE COURT:** Well, that goes to your
15 argument standing alone about their -- the timing of
16 the warrant and the search. If the search were the
17 only evidence that they're going to proffer about
18 flight, let's say I agree with you, I mean just for
19 the purpose of argument.

20 **MR. FELDMAN:** I appreciate that.

21 **THE COURT:** It doesn't -- it becomes a
22 moot issue, it seems to me, when you bootstrap on
23 the fact that there is evidence of flight, he fled
24 the scene, that he changed his shirt, and now this
25 is just supplemental information about having fled,

1 they couldn't locate him for ten days and he wasn't
2 at this place or that place and it seems to -- your
3 argument seems to lose its steam at that point.

4 MR. FELDMAN: I mean, if that's the
5 Court's ruling then I certainly won't argue it
6 further.

7 THE COURT: Well, I mean, I'm not sure
8 that the case that you suggest would change that
9 analysis. I'm just giving you the benefit of
10 everything that case may offer from the federal
11 court.

12 MR. FELDMAN: Right.

13 THE COURT: You premised your argument
14 initially on the fact that there was no evidence of
15 flight, but it seems to me there is indeed some
16 evidence of flight in the record.

17 MR. FELDMAN: But not from a warrant.

18 THE COURT: Well, not from the warrant
19 itself, but there is evidence of flight. And why
20 could they not bootstrap that on to what's already
21 in the record about flight to develop that issue of
22 flight?

23 MR. FELDMAN: Because if he's an
24 innocent man then it is highly prejudicial. And the
25 fact that everybody scattered. --

1 **THE COURT:** Well, that's already in the
2 record.

3 **MR. FELDMAN:** Oh, I agree --

4 **THE COURT:** That they ran and that he
5 changed the shirt, so why is -- the question now
6 becomes should this not be an item for
7 cross-examination for you, not an item of exclusion
8 from the State. I think I'll allow it and you can
9 cross-examine on that issue. If you want to tender
10 that case to me tomorrow and it may require some
11 other action on my part, I'll be happy to consider
12 it.

13 **MR. FELDMAN:** Thank you, Judge.

14 **THE CLERK:** Here's the file.

15 **THE COURT:** Okay. He'll probably want
16 to look at that after the fact. We'll just go ahead
17 and finish up this witness.

18 Bring the jury in, please.

19 (Jury present.)

20 **THE BAILIFF:** All present, your Honor.

21 **THE COURT:** Okay. Please be seated. Go
22 ahead, sir.

23 **BY MR. MARSHALL:**

24 Q. Detective Roper, what was the date on which
25 your department issued an arrest warrant for murder

1 against Joe Holmes?

2 A. It was on the very same day the processing of
3 the arrest warrant was drawn.

4 Q. July the 19th of '96?

5 A. Yes, sir.

6 Q. And what actions did you take as a detective
7 in the case to have that warrant served?

8 A. We began a search for Mr. Holmes in various
9 areas of the Tricounty area and the city of North
10 Charleston based on where he used to live or any
11 family members in the area. And we could not locate
12 him. Therefore, on 7-22 of '96 after all that
13 information was exhausted to that degree, I went
14 to -- with some photos of -- with some photos that I
15 had obtained on Mr. Holmes I went to all the local
16 TV stations and distributed those pictures to them
17 and asked if they can help us by maybe showing that
18 to the media.

19 Q. Do you know whether the defendant's
20 photograph was published on the television stations?

21 A. It was brought to my knowledge, yes, they
22 were.

23 Q. Do you know the date that that was done?

24 A. I believe it on the 6:00 p.m. news.

25 Q. Of July the 22nd?

1 A. Right. 7-22-96.

2 Q. Did you take any other actions in your
3 efforts to locate Joe Holmes?

4 A. We were basically trying to locate him
5 through family members, and around the area we had
6 officers -- I think we have one -- we have what we
7 call a wanted picture with some information or as
8 much information as we can have on the subject
9 posted and distributed among our fellow officers so
10 that if they run across this person in a particular
11 area they would detain this person.

12 Q. When was it that the defendant was arrested?

13 A. On 7-30-96 at about I would say approximately
14 11:20 p.m.

15 Q. And how did that occur?

16 A. Basically Mr. Holmes arrived at the police
17 headquarters I believe with some family members and
18 turned himself in.

19 Q. Do you know if his photograph was broadcast
20 on the three major stations just that one day, or do
21 you know if it was broadcast on any other days?

22 A. When I spoke to the spokesman at the time --

23 MR. FELDMAN: Your Honor, if he knows I
24 don't object. But if he doesn't know I would rather
25 him say that.

1 BY MR. MARSHALL:

2 Q. Do you know or not, sir?

3 A. Just on that particular day at 6 o'clock p.m.

4 Q. Okay. Thank you.

5 MR. FELDMAN: May it please the Court.

6 THE COURT: Yes, sir.

7 CROSS-EXAMINATION

8 BY MR. FELDMAN:

9 Q. Mr. Roper -- Officer Roper -- Detective
10 Roper, I'm sorry. Long day.

11 A. It's no problem.

12 Q. You are what would be called a case agent in
13 this case; are you not?

14 A. This is true, yes, sir.

15 Q. At least that's what the feds call it, a case
16 agent?

17 A. Case agent. That's what we're referred to,
18 yes, sir.

19 Q. Thank you very much. As the case agent
20 you're in charge of -- or overviewer, or whatever
21 you want to call it -- a number of different aspects
22 of the case; is that fair to say?

23 A. That's fair to say, yes, sir.

24 Q. Okay. And with respect to Julius Cuttino who
25 we all now know is Maurice Simmons, his gun residue

1 test came back positive; is that correct?

2 A. Yes, sir.

3 Q. Okay. Came back positive for residue on his
4 hand?

5 A. I believe that that's --

6 MR. MARSHALL: Your Honor, he's asking
7 for hearsay and on that basis I object, because the
8 analysis was not done by Mr. Roper. We're going to
9 have the proper person in to testify about this
10 tomorrow, but I object because he has no personal
11 knowledge of what the results of the test were.

12 MR. FELDMAN: I don't think this is a
13 disputed issue, your Honor, and as the case agent --
14 and, of course, the whole afternoon's line of
15 questioning has been what have you determined.
16 Well, he is the case agent.

17 THE COURT: You can ask him what he
18 acted upon, but not about the test.

19 MR. FELDMAN: Okay.

20 BY MR. FELDMAN:

21 Q. Thank you very much, Officer Roper. No other
22 questions.

23 THE COURT: Okay.

24 MR. MARSHALL: I have nothing else.

25 Thank you.

1 **THE COURT:** You may step down, sir.

2 **THE WITNESS:** Thank you.

3 **THE COURT:** Okay. Ladies and gentlemen,
4 we've reached a good stopping point in the case,
5 it's almost 5:30. I would ask that you report back
6 at 9:30 tomorrow. I'd ask that you please be here
7 about -- at least five minutes before that time so
8 that we may get started at 9:30. Normally I would
9 probably start about 9:15 but we've got a scheduling
10 matter we're talking care of so we'll go ahead and
11 start at 9:30 tomorrow. Thank you very much.
12 Please do not discuss this case overnight, and have
13 a good night.

14 **MR. MARSHALL:** Your Honor, I don't know
15 if there's any media coverage on this case or
16 there's going to be any, but you may wish to offer
17 some guidance to the jury in that regard.

18 **THE COURT:** Okay. Please be seated,
19 ladies and gentlemen. I'm sorry. Sometimes I say
20 this at the beginning of the case, sometimes I
21 don't, and sometimes I take it up during the
22 qualification of the whole panel at large. But of
23 course all of you know that from time to time the
24 media covers various events throughout the court
25 system as well as everything else that may be

1 happening in the community.

2 You should refrain from exposing yourself to
3 any kind of media coverage that may be -- that may
4 take place on this case. There may not be any that
5 takes place on this case until after the conclusion
6 of the case, but you should not expose yourself to
7 any such media coverage that may take place, whether
8 it be by TV, newspaper or otherwise.

9 If you are exposed to any such media
10 coverage, then it would become your duty to report
11 that matter to the Court. With that additional
12 matter, I'll go ahead and excuse you for the night.
13 Thank you very much.

14 **THE JUROR:** Write that down for me, I
15 don't quite understand.

16 **THE COURT:** What I'm just saying, ma'am,
17 is that as I indicated to you earlier on in the
18 case, you will base your decision in this case
19 solely on the evidence that's presented to you in
20 court and on the law that I give to you. You should
21 not, and you've taken an oath to not do so, allow
22 your decision in any way whatsoever to be influenced
23 by anything outside of this courtroom. That might
24 be anything you might hear on the news, newspaper,
25 TV, radio or otherwise.

1 If you do get exposed to any information that
2 comes out about this case, it would be your solemn
3 duty to report that matter to this Court so that
4 everyone can be aware of anything that you may be
5 exposed to and decide if I have to take any action
6 as a result of that exposure. The best thing to do
7 is not to expose yourself to any newspaper articles
8 that you may see. If you inadvertently hear
9 something on TV, of course you can't control what
10 may be announced all of a sudden on TV, just let me
11 know if you hear something so I may take that up
12 with everyone and we can just make a record of it.
13 Okay? Have a good night.

14 **THE JUROR:** Thank you.

15 (Jury excused.)

16 **THE COURT:** Anything further?

17 **MR. FELDMAN:** No, your Honor.

18 **MR. MARSHALL:** No, sir.

