

VOLUME FOUR OF SIX

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

Roger L. Couch, Special Circuit Court Judge

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S.C. Supreme Court

RICHARD BERNARD MOORE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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Dr. John David Wren
Direct examination by Mr. Gowdy

1 you pass through those, you can get sudden stoppage of the
2 heart. The vagus nerve is one of the ten cranial nerves,
3 and it actually goes all the way to the stomach.

4 And if you stimulate the vagus, the heart can stop. It
5 causes the heart to slow up anyway. It controls the heart
6 beat normally, but if you actually cut it off, the heart can
7 actually stop. That's called vasovagal reflex.

8 But if you don't hit that nerve, then most people bleed
9 to death. And you can bleed to death slowly or you can
10 bleed to death rather quickly.

11 If it goes through your aorta or through your heart and
12 blows the heart completely away, I mean, there are cases
13 where a bullet has passed through the heart and there was
14 nothing left of the heart, so it couldn't send blood out to
15 the body.

16 And when that happens a person loses consciousness at
17 about the same time. If they hadn't had a sudden concussion
18 or that sudden reflex, then they will lose consciousness at
19 about the rate that it takes a person to pass out from not
20 having oxygen, because that's -- I've seen instances of
21 people shot in the heart, and the heart couldn't pump
22 anything else.

23 And I have seen an instance where a person was shot at
24 the back of a supermarket and -- or at the front of a
25 supermarket and actually ran to the back of the supermarket,

Dr. John David Wren
Cross-examination by Mr. Morin

1 well over a hundred feet, and jumped a counter before he
2 collapsed. And he was just using his oxygen up before he
3 passed out.

4 But this person bled to death. And he bled to death by
5 bleeding into his chest cavity and bleeding around his heart
6 to where his heart couldn't expand any more. And he gave
7 out of blood. And that takes -- depends on how fast the
8 heart is beating and how much it can pump and how healthy it
9 is too.

10 This person probably survived six to ten, maybe 15,
11 minutes. He could have lived 15 minutes, but I would say
12 less than ten minutes.

13 Q Thank you, Dr. Wren.

14 MR. GOWDY: Your Honor, I don't have any further
15 questions for Dr. Wren.

16 Q Please answer any questions the Court or the defense
17 may have.

18 THE COURT: Cross-examination, Mr. Morin.

19 CROSS-EXAMINATION

20 BY MR. MORIN

21 Q Doctor, I understand that your last statement was that
22 he could have lived for ten minutes.

23 A Well, he wouldn't have been conscious, but he could
24 have lived that long, yeah.

25 Q Okay. As far as consciousness goes, how long, given

Dr. John David Wren
Cross-examination by Mr. Morin

1 these, the severity of these wounds, would you say is most
2 likely?

3 A He would remain conscious? Well, you know, there is no
4 absolute answer. I can only say that everyone is a little
5 bit different. And even though we can tell exactly where a
6 bullet went and exactly what happened, we can't tell
7 whether, as I gave an instance that it didn't hit a branch
8 of the vagus nerve and cause an immediate loss of
9 consciousness.

10 I can say, however, that his heart did beat long enough
11 to put 1250 cc's, which is about five units of packed red
12 blood cells or transfusion -- five packs of blood into his
13 right chest -- left chest cavity. I'm sorry. 200 cc's at
14 least around his heart and a hundred cc's in his peritoneal
15 cavity. So he bled about six units of blood out before his
16 heart stopped beating.

17 Q When you looked at the wounds and measured them, did
18 you use a ruler or did you just estimate them based on your
19 previous experience?

20 A I use a, a metal, metal-worker's ruler that is
21 graduated in tenths and hundredths of an inch and is also
22 graduated in eighths and sixteenths of an inch on the other
23 side.

24 So I measure it. I do not use callipers, but I do use
25 a ruler and estimate it by putting it up against it.

Dr. John David Wren
Cross-examination by Mr. Morin

1 I actually take pictures and have the law enforcement
2 take pictures of it with a ruler for comparisons. And there
3 is some distortion from the actual angles that they take it,
4 but I measure it as best I can without callipers.

5 Q Now, the entry to the arm, the wound to the arm, is it
6 your testimony that that is consistent with that being the
7 same bullet?

8 A I said with some difficulty I could pull that arm over
9 and pull it over it. I mean, it wasn't real easy, because
10 the person is stiff. And until they, like 48 hours or so to
11 where I could freely move it, I could do it. And there is a
12 good chance that it was.

13 But, on the other hand, if a bullet hits an object and
14 bounces off that, ricochets off that object and goes into
15 the arm, it could make the exact same defects in the skin.

16 Q And, as you testified, the body, you really can't say
17 what position he would have been in when he was shot.

18 A Well, no. You can't really say that. You can't, no.
19 I can't tell exactly where he was, no. You usually can't
20 unless there is something at a scene that contributes to it.

21 Q That's all I have.

22 MR. GOWDY: One follow up question, Your Honor.

23 THE COURT: All right.

24 REDIRECT EXAMINATION

25 BY MR. GOWDY

Dr. John David Wren
Redirect examination by Mr. Gowdy

1 Q Dr. Wren, I want to make sure that I -- like this. The
2 bullet on the side --

3 (Whereupon, the witness left the stand.)

4 A Yes.

5 Q -- is it higher or lower than the bullet that came out?

6 A It was lower. The bullet over here was an inch and
7 three quarters lower than this one. So, if you drew an
8 imaginary line between where it went in right about there
9 and where it came out right about here, and it was going
10 slightly forward, slightly upward and from his left to his
11 right, and if you take this arm and pull it over like that,
12 then it could have gone on in as it went through the body.

13 It didn't hit any ribs. It went -- it hit the bottom
14 of the right rib. But this caliber bullet has a good bit of
15 velocity and inertia, and it is not unusual for those
16 bullets to go completely through the body and keep going.

17 It did have a good bit of inertia to break his humerus
18 though, because that's a rather large bone. It's one of the
19 larger bones in the body.

20 And it did go in, not round like the usual bullet. It
21 went in like it is already distorted. So, it's a good
22 possibility that that was the one that went in his arm,
23 although I can't say for sure.

24 Q Doctor, while we can't say --

25 A The only way you can tell for sure is to find the

Dr. John David Wren
Redirect examination by Mr. Gowdy

1 weapon. And if there was only one bullet fired, then, and
2 there were no other weapons around, then that had to be it.

3 On the other hand, if there were two fired and you
4 didn't find a bullet anywhere else -- well, you have to find
5 a bullet somewhere else, because he has three holes and one
6 bullet.

7 One, if it was fired twice and you didn't find another
8 one, then there is something that doesn't match up. The
9 history doesn't go with the findings.

10 If you find another bullet and it was fired twice, then
11 it would have to be a different bullet. One went through
12 him and kept going somewhere. The other one hit him and
13 stayed in. That would be the scenario.

14 Q Doctor, while we are not able to tell exactly what
15 position James' body was in, if it was a single gunshot, his
16 arm would have to be like this.

17 A That's correct.

18 Q His body would have to be tilted somewhat to the left
19 to create the upward --

20 A He could have been like this too. He could have been
21 like that and shot. I mean, it just depends.

22 Anyway, you can imagine that weapon being fired toward
23 him and that position, he could have been lying on the floor
24 and he could have been shot down and could have been gone
25 in. He could have been leaned away and had his arm up like

Dr. John David Wren
Redirect examination by Mr. Gowdy

1 this shooting at somebody, just any way you can imagine.
2 You can get those three in a direct line, then that is
3 possible.

4 Q Can you grab my arm and shoot me like that?

5 A If your arm was like that and I shot you, yes, you
6 could do that and have your arm, or, you know, if you had --
7 could hold both of them and shoot him like that. He could
8 have been pulling away and shot.

9 Q Thank you, Dr. Wren.

10 THE COURT: Recross?

11 MR. MORIN: No, sir.

12 THE COURT: Thank you, Doctor. You may step down.
13 Are you asking he be excused?

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

15 THE COURT: Without objection, you are excused, Dr.
16 Wren. Thank you for coming.

17 (Whereupon, the witness was excused.)

18 MR. WILLINGHAM: Your Honor, at this time the state
19 would move State's Exhibit Number Thirty-one for
20 Identification into evidence.

21 THE COURT: Any objection?

22 MR. MORIN: No, sir.

23 THE COURT: Without objection, it will be admitted as
24 State's Number Thirty-one.

25 (Diagram marked State's Exhibit Number Thirty-One.)

Motion

1 THE COURT: Next witness.

2 MR. GOWDY: Your Honor, may it please the Court, the
3 State of South Carolina rests.

4 THE COURT: Ladies and gentlemen of the jury, that
5 concludes the state's case in chief.

6 I am going to send you to the jury room for just a few
7 minutes.

8 While you are there, please, do not discuss this case
9 among yourselves. We will get you back in just a few
10 minutes.

11 The jury may retire. Everyone else remain seated,
12 please.

13 (The following takes place outside the presence of the
14 jury.)

15 THE COURT: All right. Any motions?

16 MR. MORIN: Just one moment.

17 THE COURT: Yes, sir.

18 (Pause.)

19 MR. MORIN: Your Honor, I have a motion, but before
20 that, I wanted to clarify. There have been some
21 discussions, and I don't think any of them have been on the
22 record, regarding the jury viewing the scene.

23 THE COURT: No, sir.

24 I think that I said this morning when we got started
25 that I would take the necessary steps for the jury-view this

Motion

1 afternoon. And we discussed it at the bench, and then I
2 said we have been discussing at the bench, the jury-viewing,
3 and you had no objection to the jury-view.

4 MR. MORIN: Yes, sir.

5 THE COURT: And then I said that we would do it at the
6 appropriate time.

7 MR. MORIN: Okay. I'm sorry, Your Honor. I wanted to
8 be sure.

9 THE COURT: No problem. Yes, sir.

10 MR. MORIN: Your Honor, at this time we would move for
11 a directed verdict on behalf of the defendant in that the
12 state has provided some information, but it requires the
13 jury to do quite a bit of speculation with regard to several
14 pieces of evidence, and it would require them to do that in
15 order to find Mr. Moore guilty.

16 So, we move for a directed verdict at this time on all
17 three charges.

18 THE COURT: Solicitor.

19 MR. GOWDY: Your Honor, I think that there is an
20 abundance of both direct evidence, as well as circumstantial
21 evidence, Your Honor, on all of the charges in this case.

22 Your Honor has heard the testimony, the elements of
23 murder and unlawful killing with malice aforethought,
24 expressed or implied. There, frankly, Your Honor, is
25 evidence on both fronts.

Motion

1 We have Terry Hadden's testimony; we have ballistics;
2 we have conduct of this defendant both before and after the
3 shooting. And I think in the light -- in taking the
4 evidence in the light most favorable to the state that there
5 is an abundance of evidence on all of the charges against
6 this defendant.

7 THE COURT: Well, after listening to the testimony and
8 evidence, of course, the motion for a directed verdict is to
9 be viewed in the light most favorable to the nonmoving
10 party.

11 I think that the evidence that has been presented in
12 this case, both direct and circumstantial, would allow me to
13 send it to the jury, because I think that there is evidence
14 in both regards, and even substantial evidence in both
15 regards. And, as such, the motion for a directed verdict is
16 denied.

17 Now, insofar, gentlemen, as the manner in which we
18 proceed at this time, we're going to take a short break.
19 You will probably need to talk to your client about his
20 Fifth Amendment Rights.

21 Then I am going to -- we will come back and put that on
22 the record as to whether or not you intend to present
23 evidence. And then we will move forward.

24 The jury is going to take lunch, somewhere 12:30 to one
25 o'clock, when it gets here. And we will also make a

Defendant questioned

1 decision on the jury-view at the time.

2 All right. We will stand at ease for about ten
3 minutes.

4 (Whereupon, a recess was taken.)

5 THE COURT: All right. Mr. Morin.

6 MR. MORIN: Your Honor, Mr. Kelly and Mrs. Johnson and
7 I have met with Mr. Moore this morning.

8 Obviously, whether or not Mr. Moore was going to
9 testify at this stage of the trial is a conversation that he
10 and I have had on many occasions, and he understands his
11 rights.

12 It is our intention after lunch, regardless of whether
13 he testifies or not, to call Steve Denton as a witness.

14 THE COURT: Okay. All right. Mr. Moore, would you
15 stand, please, sir?

16 RICHARD BERNARD MOORE, having been
17 first duly sworn, was voir dired as follows:

18 THE COURT: Mr. Moore, at this time I am going to
19 explain to you certain of your rights. And if there is
20 anything that you do not understand, simply let me know, and
21 I'll attempt to clarify myself for you. Do you understand
22 that?

23 THE DEFENDANT: I understand.

24 THE COURT: We have now reached the stage of the trial
25 where you may present your own defense. And you have the

1 right to testify in your own behalf. However no one can
2 make you testify.

3 Now, in the event that you have a prior record for any
4 conviction involving dishonesty or false statement or for a
5 crime punishable by imprisonment for more than one year and
6 I determine that the probative value of admitting that
7 record outweighs its prejudicial effect to you, then the
8 state, the solicitor, would be able impeach you on your
9 prior record.

10 If you elect not to take the stand, I would charge the
11 jury that they are not to hold that against you and not to
12 infer anything from that in any way because you did not take
13 the stand.

14 It is entirely left up to you as to whether or not you
15 testify. You can talk with your attorney, family, friends
16 or anyone else, but the ultimate decision as to whether or
17 not you testify in this stage of the trial is left entirely
18 up to you. Do you understand that, sir?

19 ~~THE DEFENDANT:~~ Yes, I do.

20 THE COURT: Thank you, sir. You may be seated.

21 Now, insofar as him taking the stand, before we start
22 back into the defense's case I'm going to have to make sure
23 whether or not he's going to take the stand.

24 Do you understand, Mr. Moore, that you do have that
25 right?

1 And at this point in time, what is his intention?

2 MR. MORIN: ~~At this point, I believe he is not going to~~
3 ~~but --~~

4 THE COURT: Subject to change, is that correct?

5 MR. MORIN: ~~Subject to change.~~

6 THE COURT: That's correct, sir?

7 THE DEFENDANT: ~~Yes, sir, that is correct.~~

8 THE COURT: Okay. What I will do when we get back in
9 here though is, once again, ask him what his intention is
10 before you start your case, before I bring the jury back in.

11 And then when we get to the point, if he says that he
12 is not going to take the stand before I bring the jury back
13 in, and then if you decide to rest your case, then that's
14 going to be his answer to me.

15 MR. MORIN: Okay.

16 THE COURT: If there is a change, you need to ask me to
17 send the jury out.

18 MR. MORIN: Okay.

19 MR. GOWDY: Your Honor, Mr. Moore mentioned that he
20 planned to call Sheriff's Deputy Investigator Steve Denton.

21 I have no idea what he is going to ask him, Your Honor,
22 but I wanted to alert the Court to the possibility that the
23 testimony might try to elicit some exculpatory, self-serving
24 hearsay.

25 There were some comments that Mr. Moore made at the

Defendant questioned

1 hospital which would, if true, would tend to minimize or
2 exculpate his responsibility.

3 Now, I think the case law is absolutely clear that they
4 cannot elicit self-serving, exculpatory hearsay from the
5 case agent. We didn't call him.

6 THE COURT: I have had that before in a case like this.
7 I think it was the case of the State vs. Gary Debose Terry
8 wherein they wanted to use a defendant's statements without
9 him taking the stand. And that's not going to work if
10 that's what you are trying to do.

11 MR. MORIN: Well, that is not what we are trying to do,
12 but I --

13 THE COURT: You can't get around putting --

14 MR. MORIN: Yeah, I know.

15 THE COURT: -- him on the stand by trying to get his
16 statements in through someone else.

17 MR. MORIN: I understand that. Well, along those
18 lines, I would while we are here ask that I be allowed to
19 ask leading questions of this witness. He is the chief
20 investigator for the state.

21 THE COURT: Well, if you have a problem in getting an
22 answer out of him, I'll do that; but, no, sir, you know, he
23 might be the -- unless there is some evidence that he is
24 some type of a hostile witness -- then I can do that.

25 But just, you know, for the idea of saying, well, I am

1 going to ask leading questions the whole time, no, we are
2 not going to do that. If you have a problem, we can get
3 into that.

4 All right. The jury has their lunch. So what we are
5 going to do is be back here at 1:30. We will stand at ease
6 until that time.

7 (Whereupon, a recess was taken.)

8 THE COURT: All right. Is the defendant ready to
9 proceed?

10 MR. MORIN: Yes, sir.

11 THE COURT: Mr. Moore, would you stand, please, sir?

12 And I remind you that you are still under oath, Mr.
13 Moore.

14 I examined you on the record insofar as your rights
15 were concerned prior to our lunch break. And what is your
16 intention insofar as your testifying, or not?

17 THE DEFENDANT: No, sir, Your Honor.

18 THE COURT: You will not testify?

19 THE DEFENDANT: No, sir.

20 THE COURT: Thank you, sir. Have your seat.

21 All right. Let's bring our jury back.

22 (The following takes place in the presence of the
23 jury.)

24 THE COURT: Thank you very much, Madam Foreperson,
25 ladies and gentlemen.

Steve Denton
Direct examination by Mr. Morin

1 I hope you had a nice lunch break.

2 As you know, the state has rested. We will now move to
3 the defense case.

4 Mr. Morin.

5 MR. MORIN: Your Honor, at this time the defense would
6 call Steve Denton.

7 STEVE DENTON, having been first
8 duly sworn, testified as follows:

9 THE COURT: Please state your name for the record, and
10 spell your last name, sir.

11 THE WITNESS: Good afternoon. My name is Stephen L.
12 Denton, D-E-N-T-O-N.

13 DIRECT EXAMINATION BY MR. MORIN

14 Q Officer Denton, how long have you been a police
15 officer?

16 A Approximately 16 years.

17 Q Okay. And you started out as a regular patrolman.

18 A No, sir.

19 Q Tell us how you started out 16 years ago in law
20 enforcement.

21 A I was originally assigned to the narcotics division of
22 the Spartanburg County Sheriff's Office. I was there for
23 approximately four to five years and then moved to the
24 detective division where I'm currently assigned to the
25 homicide division.

1 Q How long have you been assigned to the homicide
2 division?

3 A How long?

4 Q Uh-huh.

5 A Since approximately around 1991, '92.

6 Q What was your involvement in this case?

7 A I was the investigator on call the week that this event
8 occurred.

9 Q Okay. Are you familiar with this item?

10 A I am.

11 Q Can you tell me what you know about that?

12 A This item appears to be a tire tool that was located
13 inside the crime scene, located on a desk behind the
14 counter.

15 Q You requested that this be sent to SLED for
16 fingerprints.

17 A I did.

18 Q Can you tell us why you did that?

19 A Well, mainly to ascertain, since at the time that I
20 investigated the crime scene, to ascertain if there were any
21 fingerprints belonging to it that wouldn't be normally on
22 the scene, be somebody's prints that normally wouldn't be
23 inside the store, that wouldn't work there.

24 Q Okay. And you picked this tire tool to be sent to SLED
25 for fingerprints because it wasn't normally there, is that

1 right?

2 A That's correct.

3 Q Okay. I show you State's Exhibit Number Eighty-three

4 Do you recognize that?

5 A I do.

6 Q What is that?

7 A This was a -- it's been described as a meat cleaver,
8 knife, that was found on the floor inside the crime scene.

9 Q Did you send that to SLED?

10 A I had it send to SLED. I did.

11 Q And did you ask for fingerprints to be run on that?

12 A I asked for blood analysis on that.

13 Q But not fingerprints?

14 A That's correct.

15 Q And you went to the crime scene that day, is that
16 right?

17 A That's correct.

18 Q Okay. Does this store have a video surveillance system
19 in it?

20 A It does.

21 Q And it has a V. C. R. connected to it.

22 A Yes, it does.

23 Q And there is a video tape in it.

24 A There was.

25 Q Did you take that into evidence?

1 A No, sir. It was, it was viewed on the scene. There
2 was nothing on it that was -- that had anything to do with
3 that crime. As far as it being taken into evidence, it's
4 possible that Paul Dorman may have. I did not.

5 Q Who viewed it?

6 A I did.

7 Q Anybody else?

8 A I believe Paul Dorman may have been there also.

9 Q Okay. Now, as the investigator who was called to this
10 scene, is it somewhat -- is it normal for you to speak to
11 witnesses as the investigator from homicide?

12 A It is.

13 Q Okay. Did you ever speak to Terry Hadden?

14 A I did.

15 Q You did?

16 A Yes, sir, I did.

17 Q When was that?

18 A I spoke to him briefly at the scene that night and then
19 briefly again at the office, which would be the same day but
20 during the daylight hours.

21 Q Okay. Is that when he made his first statement?

22 A That's when he would have probably made his first
23 written statement, yes, sir.

24 Q Now, this incident sort of has two. There is down
25 there at Nikki's, and then there is out at Hillside.

- 1 A Correct.
- 2 Q Did you go to Hillside?
- 3 A I did.
- 4 Q And did you speak to any witnesses there?
- 5 A I did.
- 6 Q Who did you speak with?
- 7 A I spoke to Mr. George Gibson.
- 8 Q Did you speak to his roommate?
- 9 A The only person I spoke to at that location was Mr.
- 10 George Gibson.
- 11 Q Were you informed that there were other people there at
- 12 that house?
- 13 A No, sir, I was not informed of that at the time I spoke
- 14 with Mr. Gibson.
- 15 Q You spoke to Mr. Fowler at the scene.
- 16 A I did.
- 17 Q Did you ask him about that tire iron?
- 18 A I did.
- 19 Q He told you he had never seen it?
- 20 A That's correct.
- 21 Q That's all I have of this witness.
- 22 MR. WILLINGHAM: Nothing from the state, Your Honor.
- 23 THE COURT: Thank you, sir. You may step down.
- 24 THE WITNESS: Very well.
- 25 THE COURT: Next witness.

1 MR. MORIN: Your Honor, at this time the defense rests.

2 THE COURT: Anything in reply?

3 MR. GOWDY: No, sir, Your Honor.

4 THE COURT: Ladies and gentlemen of the jury, that
5 concludes all of the testimony and evidence that will be
6 received.

7 What remains in this case are the closing arguments of
8 the lawyers and then my charge or instruction on the law
9 that applies to this case.

10 We are going to take a short break while we prepare to
11 enter into that phase of the trial.

12 As I send you back to the jury room, please remember
13 that you are not to discuss this case among yourselves under
14 any circumstances or in any manner or fashion whatsoever.
15 We will get you back in the courtroom in a few minutes.

16 The jury may retire. Everyone else remain seated,
17 please.

18 (The following takes place outside the presence of the
19 jury.)

20 THE COURT: Any motions?

21 MR. MORIN: At this time the defense would renew its
22 motion for a directed verdict, Your Honor.

23 THE COURT: Well, once again, I think that the
24 testimony and evidence as has been presented by the state
25 has certainly produced a question of fact to be determined

Motion

1 by the triers of fact in this case. There is substantial
2 direct and circumstantial evidence that allows me to send it
3 to the jury. And your motion is denied.

4 MR. GOWDY: Your Honor, the only other matter, I would
5 respectfully ask the Court to consider the possibility of
6 letting the jury view the scene at Nikki's.

7 THE COURT: Yes, sir.

8 MR. GOWDY: And, of course, whatever, however the Court
9 wants to do it, but if the Court would hear from us on that,
10 I would ask the Court to consider letting them do it before
11 we close.

12 THE COURT: Yes, sir. I am going to do that. I am.

13 MR. GOWDY: Okay. Thank you.

14 THE COURT: What we are going to do is I'm going to
15 bring them back in and tell them that we are going to send
16 them to view the scene, that that's simply a means for them
17 to better understand the evidence that has been presented
18 here in the courtroom, and that during that that they are
19 not to discuss it among themselves or with anyone else that
20 they are in contact with, and I give them the necessary
21 instructions and bring their jury custodians in here to
22 transport them.

23 Now, insofar as that is concerned, I assume, I would
24 prefer that the state and the defense accompany them at a
25 distance.

1 You will not be in the actual building with them, but
2 just to accompany them so that there will be question in
3 your mind. And I fully intend to also go along and observe
4 and make sure that the process is proper.

5 MR. GOWDY: Your Honor, I can't speak for Mr. Morin and
6 Mr. Kelly. When I was there, there was a single solitary
7 customer. I don't know. I don't think it was terribly busy
8 when they were there, or not, either. But I have spoken
9 with the proprietor. She is more than happy to clear that
10 store if Your Honor wanted to send a SLED agent ahead of
11 time.

12 THE COURT: We'll do that then.

13 All right. How about sending Mr. Bevis in, the SLED
14 agent, Agent Bevis -- Bettzell. I'm sorry. Darrell
15 Bettzell.

16 MR. GOWDY: Your Honor, if it would be easier for the
17 Court and the defense, I am not going to go, but I know that
18 one of my deputies is. If everyone wanted to ride in my
19 Tahoe, I will be happy to give them a ride.

20 THE COURT: I think that maybe one of these deputies
21 will give me a ride. I'll let you-all -- anybody that wants
22 to can tag along. We will put all of you-all in the back.

23 (Bench conference off record with SLED agent.)

24 THE COURT: While we are making arrangements to -- for
25 the jury to view this area, why don't we talk about charges?

Requests to charge

1 (Pause.)

2 THE COURT: Let me have all of the agents up here,
3 please. Let me have all of you up here.

4 (The following takes place at the bench with the jury
5 custodians.)

6 THE COURT: What we are going to do is send the jury
7 out to view the scene where this occurred, and I have got
8 the sheriff's department. They are going to have a sweep of
9 the area and make sure that it is cleaned out, because the
10 other day when the solicitor went out there, there was a
11 fairly intoxicated man who had a definite opinion about how
12 the case should turn out and those type of things.

13 Y'all don't do anything, and clear things out and make
14 sure when you get out before you let anybody out everything
15 is clear.

16 We are going to get them to make sure the store is
17 cleared out too. I don't want anyone, store keeper, anyone
18 else. Y'all make sure everyone is outside.

19 And I am going to be out there. What we will do is
20 maybe get there before everybody else does and check it out.
21 We will bring them in before we do that.

22 (End of proceedings at the bench.)

23 THE COURT: All right. Insofar as requests for charge
24 are concerned, other than my standard charges on murder,
25 possession of a weapon during the commission of a violent

1 crime, assault with intent to kill, armed robbery, of course
2 direct and circumstantial evidence, all of the other normal
3 things that I charge, what kind of specific requests do
4 you-all have?

5 MR. GOWDY: Your Honor, if it please the Court, this
6 may very well be in Your Honor's standard charge, but given
7 the facts in this case that the state is relying upon the
8 theory of this defendant arming himself during the
9 commission of the robbery, which if Your Honor please is
10 State vs. Keith, I'm also -- would like to ask the Court to
11 consider fashioning a charge something along the lines, and
12 I think the case law supports, that you can rob somebody who
13 actually has already expired, that there's --

14 THE COURT: Yes, sir. I don't think there is any
15 question about that.

16 MR. GOWDY: Yes, sir. And I have heard Your Honor's
17 malice charge, and I believe that Your Honor's malice charge
18 includes that it can be even for a brief moment of time.

19 THE COURT: Yes, sir. Malice need not exist any
20 particular time before the act.

21 MR. GOWDY: Yes, sir.

22 THE COURT: It just has to exist in the mind just
23 before and at the time the act is committed.

24 MR. GOWDY: Yes, sir.

25 MR. MORIN: Your Honor, I have two, and, of course, I

Requests to charge

1 also understand that it could be an armed robbery after a
2 person expires.

3 We would ask for a larceny charge. It's a lesser
4 included of armed robbery, and I think that's a factual
5 issue.

6 THE COURT: All right. Anything else?

7 MR. MORIN: Yes, sir. I would also ask for a
8 manslaughter charge. I think there is evidence that the
9 victim produced the weapon, which certainly would be legal
10 provocation. And there is evidence as to whether or not he
11 was shot, which would be sudden heat of passion.

12 THE COURT: And that's the extent of it?

13 MR. MORIN: That's all.

14 THE COURT: What says the state?

15 MR. GOWDY: Your Honor, I am holding up six or seven
16 cases, State vs. Tucker, State vs. Tyson.

17 Your Honor, there is just no factual basis to support a
18 manslaughter charge in this case. It's murder or nothing
19 based on the evidence.

20 I can't recall a single shred of evidence that would
21 tend to show that this was a killing based on sufficient
22 legal provocation or heat of passion. It's either murder,
23 or it's not.

24 I will be happy to hand these cases up, although I know
25 the Court is familiar with them.

1 THE COURT: What do you have to say about that,
2 Mr. Morin?

3 MR. MORIN: Your Honor, the evidence, is -- there
4 hasn't been anybody whose -- there is no doubt that
5 Mr. Mahoney started out armed with all of these weapons.
6 That is not an issue.

7 He produced the weapon, and the only real -- the
8 question that I think is in is whether or not Mr. Moore was
9 shot. I mean, we know he was shot, but if he was shot
10 before he fired any rounds at Mr. Mahoney.

11 My position is that if Mr. Mahoney produces a weapon, a
12 gun, that's legal provocation itself. But once Mr. Moore is
13 shot and he reacts, that's certainly in sudden heat of
14 passion. Being shot, I think, covers this heat of passion.

15 MR. GOWDY: Your Honor, the only evidence in this case
16 on this point comes from Terry Hadden who was unequivocal in
17 saying that Richard Moore fired the first shot. I asked him
18 repeatedly. The first shot came from Richard Moore.

19 Your Honor, I would invite the Court's attention to the
20 State vs. Tucker, which in parenthesis, "Evidence that the
21 victim was defending himself from an armed robbery and got
22 killed in this process is not sufficient legal provocation
23 to warrant a voluntary manslaughter charge."

24 Your Honor, even under that fact, even under the facts
25 Mr. Morin just laid out, the only evidence is that Mr. Moore

1 grabbed Mr. Mahoney's hands before anything else happened.
2 There is no other evidence. He would be entitled to defend
3 his home or his property, or his store in that case.

4 So, manslaughter is not appropriate in this case, Your
5 Honor. There is no evidence to support it other than his
6 opening statement, Your Honor.

7 THE COURT: Is that the Richard Tucker case? Which
8 case are you talking about?

9 MR. GOWDY: Your Honor, James Neal Tucker, 478, S. E.,
10 2d., 260; and State vs. Tyson actually, Your Honor, is the
11 case that's cited in the body of Tucker. I don't have a
12 copy for the defense, but I can get one. I'll be happy to
13 hand it up.

14 THE COURT: I have got one right here, or I should.

15 I really think that the case of -- the cases that you
16 have cited, Solicitor, the first one being State vs. Tucker,
17 and then contained within the Tucker case was the State vs.
18 Tyson, the Tyson case fits the factual scenario that we have
19 here a little bit better than the Tucker case to me, because
20 the Tyson case was an armed robbery similar to the one that
21 we have here, not that the Tucker case wasn't.

22 MR. GOWDY: Yes, sir.

23 THE COURT: But I am just trying to reconcile in my
24 mind. I think -- let me read this one more time.

25 I think from my, from my recollection of the, of the

1 testimony, the thing that Mr. Hadden testified to was that
2 when he heard the quote, "What the hell do you think you are
3 doing," then he turned to see what was going on. The first
4 shot was fired at him. And the hands were held.

5 And I think that the Tucker case, as well as the Tyson
6 case, both stand for the proposition that evidence that a
7 victim was defending himself from an armed robbery and got
8 killed in the process is not sufficient legal provocation to
9 warrant a voluntary manslaughter charge.

10 Quite frankly, I don't know of any testimony that is
11 persuasive to me that would cause me to charge voluntary
12 manslaughter. And, as a result, your request is denied.

13 MR. MORIN: May it please the Court.

14 THE COURT: Uh-huh.

15 MR. MORIN: A matter to put on the record.

16 THE COURT: Yes, sir.

17 MR. MORIN: My objection.

18 And I would also like to say that there is no testimony
19 that says that prior to the guns being drawn that this was a
20 robbery.

21 The solicitor is making the assumption that because the
22 victim pulled his gun out that the robbery had occurred.

23 THE COURT: Well, I think that we have a circumstantial
24 case there.

25 MR. MORIN: Yes, sir.

1 THE COURT: And I fully intend to charge, give the
2 circumstantial charge, in, in that regard. And that will,
3 of course, be the State vs. Grippon.

4 All right. Then insofar as our forms of verdict are
5 concerned as to count -- as to the charge for murder, and
6 then the count one, charge of murder, will be guilty or not
7 guilty; count two, possession of a firearm during the
8 commission of a violent crime, will be guilty or not guilty.

9 Assault with intent to kill will be the same.

10 And then armed robbery, you say that you are asking for
11 a larceny instruction. Is that correct? What do you say
12 about that, Solicitor?

13 MR. GOWDY: Your Honor, I think Deputy Willingham has
14 researched this better than I have.

15 THE COURT: All right.

16 MR. WILLINGHAM: Your Honor, it is clear that larceny
17 is the lesser included of armed robbery.

18 However, as we've pointed out before, there is evidence
19 that the money was taken by force, by a weapon in this case,
20 which killed the victim.

21 Had the victim not been shot and killed, the defendant
22 would not have been able necessarily to walk around and step
23 over the victim's body and take the money away from him.
24 Therefore, we believe armed robbery is the proper charge and
25 larceny should not be a lesser included.

1 THE COURT: Let's just assume for a -- when we talk
2 about larceny, of course, the elements of larceny is that
3 there is a taking, that there was a taking of personal
4 property; that after being taken the property was carried
5 away; and that the taking and carrying away of the property
6 was done with the intent to steal. That would, in essence,
7 be as if someone just walks in and picks up something.

8 Here, I think that the difference, when we take it a
9 step farther, because contained within just common-law
10 robbery, let's say, is the idea that the elements are those
11 of larceny, plus the other two necessary to make out the
12 crime of robbery; that the property must be taken from the
13 person of another, or in his presence; and that the taking
14 and carrying away of the property must have been
15 accomplished by placing the other person in fear.

16 And then, of course, we all understand the leap that
17 must be made for the armed robbery charge, that it contains
18 all of those elements, plus being armed, and placing, in
19 addition --

20 MR. WILLINGHAM: And, Your Honor, there is no question
21 that he was armed, because the .45 caliber weapon was found
22 on Highway Nine --

23 THE COURT: Yes, sir.

24 MR. WILLINGHAM: -- away from the store with his blood
25 on it.

1 THE COURT: I understand that.

2 I am going to deny the request for a charge on larceny.

3 I think that this is either an armed robbery case or

4 nothing. And, once again, it's a murder case or nothing.

5 All right. It's my understanding that the sheriff's

6 department has the area secured out there.

7 THE OFFICER: Yes, sir. The unit is in place.

8 THE COURT: All right, sir.

9 In that regard, let me bring the jury back in. And
10 what I will do is tell the jury custodians that we will lead
11 the way out there.

12 So whoever is going to take me, if they would, just
13 be -- the jury is back here. So, let's just go down where
14 the judges go in and out, and the jury will just meet me
15 down there.

16 Let's bring our jury back, and our custodians.

17 (The following takes place in the presence of the jury
18 and the custodians.)

19 THE COURT: Ladies and gentlemen, I am not going to let
20 you get very comfortable.

21 I am going to allow the jury custodians to take you to
22 the scene that has been the subject of this trial, and for
23 the purposes of a jury-view. You will be taken to view the
24 scene of the alleged crime.

25 While you are on your way to and from the scene and at

1 the scene, you are not to discuss this case among yourselves
2 or with anyone that you might come into contact with.

3 The lawyers and I will be in the area, but we will not
4 be there to answer any questions. This is very simply for
5 you to have the opportunity to better understand the
6 evidence as it has been presented in the courtroom by
7 viewing the scene of the alleged crime.

8 So if you have any questions about anything, that is
9 not something that you are going to be able to look to
10 someone and pose a question to. This is merely a mechanism
11 or a vehicle to help aid you in understanding the testimony
12 that has been presented.

13 The jury custodians will be taking you there. When you
14 get there, they will keep you in the vehicles until I give
15 them the authorization to take you out into the location.

16 While you are there, you may certainly look around as
17 long as you desire. Once you have completed, and when I say
18 once you have completed, all of you have completed your look
19 around, once again, without any discussions among yourselves
20 or anyone else, because the jury custodians will be there,
21 then you-all as a group will get back into your vehicles and
22 come back to the courthouse.

23 And then we will continue at that time and move into
24 the closing arguments, and then my charge or instruction on
25 the law that applies to this case.

1 So, once again, as we leave the courthouse, please
2 understand that you are not to discuss this case among
3 yourselves, with your jury custodians or anyone else that
4 you might come in contact with.

5 Also, once again, each and every cautionary instruction
6 that I have given you still comes into play, that if anyone
7 that you might run into -- that area should be cleared. But
8 out of an abundance of caution, you are not to discuss this
9 matter with anyone. And also you are not to read, watch or
10 listen to any news accounts concerning this case.

11 I will see you out at the location, I am sure. We will
12 not be talking about anything, but I will see you out there.

13 The jury may retire to the jury room.

14 To the jury custodians, we will meet you downstairs at
15 your vehicles in just a few minutes.

16 (The following takes place outside the presence of the
17 jury.)

18 THE COURT: All right. I guess everyone needs to
19 congregate. Whoever wants to ride with me in the deputy's
20 car may feel free to do so. That way we can all go and come
21 at one time unless you want to go separately. I will leave
22 that up to you.

23 But we are going to adjourn here temporarily or recess
24 here temporarily until we go out there, because we should be
25 the only ones in the area. I'll see you out there.

1 (Whereupon, a recess was taken while the jury was
2 transported to the scene.)

3 THE COURT: All right.

4 Mr. Moore, could you stand again, please, sir?

5 (Whereupon, the defendant stood.)

6 THE COURT: I remind you, sir, that you are still under
7 oath.

8 Mr. Moore, in any criminal trial where the maximum
9 penalty could result in death and any separate proceeding
10 following such trial, you or your counsel shall have the
11 right to make the last argument. That's pursuant to Section
12 16-3-28.

13 I'm advising you at this time that you and your lawyer
14 have the right to address the jury at the conclusion of his
15 argument. You have the right to address the jury.

16 So, I need to explain to you that you do have that
17 right. The state is going to have the opening argument, and
18 then Mr. Morin or Mr. Kelly, whomever it might be, will have
19 the final argument.

20 And if Mr. Moore desires to address the jury, he may
21 also do so pursuant to the State vs. Charing. That's 313,
22 S. C., 147, 437, S. E. 2d., 553, a 1993 case.

23 Is that understood, sir?

24 THE DEFENDANT: Yes, it is.

25 THE COURT: And what is your desire?

Defendant questioned

1 THE DEFENDANT: At this moment I desire to speak with
2 my counsel.

3 THE COURT: All right.

4 (Pause.)

5 THE COURT: Now, you understand, Mr. Moore, that, of
6 course, in the closing argument that you would have to
7 address the issues that are presented, that have been
8 presented, in the evidence and revealed in the evidence and
9 testimony.

10 MR. MORIN: What I have explained to him, what
11 Mr. Kelly and I have explained to him, is that should he
12 choose to do so, he can comment on the evidence that is in
13 but he is not going to be allowed to add in anything new.

14 THE COURT: Correct. Do you understand that, sir?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: What is your decision?

17 THE DEFENDANT: I shall speak.

18 THE COURT: All right, sir.

19 All right. Thank you very much.

20 Is the state ready?

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

22 THE COURT: Is the defense ready?

23 MR. MORIN: Yes, sir.

24 THE COURT: Bring them back.

25 However you-all wish to proceed, you first, it doesn't

Defendant questioned

1 matter. I will let you-all work that out.

2 (The following takes place in the presence of the
3 jury.)

4 THE COURT: Madam Foreperson, ladies and gentlemen of
5 the jury, as you know, we have reached the end of all of the
6 testimony and evidence that is to be presented in this case.
7 And what remains are the closing arguments of the parties
8 involved.

9 As we move into that process, I want you to give them
10 your undivided attention, because what they have to say to
11 you is extremely important.

12 However, I also want to remind you that what they have
13 to say in their closing arguments does not represent
14 evidence in this case. The evidence in this case comes from
15 the testimony of the sworn witnesses who appear on this
16 witness stand, together with any other evidence that has
17 been introduced into the case.

18 And if the parties make any comment as to the evidence
19 and it does not agree with what you find that the evidence
20 has revealed through the testimony or the presentation of
21 the evidence, then, of course, you will follow your own
22 recollections.

23 Also, if they make any comment as to the law in this
24 case and it differs with what I instruct you that the law
25 is, then, of course, you will follow the law as I instruct

Closing arguments

1 you.

2 The state will have the opening argument; and then the
3 defendant will have the final argument.

4 MR. GOWDY: May it please the Court, Your Honor.

5 THE COURT: Yes, sir.

6 MR. GOWDY: Good afternoon, Madam Forelady; good
7 afternoon, ladies and gentlemen of the jury.

8 We met during jury qualifications, but I'm going to
9 introduce myself again to you. My name is Trey Gowdy. I'm
10 the solicitor for the Seventh Judicial Circuit, which
11 includes Spartanburg and Cherokee Counties.

12 I know that I speak for the defense, as well as the
13 State of South Carolina, when I thank you for your service
14 in this case. Service in an ordinary criminal case is
15 difficult. Serving on a sequestered jury, being away from
16 your family and friends and putting your lives on hold, in
17 essence, for several days is extraordinary. And I know that
18 I thank you on behalf of everybody involved in this case.

19 Ladies and gentlemen of the jury, Judge Cleary is the
20 judge of the law. He wears a robe, and that's his job.

21 You are judges in this case also. And they used to
22 refer to you as judges without robes. And this may be the
23 only time you've ever served on a jury, but you are the
24 judge of the facts in this case. You decide what happened
25 on September the 16th of 1999.

Closing arguments

1 And just as Judge Clary is the judge of the law, nobody
2 can tell him what the law is. Nobody can tell you what the
3 facts are.

4 But I would like to argue to you. I would like to
5 submit or point out some things to you, ladies and
6 gentlemen, that I think are significant. And as Judge Clary
7 said, you go with your recollection, however you remember
8 it. You are the judge of the facts.

9 Each of you represent a different life experience or
10 different perspective. You have been brought together for
11 service on this jury. Many of you probably didn't know one
12 another before Monday of this week.

13 But as fate would have it, your paths have crossed.
14 You find yourselves on a Saturday afternoon in October of
15 2001 sitting in judgment of something that happened in
16 September of 1999. In essence, your paths crossed with one
17 another.

18 I want to talk to you for a minute about three other
19 people whose paths crossed on September the 16th, 1999.
20 Those three people, two of whom are victims -- Terry Hadden,
21 James Mahoney. Their paths crossed with the defendant's,
22 Richard Moore.

23 He left Nikki's Convenience Store, a little store that
24 Keith Fowler owns not five miles from here that he named
25 after his wife, Nikki.

Closing arguments

1 When he left the store sometime after 3:15, two men
2 were on the ground. One got up and came to this courtroom
3 yesterday and told you what he saw, and one man never got
4 up.

5 James Mahoney was killed on September the 16th, 1999.
6 James Mahoney was 5' 9" and weighed about 140 pounds. He
7 had crooked hands; he had bad eyesight; but he worked the
8 night shift at Nikki's Convenience Store. He worked it by
9 choice. He worked during what we refer to as the dark hours
10 of the day, serving hot dogs and giving people drinks and
11 keeping folks company. That was his job.

12 Terry Hadden had just gotten off work. He worked the
13 second shift at Wise's Foods. He got off work and took a
14 coworker home and went by Nikki's for some food and some
15 company.

16 And if you remember the testimony, ladies and
17 gentlemen, they were watching a hurricane that was fixing to
18 hit some part of the United States.

19 Terry Hadden left to go play a video game, and James
20 Mahoney waited on some other customers. In fact, at one
21 point a customer came in and needed help with a tire. And
22 there is the tire tool that he loaned him.

23 And then at three o'clock in the morning or sometime
24 between 3:00 and 3:15, Terry Hadden and James Mahoney's
25 paths crossed with a man that was so bent on getting money

Closing arguments

1 to support his cocaine habit that he would shoot another man
2 through the heart.

3 Ladies and gentlemen, criminal cases in some respect
4 are like puzzles. And if you are like me, you've got
5 puzzles at your home. Some of them don't have all of the
6 pieces, especially if you have children. Some of them don't
7 have all of the pieces.

8 It is rare to find a criminal case that has every piece
9 to the puzzle. That's not the issue in this case. If we
10 had a video recording of what happened on September the
11 16th, we would have every piece to this puzzle.

12 We don't have a recording. What we have is an
13 overwhelming amount of direct and circumstantial evidence.
14 And I want to go through that direct and circumstantial
15 evidence, and then I am going to sit down.

16 Terry Hadden came in here yesterday. He is a
17 unsophisticated man. And one of the first things he told
18 you is he is an unsophisticated man that lost an eye as a
19 child. He has one eye. But that one eye has been good
20 enough for him to drive a car, to drive a truck and work
21 since he was 16 years old.

22 And it's through his vision, through his eye, that we
23 have a glance of what happened in the early morning hours in
24 a little store that Keith Fowler named for his wife Nikki
25 not five miles from here.

Closing arguments

1 Terry Hadden is seated with his back to the entrance
2 playing a video game. He testified that this defendant
3 walked in, and their eyes met just for a moment, that their
4 eyes met.

5 And Mr. Moore walked to the left towards the cooler,
6 and Mr. Hadden went back to playing his game.

7 And the next thing that Mr. Hadden heard was James
8 Mahoney saying, "What the hell do you think you're doing?"

9 If you remember, ladies and gentlemen, he hadn't heard
10 any other conversation, but that was said in such a way and
11 with such volume that he turned around, and he paid
12 attention.

13 And what did he see? He saw this defendant with his
14 hand on both of James Mahoney's crooked little hands. He
15 saw this right here.

16 And then he saw this defendant say, "Don't move," and
17 he pointed the gun at him. And he fired almost simultaneous
18 with saying don't move.

19 And we found a .45 caliber slug up above the video
20 poker machine at Nikki's Convenience Store. That's the same
21 caliber that was fired by the same gun that shot James
22 Mahoney through the heart.

23 Terry Hadden was an eye witness to this crime. He's
24 also a victim, and sometimes maybe I haven't spent enough
25 time talking about him as a victim. He is a victim. He is

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1 a victim of assault with intent to kill.

2 But as I told you a few minutes ago, two men hit the
3 deck between 3:00 and 3:15 in Nikki's Convenience Store.
4 One of them got up, and one of them is not ever going to get
5 up.

6 The one that got up came in here yesterday and told you
7 what he remembered. Did he count the shots? No, he didn't
8 count the shots. And he shouldn't have guessed. But part
9 of your job as a juror is to determine who is telling you
10 the truth and who ain't. And you use a lot of different
11 standards and a lot of different life experiences to be able
12 to do that.

13 I submit to you that he had a better view of what
14 happened than anybody in the world. I submit to you he
15 doesn't have a motive or a bias to tell you anything other
16 than what he recalls.

17 How simple would it have been, ladies and gentlemen,
18 for him to come in here and stick by his first statement?
19 Who is going to contradict it?

20 But he didn't do it. He said I made a mistake. He had
21 never been shot at before, never seen a dead body before.
22 Can you imagine what it is like to go from playing a video
23 game, to being shot at, to seeing a guy that you just got
24 through being served a hot dog by lying on the ground
25 bleeding to death? And then everybody wants to come in and

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1 ask you what happened.

2 His statement is consistent in the material things that
3 matter in this case. Was it seven shots, was it nine shots,
4 was it 11 shots?

5 I can tell you about one shot, because it went through
6 James Mahoney's heart. And I can tell you about another
7 shot, because it's up above a video poker machine at Nikki's
8 Convenience Store.

9 He told you he didn't count them. He shouldn't have
10 guessed. But his testimony is consistent and reliable, I
11 submit to you, on the material parts of this case.

12 He has got no, no friend to reward, no foe to punish.
13 He is the only eye witness to this crime.

14 And after he watched James -- Richard Moore grab James
15 Mahoney's crooked hands and turn and shoot, I want us to
16 think about what the experts told us, what the doctor told
17 us, Dr. Ashley from Spartanburg Regional Medical Center.

18 He says Richard Moore was shot through the arm and
19 exited here and hit a bone and fragmented and may have
20 scraped across his chest.

21 I ask you is that not a hundred percent consistent with
22 what Terry Hadden saw. Hands like this, turned to fire, a
23 shot through that arm, through that arm and across the chest
24 and a projectile out there. That's exactly what the
25 evidence is in this case.

Closing arguments

1 Terry Hadden is unequivocal, and he stated it without
2 any hesitation, without any reservation, without any
3 qualification.

4 Richard Moore fired the first shot at Nikki's
5 Convenience Store two years ago. He fired the first shot,
6 and he did it after he grabbed James Mahoney's hands. And
7 then he hit the deck.

8 And the next thing he heard was Richard Moore saying
9 let's get the hell out of here. He heard Richard Moore say
10 two things. Don't move, simultaneous with being shot at,
11 and let's get the hell out of here.

12 What he didn't see, ladies and gentlemen, because his
13 head wasn't turned, he didn't see this defendant walk around
14 the counter and step over the broken dying body of James
15 Mahoney to steal somebody else's money, \$1,400 that belonged
16 to Nikki's Convenience Store. He had to step over his dead
17 body or dying body to get the money.

18 And while James Mahoney is bleeding out the front, he
19 has got the trickling, the likes of Richard Moore's blood on
20 his back. The D. N. A. proved to you this morning. Richard
21 Moore's blood is on James Mahoney's back where he stepped
22 over him to get to the money.

23 He didn't call 9-1-1 to say that we've had a shooting;
24 he didn't call the police. He didn't even -- there has been
25 no evidence that he checked on the condition of Terry Hadden

Closing arguments

1 or James Mahoney. He stepped over a dying, broken body to
2 get money to go back to George Gibson's house to get another
3 rock of crack cocaine.