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STATE OF SOUTH CAROLINA)
 : C E R T I F I C A T E
COUNTY OF DORCHESTER)

I, Robin L. Keil, Registered Merit Reporter and Circuit Court Reporter, certify that the preceding pages are a true and correct transcript of the proceedings had at the aforesaid time and place.

I certify that the same was reduced to typewritten form from my original stenograph notes by computer-aided transcription.

I further certify that I am not of counsel or kin to any of the parties to this cause of action, nor am I interested in any manner in its outcome.

IN WITNESS WHEREOF I have hereunto set my hand
this the 29th day of April 1998.

Samuel H. Adams

Robin L. Keil, RMR
Circuit Court Reporter

STATE OF SOUTH CAROLINA) COURT OF GENERAL SESSIONS
 :
 COUNTY OF CHARLESTON) CASE NO. 97-GS-10-606

STATE OF SOUTH CAROLINA) VOLUME III
)
 -versus-) TRANSCRIPT OF RECORD
)
 JOE LEWIS HOLMES,) JURY TRIAL
)
 Defendant.) October 22, 1997

B E F O R E:

The Honorable Daniel F. Pieper

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1 (October 22, 1997.)

2 THE COURT: Please be seated. Are you
3 all ready to proceed?

4 MR. MARSHALL: Yes, your Honor.

5 MR. FELDMAN: Yes, your Honor.

6 THE COURT: Okay. Bring the jury in.

7 (Jury present.)

8 THE BAILIFF: All seated, your Honor.

9 THE COURT: Thank you. Please be
10 seated. Okay. Ladies and gentlemen, we're ready to
11 proceed at this time. Sorry to keep you waiting.
12 Go ahead.

13 MR. MARSHALL: Vello Paavel.

14 THE CLERK: Please place your left hand
15 on the Bible and raise your right hand.

16 (Vello Paavel, called as a witness by
17 the State, having first been duly sworn,
18 was examined and testified as follows:)

19 THE CLERK: Please be seated. Please
20 state your full name and spell your last name for
21 the record.

22 THE WITNESS: Vello Paavel, V-e-l-l-o
23 P-a-a-v-e-l.

24 THE CLERK: Thank you.

25 DIRECT EXAMINATION

1 BY MR. MARSHALL:

2 Q. Mr. Paavel, where do you work, sir?

3 A. I work for the South Carolina Law Enforcement
4 Division which is commonly known as SLED.

5 Q. What do you do there?

6 A. I work in the firearms department where I'm a
7 firearm and tool mark examiner.

8 Q. How long have you held that position?

9 A. I've been in the firearms department for ten
10 and a half years.

11 Q. What sort of training do you have in order to
12 help you perform your duties there?

13 A. I have a bachelor of science degree from the
14 University of South Carolina where I majored in
15 chemistry, I've attended the South Carolina Criminal
16 Justice Academy and I'm a certified officer, I've
17 taken several courses at the academy and several
18 other locations in the area of crime scene
19 processing and homicide investigation.

20 I've also taken several courses involving the
21 study of firearms at firearms manufacturing
22 facilities. At those courses I had to learn how to
23 recognize problems with those firearms and determine
24 whether those firearms would work properly. I've
25 also had the opportunity to attend a specialized

1 technique school in firearms identification which is
2 offered by the FBI.

3 The bulk of my training in the area of
4 firearms identification involving microscopic
5 examination came from a training program that I had
6 to take when I was first employed by SLED. During
7 that training program I had to learn about firearms,
8 crime scenes, latent prints, an assortment of
9 information.

10 During that time what I had to do was work
11 under the supervision of court qualified examiners,
12 I was tested on information, I had to read various
13 books and studies on firearms identification, I also
14 helped those examiners in the preparation of cases
15 in actually doing comparisons on the comparison
16 microscope. After I completed that training program
17 I was allowed to work cases on my own and to testify
18 as an expert in the area of firearms identification.

19 Since completing that training program I've
20 testified over 180 times in South Carolina General
21 Sessions Court and in federal court as an expert in
22 firearm and tool mark identification.

23 MR. MARSHALL: Move to have Mr. Paavel
24 recognized as an expert in the area of firearms
25 identification, your Honor.

1 MR. FELDMAN: Your Honor, I don't have
2 any objection to this witness as an expert.

3 THE COURT: Okay. The Court finds him
4 to be so qualified.

5 THE WITNESS: Thank you, sir.

6 BY MR. MARSHALL:

7 Q. Mr. Paavel, how did you become involved in
8 this case, the State of South Carolina versus Joe
9 Holmes?

10 A. Apparently evidence was submitted to SLED for
11 examination. Some of that evidence was routed to me
12 for examination.

13 Q. Please inspect these exhibits, State's 69 and
14 68; and tell the jury, please, if you're able to
15 identify those items.

16 A. Yes, sir. I recognize these items.

17 Q. What are those?

18 A. These are two vials. In each vial is a fired
19 bullet or a projectile.

20 Q. And you have previously handled those?

21 A. Yes, sir. These are the two projectiles or
22 bullets that I examined in reference to this case.

23 Q. When did you do that?

24 A. I received this evidence from our evidence
25 locker on 7-29-96 and I conducted my examination on

1 or about that day. Let me give you -- yes, sir. I
2 conducted my examination on 7-29 of '96.

3 Q. After you completed your examination, what
4 did you do with the exhibits at that point?

5 A. The exhibits were ultimately returned to the
6 submitting agency through our proper evidence
7 control system in the laboratory, and they were
8 returned to the North Charleston Police Department.

9 Q. In inspecting those two bullets, what was
10 your goal, what were you trying to do?

11 A. Well, normally when I have a firearms case I
12 have a gun to compare to a bullet or a cartridge
13 case. In this particular instance I only had two
14 bullets. So normally what I try to do is determine
15 what type of gun could have fired this type of
16 bullet, what caliber are these bullets, and whether
17 or not these two bullets were fired from the same
18 gun or whether they were fired from two different
19 guns.

20 Q. What was the finding of your analysis?

21 A. Briefly, I concluded that these bullets were
22 most consistent with bullets that you would find in
23 some .38 special caliber ammunition. I also
24 examined them microscopically and determined that
25 these two bullets were fired from the same gun. I

1 also prepared a list of possible firearms that could
2 have fired these two bullets based on the type of
3 rifling that was found on the bullets themselves.

4 Q. Could you relay to the jury the possible -- I
5 guess those are makes of weapons?

6 A. Yes, sir. These are makes of weapons. If I
7 don't have a firearm to compare to the bullets, I
8 can examine the rifling, the rifling impressions
9 that are left on the bullets as a result of the
10 bullets traveling through a barrel. And then by
11 comparing information that I gather from the bullets
12 as a result of measuring and examining bullets to
13 information that's in a database that's provided to
14 us by the FBI Firearms Unit, I can give a list of
15 possible makes and calibers of firearms that could
16 have fired these two bullets. However, I can't
17 positively tell you which brand or type of gun fired
18 these bullets unless I have the actual firearm for
19 comparison purposes.

20 Q. That's all I have. Thank you, sir.

21 MR. FELDMAN: May it please the Court.

22 THE COURT: Yes, sir.

23 CROSS-EXAMINATION

24 BY MR. FELDMAN:

25 Q. Mr. Paavel, let me change gears, I don't have

1 anything to ask you on that point. How far, in your
2 opinion, would you have to be away from a 20-gage
3 shotgun filled with buckshot to be safe?

4 A. Depending on the size of the buckshot most of
5 the sizes of buckshot that are commonly found in 20-
6 gage shells could potentially be lethal out to
7 several hundred yards, probably 4 to 600 yards.
8 That's assuming you just shoot it in the air and let
9 the buckshot full down. That's the range you would
10 have to be.

11 Q. Yeah. My question is how far to be safe,
12 we're not talking about what you do if you're a
13 hunter and you prepared to do that.

14 A. Right.

15 Q. Thank you very much, sir.

16 A. Yes, sir.

17 MR. MARSHALL: Nothing else. Thank you.

18 THE COURT: You may step down, sir.

19 THE WITNESS: Thank you, sir.

20 MR. MARSHALL: May this witness be
21 excused, your Honor?

22 MR. FELDMAN: No objection.

23 THE COURT: You may be excused, sir.

24 THE WITNESS: Yes, sir.

25 MR. MARSHALL: Next witness, your Honor?

1 THE COURT: Yes, sir.

2 MR. MARSHALL: John Ortuno.

3 THE CLERK: Please place your left hand
4 on the Bible and raise your right hand.

5 (Manuel John Ortuno, called as a witness
6 by the State, having first been duly
7 sworn, was examined and testified as
8 follows:)

9 THE CLERK: Please be seated. Please
10 state your full name and spell your last name for
11 the record.

12 THE WITNESS: Manuel John Ortuno,
13 O-r-t-u-n-o.

14 THE CLERK: Thank you.

15 DIRECT EXAMINATION

16 BY MR. MARSHALL:

17 Q. Mr. Ortuno, where do you work, sir?

18 A. South Carolina Law Enforcement Division
19 commonly referred to as SLED.

20 Q. What do you do there?

21 A. I'm a trace evidence examiner.

22 Q. What does that mean?

23 A. We do hair and fiber analysis, gunshot
24 residue and gunpowder analysis, paint and explosives
25 analysis.

1 Q. How long have you worked in that field?

2 A. A little over seven years.

3 Q. What is your educational training and work
4 experience in the field?

5 A. I graduated with honors from the American
6 University in Washington, DC with a bachelor of
7 science degree, majoring in chemistry; I have a
8 master's degree also majoring in chemistry from the
9 University of South Carolina, Columbia; I'm a
10 graduate from the South Carolina Criminal Justice
11 Academy, have attended and completed in-house
12 training programs at SLED under the supervision of
13 court qualified experts in my field, I've attended
14 courses at McCrone Institute in Chicago, Illinois,
15 dealing with trace analysis, and have attended
16 numerous seminars and conferences throughout the
17 Southeast and Midwest pertaining to my field of
18 expertise. I've also been qualified as an expert in
19 general sessions courts throughout the states
20 approximately 45 times.