4 Deputy Barnette told you in his opening that Richard
5 Moore is a desperate man. Crack cocaine will make you
6 desperate.

7 He went to George Gibson's house sometime earlier that
8 night, Richard Moore did. He had lost his job at Kohler two
9 weeks prior. He was pawning things for money, cash.

10 He comes into the store. After the shooting he steps
11 over a dead body, and he gets a blue vinyl bag. He's shot
12 in the arm and he's bleeding profusely.

13 And if you know anything about Spartanburg, you go down
14 221 and you get to Spartanburg Regional Medical Center
15 pretty quick. He didn't go to the hospital.

16 He went to George Gibson's house, the same house that
17 he went to five hours prior, and he told George Gibson I
18 done something wrong. He wanted crack cocaine, but he told
19 George I done something wrong.

20 And then as he is backing out, as George Gibson says
21 you're going to have to fend for yourself, because I am not
22 taking you to the hospital and I'm not going to get into it.

23 He backs into a telephone pole. Just by good fortune,
24 Deputy Rollins is there. And what did Richard Moore say to
25 him? "I did it, I did it, I give up, I give up."

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1 "I did it, I did it, I give up, I give up." He said it
2 so many times, ladies and gentlemen, if you remember Mark
3 Rollins' testimony, he finally had to tell this defendant to
4 shut up. He was saying, "I did it, I did it, I give up, I
5 give up."

6 I did what? What's the it? Just shot a man through
7 the heart and stepped over his dying body to get some money.
8 It's in front of a crack dealer's house. Bleeding from the
9 arm, not on the way to the hospital. On the way to get
10 drugs.

11 And we find his truck, and we find the cash, and we
12 find the blue vinyl bag. In the front seat we find a knife
13 that is open. It's setting right behind him. He is setting
14 on top of it.

15 Ladies and gentlemen, yesterday the defense put a
16 picture up here and showed you a cat. We showed you D. N.
17 A. We showed you ballistics.

18 The .45 caliber gun of Richard -- that Keith Fowler
19 owned was fired at least five times. The .44 caliber that
20 James Mahoney carried for protection was fired a single
21 time.

22 James Mahoney worked the night shift in a convenience
23 store in Spartanburg, South Carolina. He worked from
24 9:00 p.m. to 6:00 a.m. That's dangerous work. That's why
25 he carried a firearm. It turned out to be deadly for him.

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1 Ladies and gentlemen, Judge Clary is going to tell you,
2 I think, and you go with whatever he tells you. He is going
3 to tell you that murder is the unlawful killing or taking of
4 another's life with malice aforethought. And that malice
5 can be expressed or implied. That malice can be
6 premeditated three months, or it can be an instant.

7 Ladies and gentlemen, I have written them down. Pardon
8 me while I look at this. I don't want to miss. I only have
9 one chance to talk to you.

10 I have written down 20 do 25 items, any one of which
11 can tend to show malice, because that's the issue in this
12 case. It's not a question of who shot James Mahoney. Terry
13 Hadden told you who did it, and the D. N. A. confirmed that.
14 There is no question Richard Moore was in that store.

15 There is no question Richard Moore dripped his blood on
16 the dying, broken, fallen body of James Mahoney in his rush
17 to get to a blue bank bag. His blood is all over that.
18 There is no question who was in there. There's no question
19 what happened. James Mahoney was shot with malice.

20 There is a blood trail. And if you'll think back to
21 the evidence, you will see blood in front of the counter.
22 And you will see a trail around an entrance way back to
23 where the kitchen was.

24 Now, the defense may make a big deal about where the
25 bullet casings were. We had special Agent Whitaker tell us

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1 that he's dropped four different bullet casings, and I don't
2 think any of them went the same direction.

3 They'll talk about the bullet casing back there where
4 the kitchen was. I talked to you a little bit awhile ago
5 about puzzles.

6 The State of South Carolina doesn't have to prove
7 criminal cases beyond a shadow of a doubt. We have to prove
8 it beyond a reasonable doubt. Sometimes there are pieces of
9 a puzzle that are missing.

10 It wouldn't be right for me to stand in front of you
11 and say I know every single, solitary thing that happened
12 inside of Nikki's Convenience Store on September the 16th.
13 It wouldn't be right for me to do that. But I think based
14 on the evidence, ladies and gentlemen, we know enough of
15 what happened to be able to tell what happened based on
16 direct and circumstantial evidence.

17 Was James Mahoney shot from this side of the counter or
18 was he shot when he walked around back in the kitchen to get
19 the money -- was he shot? Is that why the .45 shell casing
20 is back there, because Richard Moore walked back there to
21 shot him?

22 I don't know the answer to that. I just know James
23 Mahoney was shot through the heart with a .45 caliber gun,
24 the same .45 caliber gun that this defendant took and threw
25 out into the road, the same .45 caliber gun that shot the

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1 shot that Terry Hadden said killed James Mahoney.

2 We have a trail of blood from the front to around to
3 where the money was. Why go get the money? Why go get the
4 money unless your intention all along was robbery?

5 The testimony was the money was in the drawer. The
6 testimony, as I recall it, and you go by what you recall,
7 was that one of those drawers was empty, opened, and one of
8 them wasn't.

9 To step over a broken, dying body to rifle through
10 somebody else's desk to get money is malice.

11 He told the police not 30 minutes to 45 minutes after
12 this shooting, "I did it, I did it, I give up, I give up."

13 He told George Gibson, "I have done something wrong and
14 I need to go turn myself in." That's malice.

15 He took the money with him. He didn't call 9-1-1. He
16 didn't call E. M. S. He didn't say there has been a
17 terrible shooting here. He went to a crack dealer's house.

18 This is murder, ladies and gentlemen. It's murder.
19 It's assault with intent to kill on Terry Hadden. It's
20 armed robbery. It's possession of a firearm during the
21 commission of a violent crime.

22 Ladies and gentlemen, I am going to ask Deputy
23 Willingham to turn on this projector, and, again, I get one
24 chance to talk to you. I don't want to sit down, because
25 this is the last chance that I have to talk to you about

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1 what happened that night.

2 I know I've got to sit down in a minute, but I want to
3 go over a couple of pieces of evidence. I don't want you to
4 take my word for it. I want to put it up there where you
5 can see it.

6 Ladies and gentlemen, that's a button. That's a button
7 that the SLED agent testified was consistent with the
8 buttons from James Mahoney's shirt that was found on the
9 counter.

10 And if you remember, ladies and gentlemen, I believe
11 the SLED agent testified that there was still some thread
12 that used to hold that button on his shirt. How does the
13 button get off his shirt? Is that how a button gets off the
14 shirt? Is that how a button gets off, you pulling it with
15 so much force that it pops the threads? They found the
16 button on the counter, and the button matches James
17 Mahoney's buttons on his shirt.

18 I want you to think back to what Terry Hadden saw. He
19 saw somebody putting his hands on James Mahoney's hands.
20 Now we got him that close. He pulled his shirt. Is that
21 when James Mahoney said, "What the hell are you doing?" I
22 don't know.

23 Ladies and gentlemen, I just know that James Mahoney's
24 button is on the counter and not on his shirt and that the
25 expert said it took force to get there. You see there is

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1 still a string, ladies and gentlemen.

2 Ladies and gentlemen, this is a .44 caliber handgun.

3 This was James Mahoney's gun. It was fired one single
4 solitary time. It's a revolver. It's easy to count how
5 many times it's shoot. The bullet casings. It was shot one
6 single solitary time.

7 This is the .45. This gun belonged to Keith Fowler.
8 He kept it behind the counter at Nikki's just if needed for
9 protection. This gun was fired at least five times; at
10 least, probably more. We know of one bullet up above the
11 video poker machine; we know of one bullet that went through
12 James Mahoney's heart and into his arm.

13 If we look at the facts in the light most conservative,
14 conservative, and let's say he was shot once, not twice, but
15 once. Let's say he did it. You remember Dr. Wren, and he
16 had my arm like this. And he said the body was contorted or
17 turned in some way. Is that consistent with somebody
18 pulling on your arm and shooting you like that when you
19 trying to get away?

20 I submit to you, ladies and gentlemen, based on the
21 evidence that this gun was fired at least five times. This
22 is the gun that Richard Moore threw into the roadway. This
23 is the gun that was taken from Nikki's Convenience Store by
24 this defendant when he took \$1,400 after he stepped over the
25 dying, broken, crooked-handed body of James Mahoney. This

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1 is the gun that he took with him. This is malice.

2 And we have a gun that was never touched, a .32 if my
3 memory serves me correctly. It was never touched.

4 These are two .45 caliber slugs. This one was taken
5 from the Spartanburg Regional Medical Center Morgue by Dr.
6 David Wren. It was taken out of the body of James Mahoney.

7 This .45 caliber slug was taken from behind the video
8 poker machine at Nikki's Convenience Store. Could Kenneth
9 Whitler say that that gun fired both of them? He said it
10 could. Could either one of the other guns have fired these
11 shots? He said no. Neither one of the other three guns
12 could have fired these two shots. A .45 caliber fired the
13 same shot at Terry Hadden that was fired at James Mahoney.

14 Ladies and gentlemen, that meat cleaver has Richard
15 Moore's blood on it, but so does everything else in that
16 trail around where the money was, a trail that starts right
17 there and goes right over another human being's body.

18 Did Richard Moore bring the meat cleaver into Nikki's
19 Convenience Store? I asked every other employee whether
20 that meat cleaver belonged to Nikki's Convenience Store.
21 And if you remember, they were all unequivocal in saying no,
22 nothing.

23 I don't know where that meat cleaver came from, ladies
24 and gentlemen. I am not going to stand in front of you and
25 act like I do. I know where it is, and I know where it was

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1 when James Mahoney's body was found. It was at his feet. I
2 know it didn't belong to Nikki's Convenience Store.

3 This is the truck that Richard Moore was driving. That
4 money right there belonged to Keith and Nanette Fowler.
5 That blue vinyl bank bag belonged to Keith and Nanette
6 Fowler. That blood belonged to Richard Moore.

7 Again, I want us to remember what Hugh Ashley testified
8 to, the surgeon. If there's an entry wound here, if there's
9 an exit wound here, that there are fragments in the arm
10 where the bullet hit the bone. We know some fragments came
11 out because there was an exit wound. We know there is a
12 laceration across the chest.

13 Is that consistent with being shot while you're doing
14 that right there, shooting Terry Hadden? I submit to you,
15 ladies and gentlemen, it is one hundred percent consistent
16 with malice.

17 Ladies and gentlemen, I believe we can make that out to
18 be a knife. That's this knife right here taken from Richard
19 Moore's truck in George Gibson's driveway on September the
20 16th in the early morning hours.

21 And I will tell you the same thing I tell you about the
22 meat cleaver, ladies and gentlemen. I don't know whether it
23 was used to rob James Mahoney. I know where it was found.
24 It was found right beside the money, right beside his blood,
25 right beside his wallet that had a bunch of pawn tickets in

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1 it from a desperate man who was drunk and out of work. It
2 was open.

3 No criminal case has every single piece of the puzzle.
4 That's not the issue. The issue is are there enough pieces
5 to the puzzle. Some puzzles you can have one piece and have
6 enough. If I had a puzzle of the Statute of Liberty and
7 showed you a bunch of green bricks, you might not know what
8 it was.

9 If I showed you a lady with a torch in her hand, every
10 one of you would know what it was. One picture is sometimes
11 enough. One picture.

12 The picture that Terry Hadden saw of a man grabbing
13 the two crooked -- people arthritic hands in his one hand
14 and turning to fire a shot at him, that is malice. That is
15 murder, ladies and gentlemen.

16 And in his opening statement Deputy Barnette went
17 through the charges. And he asked to use your common sense.

18 I am going to tell you, ladies and gentlemen, the judge
19 is going to define for you reasonable doubt. I want you to
20 listen closely to what the judge says.

21 But it is not reasonable doubt, ladies and gentlemen,
22 to go back and talk about something. It is not reasonable
23 doubt to deliberate. That's what you are supposed to do.

24 The State of South Carolina is not required to prove
25 anything to you beyond a shadow of a doubt. We are required

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1 to prove it to you beyond a reasonable doubt.

2 Based on the overwhelming evidence in this case from
3 the smallest button on the counter that came from James
4 Mahoney's shirt to the cocaine that was in Richard Moore's
5 system at Spartanburg Regional Healthcare, I submit to you
6 the State of South Carolina has proven to you a motive to
7 commit this crime and the means to commit this crime, an eye
8 witness to this crime, the D. N. A. to confirm what the eye
9 witness says. The ballistics support it.

10 I am asking you as a Solicitor of the Seventh Judicial
11 Circuit to find Richard Moore guilty of murder, of assault
12 with intent to kill, of armed robbery, possession of a
13 firearm during the commission of a violent crime. The
14 evidence is overwhelming that supports it.

15 I thank you for your service and ask you to find him
16 guilty of all of the things that he is charged with. Thank
17 you.

18 THE COURT: Mr. Morin.

19 MR. MORIN: Ladies and gentlemen, yesterday morning I
20 stood before you, and I told you that in this case there
21 were undisputed facts, facts that didn't have any doubt. I
22 told you Richard entered the store and had no weapon.

23 Not one single shred of evidence disputed that. I told
24 you that Richard went to the cooler, got some beer, got some
25 cigarettes, got it from the back.

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1 Not only is the bag in evidence, but the items that
2 were in it. When you go back there you will notice that
3 there is a bullet hole through it that goes from
4 Mr. Mahoney's side of the counter to Mr. Moore's. The bag
5 has got blood on it. That's Mr. Moore's blood. Okay.
6 That's Mr. Moore who went in there and put that on the
7 counter and got shot. I told you that James Mahoney had
8 three weapons, three big guns. So, we know that.

9 The state through Investigator Denton and Mr. Dorman
10 developed a theory. And here it is. Okay. This is the
11 theory. Mr. Moore goes in there with this.

12 MR. GOWDY: Your Honor, I would object at this point
13 based on the evidence. I don't recall a single shred of
14 evidence to that effect, that that was anybody's theory.

15 THE COURT: Well, sir, the thing about it, and I'll
16 tell the jury, that what the lawyers say in their closing
17 arguments or what anyone says in the closing arguments does
18 not represent evidence.

19 The evidence in this case, ladies and gentlemen, has
20 come from the testimony that you have heard from the sworn
21 witnesses, together with the evidence that has been
22 introduced.

23 And, once again, you are the judges of the facts. I am
24 the judge of the law. And if you find that what the lawyers
25 say disagrees with what the evidence has revealed, then, of

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1 course, you will follow your own recollection.

2 You may continue.

3 MR. MORIN: Here is evidence, they said, that put it
4 there with him. And they take -- they find this at the
5 scene. Mr. Denton did.

6 All right. He asked Mr. Fowler whose is this. I don't
7 know. I never seen it before.

8 So what did they do with this? Send it to SLED. What
9 are they looking for? Fingerprints. Why are they looking
10 for fingerprints? Why are they looking for fingerprints on
11 this item that Mr. Fowler said did not belong to the store
12 and he doesn't know about it?

13 Now, Mr. Gowdy has asked you already. He must have
14 gone in there to rob. He must have.

15 But what happened three weeks ago? Something important
16 about this piece of evidence happened three weeks ago.
17 Mr. Hadden, being with these gentlemen for the first time,
18 revealed Jamie. That's Jamie's. So much for that theory.

19 All right. So, now, what are we going to do? Wait a
20 minute. There is a meat cleaver. It's on the floor. And
21 guess what? Mr. Fowler doesn't know about this either. Of
22 course this piece of evidence wasn't sent for fingerprints
23 because at the time they had built their staff with this.

24 Richard Moore goes into that store, gets that beer,
25 walks to that counter. Something happens. We don't know

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1 what. Y'all saw that store; y'all saw those pictures; y'all
2 saw that bar, table, counter.

3 Where did Mr. Fowler say that gun was? Up under the
4 counter next to that, on that desk. Is there any possible
5 way a person on that side of the counter could see that gun,
6 could see it, let alone reach all the way across it and get
7 it? No, there is not.

8 James Mahoney had to reach and get that gun. Mr. Moore
9 could not have brought that gun into play from his side of
10 the counter.

11 And Mr. Gowdy says, well, Mr. Hadden said he heard
12 Jamie and turned and saw it. Okay. Mr. Hadden's playing a
13 video poker machine. He hears somebody say, "What the hell
14 are you doing," and he turns like that.

15 Okay. In order for you to believe that scenario, what
16 you have got to do is you have got to say what the hell are
17 you doing. And in the time it took him to turn around and
18 see, because the implication is that was when Mr. Moore was
19 grabbing that.

20 In those fractions of a second it took Mr. Hadden to
21 turn around, they want you to believe Jamie -- and they made
22 a long thing about Mr. Mahoney's hands were not that great.
23 He wasn't a strong man.

24 But in that much time he reached. He got the gun. Mr.
25 Moore took it away from him, pinned his hands to the floor,

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1 to the table, and turned and stood like this. From the time
2 he said, "What the hell are you doing," and it took
3 Mr. Hadden to turn around, all of that happened.

4 Even if it could have, as Mr. Gowdy pointed out, he
5 wants you to say he's holding it. He doesn't know where
6 that butcher knife came from.

7 Ladies and gentlemen, y'all listened to that evidence.
8 They are trying to say that's what he brought in there.
9 Well, where is that if he's holding his hands after he has
10 gotten the gun and taken the gun and now he has turned and
11 holding his hands and he has got the knife?

12 A piece of the puzzle. That's what Mr. Gowdy calls it.
13 He calls it a piece of the puzzle. What I call it is is
14 evidence he is supposed to prove to you beyond a reasonable
15 doubt. I just call it the same thing that George Bush
16 talked about when he said they hate us for our freedom, the
17 freedom presumed innocent, the freedom to have the
18 government prove beyond a reasonable doubt. He is calling
19 it a piece of the puzzle.

20 He talked about the bullets. You know, he talked about
21 the bullet that landed right there. But you see the .45
22 fired two shots, and I am not saying. And I understand that
23 Mr. Hadden didn't count them. I have never contested that.
24 I am sure that he had a lot of things to think about besides
25 how many bullets were being fired.

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1 But this time, and I asked Officer Dorman how many
2 bullets fired from this here this way. And he said at least
3 three. And he got a live round right here on the counter.
4 Why is that there?

5 Once again, I don't know why Jamie reached down there
6 and got that gun. But he got it. And he fired it. And it
7 went there, and the other bullet that you have in evidence
8 went here and bounced out and went out into the driveway.

9 That leaves the question about this bullet that's on
10 the counter. And I asked Officer Dorman, and Mr. Kelly
11 asked Officer Whittler, about stovepipping and how that
12 bullet could have gotten there.

13 And Officer Dorman, you know, if you have this gun and
14 you fire it and you let it go back like this, this slide
15 will hit you and it will jam. They told you Jamie, James
16 Mahoney, was not a strong man.

17 Then what would happen? Well, you have to work this
18 thing out to get this bullet out. Then that bullet would
19 fall out. Then Jamie, he has got another gun which is
20 closer than the first gun. He has got that right here.

21 He takes that out and shoots Mr. Moore, because he is
22 bleeding right here, right through his stuff, right there.
23 And then they start shooting. Mr. Moore is shot.

24 Now, Dr. Wren, tells about people who can run through
25 stores with no blood pressure, but the fact of the matter is

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1 he, Richard, is shot, and he fires back. And then he hits
2 the person who has already fired at him, and he hit him.

3 And he says murder, just because someone gets shot and
4 dies, that doesn't make murder. What that means is two
5 people shooting at each other, and we don't know why.

6 Which gets me to Officer Dorman. I asked him. Officer
7 Dorman, was there a video surveillance system in this store?
8 And he said yep. Did it work? No.

9 And I said, well. And after a few questions he said,
10 well, yeah, the cameras worked, but the monitor was off.
11 And I said, well, are you sure. He said yeah.

12 So then I got a picture, and I had to put it up here,
13 and you will have it back there in the jury room, to show
14 him, no, see, the monitor is on. He took a picture of it
15 while it was on.

16 Well, there wasn't a tape. Well, I asked. First, I
17 asked Mr. Fowler, and then I asked all of the other
18 employees about that. Yeah. There is a tape. Now, you
19 have to turn it on, but there is a tape.

20 Then I had to call, I had to call the lead
21 investigator. I was hoping that we could straighten out
22 some of these missing pieces. He is the lead investigator.

23 Do you know anything about this tape? Yeah. There was
24 a tape. Did you look at it? Yes, I looked at it. Did
25 anybody look at it with you? Officer Dorman. What was on

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1 it? Oh, well, we didn't decide. There wasn't anything on
2 there about this case, so I don't know what we did. It went
3 away.

4 That's your job. Look at all of this evidence that
5 they have collected for you. They've got pictures; they've
6 got blood. Officer Dorman took 57 blood swabs just from the
7 store.

8 I told you in opening statements it's undisputed Mr.
9 Moore was in there, and Mr. Moore got shot, and he bled.

10 But, so, I asked officer -- when Mr. Hadden was sitting
11 up here at the beginning, walked back there and stood right
12 next to Mr. Denton to make sure that we were straight on
13 this.

14 You ever seen this man in your life? Had him stand up.
15 No, sir, I have never seen him. Seemed kinda strange to me
16 the eye witness didn't talk to the investigating officer.
17 So, when he was up here, I asked him. Did you talk to him?
18 Oh, yeah, I talked to him a couple of days afterwards. That
19 was before we started sending firearms down to SLED for
20 fingerprints.

21 Then before I get to that, now, Mr. Hadden doesn't have
22 any reason to lie. No doubt. And this is very traumatic,
23 you know. No doubt about that.

24 When I asked him what happened when he went down to the
25 station that night to give a statement, he said, man, I

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1 don't know what happened. I don't know what happened. And
2 he gave a statement. The police officer wrote it out for
3 him, and he read or didn't read it.

4 And then he came back about two weeks later and he
5 said, no, no, no. Some of this stuff is not right. And he
6 changed it and went off and came back and talked to the
7 guys -- Mr. Barnette. No, no, no, no. Something is not
8 right.

9 I'm sure he believes that what he saw was Mr. Moore
10 holding that gun, because, just like when I stood up here at
11 the beginning and I told you Jamie Mahoney had three weapons
12 and Mr. Moore had none, and you see Mr. Moore sitting over
13 there, that doesn't make any sense, but that's what
14 happened.

15 Officer Rollins. Yes. You were out at the Hillside.
16 You talked to Mr. Gibson, right? Yes. Did you talk to
17 anybody else in the house? Yes. Do you know their names?
18 No, sir. I didn't record them. I told the investigator.

19 Okay. Mr. Denton, you are the investigator. Did you
20 talk to those fellows out there? Nobody told me about any
21 other people out there.

22 And now we come to the star witness, Mr. Gibson.
23 Ladies and gentlemen, it's unbelievable, the things that
24 Mr. Gibson can say. He wants you to believe that a man who
25 had been shot and was bleeding as much as, and that's

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1 undisputed, as Mr. Moore was came to his house and said I
2 been shot. I need to go to the hospital. But before I do,
3 I want some crack.

4 Mr. Gowdy called it a crack house in his own closing.
5 When it helps him, it's a crack house. But the fact of the
6 matter is he never said anything to any police about, or
7 authorities about, any drugs being mentioned.

8 Mr. Barnette asked him after I sat down did you ever
9 talk to anybody after the police, and he said, oh, yes.
10 Somebody from the solicitor's office, an investigator, came
11 out there and talked to me about three days later.

12 He didn't say one single thing about any drugs being
13 mentioned. But he did remember it three weeks ago when he
14 met with them again.

15 What changed? Well, 18 months ago he got a charge for
16 trafficking crack. Eighteen months ago. And has anything
17 happened to that? No. That case is still pending. But, by
18 the way, I just remember that before Mr. Moore said he
19 needed help, he wanted to talk about the crack.

20 Look at the photograph in State's Exhibit Twenty-three.
21 Okay. This is a photograph taken from Mr. Gibson's house.
22 Mr. Gibson says, well, the first time he says, I was on my
23 porch and I looked out in the street and I saw Richard
24 laying on the ground.

25 How? I see a truck. I see bushes. I see bushes that

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1 are almost twice as tall as the truck. At 3:30 at night
2 could he see it? No. He couldn't see it.

3 And then on redirect I asked him another question about
4 seeing it, and he said, well, I didn't really go out. It
5 doesn't matter if he went out or he was in. He couldn't see
6 what he said he saw. There is the evidence for it right
7 there.

8 He is not telling the truth. He doesn't want to be
9 involved. He doesn't want to be involved. He has got a
10 pending drug charge as it is.

11 Then they brought in Officer Lambert from SLED this
12 morning who said there is D. N. A. over here. There is
13 blood, and it is definitely Richard's. It is definitely
14 Richard's. Jamie shot him.

15 They want to put that cart right before the horse.
16 They want to say he came in and he was going to rob him and
17 he might have had a weapon and it might have been a tire
18 iron, it might have been a butcher knife, it might have been
19 an open pocketknife that he was sitting on.

20 All of that right there, ladies and gentlemen, is a
21 major part of this case. He's calling it a missing piece.
22 What happened? Why did Jamie grab that gun? They say we
23 guess it was robbery. We guess it was. But they don't know
24 that.

25 And before you get to that, because once Jamie is

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1 pulling out guns and shooting, Richard's just somebody who
2 got shot and is trying not to get shot himself.

3 Now, so, he walked around there. The blood, Richard's
4 blood, is just going everywhere. He picks up some money,
5 and he leaves. And he is bleeding. And when he gets to
6 Hillside and talks to Officer Rollins, he actually passes
7 out.

8 Now, it fits in Mr. Gowdy's description that he has got
9 his hand here and he is like this. The only problem with
10 this theory is how did Jamie shoot if Mr. Hadden is correct
11 that he was holding both of his hands?

12 Mr. Hadden didn't come up here and not tell the truth.
13 He is trying to remember what happened, but that night he
14 didn't know what happened.

15 And over the two years he has had to think about it,
16 just like Mr. Gowdy, he assumed, well, it must have been a
17 robbery and he must have shot at me.

18 But what did Richard bring in there? What proof, what
19 evidence, anything at all to say Richard went in there to do
20 anything except put that on the counter, because he couldn't
21 reach that gun. He couldn't.

22 Richard came in here presumed innocent. They had to
23 prove beyond a reasonable doubt that Richard acted with
24 malice. He got shot. He managed to get a weapon and defend
25 himself.

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1 The direct evidence that they have, they either didn't
2 check for what they would have or guessed at it. And they
3 talk about circumstantial evidence, good circumstantial
4 evidence.

5 Well, I am aware of the story about circumstantial
6 evidence to illustrate where the gentleman was that fell out
7 of favor with someone's brothers and wanted to get rid of
8 him. But they couldn't, because they were going to upset
9 their father. So they took him out one day. They took his
10 coat off and put some blood on it and went back to their
11 father and said, father, Jacob has been eaten by the lions.
12 He wasn't. That's circumstantial evidence.

13 They come to you. They say, see, we have got a knife
14 lying around or a tire iron or something else. That's how
15 we know he meant to rob him. That's how we know he acted
16 with malice.

17 That's not what happened. They don't know what
18 happened, and they are asking you to guess. And in order
19 for you to find Richard guilty you are going to have to
20 guess, and that's not reasonable doubt.

21 I submit to you they haven't proven their case. Jamie
22 Mahoney is dead. But that doesn't prove it's a murder.
23 That proves that he got shot.

24 And I almost forget. Mr. Gowdy pointed out he did some
25 sort of body proportion after Dr. Wren tried to tell him.

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1 He can't really tell, but he did it anyway. He said, well,
2 if you were holding your arm like this and you had your gun
3 in the other hand, you could shoot it right up close.

4 What did Dr. Wren say? Dr. Wren started way back with
5 contact and said it is not a contact and it wasn't within so
6 much. It was probably back. Dr. Wren also said it was just
7 as likely he was like this.

8 This is answering Mr. Gowdy's technical question.
9 Well, he could have been like this, like he was going to
10 shoot.

11 That's not important in saying, well, he had his arm
12 pulled back like this and then he shot. That's Dr. Wren
13 answering Mr. Gowdy's question, this weapon right here with
14 the grips that shot Richard Moore.

15 Okay. Richard could not have had a gun unless Jamie
16 pulled it out and Richard managed to get it away from him.
17 Then he got this gun and shot. That's the case, that's this
18 case. Undisputed, Jamie had a gun. Jamie pulled the gun.
19 We don't know why. They want you to guess.

20 You saw that store. You see those pictures. That gun
21 did not come out until Jamie got it. Richard took it away
22 from him somehow, and then Jamie shot him with the second
23 gun.

24 MR. GOWDY: Your Honor, I hate to object, but this is
25 beginning to sound a look like testimony and not argument.

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1 THE COURT: Well, sir, as long as you submit it to the
2 jury and it is not a fact from the testimony --

3 MR. GOWDY: Yes, sir.

4 THE COURT: So, please understand that.

5 Ladies and gentlemen, I will remind you, once again,
6 the testimony in this case has come from the witnesses who
7 appeared on this stand, together with the evidence that has
8 been introduced; and that what the lawyers say does not
9 represent evidence. It is only their contention as to what
10 is revealed.

11 MR. MORIN: The reason I say that is that bag with that
12 blood and that trail that he is so proud of shows Richard
13 shot over here.

14 Richard and Mr. Kelly and Mrs. Johnson and I appreciate
15 the attention you have given in this case. When you go back
16 and you begin your deliberations, look at the evidence. Ask
17 these questions.

18 The judge is going to tell you that a reasonable doubt
19 is one that would make a person hesitate to act. And that
20 night Richard didn't have any time to hesitate. He got a
21 gun pulled on him and managed to get that away and got shot.
22 Talk about it. There is a lot of evidence.

23 As Mr. Gowdy said, if it is not the way, you remember
24 it different than me, then by all means do so. You are the
25 jury. I don't mean to interfere with that. I made

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1 statements about tire irons and theories. I think I have
2 shown where the evidence -- what I am talking about.

3 Richard is not guilty of murder. Thank you.

4 THE COURT: Ladies and gentlemen, under the South
5 Carolina Code of Laws the defendant is entitled to address
6 you at this time in closing arguments.

7 Mr. Moore.

8 THE DEFENDANT: Thank you, Your Honor.

9 I need some help with the actual wallet. What number
10 was it, my wallet?

11 MR. MORIN: I think it is in here.

12 THE DEFENDANT: Thank you.

13 I am very nervous. All I can do is tell you that I am
14 not guilty of murder.

15 MR. GOWDY: Your Honor, I am going to object. Your
16 Honor, he is testifying, and he is not making an argument.

17 THE COURT: Yes, sir.

18 You need to limit yourself to the evidence that has
19 been produced. You cannot testify. You must limit yourself
20 to the evidence that has been produced, Mr. Moore.

21 THE DEFENDANT: I hear what you are saying, but I don't
22 know if I am going to be able, but I am going to try.

23 THE COURT: Well, sir, if you are not able to, then I
24 will have to stop you. So, operate within those perimeters.

25 THE DEFENDANT: I am going to try, Your Honor.

1 THE COURT: All right, sir.

2 THE DEFENDANT: These are two pawn tickets that Mr.

3 Gowdy introduced into evidence.

4 Mr. Gowdy also said that I done this to get crack. If
5 you were to read -- if Mr. Gowdy had read to you the dates
6 on these tickets, you would know, as well as him, that while
7 these tickets were taken from the pawn shop, I was working.

8 These tickets from the pawn shop does not say I was
9 using cracks. You have a Mr. Gibson saying that. You have
10 an R. N. from the hospital saying that. You don't have no
11 test results to support that.

12 Now, I can say anything, as well as Mr. Smith and
13 Mrs., I mean, Mr. Gibson. I am nervous. I am shaking up
14 here because I don't know what to say. All I know is my
15 life is in jeopardy here a second time.

16 MR. GOWDY: Your Honor, that is improper argument at
17 this stage. I would object.

18 THE COURT: Sustain the objection.

19 Yes, sir. You are to limit yourself to the testimony
20 and evidence. And they are to determine the guilt or
21 innocence, sir.

22 THE DEFENDANT: The state is seeking the death penalty
23 on me, which means my very life is at stake.

24 MR. GOWDY: Your Honor, that's --

25 THE COURT: Sir, one moment. We are in the guilt

1 phase. They are simply determining the guilt or innocence
2 of the crimes charged at this point in time. That's all
3 they are doing in this stage of the trial. So, please limit
4 it to that.

5 ~~THE DEFENDANT: Your Honor, I am having trouble.~~

6 THE COURT: Yes, sir.

7 ~~THE DEFENDANT: Please bear with me.~~

8 ~~See what I am trying to do, put my hand in my pocket.~~
9 ~~I have no feeling in this hand.~~

10 MR. GOWDY: Objection, Your Honor. That is not in
11 evidence.

12 THE COURT: I am going to let you talk to your lawyer
13 just one moment, please, Mr. Moore.

14 (Pause.)

15 THE COURT: Ladies and gentlemen of the jury, while
16 they are doing that, I am going to allow you to go to the
17 jury room.

18 While you are there, please do not discuss this case
19 among yourselves. We will get you back in just a moment.

20 The jury may retire.

21 (The following takes place outside the presence of the
22 jury.)

23 THE COURT: Now, Mr. Moore, I want you to understand
24 that you certainly have the right to make the closing
25 argument to the jury. That's provided for by law.

1 But, once again, you have to do it within the confines
2 of the testimony and evidence that has been presented. You
3 cannot go beyond that. You cannot, since you elected not to
4 take the stand, you cannot testify.

5 You can make comments upon the evidence that has been
6 presented and what it's revealed, but beyond that, you
7 cannot do so, sir. I cannot allow you to, in essence, go
8 around the rules to testify and to bring out things that are
9 not revealed from the testimony and evidence.

10 Mr. Morin, I want you and Mr. Kelly to please explain
11 that to him. We are going to take a short break. And then
12 we will come back and finish up with this.

13 (Whereupon, a recess was taken.)

14 THE COURT: Mr. Moore, certainly you have the right
15 under Section 16-3-28 to address the jury in closing
16 argument. You may not testify. You gave that right up.
17 You can comment on the facts, what the evidence has revealed
18 in this case.

19 Insofar as mentioning punishment, you are not to
20 mention that, because we are not about that right now.

21 And if there are any violations of what I am laying out
22 at this time, you are going to stand over here. Then I am
23 going to stop your argument. And then we will proceed into
24 the charge on the law.

25 But, now, I told you Mr. Morin, I told Mr. Kelly. I

1 will tell you. As long as you operate within the confines
2 of what the lawyers operate in, because sometimes they try
3 to get outside of the box, and I stop them, particularly
4 when you are here addressing the jury. I cannot allow you
5 to testify.

6 So, if you want to comment on what you've seen develop
7 throughout the course of the trial, that is fine. But
8 beyond that, you can't go beyond that.

9 Okay. All right. Let's bring them back, Cotton.

10 (The following takes place in the presence of the
11 jury.)

12 THE COURT: Thank you very much, Madam Foreperson and
13 ladies and gentlemen.

14 You may continue, Mr. Moore.

15 ~~THE DEFENDANT:~~ Ladies and gentlemen of the jury,
16 please forgive me for the mistakes I made in this
17 presentation here.

18 I have seen a knife which is on display here, the tire
19 tool. I have heard people say that they, they've, they are
20 part of this case. They may be. It doesn't tie to me.

21 I don't want to offend Your Honor any longer, so I am
22 not going to say any more. I think I have said enough.

23 I just ask that you be fair and don't guess, because
24 that's what you are being asked to do, guess. Thank you.

25 THE COURT: Thank you, Mr. Moore.

1 Ladies and gentlemen of the jury, the indictments
2 charge the defendant, Richard Bernard Moore, with murder,
3 possession of a weapon during the commission of a violent
4 crime, assault with intent to kill and armed robbery.

5 I remind you that the fact that the defendant was
6 arrested, charged and indicted in this case is not evidence
7 in this case and cannot be considered by you as evidence of
8 guilt in this case, nor does it create any presumption or
9 inference of guilt.

10 These documents are simply the formal written
11 instruments which contain the charges made against the
12 defendant. They are the formal documents by which this case
13 is brought into this court.

14 Now, as you know, these indictments in this case allege
15 several different offenses against the defendant. On one
16 indictment he is charged with murder and possession of a
17 weapon during the commission of a violent crime; in a
18 separate indictment with assault with intent to kill; and in
19 a separate indictment, armed robbery.

20 Each indictment and each count therein charges a
21 separate and distinct offense. You must decide each
22 indictment and count separately on the evidence and the law
23 applicable to it uninfluenced by your decision as to any
24 other indictment.

25 The defendant may be convicted or acquitted on any or

1 all of the offenses charged. You will be asked to write a
2 separate verdict of guilty or not guilty for each indictment
3 and for each count on the indictment that lists two charges.

4 Now, the defendant has pled not guilty to these
5 indictments, and that plea puts the burden on the state to
6 prove the defendant guilty.

7 A person charged with committing a criminal offense in
8 South Carolina is never required to prove himself innocent.
9 I charge you that it is an important rule of the law that
10 the defendant in a criminal trial, no matter how great or
11 serious the charge may be, will always be presumed to be
12 innocent of the crime for which the indictment was issued
13 unless guilt has been proven by evidence satisfying you of
14 that guilt beyond a reasonable doubt.

15 This presumption of innocence does not end when you
16 begin your deliberations. But it accompanies the defendant
17 throughout the trial until you reach a verdict of guilty
18 based upon evidence satisfying you of that guilt beyond a
19 reasonable doubt.

20 The presumption of innocence is like a robe of
21 righteousness placed about the shoulders of the defendant
22 which remains with the defendant until it has been stripped
23 from the defendant by evidence satisfying you of the
24 defendant's guilt beyond a reasonable doubt.

25 The presumption of innocence is not a mere legal

1 theory. It's not just a legal phrase. It is a substantial
2 right to which every defendant is entitled unless you, the
3 jury, are satisfied from the evidence of the defendant's
4 guilt beyond a reasonable doubt.

5 Now, what is a reasonable doubt? A reasonable doubt is
6 the kind of doubt that would cause a reasonable person to
7 hesitate to act. Now, the state has the burden of proving
8 the defendant guilty beyond a reasonable doubt.

9 Now, some of you may have served as jurors in civil
10 cases where you were told that it is only necessary to prove
11 that a fact is more likely true than not true such as by the
12 greater weight or the preponderance of the evidence.

13 In criminal cases the state's proof must be more
14 powerful than that. It must be beyond a reasonable doubt.
15 Proof beyond a reasonable doubt is proof that leaves you
16 firmly convinced of the defendant's guilt.

17 Now, there are very few things in this world that we
18 know with absolute certainty, and in criminal cases the law
19 does not require proof that overcomes every possible doubt.

20 If, based on your consideration of the evidence, you
21 are firmly convinced that the defendant is guilty of the
22 crime charged, then you must find the defendant guilty.

23 If, on the other hand, you think there is a real
24 possibility that the defendant is not guilty, you must give
25 the defendant the benefit of the doubt and find him not

1 guilty.

2 Now, I remind you that during this trial you and I have
3 certain duties to perform. As the trial judge it is my
4 responsibility to preside over the trial of this case, and I
5 also have the duty to rule on the admissibility of evidence
6 offered during this trial.

7 You are to consider only the competent evidence before
8 you. If there was any testimony ordered stricken from the
9 record in this case during this trial, you must disregard
10 that testimony. You are to only consider the testimony
11 which has been presented from the witness stand, any
12 exhibits which have been made part of the record in this
13 case.

14 I also have the additional duty to charge you the law
15 applicable to this matter. As the presiding judge, I am the
16 sole judge of the law in this case. And it is your duty as
17 jurors to accept and apply the law as I now state it to you.

18 If you already have any idea as to what the law is or
19 what the law ought to be and it does not agree with what I
20 tell you now that the law is, you must abandon this idea,
21 because you are sworn to accept the law and apply the law
22 exactly as I state it to you.

23 In every case tried in this court before a jury the
24 jury becomes the sole and exclusive judge of the facts in a
25 case. A trial judge cannot intimate, state, comment on or

1 make any statement to a trial jury about the facts in a
2 case.

3 Since you, the jury, are the sole judges of the facts
4 in this case, you are not to infer from what I have said
5 during the progress of this trial in ruling upon the
6 admissibility of the evidence or otherwise or anything that
7 I say now during the course of this instruction to you that
8 I have any opinion about the facts in this case.

9 The law does not allow me to have an opinion about the
10 facts in this case. This is a matter solely for you, the
11 jury, to determine. As jurors it is your duty to determine
12 the effect, value, weight and truth of the evidence
13 presented during this trial.

14 Now, there are two types of evidence which are
15 generally presented during a trial, direct evidence and
16 circumstantial evidence.

17 Direct evidence is the testimony of a person who claims
18 to have actual knowledge of a fact such as an eye witness.
19 It is evidence which immediately establishes the main fact
20 to be proved.

21 Circumstantial evidence is proof of a chain of facts
22 and circumstances indicating the existence of a fact. It is
23 evidence which immediately establishes collateral facts from
24 which the main fact may be inferred. Circumstantial
25 evidence is based upon inference and not on personal

1 knowledge or observation.

2 The law makes absolutely no distinction between the
3 weight or value to be given to either direct or
4 circumstantial evidence, nor is a greater degree of
5 certainty required of circumstantial evidence than that of
6 direct evidence.

7 You should weigh all of the evidence in the case. And
8 after weighing all of the evidence if you are not convinced
9 of the guilt of the defendant beyond a reasonable doubt,
10 then you must find the defendant not guilty.

11 Conversely, if you are convinced of the guilt of the
12 defendant beyond a reasonable doubt, then you must find the
13 defendant guilty.

14 Now, necessarily, you must determine the credibility of
15 the witnesses who have testified in this case. Credibility
16 simply means believability. It becomes your duty as jurors
17 to analyze and to evaluate the evidence and determine which
18 evidence convinces you of its truth.

19 In determining the believability of witnesses who have
20 testified in this case you may believe one witness over
21 several witnesses, or several witnesses over one witness.

22 You may believe a part of the testimony of a witness
23 and reject the remaining part of the testimony of that same
24 witness. You may believe the testimony of a witness in its
25 entirety or reject the testimony of a person or witness in

1 its entirety.

2 You may consider whether any witness has exhibited to
3 you any interest, bias, prejudice or other motive in this
4 case. You may also consider the appearance and manner of a
5 witness while on the witness stand.

6 Now, the rules of evidence ordinarily do not permit
7 witnesses to testify as to their opinion or conclusions. An
8 exception, however, to this rule does exist as to those whom
9 we call expert witnesses. Expert witnesses are witnesses
10 who by education and experience have become expert in some
11 art, science, profession or calling.

12 These witnesses may state their opinions as to relevant
13 and material matter in which they profess to be an expert
14 and may also state their reasons for the opinion.

15 You should consider expert opinion received in evidence
16 in this case and give it such weight as you may think it
17 deserves. If you should decide that the opinion of an
18 expert witness is not based upon sufficient education and
19 experience or if you should conclude that the reasons given
20 in support of the opinion are not sound, or if you feel that
21 it is outweighed by other evidence, you may disregard the
22 opinion entirely.

23 Now, I charge you that the testimony of a witness may
24 be discredited or impeached by showing that he previously
25 made statements which are inconsistent with his present

1 testimony.

2 The earlier contradictory statements are admissible to
3 establish the truth of these statements. It is the province
4 of you, the jury, to determine the credibility, if any, to
5 be given the earlier statements and to be given the
6 testimony of the witness who has been impeached.

7 If a witness has shown knowingly to have testified
8 falsely concerning any material matter, you may consider
9 this in determining whether to trust such witness's
10 testimony in other particulars. You may reject all of the
11 testimony of that witness or give all or part of such
12 testimony the credibility you think it deserves.

13 Now, I charge you further, Madam Foreperson and members
14 of the jury, that the fact that a defendant elects not to
15 testify in his own behalf cannot and must not be considered
16 against him under any circumstances or in any manner
17 whatsoever.

18 The decision of any defendant not to take the witness
19 stand and testify in his own behalf does not create any
20 inference against him. And I tell you now that you must not
21 permit that fact to weigh in even the slightest degree
22 against the defendant. You should not permit this fact to
23 enter into the discussions or deliberations of the issues in
24 this case.

25 Now, ladies and gentlemen, as you are well aware, the

1 defendant is charged with murder. The state must prove
2 beyond a reasonable doubt that the defendant killed another
3 person with malice aforethought.

4 Malice is hatred, ill will or hostility towards another
5 person. It is the intentional doing of a wrongful act
6 without just cause or excuse and with an intent to inflict
7 an injury or under circumstances that the law will infer an
8 evil intent.

9 Malice aforethought does not require that malice exist
10 for any particular time before the act is committed, but
11 malice must exist in the mind of the defendant just before
12 and at the time of the act being committed. Therefore there
13 must be a combination of the previous evil intent and the
14 act.

15 Malice aforethought may be expressed or inferred.
16 These terms, expressed and inferred, do not mean different
17 kinds of malice but merely the manner in which malice may be
18 shown to exist, that is either by direct evidence or by
19 inference from the facts and circumstances which are proved.

20 Expressed malice is shown when a person speaks words
21 which expresses hatred or ill will for another or when the
22 person prepared beforehand to do the act which was later
23 accomplished. For example, lying in wait for a person or
24 any other act of preparation going to show that the deed was
25 done within the defendant's mind would be expressed malice.

1 Malice may be inferred from conduct showing a total
2 disregard for human life. Inferred malice may also arise
3 when the deed is done with a deadly weapon. A deadly weapon
4 is any article, instrument or substance which is likely to
5 cause death or great bodily harm. Whether an instrument has
6 been used as a deadly weapon depends on the facts and
7 circumstances of each case.

8 Now, the following are examples of instruments which
9 may be deadly weapons. A pistol, a shotgun, a rifle, a
10 dirk, a dagger, a knife, a slingshot, metal knuckles, a
11 razor, gasoline, a fire bomb, a Molotov cocktail or lighter
12 fluid.

13 Now, the defendant is charged with possession of a
14 weapon during the commission of a violent crime. The state
15 must prove beyond a reasonable doubt that the defendant was
16 in possession of a firearm or visibly displayed what
17 appeared to be a firearm during the commission of a violent
18 crime.

19 A firearm means any machine gun, automatic rifle,
20 revolver, pistol or any weapon which will or is designed to,
21 or may readily be converted to, expel a projectile.

22 In order to find the defendant guilty of possession of
23 a weapon during the commission of a violent crime you must
24 first find the defendant guilty of committing a violent
25 crime.

1 And I charge you that murder is a violent crime as
2 provided in Section 16-1-60 of the Code of Laws of the State
3 of South Carolina, 1976 as amended.

4 Now, the defendant is also charged with assault with
5 intent to kill. In order to prove assault with intent to
6 the kill the state must prove beyond a reasonable doubt that
7 the defendant with malice aforethought unlawfully attempted
8 or offered to commit a violent injury upon the person of
9 another and had the present ability to complete the
10 attempted injury.

11 An assault is the intentional creation of a reasonable
12 fear of immediate bodily harm. It is not necessary that the
13 attempted injury or harm actually take place. For example,
14 if I walk up to you and when we are within arm's reach, if I
15 draw back to hit you, that is an assault.

16 Malice is hatred, ill will or hostility towards another
17 person. It is the intentional doing of a wrongful act
18 without just cause or excuse and with an intent to inflict
19 an injury or under circumstances that the law will infer an
20 evil intent.

21 Now, once again, malice aforethought does not require
22 that malice exist for any particular time before the act is
23 committed, but malice must exist in the mind of the
24 defendant just before and at the time, of the act is being
25 committed. Therefore, there must be a combination of the

1 previous evil intent and the act.

2 Malice aforethought may be expressed or inferred.

3 These terms, expressed and inferred, do not mean different
4 kinds of malice but merely the manner in which malice may be
5 shown to exist. That is either by direct evidence or by
6 inference from the facts and circumstances which are proved.

7 Expressed malice is shown when a person speaks words
8 which express hatred or ill will for another or when the
9 person prepared beforehand to do the act which was later
10 accomplished.

11 Malice may be inferred from conduct showing a total
12 disregard for human life. Inferred malice may also arise
13 when the deed is done with a deadly weapon.

14 And a deadly weapon is any article, instrument or
15 substance which is likely to cause death or great bodily
16 harm. Whether an instrument has been used as a deadly
17 weapon depends on the facts and circumstances of each case.

18 If facts are proved beyond a reasonable doubt
19 sufficient to raise an inference of malice to your
20 satisfaction, this inference would simply be an evidentiary
21 fact to be considered by you, the jury, along with the other
22 evidence in the case. And you may give it the weight you
23 decide it should receive.

24 A specific intent to kill is not an element of assault
25 with intent to kill, but there must be a general intent to

1 commit serious bodily injury. Intent means intending the
2 result which actually occurs, not accidentally or
3 involuntarily. Intent may be shown by the acts and conducts
4 of the defendant and other circumstances from which you may
5 naturally and reasonably infer intent.

6 Evidence of the character of the assault, the character
7 of the instrument used, the manner in which it was used and
8 the purpose to be accomplished may be considered in
9 determining intent -- which the assault was committed.

10 Now, the defendant is also charged with armed robbery.
11 In order to prove this offense the state must first prove
12 beyond a reasonable doubt that the defendant took personal
13 property from the person or presence of another person.
14 Property is in the presence of a purpose -- excuse me.
15 Property is in the presence of a person if it is within the
16 person's reach, inspection, observation or control so that
17 the person could, if not overcome with violence or prevented
18 by fear, keep possession of the property.

19 The state must also prove beyond a reasonable doubt
20 that the defendant carried the property away intending to
21 permanently deprive the owner of the property and to keep
22 the property for the defendant's own use.

23 The slightest removal of the property or the complete
24 possession of the property, even for an instant, by the
25 defendant is sufficient to show a taking and carrying away

1 of the property. The taking and carrying away of the
2 property must have been done -- must have been done with violence
3 or by putting the owner of the property in fear of violence.

4 Finally, the state must prove beyond a reasonable doubt
5 that the defendant was armed or became armed with a deadly
6 weapon during the robbery. A deadly weapon is any article,
7 instrument or substance which is like to cause death or
8 great bodily harm. Whether an instrument has been used as a
9 deadly weapon depends on the facts and circumstances of each
10 case.

11 Now, in order to establish criminal intent, excuse me,
12 criminal liability, criminal intent is required. For
13 example, the mental state required to be proven by the state
14 for a particular crime might be purpose, intent, knowledge,
15 recklessness or criminal negligence.

16 Criminal intent must be proven by the state beyond a
17 reasonable doubt. Criminal intent is always a matter that
18 must be determined by the jury from the circumstances
19 surrounding the situation.

20 There is no way to prove intent to a mathematical
21 certainty. There is no way medical science can dissect a
22 person's brain and determine what the person had in mind.

23 So the law says that criminal intent may be inferred
24 from the circumstances shown to have existed. This is how
25 you make a determination of whether or not the element

1 requiring intent was present.

2 It is not necessary to establish intent by direct and
3 positive evidence, but intent may be established by
4 inference in the same way as any other fact, by taking into
5 consideration the acts of the parties and all of the facts
6 and circumstances of the case. Criminal intent is a mental
7 state, a conscious wrongdoing. It is up to you to determine
8 what the defendant intended to do based on the circumstances
9 shown to have existed.

10 Ladies and gentlemen of the jury, you have been
11 selected as fair and impartial jurors sworn to impartially
12 try and determine the facts of this case. And when you
13 comply with your oath to do so, then no one will have a
14 right to criticize your verdict, and you will have fully
15 discharged your duty as jurors.

16 You are to decide this case according to the testimony
17 that you have heard from the lips of the sworn witnesses,
18 along with the other evidence that has been introduced.

19 I charge you that as jurors you must decide the issues
20 in this proceeding without bias and without prejudice to any
21 party. You cannot allow yourself to be governed by
22 sympathy, by prejudice, by passion, by public opinion or any
23 other arbitrary factor.

24 Both the state and the defendant have the right to
25 expect that each of you will carefully and impartially

1 consider all of the evidence in this case and that you will
2 follow the law as I have explained it to you.

3 Now, ladies and gentlemen, I thank you very much for
4 the attention that you have paid throughout the course of
5 this trial to the lawyers, to the witnesses and to me. And
6 I want to direct your continued attention to me as I go over
7 the indictments and the forms of verdict in these cases.

8 Now, ladies and gentlemen of the jury, there are three
9 separate indictments. The first indictment that I am going
10 to consider, and, please, attach no significance to the fact
11 that I list one indictment or charge before the other or
12 that I list one verdict before the other. It is very simply
13 that one must be listed first.

14 I hold in my hand Indictment 2000-GS-42-0617, which is
15 a charge, count one, of murder; count two, possession of a
16 firearm during the commission of a violent crime.

17 As to count one, and I have placed on the back of the
18 indictment in a space which is entitled verdict, count one
19 and count two.

20 Now, ladies and gentlemen of the jury, there are two
21 possible verdicts that you may reach as to each count of the
22 indictment, guilty or not guilty.

23 And, Madam Foreperson, once all 12 members of the jury
24 have unanimously agreed to one of those two verdicts, either
25 guilty or not guilty as to count one, murder, you will write

1 out the word guilty or not guilty.

2 Then as to count two, possession of a firearm during
3 the commission of a violent crime, please infer nothing from
4 what I explained to you. It is very simply that in order
5 for the defendant to be -- to even consider this count of
6 possession of a firearm during the commission of a violent
7 crime, you would have to find that he was guilty of murder.

8 If he was found not guilty of murder, then you would
9 not even consider count two. However, if he was found
10 guilty of murder, then you would consider count two. And
11 the verdicts that you may reach are either guilty or not
12 guilty.

13 And once you unanimously reach one of those two
14 verdicts, Madam Foreperson, you would write out either
15 guilty or not guilty in the space provided. Sign your name
16 as the foreperson of the petty jury and date it today, which
17 is October the 20th, 2001.

18 Then, ladies and gentlemen, Indictment 2000-GS-42-0619
19 charges the defendant, Richard Bernard Moore, with assault
20 with intent to kill.

21 Once again, there is a space on the back of the
22 indictment, Madam Foreperson and ladies and gentlemen,
23 entitled verdict. There are two possible verdicts that you
24 may reach as to this indictment.

25 Once again, please attached no significance to the fact

1 that I list one before the other. It is very simply that
2 one must be listed first. The possible verdicts are guilty
3 or not guilty.

4 And, madam foreperson, once all 12 of the jurors, of
5 you jurors, unanimously agree with one of those two
6 verdicts, you will write out either the word guilty or the
7 words not guilty in the space provided, sign your name as
8 the foreperson and date it today.

9 Then in Indictment 2001-GS-42-2460, ladies and
10 gentlemen, that is the charge of armed robbery. Once again,
11 in the lower left-hand corner of the indictment is the form
12 of verdict. There are two possible verdicts. And please
13 attach no significance to the fact that I list one before
14 the other. It's very simply that one must be listed first.

15 The verdicts are guilty or not guilty. Once you
16 unanimously reach one of those two verdicts as to this
17 indictment for armed robbery, simply write the word guilty
18 or not guilty in the space provided. Sign your name as the
19 foreperson, date it today. And your deliberations would be
20 concluded.

21 Now, ladies and gentlemen, as you have heard me say
22 throughout the course of my instruction to you on these
23 indictments, your verdicts must be unanimous. They must be
24 the verdict of all 12 of you.

25 The word verdict comes from the Latin word veredicto,

1 which means to speak the truth.

2 And once you reach a verdict to which you all 12 agree,
3 then it will speak the truth of you collectively as a jury,
4 as well as individually.

5 Now, Madam Foreperson and ladies and gentlemen, before
6 I send you to the jury room for your deliberations, let me
7 instruct you that you are not to begin your deliberations
8 until I instruct you to do so.

9 It may be necessary for me to bring you back into the
10 courtroom for further instructions. If I do that, it will
11 be very quickly. So be prepared for that.

12 If it is not necessary for me to bring you back into
13 the courtroom for further instructions, I am going to send
14 the indictments with the forms of verdict, together with all
15 of the evidence that has been introduced into this case,
16 back to the jury room. And you will then be instructed to
17 begin your deliberations.

18 If you happen to have a question during the course of
19 your deliberations, Madam Foreperson, you will have paper
20 and a pad back there. Simply write out the question, sign
21 your name as the foreperson, knock on the door, give it to
22 the bailiff and he will see that it's delivered to me, and I
23 will address it as I am permitted under the law of the State
24 of South Carolina.

25 Once again, once you have reached a verdict to which

1 you all 12 agree and you have filled out the verdict forms
2 as I have instructed you, Madam Foreperson, simply knock on
3 the door. Tell the bailiff that you have reached a verdict
4 in these cases. We will bring you back into the jury room
5 to publish those verdicts. Once again, please keep in mind
6 that your verdicts must be unanimous. They must be the
7 verdict of all 12 of you.

8 And please do not begin your deliberations until I
9 instruct you to do so.

10 I am going send you to the jury room, once again, with
11 the instructions that you are not to begin your
12 deliberations until I instruct you to do so.

13 And please hold the two alternates just outside the
14 courtroom.

15 The jury may retire.

16 (Whereupon, the jury retired to deliberate at
17 5:17 p.m.)

18 THE COURT: Exceptions or additions from the state?

19 MR. GOWDY: No objections, no exceptions, Your Honor.

20 THE COURT: From the defendant?

21 MR. MORIN: Your Honor, at this time we would renew our
22 motion for manslaughter and larceny.

23 THE COURT: Yes, sir.

24 MR. MORIN: Your Honor, we are also -- the defense is
25 somewhat -- when you instructed the jury to fill out their

1 verdict, you told them to put today's date.

2 We would object to that because it seems at this late
3 hour that you told them that they need to make a decision
4 today.

5 THE COURT: No, sir. I haven't told them anything;
6 that if they can't reach a verdict today, they go home and
7 sleep on it. They will write tomorrow's date on there, and
8 I would reinstruct them at that time.

9 So, your exceptions are noted.

10 And when we talk about it being late, it is only 5:17.
11 By most standards that's not very late, Mr. Morin.

12 All right. Gentlemen, I want you to go over all of the
13 evidence. Make sure that it's properly before the Court
14 before we send it back to the jury room.

15 (Pause.)

16 THE COURT: All right. Is the state in agreement as to
17 all of the exhibits and to the indictments as they have been
18 prepared by the Court, and the verdict forms?

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

20 THE COURT: The defendant?

21 MR. MORIN: Yes, sir.

22 THE COURT: All right. Mr. Bailiff, if you would,
23 please, take the indictments and the evidence to the jury,
24 and tell the jury that they may begin their deliberations.

25 If you would, please get Mr. McCloud or someone, one of

1 the custodians, to step out here, please.

2 Jury custodian, please. I want the jury custodian out
3 here.

4 THE BAILIFF: Okay.

5 THE COURT: If you would, please, make sure the
6 alternates are sequestered from the jury during their
7 deliberations.

8 THE JURY CUSTODIAN: Yes, sir. That is being attended
9 to now.

10 (Whereupon, the exhibits and verdict forms were
11 submitted to the jury at 5:27 p.m.)

12 THE COURT: All right. Now the jury is going to
13 commence their -- now that the jury is commencing their
14 deliberations, we are going to stand at ease until we get a
15 question or a verdict.

16 Let me tell everyone that is in the courtroom, when
17 a -- when the jury renders its verdict, if you do not feel
18 that you can control your emotions, you need to stay
19 outside, because I will not tolerate any outbursts
20 whatsoever.

21 If there are any violations of my orders, please
22 understand. I think the solicitor and the defense lawyers
23 will tell you that I am as good as my word. I will see that
24 you are taken into custody. And we will have a contempt
25 hearing after this trial is completed, because I have a

1 couple of more to go.

2 We will stand at ease.

3 MR. GOWDY: Thank you, Your Honor.

4 THE COURT: Thank you, gentlemen.

5 (Whereupon, a recess was taken.)

6 THE COURT: Can we proceed without, Mr. Kelly?

7 MR. MORIN: Yes, sir. We are going to have Mr. Moore
8 brought around.

9 THE COURT: Yes, sir. We are going to get Mr. Moore in
10 here for sure. Or we can wait on Mr. Kelly. He should be
11 back. Whatever you want to do.

12 MR. MORIN: No. I think I can handle this.

13 THE COURT: Thank you.

14 (Whereupon, the defendant was returned to the
15 courtroom.)

16 THE COURT: All right. Let the record reflect I have
17 received a question from the jury, "Could you tell us where
18 Hillside Drive is in reference to Nikki's Store?"

19 I am going to bring them back and tell them that they
20 are the judges of the facts and I am the judge of the law
21 and it would be impermissible for me to make any comment as
22 to the facts in the case, that they will have to recall from
23 the testimony that has been presented to determine the
24 answer to their question; and send them back to continue
25 their deliberations.

1 Bring them back, Cotton.

2 (Whereupon, the jury returned to the courtroom at
3 5:54 p.m.)

4 THE COURT: Madam Foreperson, I received your note
5 where you ask the question, "Could you tell us where
6 Hillside Drive is in reference to Nikki's Store?"

7 As I have told you throughout the course of this week
8 and throughout the course of this trial, you are the judges
9 of the facts. I am the judge of the law.

10 It is improper and impermissible for me to make any
11 comment as to the facts in a case.

12 This is a factual question which you have asked, and
13 you will have to recall from the testimony and evidence
14 that's been presented the answer to the question that you
15 pose, because that is not something that I can give you,
16 given the question that you have presented to me.

17 And with that and in that regard, if you can recollect
18 a particular witness to whom you could attribute this
19 information, and we could replay that for you, let the court
20 reporter replay the tape, we would be more than happy to.

21 However, that is not something that as the judge of the
22 law that I can provide to you as to whether or not it has
23 been revealed throughout the course of the testimony.

24 So with all of that, I am going to send you back to the
25 jury room to continue your deliberations.

1 (Whereupon, the jury retired to deliberate at
2 5:55 p.m.)

3 (Question from the jury marked Court's Exhibit Number
4 Ten.)

5 THE COURT: Anything else from the state?

6 MR. GOWDY: No, sir.

7 THE COURT: From the defense?

8 MR. KELLY: No, sir.

9 THE COURT: All right. We will stand at ease for a
10 little bit longer.

11 (Whereupon, a recess was taken.)

12 THE COURT: All right. Let me remind everyone in the
13 courtroom the jury has reached a verdict.

14 Once again, if you do not feel that you can control
15 your motions, you need to remove yourself from the
16 courtroom, because I will not tolerate any outbursts
17 whatsoever.

18 Let's bring them back, please..

19 (Whereupon, the jury returned to the courtroom to
20 report its verdict at 7:30 p.m.)

21 THE COURT: Madam Foreperson, it's my understanding
22 that you have reached a verdict to which you all 12 agree.
23 Is that correct?

24 THE FOREPERSON: Yes, sir.

25 THE COURT: And you filed out the verdict forms as I

1 instructed?

2 THE FOREPERSON: Yes, sir.

3 THE COURT: Please hand them to the bailiff, ma'am.

4 All right. Madam clerk, you may publish the verdict.

5 THE CLERK: Indictment Number 2000-GS-42-617, the State
6 vs. Richard Bernard Moore, indictment for murder and
7 possession of a firearm during the commission of a violent
8 crime, count one guilty; count two, guilty.

9 Indictment Number 2000-GS-42-619, the State vs. Richard
10 Bernard Moore, indictment for assault with intent to kill,
11 verdict, guilty signed by the forelady.

12 Indictment Number 2001-GS-42-2460, the State vs.
13 Richard Bernard Moore, indictment for armed robbery, the
14 verdict, guilty, signed by the forelady.

15 Madam Forelady and ladies and gentlemen of the jury,
16 are these your verdicts and still your verdicts, so say
17 y'all?

18 THE COURT: If that is your verdict, would you please
19 raise your right hand?

20 (Whereupon, all jurors responded in the affirmative.)

21 THE COURT: Thank you very much.

22 Let the record reflect that each and every juror has
23 raised their hand in response to the clerk's question and
24 the Court's question.

25 Anything further from the state before I send the jury

1 back to the jury room?

2 MR. GOWDY: No, sir, Your Honor.

3 THE COURT: From the defense?

4 MR. MORIN: No, sir.

5 THE COURT: Ladies and gentlemen of the jury, at this
6 point in time I'm going to return you to the jury room.

7 Once again, you are not to discuss any facet of this
8 case as I return you to the jury room.

9 You may take them back to the jury room.

10 (Whereupon, the jury was excused from the courtroom.)

11 THE COURT: All right. Any motions?

12 MR. MORIN: Yes, sir.

13 ~~At this time the defense would make a motion for a new~~
14 ~~trial based on the evidence not supporting the verdict that~~
15 ~~has been received by the Court.~~

16 THE COURT: Of course, Mr. Morin, throughout the course
17 of the trial I have received various motions and ruled upon
18 them.

19 I have allowed the jury to consider the testimony and
20 the evidence and apply the law as I instructed. I felt like
21 there was ample evidence both of a direct and circumstantial
22 nature on which the jury could render their verdict.

23 The jury has deliberated now for a couple of hours, and
24 they have reached their verdict; and, as such, your motion
25 is denied.

1 Now, insofar as the manner in which we proceed, of
2 course, the defendant has 24 hours which he can either
3 accept or waive insofar as proceeding with the trial.

4 What is the -- gentlemen, as you know, under the law of
5 our state and by statute a defendant has a right to invoke a
6 24-hour cooling-off period.

7 And as such, I will ask you if you want to discuss that
8 with your client at this time. He certainly has the right
9 to ask for that or to waive it. So, would you please
10 advise?

11 ~~MR. KELLEY:~~ Your Honor, if it please the Court, we
12 ~~would like our 24 hours.~~

13 THE COURT: That is your decision also, Mr. Moore?

14 ~~THE DEFENDANT:~~ Yes, it is, Your Honor.

15 THE COURT: All right. Thank you very much, gentlemen.

16 What I will do, gentlemen, since we are at 7:35 on
17 Saturday evening, I am going to bring the jury back. And I
18 will advise the jury custodians. I am going to bring them,
19 as well as the two alternates, back, advise them that we
20 have a 24-hour waiting period.

21 Rather than us starting tomorrow night at around eight
22 o'clock, which would be kinda counterproductive, we will
23 pick back up Monday morning at 9:00 a.m. and start at that
24 time.

25 Before we disburse here tonight, there are some things

1 that I will need to talk with you all about insofar as
2 finalizing our preparations for Monday morning.

3 So, with that, let's bring the jury back, including the
4 alternates.

5 (The following takes place in the presence of the
6 jury.)

7 THE COURT: Madam Foreperson, ladies and gentlemen of
8 the jury, as a result of the jury's verdict in this case, we
9 now proceed to the sentencing phase of the trial.

10 There is a 24-hour cooling-off period that's prescribed
11 by statute here in South Carolina. And, as such, given the
12 fact that we are at 7:35 or 36 in the evening here on
13 Saturday night, rather than starting back tomorrow night and
14 working for a short period of time, we're going to start
15 back Monday morning at 9:00 a.m. in the second phase, the
16 sentencing phase, of our trial.

17 As I send you away for this evening, let me remind you,
18 first of all, that you are not to discuss this case among
19 yourselves in any manner or fashion whatsoever.

20 Also, you are not to discuss it with your jury
21 custodians or anyone else that you might come in contact
22 with.

23 Furthermore, you are not to read, watch or listen to
24 any news accounts concerning this case. And if anyone
25 should attempt to contact you concerning this case, I want

1 you to gather as much information about that person or
2 persons as you possibly can, and report that to your jury
3 custodians immediately. And they will see that I am
4 properly notified.

5 As you know, you are going to be -- I think
6 arrangements have already been made for your dinner for
7 tonight. The jury custodians will be in charge of you
8 tomorrow.

9 During this 24-hour period they will take very good
10 care of you and see that you are properly cared for, and
11 I'll look forward to seeing you back here Monday morning at
12 9:00 a.m.

13 The jury is excused. Everyone else remain seated while
14 they exit the courtroom, please.

15 (The following takes place outside the presence of the
16 jury.)

17 THE COURT: Mr. Bailiff, let's make sure that all of
18 the evidence is brought back into the courtroom at this
19 time, please, sir.

20 While they are in the process of bringing that back in,
21 I need to get from the state your statutory aggravating
22 circumstances. If you have those prepared, I would like to
23 have them; and any statutory mitigating circumstances,
24 gentlemen. This won't necessarily be your final list, but
25 certainly I would like to have what you intend at this time

1 to be offering.

2 I think the state would probably be in a better
3 position than maybe the defense insofar as all of them are
4 concerned, but I am sure that this is something that
5 everyone has been involved with.

6 During the intervening time, of course, I will be in
7 the process of preparing the necessary forms so that I will
8 have those for you on Monday. Hopefully by the time that we
9 start I will have you a copy of the charge that I intend to
10 use in the sentencing phase, provided I have all of the
11 statutory aggravating and mitigating circumstances.

12 So, we may not have all of that right at the time that
13 we start on Monday morning, but by the time that we reach
14 the middle part of the day on Monday I will have them to
15 you.

16 All right. Anything else from the state prior to us
17 breaking for the night?

18 MR. GOWDY: Your Honor, would the Court allow us to
19 approach for one moment and discuss something?

20 THE COURT: Yes, sir. Come right on up.

21 (Bench conference held off the record.)

22 THE COURT: All right. Given where we are, gentlemen,
23 and we have had a bench conference trying to discuss exactly
24 what our prospects would be for things tomorrow, I know that
25 you all have a lot to work on. Y'all have a lot to work on.

1 I have some things to work on.

2 I have given you my home phone number if you need me
3 for any particular reason, any problems that might come up.

4 The jury custodians -- I will be in touch with them. I
5 know that they do have plans. I had already discussed with
6 them that in the event we got a verdict later in this day
7 that we would not start until Monday morning, because it's
8 just -- if we had got something earlier in the day, we could
9 have started tomorrow afternoon. But it is just not worth
10 it to try to do that.

11 So we will be back here on Monday morning at 9:00 a.m.
12 I will look forward to seeing you then.

13 Thank you very much. We will stand in recess until
14 then.

15 END OF PROCEEDINGS OCTOBER 20, 2001
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1608 1 STATE OF SOUTH CAROLINA)
2) IN THE COURT OF GENERAL SESSIONS
3 COUNTY OF SPARTANBURG)

4 The State,)

5 -vs-)

6 Richard Bernard Moore,)

7 Defendant.)

TRANSCRIPT OF RECORD

00-GS-42-617;618;619

October 15 - 22, 2001

Spartanburg, South Carolina

9 B E F O R E:

10 HONORABLE GARY E. CLARY, JUDGE; and a jury
11
12

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

14 HAROLD W. GOWDY, III, ESQUIRE

15 BARRY J. BARNETTE, ESQUIRE

16 JAMES DONALD WILLINGHAM, II, ESQUIRE

Attorneys for the State

17 RALPH KEITH KELLY, ESQUIRE

18 MICHAEL DAVID MORIN, ESQUIRE

JENNIFER JOHNSON, ESQUIRE

Attorneys for the Defendant
19
20
21
22
23

LINDA D. MOFFITT

Circuit Court Reporter
24
25

(The following takes place outside the presence of the jury.)

THE COURT: Let me see Ms. Lindsay, please, Juror 160. The lawyers may approach.

(The following takes place at the bench with Juror Number 160.)

THE COURT: Good morning, Ms. Lindsay.

I understand from the jury custodians that your friend, Ms. Cash, that we received the call about has passed away.

THE JUROR: Yeah.

THE COURT: Do you know anything concerning the arrangements or anything?

THE JUROR: No, sir. I can't get in touch with the family.

THE COURT: Could you -- you know I am willing to do whatever you want to do. If you feel like you need to be away, certainly I can take that into consideration.

If you want to stay with us and let us try to find out whatever we can about the arrangements --

THE JUROR: That will be fine. I don't expect them to be doing anything before Wednesday.

THE COURT: So you will remain with us.

THE JUROR: Yes, sir.

THE COURT: If you all will, kind of check on the

1 arrangements and everything.

2 (Whereupon, the juror was excused from the courtroom.)

3 THE COURT: All right. Let the record reflect that I
4 have examined Juror 160, one of our alternates, Ms. Lindsay.

5 We had received a message the other day about a friend
6 of hers that had been very ill, and she has passed away.

7 I wanted to check with Ms. Lindsay to see what the
8 status was, because she was very close to this lady.

9 She desires to remain with us. We are going to try to
10 find out as much as we can about the arrangements and advise
11 her of that as we go along.

12 All right. Before we get started, anything from the
13 state?

14 MR. GOWDY: Your Honor, we would obviously move to
15 incorporate all of the evidence from the guilt phase into
16 the penalty phase at this point.

17 THE COURT: All right. Anything from the defense?

18 ~~MR. KELLY: Well, Judge, I understand that to be the~~
19 ~~law in this case.~~

20 THE COURT: Yes, sir.

21 The state's motion to incorporate the evidence from the
22 guilt phase to the sentencing phase is granted.

23 The manner in which we will proceed, of course, I have
24 some introductory instructions that I will give the jury.
25 Then we will, once again, proceed in the same manner with

1 the opening statements from the state and the defense, and 1611
2 then the presentation of evidence as is customary.

3 Is the state ready to proceed?

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

5 THE COURT: Is the defense ready?

6 MR. KELLY: Yes, sir, Your Honor.

7 THE COURT: All right. Cotton, let's bring them back.

8 (The following takes place in the presence of the
9 jury.)

10 THE COURT: Polling of the jury by the state?

11 MR. GOWDY: The state would waive, Your Honor.

12 THE COURT: By the defense?

13 MR. KELLY: The defense waives, Your Honor.

14 THE COURT: Madam Foreperson, ladies and gentlemen,
15 welcome back.

16 Ladies and gentlemen of the jury, the defendant,
17 Richard Richard Moore, was convicted on October 20, 2001, of
18 the offense of murder and the offenses of possession of a
19 weapon during the commission of a violent crime, assault
20 with intent to kill and armed robbery.

21 It therefore becomes necessary for us to hold this
22 additional proceeding which will determine the punishment
23 that the Court is to impose upon the defendant.

24 Section 16-3-20 of the South Carolina Code of laws as
25 amended provides in part as follows: A person who is

1612 1 convicted of or pleads guilty to murder must be punished by
2 death or imprisonment for life.

3 That section as further amended also provides in part
4 upon conviction of a defendant of murder the Court shall
5 conduct a separate sentencing proceeding to determine
6 whether the defendant should be sentenced to death or life
7 imprisonment.

8 So our purpose in conducting the proceeding in which we
9 are now engaged is to determine whether the defendant,
10 Richard Bernard Moore, should be sentenced by the Court to
11 death or to life imprisonment.

12 With respect to your particular role in this
13 proceeding, you will be asked to recommend to the Court
14 whether it should sentence the defendant, Richard Bernard
15 Moore, to death or to life imprisonment.

16 During this sentencing proceeding the state and the
17 defendant will have an opportunity to introduce additional
18 evidence in aggravation, extenuating or mitigation. And
19 both sides will have an opportunity to present arguments for
20 and against the death penalty.

21 Should you recommend a sentence of life imprisonment or
22 should you recommend a sentence of death, that is the only
23 issue involved here.

24 After the last argument has been made to you concerning
25 the punishment that should be imposed upon the defendant,

1 the Court will give you certain instructions. And you will 1613

2 then retire to determine whether a death sentence or a life
3 sentence is to be recommended.

4 We will now begin the trial.

5 Opening statement, Solicitor.

6 MR. WILLINGHAM: May it please the Court, Your Honor.

7 THE COURT: Yes, sir.

8 MR. WILLINGHAM: I want to begin, ladies and gentlemen,
9 by thanking you, thanking you for the attention that you
10 have given the testimony, the evidence in this case.

11 Thank you for the sacrifices that you and your family
12 had to make in order for you to be here today, and thank you
13 for your work.

14 In South Carolina, as the judge has told you, told you
15 during jury qualification, the state is allowed to seek the
16 death penalty in certain cases, not in every murder case,
17 but only in a murder that has aggravating circumstances.
18 And the judge told you a little bit during jury
19 qualification of what aggravating circumstances are.

20 In this case we have a murder, and we have the
21 aggravating circumstance of the murder being committed
22 during the commission of a robbery through the use of a
23 deadly weapon.

24 Ladies and gentlemen, when he was found guilty of
25 murder and armed robbery, murder, and the aggravating

1 circumstance has already been found.

2 I could sit down right now --

3 MR. KELLY: Objection, Your Honor.

4 THE COURT: Yes, sir.

5 MR. KELLY: May we approach, Your Honor?

6 THE COURT: Yes, sir.

7 (Bench conference held off the record in the presence
8 of the jury but out of the hearing of the jury.)

9 THE COURT: Ladies and gentlemen of the jury, I would
10 instruct you that your purpose in this proceeding will be to
11 determine whether or not there is the presence of an
12 aggravating circumstance that has accompanied the charge --
13 crime of murder of which you have found the defendant
14 guilty. And that is what we are to be about. And
15 thereafter you will make a recommendation after considering
16 any and all aggravating circumstances, as well as mitigating
17 circumstances.

18 MR. WILLINGHAM: Thank you, Your Honor.

19 Ladies and gentlemen, you will have before you during
20 this penalty phase all of the same evidence and all of the
21 same testimony that you had during the guilt phase.

22 And I submit to you that evidence proves that he is
23 guilty of murder and of armed robbery, which is an
24 aggravating circumstance.

25 We could stop there. And we could argue to you, ladies

1 and gentlemen, that at this point, at that point, we show
2 that evidence to you again, that he is death eligible or
3 death qualified. And we could sit down and stop.

4 But there is more. South Carolina law has an
5 additional aggravating circumstance that accompanies a
6 murder, that makes a defendant death qualified or death
7 eligible. That additional circumstance is by his actions he
8 put more than one person at risk of death in a public place.

9 The evidence of his actions toward Terry Hadden fit
10 that aggravating circumstance, that aggravating
11 circumstance. Again, murder with that aggravating
12 circumstance, sit down again, and he is death eligible, he
13 is death qualified.

14 But there is more. In South Carolina the law says that
15 an additional aggravating circumstance is a murder committed
16 for monetary gain. This case, a murder committed for
17 \$1,480. Again, he is death eligible and death qualified.

18 But there is more. You as ladies and gentlemen of this
19 jury are entitled to hear more about the victim, about what
20 makes him unique, what makes James Mahoney, James Mahoney;
21 and what effect this crime and this man's actions have had
22 on James Mahoney's family, friends and coworkers.

23 It's called victim impact. You have a right to hear
24 that.

25 But there is more. You also get to learn not only what

1 the victim contributed to society. You get to hear about
2 this man's contributions.

3 This man contributions to society date back to 1985;
4 his contribution to society, his criminal history, dating
5 back to 1985, and reaching as far as the State of Michigan.
6 You have a right to hear about that, and you will.

7 And you will hear from the victims, some of the victims
8 that he has left in his path.

9 When you have heard all of the evidence you will
10 understand and know why the state is seeking the death
11 penalty. When you have heard all of the evidence, you will
12 understand and know what punishment fits this crime. When
13 you have heard all of the evidence you will know what
14 punishment fits this defendant.

15 Thank you.

16 MR. KELLY: May it please the Court, Your Honor.

17 THE COURT: Yes, sir.

18 MR. KELLY: Thank you, Judge.

19 Madam forelady and ladies and gentlemen of the jury, I
20 too thank you for your attention and appreciate you being
21 here.

22 I want to tell you right up front today that it may
23 well be an emotional day. ~~We anticipate that the state, of~~
24 ~~course, is the one, as Mr. Willingham said, is going to tell~~
25 ~~you about Richard's criminal history.~~ Whether it be a

1 driving offense or anything else, we anticipate they are
2 going to tell you about it.

3 We anticipate that the state is going to put up the
4 victim impact testimony, which is proper in this state; that
5 some family members, possibly some coworkers and others may
6 take the stand and tell you about the uniqueness of the
7 victim. I submit that is going to be emotional.

8 We anticipate that the state may well put in other
9 photographs that the Court allows, and that may be
10 emotional.

11 You will hear about life and death today. We are not
12 here about guilt or innocence. That's been decided. That's
13 done. You are here about life or death.

14 Now, Judge Clary has told you on several occasions, and
15 specifically today, the state is going to try to introduce
16 what they call and prove to you. They have not proven that.
17 They have not proven a statutory aggravating circumstance
18 beyond a reasonable doubt. They must do so, and it must be
19 unanimous as the state seeks to prove one or more of those,
20 in this instance, I believe three they specifically
21 innumerate.

22 Judge Clary is going to tell you. He has already told
23 you, and is going to tell you again later, that even if they
24 establish one or more of those that you as a jury can come
25 back with life.

1 The state is not requiring you to return a verdict of
2 death. You have to understand it's in the jury's hands.
3 There is no law that says if they prove something like a
4 piece of evidence, then you must find for death. The law
5 says it's up to you.

6 Now, we have a right to put in what's called mitigating
7 circumstances. And those do not have to be proven beyond a
8 reasonable doubt. It's just something out there, a reason
9 to spare him.

10 Again, I thank you for your attention. It's a somber
11 moment, very somber, very serious moment. Thank you.

12 THE COURT: Call your first witness, please, Solicitor.

13 MR. GOWDY: Your Honor, may it please the Court, the
14 State of South Carolina would call James Mahoney.

15 JAMES MAHONEY, having been
16 first duly sworn, testified as follows:

17 THE COURT: Please state your name for the record, sir,
18 and spell your last name.

19 THE WITNESS: James Mahoney, M-A-H-O-N-E-Y.

20 MR. GOWDY: May it please the Court, Your Honor. Thank
21 you.

22 DIRECT EXAMINATION BY MR. GOWDY

23 Q Good morning, Mr. Mahoney.

24 A Good morning, sir.

25 Q Could you let the jury know what relation you are to

1 the victim, James Mahoney?

2 A Yes, sir. I am the father of the victim.

3 Q How many children did you have, Mr. Mahoney?

4 A Four. James was the oldest; and Kathy was the middle
5 child; and the twins are the youngest.

6 Q How long have you been married, Mr. Mahoney?

7 A Forty-five and a half years.

8 Q Where do you live now?

9 A We presently live in Blanding, Pennsylvania, although
10 we were formerly residents of Spartanburg County for about
11 24 years.

12 Q And at least one of your children, I guess maybe more
13 than one, decided to stay in Spartanburg after you and Mrs.
14 Mahoney left.

15 A Actually James and Kathy remained here.

16 Q Mr. Mahoney, I want to ask you a couple of questions
17 about your son. I want you to tell the ladies and gentlemen
18 of the jury what kind of son James was and what kind of
19 relationship you had with him.

20 A He was a good boy. He was -- he was hardworking, very
21 determined, very proud individual.

22 He was not in the best of health. In fact, several
23 years ago we offered to bring him to Pennsylvania with us
24 and live with us because of his health, and he declined. He
25 preferred to live in his little house in Boiling Springs.

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1 He was self-sufficient and very independent. He said he
2 could get along fine. He had a job. And he just preferred
3 to stay here near his sister.

4 Q Are you all a close-knit family, Mr. Mahoney?

5 A Yes, sir, we were. When we lived in the -- we lived in
6 the Boiling Springs area. We were very close-knit. The
7 children were involved in all of the local schools and
8 activities. We used to always go and support them and be
9 with them. We had big family Christmases and things of this
10 nature.

11 Q And can you tell the ladies and gentlemen of the jury
12 what impact your son's death has had on you and your wife?

13 A It has been very devastating. It's an absolute loss.
14 You've lost one of your children. And it's extremely hard
15 to explain to you unless you've experienced this yourself.
16 Part of you is gone never to return. You don't have this
17 person here anymore. The only opportunity we have now is to
18 go to the cemetery and talk to him.

19 Q How old was James when he died, Mr. Mahoney?

20 A Forty-two.

21 Q Do you remember the last time you talked to him before
22 he died?

23 A Yes. It was probably several weeks before he died. He
24 always was a big fan of -- was a NASCAR fan. And we used to
25 always kid him about Jeff Gordon because that was his

1 favorite. We discussed that on the telephone.

2 Q Now, at the time you-all discussed it you weren't much
3 of a NASCAR fan, were you?

4 A No. I never was much of a NASCAR fan. I was in to
5 baseball and football. But actually since James was killed
6 I find myself watching these races on Sunday and really
7 rooting for this guy who I don't even know.

8 Q Thank you, Mr. Mahoney.

9 THE COURT: Cross-examination.

10 MR. KERRY: No questions, Judge.

11 THE COURT: Thank you, Mr. Mahoney. You may step down,
12 sir.

13 Next witness.

14 MR. GOWDY: Your Honor, the state would call Kathy
15 Pinson.

16 KATHY PINSON, having been
17 first duly sworn, testified as follows:

18 THE COURT: Please state your name for the record, and
19 spell your first and last name, ma'am.

20 THE WITNESS: My name is Kathy Pinson, P-I-N-S-O-N.

21 THE COURT: Is your first name spelled with a K or a C?

22 THE WITNESS: K.

23 THE COURT: Thank you, ma'am.

24 MR. GOWDY: Thank you, Your Honor.

25 DIRECT EXAMINATION BY MR. GOWDY

1 Q Good morning, Ms. Pinson.

2 A Good morning.

3 Q Can you tell the ladies and gentlemen of the jury what
4 your relation to James was?

5 A James was my big brother.

6 Q Do you live in Spartanburg, Ms. Pinson?

7 A Yes, I do.

8 Q How long have you lived here?

9 A Thirty-four years.

10 Q Do you have children?

11 A Yes, I do.

12 Q And how many?

13 A I have three daughters.

14 Q Can you tell the ladies and gentlemen of the jury what
15 impact your brother's death has had on you?

16 A It has left a terrible ache in my heart, one that will
17 never heal. Part of me is gone, and I can't get it back. I
18 can't talk to him any more. I can't visit him.

19 Q Y'all were in Spartanburg together?

20 A Yes, we were.

21 Q Did you see one another very often?

22 A Yes. We saw each other all of the time. He came over
23 every Sunday for dinner.

24 Q You testified you had three children. Did your
25 children have a relationship with James?

1 A Yes, they did. He was the godfather to my oldest
2 daughter, as well as their uncle.

3 He took them places. He helped to teach my oldest
4 daughter to drive. On their birthdays he would take them to
5 the mall and let them buy whatever they wanted to buy.

6 In fact, a week before he was killed he told my
7 youngest daughter that he would take her to Nikki's when
8 they relocated, and they would have lunch together. They
9 would have hot dogs. And now that will never happen.

10 Q Did he celebrate holidays with your family?

11 A Yes, he did.

12 In fact, he was there at our house the Christmas before
13 he was killed. And the Thanksgiving after he was killed,
14 the entire family was at our house except him, of course.

15 And we waited all day and looked out the windows just
16 waiting for him, just like we normally did, expecting him to
17 walk through our door saying happy Thanksgiving, happy
18 birthday to our mother, whose birthday happened to be that
19 day. He never came.

20 Q Did he have a close relationship with your children?

21 A Yes, he did, very close.

22 He would come over when they were younger on Thursday
23 evenings and quiz them on their spelling words. And then he
24 would call back a couple of days later to make sure they did
25 good on their spelling test. He was very involved with the

1 children.

2 Q Has his death had an impact on their life as well as it
3 has yours?

4 A Absolutely. My youngest daughter cannot understand why
5 her uncle is not here any more. And for the rest of my life
6 I will never be able to explain to her why he is not.

7 MR. KELLY: Can we approach, Your Honor?

8 (Bench conference held off the record in the presence
9 of the jury but out of the hearing of the jury.)

10 THE COURT: Ladies and gentlemen of the jury, I have a
11 matter of law that I need to take up with the attorneys.

12 As I send you to the jury room, once again, please do
13 not discuss this case among yourselves. We will get you
14 back in just a very few minutes.

15 The jury may retire. Everyone else remain seated,
16 please.

17 (The following takes place outside the presence of the
18 jury.)

19 THE COURT: All right. Mr. Kelly, I will be glad to
20 hear from you, sir.

21 MR. KELLY: Judge, one of the three photographs that
22 the prosecutor intends to offer into evidence is a
23 photograph -- do you want us to mark it, Judge, so we can
24 identify it?

25 THE COURT: Well, I mean, you can just tell me what it

1 is. All of this marking for identification and everything
2 wastes a lot of time. If it is going to come in, I mean, I
3 am either going to let it in or I'm not.

4 MR. KELLY: Yes, sir. Okay, Judge.

5 ~~This is a photograph that depicts what appears to be~~
6 ~~Christmas. It has some children in it.~~ The other two
7 photographs do not. That also has a Christmas photograph,
8 but it doesn't have the small children in it, which we think
9 is consistent. I'm specifically talking about the one
10 photograph.

11 And, Judge, ~~I would submit for the Court's~~
12 ~~consideration that this photograph is -- is overly~~
13 ~~prejudicial to the defendant in this particular case.~~

14 This lady has, of course, testified to that. And I
15 think we all understand as jurors that the children are
16 small and that the children are never going to get to see
17 their uncle again at Christmas.

18 I would respectfully submit that the probative value of
19 this particular photograph is overly prejudicial to them.

20 THE COURT: All right. Solicitor.

21 MR. GOWDY: Your Honor, if it please the Court, State
22 vs. Rocheville, State vs. Johnson, State vs. James Neal
23 Tucker all stand for the proposition that photographs
24 showing the victim impact are admissible, Your Honor,
25 including -- one of those cases involves a victim holding a

1 godchild, and other cases involve Christmas decorations.

2 This witness has testified that this was the only uncle
3 living in the area for her children, and the picture depicts
4 them at Christmas opening presents.

5 If it is prejudicial, I hate that for Mr. Kelly. But
6 the fact is he had a relationship with these three children,
7 and this picture depicts that.

8 And, frankly, Your Honor, the picture is not
9 prejudicial. The picture is three kids watching an uncle
10 opening Christmas presents.

11 THE COURT: Well, I think we all understand the issues
12 that are presented in a sentencing phase of a case involving
13 wherein the state seeks the death penalty. And that's what
14 we are now engaged in.

15 And I think that certainly victim impact evidence under
16 the case of Payne vs. Tennessee, as well as the South
17 Carolina cases of State vs. Humphrey, State vs. Byram and a
18 whole host of others. My good friend Judge Henry Floyd
19 tried the Humphries case over in Greenville. I tried the
20 Byram case down in Richland County.

21 Certainly I understand the motion that you make,
22 Mr. Kelly, that the probative value is not outweighed by the
23 prejudice to the defendant, but the thing that is unique
24 about cases such as this as opposed to a trial in which the
25 state does not seek the death penalty is that nothing ever

1 comes out about the victim in those other cases, and that's
2 what makes these cases unique.

3 From my view of the photograph in question, I find
4 there is absolutely nothing wrong with that photograph. I
5 think it depicts this individual.

6 And, as such, I find that the probative value certainly
7 outweighs any prejudice to the defendant; and I, quite
8 frankly, don't find any prejudice in that regard.

9 As such, they will be admitted if you want to go ahead
10 and mark them.

11 MR. KELLY: Thank you, Judge.

12 MR. GOWDY: Thank you, Your Honor.

13 THE COURT: Well, wait just one second, because the
14 court reporter can't -- she is good, but even Linda Moffitt
15 is not that good.

16 All right. Madam reporter, how about marking those?
17 Then we will let you speed things along.

18 (Photographs marked State's Exhibits Numbers
19 Forty-five, Forty-six and Forty-seven for Identification.)

20 MR. WILLINGHAM: May it please the Court, Your Honor.

21 THE COURT: Yes, sir.

22 MR. WILLINGHAM: As far as the autopsy photographs and
23 other victim photographs of the scene, I will pass up to the
24 Court four pictures.

25 Your Honor, the first picture depicts the victim as he

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1 was found at the scene. That's a better shot of his arm
2 with the broken humerus that Dr. Wren has testified and
3 would testify to again.

4 The other photograph that is already in evidence,
5 State's Exhibit Number Thirty-four, does not depict that
6 injury, and I think the jury would be able to understand.

7 The other three pictures show the entry wound to the
8 chest, the exit wound from the chest and the entry wound to
9 the arm. Therefore, we believe it proper.

10 MR. KELLY: May it please the Court, Your Honor.

11 THE COURT: Yes, sir.

12 MR. KELLY: Judge, at this time the defense would argue
13 that the prejudicial effect is greater than the probative
14 value of the photograph that depicts the decedent -- the
15 decedent's face.

16 And in the alternative we would ask the Court the
17 photograph be cropped at that point if the intent of the
18 state is to show the wound. There would be no objection to
19 cropping that.

20 MR. WILLINGHAM: I would like to have the picture as it
21 is, Your Honor.

22 THE COURT: I understand what you would like to have.

23 All right. I am going to ask you to crop the
24 photograph in question. The rest of them are admissible.

25 MR. KELLY: Thank you, Your Honor.

1 MR. WILLINGHAM: Your Honor, as far as other items we
2 may intend to introduce along the way here, we have
3 certified copies of his convictions from Michigan. We have
4 the custodian, the clerk of court, from Michigan for their
5 review.

6 We also will introduce the certified copy of the
7 indictments from South Carolina. And, again, we will have a
8 representative of the clerk's office here to do that.

9 There was a presentence investigation, Your Honor, that
10 was completed by a fellow by the name of David Saad from the
11 Macomb County Probation Department. He did a presentence
12 investigation to present to the Court before the sentencing
13 of the attempted breaking and entering in 1987. We intend
14 to introduce that as well through Mr. Saad.

15 MR. KELLY: My understanding, Your Honor, under the law
16 of this state, those will come in if the people are here to
17 testify to it.

18 THE COURT: Yes, sir. All right. They are coming in.

19 MR. WILLINGHAM: Thank you, Your Honor.

20 There is one indictment I do need to bring the Court's
21 attention to. That's Indictment 96-1959 -- GS-42-1959.
22 It's a South Carolina indictment. The indictment is for C.
23 S. C. first degree. He pled guilty to assault and battery
24 of a high and aggravated nature.

25 What we are going to do is only introduce the assault

Direct examination by Mr. Gowdy

1 and battery of a high and aggravated nature. I don't
2 believe it will be proper for us to introduce C. S. C. I
3 wanted to make that aware to the Court so that when we pass
4 this up to you, you will understand what we are doing.

5 THE COURT: Yes, sir.

6 MR. KELLY: Well, Judge, ~~that's~~ exactly my position.
7 ~~They can introduce the ABHAM part of it, but the victim in~~
8 ~~that is deceased.~~

9 MR. WILLINGHAM: What we would do, Your Honor, is
10 instead of introducing that indictment, is ask the clerk
11 what he's convicted of, when it occurred and who the victim
12 was.

13 THE COURT: All right.

14 MR. KELLY: ~~But not what he is charged with,~~ Your
15 Honor?

16 MR. WILLINGHAM: The original charge --

17 THE COURT: The original charge is not coming in. Just
18 make sure the clerk is aware of that.

19 All right. Okay. Let's bring our jury back.

20 MR. GOWDY: Thank you, Your Honor.

21 (The following takes place in the presence of the
22 jury.)

23 THE COURT: Thank you very much, Madam Foreperson and
24 ladies and gentlemen.

25 You may continue, Solicitor.

1 MR. GOWDY: May it please the Court, Your Honor.

2 Q Ms. Pinson, let me show you what has been marked as
3 State's Exhibits Forty-six, Forty-seven and Forty-five and
4 ask you whether or not you recognize those three pictures.

5 A Yes, I do.

6 Q Are those pictures that you were familiar with and
7 that, in fact, were in your possession until you gave them
8 to me?

9 A Yes, they were.

10 MR. GOWDY: Your Honor, we would move Forty-five and
11 Forty-six and Forty-seven into evidence.

12 THE COURT: Noting the previous objection and the prior
13 ruling of the Court, it will be admitted.

14 (Photographs marked State's Exhibits Numbers
15 Forty-five, Forty-six and Forty-seven.)

16 MR. GOWDY: Your Honor, could I ask permission to
17 publish these to the jury?

18 THE COURT: Yes, sir.

19 MR. GOWDY: Thank you, Your Honor.

20 Q Before I do that, Ms. Pinson, let me ask you one quick
21 question. What do you miss most about your big brother?

22 A Miss his future with us; miss holidays. I miss him
23 coming over on Sundays. But more than anything, I miss his
24 voice; not being able to talk to him, to hear him, to hear
25 him knock on my back door on Sunday as he entered my house

1 and call out to me and say, hey, Sue, what's for supper. I
2 will never hear that again.

3 Q Thank you, Ms. Pinson. I have no further questions.

4 MR. KELLY: No questions, Your Honor.

5 THE COURT: Thank you, ma'am. You may step down.

6 Next witness.

7 MR. GOWDY: Your Honor, the state would call Jeff
8 Mahoney.

9 JEFF MAHONEY, having been
10 first duly sworn, testified as follows:

11 THE COURT: Sir, please state your name for the record,
12 and spell your last name.

13 THE WITNESS: My name is Jeff Mahoney, M-A-H-O-N-E-Y.

14 DIRECT EXAMINATION BY MR. GOWDY

15 Q Good morning, Mr. Mahoney. I notice from your uniform
16 that you are in the armed services. Can you tell the ladies
17 and gentlemen of the jury what branch you serve in?

18 A I'm in the United States Army.

19 Q How long have you been in the Army?

20 A Approximately 15 years.

21 Q Where are you stationed?

22 A I'm currently station in Quantan in the Republic of
23 South Korea.

24 Q And what is your relation to James Mahoney, the victim?

25 A James is my oldest brother.

1 Q And what's the age difference between you and your
2 brother?

3 A Six years.

4 Q Can you give the ladies and gentlemen of the jury a
5 sense of what impact his death has had on you?

6 A The devastation, the loss that was created produced
7 emotions that I am not quite certain that can be described
8 in the language that we speak. I don't know that there is a
9 word for it.

10 Small, little things that he did, such as my sister
11 testified to, little comments, little facial gestures,
12 actions, words that will never be around.

13 For me as -- well, starting as children, my father had
14 spoken that James was a huge NASCAR fan. As I can remember
15 a little boy, he was a huge NASCAR fan, and he constantly
16 had these small tester or revel models. He had a huge model
17 collection that he was very, very proud of.

18 He would build models of the old-time NASCAR guys --
19 Buddy Baker, Cale Yarborough. Those are two that come to
20 mind. The Pearson, David Pearson.

21 He was extremely proud of that. He would spend
22 countless hours putting the decals on the cars in a
23 meticulous fashion, painting them up.

24 And then my twin brother and I, just to tease him,
25 would take pieces off his car and move them around, as

1 little brothers will do. That was something that we always
2 did.

3 As Jack and I grew up, again, James' interest in
4 vehicles and NASCAR continued. Everything that I know about
5 vehicles, which is a very little bit, but I learned that
6 from him from the time that he was old enough to drive.

7 He actually took an engine in a vehicle and tore it
8 down and rebuilt it and did it exactly what he wanted it to
9 be. And my twin and I assisted him with that as much as we
10 could. And he taught us along the way, this is how it was
11 supposed to be.

12 Q Jeff, there was some testimony Friday and Saturday
13 about James' physical condition, his height, his weight, his
14 hands.

15 Growing up with him, was he always small for his age?
16 Do you, do you remember there ever being a point in time
17 where he wasn't small or where his health wasn't as bad as
18 what the testimony was?

19 A James was in poor health for as long as I can recall.
20 The diabetes that he had was a major factor. And, again,
21 I'm no medical expert, I'm assuming it played a major role
22 in why he was not a sizeable man.