21 MR. MARSHALL: Move to have Mr. Ortuno
22 recognized by the Court, your Honor, as an expert in
23 the field of trace evidence.

24 MR. FELDMAN: Your Honor, I have no
25 objection to that.

1 **THE COURT:** Okay. The Court finds him
2 to be so qualified in that area without objection.
3 Go ahead, sir.

4 **BY MR. MARSHALL:**

5 Q. Mr. Ortuno, how did you become involved in
6 the State of South Carolina versus Joe Holmes?

7 A. I received several items that were submitted
8 in this particular case.

9 Q. When was that, that you received the items?

10 A. I received gunshot residue kits through our
11 evidence chain on July 29th of '96, I also received
12 a box containing articles of clothing on August 19th
13 of '96.

14 Q. These exhibits are marked State's 73, 71, 70,
15 and 72. Please look at them and tell the jury if
16 you're able to identify them.

17 A. Yes. These are envelopes containing what
18 remains of gunshot residue kits that were submitted
19 in this case.

20 Q. And when they came into your physical
21 possession, how did that occur?

22 A. Items are logged into SLED through the
23 evidence -- through the evidence room or evidence
24 log-in department. They are then sent to a secured
25 location in our department, in trace evidence

1 department, and then upon inspection of SLED seals
2 that are contained on the outside envelope, that
3 seal is broken, initialed and dated, and then the
4 evidence from there is processed.

5 Q. And once you gained custody of those
6 exhibits, what did you do with them?

7 A. The gunshot residue kit is designed to
8 collect and analyze particles that deposit on the
9 hand from an individual who has either handled a
10 weapon, discharged a weapon or been in close
11 proximity to the discharge of a weapon.

12 The samples were already collected on the
13 field and, therefore, all I had to do was collect,
14 take these samples, analyze them and determine based
15 on the results of such analysis whether one of those
16 three scenarios is in fact possible.

17 Q. What are the names that you were given of the
18 persons from whom those samples were taken?

19 A. The names that were submitted for these
20 samples are Julius Cuttino, Michael Carson and
21 Alexander Gaillard.

22 Q. Was there a -- was the fourth exhibit, did
23 you have a name for the fourth exhibit?

24 A. Kenneth Washington.

25 Q. Could you explain, please, the procedure -- I

1 know that you did not do it yourself, but you're an
2 expert in the field -- what is your understanding of
3 the procedure that was followed by the person in the
4 field, in this case Ray Garrison and Dusty Poole, in
5 gathering those samples?

6 A. The kit is made up of two components. One is
7 what is called the swab component of the kit, and
8 what that involves is a -- typically involved is a
9 Q-tip which is dipped in a weak acid solution. The
10 Q-tip, once dipped in this solution, is applied to
11 the palm of both hands. One Q-tip for each
12 location. One Q-tip to the left palm placed in a
13 tube, one Q-tip to the left back, placed in another
14 tube, and the same thing is done with the left --
15 with the right hand. So actually have four tubes,
16 each representing the swabbing of one of the two
17 sides of each hand. That's one set of components.

18 The other one involves what are known as
19 particle lifts. And this is a half-inch aluminum
20 platform, or stub, that contains a sticky substance
21 called Vistanex. That is applied on the same
22 locations, one stub per location; right palm, right
23 back, left palm, left back, to collect these
24 microscopic particles that are located in the
25 grooves of the skin. They are then sealed and

1 submitted for analysis.

2 Q. When you examined those samples that are
3 submitted to you, what elements are you looking for,
4 what is it exactly that you're trying to find?

5 A. We're looking for three specific elements,
6 these are barium, antimony and lead.

7 Q. Why is it that you look for those elements?

8 A. Those three elements make up what is known as
9 the primer mixture, which is the mixture that burns
10 initially before the gunpowder burns. And in the
11 process of the cloud that spews out trailing the
12 bullet, these microscopic particles are in this
13 cloud and can settle on a person's hand.

14 Q. What was your finding, the finding of your
15 analysis in this case?

16 A. For Kenneth Washington the metals that were
17 present were insufficient to determine that he was
18 in fact either handling, discharging or in close
19 proximity to the discharging of a weapon.

20 For subject Julius Cuttino, I did in fact
21 find round lead particles on both sides of the left
22 hand, and round lead particles are one of the
23 components that we look for in gunshot residue.

24 For Michael Carson these particles were not
25 found. And for Alexander Gaillard, these particles

1 were insufficient to determine the presence of these
2 elements.

3 Q. Now, in the case of Michael, the person that
4 you came to know through your investigation as
5 Michael Carson, did you find -- did you find
6 anything which leads you to an opinion about a
7 probability of whether or not that person fired or
8 handled or was in the cloud of a fired gun?

9 A. As I stated earlier, there are two components
10 to this test. In the first component the swabs that
11 were collected for Michael Carson I did find
12 indications of these elements being present. They
13 were found on the right palm and the left palm.
14 However, on the second half of the test, the test
15 that involves the analysis of the stubs or the
16 particle lifts, these elements were not found. And
17 based on our policy, if we do not find them on the
18 second test as well they are reported as negative
19 and are listed as such on the result sheet.

20 Q. The findings on Carson that you just stated,
21 does that lead you --

22 MR. FELDMAN: Objection. Leading.

23 THE COURT: Sustained.

24 BY MR. MARSHALL:

25 Q. Does that lead you to any conclusion --

1 **THE COURT:** Sustained. Rephrase your
2 question.

3 **BY MR. MARSHALL:**

4 Q. Did you reach any conclusion in the findings
5 on Mr. Carson as to a probability of whether or not
6 he had --

7 **MR. FELDMAN:** Objection. Leading.

8 **THE COURT:** Counsel approach.

9 (Whereupon, a conference was held at
10 side bar.)

11 **THE COURT:** Go ahead with your question.

12 **BY MR. MARSHALL:**

13 Q. Did you attach any probability to whether or
14 not Michael Carson had fired, handled or been in the
15 cloud of a fired gun? You may or may not have, I
16 don't know the answer, I'm just asking the question.

17 A. My conclusion, based on both tests, is that
18 the particles that we would look for were not
19 present. That does not mean that he could not have
20 fired a weapon, it just doesn't mean that he in fact
21 did fire a weapon. There is some indication in the
22 first part of the test that shows some signs.
23 However, the second test being negative resulted in
24 a negative conclusion for this particular test for
25 this individual.

1 Q. And in the case -- if you could talk a little
2 bit more about how somebody might test positive on
3 your test as a result of being in, as you referred
4 to it, the cloud of a fired gun.

5 A. As I said earlier, there are three scenarios
6 that can possibly allow for a person to be exposed
7 to these particles. One is the handling of the
8 weapon, one is the discharge of the weapon, the
9 third being exposed to the cloud that trails the
10 bullet. The size of the cloud and the range of the
11 cloud varies somewhat based on conditions. If
12 you're outside and it's windy, it could travel
13 further. If you're inside it's less likely that
14 will happen. Also the caliber of the weapon and the
15 ammunition have some effect on the case of a cloud.

16 In the case of a .38 caliber what we
17 typically see is a cloud that will range between
18 three and five feet. In other words, if I discharge
19 a .38 caliber in your direction, sir, it would go
20 between three and five feet. Anyone that is --
21 whose hands are within that cloud as it is traveling
22 behind the bullet, and the hands are in that cloud,,
23 will have these particles settle on the hands and
24 they can in fact be detected.

25 Does that answer your question?

1 Q. Yes, sir. You stated, Mr. Ortuno, that in
2 the case of Kenneth Washington the levels were
3 insufficient for you to reach a conclusion. Could
4 you describe a little bit more what you mean by
5 that?

6 A. In the case of the victim what we're looking
7 for typically is to see if we can determine whether
8 he in fact fired the weapon or was in close
9 proximity to being fired upon. The fact that there
10 were no particles found on the hands of these -- of
11 the victim could indicate that either he did not
12 fire a weapon or handle a weapon that was in fact
13 discharged and that he was -- his hands were not
14 within this three- to five-foot cloud upon being
15 fired on.

16 So the shooter would be beyond three to five
17 feet assuming that the hands were exposed or in the
18 direction of the shooter when he was shot at.

19 Q. What is the amount of time that these
20 particles that you're searching for in these tests,
21 that you can detect them after either firing,
22 handling or being in the cloud of a fired gun?

23 A. On a living subject these particles, when
24 they deposit on the hands, begin immediately to be
25 absorbed by the skin. After six hours we will not

1 even perform the test because it would be not
2 indicative of either having been involved in that
3 incident or not having been involved in that
4 incident. Because by six hours these particles are
5 gone from the skin.

6 These particles can also be transferred by
7 handling. By putting your hand on something a small
8 amount of these particles would in fact transfer as
9 well. So, of course, over the course of a six-hour
10 living subject sufficient things are touched and the
11 absorption rate causes a potential positive to be a
12 negative. And so we simply just do not do the test
13 at all.