23 There was a point in time where, yes, when he was the
24 big brother he was larger than Jack and myself. But as we
25 grew up, we surpassed his size. But, no, I cannot remember

1 a time when health was not an issue with James.

2 Q Jeff, can you tell the ladies and gentlemen of the jury
3 one or two things that you miss the most about your brother?

4 A The thing I miss the most is talking with him.

5 My line of work has kept me away from the family quite
6 a bit. The times that I would get to come back, James was
7 very interested in what I did. He was very proud that I
8 served in the military. He always wanted to be in the
9 military, but he knew he never could be because of his
10 health.

11 So, we would spend countless hours late into the night
12 just talking about helicopters, the military in general, the
13 functions, the purpose, how things occur.

14 He was very inquisitive and generally interested in how
15 it operated. And I think that would be the thing that I
16 miss the most, is just quiet quality time talking with him.
17 And I am never going to have that again.

18 Q Thank you, Jeff.

19 MR. KELLY: No questions.

20 THE COURT: Thank you, sir. You may step down.

21 Next witness.

22 MR. KELLY: Your Honor, while he is coming to the
23 stand, may we approach, please?

24 THE COURT: Yes, sir.

25 (Bench conference held off the record in the presence

1 of the jury but out of the hearing of the jury.)

2 THE COURT: Ladies and gentlemen of the jury, once
3 again, I'm going to -- I have a matter of law that I need to
4 take up with the attorneys.

5 As I told you when we started this case, the reason
6 that I send you out of the courtroom when I am discussing
7 matters of law with the attorneys is because you are the
8 judge of the facts. I'm the judge of the law.

9 Sometimes when I'm ruling on matters of law, it might
10 be necessary for me to make some comment as to the facts. I
11 am not supposed to do that in front of you. That's the
12 reason that I send you to the jury room at these times.

13 I know that you are passing around some exhibits. If
14 you would just leave them in your seat, you can look at them
15 when you get back.

16 The jury may retire. We'll get you back in just a few
17 minutes. Please do not discuss this case while you are in
18 the jury room.

19 (The following takes place outside the presence of the
20 jury.)

21 THE COURT: Yes, sir. Mr. Kelly.

22 MR. KELLY: Judge, at this time we understand that the
23 state intends to call other than immediate family members or
24 family members at all. In fact, we understand the state
25 intends to call the coworkers, owner of the business, two or

1 three witnesses along those lines. I don't know, exactly
2 sure, but at least now they have called one.

3 And we would urge the Court that under Payne, which our
4 Court adopted in Lucas vs. Evett and also in State vs.
5 Johnson, we would urge the Court that that uniqueness and
6 those things that are allowed under victim impact evidence
7 is limited to the family members.

8 I am not aware of any South Carolina Supreme Court case
9 that has expanded that holding and allowed others to so
10 testify. And for that reason, I would respectfully object
11 to anyone other than the family members testifying, Your
12 Honor.

13 THE COURT: Solicitor, do you want to be heard?

14 MR. GOWDY: Your Honor, I may let the deputy that is
15 handling this witness respond.

16 THE COURT: All right. I will be glad to.

17 MR. BARNETTE: Your Honor, obviously he worked with
18 these people. And these are friends, plus coworkers of his.
19 They should have the opportunity to speak on his behalf
20 too regarding the situation that he dealt with, plus that
21 have been in the situation.

22 I believe that would be victim impact information, as
23 well as family members also.

24 And it would go to the uniqueness of the individual in
25 this case, Your Honor. And we should be able to show to the

Direct examination by Mr. Gowdy

1 jury also.

2 MR. KELLY: Your Honor, as an additional point, we
3 would urge the Court that its probative value certainly
4 would be outweighed by the prejudice to the defendant.

5 MR. GOWDY: He doesn't know what he is going to say
6 yet, Your Honor. I'm not sure how he knows which outweighs
7 the other.

8 THE COURT: Well, I understand that, Solicitor. If you
9 are going to let Mr. Barnette argue it, I'll be glad to hear
10 from him on it.

11 MR. BARNETTE: Yes, sir. Basically, he doesn't know
12 what he is going to say at this point. How could he know if
13 it's prejudicial or relevant?

14 THE COURT: Well, of course, Mr. Barnette, my concern
15 is not to guess about what we are doing. My concern is to
16 have a clean trial.

17 I don't care what the state's motives are or the
18 defense motives are. My concern is to have a clean record
19 in the case. And, you know, that's my issue.

20 I have other things that I have to look at, and
21 certainly as officers of the court we all have issues to
22 look at to try to make sure that we try a case that is as
23 pristine as it can be.

24 MR. BARNETTE: Yes, sir. Your Honor, also, I would
25 site to you the State vs. Jason Byram on the basis that it

1 says the victim impact testimony is --

2 THE COURT: Wait just a minute. You got to slow down,
3 Mr. Barnette.

4 MR. BARNETTE: Yes, sir.

5 THE COURT: I think I probably got the same thing that
6 you have got that you are reading from. So, slow it down a
7 little bit.

8 MR. BARNETTE: Yes, sir. I will go ahead and let Your
9 Honor read it.

10 THE COURT: You can go ahead and read it, because I'm
11 looking for some case law rather than just some feelings.

12 MR. BARNETTE: Yes, sir. I understand.

13 State vs. Byram, Your Honor, states the following
14 victim impact testimony held not excessive. And teachers
15 assistant testified the victim was a wonderful teacher of
16 emotionally handicapped children. And the victim's students
17 was devastated to learn of their teacher's death. Vickie
18 Wells, apparently one of the victim's students, testified
19 the victim had a positive impact on her son. And victim's
20 sister testified about the effects of the victim's death
21 upon herself and the victim's three children. And the
22 victim's husband testified about the impact of his wife's
23 death on their children.

24 THE COURT: Mr. Kelly, I think that -- of course I am
25 very aware of the case of the State vs. Byram. I tried that

1 case in Richard County in 1995. And these were issues in
2 that case that two very fine lawyers, Doug Stricker and Lee
3 Coggiola, presented to the Court.

4 And at that time I made the determination that the
5 impact that someone has on others' lives is not strictly
6 limited to family members.

7 I think a very careful reading of Payne and its
8 progeny, looking also at State vs. Humphries, Byram and a
9 whole host of cases in this state, but most particularly
10 Byram, there was testimony in that case by coworkers,
11 students, any number of people, including family members, of
12 the great loss of this lady to her family and to her
13 community.

14 And I believe that is relevant victim impact evidence.
15 I think that that's the key to it, is that we refer to
16 victim impact evidence. It is not just family impact
17 evidence, because any number of people can be a victim as a
18 result of crime. So, your objection is noted, and it is
19 overruled.

20 MR. KELLY: Thank you, Judge.

21 THE COURT: All right. Let's bring our jury back, and
22 then we will swear him.

23 (The following takes place in the presence of the
24 jury.)

25 THE COURT: Thank you very much, ladies and gentlemen.

1 You may swear the witness.

2 KEITH FOWLER, having been
3 first duly sworn, testified as follows:

4 THE COURT: State your name for the record, and spell
5 your last name, sir.

6 THE WITNESS: My name is Keith Fowler, F-O-W-L-E-R.

7 MR. BARNETTE: Thank you, Your Honor. May it please
8 the Court.

9 DIRECT EXAMINATION BY MR. BARNETTE

10 Q Mr. Fowler, I know you've testified before, but, if you
11 would, tell the jury again where you work at or what you've
12 done.

13 A I work at Nikki's Speedy Mart, which is owned by my
14 wife.

15 Q And James Mahoney worked for you all, is that correct?

16 A Yes, sir, he did.

17 Q And how long did he work for you?

18 A Approximately three years.

19 Q Did you know him before that?

20 A Yes, sir. I knew James in school, in junior high
21 school.

22 Q And did he also, did he work somewhere else before he
23 came to Nikki's?

24 A Yes, sir. He worked at the Robo car wash right beside
25 us. It's really right beside us there. Yes, sir.

1 Q And did you get to see him when he worked at the car
2 wash?

3 A Yes, sir. He came in quite often and talked with us,
4 and he would order food. And a lot of times he was in a big
5 hurry, you know. He had a lot of customers, and he would
6 order and run back over there.

7 Most of the time I would run his food to him to save
8 him from having to go back and forth across the road like he
9 did.

10 Q And what happened to him at that job?

11 A He had an accident over there and broke his leg. And
12 he wasn't able to perform the job any more.

13 Q And then did he come to work for you all?

14 A Yes, sir; yes, sir. He came in, and we talked. And it
15 just came around, you know. He came to work for us.

16 Q And what kind of worker was he?

17 A He was an excellent worker. He was above and beyond
18 anyone you ever want to meet on a job like that.

19 Q What kind of person was he? What kind of character did
20 he have?

21 A He was, I guess, to me he was a good-ole boy. He was
22 my friend. I had some problems in the summer of '99. I was
23 diagnosed with diabetes, and James was my Achilles heel
24 through that. He helped me more than a doctor did. He
25 stayed on me and told me what to do, what not to do. He

1 was, he was a good friend.

2 Q Did y'all have a third shift at Nikki's any more?

3 A No, sir. We will never have a third shift again.

4 Q And why is that, sir?

5 A Because I lost a good friend due to the third shift,
6 and I just never want it to happen again.

7 Q Thank you, sir.

8 A Yes, sir.

9 MR. KELLY: No questions.

10 THE COURT: Thank you, sir. You may step down,

11 Mr. Fowler.

12 Next witness.

13 MR. BARNETTE: I would like to call Nikki Fowler to the
14 stand.

15 NIKKI FOWLER, having been
16 first duly sworn, testified as follows:

17 THE COURT: Please state your name for the record, and
18 spell your last name, ma'am.

19 THE WITNESS: Nanette Fowler, F-O-W-L-E-R.

20 REDIRECT EXAMINATION BY MR. BARNETTE

21 Q Ms. Fowler, you own Nikki's, is that correct?

22 A That's right.

23 Q And how long did you know James?

24 A Well, since we opened in '95.

25 Q Did he work at the car wash?

1 A At the car wash.

2 Q And you got to know him through coming over to your
3 business?

4 A Yes.

5 Q And he came and worked for you later, is that correct?

6 A That's right.

7 Q And, if you would, tell the jury what kind of person he
8 was to you.

9 A He was a very hard worker. He really did more than he
10 was called on to do. He would always try to make things
11 easier, really.

12 Q What kind of -- how was his health when he first
13 started there, and how did it progress as he worked there?

14 A Well, I know he had trouble with his hands and his
15 eyes. They were getting worse through the time.

16 Q And how often would you see him? Would you see him
17 every day?

18 A I saw him every day.

19 Q And how did he interact with other coworkers and other
20 people? How did he react with other people in the store as
21 that you saw?

22 A He always acted real fine. He always treated people
23 right.

24 Q And y'all don't have a third shift any more.

25 A No.

1 Q And what is your reason why you don't have a third
2 shift any more?

3 A Just can't handle that. I don't know how to explain
4 it.

5 MR. BARNETTE: One moment, Your Honor.

6 (Pause.)

7 Q Ms. Fowler, what do you miss most about James Mahoney?

8 A It's really hard to put into words. Just seeing him
9 every day, the way he greeted us. I have a daughter. He
10 always called her the boss and went on with her. Just
11 really hard to put into words.

12 Q Did he have any names or affections he called you or
13 Keith?

14 A When we would come in in the mornings a lot of times he
15 would say hi, hey mom and dad, just going on with us.

16 Q Thank you.

17 MR. KELLY: No questions.

18 THE COURT: Thank you, ma'am. You may step down
19 Ms. Fowler.

20 Next witness.

21 MR. BARNETTE: Thank you, Your Honor. May it please
22 the Court. I would like to call Ann Yarbrough to the stand,
23 please.

24 ANN YARBROUGH, having been
25 first duly sworn, testified as follows:

1 THE COURT: Please state your name for the record. And
2 spell your last name, ma'am.

3 THE WITNESS: Ann Yarborough, Y-A-R-B-R-O-U-G-H.

4 MR. BARNETTE: Thank you, Your Honor.

5 DIRECT EXAMINATION BY MR. BARNETTE

6 Q Ms. Yarborough, what shift did you work at Nikki's?

7 A I worked the second shift.

8 Q And how long did you know James Mahoney?

9 A Since '96.

10 Q And did he used to come at the end of your shift, or do
11 you know?

12 A Only on Saturdays.

13 Q And what kind of person was he to you?

14 A He was -- he loved to joke around with people. He had
15 a lot of friends, a lot of friends; and a lot of people came
16 in and left their number for me to give him.

17 He always told people how to work on their cars and
18 everything. If anybody had something wrong, they would call
19 him.

20 Q Would he go help people?

21 A He would tell them what to do. He could tell them what
22 to do over the telephone.

23 Q And would he help people when they was in trouble?

24 A Yeah.

25 Q Do you know of an instance where he helped somebody

1 when --

2 A He helped people change tires. He helped me. I lived
3 a half a mile from the store, so a lot of times at night I
4 would go by and see him. I went to get boxes one time and
5 he had already put them in the dumpster; that he went and
6 got into the dumpster and got boxes out for me, and things
7 like that.

8 Q Did he -- would he help people with medical problems?

9 A He would talk to -- I know that he talked to Keith a
10 lot about his medical problems.

11 Q Would he help customers too that came into the store at
12 times?

13 A There was one of our customers that came on all shifts.

14 He came in one night having chest pains, and James
15 closed the store and took him to the hospital and called his
16 family. He knew he could get him there faster than the
17 ambulance could get there to pick him up.

18 Q Thank you, ma'am.

19 MR. KELLY: No questions.

20 THE COURT: Thank you, ma'am. You may step down,
21 Ms. Yarborough.

22 MR. KELLY: Can we approach, Your Honor?

23 THE COURT: Yes, sir.

24 (Bench conference held off the record in the presence
25 of the jury but out of the hearing of the jury.)

Direct examination by Mr. Willingham

1 MR. WILLINGHAM: May it please the Court, the state
2 would call Jacqueline Walker.

3 JACQUELINE WALKER, having been
4 first duly sworn, testified as follows:

5 THE COURT: Ma'am, if you would, please state your name
6 for the record, and spell your first and last names.

7 THE WITNESS: My name is Jacqueline Walker,
8 J-A-C-Q-U-E-L-I-N-E W-A-L-K-E-R.

9 THE COURT: Thank you, ma'am.

10 DIRECT EXAMINATION BY MR. WILLINGHAM

11 Q Ms. Walker, tell the jury where you work.

12 A I work for the Frank Murphy Hall of Justice in Detroit,
13 Michigan, in the criminal division for Ms. Julia Penn who is
14 the deputy administrator.

15 Q Okay. Is it safe to say you work in the clerk of
16 court's office in Michigan?

17 A Yes. Wayne County Clerk, yes.

18 Q And whereabouts in Michigan?

19 A In Detroit, Michigan.

20 Q Okay. And is that the Third Judicial Circuit?

21 A Yeah, the Third Judicial Circuit Court.

22 Q As the clerk of court do you normally keep possession
23 and custody of public records?

24 A Yes, I do.

25 Q And in the clerk of court's office you keep civil

1 papers --

2 A Yes.

3 Q -- and criminal papers?

4 A Yes.

5 Q Did you or someone in your office provide us with a
6 certified copy of a record involving Richard Bernard Moore?

7 A Yes.

8 Q I am going to show you what's been marked as State's
9 Exhibit Number Forty-eight and ask if you recognize that.

10 A Yes, I do.

11 Q What is it?

12 A It's a certified copy of an exemplified copy of his
13 court papers like order of probation, petition for
14 discharge, information complaint and warrant.

15 Q And is that paperwork kept in your normal course of
16 business?

17 A Yes, it is.

18 Q And is it a public record available to the public?

19 A Yes.

20 Q The original of that, where is it kept?

21 A It's on microfilm.

22 Q Is that a certified true copy of what's present on
23 their microfilm?

24 A Yes, it is.

25 MR. WILLINGHAM: Your Honor, at this time I move

Jacqueline Walker
Direct examination by Mr. Willingham

1 State's Exhibit Number Forty-eight into evidence.

2 THE COURT: Any objection?

3 MR. KELLY: No objection.

4 THE COURT: Without objection, State's Exhibit Number
5 Forty-eight will be admitted.

6 (Defendant's prior record from Michigan marked State's
7 Exhibit Number Forty-eight.)

8 Q Viewing State's Exhibit Number Forty-eight, is it true
9 that Richard Bernard Moore has a conviction for an offense
10 in 1985 for unlawful possession of a weapon?

11 A Yes.

12 Q And that is from your Third Judicial Circuit in the
13 State of Michigan.

14 A Yes, it is.

15 Q Ms. Walker, thank you for answering my questions.
16 Would you answer any questions the Court or the defense may
17 have for you?

18 THE COURT: Cross-examination.

19 ~~MR. KELLY: No questions.~~

20 THE COURT: Thank you, ma'am. You may step down
21 Ms. Walker.

22 MR. WILLINGHAM: Your Honor, we would ask that she be
23 excused to go back to Michigan.

24 THE COURT: Without objection, you are excused. I
25 appreciate you coming, ma'am.

Bill Nixon
Direct examination by Mr. Willingham

1 Next witness.

2 (Whereupon, the witness was excused.)

3 MR. WILLINGHAM: Your Honor, we would call Bill Nixon.

4 BILL NIXON, having been first
5 duly sworn, testified as follows:

6 THE COURT: Please state your name for the record, sir,
7 and spell your last name.

8 THE WITNESS: Bill Nixon, N-I-X-O-N.

9 DIRECT EXAMINATION BY MR. WILLINGHAM

10 Q Mr. Nixon, tell the jury where you work.

11 A I work for the County of Macomb, State of Michigan,
12 Chief Deputy Clerk.

13 Q And as one of your responsibilities as Chief Deputy
14 Clerk do you keep up with the public records and public
15 documents in your office?

16 A That is correct.

17 Q And do you keep up with criminal records?

18 A Yes, I do.

19 Q Where are there kept?

20 A They're kept in the county clerk's office.

21 Q And how long are they kept?

22 A They are kept for 25 years.

23 Q What happens to them after 25 years?

24 A They are microfilmed.

25 Q How long are the microfilms kept?

Bill Nixon
Direct examination by Mr. Willingham

1 A Indefinitely.

2 Q At our request did you or someone in your office
3 provide a certified copy of a criminal record involving
4 Richard Bernard Moore?

5 A Yes.

6 Q And I show you State's Exhibit Number Forty-nine and
7 ask if you recognize that.

8 A Yes, I do.

9 Q What is it?

10 A It's part of a court file.

11 Q What part of it?

12 A It is a people's exhibit in which the defendant answers
13 a series of questions and makes a statement.

14 Q Is it additionally a part of the records, his charge
15 and his conviction?

16 A Yes, it is.

17 Q And what was his charge?

18 A A B & E.

19 Q What's a B & E?

20 A Breaking and entering.

21 Q What type of --

22 A With intent.

23 Q Does it say what type of a -- what we broke into?

24 A Yes.

25 Q What I am referring to specifically is count one. It

Bill Nixon
Direct examination by Mr. Willingham

1 says -- is that a true and correct copy of what you have in
2 your file, on file, in your office in Michigan?

3 A Yes, it is.

4 MR. WILLINGHAM: Your Honor, at this time I move
5 State's Exhibit Number Forty-nine into evidence.

6 MR. KELLY: May we approach the bench, Your Honor?

7 THE COURT: Yes, sir.

8 (Bench conference held off the record in the presence
9 of the jury but out of the hearing of the jury.)

10 THE COURT: All right. Any objection to State's Number
11 Forty-nine?

12 ~~MR. KELLY:~~ Yes, sir, Your Honor. If it please the
13 Court, ~~we submit that the first part of the document is~~
14 ~~proper but that the back part is not proper.~~

15 THE COURT: Your objection is noted. It is overruled.
16 It is be admitted as State's Number Forty-nine.

17 MR. KELLY: Thank you, Your Honor.

18 (Defendant's record from Michigan marked State's
19 Exhibit Number Forty-nine.)

20 Q Mr. Nixon, does this document show that he had count
21 one breaking and entering of a building with intent?

22 A Yes, it does.

23 Q And does it show he was convicted on 5/15, 1987?

24 A That is correct.

25 Q Mr. Nixon, the second page of this document your office

Bill Nixon
Cross-examination by Mr. Kelly

1 provided to us, is that a form that the defendant is advised
2 of his rights?

3 A Yes.

4 Q As part of that form -- ask the defendant in his own
5 words to say what he did?

6 A Yes. It does state that.

7 Q If you will, read that to the jury.

8 A "Pushed open front door of Broadway Market. Entered
9 store and removed two handguns and \$10 in quarters. When
10 officers arrived -- but I ran away."

11 Q Who is that signed by?

12 A Richard Moore.

13 Q If you would, answer any questions the defense or the
14 judge would have for you.

15 THE COURT: Cross-examination.

16 CROSS-EXAMINATION

17 BY MR. KELLY

18 Q Let me ask you about this, please. I am not sure I
19 will understand it, but I'm hoping you can help me, sir.

20 Mr. Moore entered a plea of guilty, correct?

21 A Yes, that's correct.

22 Q Okay. And he entered a plea of guilty to attempt to
23 break and enter, is that right?

24 A That's correct.

25 Q So, he was not convicted of breaking and entering, is

David Saad
Direct examination by Mr. Willingham

1 that correct?

2 A That is correct.

3 MR. KELLY: Thank you, Judge.

4 MR. WILLINGHAM: I have no other questions of this
5 witness.

6 THE COURT: Thank you, sir. You may step down,
7 Mr. Nixon.

8 Are you asking that he be excused?

9 MR. WILLINGHAM: Please, Your Honor.

10 THE COURT: Without objection, you are excused. I
11 appreciate you coming, sir.

12 (Whereupon, the witness was excused.)

13 THE COURT: Next witness.

14 MR. WILLINGHAM: We would call David Saad.

15 ~~DAVID SAAD~~, having been first
16 duly sworn, testified as follows:

17 THE COURT: Sir, please state your name for the record,
18 and spell your last name.

19 THE WITNESS: My name is David Saad, S-A-A-D.

20 THE COURT: Solicitor.

21 DIRECT EXAMINATION BY MR. WILLINGHAM

22 Q Mr. Saad, where do you live?

23 A I live in Sterling Heights, Michigan.

24 Q And what do you do in Michigan?

25 A I'm a parole and probation officer from the Michigan

David Saad
Direct examination by Mr. Willingham

1 Department of Corrections.

2 Q How long have you worked for the Department of
3 Corrections?

4 A Thirty years now.

5 Q Prior to Richard Moore being sentenced for attempted
6 breaking and entering did you prepare a presentence
7 investigation report for the Court?

8 A Yes, I did.

9 Q Is that a record you prepare and keep in your normal
10 course of business?

11 A Yes, it is.

12 Q And did you provide a copy of that report to our office
13 upon our request?

14 A Yes, I did.

15 Q And I show you what's been marked as State's Exhibit
16 Number Fifty and ask if you recognize that.

17 A This is the presentence report I did prepare.

18 Q Is that a true and correct copy of the report you
19 prepared?

20 A Yes, it is.

21 MR. WILLINGHAM: Your Honor, at this time I move
22 State's Exhibit Number Fifty into evidence.

23 ~~MR. KELLY:~~ May we approach, Your Honor?

24 THE COURT: Yes, sir.

25 (Bench conference held off the record in the presence

David Saad

Direct examination by Mr. Willingham

1 of the jury but out of the hearing of the jury.)

2 THE COURT: The objection is sustained --

3 MR. KELLY: Thank you, Judge.

4 THE COURT: -- as to Number Fifty.

5 MR. WILLINGHAM: Thank you, Your Honor.

6 Q Mr. Saad, as part of your job in preparing a
7 presentence investigation did you have an opportunity to
8 talk to the defendant?

9 A Yes, we did.

10 Q And as part of that did you find out what the defendant
11 Richard Moore's version of the facts were?

12 A That's a mandatory part of the report, yes.

13 Q Do you have -- will you tell this Court what this
14 defendant's version of the 1987 offense was?

15 A As I recall speaking with Mr. Moore, he told me that he
16 had broken into a building, just picked it out at random.
17 He had stolen from the building two handguns and a roll of
18 quarters.

19 He was caught at the time of the offense but broke away
20 and gave himself up later knowing that there was a warrant
21 out for his arrest.

22 I asked him what was the cause of his behavior, and he
23 said he was using -- was addicted to cocaine, both in crack
24 and powder form.

25 Q If you would, answer any questions the defense or the

Michelle Crowder

Direct examination by Mr. Willingham

1 Court may have.

2 MR. KELLY: No questions.

3 THE COURT: Thank you, sir. You may step down,
4 Mr. Saad.

5 Any objection to him being excused?

6 MR. KELLY: No, sir.

7 THE COURT: Without objection, you are excused. I
8 appreciate you coming, sir.

9 MR. WILLINGHAM: Thank you, Your Honor.

10 (Whereupon, the witness was excused.)

11 MR. WILLINGHAM: The state would call Michelle Crowder.

12 MICHELLE CROWDER, having been
13 first duly sworn, testified as follows:

14 THE COURT: Ma'am, state your name for the record, and
15 spell your first and last names.

16 THE WITNESS: Michelle Crowder, M-I-C-H-E-L-L-E
17 C-R-O-W-D-E-R.

18 MR. WILLINGHAM: Thank you.

19 DIRECT EXAMINATION BY MR. WILLINGHAM

20 Q Ms. Crowder, where do you live now?

21 A Columbia, South Carolina.

22 Q And where did you live before you moved to Columbia?

23 A Spartanburg, South Carolina.

24 Q And when was that?

25 A When did I move?

Michelle Crowder
Direct examination by Mr. Willingham

1 Q When did you live here?

2 A I've lived in Spartanburg from June 1988 until
3 September of 1999.

4 Q In September of 1991 did you have an occasion to meet
5 the defendant, Richard Moore?

6 A Yes, I did.

7 Q And tell the jury about that.

8 A I had walked into a Sub Station with my fiance at the
9 time. And Mr. Moore walked in and walked around and stood
10 behind me.

11 At that time the lady behind the counter said if you
12 wanted to play some--

13 MR. KELLY: Objection to what the lady behind the
14 counter said.

15 THE COURT: Yes, sir. I sustain the objection. Just
16 tell us what you know, ma'am, not what someone else said.

17 A He went around. He ordered a drink and came back and
18 stood behind me.

19 A few minutes later he proceeded to grab my purse.
20 When he grabbed my purse, the strap part hit my arm and
21 broke in two.

22 I turned around. He punched me in the left side of my
23 neck, and I fell. When I fell, I fell on my purse.

24 He proceeded to kick me up and down my back, on my
25 head.

Michelle Crowder
Direct examination by Mr. Willingham

1 At that time my fiance came from across the other side
2 of the restaurant and proceeded to try to tackle him.

3 He then beat my fiance on the back, on the head, in the
4 ribs, and sent him to the hospital.

5 He walked -- Mr. Moore then slowly just walked out of
6 the restaurant into the car and drove away. And that was
7 the time that we got the tag number.

8 Q Ms. Crowder, do you see Richard Moore in the courtroom
9 today?

10 A Yes, I do.

11 Q Point him out for me.

12 A Right there.

13 Q Tell me what he is wearing.

14 A What he is wearing today?

15 Q Uh-huh.

16 A He has a suit on, a tie. There's a pin on his left
17 side of the suit.

18 Q Is he white or black?

19 A He is black.

20 Q Answer any questions that the defendant or the Court
21 may have.

22 MR. KELLY: No questions, Judge.

23 THE COURT: Thank you, ma'am. You may step down,
24 Ms. Crowder.

25 Any objection to her being excused?

Michelle Crowder
Direct examination by Mr. Willingham

1 MR. KELLY: None.

2 THE COURT: You may be excused, ma'am. I appreciate
3 you coming.

4 (Whereupon, the witness was excused.)

5 THE COURT: Let me see the lawyers just one moment,
6 please.

7 (Bench conference held off the record in the presence
8 of the jury but out of the hearing of the jury.)

9 THE COURT: Ladies and gentlemen of the jury, even
10 though I sent you out of the courtroom a couple of times,
11 all of the participants have been in here for some time.
12 We're going to take our morning break.

13 As I send you back to the jury room, once again, please
14 understand that you are not to discuss this case among
15 yourselves under any circumstances or in any manner or
16 fashion whatsoever. We will get you back in the courtroom
17 in just a few minutes.

18 The jury may retire. Everyone else remain seated,
19 please.

20 (The following takes place outside the presence of the
21 jury.)

22 THE COURT: All right. We are going to stand at ease
23 while we take a break, and we will be back.

24 I assume this jury may want to smoke; probably in about
25 15 or 20 minutes.

Valorie Elaine Wisniewski
Direct examination by Mr. Willingham

1 (Whereupon, a recess was taken.)

2 THE COURT: All right. Is the state ready to proceed?

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

4 THE COURT: Is the defense ready?

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

6 THE COURT: Bring our jury back, please.

7 Mr. Cottonareau.

8 (The following takes place in the presence of the
9 jury.)

10 THE COURT: Thank you very much, ladies and gentlemen
11 of the jury.

12 Call your next witness, please, Solicitor.

13 MR. WILLINGHAM: Your Honor, the state calls Valorie
14 Wisniewski.

15 VALORIE ELAINE WISNIEWSKI,
16 having been first duly sworn, testified as follows:

17 THE COURT: Ma'am, please state your name for the
18 record, and spell your last name for us.

19 THE WITNESS: Valerie Elaine Wisniewski,
20 W-I-S-N-I-E-W-S-K-I.

21 THE COURT: Thank you.

22 Solicitor.

23 DIRECT EXAMINATION BY MR. WILLINGHAM

24 Q Ms. Wisniewski, I need for you to speak where I can
25 hear you back over here.

Valorie Elaine Wisniewski
Direct examination by Mr. Willingham

- 1 Okay. Where do you live?
- 2 A Myrtle Beach, South Carolina.
- 3 Q And how long have you lived in Myrtle Beach?
- 4 A Since August the 11th of this year.
- 5 Q Before you went to the beach did you live in
- 6 Spartanburg County?
- 7 A Yes, sir.
- 8 Q How long did you live in Spartanburg?
- 9 A Twenty-nine years.
- 10 Q Did you live here in Spartanburg in 1991?
- 11 A Yes, sir.
- 12 Q Where did you work back in September of 1991?
- 13 A Rack Room Shoes.
- 14 Q What did you do for them?
- 15 A I was the cashier.
- 16 Q Back on September the 13th, 1991, did you have an
- 17 opportunity to meet Richard Moore?
- 18 A Yes, I did.
- 19 Q Tell the jury about that.
- 20 A It was around closing time, about 8:58, 55 at night.
- 21 He came into the store. He jumped over the door where I
- 22 was, threw me against the counter and told me to open the
- 23 register and give him the money.
- 24 Q Do you remember what his exact words --
- 25 A He said, "Bitch, open the register and give me the

Valorie Elaine Wisniewski
Direct examination by Mr. Willingham

1 money." And I just started screaming for the assistant
2 manager, David Kivet. And Mr. Moore had me cornered against
3 the counter.

4 Q Tell the jury when you say he had you cornered, tell
5 them exactly what you mean.

6 A I was here, and his body was against mine here, and the
7 register was here. And David came up and opened the
8 register for him.

9 Q And did he get any money?

10 A Yes, he did.

11 Q And what happened then?

12 A After David opened the register, he left the box and
13 jumped over the -- it was a thing that turns as you walk in.
14 He jumped over that and ran out the door toward the BP
15 station. And I was instructed to go -- or told to go lock
16 the door.

17 Q Ms. Wisniewski, do you see Richard Moore in this
18 courtroom today?

19 A Yes, I do.

20 Q Will you point him out for us?

21 A That man over there.

22 Q Tell me what he looks like and what he is wearing.

23 A He is wearing khaki pants and a blue blazer.

24 Q Is he white or black?

25 A Black.

Gail Moffitt
Direct examination by Mr. Barnette

1 Q Answer any questions the defense lawyers or the Court
2 may have for you.

3 MR. KELLY: No questions, Judge.

4 THE COURT: Thank you, Ms. Wisniewski. You may step
5 down.

6 MR. WILLINGHAM: Your Honor, we would ask that she be
7 excused.

8 THE COURT: Without objection, you are excused ma'am.
9 Thank you for coming.

10 (Whereupon, the witness was excused.)

11 THE COURT: Next witness.

12 MR. BARNETTE: Thank you, Your Honor. May it please
13 the Court.

14 I would like to call Gail Moffitt to the stand, please.

15 GAIL MOFFITT, having been
16 first duly sworn, testified as follows:

17 THE COURT: Please state your name for the record, and
18 spell your last name, ma'am.

19 THE WITNESS: Gail Moffitt, M-O-F-F-I-T-T.

20 THE COURT: Solicitor.

21 MR. BARNETTE: Thank you, Your Honor.

22 DIRECT EXAMINATION BY MR. BARNETTE

23 Q Ms. Moffitt, what do you do, ma'am?

24 A I employed in the Clerk of Court's Office, Assistant
25 Clerk of Court for Spartanburg County.

Gail Moffitt
Direct examination by Mr. Barnette

1 Q And what's your duty there, ma'am?

2 A We maintain records, civil and criminal records.

3 Q Okay. You keep all records for Spartanburg County?

4 A That's correct.

5 Q Let me show you these that have been marked as State's
6 Exhibits Fifty-one through Fifty-nine. If you would, take a
7 look at those, ma'am.

8 Are those certified records or certified copies of
9 indictments in the Clerk of Court's Office?

10 A Yes, it is. It is certified copies, and that is saying
11 that we have the true copies on record.

12 Q And where would the original indictments --

13 A They would be in the Office of the Clerk of Court.

14 Q And is that in this building here?

15 A That's correct.

16 MR. BARNETTE: Your Honor, I would like to have State's
17 Exhibits Fifty-one through Fifty-eight introduced into
18 evidence at this time. Fifty-nine is for I. D. purposes
19 only.

20 THE COURT: Any objection?

21 MR. KELLY: None, Your Honor.

22 THE COURT: It will be admitted, Fifty-one through
23 Fifty-eight; and Fifty-nine is for I. D., correct?

24 MR. BARNETTE: Yes, sir.

25 (Copies of indictments marked State's Exhibits Numbers

Gail Moffitt

Direct examination by Mr. Barnette

1 Fifty-one through Fifty-eight; copy of indictment marked
2 State's Exhibit Number Fifty-nine.)

3 Q Ms. Moffitt, let me show you State's Exhibit Number
4 Fifty-one. Can you give me the indictment number on that,
5 please?

6 A It's 92-GS-42-2606; state's Exhibit Number Fifty-one.

7 Q And what was -- who was the defendant on that
8 indictment?

9 A Richard Bernard Moore.

10 Q Okay. And what was Mr. Moore convicted of?

11 A Common-law robbery.

12 Q And what year was he convicted of that?

13 A August the 23rd, 1994.

14 Q And who was the victim in that case?

15 A David Cavet.

16 Q And what store was it, ma'am?

17 A Rack Room Shoes.

18 Q Let me show you State's Exhibit Number Fifty-two. Can
19 you give me the indictment number on that one, please?

20 A This is 92-GS-42-6359; State's Exhibit Number
21 Fifty-two.

22 Q And was that also Richard Moore?

23 A That is correct, against Richard Bernard Moore.

24 Q And what was he convicted of, ma'am?

25 A D. U. S. second offense.

Gail Moffitt
Direct examination by Mr. Barnette

1 Q And what year was he convicted?

2 A September the 15th, 1993.

3 Q Let me show you State's Exhibit Number Fifty-three. Is
4 that also Richard Bernard Moore?

5 A That's correct.

6 Q And what was the indictment number on that?

7 A 93-GS-42-1804.

8 Q And what was he convicted of?

9 A That's State's Exhibit Number Fifty-three. He was
10 convicted of habitual traffic offender.

11 Q Let me show you State's Exhibit Number Fifty-four,
12 ma'am. Was this also Richard Bernard Moore?

13 A That's correct.

14 Q And what was the indictment number on that, please?

15 A 93-GS-42-1805; State's Exhibit Number Fifty-four.

16 Q And what was he convicted of?

17 A D. U. S. third offense.

18 Q And D. U. S., is that driving under suspension?

19 A That's correct.

20 Q And what year was he convicted of that, what day?

21 A September the 15th, 1993.

22 Q I would like to show you State's Exhibit Number
23 Fifty-five. Was that also involving Richard Bernard Moore?

24 A That's correct.

25 Q And could you give me the indictment number, please?

Gail Moffitt

Direct examination by Mr. Barnette

1 A That's 94-GS-42-3666; State's Exhibit Number
2 Fifty-five.

3 Q And what was he convicted of?

4 A Violation of habitual traffic offender.

5 Q And when was he convicted of that, ma'am?

6 A August the 23rd, 1994.

7 Q Okay. I would like to show you State's Exhibit Number
8 Fifty-six, ma'am. Is that also Richard Bernard Moore?

9 A That's correct.

10 Q And what was the indictment number on that?

11 A 95-GS-42-160. That is State's Exhibit Number
12 Fifty-six.

13 Q And what was he convicted of?

14 A Driving under suspension third offense.

15 Q And what was the date of that conviction?

16 A July the 13th, 1995.

17 Q I would like to show you State's Exhibit Number
18 Fifty-seven. Is that also Richard Moore?

19 A That's correct.

20 Q Could you give me the indictment number, please?

21 A 95-GS-42-3836. That State's Exhibit Number
22 Fifty-seven.

23 Q And what was he convicted of at that time?

24 A Driving under suspension sixth offense.

25 Q And what date was he convicted of that, ma'am?

Gail Moffitt
Direct examination by Mr. Barnette

1 A January the 18th, 1996.

2 Q Let me show you State's Exhibit Number Fifty-eight. Is
3 this also Richard Moore?

4 A That's correct.

5 Q And what was the indictment number on that, ma'am?

6 A 96-GS-42-387.

7 Q And what was he convicted of?

8 A Driving under suspension fifth offense. That's State's
9 Exhibit Number Fifty-eight.

10 Q And when was he convicted of that, ma'am?

11 A January the 18th, 1996.

12 Q Let me show you State's Exhibit Number Fifty-nine
13 marked as I. D. purposes only. Is that Richard Bernard
14 Moore?

15 A That's correct.

16 Q And what was the indictment number on that, ma'am?

17 A 96-GS-42-1959; that's State's Exhibit Number
18 Fifty-nine.

19 Q And what was he convicted of?

20 A Assault and battery of a high and aggravated nature.

21 Q And when was he convicted of that, ma'am?

22 A August the 7th, 1997.

23 Q And, if you would, please tell us who the victim was.

24 A Sonja Harrison.

25 MR. BARNETTE: One moment, Your Honor, please.

Gail Moffitt

Direct examination by Mr. Barnette

1 THE COURT: Yes, sir.

2 (Pause.)

3 MR. BARNETTE: May we approach the bench for a second,
4 Your Honor?

5 THE COURT: Yes, sir.

6 (Bench conference held off the record in the presence
7 of the jury but out of the hearing of the jury.)

8 THE COURT: All right. You can continue.

9 UNIDENTIFIED JUROR: Judge Clary, could common-law
10 robbery be --

11 THE COURT: Wait just one minute. If you have a
12 question, I am going to need to get you to -- I'm going to
13 send you to the jury room and get you to write that out for
14 me.

15 I cannot entertain verbal questions. So, if you have a
16 question, I am going to send the jury to the jury room in
17 just a moment. If you would, write that question out.

18 I do not know that it's something that I will be able
19 to clear up or answer for you. But if you would simply
20 write that out for me, I will do that.

21 I am going to send the jury to the jury room with the
22 understanding that you are not to discuss this case among
23 yourselves. If you would, write that question, Madam
24 Foreperson.

25 Then knock on the door and give it to the bailiff. And

Gail Moffitt
Direct examination by Mr. Barnette

1 they will see that it is delivered to me.

2 The jury may retire. Everyone else remain seated,
3 please.

4 (The following takes place outside the presence of the
5 jury.)

6 THE COURT: Why don't you go ahead and take care of
7 these exhibits as we discussed?

8 I think, so that the record is clear, the state had
9 attached sentencing sheets to these exhibits.

10 The defense had objected to the sentencing sheets. I'm
11 sustaining that objection as to the sentencing sheets. They
12 will be removed.

13 MR. KELLY: Thank you, Judge.

14 MR. BARNETTE: Thank you, Your Honor.

15 (Pause.)

16 THE COURT: What I am also going to do is wait and see
17 what that question is from the jury, because we have a
18 specific mechanism by which I need to deal with this.

19 The lawyers may approach.

20 (Bench conference held off the record.)

21 THE COURT: All right. Let the record reflect that the
22 foreperson of the jury has sent me a question, "Could
23 common-law robbery be explained?" And, of course, I'm going
24 to tell them that, no, I cannot explain that to them,
25 because, once again, that could be a comment as to the

Gail Moffitt

Direct examination by Mr. Barnette

1 particular facts of this case.

2 And I am going to also instruct them about them posing
3 a question and what I can and cannot do, and give them that
4 charge.

5 And then she also says, "Could you please ask the
6 witnesses to speak louder?"

7 Witnesses, lawyers, please speak up. You know, if they
8 can't hear, the court reporter can't hear, we're in a lot of
9 trouble. So, please, understand that the first thing that
10 you should tell your witnesses before they, before you start
11 a trial is for them to speak up.

12 All right. Let's bring our jury back. Let me see the
13 lawyers while the jury is coming back in.

14 (Bench conference held off the record.)

15 (The following takes place in the presence of the
16 jury.)

17 THE COURT: Madam Foreperson, ladies and gentlemen of
18 the jury, you have indicated the desire to ask a question;
19 and normally this is outside of your role as a juror.

20 For that reason, the law requires that I evaluate your
21 question and discuss it with the lawyers before it can be
22 asked.

23 I have sent you to the jury room so that you could
24 respond to me in a written form, and you have done that.
25 You have sent it to me through the bailiff.

Gail Moffitt
Direct examination by Mr. Barnette

1 And the lawyers and I have discussed it on the record
2 outside of your presence.

3 As I have told you throughout the course of this trial,
4 and you have heard me say, you are the judges of the facts
5 in this case. I am the judge of the law.

6 Please understand that there can be many reasons that
7 would prevent me from allowing this question, and some of
8 them are of a very technical reason. And none of the
9 reasons has anything to do with what the answer -- that
10 might be given by a witness.

11 So, please, understand that when I consider your
12 question that it's not in an effort to -- in any way for me
13 to prevent you from knowing certain information. It is just
14 that I am constrained by the law as to what is admissible in
15 a case.

16 I would also like to point out to you that these -- the
17 introduction of evidence on the behalf of the state and the
18 defense, that is something that they do, and they have to do
19 within the constraints of the law under which we all
20 operate.

21 The question that you have presented to me, "Could
22 common-law robbery be explained," is not something that I
23 can answer for you, because that would be a comment not only
24 on the law but also the particular facts of a case, and I
25 cannot do that.

Gail Moffitt
Direct examination by Mr. Barnette

1 "Could you please ask the witnesses to speak louder?"

2 Yes, I can, and I have already done that. We will take care
3 of that.

4 Madam reporter, if you will, please mark that as a
5 court's exhibit.

6 (Question from the jury marked Court's Exhibit Number
7 Eleven.)

8 THE COURT: Solicitor, you may continue.

9 MR. BARNETTE: Thank you, Your Honor. May it please
10 the Court.

11 Q Ms. Moffitt, one question I wanted to make sure was
12 answered.

13 The victim, who was the victim on the
14 assault-and-battery-of-a-high-and-aggravated-nature
15 conviction.

16 A Sonya Harrison.

17 Q Thank you, ma'am. Please answer any questions
18 Mr. Kelly may have for you, or the Court.

19 MR. KELLY: No questions.

20 THE COURT: Thank you, ma'am. You may step down,
21 Ms. Moffitt.

22 MR. WILLINGHAM: We would call Dr. Wren.

23 DR. JOHN DAVID WREN, having
24 been first duly sworn, testified as follows:

25 THE COURT: Please state your name for the record.

Dr. John David Wren
Direct examination by Mr. Willingham

1 THE WITNESS: John David Wren, W-R-E-N.

2 THE COURT: Thank you, sir.

3 Solicitor.

4 DIRECT EXAMINATION BY MR. WILLINGHAM

5 Q Dr. Wren, you've already testified in the guilt phase
6 of this trial, is that correct --

7 A Yes.

8 Q -- and been qualified as an expert in forensic
9 pathology, is that correct?

10 A Yes, sir.

11 MR. WILLINGHAM: Your Honor, we would ask that he
12 continue to be qualified in that area.

13 MR. KELLY: No questions.

14 THE COURT: Without any objection, he is -- you may
15 continue.

16 Q Showing you what has been marked as State's Exhibit
17 Number Fifty, a series of four photographs. Do those four
18 photographs assist you in explaining to the jury the
19 injuries suffered by James Mahoney?

20 A Yes. He had a few abrasions to his body that I can go
21 through, but most of them were minor. One photograph here
22 shows --

23 Q Hang on just a minute, Doctor, if you would.

24 MR. WILLINGHAM: Your Honor, at this time I move
25 State's Exhibit Number Sixty into evidence.

Dr. John David Wren
Direct examination by Mr. Willingham

1 THE COURT: Subject to the prior objection, it will be
2 admitted.

3 MR. WILLINGHAM: Thank you, Judge.

4 (Four photographs marked State's Exhibit Number Sixty.)

5 Q If you will, come down.

6 (Whereupon, the witness left the stand.)

7 Q Dr. Wren, what would cause an injury like -- I mean,
8 what happened there with that arm to be like that?

9 A This is the wound. This was a result of the wound
10 that, I said, where it fractured his right humerus and
11 where it sharply angulated in an unusual way where the break
12 was.

13 It was not what's called a compound fracture. It was
14 just a comminuted fracture, which the skin wasn't broken
15 except by the bullet. The fracture was right about there.

16 Turn it up in there. This is the gunshot wound that I
17 described in his axillary line region, posterior axillary
18 line region. I think that is the outline of part of his arm
19 there.

20 This is the gunshot wound that is slightly oval in this
21 picture. I described it as .38 inches in diameter. You can
22 see a little bit of discoloration around it, although you
23 can't tell right there. You can see the underlying tissue.

24 And this, I thought, could be powder stippling, but
25 when you look at the actual photograph, it's maybe

Dr. John David Wren
Direct examination by Mr. Willingham

1 hemorrhage or something of that nature. I don't think it's
2 tattooing.

3 And this is the gunshot wound. The bullet was actually
4 travelling in this direction. This is that gunshot wound to
5 the arm, close up of it. And it is irregular. No, no, I am
6 sorry. Turn it up and down this way.

7 Q That way?

8 A Yes. This is his right nipple on his breast. This is
9 the exit. I believe it was that way.

10 At any rate, it was below the nipple. And you can see
11 that it's irregular and slit like. There was tissue
12 protruding from that. And this is actual hemorrhage
13 surrounding that exhibit wound which came out of his chest.
14 And actually the entrance would have been over in this
15 direction and went up that way.

16 And then this is the one in his arm. This is his right
17 arm. That's his armpit there.

18 This is about the area of the elbow. And you can see
19 that it's irregular. And this is an abrasion type border
20 here that could have been a barrel imprint, but it wasn't
21 split. It's just irregular, and it's so irregular that it
22 could have been a reentry wound. But you just can't tell in
23 some cases.

24 And actually the bone running down here is where it was
25 fractured. And I found the bullet right behind there.

Dr. John David Wren

Direct examination by Mr. Willingham

1 Q If you would, take your seat back, please, sir.

2 (Whereupon, the witness returned to the stand.)

3 Q Dr. Wren, we got into this a little bit during the
4 guilt phase, but were those injuries -- how long would it
5 take for someone to die with those injuries?

6 A Well, as I said before, if it happens to hit the vagus
7 nerve, it's possible you could -- the heart could stop right
8 away, but he had 1250 cc's or five units of packed red blood
9 cells or equivalent to that, about 250 cc's, in a unit of
10 blood; not one they draw but a unit that they give.

11 He had about 1250 cc's in his right plural cavity. He
12 had about 200 cc's in his pericardial sac and about a
13 hundred cc's in his abdomen.

14 I describe where it went. It went through-and-through
15 the stomach, through-and-through the liver,
16 through-and-through the heart and the lung.

17 And, generally speaking, the heart puts out about five
18 liters of blood a minute. And if you are -- your heart is
19 beating 60 times a minute, that's about 80 cc's a heart
20 beat.

21 Now, the -- for him to have bled that much more into
22 his pleural cavity than he did into his heart, it probably
23 hit an artery, although it's extremely difficult after a
24 person dies to trace all of the arteries that go out to the
25 lungs. But it wasn't a large artery that it hit, but it was

Dr. John David Wren
Direct examination by Mr. Willingham

1 bleeding rather freely.

2 But the hole in his heart, every time the heart would
3 contract, it would partially occlude just by the contraction
4 process.

5 So at about 80 cc's a minute, if you are losing, say, a
6 quart of that in your heart, that would be 20, I mean, 80
7 cc's a beat. If your heart rate goes up, it will actually
8 decrease the amount of blood that is expelled each beat. So
9 he probably would have not filled up his heart for a couple
10 of minutes.

11 Now, the pleural cavity would have been a little bit
12 longer. So, I would say he lived six to ten minutes before
13 everything stopped.

14 Q The entry and exit wound to the chest, on a scale of
15 one to ten, ten being the least -- one being the least and
16 ten being the most -- the injury to the chest and exit to
17 the chest, how painful would that have been?

18 A Just that injury?

19 MR. KELLY: Objection, Your Honor. It calls for
20 speculation.

21 THE COURT: Overruled.

22 A Just that injury?

23 Q Yes.

24 A Well, it went through the lower border of his eighth
25 rib as it went in, just like a rib fracture.

Dr. John David Wren
Direct examination by Mr. Willingham

1 Most people, I mean, there is a variation in pain, but
2 for that and the other places it went through, I would say
3 probably about maybe a six to eight. I don't think it would
4 be devastatingly painful, but/and some people, some people
5 tolerate pain better than others.