14 If a person is deceased there is no
15 absorption, there is no handling, and so we have had
16 positives found days after a victim has been found.

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

18 MR. FELDMAN: May it please the Court.

19 CROSS-EXAMINATION

20 BY MR. FELDMAN:

21 Q. Mr. Ortuno, could I ask you if you would
22 stand around here? I want to just ask you a
23 question.

24 A. (The witness complied.)

25 Q. If the shooter of a weapon were standing

1 here, a .38, and an individual were back behind
2 to the left five feet, maybe a little less, would
3 that be possible for that cloud to do that, to do
4 what you just described?

5 A. What is the direction of the shooter?

6 Q. The shooter would be standing about right
7 here (indicating), and the target would be the tire.
8 And the other person hypothetically, if you will,
9 would be over here (indicating) to the left, a
10 little to the rear and a little to the left about
11 five feet, maybe a little less.

12 A. The shooter is discharging the weapon towards
13 the Jeep?

14 Q. Yes, sir.

15 A. And the person is to the left?

16 Q. To the left back here behind the car
17 (indicating).

18 A. Well, it would depend on how close the
19 shooter is to the vehicle upon the discharge. Once
20 again, the cloud is going to travel in the direction
21 of the bullet, so the closer that the shooter is to
22 the Jeep, the more of the cloud is going to go
23 towards the Jeep and not to the left or to the
24 right. There's also wind conditions to consider as
25 another factor, which I can't testify to. It's a

1 difficult question to answer.

2 Q. Okay. All right. Thank you very much. You
3 can be seated.

4 A. (The witness complied.)

5 Q. Mr. Ortuno, you were good enough to talk to
6 me for a few minutes before we started this morning
7 and I appreciate that. And I showed you some of my
8 internet research, I can't compete with your
9 expertise, but we talked about how residue can be
10 found on the skin or clothing of the person who
11 fired the gun, I even showed you, and you said "Yes,
12 that's correct."

13 A. On the person who fired the weapon?

14 Q. Yes, sir.

15 A. That that is possible. We do not perform
16 that test, but it is possible.

17 Q. Well, you performed it in this case, didn't
18 you?

19 A. On the victim, the person who was shot upon,
20 not the articles of clothing....

21 Q. Do you have your report dated September 25th
22 of 1996?

23 A. Yes, I do.

24 Q. Okay. I'm looking at the item submitted for
25 which you test. And the way you do it is you show

1 the item submitted with various numbers and then on
2 the results of examination you have it by
3 corresponding number down below; is that correct?

4 A. That's correct.

5 Q. Yes, sir. One of the items you tested that
6 was submitted to you that was recovered immediately,
7 immediately after the incident, was a Forest Club
8 shirt, is that correct, item number 14?

9 A. Yes, sir. That is correct.

10 Q. Okay. And on the results of your test you
11 determined that there were -- that it was examined
12 for the presence of gunshot residues and none were
13 found; is that correct?

14 A. That is correct.

15 Q. Okay.

16 MR. FELDMAN: Your Honor, I'm showing
17 the witness State's Exhibit 60 which I understand is
18 in evidence, one Forest Club shirt.

19 BY MR. FELDMAN:

20 Q. Is this the Forest Club shirt that you
21 examined for gunshot residue where none was found?

22 A. Yes, it is. However, I would like to point
23 out that this particular test is looking for residue
24 which settles on an item or a garment upon being
25 shot at, not particles that would settle as a result

1 of shooting a weapon.

2 Q. Well, you know, I mean, I know you're the
3 State's witness. I showed you my research, and it
4 said residue may be found on the skin or clothing.
5 Your test says the presence of gunshot residues?

6 A. Yes, sir.

7 Q. And none were found?

8 A. Yes, sir.

9 Q. Thank you, sir.

10 MR. FELDMAN: Your Honor, I would --
11 Thank you, your Honor.

12 THE COURT: Okay. Anything else?

13 MR. MARSHALL: Yes.

14 REDIRECT EXAMINATION

15 BY MR. MARSHALL:

16 Q. Mr. Ortuno, you stated that the test that you
17 conducted on that shirt that was just shown to you
18 by Mr. Feldman, that that particular test was
19 searching to find out whether the person wearing
20 that shirt had been fired upon, correct?

21 A. Yes, sir.

22 Q. You testified that you did not check the
23 shirt to see if someone who had been wearing the
24 shirt fired upon someone else; is that correct?

25 A. That is correct.

1 Q. Are there different tests to test for those
2 two things?

3 A. Yes. The first test that I've explained to
4 the jury and to this Court deals with the small
5 minute microscopic particles that settle on the
6 hands of the individual. The second test dealing
7 with articles of clothing pertains to larger
8 particles that settle from this cloud. And what
9 occurs is through a chemical reaction a color
10 appears and forms a pattern. This pattern would
11 allow us to determine the distance that the gun was
12 from the person who was shot at.

13 That is not to say that the particles that we
14 would look for on the first test could not be
15 found -- or I'm sorry, do not settle on the shirt or
16 garment, it's simply that they are so small that it
17 would be impossible to collect them between the
18 threads, say, of a shirt or a sweater or something
19 of that sort. So it's not they don't settle there,
20 we just cannot collect them in an efficient way to
21 say whether or not they're in fact there.

22 In fact, if this item had been identified to
23 me as being a garment belonging to a subject, the
24 test would have not been performed if he had not
25 been shot at simply because what we're looking for

1 isn't present. And so it's not surprising that the
2 test was negative.

3 Q. So if someone had worn this shirt while
4 committing a murder with a .38 caliber handgun,
5 would you be able to determine that from the test
6 that you ran on the shirt?

7 A. When he discharged a weapon?

8 Q. Yes, sir.

9 A. No.

10 Q. If I could ask you, please, to come down, I
11 would like to look at that photo again.

12 A. (The witness complied.)

13 Q. Okay. Mr. Feldman posed to you a
14 hypothetical, and I would like to do the same. If a
15 person were standing in front of this -- roughly in
16 front of this tire at a distance of approximately
17 three feet and another person was standing to that
18 person's left at a distance of approximately three
19 feet, do you have an opinion as to whether or not
20 the person standing to the left could pick up the
21 particles that you search for on their hands while
22 somebody was firing the .38 at the tire from a
23 distance of approximately three feet?

24 A. Once again, assuming that you're standing
25 more in this location (indicating) to the right of

1 the corner of the vehicle, you're allowing more
2 space that is not intervening between another
3 individual. If the individual was right here
4 (indicating), the closer that individual is to this
5 cloud which is going to travel behind the bullet,
6 trailing the bullet towards the Jeep, the closer
7 that individual is, the more likely it is possible
8 for the hands of that individual to interfere with
9 this cloud and collect these particles.

10 Q. Could wind have an impact on whether or not
11 the person to the left might have the particles on
12 their hand?

13 A. Wind would most definitely have an impact.

14 Q. Okay. That's all I have. Thank you.

15 MR. MARSHALL: I don't have any further
16 questions, your Honor.

17 MR. FELDMAN: May it please the Court.

18 THE COURT: Yes, sir.

19 RE CROSS-EXAMINATION

20 BY MR. FELDMAN:

21 Q. Mr. Ortuno, we agree that residue can be
22 found on clothing of a shooter; isn't that true?
23 Residue -- I showed you in print, you said, "Yes,
24 that's correct." Are you saying it's impossible for
25 residue to be found -- if I shoot a gun at that wall

1 it's impossible to find residue on my shirt?

2 A. No, I'm not saying it's impossible. It's a
3 test we do not perform, but it's not impossible.

4 Q. But, there are tests to determine, there are
5 chemical, scientific tests to determine if I have
6 gun residue after I shoot that on my clothing; are
7 there not?

8 A. The test would be the same that was performed
9 on the hand. The problem would be collecting the
10 particles on the shirt to then test.

11 Q. I'm not asking you how hard the test would
12 be, I'm asking you whether it can be performed. And
13 it can be performed, can't it? Just whether it can
14 be performed.

15 A. We do not perform it. Theoretically it could
16 be performed.

17 Q. It could be performed?

18 A. Yes.

19 Q. And if you performed it on the shirt, and you
20 found something, that would certainly be real
21 probative, real good evidence that that person
22 probably shoot the gun, wouldn't it?

23 A. Well, it actually wouldn't, and here's the
24 problem that we have. As mentioned earlier, on the
25 hands of the individual these particles have a

1 six-hour window. After six hours they can't be
2 involved in that particular incident. The problem
3 with garments is that these particles can remain on
4 the garment indefinitely. And, therefore, you can
5 find the particles and say it's positive. However,
6 to link it to that particular incident would be much
7 more difficult.

8 Q. That's an evidentiary question, isn't it?
9 This shirt was found -- whatever it is, it was found
10 within moments of the police arriving on the scene.
11 Are you aware of that?

12 A. I'm not aware of that.

13 Q. In other words, the police had it in their
14 possession immediately. If the thing -- if the
15 incident happened in the neighborhood of sunrise,
16 then they had it a half an hour thereabouts after
17 sunrise. Okay? And there are tests that could have
18 been performed, no matter how hard they are, tests
19 could have been performed?

20 A. Well, no, we don't perform them. It's not
21 that we didn't do a test that could be performed,
22 because it's ineffective and inefficient and because
23 it would not necessarily be from that incident.
24 This individual could have fired a weapon a week
25 before.

1 Q. But that's the whole thing. But if it's not
2 there, if you perform the test and there's nothing
3 there then he didn't fire it that day, he didn't do
4 it that week, he didn't do it last week, never did
5 it in that shirt.

6 A. But that test was not performed for these
7 microscopic particles that we're referring to.

8 Q. Even though the police had it in their
9 custody immediately.

10 Thank you very much, sir.

11 FURTHER REDIRECT EXAMINATION

12 BY MR. MARSHALL:

13 Q. Mr. Ortuno, it wouldn't matter for the
14 purpose of discussions you all just had whether the
15 police got it immediately or, say, about five and a
16 half hours later, would it? Because those --

17 A. Not for the test that I performed on this
18 shirt.

19 Q. Or the one that Mr. Feld -- or the one you
20 say is possible but you all don't do because it's
21 not very probative and it's not efficient?

22 MR. FELDMAN: No, no. He said it was
23 hard to do, not that it wasn't probative.

24 THE COURT: Mr. Feldman?

25 MR. FELDMAN: Yes, sir.

1 **THE COURT:** Counsel approach.

2 (Whereupon, a conference was held at
3 side bar.)

4 **THE COURT:** Restate your -- rephrase
5 your question.

6 **BY MR. MARSHALL:**

7 Q. The test which is possible during which you
8 might examine clothing of a suspected shooter, would
9 it make any difference whether the clothing was
10 gathered immediately after the shooter fired the gun
11 or hours later?

12 A. Well, you want to obtain the evidence as
13 quickly as possible just to guarantee that the
14 evidence and what you're looking for is secured, so
15 based on the way the question is posed you'd want to
16 get it as quickly as possible.

17 If it's collected four hours afterwards it's
18 not as good as three hours afterwards, but we have
19 found on the tests that we do we for a person who
20 was shot at positives within hours, sometimes even
21 days. It just depends on how much handling this
22 individual item has been exposed to since the
23 incident. So it's always good to get it as quickly
24 as possible.

25 Q. Might significant deterioration occur if --

1 MR. FELDMAN: Objection. Leading.

2 THE COURT: Go ahead.

3 BY MR. MARSHALL:

4 Q. Would there be any significant deterioration.
5 possible if an item had been outside for a period
6 of, say, five hours?

7 A. The particles that we look for, which are
8 larger than the ones that we look for on the first
9 tests that I explained, are embedded within the
10 threads. It's just not that easy to have them fall
11 off. So in that sense the question of hours should
12 not impact on that particular test.

13 Q. That's all the questions I have, sir. Thank
14 you.

15 MR. FELDMAN: I just have one more.

16 FURTHER RECROSS-EXAMINATION

17 BY MR. FELDMAN:

18 Q. This time thing, how many hours was it
19 between when -- well, I'm sorry. How many hours, or
20 what time did you say Julius Cuttino was swabbed?

21 A. The kit contains a small sheet of paper with
22 items that we request before analysis of these
23 samples. One is the subject's name, another one is
24 the time of the test, the time in which these
25 samples are collected.

1 Q. Yes, sir.

2 A. For Julius Cuttino, sir?

3 Q. Yes, sir.

4 A. The time that is indicated on the sheet that
5 was submitted with the swabs and the stubs is 10:05.

6 Q. Okay. And that one was positive for the gun
7 residue. I think you explained a little more
8 technically, round lead particles found on both
9 sides of the left hand of Julius Cuttino?

10 A. Yes, sir.

11 Q. All right. So if Julius Cuttino were
12 standing five feet or a little less --

13 MR. MARSHALL: Your Honor, I object just
14 on the grounds he's way outside the scope of any
15 recross. I mean, he's supposed to narrow things
16 down as we go. He's opening up a whole new line of
17 questioning. The State's ready to move on, your
18 Honor.

19 MR. FELDMAN: Your Honor, here's what
20 I'd say. The reason I asked about Cuttino is
21 because I wanted to get into the time thing again.

22 THE COURT: I'll give you a little
23 leeway.

24 MR. FELDMAN: This is my last question.

25 THE COURT: Go ahead.

1 BY MR. FELDMAN:

2 Q. If he were standing to the left five, maybe a
3 little less, of course his left hand is yet another;
4 whatever, you know, foot and a half to his left, and
5 the purpose of these tests is to determine suspects
6 who may have shot a gun, correct?

7 A. Or close proximity, right, to a discharging
8 weapon.

9 Q. Thank you very much, Mr. Ortuno. I
10 appreciate you answering my questions.

11 MR. MARSHALL: That's all.

12 THE COURT: You may step down.

13 THE WITNESS: Thank you, your Honor.

14 THE COURT: Call your next witness.

15 MR. MARSHALL: May this witness be
16 excused, your Honor?

17 MR. FELDMAN: No objection.

18 THE COURT: You may be excused.

19 Call your next witness.

20 MR. MARSHALL: Dr. Leigh Thorne.

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

23 (Leigh Thorne, MD, called as a witness
24 by the State, having first been duly
25 sworn, was examined and testified as

1 follows:)

2 THE CLERK: Please be seated. Please
3 state your full name and spell your last name for
4 the record.

5 THE WITNESS: Leigh Thorne, T-h-o-r-n-e.

6 THE CLERK: Thank you.

7 DIRECT EXAMINATION

8 BY MR. MARSHALL:

9 Q. Dr. Thorne, where do you work, please?

10 A. At the Medical University of South Carolina.

11 Q. And what do you do there?

12 A. I am a pathology resident.

13 Q. Can you explain to the jury, please, what
14 pathology is?

15 A. Pathology is basically the study of tissues
16 and organs at a cellular or microscopic level.
17 Tissues that are removed from the body are cut into
18 very small sections and we look at it under the
19 microscope to determine if there's cancer,
20 inflammation or any other process that's going on.

21 Q. And you stated that you are a resident. What
22 does that mean?

23 A. It means I'm a physician training in the area
24 of pathology.

25 Q. How long have you worked at the Medical

1 University of South Carolina?

2 A. Two years. Going on my third year.

3 Q. In the field of forensic pathology?

4 A. We do several months' training specifically ,

5 in the area of forensics, but the rest of the time

6 we rotate in different areas.

7 Q. What is your educational background?

8 A. Beginning with college?

9 Q. Yes, ma'am.

10 A. I attended the University of North Carolina

11 in Chapel Hill where I received a BS degree in

12 medical technology. I worked for four years as a

13 medical technologist and at the same time received a

14 master's in health sciences. Then I went to med

15 school at the Medical University of South Carolina,

16 and once I graduated there started as a pathology

17 resident.

18 Q. Have you received any special training other

19 than your medical degree in the area in which -- in

20 the area of forensic pathology?

21 A. Other than the several months' rotation, no, ..

22 I have not. ..

23 Q. And how long have you worked in the pathology

24 department?

25 A. For approximately a little over two years.

1 Q. How many autopsies have you been involved in?

2 A. Sixty-two.

3 Q. Have you testified before in court about your
4 findings in autopsies?

5 A. One time in a previous case.

6 MR. MARSHALL: All right. Your Honor,
7 the State offers Dr. Thorne as an expert in the area
8 of forensic pathology.

9 MR. FELDMAN: Your Honor, I have no
10 objection to Dr. Thorne for that purpose.

11 THE COURT: Okay. The Court finds her
12 to be so qualified without objection.

13 BY MR. MARSHALL:

14 Q. Dr. Thorne, how did you become involved in
15 the case which we're trying here today?

16 A. I was doing my forensic rotation and this was
17 one of the cases we had. That's part of my required
18 rotation.

19 Q. Were you involved in the -- in an autopsy?

20 A. Yes, I was.

21 Q. And upon whom was that autopsy conducted?

22 A. Kenneth Washington.

23 Q. When was that done?

24 A. July 29th.

25 Q. Of 1996?

1 A. Actually, excuse me, that was July 19th,
2 1996.

3 Q. July 19th. Before we get into the
4 particulars of that autopsy, can you explain to the
5 jury a little bit, please, about what the medical
6 examiner's office is?

7 A. The medical examiner's office is composed of
8 pathology residents like myself as well as
9 pathologists who have been specifically trained in
10 the area of forensics. And their job entails
11 investigating a death and determining whether or not
12 it is a natural death, such as a heart attack, or an
13 unnatural or suspicious death like homicide,
14 suicide.

15 Q. And in this particular case when the autopsy
16 was performed on the 19th on Mr. Washington, did
17 anybody assist you with that?

18 A. Yes, they did.

19 Q. Who was that?

20 A. Dr. Russell Uptagrove (phonetic), and then we
21 always have an attending present and that was
22 Dr. Sandra Conrati.

23 Q. So there were three doctors performing the
24 autopsy?

25 A. Yes, sir.

1 Q. What do forensic pathologists mean when they
2 refer to cause of death?

3 A. Cause of death is actually the medical cause
4 of death in the sense whether it was a heart attack,
5 a person bled to death. So it's actually the
6 medical cause of death, the reason they died.

7 Q. And what do forensic pathologists mean when
8 they refer to manner of death?

9 A. Manner of death refers to was it a natural
10 death like a heart attack, as I mentioned, or was it
11 a homicide, suicide or some other unnatural means.

12 Q. Can you relate to the jury the findings of
13 your autopsy which you conducted on Kenneth
14 Washington?

15 A. Yes. We noted an entrance wound, a gunshot
16 entrance wound on the right posterior shoulder. The
17 path of the bullet was basically through soft
18 tissue, it lacerated the upper right lung and went
19 into the paracardial sac, which is a sac that
20 surrounds the heart. It lacerated the aorta, which
21 is the main blood vessel which leaves the heart
22 which supplies the rest of the body, exited the
23 paracardial sac, went through the left upper lung
24 and lodged between the fifth and sixth ribs in the
25 intercostal space. We also found large amounts of

1 blood in both the right and left spaces around the
2 lungs, as well as within that paracardial sac around
3 the heart.