6 Now, I know some people that it would probably be a
7 ten, but I don't think it was so bad until he started
8 getting short of breath, assuming he was conscious, that it
9 would have been unbearable.

10 Q And then the injury to the arm, the gunshot injuries to
11 the arm and the breaking of the humerus, on a scale of one
12 to ten, how painful?

13 A I think that would be a seven, possibly up to eight and
14 a half, something like that, because it did distort it. It
15 wasn't a puncture wound. Like I said, this bone didn't
16 actually protrude through the skin, but it would have
17 been -- I've never had a broken bone except my nose, and I
18 didn't like that very much, but I could stand it. But I
19 think this one would have been much worse than that.

20 Q I have no other questions, Dr. Wren. Answer any
21 questions the defense or the Court has.

22 MR. KELLY: No questions, Judge.

23 THE COURT: Thank you, Dr. Wren. You may step down.

24 Are you asking that he be excused?

25 MR. WILLINGHAM: Please, Your Honor.

Dr. John David Wren
Direct examination by Mr. Willingham

1 THE COURT: Without objection, you are excused. I
2 appreciate you coming, Dr. Wren.

3 (Whereupon, the witness was excused.)

4 THE COURT: Next witness.

5 MR. GOWDY: Your Honor, the State of South Carolina
6 rests.

7 THE COURT: Ladies and gentlemen of the jury, that
8 concludes the state's presentation of its evidence in chief
9 in this case.

10 I am going to be sending you to the jury room for just
11 a moment. While you are there, please, do not deliberate or
12 discuss this case in any manner or fashion whatsoever.

13 We will get you back in the courtroom in just a few
14 minutes.

15 The jury may retire. Everyone else remain seated.

16 (The following takes place outside the presence of the
17 jury.)

18 THE COURT: All right. I was just talking with Agent
19 McCloud, one of the jury custodians, about lunch. The
20 jury's lunch is going to be ready around 12:30.

21 I know the state has completed their case. I had put
22 the defense on notice that we would start between 1:30 and
23 2:00. We will still do that; closer to 1:30 rather than
24 2:00.

25 I am going to bring the jury back and explain to them

Colloquy

1 the process that we are going to do their lunch and let them
2 take a break. And we'll let them take them to -- we've got
3 a few smokers. Let them go smoke and stretch their legs
4 prior to their lunch coming. And then when it gets here,
5 they can eat, and give them a few more minutes to relax, and
6 then we will start into the defense portion of the case.

7 Now, let's also understand that the defense is going to
8 start their phase of the presentation at around 1:30 or a
9 quarter of two.

10 Certainly the defendant, Mr. Moore, has the right to
11 testify during that phase of the trial, and I want you to
12 discuss that with him. Once again, I will do that, once
13 again, on the record and make sure that we have that
14 properly documented for the record.

15 Anything else before I bring the jury back from the
16 state?

17 MR. GOWDY: No, sir, Your Honor.

18 THE COURT: From the defense?

19 MR. KELLY: No, Judge, not at this time.

20 THE COURT: Let's bring them back in, please.

21 (The following takes place in the presence of the
22 jury.)

23 THE COURT: Madam Foreperson and ladies and gentlemen,
24 as you know, the state has rested its case in chief in the
25 sentencing phase. And the next phase that we will move into

Colloquy

1 will be that of the defense case.

2 I think that we are at an appropriate point right now
3 to stop and allow you to have a little bit of a break. Your
4 lunch should be here in the next 25 minutes or so.

5 I am going to allow the jury custodians to -- for those
6 of you who wish to go to the courtyard and stretch your
7 legs, some of you may desire to smoke. Although I wouldn't
8 encourage that, I will let you do that. That is your
9 prerogative. Then we will be back here or they will be back
10 here with your lunch somewhere around 12:30 or so. We are
11 going to try to start back between 1:30 and a quarter of
12 2:00. That will give everyone time to get lunch and get
13 back here and get started.

14 As you are together during your lunch break, once
15 again, you are not to discuss this case among yourselves in
16 any manner or fashion whatsoever or with anyone else that
17 you might come in contact with, whether it be your jury
18 custodians or anyone else. And I will look forward to
19 seeing you back here between 1:30 and a quart of 2:00.

20 The jury may retire to the jury room. The custodians
21 can take the necessary steps with them. You may retire.

22 (The following takes place outside the presence of the
23 jury.)

24 THE COURT: All right. Let's just plan on reconvening
25 down here around 1:30. And we will try to get started at

Colloquy

1 that particular point in time.

2 And depending on how far we get today, we will make a
3 determination as to whether or not we can argue and charge.
4 And/but we will do that as we go along.

5 All right. We will stand at ease until 1:30.

6 (Whereupon, a recess was taken.)

7 THE COURT: All right. I think you said you had some
8 motions, gentlemen, from the defense perspective.

9 MR. KELLY: Just one moment.

10 THE COURT: Yes, sir. Take your time.

11 (Pause.)

12 ~~MR. KELLY~~: Judge, may it please the Court, first of
13 all, in an abundance of caution, ~~he would like to again~~
14 ~~renew all motions and all objections previously made~~ so that
15 we have the record protected.

16 THE COURT: All right, sir. Insofar as motions that
17 have been made, of course, we are at the -- have completed
18 the state's showing in the sentencing phase.

19 Of course what is to be determined, as I told the jury,
20 in the case is they are to determine punishment which will
21 either be life imprisonment or death.

22 And the state certainly has presented ample evidence
23 from which they can make that determination. As such, all
24 motions are denied.

25 MR. KELLY: Thank you, Judge.

Defendant questioned

1 THE COURT: All right. Mr. Moore, if you would stand,
2 please, sir.

3 (Whereupon, the defendant stood.)

4 THE COURT: I will remind you, sir, that you are still
5 under oath.

6 Mr. Moore, we have, once again, reached the stage of
7 the trial where you may present your own defense, and you
8 may also take the stand.

9 Now, once again, whether or not you take the stand is
10 left entirely up to you. Once again, the state, even though
11 they have already introduced evidence into this case of your
12 prior record, if you take the stand, then they would be able
13 to use your prior record for impeachment purposes only.

14 And in the event that you decide not to take the stand,
15 I would instruct the jury that they are not to give that
16 fact any consideration whatsoever, and there is to be
17 absolutely no prejudice to you because you did not take the
18 stand and testify.

19 Once again, it will be left entirely up to you as to
20 whether or not you testify. You can talk to your attorney
21 or family, friends or anyone else, but the ultimate decision
22 is left entirely up to you. Do you understand that, Mr.
23 Moore?

24 THE DEFENDANT: Yes, sir, I do.

25 THE COURT: And what is your intention?

Defendant questioned

1 THE DEFENDANT: At this moment, ~~I shall not testify.~~

2 THE COURT: All right, sir. Thank you very much. But
3 you do understand that you have that right in this juncture
4 of the trial.

5 THE DEFENDANT: Oh, yes, sir.

6 THE COURT: Thank you, sir.

7 MR. KELLY: May we approach, Your Honor?

8 THE COURT: Yes, sir.

9 (Bench conference held off the record.)

10 THE COURT: All right. Is the defense ready to
11 proceed?

12 MR. KELLY: We are, Your Honor.

13 THE COURT: Is the state ready?

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

15 THE COURT: Let's bring them back, Cotton.

16 (The following takes place in the presence of the
17 jury.)

18 THE COURT: Thank you very much, Madam Foreperson,
19 ladies and gentlemen.

20 We are going to continue with the case.

21 Call your first witness, please, Mr. Kelly.

22 MR. KELLY: The defense calls Lynda Byrd.

23 ~~LYNDA BYRD~~, having been first
24 duly sworn, testified as follows:

25 THE COURT: Please state your name for the record, and

Lynda Byrd
Direct examination by Mr. Kelly

1 spell your last name.

2 THE WITNESS: Lynda Byrd, B-Y-R-D.

3 DIRECT EXAMINATION BY MR. KELLY

4 Q Ms. Bird, I am going to stand way over here, and I want
5 you to speak up so that I can hear you. And if I can hear
6 you, then hopefully everybody else will be able to. Okay?

7 A All right.

8 Q And I would ask you to pull a little closer to the
9 microphone if you need to there. You don't have to hold it
10 or anything, but just speak close.

11 You are Lynda Byrd, right?

12 A Yes.

13 Q ~~And you know Richard Moore.~~

14 A Yes.

15 Q How long have you known Richard?

16 A Since 1989.

17 Q Okay. Now, where were you living in 1989?

18 A Michigan.

19 Q And after meeting him in 1989 did you have the occasion
20 to move from Michigan to some place else?

21 A South Carolina, yes.

22 Q How did that come about?

23 A A job offer.

24 Q All right. You got a job offer to come here, or did
25 Richard have one?

Lynda Byrd
Direct examination by Mr. Kelly

- 1 A I did.
- 2 Q And at that point in time did you and he become a
3 couple?
- 4 A Yes, we did.
- 5 Q When you came here in 1989, where were you working?
- 6 A ~~We came here in 1991.~~
- 7 Q I'm sorry. 1991. Where were you working?
- 8 A ~~T. W. Services.~~
- 9 Q Okay. And when you got here did Richard get a job?
- 10 A Yes, he did.
- 11 Q And where was he working if you remember?
- 12 A I believe it was Adidas.
- 13 Q Adidas?
- 14 A Yes.
- 15 Q Okay. And did he work there for a long period of time
16 or a short period of time?
- 17 A It was through a temp agency. I'm not quite sure how
18 long it was.
- 19 Q When you came here did you have a child?
- 20 A Yes, I did.
- 21 Q And that child is whom?
- 22 A James Byrd.
- 23 Q And how old is James?
- 24 A ~~Now he is 16.~~
- 25 Q All right. He was a small child at that point in time,

Lynda Byrd
Direct examination by Mr. Kelly

1 correct?

2 A Correct.

3 Q Does James associate or know his real father?

4 A No.

5 Q Who does he consider to be his father?

6 A Richard Moore.

7 Q Has Richard been a father to him?

8 A Most definitely.

9 Q James is in school now, is that right?

10 A Correct.

11 Q Where does he go to school?

12 A Spartan High.

13 Q What grade is he in?

14 A Eleventh.

15 Q And in growing up did he -- was he active in sports or
16 anything?

17 A Yeah. He has been active in baseball, basketball.

18 Q Okay. And before he was playing -- let me ask you
19 this. Was he playing baseball or basketball for the school?

20 A Not right now. They haven't had tryouts yet.

21 Q Okay. Did he play last year?

22 A No.

23 Q Has he played other -- has he played those sports in
24 like a recreation league or other type of activity?

25 A Yes, little league.

Lynda Byrd
Direct examination by Mr. Kelly

1 Q Little league?

2 A Yes.

3 Q And when he did so, who would coach the team?

4 A He has been on several teams, several different
5 coaches. One year Richard was the coach of his basketball
6 team.

7 Q About how long ago was that?

8 A That was in elementary school, fifth or sixth grade.

9 Q Five or six years ago, maybe?

10 A Yeah.

11 Q In addition to those activities have Richard and James
12 done other things together?

13 A Yeah.

14 Q Well, have they, have they, have they had a chance to
15 go fishing together?

16 A Yeah, they did go fishing together, yes.

17 Q And more than once?

18 A Yeah, I believe so.

19 Q Okay. Watch T. V. sports together?

20 A Definitely.

21 Q Richard has had some problems with the law, hasn't he?

22 A Yes, he has.

23 Q And when he, when he had some problems -- well, let me
24 ask you. In September of 1999 when this incident occurred
25 Richard was incarcerated, wasn't he?

Lynda Byrd
Direct examination by Mr. Kelly

1 A Yes, he was.

2 Q And he has been there since then, has he not?

3 A Correct.

4 Q Now, since then, ~~since September of 1999,~~ have you had
5 the occasion to go see him?

6 A Yes. I do.

7 Q How many times would you say you have been?

8 A ~~On the average, scheduled for once a week, twice a~~
9 ~~week.~~

10 Q All right. Have you gone once or twice a week since
11 then?

12 A I tried to make them. Yes, I have.

13 Q In addition to going there, is there a procedure for
14 you to leave some money or something for his use?

15 A Yes.

16 Q Tell the jury about that a little bit.

17 A Try to just leave him a couple of dollars so that he
18 can call home to talk to his children and so that he has
19 soap and deodorant and toothpaste, necessities.

20 Q Okay. And when he calls home -- ~~does he call home to~~
21 ~~talk to his children?~~

22 A ~~Every day.~~

23 Q The children that you are talking about he calls, in
24 addition to James, do we have other children?

25 A ~~He and I have two children together.~~

Lynda Byrd
Direct examination by Mr. Kelly

- 1 Q What are their names and ages, please, ma'am?
- 2 A Alexander is eight years old, and a son, Lindall, who
- 3 just turned seven.
- 4 Q And are they in public school too?
- 5 A Yes.
- 6 Q Where do they go to school?
- 7 A Chapman Elementary.
- 8 Q Both of them?
- 9 A Yes.
- 10 Q And do those children get report cards?
- 11 A Yes.
- 12 Q And have you had the occasion to take a report card to
- 13 Richard?
- 14 A I have to make copies and mail them to him.
- 15 Q Right. I'm sorry. You have to turn the report card
- 16 back in to the school.
- 17 A Right.
- 18 Q Is that right?
- 19 A Right.
- 20 Q All right. But have you made photocopies of the report
- 21 cards and provided them to Richard?
- 22 A I have.
- 23 Q And has he made comments to you about the report cards?
- 24 A To me?
- 25 Q Yes.

Lynda Byrd
Direct examination by Mr. Kelly

- 1 A Yes.
- 2 Q And without asking you what he might have said to a
- 3 child -- I'm not going to ask you for that -- but has he
- 4 made comments to the child about how proud he is of their
- 5 grades?
- 6 A Very much, yes.
- 7 Q And they do make good grades, don't they?
- 8 A Yes, excellent.
- 9 Q And are they also involved in sports or other
- 10 activities at the school?
- 11 A ~~They are in the boys and girls club.~~
- 12 Q I believe they get some kind of certificate, do they
- 13 not?
- 14 A Yes. They are always bringing home some kind of
- 15 certificates.
- 16 Q And have you made copies of those for Richard?
- 17 A He has some.
- 18 Q And has some?
- 19 A Yes.
- 20 Q Has he made comments to you about that?
- 21 A Yes.
- 22 Q ~~Richard -- since you guys moved here when he worked at~~
- 23 ~~Adidas, did he work at other places?~~
- 24 A ~~Yeah. He was always working.~~ Like I say, when we
- 25 first moved here, his job was through a temp agency. And

Lynda Byrd
Direct examination by Mr. Kelly

1 they -- he stayed as Adidas until that assignment ended, but
2 he stayed working.

3 Q And when he would work would he bring his paycheck
4 home --

5 A Yes, sir.

6 Q -- and contribute to the family?

7 A Yes, sir.

8 Q Help buy groceries?

9 A Definitely.

10 Q ~~At the time that this incident occurred, there is~~
11 ~~evidence that Richard was out of a job.~~ Do you remember
12 that?

13 A Yes.

14 Q ~~Was he out of a job at Kholer~~ at that point in time as
15 far as you know?

16 A Maybe for a few days.

17 Q Okay. Had he been without a job before? I mean, was
18 this the first time he had been without a job?

19 A No.

20 Q Okay. ~~Was he always able to secure another job?~~ If he
21 got -- ended at one for -- the job quit through the temp
22 agency, could he usually get another one fairly quickly?

23 A Yes.

24 Q There is evidence before the Court that there was some
25 pawn, or that there are pawn tickets in evidence before the

Lynda Byrd
Direct examination by Mr. Kelly

1 Court dating back to June, I think, of 1999. To your
2 knowledge was Richard pawning stuff out of the house?

3 A No, sir.

4 Q There is also evidence before the Court that Richard
5 had a drug problem or may have had a drug problem at one
6 point. Are you familiar with that?

7 A I'm familiar with it.

8 Q And he did have a problem at one time, did he not?

9 A Yes.

10 Q When he was using some drugs, is that when he would
11 lose a job or be out of work or something?

12 A No.

13 Q Okay. Did he ever bring that problem to your house?

14 A Never.

15 Q He didn't allow it to be brought to your house, is that
16 right?

17 A No.

18 Q Did he ever expose the children to that?

19 A Never.

20 Q Even though he had a problem, he managed to still work
21 and contribute to the family, is that right?

22 A Yes, he did.

23 Q You said that James and Richard have a close
24 relationship. What about the other two children?

25 A They adore their father.

Lynda Byrd
Direct examination by Mr. Kelly

1 Q Even though James is not his natural son, he, all three
2 children are considered by him to be his children.

3 A Yes.

4 Q The things that you have done about taking the report
5 cards and boys and girls clubs' certificates and things to
6 the jail or copies to the jail, has that maintained or
7 helped to maintain a relationship with James and his
8 children?

9 A To Richard?

10 Q I am sorry. Richard and his children.

11 A Yeah. They look forward to talking to him and telling
12 him what they have done in the case of their report cards
13 and their certificates. They can't wait to share that with
14 him. He is a very positive influence on them.

15 Q In addition to those things do they also write him
16 letters?

17 A Yeah.

18 Q Do they actually mail them, or do you carry them, take
19 the children and let them give them to him in some way?

20 A No. I have to mail them.

21 Q Okay. And do they send him pictures like a school
22 picture?

23 A Yeah.

24 Q Do they send one of their school pictures?

25 A Just school pictures. And they draw pictures back and

Lynda Byrd
Direct examination by Mr. Kelly

1 forth. They actually -- right now Richard and my daughter
2 are teaching each other Spanish through the mail.

3 MR. WILLINGHAM: Your Honor, may we approach?

4 THE COURT: Yes, sir.

5 (Bench conference held off the record in the presence
6 of the jury but out of the hearing of the jury.)

7 Q Have -- you indicated earlier about the telephone
8 calls. How many times a week would Richard call your house
9 now?

10 A ~~At least seven times a week.~~

11 Q Okay. Lynda, do you have a basis for asking this jury
12 to spare Richard's life?

13 A Yes.

14 Q Would you tell us what it is?

15 A ~~He has three children who need him, adore him. They --~~
16 ~~even though he has been incarcerated, he continues to~~
17 ~~provide a very strong support base to these children. They~~
18 ~~depend on him, his guidance.~~

19 ~~He stresses to the children to be the best that they~~
20 ~~can be, not follow his path in all directions, but to be the~~
21 ~~best that they can be.~~

22 They love him to death. They go to see him all of the
23 time. They run to the phone when it rings hoping that it's
24 him. They need him in his life (sic).

25 Q Thank you, Lynda.

James Byrd
Direct examination by Mr. Kelly

1 MR. KELLY: That is all I have.

2 THE COURT: Cross-examination.

3 MR. WILLINGHAM: No questions, Your Honor.

4 THE COURT: Thank you, ma'am. You may step down.

5 Next witness.

6 JAMES BYRD, having been first
7 duly sworn, testified as follows:

8 THE COURT: Sir, please state your name for the record,
9 and spell your last name.

10 THE WITNESS: James Byrd, B-Y-R-D.

11 THE COURT: Thank you. Mr. Kelly.

12 MR. KELLY: Thank you, Your Honor.

13 DIRECT EXAMINATION BY MR. KELLY

14 Q James, I am going to stand way over here, and I'm going
15 to ask you to speak loudly so that I might hear you and
16 therefore the other people in the courtroom can hear you.

17 Okay. You've going to have to answer verbally. I notice
18 you are nodding up there. But this lady is recording. If
19 you will speak up, she would be able to capture that. Okay?

20 A All right.

21 Q Thank you, sir.

22 James, you live with your mom at this point in time in
23 Spartanburg, do you not?

24 A Yes.

25 Q How old are you?

James Byrd
Direct examination by Mr. Kelly

- 1 A Sixteen?
- 2 Q About how old were you when you came to South Carolina
- 3 with your mother?
- 4 A Six.
- 5 Q James, do you have a relationship with your natural
- 6 father?
- 7 A No.
- 8 Q Who is the man that you refer to as your father?
- 9 A Richard.
- 10 Q What do you call him? Do you call him Richard or
- 11 daddy?
- 12 A Richard.
- 13 Q During the last several years since you have been here
- 14 in South Carolina have you played any football, baseball,
- 15 soccer, anything like that?
- 16 A Yeah.
- 17 Q All right. Tell me a little bit about it.
- 18 A Play baseball and basketball.
- 19 Q All right. Was there ever an occasion where Richard
- 20 was the coach of your team?
- 21 A Yeah. One year I played for the league at Chapman.
- 22 Our coach died. He was in a car accident. And Richard
- 23 replaced him for the rest of the year.
- 24 Q Okay. So he just came in when there was a problem
- 25 there.

James Byrd
Direct examination by Mr. Kelly

1 A Yeah.

2 Q And other than coaching that one year, has he attended?

3 A Yeah. He goes whenever he can be at the practices and
4 at the games.

5 Q So he would be in practices, as well as the games.

6 A Yeah.

7 Q Was that supportive to you?

8 A Yeah.

9 Q Since 1999, Richard has been unable to attend any such
10 activity, right?

11 A Right.

12 Q Has he written letters to you encouraging you in any
13 way in your academics?

14 A Yeah, all of the time.

15 Q Has he encouraged you in your athletics?

16 A Uh-huh.

17 Q Do you write letters to him?

18 A Sometimes.

19 Q Do you talk to him on the phone?

20 A Every day.

21 Q You obviously can't call him, right?

22 A Uh-uh.

23 Q He has to call you.

24 A Right.

25 MR. BARNETTE: Objection, Your Honor. I believe he is

James Byrd
Direct examination by Mr. Kelly

1 leading.

2 THE COURT: Sustain the objection. Rephrase your
3 question, please, sir.

4 MR. KELLY: Thank you, Judge.

5 Q Does he call you?

6 A Yes.

7 Q ~~And what do you guys talk about when he calls you?~~

8 A Talk about things that are going on -- football,
9 basketball, school.

10 Q How about your grades, James? Good grades?

11 A Yeah, pretty good.

12 Q Do you give a copy of your report card to Richard?

13 A Yeah. My mom. She mails them.

14 Q Does he write a comment or anything on them?

15 A Yeah. We talk about them.

16 Q Okay. You talk about them on the phone visits?

17 A Yeah.

18 Q What about your brother and sister? What grades are
19 they in?

20 A ~~My sister is in the third grade and my brother is in~~
21 ~~the first.~~

22 Q And do you help them with their homework a little bit?

23 A No. They help themselves.

24 Q Okay. Does Richard talk with your brother and sister
25 about their report cards?

James Byrd
Direct examination by Mr. Kelly

1 A Uh-huh.

2 Q Does -- do you know whether or not he encourages them
3 to do well?

4 A I know he does.

5 Q Do they write letters as well?

6 A All of the time. And he writes them back.

7 Q Do they draw pictures and send them to daddy?

8 A Yes.

9 Q How about a visit, James? Do you have an opportunity
10 to visit with Richard?

11 A Yeah. I go and visit, but it depends. They go every
12 week, but you can only have like four people. And it's me
13 and my brother and sister. And sometimes they don't let me
14 in to see him.

15 Q Sometimes you go to see him and you don't get to.

16 A Yeah. But whenever I can go, I see him.

17 Q James, do you have a basis for asking this jury to
18 spare Richard's life?

19 A Yeah.

20 Q Tell them what it is, please.

21 A It's like he is the only dad I ever had. You know, if
22 he is gone, I just couldn't take it. My brother and sister,
23 they couldn't take it either. I don't know what to say.

24 MR. KELLY: That's all I have, Your Honor.

25 THE COURT: Cross-examination.

James Byrd
Direct examination by Mr. Kelly

1 MR. BARNETTE: Nothing from the state, Your Honor.

2 THE COURT: Thank you, sir. You may step down,
3 Mr. Byrd.

4 MR. KELLY: Can I approach, Your Honor?

5 THE COURT: Yes, sir.

6 (Bench conference held off the record in the presence
7 of the jury but out of the hearing of the jury.)

8 ~~MR. KELLY: The defense rests, Your Honor.~~

9 THE COURT: Ladies and gentlemen of the jury, that
10 concludes the defendant's case. What remains in this case
11 are the closing arguments of the parties and then my charge
12 or instruction on the law that applies to this matter.

13 I'm going to send you to the jury room as we begin our
14 preparations for that, those closing arguments, and then my
15 charge or instruction on the law that applies.

16 As I send you to the jury room, please remember that
17 you are not to discuss this case among yourselves. We will
18 get you back in just a few minutes.

19 The jury may retire.

20 (The following takes place outside the presence of the
21 jury.)

22 THE COURT: All right. Insofar as the aggravating
23 circumstances are concerned, I have three that the state is
24 relying upon.

25 And those would be -- let me get to them. That the

Requests to charge

1 murder was committed while in the commission of the
2 following crimes or acts: One, robbery while armed with a
3 deadly weapon; two, that the offender by his act of murder
4 knowingly created a great risk of death to more than one
5 person in a public place by means of a weapon or a device
6 which normally would be hazardous to the lives of another
7 person; and, three, the offender committed murder for
8 himself or another for the purpose of receiving money or a
9 thing of money or value.

10 Is that the way I understand the aggravating
11 circumstances that have been submitted?

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

13 THE COURT: That insofar as mitigating circumstances
14 are concerned, we have presented from the testimony and
15 evidence the 2-6-7 combination that is required to be
16 charged by the judge, even absent a request where there is
17 an allegation of intoxication or drug use, that being that
18 the murder was committed while the defendant was under the
19 influence of a mental or emotional disturbance, the capacity
20 of the defendant to appreciate the criminality of his
21 conduct and to conform his conduct to the requirements of
22 the law, substantially impaired, and the age or mentality of
23 the defendant at the time of the crime.

24 Is that correct, gentlemen?

25 MR. KELLY: Yes, sir, Your Honor.

Requests to charge

1 THE COURT: And, of course, I will also tell them that
2 they may also consider any nonstatutory mitigating
3 circumstances.

4 MR. KELLY: Yes, sir.

5 THE COURT: All right. I'm going to get my clerk. I
6 have got a couple of more things I need to do on the charge
7 to give you a copy of that before I actually enter into the
8 charge just to give you an idea of what it entails.

9 I will explain to them, once again, about their role as
10 the finders of the fact and me as the judge of the law; but
11 that they also in this case or in this particular portion of
12 the trial will have the added responsibility of determining
13 the sentence; talk about the credibility of the witnesses;
14 once again, also direct and circumstantial evidence under
15 the State vs. Grippon.

16 I will also instruct them about the defendant not
17 taking the stand, that they are not to hold that against him
18 in any manner or fashion whatsoever.

19 I will also instruct them that the fact that the
20 defendant and the deceased are of different races must not
21 be considered by them; that their oath requires that their
22 verdict be supported by the evidence and the testimony
23 properly introduced in the trial.

24 Are there any other requests for charge?

25 MR. GOWDY: Not from the state, Your Honor.

Requests to charge

1 MR. KELLY: Yes, Your Honor, future endangerment from
2 the defendant, if it please the Court.

3 THE COURT: What says the state in that regard? Have
4 you got something to hand up, Keith? I will be glad to --

5 MR. KELLY: My handwritten notes, Judge. I can hand
6 these up.

7 MR. WILLINGHAM: Your Honor, I don't know that future
8 dangerousness is an issue here.

9 We did discuss his prior criminal history as it went to
10 character and not to his future dangerousness. There has
11 been no evidence of how he adapted in prison and whether or
12 not he could conform to life in prison. There has been no
13 testimony offered to discuss how he did on probation or
14 parole. It has simply been his prior character through his
15 prior convictions.

16 THE COURT: You know, gentlemen, this is an issue that
17 has been tussled and tangled about for a number of years
18 now.

19 And I guess that where it really came down was in the
20 State vs. Simmons where there was an issue as to future
21 dangerousness in that case. Future dangerousness was made
22 an issue.

23 And, of course, the U. S. Supreme Court decided on
24 March the 20th of 2001 in the case of Shaffer vs. South
25 Carolina that rather than reversing the sentence outright

Requests to charge

1 that the Court's seven justice majority agreed that because
2 the South Carolina Supreme Court did not home in on the
3 question of whether the prosecutor's evidentiary submissions
4 or closing arguments, in fact, placed Shaffer's future
5 dangerousness at issue; that the South Carolina Supreme
6 Court should directly consider the question as to whether
7 the prosecutor's arguments placed Shaffer's future
8 dangerousness in issue. That was the issue in that
9 particular case.

10 I think that from the testimony and evidence that has
11 been produced here today there is nothing any different in
12 this case than the other 11 that I have tried insofar as
13 future dangerousness is concerned. That has not been an
14 issue in the other cases that I have tried.

15 I think that where the state makes it an issue, is one
16 that I have no alternative but under the Simmons case to
17 charge it.

18 But I think that when you have evidence of a prior
19 record of prior misconduct, I will charge the jury that they
20 are not to consider that evidence as evidence of any
21 aggravating circumstances but merely as to the character of
22 the defendant.

23 And unless the state in their closing argument -- and
24 we will take at a break before I charge the jury so that we
25 can put everything on the record -- unless they broach that

Requests to charge

1 issue of future dangerousness, I am not inclined at this
2 particular point in time to charge it.

3 I know on November the 26th the U. S. Supreme Court is
4 going to hear oral arguments in a case that I tried down in
5 Lexington County a couple of years ago, the State vs.
6 William Arthur Kelly, and that future dangerousness is an
7 issue, once again, because of the solicitor's closing
8 argument basically.

9 So, Solicitor, with that said, I will say this insofar
10 as future dangerousness is concerned.

11 Now, what you have given me, Mr. Kelly, is out of the
12 code. If the state seeks the death penalty and a statutory,
13 aggravating circumstance is found beyond a reasonable doubt
14 and a recommendation of death is not made, then the trial
15 judge must impose a sentence of life. For the purposes of
16 this section, life imprisonment means until the death of the
17 offender.

18 If I am going to charge anything, that's what I will
19 charge, not all of that good conduct and credit and
20 everything else, because I think that that adequately
21 describes what life imprisonment is if they find an
22 aggravating circumstance.

23 Now, if they do not find an aggravating circumstance, I
24 tell them in my charge that I would sentence the defendant
25 under the law and the appropriate code section. And that's

Requests to charge

1 where the state Supreme Court and the U. S. Supreme Court
2 have apparently had their misunderstanding, because the
3 state Supreme Court has taken the position that if an
4 aggravating circumstance is not found, then he could be
5 sentenced to 30 years to life. And so, in essence, that is
6 a misinformation.

7 But I think that what I am inclined to do, gentlemen,
8 given the way that I view the landscape at this particular
9 point in time, is rather than what we normally do, the old
10 charge that, when a defendant would request it, that the
11 terms life imprisonment and death sentence are to be
12 understood in their plain and ordinary meaning, the old
13 State vs. Norris language, at 285, S. C., 86, 328, S. E. 2d,
14 339, a 1985 case, is to say that a sentence of life
15 imprisonment is life in prison if there is the presence of a
16 statutory aggravating circumstance. And I think that there
17 is probably some very good reasons for us to do that.

18 So I will give that charge, so, if the state seeks that
19 life means until the death of the offender.

20 MR. KELLY: Judge, I know the Court has not ruled yet,
21 although on a few things, but I know the Court's position to
22 that. Can I be heard further on that if it please the
23 Court?

24 THE COURT: On what?

25 MR. KELLY: On the future dangerousness.

Requests to charge

1 THE COURT: Well, what do you want me to do about
2 future dangerousness other than what I am doing?

3 MR. KELLY: Judge, in addition to the Shaffer case, I
4 respectfully submit that a 1995 in footnote four of the
5 Kevin Young case, which is 459 S. E. 2d, 84, footnote four
6 says that evidence was presented concerning Young's
7 character and his prior criminal record such as was relevant
8 in the sentencing phase without regard to future
9 dangerousness. And, of course, then it cites Simmons.

10 Then in 2000 the Fourth Circuit, Judge King writing for
11 the Court, specifically cites this note. And he says, "That
12 we agree with Young that the state did, in fact, referring
13 to Young's future dangerousness at the resentencing phase,
14 although state did so without specifically relying upon the
15 future dangerousness as a basis for seeking the death
16 penalty and that the references were sufficient to place
17 Young's future dangerousness at issue." And then it cites
18 that back to this particular footnote.

19 And I just respectfully submit for the Court's
20 consideration that with that new language from the Fourth
21 Circuit that one could take it that the mention of the prior
22 record now constitutes --

23 THE COURT: Well, Mr. Kelly, are you misunderstanding
24 me? I'm telling you that I'm going to charge that, charge
25 what you are asking, that if you sentence the defendant to

Requests to charge

1 death, you must assume that the sentence of the court will
2 be carried out.

3 If a recommendation of death is not made, then the
4 defendant shall be sentenced to life imprisonment without
5 the possibility of parole and that that means, life
6 imprisonment means, for the remainder of his natural life.

7 MR. KELLY: Yes, sir.

8 THE COURT: I don't know what else I can do other than
9 that.

10 ~~MR. KELLY: That's great, Judge. Thank you.~~

11 THE COURT: All right. We will stand at ease until I
12 can get my paperwork done.

13 Let's say we will try to start back at a quarter of
14 3:00.

15 MR. GOWDY: Thank you, Your Honor.

16 THE COURT: And then I want to talk with the defendant
17 about his ability to address the jury before we get started
18 back.

19 (Whereupon, a recess was taken.)

20 THE COURT: All right. Now, insofar as the documents
21 that I have given you gentlemen, I think that I have given
22 you the statutory instructions, a copy of that; the form of
23 aggravating circumstances will be submitted to the jury;
24 then the recommendation of sentences as to life or death,
25 which will go to the jury. Those are the four documents

Defendant questioned

1 that will be presented to the jury.

2 All right. Insofar as the remainder is concerned, of
3 course in the closing arguments in a sentencing phase the
4 defense may open if you desire, then the state's argument,
5 and then the defense will close.

6 Of course, Mr. Moore, would you stand, please, sir?

7 (Whereupon, the defendant stood.)

8 THE COURT: As is the case in the sentencing phase, as
9 well as the guilt phase that we have already been through,
10 you certainly have the right, along with your attorney, to
11 have a closing argument regarding the sentence imposed.

12 Now, once again, this is your right, Mr. Moore, to
13 address the jury; and once again, the statement that you
14 would make to the jury would have to be confined to the
15 evidence that has been presented and to the issues
16 concerning the sentence imposed.

17 Do you understand that you have this right, sir?

18 THE DEFENDANT: Yes, sir, I do.

19 THE COURT: And what is your decision?

20 THE DEFENDANT: I shall not speak, Your Honor.

21 THE COURT: You will not speak to the jury?

22 THE DEFENDANT: No, sir.

23 THE COURT: But you understand that that is your right.

24 THE DEFENDANT: Yes, sir.

25 THE COURT: All right, sir. Thank you very much,

Defendant questioned

1 Mr. Moore.

2 So insofar as the defense is concerned, if you
3 gentlemen wish to split up your argument, one open, the
4 other one close, you may do so. Or if you want the state to
5 open and you to close, that would be the way we would
6 proceed.

7 ~~MR. KELLY: We would like the state to open, and we~~
8 ~~will close, Judge.~~

9 THE COURT: Are you ready, Solicitor?

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

11 THE COURT: And, gentlemen, are you ready?

12 MR. KELLY: Yes, sir.

13 THE COURT: Let's bring our jury back.

14 (The following takes place in the presence of the
15 jury.)

16 THE COURT: Madam foreperson, ladies and gentlemen of
17 the jury, as you know, we have received all of the testimony
18 and evidence that will be presented in this sentencing phase
19 of this trial. And what remains are the closing arguments.

20 And during the closing arguments, let me remind you
21 that what the lawyers say does not represent evidence in the
22 case. The evidence in this case is coming from the
23 testimony of the sworn witnesses who have appeared on the
24 witness stand, together with all of the other evidence that
25 has been introduced.

Closing arguments

1 I want you to give them your undivided attention. But
2 if there is any discrepancy in what they say, in their
3 recollection as to what the testimony and the evidence has
4 revealed and it does not agree with what you find has come
5 from the witness stand, then, of course, you will follow
6 your own recollection.

7 Also if the lawyers make any reference to the law or
8 comment upon the law and it differs with what I instruct you
9 that the law is, then, of course, you will follow the law as
10 I instruct you.

11 The state will have the opening argument; the defense
12 will have the final argument.

13 Solicitor.

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

15 THE COURT: Yes, sir.

16 MR. GOWDY: Good afternoon, Madam Forelady; and good
17 afternoon, ladies and gentlemen of the jury.

18 This will be the final time that anybody representing
19 the State of South Carolina will stand before you. And I
20 would be remiss if I didn't, as I did in my closing in the
21 guilt phase, thank you for your service in this very
22 difficult, very somber case.

23 I guess it was about a week ago that we all met in this
24 courtroom. It looked bigger. It was larger back then --
25 and began the process of overall qualification.

Closing arguments

1 And then I suppose it was three or four days ago that
2 you were separated or sequestered from your family and began
3 to serve in this case.

4 And I know that I speak on behalf of everybody in both
5 sides of this case when I thank you for the sacrifices that
6 you made. Our system doesn't work without juries, and I
7 thank you for that.

8 Ladies and gentlemen, you have already found Richard
9 Bernard Moore guilty of murder; you have found him guilty of
10 armed robbery; you have found him guilty of possession of a
11 firearm during the commission of a violent crime; you have
12 found him guilty of assault with intent to kill. He has
13 been found guilty of those four crimes.

14 And what's left for us, ladies and gentlemen, is to
15 determine what the appropriate punishment is. And each one
16 of you that came and sat in this chair told His Honor that
17 you could give death in the appropriate case and that you
18 could give life in the appropriate case. And all that's
19 left to do in this case is to determine what's appropriate,
20 what is appropriate based on the facts and circumstances of
21 this case.

22 Ladies and gentlemen, as Deputy Willingham told you
23 this morning, the State of South Carolina has to allege and
24 prove beyond a reasonable doubt aggravating circumstances or
25 aggravating factors. We have alleged three.

Closing arguments

1 This murder was committed during the commission of an
2 armed robbery; that during the commission of this murder
3 another person was endangered in a public place, that being
4 Terry Hadden who was shot at; and that the purpose of this
5 crime, the purpose of this murder, was to obtain money, and,
6 indeed, that was the only purpose of this murder.

7 I am not going to dwell on the aggravating factors and
8 circumstances. I will submit to you this evidence that we
9 went through in the guilt phase is overwhelming that all
10 three of those aggravating factors have been met. And,
11 again, what we are left to decide is what is the appropriate
12 punishment in this case.

13 And to do that I am not going to spend the remainder of
14 my time talking about aggravating factors or aggravating
15 circumstances. I am going to talk about the circumstances
16 of this crime on September the 16th, a little bit more than
17 two years ago. I am going to talk about the impact this
18 crime had on a family that stretches from Pennsylvania to
19 the west side of Spartanburg. And I am going to talk about
20 the character of Richard Bernard Moore.

21 On September the 16th, 1999, James Mahoney was doing
22 his job. He was doing his job at a little convenience store
23 that Keith Fowler named for his wife Nikki not five miles
24 from here. And he had a right to do his job.

25 He worked the third shift. Some people call it the

Closing arguments

1 dark shift, the night shift. He loved that work. They
2 asked him to move, and he didn't want to move. He loved
3 that work.

4 And on September the 16th, 1999, we find out that Terry
5 Hadden -- it seemed to be an ordinary night of work. People
6 were coming in for hot dogs. People were coming in for
7 this. Somebody came in and borrowed his tire arm.

8 The hands that were so small and so crooked that they
9 couldn't chop an onion went and got his own tire iron and
10 loaned it to a stranger. And the eyesight that required a
11 magnifying glass to read a label was watching T. V. to find
12 out about a hurricane. It was an average night.

13 Terry Hadden came in like he did every other night, he
14 testified; got off work from Wise Foods and sat down and
15 played video game, video poker.

16 Sometime after 3:00 a.m. something happened that
17 changed the course of forever for these people and ended the
18 life of a 40-something-year-old man. And I ask you for what
19 purpose. What was accomplished by this crime? It was as
20 senseless and violent and nonsensical as any crime you can
21 imagine.

22 Richard Moore walks into the front door. He glances at
23 Terry Hadden. He goes to the cooler. He comes to the
24 checkout stand.

25 Terry Hadden hears James Mahoney say, "What the hell do

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1 you think you are doing," and he turns around to see those
2 crooked, crippled hands on that defendant's hands, and a gun
3 is pointed right squarely at him, and he shot at him.

4 Why shoot at Terry Hadden? What had he done? He is as
5 innocent as any bystander can be. He is sitting there
6 playing a video game, and this defendant simultaneous with
7 saying don't move, fires a .45 caliber slug at Terry Hadden
8 and misses.

9 And we know from the evidence, ladies and gentlemen,
10 that James Mahoney got off a shot. We know that his gun was
11 fired a single solitary time. I cannot stand before you and
12 tell you that he fired that shot in defense of Terry
13 Hadden's life. He may have. I can't stand before you and
14 say that he fired that shot to protect another human being,
15 although the evidence circumstantially supports that.

16 I can tell you, ladies and gentlemen, that he has a .45
17 caliber hole through his heart, his lungs, his stomach and
18 his liver. I can tell you that it happened like that in
19 less than the time it would take me to talk over to the
20 defense table. A man's life ended for \$1,400. It was a
21 selfish, senseless, violent crime.

22 And as Richard Moore walks out of Nikki's Convenience
23 Store, there are two men on the ground. Terry Hadden gets
24 up and identifies him. James Mahoney is not getting up.
25 James Mahoney bled to death on a concrete kitchen floor of

Closing arguments

1 Nikki's Convenience Store.

2 And as the life bled out of him, I submit to you,
3 ladies and gentlemen, it bled out of his mama and daddy and
4 his sister and his brothers.

5 How do you describe to people what the impact of losing
6 a child is? And it doesn't matter how old that child is.
7 It is still your child.

8 James Mahoney did his best this morning to tell you
9 what it's like to lose a son. And I was struck by the
10 testimony that they asked him to come home. His eyesight,
11 his diabetes, his arthritis was so bad. Come home, James.

12 What did he tell them? This was his home. Spartanburg
13 was his home, and Nikki's Convenience Store was his home,
14 and, more specifically, the third shirt as Nikki's
15 Convenience Store was his home. And he stayed.

16 If you remember, James Mahoney wasn't a NASCAR fan.
17 Mr. Mahoney wasn't a NASCAR fan. His son was. But now that
18 his son is gone he watches the Number 24 car as it goes
19 around the track because that's the connection he has with
20 his son.

21 He didn't get to tell his son goodbye, didn't get to
22 tell his son I love you; didn't get to patch up any
23 differences if he had any differences. He watches the
24 little race car ride around the track. That's the
25 connection with a 40-year-old child that he wasn't able to

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1 protect on September the 16th.

2 And then we hear from his sister Kathy, a Spartanburg
3 County resident. And I asked her what will you miss. She
4 will miss his voice coming over for dinner on Sunday night;
5 she will miss the voice saying happy birthday, mom, when
6 they celebrated Ms. Mahoney's birthday.

7 Ladies and gentlemen, there was testimony James Mahoney
8 was a small man, 5' 9" and 140 pounds at the outside. But I
9 submit to you he was small only in size, because he was a
10 big enough man to call out spelling words for somebody
11 else's children. He was a big enough man to drive somebody
12 to the hospital even if it meant closing the store.

13 And there has been testimony that he had bad eyesight,
14 and he may have had bad eyesight, but I submit to you that
15 his vision was good, his vision was good enough to see the
16 good in the people that came into Nikki's Convenience Store
17 on the third shift, people like Terry Hadden, people that
18 needed help with their cars, people that would call and say
19 my car is doing this and what does that man, James.

20 He was a small man in size only, and he was a blind
21 man, but he saw the good in other people. And he did not
22 deserve to die on September the 16th, two years ago. And I
23 submit to you he did not deserve to die in the circumstances
24 that he did, alone and by himself while this defendant is
25 dripping blood on his back.

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1 The hopes and the goals and the dreams of a 40-year-old
2 man are coming out of the heart, and the cold, wet drops of
3 blood of a career criminal are dripping on his back.

4 Those are the circumstances of this crime. And as he
5 drips blood on the back of a fellow human being that he has
6 just shot, he is rifling through somebody else's property
7 and taking somebody else's money, somebody else's gun.

8 And he never stops to call 9-1-1; he doesn't call E. M.
9 S. He says, "Let's get the hell out of here," as he goes to
10 buy some more crack cocaine. That's what James Mahoney's
11 life was worth. Crack addiction. Those are the
12 circumstances of this crime, impact.

13 You heard from Mr. Mahoney; you heard from Kathy
14 Pinson; you heard from James' brother who served in the
15 armed services. You heard him say that James himself wanted
16 to serve in the Army. Of course he couldn't. He was too
17 small and his health was too bad.

18 But can you imagine a more exciting time for a big
19 brother to talk to a little brother than right now that's in
20 the armed service?

21 They had their last conversation. How do you put an
22 impact on the death of a sibling or a child? You can't do
23 it. How do you put an impact on the death of a friend?
24 Keith and Nikki Fowler were his employers. They were also
25 friends.

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1 There is no third shift at Nikki's Convenience Store
2 any more. That's just a small example of something that's
3 changed since September the 16th. These people's lives will
4 never be the same, never. Think about it.

5 Richard Moore wasn't working, even though he could, on
6 September the 16th. James Mahoney was working, even though
7 he really shouldn't have been.

8 Richard Moore has experienced what it's like to be
9 loved by his spouse. James Mahoney will never experience
10 what it's like to be loved by his spouse.

11 This defendant can tell his children goodbye. James
12 Mahoney never had time to tell them hello. At age 40 he is
13 killed for crack cocaine.

14 Ladies and gentlemen, on one end of the spectrum we
15 have mercy, and we have all benefited from mercy at some
16 point in our lives. We have all needed mercy. We have all
17 received mercy.

18 And mercy can come in the form of any number of things.
19 It can come in the form of probation or relatively small
20 prison sentences. As you look back through his record,
21 1985, 1987, 1991, which is where he said get out of the way,
22 Bitch. Michelle Crowder. He pushes her down and assaults
23 her over a pocketbook. 1993, 1994, more 1993, '94, '95,
24 '96, '97, assault and battery of a high and aggravated
25 nature, '99 murder, armed robbery, assault with intent to

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1 kill, possession of a firearm during a violent crime.

2 That is a steady, continuous, gradual pattern of
3 escalating violence. Mercy is at this end of the spectrum.
4 It can be shown with small prison sentences; it can be shown
5 with probation; it can be shown with second chances.

6 There is a time for mercy, ladies and gentlemen. That
7 time has come and gone.

8 At the other end of the spectrum we have vengeance, and
9 sometimes we want to strike out at somebody. Sometimes we
10 want retribution.

11 I am not asking you for retribution. I am not asking
12 you to strike out. I'm standing in the middle of mercy and
13 vengeance on a platform called justice. And I am telling
14 you that justice demands accountability.

15 He has had chance after chance after chance. James
16 Mahoney had no chance. Why is it that the people who come
17 before you and ask for mercy will not ever show any mercy?
18 Why is it the people that come before you and ask for
19 compassion will never show any compassion?

20 He has had ample opportunity, 16 years of escalating
21 violent acts. There have been too many people hurt too bad
22 for too long for mercy in this case.

23 Ladies and gentlemen, the circumstances of this crime,
24 the nature of this defendant, the aggravating factors in
25 this case all lead us to the conclusion that enough is

Closing arguments

1 enough, is enough. 1985 till 1999 he has been shown mercy
2 and second chances.

3 And I stand before you on behalf of the State of South
4 Carolina, and I am asking you to give him what he has earned
5 for 15 years. He has earned it. Fifteen years of
6 victimizing people; 15 years of disregarding other people's
7 well-being.

8 Push a woman down for her pocketbook and stomp on her;
9 push a woman aside and call her the name that he called her
10 for money that doesn't belong to him; to fire a shot at
11 somebody playing a video game in a convenience store, to
12 shoot somebody through the heart for crack cocaine.

13 Ladies and gentlemen, he has earned a sentence of
14 death. You told the judge that in the appropriate case you
15 could give death. This is the appropriate case.

16 I'll tell you again, ladies and gentlemen, that people
17 that come and stand before this rail and ask for mercy never
18 show mercy. They never show mercy.

19 He wants to come and ask you for compassion, step over
20 a crippled, crooked dying body and drip blood on their back
21 and want you to show them passion.

22 I ask you to show them justice. I ask you to sentence
23 him to what he has earned for a lifetime of violent crimes.
24 Death.

25 THE COURT: Mr. Kelly.

Closing arguments

1 MR. KELLY: Thank you, Your Honor.

2 Madam forelady and ladies and gentlemen of the jury,
3 ~~this will be my last opportunity to speak with you.~~

4 The prosecutor wants to talk about the past criminal
5 record and how somebody has earned the death penalty. I
6 don't know that you can earn the death penalty. We are ~~not~~
7 ~~here talking about a guilty or innocence. That's been~~
8 ~~decided. We are here now to talk about what we are going to~~
9 ~~do.~~

10 Now, there are ~~two possible sentences~~, as you well
11 know. Judge Clary is going to tell you in his instructions
12 called charges later that there is ~~death~~, and that you
13 should consider that it will be carried out, ~~and that there~~
14 ~~is life without parole.~~

15 Now, listen to Judge Clary who is going to tell you.
16 We are not talking about sparing a man's life who is going
17 to add something else to this sheet of paper. We are
18 through. That's all done. We are not going to have to
19 worry about that any more.