4 Q. Did you reach a conclusion as to the cause of,
5 Mr. Washington's death?

6 A. Yes, we did.

7 Q. What was that?

8 A. Exsanguination due to the aortic laceration
9 as a result of the gunshot wound.

10 Q. Exsanguination meaning what?

11 A. He basically bled to death.

12 Q. Did you reach a conclusion as to the manner
13 of death?

14 A. Yes, we did. It was homicide.

15 Q. And homicide means what?

16 A. That he was shot by someone else.

17 Q. What does the term stippling mean, Doctor?

18 A. Stippling is the gunshot residue that you
19 often see at close gunshots. Usually within 18 to
20 24 inches, if the gun is shot within that distance,
21 you'll see the stippling, or gunshot residue, on the
22 body often.

23 Q. Did you inspect Mr. Washington for stippling?

24 A. Yes, I did.

25 Q. Did you find any?

- 1 A. No, I did not.
- 2 Q. Did you reach any conclusion about the
3 distance from which the murderer shot him?
- 4 A. All that we can really tell from the autopsy
5 is that because there is no stippling we considered
6 it a distant gunshot wound. We assumed that it was
7 grater than the 18 to 24 inches because there is no
8 stippling. Other than that we can't tell, you know,
9 if it was 25 feet or 50 feet.
- 10 Q. Did you determine -- did you remove anything
11 from Mr. Washington's body?
- 12 A. Yes, we did.
- 13 Q. What was that?
- 14 A. A bullet.
- 15 Q. These two exhibits are -- that's State's 68
16 and this is State's 69, they're each bullets. Are
17 you able to tell if one of those is the one that you
18 removed from Mr. Washington?
- 19 A. Yes.
- 20 Q. Which one is it? That's 69. Is that the one
21 that you removed from his body?
- 22 A. Yeah, 69.
- 23 Q. And then after it was removed, what did you
24 do with it?
- 25 A. We transferred the evidence to an

1 investigator. We take photographs of it and then
2 transfer it.

3 Q. In this particular case do you recall who it
4 is that you gave that bullet to after it was
5 removed?

6 A. I believe it was a Detective Poole.

7 Q. Doctor, using me as an exhibit, if you don't
8 mind, would you be able to show with a dowel the
9 approximate path of this bullet through
10 Mr. Washington?

11 A. Yes. Okay. The bullet went into his right
12 posterior shoulder. So it was in this vicinity, and
13 it actually went downwards and forwards and lodged
14 over here (indicating) in his left intercostal
15 space, his fifth intercostal space. We could
16 actually see the bullet through the skin.

17 Q. Okay. And while you're down, if you don't
18 mind, I would like to show you a photograph. This
19 photograph is marked State's 35, it's in evidence.
20 Are you able to identify what is shown on that
21 photograph?

22 A. That shows the entrance wound on his right
23 posterior shoulder as well as lots of tiny marks
24 around the wound.

25 Q. And you're referring to the marks -- you're

1 referring to these marks?

2 A. Yes.

3 Q. What are those marks, were you able to
4 determine?

5 A. Yes. Just based on the pattern, and I
6 believe the position of the body when he was found,
7 we believe those to be ant bite marks.

8 Q. Okay. Thank you. You may have a seat.

9 A. (The witness complied.)

10 Q. Now, in your examination of Mr. Washington's
11 body, did you conduct any studies in the area of
12 toxicology?

13 A. Yes, we did.

14 Q. What did you do in that regard?

15 A. We usually test for cocaine and
16 benzoylecgonine which is a metabolite of cocaine, as
17 well as there's multiple other drugs we test for,
18 alcohol as well.

19 Q. What were your findings in the case of
20 Mr. Washington's toxicological report?

21 A. We found blood ethanol was present as well as
22 cocaine and benzoylecgonine.

23 Q. Meaning...?

24 A. Alcohol.

25 Q. Were you able to quantify?

1 A. Yes, we did. It's 26 milligrams per
2 deciliter or .026 percent.

3 Q. .026?

4 A. Yes.

5 Q. Are you able to give the jury any feel for
6 whether that would cause someone to be impaired or
7 not?

8 A. Not knowing what he was doing before, how
9 much he drank or what the time frame was from when
10 he drank until death, it's hard to say.

11 Q. Is that number, .026, how does that relate to
12 the legal standard or driving impaired in South
13 Carolina of .10?

14 A. That's below that.

15 Q. Is it roughly four times less than the legal
16 standard? I'm sorry, is it roughly one quarter --

17 A. Yes.

18 Q. -- of the legal standard?

19 A. Yes.

20 Q. Now, what other findings did you have in the
21 area of toxicology?

22 A. Found his blood cocaine level to be
23 .346 milligrams per liter and his benzoylecgonine
24 was 1.550.

25 Q. Are you able to explain to us so that we can

1 understand what that means?

2 A. His cocaine level is basically -- and again,
3 it's the same with the alcohol, it's very difficult
4 to determine because you don't know how much
5 somebody took or how long it had been since they
6 took it, but the cocaine level is a level similar to
7 what we find in recreational users.

8 Q. Have you ever conducted autopsies where you
9 found higher levels?

10 A. Yes.

11 Q. Have you ever found significantly higher
12 levels?

13 A. I'm sure we have. I don't recall exactly.

14 Q. Are you able to give an opinion as to whether
15 or not the levels you found in Mr. Washington would
16 cause him to be suffering impairment due to cocaine
17 usage?

18 A. As I said, I think it's difficult to
19 determine. We can say that because his cocaine
20 level -- because cocaine is present there was recent
21 use, whereas benzoylecgonine -- recent meaning it
22 can be detected up to eight hours, the
23 benzoylecgonine you can detect up to 72 hours. But
24 as far as his state of mind, not knowing how much he
25 took, when he took it, there's too many variables.

1 It's difficult to correlate concentrations with the
2 actual state of mind.

3 Q. Were you present at the time that Detective
4 Poole, Dusty Poole, did what he refers to as SEM
5 tabs on Mr. Washington's hands?

6 A. Yes, I was in the room.

7 Q. Did you at any time handle the kit that he
8 used to do that?

9 A. I know that I transferred the evidence.

10 Q. Let me show you an exhibit. This is State's
11 73, you can look at the outside, open it up and look
12 at the inside. See if you're able to identify that
13 for the jury.

14 A. It's difficult to recall, but it does have
15 our pathology label on it and I know based on our
16 notes and our records that I did transfer this to
17 Mr. Poole.

18 Q. Okay. Were you and the other doctors able to
19 reach any determination as to approximately how long
20 Mr. Washington would have lived after being shot?

21 A. We believe it to be seconds.

22 Q. Are you able to give any maximum range, or
23 you're not comfortable trying to do that?

24 A. Based on his injury it could be seconds
25 possibly up to several minutes.

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

2 CROSS-EXAMINATION

3 BY MR. FELDMAN:

4 Q. Dr. Thorne, I just have a couple questions
5 for you. And I can't pronounce this -- I've been
6 sitting there to try to do it -- properly. Please
7 pronounce that.

8 A. Benzoylecgonine.

9 Q. Benzoylecgonine, okay. If I understand the
10 toxicology analysis, there's alcohol, there's
11 cocaine, there's nicotine, there's marijuana,
12 cannabinoids.

13 A. Yes.

14 Q. Marijuana?

15 A. Yes.

16 Q. Okay. Please explain to me again, because I
17 really just didn't understand what the ben, what
18 that is.

19 A. What?

20 Q. Benzoylecgonine.

21 A. It's a cocaine metabolite. Once you ingest
22 the cocaine, of course it's degraded, and that's one
23 of the metabolites.

24 Q. Okay. You just had them listed separately,
25 cocaine and then the metabolite?

1 A. Yeah. They're both measured separately.

2 Q. I see. Would that be because of the
3 breakdown as it goes, as time goes on it would just
4 take a different form?

5 A. Right. Yes. Usually cocaine's broken down,
6 I'm not exactly sure of the half life, but it's like
7 half an hour to one or one and a half hours it will
8 start being metabolized or broken down.

9 Q. Okay. And these are all things that were
10 present at the time of death?

11 A. Yes, sir.

12 Q. Okay. And -- all right. Thank you very
13 much, Doctor.

14 THE COURT: Counsel?

15 MR. MARSHALL: Nothing else. Thank you.

16 THE COURT: You may step down.

17 MR. MARSHALL: May this witness be
18 excused, your Honor?

19 MR. FELDMAN: No objection.

20 THE COURT: You may be excused.

21 Call your next witness.

22 MR. MARSHALL: Pat Evans.

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

25 (Patrick Evans, called as a witness by

1 the State, having first been duly sworn,
2 was examined and testified as follows:)

3 **THE CLERK:** Please state your full name
4 and spell your last name for the record.

5 **THE WITNESS:** Patrick Evans, E-v-a-n-s.

6 **DIRECT EXAMINATION**

7 **BY MR. MARSHALL:**

8 Q. Mr. Evans, where do you work, sir?

9 A. Ninth Judicial Solicitor's Office.

10 Q. What do you do there?

11 A. Special investigator.

12 Q. What is your law enforcement background?

13 A. Eight years law enforcement in patrol,
14 investigations, management, administration.

15 Q. I won't keep you long, sir. I'd like for you
16 to step down, please.

17 A. (The witness complied.)

18 Q. All right. This is in evidence, it's been
19 marked State's Exhibit 12. Using that photo, are
20 you able to tell the ladies and gentlemen of the
21 jury whether you conducted any activities in that
22 location which pertained to this case?