20 He is talking about what's going to happen. Is he
21 going to spend whatever time he has left in a ~~natural~~
22 ~~process incarcerated doing life, or is he going to face~~
23 ~~death?~~

24 Now, you understand that the prosecutor talked to you
25 about aggravating and mitigating circumstances and what this

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1 one means and what that one means, whether they have proved
2 one of those aggravating circumstances -- well, they must
3 prove one. If they do not prove one of those factors to
4 your satisfaction beyond a reasonable doubt, then you must
5 give life.

6 THE COURT: No, sir. That is not a correct statement
7 of the law. If one is not proven, then this Court would
8 sentence, and that is my instruction.

9 MR. KELLY: Then this Court would sentence, and the
10 result would be life.

11 THE COURT: No, sir. Not under the law.

12 MR. KELLY: The result would be other than death.

13 ~~If one of those aggravating circumstances is proven~~
14 ~~beyond a reasonable doubt, then at that point the choice is~~
15 ~~yours. The law of this state does not require you to vote~~
16 ~~death, the law of this state does not require you to vote~~
17 ~~life. The choice is yours.~~

18 Judge Clary is going to tell you about some mitigating
19 circumstances, some things that tend to make it less severe.
20 And I think there are three we've asked that they be
21 charged.

22 You do not have to find one of those beyond a
23 reasonable doubt. It needn't be at that level of proving.
24 And it does not need to be unanimous. One person can find
25 one mitigating circumstance, and for that reason vote life.

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1 One person or all can vote life for no reason.

2 Now, what we are talking about here is Richard Moore.

3 Mr. Willingham got up in his opening, and he said Richard
4 Moore has contributed to the community this, 15 or 16 years
5 of criminal activity. That's all he has contributed. That
6 was the implication.

7 But Lynda Byrd came in here and told you in about 1991
8 or two, some date, and I didn't write it down. I am sorry.
9 But in the early 1990's she and Richard came here from
10 Michigan. And they brought with them her six-year-old son
11 who does not know his father but considers this man to be
12 his father.

13 In the time period that they have been here two
14 children have been born of this union, and they are Lindel
15 or Lindell and Alexandria. And if I got this right, it is
16 the first and the third grade students.

17 And Lynda has told you and James has told you that
18 Richard Moore was a daddy, that Richard Moore was a coach,
19 that Richard Moore was a worker, that he provided. He
20 bought groceries. He contributed to the family.

21 Unfortunately, he has suffered with an addiction
22 problem. I just tell you. No reason to hide it. Not
23 talking about not doing drugs. And he has had a problem,
24 but that's over, because where Richard is going after today,
25 you don't have to worry about that. We haven't had to worry

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1 about it since 1999.

2 But since 1999 while he has been in jail those children
3 have been able to write letters. Those children have been
4 able to sent a photocopy of a report card. And Richard,
5 according to Lynda and James, has been able to talk with the
6 children and has been able to encourage them, do the right
7 thing, Lynda said. He encourages them to do the right thing
8 because he knows what it is like to do the wrong thing.

9 Now, we've got an eleventh grader, a first grader and a
10 third grader as citizens that understands that better than
11 he does.

12 Now, James has sent his father, Richard, his father
13 figure, stuff like letters that I said. And in the future
14 that young man at some point, I think he said he is in the
15 eleventh grade. He will graduate.

16 I submit he will be able to send Richard a copy of his
17 diploma. Richard will then be able to encourage him. Go on
18 in school. Do something good.

19 Those other children likewise have been continuing to
20 send him copies of report cards, boys and girls' club
21 certificates, any other activity they may be in.

22 And Richard, as he has done in the past, will be able
23 to continue to encourage them, do the right thing.

24 You can draw that all the way to any other conclusion,
25 all the way down to people announcement weddings, when they

Closing arguments

1 announce grandchildren born. But if you give him life,
2 Richard at least in writing and in phone conversations can
3 encourage those people to continue to do the right thing.

4 That is being a productive member of society. It is
5 not as productive as it could be, but that is something. I
6 submit to you that is something.

7 Mr. Willingham told you at the very beginning this man
8 is death eligible and death qualified. I tell you he is
9 life eligible and he is life qualified. There is a
10 presumption of life. He wants to live. He wants to
11 continue to write those cards. He wants to be able to
12 continue to make those encouraging statements.

13 ~~Richard Moore, I submit to you, is a man worth living.~~
14 ~~He is a man worth saving. The man you see today is not the~~
15 ~~man that you would have seen September of 1999. But this~~
16 ~~man today is at least worth life without the possibility of~~
17 ~~parole. I am here about mercy. I am here about mercy. I am~~
18 making a general plea for your mercy for his life. Not the
19 possibility of parole.

20 THE COURT: Madam Foreperson and members of the jury,
21 you have heard the testimony and evidence and arguments of
22 the state and the defendant.

23 I will now explain to you the law that applies to this
24 case. Under the constitution and laws of South Carolina you
25 are the finders of the facts in this case. I do not have

Jury charge

1 the right to pass upon the facts or even to express any
2 opinion that I might have as to them.

3 You are also the judges, the sole judges, of the
4 credibility, the believability of the witnesses who have
5 testified in this case.

6 In passing upon their credibility you may take into
7 consideration many things, such as the following: The
8 demeanor or manner of testifying, whether the witness had
9 reason to be biased or prejudiced, whether a witness'
10 testimony was contradicted on the one hand or supported and
11 corroborated on the other hand.

12 Now, you certainly do not determine this credibility or
13 believability by counting the number of witnesses for either
14 side. You may believe a small portion of a witness'
15 testimony and disregard the larger, or vice versa.

16 You may believe one witness against many, or many
17 against one. All of these things you will consider, bearing
18 in mind that you should give the defendant the benefit of a
19 reasonable doubt.

20 Now, there are two types of evidence which are
21 generally presented during a trial, direct evidence and
22 circumstantial evidence. Direct evidence is the testimony
23 of a person who asserts or claims to have actual knowledge
24 of a fact such as an eye witness. Circumstantial evidence
25 is proof of a chain of facts and circumstances indicating

Jury charge

1 the existence of a fact.

2 And the law makes absolutely no distinction between the
3 weight or value to be given to either direct or
4 circumstantial evidence, nor is a greater degree of
5 certainty required of circumstantial evidence than that of
6 direct evidence.

7 You should weigh all of the evidence in this case. And
8 after weighing all of the evidence, you must be convinced
9 that the sentence you recommend for the defendant is beyond
10 a reasonable doubt.

11 I charge you further, Madam Foreperson and members of
12 the jury, that the fact that a defendant elects not to
13 testify in his own behalf cannot and must not be considered
14 against him under any circumstances or in any manner
15 whatsoever.

16 The decision of any defendant not to take the witness
17 stand and testify in his own behalf does not create any
18 inference against him. And I tell you now that you must not
19 permit that fact to weigh in even the slightest degree
20 against the defendant. You should not permit this fact to
21 enter into the discussions or deliberations of the issues in
22 this case.

23 Now, the rules of evidence ordinarily do not permit
24 witnesses to testify as to their opinion or conclusions. An
25 exception however to this rule does exist as to those whom

Jury charge

1 we call expert witnesses. Those are witnesses who by
2 education and experience have become expert in some art,
3 science, profession or calling.

4 These witnesses may state their opinions as to relevant
5 and material matter in which they profess to be an expert
6 and may also state their reasons for the opinion.

7 You should give the -- you should consider expert
8 opinion received in evidence in this case and give it such
9 weight as you may think it deserves. If you should decide
10 that the opinion of an expert witness is not based upon
11 sufficient education and experience or if you should
12 conclude that the reasons given in support of the opinion
13 are not sound, or if you feel that it is outweighed by the
14 other evidence, you may disregard that opinion entirely.

15 I further instruct you that the fact that the defendant
16 and the deceased are of different races must not be
17 considered by you. Your oath requires that your verdict be
18 supported by evidence and testimony properly introduced in
19 this trial.

20 Now, by the same constitution and laws which makes you
21 the finders of the facts and the evidence as I have
22 discussed with you, I am as the judge made the sole and the
23 only instructor in the law.

24 And, finally, I charge you in this regard, that you
25 should not be concerned about what you think the law ought

Jury charge

1 to be but rather what I charge you the law to be.

2 Now, ladies and gentlemen of the jury, I charge you
3 that evidence of prior misconduct by the defendant should
4 not be considered and may not be used as proof of any
5 aggravating circumstance, any statutory aggravating
6 circumstance, about which I will instruct you shortly.
7 However, you may consider such evidence only as to the
8 defendant's character, his characteristics, but not as proof
9 of the alleged statutory aggravating circumstances.

10 Now, Madam Foreperson and members of the jury, it now
11 becomes your duty to decide what sentence you will recommend
12 that this Court impose upon the defendant, Richard Bernard
13 Moore.

14 There are two verdicts you are to consider in this
15 case. One is the death penalty, which in this state is by
16 electrocution or lethal injection, and the other is life
17 imprisonment.

18 If you sentence the defendant to death you must assume
19 that the sentence will be carried out.

20 If a recommendation of death is not made, the defendant
21 shall be sentenced to life imprisonment without the
22 possibility of parole. Life imprisonment means until the
23 death of the offender.

24 Please understand that your sentencing recommendation
25 will be followed by this Court. The order in which I

Jury charge

1 explain these sentences is in no way a recommendation by the
2 Court as to which sentence you should choose to recommend.
3 It is simply that one must be stated first.

4 By this recommendation-of-sentence form which I hold in
5 my hand you, the jury, may recommend that this Court
6 sentence the defendant to death. Please observe that
7 immediately below the body of the recommendation there are
8 12 lines.

9 This is where you should -- this is where you -- this
10 is where, should you decide to recommend the death penalty,
11 each one of you would sign your name.

12 It is the law of this state, Madam Foreperson and
13 members of the jury, that a recommendation or imposition of
14 the death penalty must be a unanimous recommendation and
15 that each and every juror sign his or her name to the
16 recommendation form. And please remember that your
17 sentencing recommendation will be followed by this Court.

18 I will now read to you the text of this form, and I
19 quote: "We, the jury, in the above entitled case, having
20 found beyond a reasonable doubt the existence of the
21 following statutory aggravating circumstance or
22 circumstances, to wit."

23 At this point there is a place provided for you to
24 write such circumstances about which I will instruct you
25 further.

Jury charge

1 Quote, "Now recommend to the Court that the defendant,
2 Richard Bernard Moore, be sentenced to death." End quote.

3 Now, for this recommendation to be made, that is that
4 the defendant be sentenced to death, you must first find a
5 statutory aggravating circumstance existed beyond a
6 reasonable doubt.

7 What is a statutory aggravating circumstance? It is a
8 fact, an incident, a detail or an occurrence which the South
9 Carolina General Assembly has declared by statute would make
10 worse, that is aggravate, the offense of murder when the two
11 occur together. In other words, it's something which
12 increases the enormity or adds to the injurious consequences
13 of the offense.

14 Now, upon this sheet of paper which I hold in my hand
15 are written the words statutory instructions. You will have
16 this paper in your jury room during your deliberations.

17 The body of this form states, and I quote: "In
18 determining whether to recommend that the defendant, Richard
19 Bernard Moore, be sentenced by the Court to life
20 imprisonment or to death you may consider the following
21 statutory aggravating circumstances."

22 And they are as follows: "That the defendant, Richard
23 Bernard Moore, did murder James Mahoney while in the
24 commission of the crime or act of robbery while armed with a
25 deadly weapon; two, that the defendant, Richard Bernard

Jury charge

1 Moore, by his act of murder knowingly created a great risk
2 to more than one person in a public place by means of a
3 weapon or device which normally would be hazardous to the
4 lives of more than one person; and, three, that the
5 defendant, Richard Bernard Moore, committed the murder of
6 James Mahoney for himself or another for the purpose of
7 receiving money or a thing of monetary value." End quote.

8 Let me emphasize to you that these are the only
9 circumstances you may consider as aggravating circumstances.
10 Should you find, and it must be a unanimous finding, that is
11 a finding by each and every one of you -- should you find
12 that the state has proven beyond a reasonable doubt the
13 existence of one or more of the circumstances listed on this
14 sheet of paper, then you would be authorized, which is to
15 say permitted, to consider recommending to this Court that
16 the defendant be sentenced to death.

17 Now, what do I mean by the term proven beyond a
18 reasonable doubt? As I have previously instructed you, a
19 reasonable doubt is the kind of doubt that would cause a
20 reasonable person to hesitate to act. And the state has the
21 burden of proving the aggravating circumstances beyond a
22 reasonable doubt.

23 Now, as I have previously told you, some of you may
24 have served as jurors in civil cases where you were told
25 that it is only necessary to prove that a fact is more

Jury charge

1 likely true than not true.

2 In criminal cases the state's proof must be more
3 powerful than that. It must be beyond a reasonable doubt.
4 Proof beyond a reasonable doubt is proof that leaves you
5 firmly convinced.

6 There are very few things in this world that we know
7 with absolute certainty, and in criminal cases the law does
8 not require proof that overcomes every possible doubt. And
9 please pay particular attention to this. You are never
10 required to recommend the death penalty, even if you find
11 that a statutory aggravating circumstance existed at the
12 time the offense occurred.

13 However, if you find the existence of a statutory
14 aggravating circumstance, you are to list that circumstance
15 or circumstances on the form entitled aggravating
16 circumstances. And all 12 jurors would sign this form.
17 This is the form of aggravating circumstances which I hold
18 in my hand that you will also have in your jury room.

19 Now, as I have told you, the three aggravating
20 circumstances that the state alleges in this case, and it's
21 important for me to explain to you now that murder while in
22 the commission of a crime of armed robbery -- excuse me.
23 Murder while in the commission of the crime or act of
24 robbery while armed with a deadly weapon is one of the
25 issues which the state alleges is an aggravating

Jury charge

1 circumstance. And the state must prove beyond a reasonable
2 doubt that the defendant killed another person with malice
3 aforethought. And I have previously explained to you that
4 malice is hatred, ill will or hostility towards another
5 person.

6 It is the intentional doing of a wrongful act without
7 just cause or excuse and with an intent to inflict an injury
8 or under circumstances that the law would infer an evil
9 intent.

10 Malice aforethought does not require that malice exist
11 for any particular time before the act is committed, but
12 malice must exist in the mind of the defendant just before
13 and at the time the act is committed. Therefore there must
14 be a combination of the previous evil intent and the act.

15 Malice aforethought may be expressed or inferred, and
16 these terms expressed or inferred do not mean different
17 kinds of malice but merely the manner in which malice may be
18 shown to exist, that is either by direct evidence or by
19 inference from the facts and circumstances which are proved.

20 Expressed malice is shown when a person speaks words
21 which express hatred or ill will for another and when the
22 person prepared beforehand to do the act which was later
23 accomplished.

24 Malice may be inferred from conduct showing a total
25 disregard for human life. Inferred malice may also arise

Jury charge

1 when the deed is done with a deadly weapon. And a deadly
2 weapon is any article, instrument or substance which
3 likely -- which is likely to cause death or great bodily
4 harm. Whether an instrument has been used as a deadly
5 weapon depends upon the facts and circumstances of each
6 case.

7 Now, armed robbery. In order to prove this offense the
8 state must first prove beyond a reasonable doubt that the
9 defendant took personal property from the person or presence
10 of another. And property is in the presence of a person if
11 it's within that person's reach, inspection, observation or
12 control so that the person could, if not overcome with
13 violence or prevented by fear, keep possession of the
14 property.

15 The state must also prove beyond a reasonable doubt
16 that the defendant carried the property away intending to
17 permanently deprive the owner of the property and to keep
18 the property for the defendant's own use.

19 The slightest removal of the property or the complete
20 possession of the property even for an instant by the
21 defendant is sufficient to show a taking and carrying away
22 of the property.

23 The taking and carrying away must have been done with
24 violence or by putting the owner of the property in fear of
25 violence.

Jury charge

1 Finally, the state must prove beyond a reasonable doubt
2 that the defendant was armed or became armed with a deadly
3 weapon during the robbery. And a deadly weapon is any
4 article, instrument or substance which is likely to cause
5 death or great bodily harm. Whether an instrument has been
6 used as a deadly weapon depends on the facts and
7 circumstances of each case.

8 The state must also prove beyond a reasonable doubt
9 that the defendant by his act of murder knowingly created a
10 great risk of death to more than one person in a public
11 place by means of a weapon or device which normally would be
12 hazardous to the lives of more than one person.

13 The state must also prove beyond a reasonable doubt
14 that the defendant committed the murder of the victim for
15 the purpose of receiving money or a thing of monetary value.

16 Now, I instruct you further that should you find that
17 the state has not proven that an aggravating circumstance
18 existed, that is to say you should find that you still have
19 a reasonable doubt as to the existence of such a
20 circumstance, then you would not make a recommendation of
21 sentence. The Court would then sentence the defendant under
22 the law of this state.

23 Now, should you find beyond a reasonable doubt that one
24 of the aggravating circumstances listed on the sheet of
25 statutory instructions which I have previously showed you

Jury charge

1 existed at the time of the murder or during the commission
2 of the crime of murder, and should you decide after
3 considering the elements in favor of a recommendation of
4 life imprisonment, about which I will instruct you shortly,
5 that the recommendation of the jury is to be that the
6 defendant be sentenced to death, then it would be your duty,
7 Madam Foreperson, to write on the recommendation-of-sentence
8 form, entitled recommendation-of-the-sentence-of-the-death-
9 penalty, the statutory aggravating circumstance or
10 circumstances that you found that were attached to this
11 previous form.

12 Then, Madam Foreperson, you and each and every juror
13 would sign your names in the places provided. Do you
14 understand?

15 And that, Madam Foreperson and ladies and gentlemen,
16 there are places for all 12 jurors to sign as to the
17 aggravating circumstances, if any, that you find and also as
18 to the recommendation-of-sentence-of-death-penalty if that
19 be your sentence.

20 Now, ladies and gentlemen of the jury, by this
21 recommendation-of-sentence form which I hold in my hand,
22 you, the jury, can recommend to this Court that the
23 defendant be sentenced to life imprisonment. Please note
24 that although you must unanimously agree to recommend life
25 imprisonment, only the foreperson is required to sign this

Jury charge

1 recommendation form.

2 I will now read to you the text of this recommendation
3 form. And I quote: "We, the jury, in the above entitled
4 case having found the -- in the above entitled case, having
5 found the existence of aggravating circumstances, to wit,
6 recommend to the Court that the defendant, Richard Bernard
7 Moore, be sentenced to life imprisonment." End quote.

8 I will now instruct you on what you may consider in
9 making your decision as to which sentence to recommend. As
10 I previously instructed you, if you find the existence
11 beyond a reasonable doubt of a statutory aggravating
12 circumstance, then you are permitted but not required to
13 recommend the death penalty.

14 There are three conditions you should consider in
15 reaching your decision; first, whether the existence of a
16 statutory mitigating circumstance was supported by the
17 evidence; second, whether the existence of any other
18 nonstatutory mitigating circumstance was supported by the
19 evidence; and, third, whether for any reason you can think
20 of or for no reason at all the defendant should be sentenced
21 to life imprisonment.

22 What is a statutory mitigating circumstance? It is a
23 fact, an incident, a detail or an occurrence which the South
24 Carolina General Assembly has declared by statute would
25 reduce the severity of the offense of murder. In other

Jury charge

1 words, it is a circumstance recognized by statute as one
2 which in fairness and mercy may be considered as extenuating
3 or as reducing the degree of moral culpability for the
4 commission of the act of murder.

5 A mitigating circumstance is neither justification nor
6 excuse for the murder. It simply lessens the degree of
7 one's guilt, that is makes him less blameworthy or less
8 culpable.

9 Now, what statutory mitigating circumstances should you
10 consider in this case? I refer, once again, to this sheet
11 of paper entitled statutory instructions.

12 Now, immediately below the listing of statutory
13 aggravating circumstances, which I have previously discussed
14 and read to you earlier, the text continues.

15 Quote, "You may consider the following statutory
16 mitigating circumstances: One, that the murder was
17 committed while the defendant was under the influence of
18 mental or emotional disturbance; two, that the capacity of
19 the defendant to appreciate the criminality of his conduct
20 or to conform his conduct to the requirements of the law
21 were substantially impaired; and, three, the age or
22 mentality of the defendant at the time of the crime. You
23 may also consider any nonstatutory mitigating
24 circumstances." End quote.

25 A nonstatutory mitigating circumstance is one which is

Jury charge

1 not provided by statute but is one which the defendant
2 claims serves the same purpose, that is to reduce the degree
3 of his guilt in the offense.

4 While there must be some evidence which supports a
5 finding by you that a statutory or nonstatutory mitigating
6 circumstance exists, and it is not necessary for you to find
7 the existence of such a circumstance unanimously nor beyond
8 a reasonable doubt.

9 In reaching your decision as to which sentence to
10 recommend, you will consider the aggravating and mitigating
11 circumstances. While an aggravating circumstance must be
12 found before you can even consider recommending the death
13 penalty or life imprisonment, once such a finding is made
14 beyond a reasonable doubt you may recommend the death
15 sentence even though you find the existence of a statutory
16 mitigating circumstance or a nonstatutory mitigating
17 circumstance or both.

18 In other words, the existence of an alleged statutory
19 mitigating circumstance, an alleged nonstatutory mitigating
20 circumstance or both is not a bar to the imposition of the
21 death penalty.

22 The third element you may consider if you should
23 unanimously conclude beyond a reasonable doubt that a
24 statutory aggravating circumstance exists is whether the
25 defendant should be sentenced to life imprisonment for any

Jury charge

1 reason or for no reason at all.

2 This is what has been traditionally referred to as a
3 recommendation of mercy. And should you -- and should such
4 be your decision, you would so indicate by returning to the
5 Court the recommendation-of-life-imprisonment form which
6 would be signed by the foreperson.

7 In other words, you may choose to recommend life
8 imprisonment if you find a statutory or nonstatutory
9 mitigating circumstance; or you may choose to recommend life
10 imprisonment as an act of mercy if you have unanimously
11 found beyond a reasonable doubt the existence of a statutory
12 aggravating circumstance or circumstances.

13 In any instance, should you choose to recommend life
14 imprisonment, you still must find the existence of a
15 statutory aggravating circumstance or circumstances. Your
16 decision must be a unanimous one. However, only the
17 foreperson would be required to sign the recommendation form
18 for life imprisonment.

19 I will now summarize what I have just told you. You
20 will have in your jury room during your deliberations four
21 forms: Recommendation-of-life-imprisonment form;
22 recommendation of death form; statutory instructions;
23 aggravating circumstances.

24 The statutory instructions state and include the only
25 aggravating circumstances you shall consider in this case.

Jury charge

1 Should you fail to find beyond a reasonable doubt that one
2 of these circumstances existed at the time the murder was
3 committed, then you would go no further. You would make no
4 recommendation and the Court would sentence the defendant
5 according to the law.

6 Should you find beyond a reasonable doubt the existence
7 of an aggravating circumstance or circumstances, you would
8 then be authorized to consider recommending the death
9 penalty.

10 In your deliberations you will consider any statutory
11 or nonstatutory mitigating circumstances which are supported
12 by the evidence. You will consider the aggravating
13 circumstance or circumstances you found and the mitigating
14 circumstances. And you will then decide whether you will
15 recommend the death penalty.

16 You may also consider any other factors in mitigation
17 of the offense. And you can recommend a sentence of life
18 imprisonment for no reason at all.

19 If you decide to recommend the death penalty, you will
20 complete the proper form. You must write out the
21 aggravating circumstances, circumstance or circumstances,
22 that you found. And all 12 jurors must sign the
23 recommendation.

24 Should you decide to recommend life imprisonment, you
25 must also write out the aggravating circumstance or

Jury charge

1 circumstances that you found and sign that form by each and
2 every member of the jury, and the foreperson must then sign
3 the recommendation-for-life-imprisonment form only.

4 Whatever your recommendation is, it must be a unanimous
5 one, that is to say it must be the verdict of each and every
6 juror. Please remember your sentencing recommendation will
7 be followed by this Court.

8 Now, in considering whether to recommend the defendant
9 is to be sentenced to death or life imprisonment, I charge
10 you that as jurors you must decide the issues involved in
11 this proceeding without bias and without prejudice to any
12 party.

13 You have been selected as fair and impartial jurors
14 sworn to impartially try and determine the facts of this
15 case. And when you comply with your oath to do so, then no
16 one will have a right to criticize your verdict, and you
17 will have fully discharged your duty as jurors.

18 You are to decide this case according to the testimony
19 that you have heard from the lips of the sworn witnesses,
20 along with the other evidence that has been introduced.

21 I charge you that as jurors you must decide the issues
22 in this proceeding without bias and without prejudice to any
23 party. You cannot allow yourself to be governed by
24 sympathy, by prejudice, by passion, by public opinion or any
25 other arbitrary factor.

Jury charge

1 Both the state and the defendant have the right to
2 expect that each of you will carefully and impartially
3 consider all of the evidence in the case and that you will
4 follow the law as I have explained it to you.

5 Now, ladies and gentlemen of the jury, once again, I'm
6 going to go over the forms that I have provided for you.
7 And what I would suggest in your deliberations is that you
8 read over the statutory instructions from start to finish,
9 Madam Foreperson. I have included those on a two-page
10 document that I have signed.

11 After considering the statutory instructions, I would
12 then suggest that you move to the consideration of
13 aggravating circumstances, and those are listed on the
14 statutory instructions.

15 Keep in mind that you must find a statutory -- to find
16 a statutory aggravating circumstance you must find that that
17 has been proven by the state beyond a reasonable doubt. For
18 whatever aggravating circumstance or circumstances that you
19 find that the state has proven beyond a reasonable doubt,
20 Madam Foreperson, you would write those out in the spaces
21 provided. And then you would sign your name as the
22 foreperson. And each and every juror would sign their names
23 thereafter.

24 Thereafter, Madam Foreperson, you would then be in a
25 position to consider the two forms of penalty which are

Jury charge

1 contained in the recommendations of sentences, one being
2 life imprisonment and the other being a recommendation of
3 sentence of the death penalty.

4 Once again, if the jury after considering the existence
5 of aggravating circumstances, and you find beyond a
6 reasonable doubt that at least one of those circumstances
7 existed, you may consider the imposition of the death
8 penalty, though you are not required to impose it.

9 If that is your decision and if you unanimously agree
10 that the defendant should be sentenced to death, then you
11 would write the aggravating circumstances that you had
12 placed on this form, and each one of you would sign in the
13 space provided. And then each and every juror would sign on
14 the line provided here on the recommendation-of-sentence-of-
15 death-penalty form.

16 Now, once again, if a recommendation of sentence of
17 life imprisonment is found, keep in mind that there must be
18 the finding of at least one aggravating circumstance in
19 order to impose this sentence.

20 But only you, Madam Foreperson, would have to sign this
21 sentence which simply says that we, the jury, in the above
22 entitled case recommend that the Court -- to the Court that
23 the defendant, Richard Bernard Moore, be sentenced to life
24 imprisonment. You would sign it and date it with the
25 appropriate date on each of these documents.

Jury charge

1 Now, ladies and gentlemen of the jury, once again, if
2 you do not find the existence of an aggravating, at least
3 one aggravating, circumstance, you can make no
4 recommendation. That sentence would then fall to the Court
5 for the sentence to be imposed in accordance with our state
6 law.

7 Now, ladies and gentlemen of the jury, I am going to be
8 sending you to the jury room in just a moment. At this time
9 I am going to instruct you that you are not to begin your
10 deliberations until I instruct you to do so.

11 If it's necessary for me to bring you back into the
12 courtroom for further instructions, I will do that very
13 quickly. If it is not necessary for me to bring you back
14 into the jury room for further instructions, I'm going to
15 send all of the evidence in this case, together with the
16 four forms that I have previously discussed with you, the
17 two recommendation-of-sentence forms, the aggravating-
18 circumstances forms, form, and the statutory-instruction
19 form. And you will then be instructed to begin your
20 deliberations.

21 Now, once again, ladies and gentlemen, if you have a
22 question during the course of your deliberations, I want,
23 Madam Foreperson, for you to write that question out. Sign
24 your name as the foreperson, knock on the door, give it to
25 the bailiff. And he will see that it's delivered to me.

Jury charge

1 And I will address it as I am permitted under the law of
2 this state.

3 Once you reach a verdict to which all 12 of you agree
4 and you have filled out these forms as I instructed you,
5 Madam Foreperson, simply knock on the door. Tell the
6 bailiff that you have reached a verdict in this case. And
7 we will receive you back into the courtroom to publish your
8 verdict.

9 Once again, ladies and gentlemen, please keep in mind
10 that the verdict that you reach as to life or death must be
11 unanimous, as well as the finding of any aggravating
12 circumstances. That must also be unanimous.

13 The word verdict comes from the Latin word veredicto,
14 which means to speak the truth. And once you have reached a
15 verdict to which all 12 of you agree, then it will speak the
16 truth of you collectively, as well as individually.

17 I'm going to send you to the jury room. Once again,
18 please do not begin your deliberations until I instruct you
19 to do so.

20 And, please, remember that your verdict must be
21 unanimous.

22 The jury may retire.

23 Please hold the alternates just outside the courtroom.

24 (Whereupon, the jury retired to deliberate at

25 4:20 p.m.)

Jury charge

1 THE COURT: Exceptions or additions from the state,
2 Solicitor?

3 MR. GOWDY: No exceptions and no objections, Your
4 Honor.

5 THE COURT: From the defendant?

6 MR. KELLY: No objections and no exceptions, Your
7 Honor.

8 THE COURT: Gentlemen, I want you -- I think that you
9 have been provided with the statutory documents, the
10 instructions, the aggravating circumstances, the
11 recommendation of sentence of death penalty and the
12 recommendation of sentence of life imprisonment. And you
13 are in agreement with those.

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

15 MR. KELLY: No objections and no exceptions.

16 THE COURT: All right. Then I think that all of the --
17 I think that all of the exhibits have remained in the same
18 position that they were in when they came out.

19 Madam Reporter, I assume that they're all still there.
20 Why don't you check them before we send them back?

21 (Pause.)

22 THE COURT: All right. Is the state and the defendant
23 in agreement on the exhibits to go back to the jury?

24 MR. KELLY: Yes, Your Honor.

25 MR. GOWDY: Yes, sir.

Jury charge

1 THE COURT: And you have reviewed the statutory
2 instructions, the aggravating circumstances, recommendation-
3 of-sentence-of-death-penalty and recommendation-of-sentence-
4 of-life-imprisonment forms.

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

6 THE COURT: And you are in agreement with those.

7 MR. KELLY: Yes, sir, Your Honor.

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

9 THE COURT: All right. Bailiffs, if you would, please
10 take the exhibits. Give that to the foreperson. And tell
11 her that they may begin their deliberations.

12 And, if I could, have a jury custodian in here, please.

13 (Whereupon, the exhibits were submitted to the jury for
14 deliberations at 4:32 p.m.)

15 (Copy of statutory instructions and copy of jury charge
16 marked Court's Exhibit Number Twelve.)

17 THE COURT: Mr. Jury Custodian, please take the
18 alternates to the separate locations.

19 And before anyone disburses, I have a couple of
20 announcements to make.

21 All right. First of all, let me thank the state and
22 the defense for the fine manner in which you have tried this
23 case. Now that we have been going on for a week now, I have
24 enjoyed trying the case with you. I thank that all of you
25 performed very well.

Verdict

1 And I appreciate your cooperation in a very difficult
2 case. Every case is difficult. These are more difficult
3 than others.

4 Also, anyone in the courtroom -- when a verdict is
5 returned, if you do not feel that you can control your
6 emotions, once again, please remove yourself from the
7 courtroom, because I will not tolerate any outburst
8 whatsoever. And I will make that announcement one more time
9 before the jury comes back. But please understand that.

10 Solicitor, I'm going to need to talk with you about
11 planning purposes for the rest of the week. We had set
12 aside the rest of this week to try this case. We're going
13 to have some time left over.

14 I know Judge Cole is doing some general sessions. I
15 can tell that all of you all are itching to get back into
16 the fray. We will see if we can drum anything else up.
17 Maybe I can do some pleas for you sometime this week.

18 MR. GOWDY: Yes, sir.

19 THE COURT: I need to see you.

20 We will stand at ease until we get a question or a
21 verdict.

22 (Whereupon, a recess was taken.)

23 THE COURT: Let me, once again, tell everyone that if
24 you do not feel that you can control your emotions,
25 regardless of what the verdict is, you need to remove

Verdict

1 yourself from the courtroom, because I will not tolerate any
2 outbursts whatsoever.

3 And I will direct the deputies that if there are any
4 outbursts, take that person into custody. And we will hold
5 a contempt hearing later on this week.

6 All right. Let's bring our jury back.

7 (Whereupon, the jury returned to report its verdict at
8 5:51 p.m.)

9 THE COURT: Madam Foreperson, it is my understanding
10 you have reached a verdict in this case. Is that correct?

11 THE FOREPERSON: Yes, sir.

12 THE COURT: And you filed out the verdict forms as I
13 instructed.

14 THE FOREPERSON: Yes, sir.

15 THE COURT: Please hand them to the bailiff.

16 In the case of the State vs. Richard Bernard Moore, we,
17 the jury in the above entitled case, find beyond a
18 reasonable doubt the following statutory aggravating
19 circumstances: One, that the defendant, Richard Bernard
20 Moore, did murder James Mahoney while in the commission of
21 the crime or act of robbery while armed with a deadly
22 weapon; two, that the defendant by his act of murder
23 knowingly created a great risk of death to more than one
24 person in a public place by means of a weapon or device
25 which normally would be hazardous to the lives of more than

Verdict

1 one person; three, that the defendant committed the murder
2 of James Mahoney for himself or another for the purpose of
3 receiving money or a thing of monetary value. And that is
4 signed by each and every juror.

5 I am going to ask you as I call your names, if this was
6 your finding as to aggravating circumstances, and is it
7 still your finding. And please answer to those two
8 questions.

9 Foreperson, Karen E. Nave.

10 JUROR NUMBER 194: Yes.

11 THE COURT: Jennifer Caston.

12 JUROR NUMBER 53: Yes, sir.

13 THE COURT: Debra Ledford.

14 JUROR NUMBER 157: Yes, sir.

15 THE COURT: Doris Robertson.

16 JUROR NUMBER 230: Yes, sir.

17 THE COURT: Larry Wayne Ridings.

18 JUROR NUMBER 227: Yes, sir.

19 THE COURT: Michael Scott Garner.

20 JUROR NUMBER 95: Yes, sir.

21 THE COURT: Walter M. Ballard, Jr.

22 JUROR NUMBER 19: Yes, sir.

23 THE COURT: Sandra Taylor.

24 JUROR NUMBER 265: Yes, sir.

25 THE COURT: Susan Hardison.

Verdict

1 JUROR NUMBER 116: Yes, sir.

2 THE COURT: Pamela Robinson.

3 JUROR NUMBER 231: Yes, sir.

4 THE COURT: Benjie J. Martinez.

5 JUROR NUMBER 170: Yes, sir.

6 THE COURT: Jeffrey A. Blanchard.

7 JUROR NUMBER 29: Yes, Your Honor.

8 THE COURT: Case of the State vs. Richard Bernard

9 Moore, we, the jury in the above entitled case having found
10 beyond a reasonable doubt the existence of the following
11 statutory aggravating circumstances, to wit, that the
12 defendant, Richard Bernard Moore, did murder James Mahoney
13 while in the commission of the crime or act of robbery while
14 armed with a deadly weapon, now recommend to the Court that
15 the defendant, Richard Bernard Moore, be sentenced to death,
16 signed by the foreperson, Karen E. Nave, Juror Jennifer
17 Caston, Juror Susan Hardison, Juror Pamela Robinson, Juror
18 Debra Ledford, Juror Doris Robertson, Juror Larry Wayne
19 Ridings, Juror Michael Scott Garner, Juror Walter Ballard,
20 Jr., Juror Sandra Taylor, Juror Benjamin Martinez, Juror
21 Jeffrey A. Blanchard.

22 As I call your names, I'm going to ask you, was this
23 your verdict and is it still your verdict.

24 Foreperson Karen E. Nave.

25 JUROR NUMBER 194: Yes, sir.

Verdict

1 THE COURT: Juror Jennifer Caston.
2 JUROR NUMBER 53: Yes, sir.
3 THE COURT: Susan Hardison.
4 JUROR NUMBER 116: Yes, sir.
5 THE COURT: Pamela Robinson.
6 JUROR NUMBER 231: Yes, sir.
7 THE COURT: Debra Ledford.
8 JUROR NUMBER 157: Yes, sir.
9 THE COURT: Doris Robertson.
10 JUROR NUMBER 230: Yes, sir.
11 THE COURT: Larry Wayne Ridings.
12 JUROR NUMBER 227: Yes, sir.
13 THE COURT: Michael Scott Garner.
14 JUROR NUMBER 95: Yes, sir, Your Honor.
15 THE COURT: Walter M. Ballard, Jr.
16 JUROR NUMBER 19: Yes, sir.
17 THE COURT: Sandra Taylor.
18 JUROR NUMBER 265: Yes, sir.
19 THE COURT: Benjamin L. Martinez.
20 JUROR NUMBER 170: Yes, sir.
21 THE COURT: Jeffrey A. Blanchard.
22 JUROR NUMBER 29: Yes, Your Honor.
23 THE COURT: Anything further from the state before the
24 jury is excused?
25 MR. GOWDY: No, sir, Your Honor.

Motions

1 THE COURT: Anything from the defendant?

2 MR. KELLY: No, sir.

3 THE COURT: Ladies and gentlemen of the jury, that
4 concludes your responsibilities in this matter. I am going
5 to send you to the jury room. And from there you will be
6 dismissed.

7 The jury may retire to the jury room at this time.

8 (Whereupon, the trial jury was excused.)

9 THE COURT: All right. Anything further from the
10 defendant before sentencing? Any motions?

11 MR. KELLY: Judge, once again, just out of an abundance
12 of caution, we would appreciate the Court noting all of our
13 exceptions and renew our motions.

14 THE COURT: All motions are noted, and they are denied
15 in being consistent with my prior rulings.

16 MR. KELLY: Thank you, Your Honor.

17 THE COURT: All right. Let's bring the defendant
18 around for sentencing, please.

19 All right. Anything you want to say, Mr. Moore?

20 THE DEFENDANT: No, sir, Your Honor.

21 THE COURT: Anything from Mr. Kelly or Mr. Morin?

22 MR. KELLY: No, sir.

23 MR. MORIN: No, sir.

24 THE COURT: In the case of 2000-GS-42-617, that's count
25 two, the possession of a weapon during the commission of a

Sentence

1 violent crime, the Sentence of the Court is that the
2 defendant, Richard Bernard Moore, be committed to the State
3 Department of Corrections for a term of five years.

4 2000-619, that's assault with intent to kill, the
5 defendant, Richard Bernard Moore, is committed to the State
6 Department of Corrections for a term of ten years.

7 2001-2460, that's armed robbery, the defendant, Richard
8 Bernard Moore, is committed to the State Department of
9 Corrections for a term of 30 years.

10 And as to 2000-GS-42-617, as the trial judge in the
11 above entitled action and prior to the imposition of the
12 death sentence upon the defendant, Richard Bernard Moore, I
13 find as an affirmative fact that the evidence of the case
14 warrants the imposition of the death penalty, and its
15 imposition is not the result of prejudice, passion or any
16 other arbitrary factor.

17 And in the case of 2000-GS-42-617, the defendant,
18 Richard Bernard Moore, has been found by the jury to be
19 guilty of the offense of murder. The jury has recommended
20 that the defendant should be sentenced to death.

21 It is therefore the Judgment of the Law and the
22 Sentence of the Court that the defendant, Richard Bernard
23 Moore, be taken to the Spartanburg County Detention Center
24 and thence to the state Department of Corrections henceforth
25 to be kept in close and safe confinement until the 22nd day

Sentence

1 of January 2002 upon which day between the hours of six
2 o'clock p.m. and six o'clock a.m. or upon an order of
3 execution issued by the South Carolina Supreme Court the
4 defendant, Richard Bernard Moore, shall suffer death by
5 electrocution or lethal injection in the manner provided by
6 law.

7 May God have mercy on your soul.

8 Those sentences are consecutive.

9 You may take him away.

10 Just one moment. I need to bring the jury back in and
11 give them their dismissal charge. Let's bring the jury back
12 in, please. Everyone else remain seated, please.

13 (The following takes place after the defendant was
14 removed from the courtroom.)

15 THE COURT: Let the record reflect that the jury has
16 been taken by the jury custodians to their location.

17 Anything further from the state?

18 MR. GOWDY: No, sir, Your Honor.

19 THE COURT: From the defense?

20 MR. KELLY: No, sir, Your Honor.

21 THE COURT: Once again, thank you very much for your
22 cooperation during the case. And for everyone involved in
23 the case, thank you for your cooperation during this last
24 week.

25 Insofar as this case is concerned, court is adjourned.

Sentence

1 (State's voir dire request; defendant's requested voir
2 dire; defense request to charge; notice of statutory
3 aggravating circumstances and evidence in support of
4 aggravating circumstances; supplemental notice of additional
5 evidence in support of aggravating circumstances marked
6 Court's Exhibit Number Thirteen.)

7 END OF REQUESTED TRANSCRIPT OF RECORD
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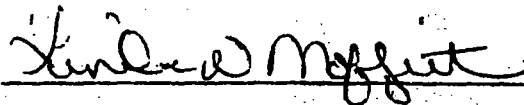
Certificate

CERTIFICATE

I, the undersigned, Linda D. Moffitt, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned cause, relative to appeal, in the Court of General Sessions for Spartanburg County, South Carolina, on the 3rd day of April, 2001; the 8th day of June 2001; the 28th day of September 2001; October the 15th through the 20th, 2001; and October the 22nd, 2001.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

April 3, 2002



Linda D. Moffitt
Circuit Court Reporter

Case No. 00-GS-42-617-619

Judge: Clary

State

State's Attorneys: Gowdy; Barnette;
WillinghamDefendant: Richard Bernard Moore
B/M

Court Reporter: Linda D. Moffitt

Defense Attorneys: Morin, Kelly, Johnson

Juror No.	Name	Sex	Race	Court	Strikes		Accept
					State	Defense	
251	Joyce B. Smythe	F	W		N		N
166	Jason B. Lyda	M	W		Y	X	N
231	Pamela Robinson	F	W		Y	Y	Y
29	Jeffrey A. Blanchard	M	W		Y	Y	Y
191	Joyce Morrow	F	B		N		N
116	Susan Hardison	F	W		Y	Y	Y
2	Douglas Alexander	M	B		N		N
230	Doris M. Robertson	F	W		Y	Y	Y
28	Don S. Blair	M	W		Y	N	N
213	Debra P. Perkins	F	W		N		N
194(F)	Karen E. Nave	F	W		Y	Y	Y
53	Jennifer M. Caston	F	W		Y	Y	Y
19	Walter M. Ballard, Jr.	M	W		Y	Y	Y
4	Lanie M. Allen	F	W		Y	N	N
227	Larry W. Ridings	M	W		Y	Y	Y
197	Gary L. New	M	W		Y	N	N
205	Ronda B. Parks	F	W		Y	N	N
288	Kelly S. West	F	W		Y	N	N
220	Tammy P. Hayes	F	W		Y	N	N
145	Charles L. Kent	M	W		N		N
192	David M. Mosley	M	W		Y	N	N
95	Michael S. Garner	M	W		Y	Y	Y
157	Debra M. Ledford	F	W		Y	Y	Y
170	Benjamin L. Martinez	M	H		Y	Y	Y
295	Michael J. Willingham	M	W		Y	N	N
85	Jeff L. Fortner	M	W		Y	N	N
265	Sandra S. Taylor	F	W		Y	Y	Y
132	Edward T. Huffman	M	W		N		N
290	Malcolm S. White	M	W		Y	N	N
94(A)	Stacy Gantt	F	W		Y	Y	Y
92	Patricia P. Gallman	F	W		Y	N	N
160(A)	Deborah J. Lindsay	F	W		Y	Y	Y

STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF SPARTANBURG	)	IN THE COURT OF
	)	COMMON PLEAS
RICHARD BERNARD MOORE,	)	
APPLICANT,	)	INITIAL APPLICATION
VS.	)	FOR POST-CONVICTION RELIEF
	)	
STATE OF SOUTH CAROLINA,	)	04-CP-42-*** 2715
RESPONDENT.	)	

1. Place of Detention: The Applicant is currently detained at Leiber Correctional Institution.
2. Name and location of Court which imposed sentence: Spartanburg County Court of General Sessions located in Spartanburg, S.C. 29306.
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed: murder, armed robbery, assault with intent to kill, possession of a firearm during the commission of a violent crime.
4. The date upon which sentence was imposed and the terms of the sentence:
 - a. On October 15, 2001, the Court imposed a sentence of death.
5. A finding of guilty was made after a plea of not guilty.
6. Did you appeal from the judgment of conviction or the imposition of sentence? Yes.
7. If you answered "yes" to (6), list
 - (a) the name of each Court to which you appealed:
 - i. The South Carolina Supreme Court.
 - (b) the result in each such Court to which you appealed:
 - ii. Affirmed.
 - (c) the date of each such result:

Computer

i. March 1, 2004.

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. State v. Moore, 57 S.C. 458, 593 S.E.2d 608 (2004).

8. N/A.

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Ineffective assistance of counsel in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Counsel was ineffective in failing to preserve for appellate review the question of whether defendant's waiver of his right to make a closing phase argument was rendered involuntary due to the trial court's admonition to him. State v. Perez, 334 S.C. 563, 514 S.E.2d 754 (1999); State v. Hall, 312 S.C. 95, 439 S.E.2d 278 (1994).

(b) Ineffective assistance of counsel in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Counsel failed to perform an adequate investigation into evidence in mitigation. Counsel produced only two lay witnesses during the penalty phase, and presented no expert evidence on applicant's behalf. Eddings v. Oklahoma, 455 U.S. 104 (1982).

10. State concisely and in the same order the facts which support each of the grounds set out in (9):

(a) The applicant was entitled to have all relevant evidence in mitigation presented to his sentencing jury. Eddings v. Oklahoma, 455 U.S. 104 (1982). The trial court's admonition and limitation deprived applicant of his right to argue for mercy, thereby depriving him of a fair sentencing and due process of law.

b) The applicant was entitled to have all relevant evidence in mitigation presented to his sentencing jury. *Eddings v. Oklahoma*, 455 U.S. 104 (1982). Counsel's failure to adequately investigate potential avenues of mitigation deprived

Applicant of a fair sentencing and due process of law.

11. Prior to this application have you filed with respect to this conviction

(a) any petition in a State Court under South Carolina Law? No.

(b) any petitions in State or Federal Courts for habeas corpus or post-conviction relief? No.

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7)? No.

(d) any other petitions, motions or applications in this or any other Court? No.

12. N/A.

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? No.

14. N/A.

15. If any ground set forth in (9) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented: Issues were appropriate for post-conviction relief, and could not have previously been presented.

16. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? N/A.

(b) your trial, if any? Yes.

(c) your sentencing? Yes.

(d) your appeal, if any, from the judgment of conviction or imposition of sentence? Yes.

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? No.

17. If you answered "yes" to one or more parts of (16), list:

(a) the name and address of each attorney who represented you

i. Michael Morin, Esquire, Ralph Kelly, Esquire, Jennifer Johnson, Esquire, all of Spartanburg, S.C.

ii. Joey Savitz, S.C. Office of Appellate Defense.

(b) the proceedings at which each such attorney represented you:

i. Trial.

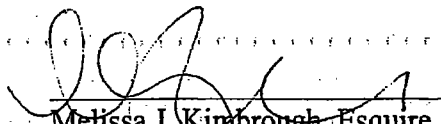
ii. Direct appeal.

18. State clearly the relief you seek in filing this application.

Reversal of conviction and a new trial.

19. Are you now under sentence from any other court that you have not challenged? No.

Respectfully Submitted,


Melissa J. Kimbrough, Esquire
1720 Main Street, Suite 303
Columbia, S.C. 29201
(803) 765-2796

This 8th day of August, 2004.

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

Richard Bernard Moore,)
Applicant,)

04-CP-42-2715

-vs-

State of South Carolina,)
Respondent.)

RETURN

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2005 AUG -5 AM 10:54
MARC KITCHENS

Respondent, making Return to the Application for Post-Conviction Relief dated August 8, 2004; would respectfully make the following showing unto the Court:

I.

A. Procedural History

Applicant is currently confined on death row at Lieber Correctional Institution of the South Carolina Department of Corrections, pursuant to commitment orders from the Spartanburg County Clerk of Court. The Spartanburg County Grand Jury indicted Applicant at the January 2000 term of court for murder, assault with intent to kill (AWIK), armed robbery and possession of a firearm during the commission of a violent crime. (00-GS-42-617 through -619). The State thereafter served notice of its intention to seek the death penalty. The Spartanburg County Grand Jury handed down another armed robbery indictment at the October 2001 term of court. Applicant was represented in the lower court by Michael David Morin, Ralph Keith Kelly and Jennifer Johnson, Esquires. The prosecution was represented by Seventh Circuit Solicitor Harold W. Gowdy, III, and Assistant Solicitors James Donald Willingham, II, and Barry J. Barnette.

COMPUTER (EP)

The Honorable Gary E. Clary held motions hearings in the case on April 3, September 28, and October 15, 2001. On October 16-22, 2001, Applicant received a capital jury trial pursuant to S.C. Code Ann. § 16-3-20 (Supp. 2002). The jury convicted him of each of the indicted offenses.

Following Applicant's exercise of the twenty-four hour waiting period in § 16-3-20(B), a sentencing proceeding was conducted in front of the same jury. The prosecution relied upon the statutory aggravating circumstances that the murder was committed while in the commission of robbery while armed with a deadly weapon; that Applicant, by his act of murder, had knowingly created a risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person; and that Applicant had committed the murder for the purpose of receiving money or a thing of monetary value. § 16-3-20(C)(a)(1), (3)-(4), (D). Judge Clary submitted the statutory mitigating circumstances found in § 16-3-20(C)(b)(2), (6)-(7).