23 A. Yes, I did. I performed a measurement from
24 the green building which is located here
25 (indicating), to this tree here (indicating), which

1 was measured 24 linear feet approximately. And from
2 this tree (indicating) to this tree (indicating),
3 which is right on the road side on Target Street,
4 approximately 105 linear feet.

5 Q. Okay. That's all I have. Thank you.

6 MR. MARSHALL: Do you have anything,
7 Mr. Feldman?

8 MR. FELDMAN: Yes, please. May it
9 please the Court.

10 THE COURT: Yes, sir.

11 CROSS-EXAMINATION

12 BY MR. FELDMAN:

13 Q. Mr. Evans, you are the solicitor's
14 investigator; is that correct?

15 A. That's correct.

16 Q. And do you remember that you had a meeting,
17 an interview where you and the solicitor, Cameron
18 Marshall and Chris Adams, White Boy's attorney, were
19 present?

20 A. Yes.

21 Q. Okay. And during that interview, do you
22 remember that White Boy told you he had given the
23 pistol to Mookie at least twice, possibly more,
24 during the interview when you were taping; is that
25 correct?

1 A. A statement was made and a tape was made of
2 that interview. I would have to --

3 Q. I'm asking you if you remember that he told
4 you a couple of times.

5 A. I don't have full recollection without
6 reviewing the statement or the tape.

7 Q. Okay. Well, the way it went was you all sat
8 and you all -- you, White Boy, the lawyer and the
9 solicitor sat and you all talked for a little bit;
10 is that correct?

11 A. Yes.

12 Q. And then you turned the tape on and you
13 talked on the tape for a while --

14 A. That's correct.

15 Q. -- correct? And then you -- about how long
16 would you say you all talked on the tape?

17 A. I would estimate probably about 45 minutes to
18 an hour. I'm unsure.

19 Q. Okay. All right. And then the solicitor
20 went down to talk to somebody else, somebody in a
21 different part of the building, and you sat down and
22 wrote up a statement for White Boy, William Wade
23 Phillips?

24 A. That's correct.

25 Q. Okay. And when you do a statement, what you

1 do is you draw a line at the very -- where the
2 statement ends you draw a line from the end of
3 the -- you know, the last line, all the way to the
4 bottom to show where the statement ended; is that
5 correct?

6 A. That's correct.

7 Q. Okay. And you did that in this case. And
8 William Wade Phillips signed his statement, correct?

9 A. That's correct.

10 Q. And in the statement, let me show you, he
11 told you that "I gave Mookie the shotgun back and
12 the pistol to hide them at his house"; did he not?

13 A. Yes. That is in the statement.

14 Q. Okay. And it was you and White Boy when he
15 signed that at that point, correct?

16 A. That's correct.

17 Q. Okay. And then later the solicitor came back
18 and he looked at the statement and he talked to
19 White Boy and the statement was changed, wasn't it?

20 A. I have no knowledge of anything after that
21 interview that I conducted with William Phillips.

22 Q. Okay. So you don't even -- that's not even
23 you writing beyond the line, is it?

24 A. No, it is not.

25 Q. And you don't know how the statement got

1 changed, do you?

2 A. I have no knowledge of that.

3 Q. All right. It's about 30 yards you said from
4 the tree to the road, thereabouts?

5 A. Using those points of reference, 105 feet
6 approximately.

7 Q. Okay. Thank you very much, Mr. Evans.

8 MR. MARSHALL: Nothing else from the
9 State. Thank you.

10 THE COURT: You may step down, sir.

11 MR. MARSHALL: Next witness, your Honor?

12 THE COURT: Yes, sir.

13 MR. MARSHALL: Mr. Larry Harmon.

14 THE CLERK: Please place your left hand
15 on the Bible and raise your right hand.

16 (Larry Edward Harmon, called as a
17 witness by the State, having first been
18 duly sworn, was examined and testified
19 as follows:)

20 THE CLERK: Please be seated. Please
21 state your full name and spell your last name for
22 the record.

23 THE WITNESS: Okay. Larry Edward
24 Harmon, H-a-r-m-o-n.

25 THE CLERK: Thank you.

1 DIRECT EXAMINATION

2 BY MR. MARSHALL:

3 Q. Mr. Harmon, where do you work, sir?

4 A. I work for the City of North Charleston
5 Police Department.

6 Q. What do you do there?

7 A. I'm the property and evidence custodian.

8 Q. What does that mean?

9 A. My duties are to receive and secure all items
10 that are turned in by the police officers whether it
11 be safekeeping, found property or in fact evidence.
12 I secure it as evidence until it is needed either
13 for court or to transfer it to SLED for further
14 investigation.

15 Q. Can you describe the facility where you
16 secure items?

17 A. Yes, sir. We have a secure evidence room
18 where in the day shift only I am stationed to
19 receive items in person. On the back shift or
20 weekends we have secure drop boxes where I have a
21 key, and for larger items the duty officer has a key
22 to secure items when no one else is there.

23 I empty these drop boxes on my next regular
24 tour of duty and bring them on into the evidence
25 room where they remain until they're needed for

1 other reasons.

2 Q. Do you ever transport evidence?

3 A. Yes, I do. On a regular basis I transport
4 items to the SLED facilities in Columbia for various
5 tests that they do.

6 Q. I would like to show you State's Exhibits 60
7 and 61, ask you if you're able to identify those
8 items?

9 A. Yes, sir. I received both of these items
10 concerning this case, they have my numbers on them.
11 These were removed with many other items on July the
12 22nd of 1996 from a secure drop box.

13 Q. From whom did you receive those, and when?

14 A. Dusty Poole put those in the drop box on 7-19
15 of '96 which was a Friday. I received them on the
16 22nd, the following Monday.

17 Q. Okay. And what actions did you take with the
18 items?

19 A. These were placed in a box for transport to
20 SLED, which I delivered them to SLED in Columbia on
21 the following Friday which was 7-26 of '96.

22 Q. And to whom did you give them at that time?

23 A. Well, the items are turned in to the evidence
24 receiving section in the facility, they are logged
25 in, lab numbers are assigned and they're secured in

1 their drop boxes to await pick up by the technicians
2 involved.

3 Q. When did you next come into possession of
4 those exhibits?

5 A. I retrieved these items from SLED on 8-29-97
6 and brought them back to my evidence room.

7 Q. Could you see, please, if you could also
8 identify State's Exhibits 69, 68, 73, 71, 70 and 72?

9 A. All right. I need the bag that these were
10 in.

11 Q. Yes, sir.

12 A. Yes, sir. These were all received at the
13 same time as the shirts from the drop box, and I
14 also transported them to SLED at the same time.

15 Q. Okay. And did you transport them back at the
16 same time that you did Exhibit 60 and 61?

17 A. Yes, sir. Yes, sir.

18 Q. So all the exhibits you were just shown, were
19 they handled in exactly the same fashion?

20 A. Exactly.

21 Q. Okay.

22 MR. MARSHALL: State moves to have
23 admitted into evidence, your Honor, Exhibits 70, 71,
24 72, 73, 68 and 69.

25 MR. FELDMAN: May I approach? I don't

1 think I have an objection, I just want to make sure.
2 No objection, your Honor.

3 THE COURT: Okay. Those exhibits are in
4 evidence without objection.

5 (Entered into evidence was
6 State's Exhibit 68.)

7 (Entered into evidence was
8 State's Exhibit 69.)

9 (Entered into evidence was
10 State's Exhibit 70.)

11 (Entered into evidence was
12 State's Exhibit 71.)

13 (Entered into evidence was
14 State's Exhibit 72.)

15 (Entered into evidence was
16 State's Exhibit 73.)

17 MR. MARSHALL: May we approach for a
18 moment, your Honor?

19 (Whereupon, a conference was held at
20 side bar.)

21 BY MR. MARSHALL:

22 Q. I don't have any other questions for you,
23 Mr. Harmon.

24 MR. FELDMAN: May it please the Court.
25 Thank you, your Honor.

CROSS-EXAMINATION

1
2 BY MR. FELDMAN:

3 Q. Mr. Harmon, as the custodian of the evidence
4 at North Charleston, it's your job to request
5 certain tests be performed on whatever evidence?

6 A. No, sir.

7 Q. Well, I'm holding a sheet that says,
8 "Evidence inventory sheet examinations requested"
9 with your signature on it.

10 A. That says, "delivered by." I deliver it,
11 sir.

12 Q. Okay. You didn't ask for that?

13 A. No, sir.

14 Q. I'm sorry. Are you familiar with that SLED
15 inventory -- evidence inventory sheet?

16 A. I have a copy of it.

17 Q. Who does request the examinations?

18 A. Generally the Crime Scene fills out the
19 request sheets for items to go to SLED. They
20 usually put the case officer's name --

21 Q. Yes, sir.

22 A. -- on it.

23 Q. Do you have that, this sheet? I want to ask
24 you a question. If not, I'll hand it to you.

25 Now, with respect to Exhibits 71, 72 and 73,

1 these are the trace gunpowder residue tests; is that
2 correct? These up here?

3 A. Yes, sir. These are GSR tests.

4 Q. And those tests were performed because they
5 were requested, trace gunpowder residue were
6 requested by the North Charleston Police Department;
7 is that what the form says?