The jury found the existence of each of the statutory aggravating circumstances alleged by the prosecution and sentenced Applicant to death. Judge Clary imposed the sentence of death for murder and sentenced Applicant to five years for the weapons charge, ten years for AWIK and thirty years for armed robbery. Ralph Keith Kelly, Michael David Morin and Jennifer Johnson, Esquires, represented Applicant at trial.

A timely Notice of Appeal was served and filed. On October 16, 2003, Applicant filed a Final Brief of Appellant, in which he raised the following issues:

1. The judge erred in the guilt phase by preventing Moore from stressing the gravity of the decision facing the jury by arguing "The State is seeking the death penalty on me, which means my very life is at stake." The judge abused his discretion by ruling that Moore could not mention punishment, but was limited solely to a discussion of "the testimony and evidence that has

been presented."

2. The judge erred during the sentencing phase by once again limiting Moore's closing argument "to the evidence that has been presented and to the issues concerning the sentence imposed." Since S.C. Code Sections 16-3-20(C) and 16-3-28 afford a capital defendant the opportunity to ask for mercy and express feelings of remorse, this arbitrary limitation was an abuse of discretion and rendered Moore's purported waiver of closing argument involuntary.

The State filed a Final Brief of Respondent on September 15, 2003, and restated the issues as follows:

1. The trial judge did not abuse his discretion by ruling that Appellant could not argue "my very life is at stake" in his guilt phase closing argument because Appellant's argument was not relevant to the question of his guilt or innocence, which was the only question before the guilt phase jury.
2. Appellant's complaints about the trial judge's conduct of the on-the-record waiver of Appellant's right to make a closing argument in the sentencing phase is not properly before the Court because there was no objection at trial.

The South Carolina Supreme Court affirmed Applicant's convictions and death sentence in a published decision filed on March 1, 2004. *State v. Moore*, 357 S.C. 458, 593 S.E.2d 608 (2004).

The Remittitur was sent to the Spartanburg County Clerk of Court on March 18, 2004. Deputy Chief Attorney Joseph L. Savitz, III, of the South Carolina Office of Appellate Defense, represented Applicant on direct appeal. William Edgar Salter, III, of the Attorney General's Office, represented Respondent.

On March 16, 2004, Applicant (through Mr. Dudek) petitioned the State Supreme Court for a stay of execution. In an Order dated April 4, 2004, the Court granted a stay, pursuant to *In Re Stays of Execution in Capital Cases*, Larry R. Patterson to preside over the case and granted him exclusive jurisdiction over the matter. In accordance with *In Re Stays of Execution*, the PCR Court

held a hearing on July 22, 1999, to determine whether Applicant desired to pursue Post-Conviction Relief and whether he wished to have counsel appointed. On June 17, 2004, the Court appointed Melissa Kimbrough, Esquire, and Kathryn Hudgins, Esquire, to represent Applicant.

B. Statement of Facts

The present crime further illustrates the evils of crack cocaine and the problems it has caused in our society. Sometime between 8:00 and 10:00 p.m. on September 15, 1999, Applicant went to the residence of George Gibson, on Hillside Drive in Whitney, S.C.¹ He asked Gibson to get him some crack cocaine. Gibson refused because Applicant did not have any money. Gibson also told Applicant that he could not get the crack for Applicant on credit. Applicant, who was unemployed at the time, told Gibson he was going to work and would return the following morning. Then, he left. **R. pp. 1245-48; 1253; 1255; 1371-72.**

Meanwhile, Mr. James Mahoney (the murder victim) was working the third shift at Nikki's Speedy Mart, a restaurant-convenience store located at the corner of Highway 221 and California Avenue in Whitney, South Carolina. He had been employed there for over three years. The owner of Nikki's kept a .32 caliber pistol and a .45 caliber semi-automatic pistol (State's Exhibit 3) in the store for protection.² Also, Mr. Mahoney carried a .44 caliber handgun (State's Exhibit 1) in his waistband for protection. However, his hands were ravaged by arthritis and he was of slight build. (He was between 5' 7" and 5' 9" tall and weighed approximately 145 pounds). Also, none of his co-workers or friends had seen him ever be physically aggressive towards anyone in Nikki's. **R. pp.**

¹ Gibson knew Applicant as "Mo." **R. p. 1246.** Also, all locations referred to in this brief are in Spartanburg County unless otherwise specified.

² Neither of the weapons were visible to customers: the .45 was kept under a towel by the cash register and the .32 was kept under the counter.

1195-96; 1346-57; 1361-63; 1366-70; 1489.

Terry Hadden (the AWIK victim) was a regular customer at Nikki's, who stopped in to eat around 12:15 a.m. on September 16, 1999.³ After eating and talking to Mr. Mahoney for a while, he began playing video poker around 1:00 a.m. The store was busy for a short period, but the early morning hours remained relatively uneventful until Applicant walked into the store shortly after 3:00 a.m.⁴ Mr. Hadden and Applicant glanced at each other briefly when Applicant first entered. Then Mr. Hadden turned around and continued playing video poker. Applicant went to a cooler and, apparently, retrieved two cans of beer. See R. pp. 1193-1205; 1309.

The next thing I know of anything going on in the store is when I heard Jamie [Mahoney] say, 'What the hell do you think you are doing?' . . . in a loud tone of voice.

R. p. 1205, ll. 9-14. Once Mr. Hadden heard this comment, he swivelled around in his chair and saw Applicant holding both of Mr. Mahoney's hands in one of Applicant's hands. Applicant immediately "come around and come up with a gun and told me not to move." Without giving Mr. Hadden an opportunity to comply with his directions, Applicant fired the .45 caliber semi-automatic (State's Exhibit 3), which he had taken from the victim's constructive possession, at him. Mr. Hadden instantly fell to the floor and played dead. He then heard a number of gunshots but did not count how many had been fired. **R. pp. 1204-09; 1215-17; 1288-89; 1424.**

In the shooting which followed, at least one shot mortally wounded the victim. The

³ Mr. Hadden worked the second shift at Wise Snacks Company. **R. pp. 1193-94; 1196.**

⁴ Mr. Mahoney had a brief rush of customers around 1:15 a.m. and later he loaned his lug wrench to an African-American customer who had trouble with his tire in the parking lot. However, it does not appear that anyone came into Nikki's between the time that man left and Applicant arrived. **R. pp. 1202-04.**

pathologist explained that Mr. Mahoney had a gunshot wound which "passed through the lower border of the eighth rib" before going through his liver, through and through his stomach, through and through his diaphragm, through and through his heart and his left lung. It then exited Mr. Mahoney's right chest. Mr. Mahoney also had a gunshot wound to his lower right arm, which broke his right arm. **R. pp. 1491-1502.**

The pathologist opined that it is possible that either there were two gunshot wounds or all of Mr. Mahoney's injuries could have been caused by a single gunshot if his body had been positioned in a manner in which that could have occurred. He died from internal hemorrhaging caused by the wound to his torso and would have died within six to ten minutes after receiving this wound. **R. pp. 1491-1502.** A bullet from Mr. Mahoney's .44 caliber weapon went through Applicant's left arm. **R. pp. 1380-84.**

Mr. Hadden continued to play dead until he heard Applicant say, "Let's get the hell out of here" and exit the store.⁵ Mr. Hadden ran out of the building after he heard Applicant's vehicle leave. He then went back into the store, saw that his friend was dead and called 911. **R. pp. 1205-13.**

Applicant took a money bag containing \$1,408.00 and immediately drove his pickup truck to Gibson's house. Along the way, he discarded the .45 caliber handgun which had his blood on it. **R. pp. 1211; 1262-64; 1267; 1312-13; 1352-54; 1466-69; 1478.** When he reached Gibson's, he

⁵ Applicant asserted on direct appeal that he only shot the victim after the victim first shot him through the left arm. However, the record does not indicate whether the victim shot him first, whether they shot at each other simultaneously or whether the victim shot him immediately after having been shot himself. Mr. Hadden clearly testified that he was playing dead after the first shot and Applicant did not testify in either phase of his trial. As with his arguments, his assertion in this regard is mere conjecture and speculation.

asked for Gibson to get him some crack. Gibson refused because of the late hour. During their conversation, Applicant told Gibson, "I done something bad, and I got to go turn myself in, and I got money." R. pp. 1248-49.

Applicant was obviously bleeding and Gibson asked him what had occurred. Applicant told him that he had been shot, and he asked Gibson to take him to the emergency room. Gibson refused because he did not want to become involved. When Applicant tried to back his truck out of Gibson's driveway, he struck a telephone pole. R. pp. 1249-50; 1256-57.

Coincidentally, Spartanburg County Deputy Sheriff Bobby Rollins was searching for "a black male, possibly injured, driving a loud vehicle" since this was the description of the suspect he had received. He passed by as Applicant backed into the telephone pole. Therefore, he quickly turned his car around, "threw all of my light in that general area" and exited his vehicle with his weapon drawn. R. pp. 1234-38.

Applicant approached Deputy Rollins with his hands in the air and "bleeding profusely" from his left arm. The whole time Applicant was complying with Deputy Rollins' instructions to get on the ground, he repeatedly said, "I did it, I did it, I give up, I give up." A search of his truck resulted in the seizure of the stolen money and an open pocketknife. They found Applicant's wallet in the roadway and the bloody shirt Applicant had been wearing near Gibson's residence. R. pp. 1238-40; 1311-18. At the hospital, Applicant told the emergency room nurse that he was using alcohol and cocaine. R. pp. 1377-78.

The forensic investigator who first responded to the crime scene at Nikki's found the victim lying in the kitchen floor. He was deceased and his right arm was bent at such a peculiar angle it was clear that it was broken. In addition to finding evidence of the victim's blood, Applicant's blood was

found across the back of the victim's clothing and a trail of his blood led out the front door. Also, a meat cleaver, which did not belong to Nikki's Speed Shop (State's Exhibit 83), was found at the victim's feet with Applicant's blood on it. R. pp. 1271-93; 1305-10; 1352-53; 1364-65; 1368; 1421-32. Additionally, there were six shell casings, two lead bullet cores and two fired bullets which

had been fired by the .45 automatic, as well as several fragments which were consistent with having been fired by it.

Applicant mistakenly asserts that his crimes of September 16, 1999, were not "premeditated." However, for a defendant to be guilty of murder, the State must prove only that he acted with malice aforethought at the time of the unlawful killing. There cannot be any serious contention that the prosecution failed to do so in this case and Applicant has not raised any issue on appeal concerning the sufficiency of the State's evidence. Further, a reasonable inference from the presence of the cleaver at the store and the opened pocket knife is that Applicant may have very well been armed before he entered the store. In any event, his crimes were certainly premeditated by the time he fired at Mr. Hadden, who was unarmed and had not spoken to him.

In the penalty phase of Applicant's trial, the State presented victim impact evidence (R. pp. 1618-24; 1632-35; 1641-47) as well as photographs and additional testimony from the pathologist who performed the autopsy. R. pp. 1675-81. The remainder of the State's evidence was devoted to presenting evidence related to Applicant's character.

The State presented evidence of a 1985 Michigan conviction for unlawful possession of a weapon and a May 15, 1987, Michigan conviction (see State's Exhibit 49) for attempted breaking and entering with intent. At the time, Applicant had described the crime by saying that he had pushed open the front door of the Broadway Mark, entered the store and removed two handguns as

well as \$10.00 in quarters. When later stopped by police, he managed to get away from them.

Applicant spoke to David Saad (a parole and probation officer from the Michigan Department of

Corrections) and said that his addiction to cocaine and crack cocaine caused him to commit the

crime. **R. pp. 1648-57.**

Michelle Crowder testified to a September 1991 incident in South Carolina, in which Applicant robbed her and beat and kicked both her and her boyfriend. Her boyfriend was so badly

injured that he had to go to the hospital. **R. pp. 1658-60.** Valerie Wisniewski testified about a

September 13, 1991, incident in which Applicant stole money from her at the Rack Room where she

was working as a cashier. **R. pp. 1662-64.**

Additionally, the State introduced evidence concerning Applicant's South Carolina

convictions. On September 15, 1993, he was convicted of second offense DUS (92-GS-63-59),

habitual traffic offender (93-GS-42-1804), DUS third offense (93-GS-42-1805). He was convicted

of habitual traffic offender again on August 23, 1994 (94-GS-42-3666). On the same date, he was

convicted of common law robbery in connection with the incident at Rack Room Shoes (92-GS-42-

2606). On July 13, 1995, he was convicted of driving under suspension (third offense) (95-GS-42-

160). On January 18, 1996, he was convicted of driving under suspension (sixth offense) (95-GS-42-

3836) and driving under suspension (fifth offense) (96-GS-42-387). On August 7, 1997, he was

convicted of assault and battery of a high and aggravated nature on Ms. Sonja Harrison. **R. pp.**

1665-70.

II. ALLEGATIONS

Applicant raises two allegations of ineffective assistance of counsel in his August 4, 2004,

PCR Application:

[A] Ineffective assistance of counsel in violation of the Fifth, sixth and Fourteenth Amendments to the United States Constitution. Counsel was ineffective for failing to preserve for appellate review the question of whether defendant's waiver of his right to make a closing phase argument was rendered involuntary due to the trial court's admonition to him. *State v. Perez*, 334 SC 563, 514 S.E.2d 754 (1999); *State v. Hall*, 312 SC 95, 439 S.E.2d 278 (1994).

[B] Ineffective assistance of counsel in violation of the Fifth, sixth and Fourteenth Amendments to the United States Constitution. Counsel failed to perform an adequate investigation into evidence in mitigation. Counsel produced only two lay witnesses during the penalty phase, and presented no expert evidence on applicant's behalf. *Eddings v. Oklahoma*, 455. US 104 (1982).

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III. DISCUSSION

Clearly, a criminal defendant is entitled to effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759 (1970). However, Respondent submits Applicant's attorneys were diligent in their representation of Applicant in both phases of his capital trial retrial and counsel's performance was well within the range of competence demanded of attorneys in criminal matters. *State v. Pendergrass*, 270 S.C. 1, 239 S.E.2d 750 (1977); *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). *See also Marzullo v. Maryland*, 561 F.2d 540 (4th Cir. 1977).

To establish that he received ineffective assistance of counsel, an inmate must make a twofold showing. *See Wiggins v. Smith*, 539 U.S. 510 (2003). First, he must demonstrate that his attorneys' "representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. "Judicial scrutiny of counsel's performance must be highly deferential," and "every effort [must] be made to eliminate the distorting effects of hindsight . . . and to evaluate the [challenged]

conduct from counsel's perspective as the time." *Id.* at 689.⁶

The inmate must also demonstrate that he was prejudiced by his attorneys' ineffectiveness, *i.e.*, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. *See also Nixon v. Florida*, ___ U.S. ___, 125

S.Ct. 551 (2004); *Palacio v. State*, 333 S.C. 506, 511 S.E.2d 62 (1999). In the context of a capital sentencing proceeding, he must prove that "there is a reasonable probability that the sentencer--including an appellate court, to the extent it independently reweighs the evidence--would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695; see also *Wiggins*, 539 U.S. at 537; *Jones v. State*, 332 S.C. 329, 344-45, 504 S.E.2d 822, 829-30 (1998) (petitioner did not meet burden). Applying these criteria to the case at bar, Respondent submits that Applicant cannot meet his burden of proving either deficient performance or, more importantly, resulting prejudice under *Strickland* as to the various allegations raised in his Application.

Ground 10[A].

Applicant first maintains that trial counsel was ineffective for not preserving for appellate review the question of whether the trial judge's admonition to him rendered the waiver of his right to closing argument in the sentencing phase involuntary. Respondent submits that he cannot prove either deficient performance or resulting prejudice.

As he had in the guilt phase, the trial judge obtained an on-the-record waiver of Applicant's right to testify in the penalty phase. R. p.1686, l. 1 - p. 1687, l. 6. Following a charge conference,

⁶See also *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) ("[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight").

the trial judge obtained an on-the-record waiver of Applicant's right to personally address the penalty phase jury. The waiver colloquy was as follows:

Of course, Mr. Moore, would you stand, please, sir?

(Whereupon the defendant stood).

THE COURT: As is the case in the sentencing phase, as well as the guilt phase that we have already been through, you certainly have the right, along with your attorney, to have a closing argument **regarding the sentence imposed.**

Now, once again, this is your right, Mr. Moore, to address the jury; and once again, **the statement that you would make to the jury would have to be confined to the evidence that has been presented and to the issues concerning the sentence imposed.**

Do you understand that you have this right, sir?

THE DEFENDANT: Yes, sir, I do.

THE COURT: And what is your decision?

THE DEFENDANT: I shall not speak, Your Honor.

THE COURT: You will not speak to the jury?

THE DEFENDANT: No, sir.

THE COURT: But you understand that that is your right?

THE DEFENDANT: Yes, sir.

THE COURT: All right, sir. Thank you very much, Mr. Moore.

R. p. 1713, l. 6 - 1714, l. 1 (emphasis added):

Thus, neither Applicant nor trial counsel objected to the manner in which the trial judge conducted the penalty phase on-the-record waiver. As a result, the South Carolina Supreme Court

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ruled that the challenge on direct appeal was procedurally barred, and that "to the extent the trial court's comment could feasibly be viewed as limiting Moore's ability to express remorse to the sentencing phase jury, the matter is more appropriately addressed in a post conviction relief (PCR)

action. As noted above, the only comment made by the trial court was that Moore could address

the sentencing jury as to "the issues concerning the sentence to be imposed." This statement arguably

encompasses the right to argue remorse and mercy. There is no further explanation of what this

sentence means, nor any objection to it. On the present record, it is simply impossible to determine

precisely what the trial court meant by this statement, or what Moore understood it to mean. In the

PCR context, however, a court could analyze all the facts surrounding the trial to determine if Moore

knowingly and intelligently waived his rights under section 16-3-28" *Moore*, 357 S.C. at 465-65,

593 S.E.2d at 611-12.

Further, Applicant did not make any proffer, personally, concerning what argument he intended to make but felt that the trial judge's admonition prevented him from making. Under these circumstances, all we have is speculation concerning what he may have argued had he attempted to do so.

More importantly, Applicant's assertion that the trial judge told him that any argument

"would have to be confined to the evidence that has been presented" (see R. p. 1713, ll. 14-15)

ignores the remaining portion of the trial judge's explanation "and to the issues concerning the

sentence imposed." R. p. 1713, ll. 15-16. Clearly, the admonition that a closing argument would

have to be confined to the evidence presented at trial and to issues concerning the appropriate

sentence was proper. See *State v. Kornahrens*, 290 S.C. 281, 350 S.E.2d 180 (1986); *State v. Shaw*,

273 S.C. 194, 200, 255 S.E.2d 799, 802 (1979); § 16-3-20 (B). In fact, he could not have given a

more accurate description of what the defendant could argue to the penalty phase jury since the jury, at that point, was determining the appropriate sentence to be imposed. *Id.* In fact, the Supreme Court's opinion in this case appears to recognize as much. *Moore*, 357 S.C. at 465-65, 593 S.E.2d

at 611-12. As a result, Applicant's allegation is without merit, counsel was not deficient and

Applicant was not prejudiced by any supposed error. However, Respondent requests a hearing on this claim.

Ground B.

Applicant's remaining contention is trial counsel failed to adequately investigate for and present mitigating evidence. Respondent submits he cannot show deficient performance or resulting prejudice because trial counsel presented an adequate case in mitigation of punishment.

Trial counsel presented two witnesses, Linda and James Byrd. Linda Byrd testified that she had known Applicant since 1989. They met in Michigan but moved to South Carolina in 1991, when Applicant received a job offer in this state with the Adidas company. She had a child at that time, James Byrd, who is now sixteen years old. James considers Applicant to be his father. **R. pp. 1688-90.**

James played little league baseball and basketball growing up. While he was in elementary school, Applicant coached his team one year. Applicant and James would also go fishing together and watch sports on television together. Linda testified that she has gone to see him once or twice a week since the crime occurred in September 1999. She also tries to leave him some money so that he can call home and talk to his children, and so that he would have basic necessities. She indicated that he would call home to talk to his children "[e]very day." In addition to James, Linda and Applicant have two sons together, Alexander (who was eight years old) and Lindall (who was

seven). R. pp. 1690-93.

Linda has shown Applicant photo copies of the report cards his son have received and he is proud of them because they make excellent grades. Linda explained that although the job at Adidas was only temporary, Applicant had worked many other jobs since coming to South Carolina and had

only been out of work several days before the murder occurred. Despite contrary evidence presented by the state, Linda was unaware of Applicant pawning items from their house. R. pp. 1693-96.

Linda was familiar with Applicant's drug problem, but she testified that he never brought that problem into their home, he never exposed the children to it and he managed to work and contribute to the family despite it. Both of Applicant's children with Linda adore him and he has a close relationship with James Byrd. His natural children also look forward to "talking to him and telling him what they have done in case of their report cards and their certificates." She described Applicant as "a very positive influence on them." When asked if she had a basis for asking the jury to spare

Applicant's life, Linda testified that:

"He has three children who need him, adore him. ... [E]ven though he has been incarcerated, he continues to provide a very strong support base to these children. They depend on him, his guidance.

He stresses to the children to be the best that they can be, not follow his path and all directions, but to be the best that they can be.

They love him to death. They go to see him all the time. They run to the phone when it rings hoping that it's him. They need him in [their] life."

R. pp. 1695-98.

Linda's sixteen year old son, James Byrd, testified that he was six when Applicant and his mother brought him to South Carolina. He also denied having a relationship with his natural father

and testified that he refers to Applicant as his father. One year, when James played for a league at Chapman, the coach died and Applicant replaced him "for the rest of the year." Applicant would also go to practices and games when he could to support James. **R. pp. 1699-701.**

Since 1999, Applicant has written letter to James encouraging him in his academics "all of the time." They talk daily on the phone about "things that are going on - - football, basketball, school." His mother also gives a copy of his report card to Applicant and they discuss it. James testified that his sister was in the third grade and his brother was in the first. Applicant talks to them and encourages them to do well. Also, he corresponds with them in writing. While the family visits Applicant weekly, because of the limitation on the number of people who can go at any particular time, James does not always get to see Applicant on a weekly basis. When asked if he had a basis for asking the jury to spare Applicant's life, James testified that "[i]ts like he is the only dad I ever had. You know, if he is gone, I just couldn't take it. My brother and sister, they couldn't take it either. I don't know what to say." **R. pp. 1702-03.**

Respondent submits that the above-stated evidence clearly showed that counsel's presentation of mitigating evidence was not deficient under *Wiggins, supra*. However, because the record does not conclusively refute Applicant's allegation, respondents would request a hearing on this allegation.

WHEREFORE, having made return to the Application for Post-Conviction Relief, Respondent requests a hearing on the grounds for relief as raised in the Application for Post-Conviction Relief.

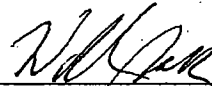
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By:



WILLIAM EDGAR SALTER, III

ATTORNEY FOR RESPONDENT

August 4, 2005.

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STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

Richard Bernard Moore,)
)
 Applicant,)

04-CP-42-2715

-vs-

State of South Carolina,)
)
 Respondent.)

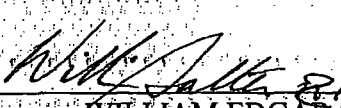
CERTIFICATE OF SERVICE

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The undersigned hereby certifies that on the 4th day of August, 2005, a copy of the Respondent's Return was served on counsel for the Applicant by depositing same in the United States mail, postage prepaid, and addressed as follows:

Melissa J. Kimbrough, Esquire
 1720 Main Street, Suite 303
 Columbia, South Carolina 29201

Kathryn Hudgins, Esquire
 914 Richland Street, Suite A-102
 Columbia, South Carolina 29201


 WILLIAM EDGAR SALTER, III
 ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	
	)	
RICHARD B. MOORE,	)	AMENDED APPLICATION FOR POST
Applicant,	)	CONVICTION RELIEF
	)	
v.	)	04-CP-42-2715
STATE OF SOUTH CAROLINA,	)	
Respondent.	)	

1. The Applicant is currently detained at the Leiber Correctional Institution in Ridgeville, South Carolina.
2. Name and Location of Court which imposed sentence: Spartanburg County Court of General Sessions, Spartanburg County Courthouse, Spartanburg, S.C.
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed: murder, armed robbery, assault with intent to kill, possession of a firearm during the commission of a violent crime.
4. The date upon which sentence was imposed and the terms of the sentence:
 - A. On October 15, 2001, the Court imposed a sentence of death for murder;
 - B. On October 15, 2001, the Court imposed a consecutive sentence of five years for possession of a weapon;
 - C. On October 15, 2001, the Court imposed a consecutive sentence of ten years for assault and battery with intent to kill;
 - D. On October 15, 2001, the Court imposed a consecutive sentence of thirty years for armed robbery;
5. A finding of guilty was made after a plea of not guilty.
6. The Applicant appealed from the judgment of conviction and the imposition of sentence.
7. As to his direct appeal,
 - a. The Applicant appealed to the South Carolina Supreme Court;
 - b. The South Carolina Supreme Court affirmed Applicant's conviction;
 - c. March 1, 2004, was the date upon which Applicant's conviction was affirmed on direct appeal;
 - d. Applicant's direct appeal opinion is published as *State v. Moore*, 57 S.C. 458, 593 S.E.2d 608 (2004).

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8. Not applicable.

9&10. Applicant maintains, as the grounds on which he bases his claims of unlawful custody, that:

- a. Trial Counsel was ineffective in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and federal laws, South Carolina Constitution and South Carolina state law due to counsel's failure to object to the trial court's erroneous limitation on Applicant's right to allocution/ right to address his jury at the end of the penalty phase and/or make a plea for mercy during his penalty phase closing statement. Counsel's failure to object to the trial court's improper admonition to Applicant deprived Applicant of the fundamentally important right to seek mercy from his sentencing jury, and prevented review of this issue on direct appeal. *State v. Perez*, 334 S.C. 563, 514 S.E.2d 754 (1999); *State v. Hall*, 312 S.C. 95, 439 S.E.2d 278 (1994).
- b. Trial Counsel was ineffective in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and federal laws, South Carolina Constitution and South Carolina state law due to their failure to perform a reasonable investigation into Applicant's background and family life, resulting in a sentencing proceeding that was fundamentally unfair and assured a death verdict for the Applicant would be returned by the jury. Trial counsel failed to conduct any investigation in the state of Michigan, where the Applicant was born and raised. Had counsel conducted a reasonable investigation into Applicant's background, they would have learned that Applicant comes from a large family, had numerous relatives who could have testified to his good character and struggle with addiction, and these relatives and/or friends would have been willing to testify on Applicant's behalf during his sentencing proceeding at trial. Failure to conduct a reasonable investigation into potential avenues of mitigation is conduct falling below what is required of trial counsel in a capital case. *Wiggins v. Smith*, 539 U.S. 510 (2003); *Strickland v. Washington*, 466 U.S. 668 (1984) ("counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.*, 466 U.S. at 691); *Eddings v. Oklahoma*, 455 U.S. 104 (1982).
- c. Applicant was denied the right to effective assistance of counsel at both the trial and sentencing phases in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution, federal law, South Carolina State Constitution and South Carolina law in that trial counsel failed to properly and adequately investigate and prepare to confront and rebut the State's alleged physical evidence, and further trial counsel failed to present its own expert or evidence to rebut or explain such physical evidence and/or object that ballistics and firearms and serology testimony was inadmissible in that it failed to meet the mandates of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *State v. Jones*, 273 S.C. 723 (1979). Counsel's unreasonable

omissions denied Applicant an opportunity to show to the jury he acted in self-defense or

This incident involved a late night shoot out in a convenience store. Multiple gun shots involving two guns were fired. The defendant was wounded in the arm and chest and the victim was mortally wounded. There is undisputed evidence that the victim owned and/or possessed both guns involved and no evidence the defendant possessed any gun until he wrestled one of the guns from the victim. There was a great deal of evidence and testimony presented by the Solicitor regarding multiple guns, ballistics, shell casings, bullet jackets, bullet fragments, finger prints, trace evidence, guns shot residue, blood, blood spatter, DNA, and pathology. Much of this testimony is subject to attack on the basis of its questionable admissibility. Even if admissible, the evidence was easily contradicted and/or explained in a manner consistent with "circumstances other than the guilt of the accused." Trial counsel never retained its own expert to assist with the forensic issues involved with the State's physical evidence. Trial counsel never called as witnesses its own experts for the jury to hear an opposing view and opinion as to the physical evidence. Thus, trial counsel did not adequately investigate or prepare to deny, rebut, or explain the State's physical evidence. *Gardner v. Florida*, 430 U.S. 122, 50 L.Ed.2d 339, 97 S. Ct. 399 (1976). Had counsel hired appropriate forensic experts, including a forensic pathologist, who could have testified as to the single bullet having killed James Mahoney, rather than two as opined by the state, and a crime scene analyst, who could have provided testimony concerning the likely origin of bullets, bullet fragments, shell casings, and general crime scene analysis, there is a reasonable probability that the guilt and/or penalty phase would have had a different outcome. *Strickland v. Washington*, *supra*.

- d. Applicant was denied due process of law and also denied the right to effective assistance of counsel in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution, the South Carolina Constitution and South Carolina law because the State failed to disclose material evidence to the defense concerning State's witness George Gibson. *Brady v. Maryland*, 373 U.S. 83 (1963). Alternatively, if trial counsel was aware of all of the information set forth below about George Gibson, then trial counsel acted unreasonably in not cross-examining Gibson as to his pending charges and/or investigating the other witnesses at Gibson's home the night of the incident. *Strickland v. Washington*, *infra*.

George Gibson, a State witness had told detectives immediately after the shootings, in 1999, that Applicant came to Gibson's home and asked him for a ride to the hospital, which Gibson refused to do. On October 18, 2001, the first day of trial, defense counsel told the Court that the State now had an additional statement from Gibson. This new statement had been provided to counsel the

previous week in a summary of supplemental aggravating circumstances notice. Gibson's new statement said that defendant robbed and murdered the store clerk in order to buy cocaine, and that was why Applicant showed up at Gibson's home after the shooting. Although other witnesses were at Gibson's residence on the night of the incident at the time of Moore's visit there, and had talked to law enforcement, defense counsel was either unaware of these other witnesses, which the state failed to name or take statements from, or had not been able to locate or interview them before trial.

Additionally, defense counsel was not informed that, at the time of his testimony, George Gibson was incarcerated at Allendale Correctional Institution and was brought to Spartanburg to testify at the solicitor's direction. Defense counsel was never told that Mr. Gibson was also out on bond for a then-new (July 2001) possession of crack arrest (although counsel had been informed of Gibson's 2000 Trafficking Crack charge that was pending in the 7th Circuit). Assuming, *arguendo*, that the State did provide the above information to the defense about Mr. Gibson, then counsel failed to adequately investigate this matter. Impeachment evidence related to a critical witness, such as George Gibson, whose testimony formed the centerpiece/lynchpin of the state's case against Applicant, and whose second statement to law enforcement, given at the eleventh hour, became their basis for *res gestae* testimony, that was used to prove a sketchy, yet overwhelmingly prejudicial, "motive" and should have been disclosed to defense counsel. George Gibson had substantial charges for which he faced significant prison time, which fact, had it been known to the jury, would certainly have cast doubt on Gibson's credibility. *State v. Mizzell*, 394 S.C. 326 (2002). The State's nondisclosure of critical impeachment evidence against its star witness undermines any confidence that can be had in the jury's guilt and/or sentencing verdict(s). *Brady v. Maryland*, *supra*; *Strickland v. Washington*, *supra*. Alternatively, if trial counsel were aware of the information, they were ineffective in failing to use it during cross-examination and for investigation. *Strickland v. Washington*, *supra*.

- e. Applicant was denied due process of law and also denied the right to effective assistance of counsel in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution, the South Carolina Constitution and South Carolina law because trial counsel failed to pursue their *Batson v. Kentucky*, 476 U.S. 79 (1986) claim, despite the fact that Applicant's jury was exclusively white and the state struck the only two African-Americans qualified to serve as jurors. Applicant is African-American and the alleged victim, James Mahoney, was Caucasian. The State's decision to strike the only two qualified African-American jurors on the jury panel established a prima facie case of racial discrimination. Trial Counsel raised a *Batson* challenge, but later abandoned it. (Tr. P. 1137). Trial Counsel's failure to pursue and/or preserve for direct appeal a *Batson* challenge was unreasonable, as the State's alleged race-neutral reasons for

striking jurors Morrow and Huffman were pre-textual, as white jurors who gave almost mirror like responses and/or were similarly—if not exactly—situated insofar as having relatives who were prosecuted, were not challenged by the State and were seated on Applicant's jury. Counsel's failure to preserve this meritorious issue was deficient and unreasonable, as well as prejudicial. *Strickland v. Washington, supra.*

- f. Applicant was denied due process of law and also denied the right to effective assistance of counsel in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution, the South Carolina Constitution and South Carolina law because trial counsel failed to preserve their objection to the trial court's refusal to give a jury charge on voluntary manslaughter. Assuming, *arguendo*, that the issue of the trial judge failing to give a voluntary manslaughter charge was properly preserved, appellate counsel was ineffective in failing to raise this issue on direct appeal. Applicant was entitled to a charge of voluntary manslaughter based on the facts of his case. It is undisputed that Applicant was shot by James Mahoney and he was shot by a weapon owned by either James Mahoney or the owner of Nikki's Convenience Store. James Mahoney's death was likewise the result of being shot with his own weapon. The fact that all three firearms collected from the crime scene in and near Nikki's Convenience Store belonged to either Mahoney or the store owner establishes that: (1) Applicant entered the store without a firearm and (2) that James Mahoney initiated what later became a deadly gun fight.

Voluntary manslaughter is a lesser-included offense of murder. Voluntary manslaughter is defined as an "unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." *State v. Cole*, 338 S.C. 97 (2000). The only time a voluntary manslaughter charge should not be provided to the jury is when there is "no evidence whatsoever tending to reduce murder to voluntary manslaughter." *State v. Pittman*, 373 S.C. 527 (2007). In Applicant's case, there was ample evidence that Mahoney was killed as a result of a gun battle he initiated with a weapon that did not belong to Applicant. These facts alone establish sufficient provocation by Mahoney to entitle Applicant to a charge on voluntary manslaughter.

Trial counsel's failure to preserve this issue or, alternatively, appellate counsel's failure to raise it on direct appeal amounts to ineffective assistance of counsel. *Strickland v. Washington, supra.*

- g. Applicant was denied due process of law and also denied the right to effective assistance of counsel in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution, the South Carolina Constitution and South Carolina law because trial counsel failed to present adaptability evidence from James Aiken, a nationally recognized expert in the field of penal institution

safety and management. Mr. Aiken was prepared and available to testify on behalf of Applicant, but never called as a witness. Counsel's unreasonable decision to not call Mr. Aiken opened the door for the state's damning closing argument that Applicant had shown "escalating violence," thereby injecting the fear of Applicant's future dangerousness into the minds of the jurors, who were never told that Applicant could be safely housed for the duration of his life. The prejudice to Applicant stemming from counsel's inexplicable (and seemingly eleventh hour) decision to discard the only defense expert is manifest. *Strickland v. Washington, supra*.

- h. Applicant was denied due process of law and also denied the right to effective assistance of counsel in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution, the South Carolina Constitution and South Carolina law because trial counsel failed to request a charge on the statutory mitigating circumstance of provocation by the victim, as set forth in S.C. Code Section 16-3-20 (c)(b)(8). Failure to request this mitigating circumstance was both deficient and prejudicial to Applicant. Counsel argued to the jury that Applicant was also a "victim," so there is no conceivable professionally reasonable basis for not seeking instruction to the jury that the victim's provocation could be considered by them as a factor in mitigation of punishment. Without such an instruction, the jury was left with no guidance to assist them in taking into consideration the fact that Mahoney shot Applicant, which was the whole basis of counsel's argument that Applicant was a victim, too. Trial counsel's failure to request the statutory mitigator of provocation by the victim was ineffective assistance of counsel. *Strickland v. Washington, supra*.

- i. Trial Counsel was ineffective in failing to object to the State's request to charge the statutory aggravating circumstance found at S.C. Code Section 16-3-20(c)(3) because it was not appropriate to the facts of Applicant's case. Alternatively, if the trial court correctly held that S.C. Code Section 16-3-20(c)(3) is properly applied to the facts of Applicant's case, then this code section is unconstitutional due to its over-breadth, in that it fails to sufficiently narrow the class of offenders who are eligible for a death sentence.

South Carolina Code Section 16-3-20(c)(3) reads as follows: The Offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person.

Applicant's case involved use of a pistol. A pistol is not "a weapon or device which normally would be hazardous to the lives of more than one person." Alternatively, if a single-shot pistol meets the criteria of 16-3-20(c)(3), then this aggravating factor would make any non-residential intentional shooting death

occurring near a third-party eligible for the death penalty. Clearly, this is not what the legislature intended. The more reasonable construction of 16-3-20 (c)(3) is to apply it in those few cases where an incendiary device, bomb or other explosive type of weapon is used to kill people in a public place. To hold otherwise would violate the basic Eighth Amendment principle that death penalty statutes must sufficiently narrow the class of death-eligible offenders.

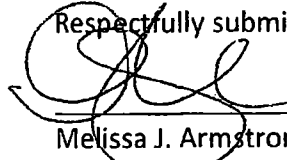
Applicant either received ineffective assistance of counsel or S.C. Code Section 16-3-20(c)(3) is unconstitutional. *Strickland v. Washington, supra, Lewis v. Jeffers*, 497 U.S. 764, 774 (1990).

11. Prior to this application, have you filed any with respect to this conviction?
 - (a) Any petition in a State Court under South Carolina Law? No.
 - (b) Any petitions in State or Federal Courts for habeas corpus or post-conviction relief? No.
 - (c) Any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7)? No.
 - (d) Any other petitions, motions or applications in this or any other Court? No.
12. Not Applicable.
13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? No.
14. Not Applicable.
15. If any ground set forth in (9) has not previously been presented to this or any other Court, State or Federal, set forth the ground, and state concisely the reasons why such grounds were not previously presented: All issues in Section (9) are being presented for the first time and were not presented because issues of ineffective assistance of counsel and after-discovered evidence of a Brady violation were not cognizable on direct appeal.
16. Were you previously represented by an attorney at any time during the course of:
 - (a) Your arraignment and plea? Yes.
 - (b) Your trial, if any? Yes.
 - (c) Your sentencing? Yes.
 - (d) Your appeal, if any, from the judgment of conviction or imposition of sentence? Yes.
17. If you answered "yes" to one or more parts of (16), list:
 - (a) The name and address of each attorney who represented you:
 - (i) Michael Morin, Esquire, Ralph Keith Kelly, Esquire, all of Spartanburg County Bar;

- (ii) Joseph L. Savitz, III, Esquire, of the South Carolina Office of Appellate Defense.

18. State clearly the relief you seek in filing this application:
Conviction reversed and/or sentence reversed with remand for new trial and/or sentencing proceeding.
19. Are you now under sentence from any other court that you have not challenged?
No.

Respectfully submitted,



Melissa J. Armstrong, Esquire
1830 Marion Street
Columbia, S.C. 29201
(803) 765-2796.

James M. Morton, Esquire
334 Oakland Avenue
Rock Hill, S.C. 29731
(803) 366-3432.

This 31st day of December, 2010.

FILED
CLERK OF COURT
SOUTH CAROLINA
2011 JAN 7 PM 2:07

(m)

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

Richard B. Moore,)

C/A No.: 04-CP-42-2715

Applicant,)

v.)

Supplemental Amendments to Application For
Post Conviction Relief

State of South Carolina,)

Respondent.)
 _____)

(9/10j) Appellant was denied the right to effective assistance of appellate counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution during the appellate proceedings when appellate counsel failed to raise on appeal the trial court's error in admitting the testimony of State's witnesses George Gibson and Jeanie Smith as res gestae witnesses. These witnesses' testimony should not have been admitted under a res gestae theory and, as such, the probative value of such testimony was substantially outweighed by its prejudicial nature.

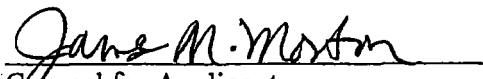
(9/10k) Appellant was denied the right to effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution in that trial counsel failed to object to the admission of testimony by State's witness Jeanie Smith in that such testimony was inadmissible hearsay.

FILED
 2014 OCT 21
 SPARTANBURG
 CLERK OF COURT

(m)

Melissa Jane Reed Kimbrough, Esq.
1830 Marion St.
Columbia, SC 29201-2528

James Morton
Morton and Gettys LLP
Post Office Box 707
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803-366-3388


Counsel for Applicant

January 5, 2011

FILED
CLERK OF COURT
STANFORD COUNTY
JAN 11 2011 AM 10:00
M. HOPE BLANCHETT

IN THE COURT OF COMMON PLEAS

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG
RICHARD BERNARD MOORE,

Applicant,

vs.

04-CP-42-2715

STATE OF SOUTH CAROLINA,
Commissioner, South Carolina
Department of Corrections, and
Henry Dargan McMaster, Attorney
General, State of South Carolina,

Respondents.

The Deposition of DOROTHY J. HOOPER, taken pursuant to
Notice of Taking Deposition, before Laura R. Inman, Certified
Shorthand Reporter, CSR-2272, RPR, a Notary Public within and
for the County of Macomb, acting in the County of Macomb,
State of Michigan, at 67 N. Walnut, Mt. Clemens, Michigan, on
Thursday, January 20, 2011, commencing at about 11:00 o'clock
in the forenoon.

1 APPEARANCES:

2

3 ARMSTRONG LAW OFFICE
4 BY: MELISSA J. ARMSTRONG, ESQ.
5 1830 Marion Street
6 Columbia, South Carolina 29201
7 (803) 765-2796

8 Appearing on behalf of the Applicant.

9

10 SOUTH CAROLINA OFFICE OF THE ATTORNEY GENERAL
11 BY: J. ANTHONY MABRY, ESQ.
12 WILLIAM EDGAR SALTER, III, ESQ.
13 P.O. Box 11549
14 Columbia, South Carolina 29211-1549
15 (803) 734-3970

16 Appearing (via Skype) on behalf of the Respondents.

17

18 ALSO PRESENT: James Michael Morton (Via Skype)
19 Cecil J. Hooper

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4 WITNESS:

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DOROTHY J. HOOPER

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Direct Examination by Ms. Armstrong 04

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Re-Direct Examination by Ms. Armstrong 15

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Re-Cross Examination by Mr. Mabry 16

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E X H I B I T S

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IDENTIFICATION

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(None offered.)

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1 Mt. Clemens, Michigan
2 Thursday, January 20, 2011

3 * * *

4 DOROTHY J. HOOPER,
5 was called as a witness herein, and after
6 having first been duly sworn to tell the
7 truth, the whole truth, and nothing but the truth,
8 was examined and testified as follows:

9 DIRECT EXAMINATION

10 BY MS. ARMSTRONG:

11 Q. Good morning, Ms. Hooper. Would you please state your
12 full name for the Court Reporter, please.

13 A. Dorothy J. Hooper.

14 MR. MABRY: Ask her to say her name
15 again, please?

16 A. Dorothy J. Hooper.

17 MR. MABRY: Okay.

18 BY MS. ARMSTRONG:

19 Q. Ms. Hooper, what is your date of birth?

20 A. 1/24/35.

21 Q. Okay. Well, happy almost birthday.

22 A. Thank you.

23 Q. And can you give us your Social Security number just to
24 verify that all the information I provided to the
25 Attorney General is correct?

- 1 A. [REDACTED]
- 2 Q. Thank you. And Ms. Hooper, are you employed?
- 3 A. Retired.
- 4 Q. Okay. And are you married?
- 5 A. Yes.
- 6 Q. Okay. And do you have any children?
- 7 A. Yes.
- 8 Q. Okay. And how many children do you have?
- 9 A. Nine.
- 10 Q. Wow. Okay. And do you know the applicant in this case,
- 11 Richard Bernard Moore?
- 12 A. Yes.
- 13 Q. Okay. How do you know him?
- 14 A. He is my nephew.
- 15 Q. He is your nephew?
- 16 A. Uh-huh.
- 17 Q. Okay. And Ms. Hooper, where do you live?
- 18 A. [REDACTED] Mt. Clemens, Michigan.
- 19 Q. Okay. How long have you lived in Mt. Clemens?
- 20 A. 57 years.
- 21 Q. 57 years? Okay. And you said you know Richard Moore
- 22 and that he is your nephew?
- 23 A. Uh-huh, yes.
- 24 Q. Okay. Well, let me ask you this. Are you aware or were
- 25 you aware that Richard had been charged with criminal

1 offenses in South Carolina?

2 A. I heard about it.

3 Q. Okay.

4 MR. MABRY: Lisa, ask her to speak up.

5 Lisa, we're having trouble sometimes after you ask her
6 the question, we're having trouble picking up the very
7 beginning of what she is saying.

8 A. Yes.

9 MS. ARMSTRONG: Okay. Why don't I start
10 that question over.

11 MR. MABRY: Okay.

12 BY MS. ARMSTRONG:

13 Q. Ms. Hooper, did you become aware that Richard had been
14 charged with murder in South Carolina?

15 A. I did.

16 Q. Okay. And approximately when did you learn of that
17 situation?

18 A. About five years ago.

19 Q. Okay. So five years ago is the first time you heard
20 about Richard's murder charges?

21 A. Yes.

22 Q. Okay. So did anyone ever, prior to my contacting you,
23 had you ever spoken to any lawyers on Richard's behalf?

24 A. No.

25 Q. If anyone had contacted you prior to his trial, would

1 you have spoken to them the way you've spoken with me?

2 A. Yes.

3 Q. Okay. And if anyone had contacted you and asked you to
4 speak on Richard's behalf at trial in South Carolina,
5 would you have been willing to do so?

6 A. Yes.

7 Q. Okay. Well, in that regard, Ms. Hooper, tell us what
8 you remember about Richard.

9 A. Richard, he was good person, you know, and he would be
10 at my house a lot still with my son and I've known him
11 for a long time, you know, and he was, I know he was
12 good.

13 Q. Okay. He never gave you any trouble?

14 A. No.

15 Q. And you were around him a good bit?

16 A. Yes.

17 Q. Okay. Approximately how old was Richard, you said that
18 you lived in Mt. Clemens for 57 years, so you were
19 around when Richard was born?

20 A. Yes.

21 Q. Okay. How much contact did you have with Richard prior
22 to his leaving Mt. Clemens?

23 A. Almost every week I would.

24 Q. And that's when he was a child?

25 A. Yes.

- 1 Q. Okay. And you said that he would play with your
2 children?
- 3 A. Yes, and stay overnight with me.
- 4 Q. Okay. Did you all do things together as a family?
- 5 A. Yes.
- 6 Q. Okay. What sorts of things did you do?
- 7 A. Well, like picnics, stuff like that.
- 8 Q. Okay. So family gatherings?
- 9 A. Family gatherings.
- 10 Q. Okay. Any outside activities?
- 11 A. Yes.
- 12 Q. Okay. Now, I want to talk to you a little bit about
13 Richard's behavior. How would you describe Richard as
14 far as his demeanor and disposition is concerned?
- 15 A. Well, he was just normal, you know, he was a good kid,
16 he was good.
- 17 Q. Okay. Did you ever have any trouble with Richard as far
18 as his behavior is concerned?
- 19 A. No.
- 20 Q. Okay. And was Richard respectful?
- 21 A. Very, yes.
- 22 Q. Okay. Was he an aggressive child at all, did you ever
23 have to discipline him for any acts of violence or --
- 24 A. No.
- 25 Q. Okay. And had you had an opportunity to speak to the

1 jurors in Richard's case, is there anything you would
2 have asked them for or said to them?

3 A. Yes, to spare his life.

4 Q. Okay. And in other words, you would have asked for
5 mercy?

6 A. Yes, I would.

7 MR. MABRY: Objection, leading. Go
8 ahead.

9 MS. ARMSTRONG: Okay. I think she's
10 answered the question.

11 MR. MABRY: She answered it before I
12 could object, but my objection is on the record. Go
13 ahead.

14 MS. ARMSTRONG: All right.

15 BY MS. ARMSTRONG:

16 Q. Again, Ms. Hooper, I just want to confirm that the first
17 you heard of Richard's troubles were approximately five
18 years ago?

19 A. Yes.

20 Q. Okay. And the first lawyer you spoke with was me.

21 A. Right.

22 Q. No one else ever contacted you.

23 A. No.

24 MS. ARMSTRONG: Okay. Thank you very
25 much, Ms. Hooper. Please answer any questions that

1 Mr. Mabry may have for you.

2 THE WITNESS: Okay.

3 CROSS EXAMINATION

4 BY MR. MABRY:

5 Q. Good morning, Ms. Hooper.

6 A. Good morning.

7 MS. ARMSTRONG: She said good morning.

8 Can you hear?

9 MR. MABRY: Okay. You're going to have
10 to speak up, it's hard for us to hear, you've got a soft
11 voice, okay?

12 THE WITNESS: Okay.

13 A. Good morning.

14 BY MR. MABRY:

15 Q. Good morning. And you were asked about some lawyers
16 speaking to you and you said they hadn't.

17 Do you remember a woman by the name of
18 Drucy Glass who was an investigator working on Richard's
19 behalf?

20 A. No.

21 Q. Did you ever talk to an investigator working on Richard
22 Moore's behalf after he was charged with murder?

23 A. No.

24 Q. You didn't talk to anybody, whether a police officer, an
25 investigator or attorney, anyone on Richard's behalf.

1 A. No.

2 Q. Okay. And tell me, you said five years ago, how did you
3 find out that Richard had been charged with murder?

4 A. I think it was through my sister.

5 Q. And who is that?

6 A. Arma Hadley.

7 Q. Okay. Are you Richard's aunt by blood or are you
8 married to his uncle, blood uncle?

9 A. His mother was my sister.

10 Q. Okay. That's what I, the question I had.

11 Did Richard's mother ever ask you to come
12 and testify for Richard in South Carolina?

13 A. No.

14 Q. Okay.

15 A. My sister had passed.

16 Q. Did Richard's father ever ask you to come and testify
17 for Richard in South Carolina?

18 A. No.

19 Q. Did anybody from Richard's family ask you to come and
20 testify for Richard?

21 A. No.

22 Q. Now, what was Richard's family's reaction to him being
23 charged with murder?

24 A. They were upset.

25 Q. Okay. And why were they upset?

1 A. Because they didn't want their child to be charged for
2 murder.

3 Q. Okay. Did they ever communicate to you the fact that
4 Richard had been in trouble before this murder?

5 A. No.

6 Q. Did they ever communicate to you that they were fed up
7 with or tired of the fact that Richard kept getting in
8 trouble with the law?