8 A. Yes, sir.

9 Q. And the purpose of that test is to determine
10 if someone has shot a gun or was in the proximity of
11 a gun; is that correct?

12 A. Yes, sir. That's basically true, yes.

13 Q. Yes, sir. And the same exact tests were
14 requested on items 13 and 14 with respect to the
15 shirts, Exhibits 60 and 61, is that what the form
16 shows?

17 A. Yes, sir.

18 Q. No DNA testing or anything was requested, was
19 it?

20 A. No, sir.

21 Q. Okay.

22 MR. FELDMAN: No other questions, your
23 Honor.

24 REDIRECT EXAMINATION

25 BY MR. MARSHALL:

1 Q. Mr. Harmon, as the evidence custodian for
2 North Charleston, if a defense attorney comes to
3 you --

4 MR. FELDMAN: Your Honor, may we
5 approach?

6 THE COURT: Yes.

7 (Whereupon, a conference was held at
8 side bar.)

9 BY MR. MARSHALL:

10 Q. Mr. Harmon, if a defense attorney comes to
11 you and asks that you release to him a piece of
12 evidence so that he may have it tested, is it within
13 your authority to do that?

14 A. Not exactly. He would have to go through the
15 case officer, and a case officer would have to sign
16 for me to release anything to a defense attorney.
17 In that manner it could be done. It's not to my
18 discretion to decide whether or not to do it.

19 Q. There is a process in place at your
20 department for that to occur, correct?

21 A. Yes, that's correct.

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

23 MR. FELDMAN: Nothing further, your
24 Honor.

25 THE COURT: Okay. You may step down,

1 sir.

2 Okay. Ladies and gentlemen, this is a good
3 time to take a break. I'm going to send you back to
4 the jury room. Please do not discuss the case in
5 any way. Thank you very much.

6 (Jury excused.)

7 **THE COURT:** Okay. We'll be at ease.

8 (Recess taken.)

9 **THE COURT:** Please be seated. Thank
10 you. Are you all ready to proceed?

11 **MR. FELDMAN:** Yes, your Honor.

12 **THE COURT:** Ready?

13 **MR. MARSHALL:** Mr. Churchill is
14 downstairs, but we can go ahead.

15 **THE COURT:** Bring the jury in, please.

16 (Jury present.)

17 **THE BAILIFF:** Jurors all present, your
18 Honor.

19 **THE COURT:** Thank you. Okay. We're
20 ready to proceed, ladies and gentlemen. Please be
21 seated.

22 Go ahead, call your next witness.

23 **MR. MARSHALL:** State rests, your Honor.

24 **MR. FELDMAN:** I have a matter of law,
25 your Honor.

1 **THE COURT:** Okay. Ladies and gentlemen,
2 I have to send you back out. I'm sorry. If I had
3 known that that I was going to happen I would have
4 gone ahead and kept you out and they could have done
5 that. Please do not discuss the case.

6 (Jury excused.)

7 **THE COURT:** Okay. Please be seated.

8 **MR. FELDMAN:** Your Honor, I want to
9 revisit the issue yesterday. I just want to make
10 sure, I didn't know whether by introducing those
11 stipulations I had --

12 **THE COURT:** You can make your motions.

13 **MR. FELDMAN:** I can make my motions.
14 Your Honor, I would move for a directed verdict of
15 acquittal -- and I think I can make them again at
16 the end of my case -- I move for a directed verdict
17 of acquittal, a directed verdict of acquittal on the
18 basis that there is no competent evidence that would
19 make it appropriate to send this case to the jury.
20 To the contrary, there is evidence that at least one
21 or two other people were the shooters that night.

22 With respect to the gunpowder residue
23 evidence, there is also evidence that my client did
24 not commit the crime and on that basis I would move
25 for a directed verdict.

25 (The defendant stands before the Court.)

1 **THE COURT:** We have reached that stage
2 of the trial where you may present your defense.
3 You have a right to testify in your own behalf;
4 however, no one can make you testify. If you elect
5 to testify and you have some prior record which
6 falls within the coverage of our rules of procedure
7 evidence or there's some other basis for admission
8 of that prior record, then the solicitor will be
9 able to present this prior record to the jury for
10 its consideration for impeachment and possibly other
11 purposes.

12 If you elect not to take the stand, I will
13 charge the jury that they are not to give the fact
14 that you did not testify any consideration
15 whatsoever, and that there is to be no prejudice to
16 you because you did not testify.

17 It will be left entirely up to you as to
18 whether or not you wish to testify. You may talk
19 some more with your attorney or whomever else you
20 choose, but the ultimate decision will be left
21 entirely up to you. Do you understand what I have
22 told you?

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

24 **THE COURT:** Mr. Feldman, have you
25 explained to your client the advantages and

1 disadvantages of testifying?

2 MR. FELDMAN: I have, your Honor.

3 THE COURT: Have you had enough time to
4 go over that with him?

5 MR. FELDMAN: I have, your Honor.

6 THE COURT: Has Mr. Feldman explained to
7 you the advantages and disadvantages of testifying?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Have you had enough time to
10 make a decision about this matter?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: Has your client made a
13 decision, sir?

14 MR. FELDMAN: Yes, he has, your Honor.

15 THE COURT: And what is that?

16 MR. FELDMAN: We will not present him as
17 a witness in this case.

18 THE COURT: Is that your decision, sir?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Okay. That leaves us with
21 the -- you may sit. You may be seated.

22 (The defendant resumes his seat.)

23 THE COURT: Well, I'm not sure your
24 persons -- are you saying they're on the way?

25 MR. FELDMAN: He's on the way, yes, sir.

1 And he's a physiatrist down there and I just told
2 him we'd try to get to him before lunch. I don't
3 think it's going to be terribly long, and it would
4 be a big favor from the Court if the Court would
5 take him when he gets here. I'm sure he can be here
6 before noon and I don't think it will take terribly
7 long. I could be working on my jury instructions to
8 hand up.

9 THE COURT: Has he already left?

10 MR. FELDMAN: Yes, your Honor. I went
11 down to call him. I told him this morning that it
12 looked like it would be 11:00. And when I walked
13 out just now I really didn't know that the
14 prosecutor had rested, or that I was not going to
15 call the other witness that would have taken a
16 little while.

17 THE COURT: I was thinking we seemed to
18 finish faster than anyone anticipated yesterday. I
19 wish I had my panel back. How long is his
20 testimony?

21 MR. FELDMAN: I can't imagine it would
22 be more than about 20 minutes, 15 minutes.

23 THE COURT: But you know that he's
24 already left?

25 MR. FELDMAN: Yes, sir. I mean, he was

1 ready to go, he was on call.

2 THE COURT: We'll wait a few minutes,
3 but I'm not -- if it ends up being too late I'm not
4 going to push us that much further into the day.

5 MR. FELDMAN: Okay. That's all right.
6 This will be the trial of delays and -- but I don't
7 think not with this witness.

8 Would it be safe to say, your Honor, that you
9 would -- that we would charge and argue after lunch?

10 THE COURT: Oh, definitely. Well, it
11 seems to me that if you have -- you have two
12 witnesses, you said?

13 MR. FELDMAN: Just one. I've decided
14 not to call the other one. And that's the real
15 reason why we have this little gulf of time, not
16 because the solicitor rested, because I decided not
17 to call that other witness and I just made the
18 decision just now.

19 THE COURT: I see. Okay. Well, we'll
20 just be at ease for a few minutes. I'll call you
21 back together if I've come to the conclusion that
22 we're waiting too long.

23 MR. FELDMAN: Okay, your Honor. Thank
24 you very much.

25 (Recess taken.)

1 THE COURT: Okay. Bring the jury in.
2 Please be seated everyone else. Thank you.

3 (Jury present.)

4 THE BAILIFF: All present.

5 THE COURT: Call your witness, sir.

6 MR. FELDMAN: Thank you, your Honor. If
7 it would please the Court, I would call Dr. John
8 Robert Cusack to the stand.

9 THE COURT: Please raise your right
10 hand, sir. State your full name for the Court.

11 THE WITNESS: I'm John Robert Cusack.

12 (John Robert Cusack, called as a witness
13 by the defendant, having first been duly
14 sworn, was examined and testified as
15 follows:)

16 THE COURT: Okay. You may take a seat.

17 DIRECT EXAMINATION

18 BY MR. FELDMAN:

19 Q. Dr. Cusack?

20 A. Sure.

21 Q. I want to ask you some questions about your
22 qualification. And let me hand you your résumé in
23 case you need to refer to it. Not that you would,
24 but I want to ask you about some -- a number of
25 things. You are John Robert Cusack?

1 A. Correct.

2 Q. Where are you employed, sir?

3 A. I'm an assistant professor at the Medical
4 University of South Carolina.

5 Q. You are Dr. Cusack?

6 A. Correct.

7 Q. Where do you live?

8 A. Mount Pleasant, South Carolina.

9 Q. And what is your date of birth, please, sir?

10 A. 6 November [REDACTED].

11 Q. Okay. Are you married?

12 A. Separated.

13 Q. And do you have any children?

14 A. Yes. Two children, one's adopted. My son is
15 19, my daughter is 15.

16 Q. Thank you. What is your current position,
17 please, sir?

18 A. I'm assistant professor at the Medical
19 University of South Carolina. I'm the clinical
20 director for the Center for Drug and Alcohol
21 Programs at the Institute of Psychiatry.

22 Q. And what is your education, Doctor?

23 A. Okay. Background -- thumbnail type sketch.
24 Background, I graduated from Iowa State University
25 in 1966, then into the Marine Corps, I was an