9 MS. ARMSTRONG: Objection, leading.

10 MR. MABRY: This is cross-examination, I
11 can lead the witness.

12 BY MR. MABRY:

13 Q. My question is, did his mother or father or any family
14 members ever communicate to you that they were tired of
15 the fact that Richard was continually being arrested
16 prior to this murder?

17 A. No. His mother was dead, his mother.

18 Q. Did they ever tell you that they had washed their hands
19 of Richard?

20 A. No.

21 Q. Were you aware that Richard was arrested in 1985, 1985
22 in Michigan for possession of a weapon?

23 A. No.

24 Q. Are you aware that he was convicted of that offense?

25 A. No.

1 Q. Had you kind of lost touch with Richard by 1985?

2 A. Yes, yeah.

3 Q. Okay. Were you aware that in 1987 he was convicted of
4 attempted breaking and entering in Michigan?

5 A. I don't remember that. I can't remember that.

6 Q. Okay. Well, do you remember at all ever hearing that he
7 had been arrested for breaking into a building?

8 A. I don't know, no.

9 Q. Were you aware that in 1991 that he was arrested for and
10 convicted of grabbing a purse of a lady and beating the
11 woman?

12 A. In Michigan -- no. It was in Michigan?

13 Q. His mother and father didn't tell you about that.

14 A. No.

15 Q. Okay. Were you aware that in 1991 he was convicted of
16 robbing a Rack Room?

17 A. No.

18 Q. Are you aware that in 1992 he was convicted of common
19 law robbery?

20 A. I'm not aware of that.

21 Q. Okay. Were you aware that he was convicted in 1993 of
22 driving under suspension and habitual traffic offender?

23 A. No.

24 Q. Were you aware that in 1993 he was convicted again of
25 driving under suspension, third offense?

1 A. No.

2 Q. Are you aware that in 1994 he was convicted again of
3 violating habitual traffic offender laws?

4 A. No.

5 Q. Are you aware of in 1995 and '96 he was convicted of
6 three more charges of driving under suspension?

7 A. No, I don't remember that.

8 Q. I can't hear you, I'm sorry.

9 A. No.

10 Q. Okay. Were you aware that in 1997 he was convicted of
11 aggravated assault and battery of Sonya Harrison?

12 A. No.

13 Q. So, I believe your testimony is you didn't know about
14 any of these crimes that he committed prior to the
15 murder being committed.

16 A. Right.

17 Q. And you didn't know about them even after he had been
18 charged with murder.

19 A. I knew about that he was being charged for murder.

20 Q. Right, but you didn't, they didn't tell you about all
21 these other crimes that he had been convicted of even
22 after he'd been charged with murder.

23 A. No.

24 MR. MABRY: Okay. That's all I have of
25 the witness. Just one second.

1 Q. Did Richard come from a good family?

2 A. Excuse me?

3 MS. ARMSTRONG: I don't think the witness
4 understood your question, she said excuse me.

5 BY MR. MABRY:

6 Q. Yes, ma'am, I'm sorry. My question was, did Richard
7 come from a good family?

8 A. Yes.

9 Q. Okay. Did he live with his grandmother growing -- I
10 mean with his mother growing up or with his
11 grandparents?

12 A. His parents.

13 Q. Okay. Did they make him go to church?

14 A. Yes.

15 Q. And would they tell him right from wrong?

16 A. Yes.

17 MR. MABRY: That's all I have. Thank
18 you, ma'am.

19 THE WITNESS: You're welcome.

20 MS. ARMSTRONG: I need just a minute
21 briefly.

22 RE-DIRECT EXAMINATION

23 BY MS. ARMSTRONG:

24 Q. Okay. Ms. Hooper, Mr. Mabry asked you if Richard's
25 mother ever asked you to testify on his behalf.

1 Was Ms. Moore around, was she alive at
2 the time?

3 A. No.

4 Q. Thank you. And I just want to confirm that there was
5 never any contact between you and Drucy Glass, law
6 enforcement, an attorney, or any other representative of
7 Richard Moore ever until you and I first spoke.

8 A. Right.

9 Q. Okay. Thank you. And again, let me, just following up
10 on what Mr. Mabry asked you about, does the fact that
11 Richard had legal troubles, would that have affected
12 your willingness to testify on his behalf?

13 A. No.

14 Q. Okay. And why is that?

15 A. Because we love him.

16 MS. ARMSTRONG: Thank you.

17 MR. MABRY: I just have a couple on

18 Re-Direct.

19 RE-CROSS EXAMINATION

20 BY MR. MABRY:

21 Q. When did Richard's mother pass away?

22 A. In '97.

23 Q. Okay. Well, who told you about Richard being charged
24 with murder? You said it was his sister, right?

25 A. Yes.

1 Q. Okay. Was his father still alive?

2 A. Yes.

3 Q. Did his father or your sister ever ask you to come down
4 here and testify on Richard's behalf?

5 A. No.

6 Q. Did they ever tell you that his lawyers or an
7 investigator for Richard had come and talked to them
8 about Richard?

9 A. No.

10 Q. You don't know what Richard was like after you lost
11 contact with him; is that correct?

12 A. Correct.

13 MR. MABRY: No further questions.

14 MS. ARMSTRONG: Thank you, Ms. Hooper.

15 THE WITNESS: Sure.

16 MS. ARMSTRONG: May the witness be
17 excused?

18 MR. MABRY: Yes, ma'am.

19 MS. ARMSTRONG: Okay. Thank you.

20 (Deposition concluded 11:17 a.m.)

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1 STATE OF MICHIGAN)
2) ss.
3 COUNTY OF MACOMB)

4 Certificate of Notary Public

5 I, the undersigned, do hereby certify that
6 the witness, whose attached deposition was taken before
7 me in the above-entitled matter, was by me first duly
8 sworn to testify to the truth; that the testimony
9 contained herein was by me reduced to writing in the
10 presence of the witness by means of stenography;
11 afterwards transcribed; and that the deposition is a
12 true and complete transcript of the testimony given by
13 the witness.

14 I do further certify that I am not connected
15 by blood or marriage with any of the parties; their
16 attorneys or agents; that I am not an employee of either
17 of them; and that I am not interested, directly or
18 indirectly, in the matter of controversy.

19 In witness whereof, I have hereunto set my
20 hand and affixed my notarial seal at Mt. Clemens,
21 Michigan, County of Macomb, State of Michigan.

22 
23 Laura R. Inman, CSR-2272, RPR
24 Certified Shorthand Reporter
25 Notary Public, Macomb County, Michigan
My commission expires: 08/25/2012

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IN THE COURT OF COMMON PLEAS

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG
RICHARD BERNARD MOORE,

Applicant,

vs.

04-CP-42-2715

STATE OF SOUTH CAROLINA,
Commissioner, South Carolina
Department of Corrections, and
Henry Dargan McMaster, Attorney
General, State of South Carolina,

Respondents.

The Deposition of CECIL J. HOOPER, taken pursuant to
Notice of Taking Deposition, before Laura R. Inman, Certified
Shorthand Reporter, CSR-2272, RPR, a Notary Public within and
for the County of Macomb, acting in the County of Macomb,
State of Michigan, at 67 N. Walnut, Mt. Clemens, Michigan, on
Thursday, January 20, 2011, commencing at about 11:18 o'clock
in the forenoon.

1 APPEARANCES:

2

3 ARMSTRONG LAW OFFICE
4 BY: MELISSA J. ARMSTRONG, ESQ.
5 1830 Marion Street
6 Columbia, South Carolina 29201
7 (803) 765-2796

8 Appearing on behalf of the Applicant.

9

10 SOUTH CAROLINA OFFICE OF THE ATTORNEY GENERAL
11 BY: J. ANTHONY MABRY, ESQ.
12 WILLIAM EDGAR SALTER, III, ESQ.
13 P.O. Box 11549
14 Columbia, South Carolina 29211-1549
15 (803) 734-3970

16 Appearing (via Skype) on behalf of the Respondents.

17

18 ALSO PRESENT: James Michael Morton (Via Skype)
19 Dorothy J. Hooper

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WITNESS:

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CECIL J. HOOPER

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Direct Examination by Ms. Armstrong

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Cross Examination by Mr. Mabry

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Re-Direct Examination by Ms. Armstrong

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E X H I B I T S

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IDENTIFICATION

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(None offered.)

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1 Mt. Clemens, Michigan
2 Thursday, January 20, 2011

3 * * *

4 CECIL J. HOOPER,
5 was called as a witness herein, and after
6 having first been duly sworn to tell the
7 truth, the whole truth, and nothing but the truth,
8 was examined and testified as follows:

9 DIRECT EXAMINATION

10 BY MS. ARMSTRONG:

11 Q. Good good morning, sir.

12 A. Oh, good morning.

13 Q. Can you please state your full name for the Court
14 Reporter, please?

15 A. Cecil J. Hooper.

16 Q. Okay. Mr. Hooper, when were you born, sir?

17 A. 1/7/35.

18 Q. Okay. And your Social Security number?

19 A. [REDACTED]

20 Q. Okay. Sir, and how are you employed?

21 A. We're retired.

22 Q. When you say "we," are you referring to you and your
23 wife?

24 A. Yes.

25 Q. And who is that?

- 1 A. Dorothy Hooper.
- 2 Q. Okay. And Mr. Hooper, do you know Richard Bernard
- 3 Moore?
- 4 A. Yes, I did.
- 5 Q. Okay. And how do you know him?
- 6 A. He grew up with my son.
- 7 Q. Okay. And you're his uncle by marriage?
- 8 A. Yes.
- 9 Q. Okay. And where do you live, sir?
- 10 A. 175 Barbara in Mt. Clemens, 48043.
- 11 Q. Okay. And how long have you lived in Mt. Clemens?
- 12 A. 57 years.
- 13 Q. Okay. So you were around when Richard was born up until
- 14 the time he left?
- 15 A. Yes, I was.
- 16 Q. Okay. At some point did you become aware that Richard
- 17 was charged with murder?
- 18 A. Yes.
- 19 Q. Okay. And how did you learn of that fact?
- 20 A. My wife would talk.
- 21 Q. Okay. And prior to my contacting you, had you ever
- 22 spoken with anyone on Richard's behalf?
- 23 A. No.
- 24 Q. No investigators?
- 25 A. No.

- 1 Q. Okay. Anyone?
- 2 A. No.
- 3 Q. Okay. Had someone contacted you, would you have been
- 4 willing to speak with them about Richard?
- 5 A. Yes.
- 6 Q. Okay. And had you been asked to do so, would you have
- 7 been willing to testify on Richard's behalf during the
- 8 penalty phase of his murder trial?
- 9 A. Yes, I would have.
- 10 Q. Okay. And what would you have testified to the Jury?
- 11 A. That he was a nice kid growing up.
- 12 Q. Okay. And did you have regular contact with him?
- 13 A. Yes.
- 14 Q. Okay. What was his behavior like?
- 15 A. Just with the rest of the children.
- 16 Q. Okay. He didn't stand out with any sort of behaviors
- 17 that were problematic?
- 18 A. No.
- 19 Q. Okay. And how would you describe his interaction with
- 20 adults?
- 21 A. He's just like the rest of the children, respectful.
- 22 Q. Respectful? Okay. And is there anything else you would
- 23 want the Jury to know?
- 24 A. We played football together, I did that with my kids.
- 25 Q. Okay. Anything that you would ask the Jury on Richard's

1 behalf?

2 A. Mercy.

3 MS. ARMSTRONG: Okay. Please answer any
4 questions Mr. Mabry may have.

5 CROSS EXAMINATION

6 BY MR. MABRY:

7 Q. Mr. Hooper, when did -- did you, well first of all, did
8 you ever talk to an investigator named Drucy Glass?

9 A. No.

10 Q. From South Carolina that was working on Richard's
11 behalf?

12 A. No.

13 Q. No?

14 A. No.

15 Q. Okay. I'm just having trouble hearing you, I guess.

16 A. No.

17 Q. Okay. Did you ever talk to any of his attorneys?

18 A. No.

19 Q. When did Richard first start getting in trouble with the
20 law?

21 A. I have no idea.

22 Q. Okay. So you weren't aware -- well, did his mother or
23 father ever tell you about him being arrested in 1985 in
24 Michigan for possession of a weapon?

25 A. Not to my knowledge.

- 1 Q. Okay. Now, how many children do you have?
- 2 A. The wife and I have nine.
- 3 Q. And did they ever tell you or did you ever become aware
- 4 he was convicted in 1987 of attempted breaking and
- 5 entering?
- 6 A. No.
- 7 Q. Where was Richard at that time?
- 8 A. I have no idea.
- 9 Q. Okay. You don't know where he was in 1985 or '87?
- 10 A. No, not after he got 18.
- 11 Q. Okay. When did he leave Michigan?
- 12 A. I have no idea.
- 13 Q. In 1991 were you aware he was convicted of grabbing a
- 14 lady's purse and beating a woman and kicking her?
- 15 A. No.
- 16 Q. His mother and father didn't tell you about that.
- 17 A. No.
- 18 Q. Did the family ever talk about Richard's problems with
- 19 the law?
- 20 A. No.
- 21 Q. Ever talk about him having any kind of problems at all
- 22 that were causing him to get in trouble?
- 23 A. No.
- 24 Q. Were you aware that in 1991 he robbed a place called the
- 25 Rack Room?

1 A. No.

2 Q. Are you aware that in 1994 he was convicted of common
3 law robbery?

4 A. No.

5 Q. Were you aware that he got convicted from 1993 through
6 1996 of driving under suspension multiple times and
7 habitual traffic offender?

8 A. No.

9 Q. Are you aware that he was convicted in 1997 of assault
10 and battery of a high and aggravated nature?

11 A. No.

12 Q. All right. How did you find out about him being charged
13 with murder?

14 A. Through my wife.

15 Q. Okay. Did anybody in Richard's family, his father or
16 any of his sisters or anybody ever ask you to come to
17 South Carolina --

18 A. No.

19 Q. -- and testify?

20 A. No.

21 Q. Did they ever tell you that they had talked to lawyers
22 and an investigator from South Carolina?

23 A. No.

24 Q. So they basically didn't have any contact with you about
25 the case.

1 A. No.

2 Q. One moment, please.

3 Did Richard come from a good family?

4 A. Yes.

5 Q. Did they teach him right from wrong?

6 A. Again, please?

7 Q. Did they teach him right from wrong?

8 A. Oh, yes, yes.

9 Q. Okay. Did they make him go to church?

10 A. Yes, they did.

11 MR. MABRY: Okay. That's all the

12 questions I have.

13 MS. ARMSTRONG: Briefly on Re-Direct.

14 RE-DIRECT EXAMINATION

15 BY MS. ARMSTRONG:

16 Q. Mr. Harrington, the fact that Richard -- I'm sorry,

17 Mr. Hooper, I apologize.

18 The fact that Richard got into trouble

19 with the law, does that change your love for him?

20 A. No.

21 Q. Would it have affected your willingness to testify on

22 his behalf?

23 A. Yes.

24 Q. Even knowing Richard's trouble with the law, would you

25 have been willing to testify on his behalf?

1 A. Yes, I would have.

2 Q. Okay. I just wanted to confirm that.

3 MS. ARMSTRONG: Thank you very much.

4 Please answer any questions Mr. Mabry may have on
5 Re-Cross.

6 MR. MABRY: Nothing.

7 MS. ARMSTRONG: Thank you. That's all
8 with this witness.

9 MR. MABRY: No objection to him being
10 excused.

11 MS. ARMSTRONG: Thank you very much.

12 MR. MABRY: Okay.

13 (Deposition concluded 11:30 a.m.)

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1 STATE OF MICHIGAN)
) ss.
2 COUNTY OF MACOMB)

3 Certificate of Notary Public

4 I, the undersigned, do hereby certify that
5 the witness, whose attached deposition was taken before
6 me in the above-entitled matter, was by me first duly
7 sworn to testify to the truth; that the testimony
8 contained herein was by me reduced to writing in the
9 presence of the witness by means of stenography;
10 afterwards transcribed; and that the deposition is a
11 true and complete transcript of the testimony given by
12 the witness.

13 I do further certify that I am not connected
14 by blood or marriage with any of the parties; their
15 attorneys or agents; that I am not an employee of either
16 of them; and that I am not interested, directly or
17 indirectly, in the matter of controversy.

18 In witness whereof, I have hereunto set my
19 hand and affixed my notarial seal at Mt. Clemens,
20 Michigan, County of Macomb, State of Michigan.

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Laura R. Inman, CSR-2272, RPR
Certified Shorthand Reporter
Notary Public, Macomb County, Michigan
My commission expires: 08/25/2012

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IN THE COURT OF COMMON PLEAS

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG
RICHARD BERNARD MOORE,

Applicant,

vs.

04-CP-42-2715

STATE OF SOUTH CAROLINA,
Commissioner, South Carolina
Department of Corrections, and
Henry Dargan McMaster, Attorney
General, State of South Carolina,

Respondents.

The Deposition of HAROLD HARRINGTON, taken pursuant to
Notice of Taking Deposition, before Laura R. Inman, Certified
Shorthand Reporter, CSR-2272, RPR, a Notary Public within and
for the County of Macomb, acting in the County of Macomb,
State of Michigan, at 67 N. Walnut, Mt. Clemens, Michigan, on
Thursday, January 20, 2011, commencing at about 10:10 o'clock
in the forenoon.

1 APPEARANCES:
2

3 ARMSTRONG LAW OFFICE
4 BY: MELISSA J. ARMSTRONG, ESQ.
1830 Marion Street
5 Columbia, South Carolina 29201
(803) 765-2796
6

7 Appearing on behalf of the Applicant.

8 SOUTH CAROLINA OFFICE OF THE ATTORNEY GENERAL
9 BY: J. ANTHONY MABRY, ESQ.
WILLIAM EDGAR SALTER, III, ESQ.
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(803) 734-3970
11

12 Appearing (via Skype) on behalf of the Respondents.

13 ALSO PRESENT: James Michael Morton (Via Skype)
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Harold Harrington

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I N D E X

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WITNESS:

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HAROLD HARRINGTON

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Cross Examination by Mr. Salter 09

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Re-Direct Examination by Ms. Armstrong 13

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Re-Cross Examination by Mr. Salter 13

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E X H I B I T S

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17

NUMBER

IDENTIFICATION

PAGE

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(None offered.)

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Harold Harrington

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1 Mt. Clemens, Michigan
2 Thursday, January 20, 2011

3 * * *

4 HAROLD HARRINGTON,
5 was called as a witness herein, and after
6 having first been duly sworn to tell the
7 truth, the whole truth, and nothing but the truth,
8 was examined and testified as follows:

9 DIRECT EXAMINATION

10 BY MS. ARMSTRONG:

11 Q. Good morning, Mr. Harrington.

12 A. Good morning.

13 Q. Would you please state your full name for the Court
14 Reporter?

15 A. Harold Hunter Hayes Harrington.

16 Q. And Mr. Harrington, when were you born, sir?

17 A. January 9th, 1948.

18 Q. Okay. And can you please give us your Social Security
19 number just for verification?

20 A. [REDACTED]

21 Q. Okay, Mr. Harrington. Sir, what do you do for a living?

22 A. I am a maintenance and construction supervisor for Ford
23 Motor Company.

24 Q. Okay. And how long have you been employed at this
25 position?

- 1 A. I've been with Ford Motor Company now in March it will
2 be 35 years.
- 3 Q. Okay. And where do you live, sir?
- 4 A. I live at [REDACTED] in Mt. Clemens, Michigan.
- 5 Q. Okay. And how long have you lived in Michigan?
- 6 A. I've been in Michigan for 58 years.
- 7 Q. Okay. And sir, are you married?
- 8 A. I am divorced.
- 9 Q. Okay. Do you have any children?
- 10 A. Yes, I do.
- 11 Q. Okay. And do you know the applicant in this case,
12 Richard Bernard Moore?
- 13 A. Yes.
- 14 Q. Okay. How long have you known Mr. Moore?
- 15 A. Since he was born.
- 16 Q. Okay. Are you related to Mr. Moore?
- 17 A. I am his uncle.
- 18 Q. Okay. Would that be on the mother's side or the
19 father's side?
- 20 A. On the mother's side.
- 21 Q. Okay. And Mr. Harrington, were you aware that at some
22 point Mr. Moore was charged with what's known as capital
23 murder?
- 24 A. No, I was not aware that he was charged with that. I
25 was aware that he had gotten into trouble and it was

Harold Harrington

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1 involving a murder.

2 Q. Okay. When did you become aware of Richard's murder
3 charges?

4 A. That would have been right after the death of his
5 mother, I was informed by relatives.

6 Q. Okay. About what year was that, sir?

7 A. I think that would have been 1999.

8 Q. Okay. And after you became aware of his charges did
9 anyone on behalf of Mr. Moore, any lawyers,
10 investigators, anyone ever contact you about your
11 nephew, Richard Moore?

12 A. No, no one ever contacted me.

13 Q. Okay. Who was the first person who contacted you after
14 he was convicted?

15 A. Lisa Armstrong.

16 Q. Would that be me?

17 A. That would be you.

18 Q. Okay, all right. So in other words, the first time you
19 learned of Richard's legal situation and spoke to anyone
20 who was representing him was when I contacted you.

21 A. That is correct.

22 Q. Okay. And approximately when was that, sir?

23 A. Your first contact with me was I think in August, I
24 think it was in August.

25 Q. Okay. And let me ask you this, Mr. Harrington. If

1 Q. Mr. Harrington?

2 MR. SALTER: Again, Lisa, we've lost you.

3 MS. ARMSTRONG: Okay. I'm back on.

4 MR. SALTER: Okay.

5 BY MS. ARMSTRONG:

6 Q. Mr. Harrington, had you been in front of the Jury, would
7 you have asked them for anything on behalf of Richard?

8 A. I would have asked the Jury to be lenient, that he was a
9 good person and he was not the type of person to go out
10 and try to harm anybody, that I will ask them to be
11 lenient and not to give him the death penalty because we
12 love him and we've known him for a long time and he's
13 always been a good person.

14 MS. ARMSTRONG: Okay. Thank you,
15 Mr. Harrington, and please answer any questions that
16 Mr. Salter may have.

17 CROSS EXAMINATION

18 BY MR. SALTER:

19 Q. Good morning, Mr. Harrington.

20 A. Good morning.

21 Q. My name is Ed Salter. I'm with the South Carolina
22 Attorney General's Office. I would like -- I will try
23 to be real brief.

24 How often did you see Mr. Moore?

25 A. How often did I see him?

Harold Harrington

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1 Q. Yes, sir.

2 A. Basically I saw him, oh, several times a week because
3 even after I moved from next-door I would stop and see
4 my mother and father almost every day and as a young boy
5 growing up I saw him quite often.

6 Q. All right, sir. You said as a young boy. How young are
7 we talking about?

8 A. Teenage, teenage years and even onto his, into his
9 twenties.

10 Q. Into his twenties?

11 A. Yes, sir.

12 Q. All right. Are you aware that in 1985 he was convicted
13 for possession of a weapon?

14 A. No, I was not aware.

15 Q. You're not aware? Were you aware of another Michigan
16 conviction in 1987 for attempted breaking and entering?

17 A. I was not aware of that either.

18 Q. So you didn't know anything about that charge either.

19 A. No, sir.

20 Q. You didn't know that he admitted that he pushed open a
21 door to a business, went in and stole two guns?

22 A. No, sir.

23 MR. SALTER: Okay. I understand right
24 now, Court Reporter, there is some indication of an
25 Internet connection problem. Are we still on?

1 MS. ARMSTRONG: Yes.

2 THE WITNESS: Yes.

3 MR. SALTER: Okay. Thank you.

4 BY MR. SALTER:

5 Q. So how close were you to Mr. Moore?

6 A. Just as an uncle in interacting with him, throwing the
7 football around, seeing him go fishing or sometimes
8 fishing with him along with my father, which was his
9 grandfather.

10 Q. All right.

11 A. And his mom lived next-door and she was like one of my
12 favorite sisters and I was at their house quite often.

13 Q. You were at their house quite often?

14 A. Yeah.

15 Q. Were you aware of him acting out aggressively within the
16 family?

17 A. No, I don't ever recall him acting out aggressively or
18 having any squabbles with his other siblings.

19 Q. Okay. Are you aware of any, him using drugs or alcohol?

20 A. No, sir.

21 Q. Not at all? You said you became aware of the trial some
22 time after his mother's death?

23 A. I didn't become aware of the trial. I became aware of
24 what he was charged with shortly after that.

25 Q. Okay, all right. Are you aware that prior to the murder

Harold Harrington

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1 charge he had a conviction for strong-arm robbery?

2 A. No, sir.

3 Q. You weren't. Okay. So is it fair to say that you
4 didn't, as you grew older you did not stay close to him,
5 is that fair to say?

6 A. Pretty much, yes. After he, you know, became older and
7 when he, you know, left the Michigan area I was not in
8 contact with him.

9 Q. All right. When did he leave the Michigan area?

10 A. I would think that may have been like in '98, '97, I'm
11 not sure.

12 Q. All right. Are you aware of any times when Mr. Moore
13 went to prison?

14 A. Only when he went to prison in South Carolina, I was
15 aware of that from --

16 Q. You were unaware of any prison time he may have served
17 in Michigan.

18 A. No, I wasn't aware.

19 Q. All right.

20 A. I don't recall any Michigan prison.

21 MR. SALTER: All right, sir. Anything
22 further? Nothing further.

23 MS. ARMSTRONG: I need just a minute,
24 okay?

25 MR. SALTER: Certainly.

1 MS. ARMSTRONG: Thank you. I'll be real
2 brief on Re-Direct.

3 RE-DIRECT EXAMINATION

4 BY MS. ARMSTRONG:

5 Q. Mr. Harrington, the fact that Richard had some legal
6 troubles about which you were unaware, would that have
7 changed your willingness in any way to testify on his
8 behalf during the penalty phase?

9 A. No, it wouldn't.

10 Q. Okay. Does that change the fact that you love Richard?

11 A. It does not. I love him no matter what, and if I'd of
12 known some of these other things, I would have tried to
13 give him some assistance with attorneys or with
14 financial assistance to help him out because I believe
15 in him as being a good person.

16 MS. ARMSTRONG: Okay. Thank you, sir, I
17 appreciate it. I have no further questions.

18 MR. SALTER: All right.

19 RE-CROSS EXAMINATION

20 BY MR. SALTER:

21 Q. So it's fair to say you're unaware of the various
22 offenses for which he was convicted in South Carolina;
23 is that correct?

24 A. Correct.

25 Q. All right. You were unaware that he grabbed a purse and

1 beat a woman in 1991?

2 A. No, sir, I'm never heard anything about that.

3 Q. And you're unaware that he robbed a Rack Room in 1991
4 also down here in Spartanburg County?

5 A. No, sir.

6 MR. SALTER: All right. I don't believe
7 I have anything further.

8 MS. ARMSTRONG: Okay. Thank you.

9 (Deposition concluded 10:26 a.m.)

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1 STATE OF MICHIGAN)
2) ss.
3 COUNTY OF MACOMB)

4 Certificate of Notary Public

5 I, the undersigned, do hereby certify that
6 the witness, whose attached deposition was taken before
7 me in the above-entitled matter, was by me first duly
8 sworn to testify to the truth; that the testimony
9 contained herein was by me reduced to writing in the
10 presence of the witness by means of stenography;
11 afterwards transcribed; and that the deposition is a
12 true and complete transcript of the testimony given by
13 the witness.

14 I do further certify that I am not connected
15 by blood or marriage with any of the parties; their
16 attorneys or agents; that I am not an employee of either
17 of them; and that I am not interested, directly or
18 indirectly, in the matter of controversy.

19 In witness whereof, I have hereunto set my
20 hand and affixed my notarial seal at Mt. Clemens,
21 Michigan, County of Macomb, State of Michigan.

22 

23 Laura R. Inman, CSR-2272, RPR
24 Certified Shorthand Reporter
25 Notary Public, Macomb County, Michigan
My commission expires: 08/25/2012

1 IN THE COURT OF COMMON PLEAS

2

3 STATE OF SOUTH CAROLINA
4 COUNTY OF SPARTANBURG
5 RICHARD BERNARD MOORE,

6

Applicant,

7

vs.

04-CP-42-2715

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9 STATE OF SOUTH CAROLINA,
10 Commissioner, South Carolina
11 Department of Corrections, and
12 Henry Dargan McMaster, Attorney
13 General, State of South Carolina,

14

Respondents.

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17 The Deposition of ARMA HADLEY, taken pursuant to
18 Notice of Taking Deposition, before Laura R. Inman, Certified
19 Shorthand Reporter, CSR-2272, RPR, a Notary Public within and
20 for the County of Macomb, acting in the County of Macomb,
21 State of Michigan, at 67 N. Walnut, Mt. Clemens, Michigan, on
22 Thursday, January 20, 2011, commencing at about 1:18 o'clock
23 in the afternoon.
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1 APPEARANCES:

2

3 ARMSTRONG LAW OFFICE
4 BY: MELISSA J. ARMSTRONG, ESQ.
5 1830 Marion Street
6 Columbia, South Carolina 29201
7 (803) 765-2796

8 Appearing on behalf of the Applicant.

9

10 SOUTH CAROLINA OFFICE OF THE ATTORNEY GENERAL
11 BY: J. ANTHONY MABRY, ESQ.
12 WILLIAM EDGAR SALTER, III, ESQ.
13 P.O. Box 11549
14 Columbia, South Carolina 29211-1549
15 (803) 734-3970

16 Appearing (via Skype) on behalf of the Respondents.

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I N D E X

WITNESS:

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ARMA HADLEY

Direct Examination by Ms. Armstrong

04

Cross Examination by Mr. Mabry

10

E X H I B I T S

NUMBER

IDENTIFICATION

PAGE

(None offered.)

1 Mt. Clemens, Michigan
2 Thursday, January 20, 2011

3 * * *

4 ARMA HADLEY,

5 was called as a witness herein, and after
6 having first been duly sworn to tell the
7 truth, the whole truth, and nothing but the truth,
8 was examined and testified as follows:

9 DIRECT EXAMINATION

10 BY MS. ARMSTRONG:

11 Q. Good afternoon, Ms. Hadley. How are you?

12 A. Fine, thanks. How are you?

13 Q. Good. I know you're soft spoken, so just try to
14 remember to keep your voice up so that Mr. Salter,
15 Mr. Morton and Mr. Mabry can hear you.

16 A. Okay.

17 Q. Okay.

18 MR. SALTER: Lisa?

19 MS. ARMSTRONG: Yes, sir.

20 MR. SALTER: Jim's no longer here.

21 BY MS. ARMSTRONG:

22 Q. Oh, okay, I'm sorry. It will just be Mr. Salter and
23 Mr. Mabry, but we need to make sure that they hear what
24 you say, so just force yourself to speak a little louder
25 than you ordinarily would.

- 1 A. Okay.
- 2 Q. Okay? Ms. Hadley, will you please tell the Court
- 3 Reporter your full name?
- 4 A. Arma Nell Hadley.
- 5 Q. All right. Ms. Hadley, and when were you born, ma'am?
- 6 A. When?
- 7 Q. Your date of birth, yes, ma'am.
- 8 A. 6/10/42.
- 9 Q. And just to make sure we've got the absolute correct
- 10 information, can you go ahead and give us your Social
- 11 Security number again?
- 12 Do you need to get it out of your
- 13 billfold?
- 14 A. I have to get it out of my billfold. I'm sorry, just
- 15 give me some time, I'll have it.
- 16 Social Security number 375-42-3427.
- 17 Q. Thank you. Okay. Ms. Hadley, are you employed?
- 18 A. No.
- 19 Q. Retired?
- 20 A. I'm retired.
- 21 Q. Okay. And Ms. Hadley, where do you live?
- 22 A. Mt. Clemens, Michigan.
- 23 Q. Okay. And do you know Richard Moore?
- 24 A. Yes, I do.
- 25 Q. Okay. And how do you know Richard?

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1 A. Richard is my nephew.

2 Q. Is that by your sister or your brother?

3 A. My sister.

4 Q. Okay. And were you aware that Richard had been charged
5 with murder in South Carolina?

6 A. Not at the time.

7 Q. Okay. Not at the time that he was charged?

8 A. Well, it was a long time, I didn't know.

9 Q. Okay. When did you first learn that he was charged with
10 murder?

11 A. It's been a couple of years.

12 Q. Okay. And let me ask you this. Has anyone other than
13 myself ever requested to speak with you about Richard?

14 A. No.

15 Q. Okay. No investigators?

16 A. No.

17 Q. No lawyers?

18 A. No.

19 Q. No, in other words, nobody working for Richard in any
20 capacity?

21 A. No.

22 Q. Okay, all right. Well, if someone had come and asked to
23 speak with you about Richard prior to his trial in South
24 Carolina, would you have been willing to speak with them
25 the way you spoke with me?

1 A. Yes.

2 Q. Okay. And taking it a step further, if you had been
3 asked to speak on behalf of Richard during his criminal
4 trial, would you have been willing to do that?

5 A. Yes.

6 Q. Okay. Well, in sort of following up with that, tell me
7 a little bit about your recollection of Richard. You
8 said he's your nephew?

9 A. Yes.

10 Q. Okay. What kinds of things do you recall about Richard?

11 A. Well, Richard, he was my nephew. He was --

12 MR. MABRY: Wait, wait, we can't hear any
13 of that.

14 MS. ARMSTRONG: Okay. Well, we'll get
15 her to speak up some. Sorry about that.

16 MR. MABRY: Yeah, start the answer over,
17 we didn't hear you.

18 MS. ARMSTRONG: Okay. I'll ask the
19 question again just so we're all on the same page.

20 BY MS. ARMSTRONG:

21 Q. Ms. Hadley, tell us a little bit about your relationship
22 with Richard. What kind of person was he when he was
23 growing up in Mt. Clemens?

24 A. He was a really nice guy, sweet guy, very sweet,
25 friendly.

1 MR. MABRY: Wait, I didn't hear that.

2 A. Friendly.

3 MR. MABRY: Okay.

4 A. I was his aunt and he respected me as being his aunt.

5 We just had a lot of fun together with the family. He's

6 just a really down-to-earth guy. He worked hard. He

7 played with the, on the basketball team at school, in

8 Mt. Clemens High School.

9 Then after that he got a job, and he was
10 just around. My mother and father lived next-door to
11 them so they, he grew up in a family of being around
12 people that was loving.

13 BY MS. ARMSTRONG:

14 Q. Okay. And did you ever have any problems with Richard?

15 A. No, I didn't.

16 Q. No disciplinary problems?

17 A. No.

18 Q. Okay. Did you ever see him act in ways that were
19 aggressive?

20 A. No.

21 Q. Okay. And let me ask you this, just one final question.

22 If you had been called to testify on
23 Richard's behalf during the penalty phase, is there
24 anything you would want the Jury to know?

25 A. Yes, I think so. I just don't believe, you know, he

1 wasn't that type of guy, he didn't seem to be when I
2 knew him, when we grew up together with my family and I
3 would want the Jury to know that he didn't have, he
4 didn't seem to have that kind of personality.
5 Q. When you say "that," you mean aggressive?
6 A. Aggressive, no.
7 Q. Okay.
8 A. I've always saw him as calm, just not mean tempered or
9 anything.
10 Q. Okay. And is there anything you'd like to ask on behalf
11 of Richard?
12 A. Just like, what is -- I don't know what he's charged
13 with.
14 Q. On the murder charge.
15 A. Uh-huh.
16 Q. As far as his penalty is concerned, is there anything
17 you'd like to ask for the Jury to consider?
18 A. He's my nephew and I love him. I would ask the Jury to
19 be considerate as being a human being. I just don't
20 think he deserved to die.
21 Q. Okay. So in other words, you would ask the Jury to
22 spare his life.
23 A. Yes.
24 Q. Okay. All right.
25 MR. MABRY: Object to the form of the

1 question, but go ahead, she answered it.

2 MS. ARMSTRONG: Okay. Anthony -- or
3 excuse me, Ms. Hadley, please answer any questions that
4 Mr. Mabry may have for you.

5 CROSS EXAMINATION

6 BY MR. MABRY:

7 Q. Ms. Hadley, good afternoon. How are you doing?

8 A. Fine, thanks. How are you?

9 Q. I'm fine. I'm Anthony Mabry. I'm the Assistant
10 Attorney General. I just want to ask you a few
11 questions, and the first one I have is can you tell me
12 why you would not have found out about Richard being
13 charged with murder for a couple of years after he was
14 charged with murder?

15 A. I don't know, I'll usually get, his father lived
16 next-door to me now, I hadn't always lived next-door to
17 him, but during the time his father, he didn't tell me
18 too much, so I really didn't know that he was charged
19 with murder.

20 Q. Well, when did your sister -- well, first of all, how
21 many brothers and sisters in this family, your family?

22 A. My family?

23 Q. You, yeah, how many brothers and sisters do you have?

24 A. It's nine of us.

25 Q. Nine. Okay. And do they all live there in the Michigan

- 1 area or are they scattered out over the country?
- 2 A. Mt. Clemens area.
- 3 Q. Okay. Now, when did your sister die, Richard's mother?
- 4 A. Oh dear, I think it may have been -- five, six -- seven.
- 5 Q. '97?
- 6 A. I'm not sure. I'm not sure.
- 7 Q. Okay. Well, after your sister died, did you kind of
- 8 lose touch with Richard's family?
- 9 A. No, we're all very close.
- 10 Q. Very close. All right. Where did Richard's family live
- 11 when your sister died in 1997?
- 12 A. They lived next-door to my mother.
- 13 Q. Where did you live?
- 14 A. When my sister passed I was taking care of my mother
- 15 next-door to them.
- 16 Q. Where were you living?
- 17 A. I lived maybe four or five blocks away.
- 18 Q. And did you and your sister, Richard's mother, talk
- 19 about Richard before she died?
- 20 A. No, not really.
- 21 Q. Were you aware that Richard had been in trouble with the
- 22 law before he was arrested for murder?
- 23 A. There may have been one occasion.
- 24 Q. Well, you'll have to tell me what you knew about him and
- 25 who told you about him?

1 A. They told me that he may have had some trouble down
2 there, but they didn't --

3 Q. Where?

4 A. In South Carolina, but --

5 Q. And where did Richard live when he was in Michigan?

6 A. He lived with his girlfriend, I think.

7 Q. Okay. Well, where did he live growing up?

8 A. He lived at home with his mother and father.

9 Q. Well, how old was he when he moved in with his
10 girlfriend?

11 A. That was after high school graduation.

12 Q. Okay. But up until high school graduation he lived with
13 his mother.

14 A. Pardon me?

15 Q. Before he graduated from high school he lived with his
16 mother.

17 A. Right, he was still living with his mother.

18 Q. All right. And after he graduated from high school you
19 said he moved in with his girlfriend. Did he live
20 anywhere else in Michigan besides with his girlfriend?

21 A. I don't think so, I'm not sure.

22 Q. Okay. Well, when he was in Michigan he was convicted in
23 1985 of possession of a weapon. Did you know about
24 that?

25 A. No.

- 1 Q. But his mother didn't tell you about him being arrested
2 and convicted of that in Michigan.
- 3 A. I don't think so, I don't remember.
- 4 Q. Well, did his father or anybody else in the family know
5 about it, talk about Richard been arrested by the police
6 in 1985 for possession of a weapon?
- 7 A. They may have, but I'm not sure.
- 8 Q. Okay. Well, in 1987 he was convicted of attempted
9 breaking and entering into a building. Did you know
10 about that?
- 11 A. No.
- 12 Q. They didn't tell, your sister and your brother-in-law
13 didn't tell you about that either?
- 14 A. I don't recall them telling me about it.
- 15 Q. Do you remember anybody in the family talking about it?
- 16 A. I'm not sure, they may have talked about him being in
17 trouble, but I'm not sure of the extent of the trouble
18 it was in.
- 19 Q. Anything they did tell you about the breaking and
20 entering?
- 21 A. I'm not sure.
- 22 Q. Okay. Well, what do you remember them telling you about
23 Richard, any trouble with the law in Michigan?
- 24 A. There may have been a time when he was in jail, but I
25 didn't know what he was in jail for.

1 Q. Okay. You never asked?

2 A. No.

3 Q. And you lived about three or four blocks away and was
4 over there taking care of your mother, the grandmother,
5 and you never asked why he was in jail?

6 A. No.

7 Q. Okay. In 1991 he was convicted of grabbing a purse and
8 beating and kicking a woman. Did they ever tell you
9 about that?

10 A. No.

11 Q. Did your mother ever tell you about that?

12 A. No.

13 Q. Anybody in the family ever talk about they were worried
14 about Richard what kind of person he was becoming?

15 A. No.

16 Q. Do you know that in 1991 he was convicted of robbing a
17 place called the Rack Room?

18 A. I'm sorry, I didn't understand.

19 Q. Did you know in 1991 he was convicted of robbing a place
20 called the Rack Room?

21 A. No, I don't recall that.

22 Q. They never told you about that?

23 A. No.

24 Q. Did you know that in 1992 he was convicted of common law
25 robbery?

- 1 A. Common --
- 2 Q. Did you know he went to prison for that?
- 3 A. I don't recall. It's been quite a while since that
- 4 happened whenever he was living, after he moved out from
- 5 the house around the neighborhood.
- 6 Q. Okay.
- 7 A. 'Cause he lived in Detroit.
- 8 Q. Oh, okay. So when he moved out of his mother's home and
- 9 moved in with his girlfriend he moved to Detroit; is
- 10 that right?
- 11 A. I think so.
- 12 Q. Okay. So you all kind of lost touch with Richard at
- 13 that point.
- 14 A. At that point.
- 15 Q. Okay. And you lost touch with him from that point on;
- 16 is that right?
- 17 A. Let me see. Until he would come out to visit I didn't
- 18 recall seeing, you know, being in touch with him.
- 19 Q. Okay. So then you would just see him when he would come
- 20 to visit. So you don't know what kind of life he was
- 21 living after he left your sister's home.
- 22 A. Not after he left the home.
- 23 Q. No?
- 24 A. No.
- 25 Q. Okay. Did your sister or your mother ever tell you or

1 any family member ever tell you about him getting
2 arrested numerous times in 1993, '94, '95 and '96 for
3 driving under suspension and habitual traffic offender?

4 A. No.

5 Q. You didn't know about any of that.

6 A. No.

7 Q. Is that right?

8 A. That's right, I didn't know.

9 Q. Okay. And did you know, did they ever tell you that in
10 1997 he was convicted of aggravated assault and battery
11 of a Sonya Harrison?

12 A. I don't recall that either.

13 Q. Okay. So as I understand it, your sister and your
14 mother and your brother-in-law, they really didn't talk
15 about Richard's problems and how he had turned out in
16 life after he left the area where you lived.

17 A. Right.

18 Q. Okay. And when did they tell you about the murder? The
19 murder happened in 1999. How long was it after the
20 murder that they told you that he had been arrested and
21 convicted of murder?

22 A. In South Carolina?

23 Q. Yes, ma'am.

24 A. I'm not sure when I found out about that. It had to
25 have been like two or three years.

- 1 Q. Okay. And how did you find out about it?
- 2 A. I'm trying to think, I don't remember. I guess through
- 3 his brother.
- 4 Q. You found out through his brother.
- 5 A. Yes.
- 6 Q. And do you know whether his brother has had any troubles
- 7 with the law?
- 8 A. No.
- 9 Q. You don't know.
- 10 A. No.
- 11 Q. Okay. I didn't hear the last answer.
- 12 A. No.
- 13 Q. Okay. They didn't talk about that with you either.
- 14 A. About his brother?
- 15 Q. Right.
- 16 A. I didn't understand your question.
- 17 Q. My question was, did they ever tell you that Richard's
- 18 brother had been in trouble with the law?
- 19 A. Which one?
- 20 Q. Well, I'm not sure but I think his name is James Dumons
- 21 Moore? Maurice, I'm sorry.
- 22 A. Oh, Maurice.
- 23 Q. Is that his brother?
- 24 A. That's his brother.
- 25 Q. Well, did you ever find out he was in trouble with the

- 1 law?
- 2 A. No, not that I know of.
- 3 Q. Okay. Did Richard Moore come from a good family?
- 4 A. Yes, he did.
- 5 Q. Okay. Did they, did he come from a good home?
- 6 A. Yes, very good home.
- 7 Q. And did they teach him wrong from right?
- 8 A. Yes.
- 9 Q. Did they make him go to church?
- 10 A. Yes, when they were coming up.
- 11 Q. Okay. So if he got in trouble with the law after he
- 12 left home, it wasn't something that his mother and daddy
- 13 taught him.
- 14 A. No, it wasn't. Richard was raised by, but he stayed
- 15 next-door to my mother so my grandfather had an
- 16 influence over him -- his grandfather, my father which
- 17 was his grandfather.
- 18 Q. Right.
- 19 A. They had a great influence over him.
- 20 Q. He did or didn't?
- 21 A. He did.
- 22 Q. Okay. And is your father a good person?
- 23 A. Yes, my father is.
- 24 Q. Okay. So he taught him right from wrong?
- 25 A. He was. Yes, he was taught right from wrong.

- 1 Q. Okay. Now, is there any reason -- and is your father
2 still alive?
- 3 A. No.
- 4 Q. No? I'm sorry. Is there any reason that Richard's
5 father or brothers would not have told his lawyers or
6 their investigator to not talk to you?
- 7 A. No.
- 8 Q. Okay. They certainly were aware that you existed,
9 correct?
- 10 A. Yes.
- 11 Q. Okay. And you never talked to a woman named Drucy
12 Glass?
- 13 A. A who?
- 14 Q. An investigator from South Carolina named Drucy Glass?
- 15 A. No.
- 16 Q. Did she ever call you and leave a message on your phone
17 and ask you to call her back?
- 18 A. No.
- 19 Q. Did anybody ever send you any letters trying to contact
20 you on Richard's behalf?
- 21 A. No.
- 22 Q. Were you even aware of Richard's trial when it took
23 place in South Carolina?
- 24 A. No.
- 25 Q. And your testimony is the reason you didn't come forward

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1 back then is nobody told you about it.

2 A. That's right.

3 MR. MABRY: Okay. That's all I have,
4 ma'am. Thank you.

5 THE WITNESS: Thank you.

6 MS. ARMSTRONG: It'll be just a second, I
7 may not have any Re-Direct.

8 MR. MABRY: Okay.

9 MS. ARMSTRONG: I have no further
10 questions.

11 MR. MABRY: Okay. We don't object to her
12 being excused.

13 MS. ARMSTRONG: Thank you very much.

14 (Deposition concluded 1:45 p.m.)

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1 STATE OF MICHIGAN)
2) ss.
3 COUNTY OF MACOMB)

4 Certificate of Notary Public

5 I, the undersigned, do hereby certify that
6 the witness, whose attached deposition was taken before
7 me in the above-entitled matter, was by me first duly
8 sworn to testify to the truth; that the testimony
9 contained herein was by me reduced to writing in the
10 presence of the witness by means of stenography;
11 afterwards transcribed; and that the deposition is a
12 true and complete transcript of the testimony given by
13 the witness.

14 I do further certify that I am not connected
15 by blood or marriage with any of the parties; their
16 attorneys or agents; that I am not an employee of either
17 of them; and that I am not interested, directly or
18 indirectly, in the matter of controversy.

19 In witness whereof, I have hereunto set my
20 hand and affixed my notarial seal at Mt. Clemens,
21 Michigan, County of Macomb, State of Michigan.

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Laura R. Inman, CSR-2272, RPR
Certified Shorthand Reporter
Notary Public, Macomb County, Michigan
My commission expires: 08/25/2012

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IN THE COURT OF COMMON PLEAS

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG
RICHARD BERNARD MOORE,

Applicant,

vs.

04-CP-42-2715

STATE OF SOUTH CAROLINA,
Commissioner, South Carolina
Department of Corrections, and
Henry Dargan McMaster, Attorney
General, State of South Carolina,

Respondents.

The Deposition of JAMES A. MOORE, taken pursuant to
Notice of Taking Deposition, before Laura R. Inman, Certified
Shorthand Reporter, CSR-2272, RPR, a Notary Public within and
for the County of Macomb, acting in the County of Macomb,
State of Michigan, at 67 N. Walnut, Mt. Clemens, Michigan, on
Thursday, January 20, 2011, commencing at about 3:50 o'clock
in the afternoon.

1 APPEARANCES:

2

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8 Appearing on behalf of the Applicant.

9

10 SOUTH CAROLINA OFFICE OF THE ATTORNEY GENERAL
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16 Appearing (via Skype) on behalf of the Respondents.

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WITNESS:

PAGE

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JAMES A. MOORE

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Direct Examination by Ms. Armstrong

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Cross Examination by Mr. Mabry

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Re-Direct Examination by Ms. Armstrong

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Re-Cross Examination by Mr. Mabry

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IDENTIFICATION

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(None offered.)

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Mt. Clemens, Michigan

Thursday, January 20, 2011

* * *

MS. ARMSTRONG: This is our sixth and final witness. The Court Reporter is going to swear him.

JAMES A. MOORE,
was called as a witness herein, and after having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MS. ARMSTRONG:

Q. Would you please state your full name for the record?

A. Mr. James Allen Moore.

Q. Thank you, Mr. Moore. When were you born, sir?

A. June 30th, 1973.

Q. Okay. And just --

MR. MABRY: What was the last, June 30th, what?

MS. ARMSTRONG: 1973 I believe he said.

THE WITNESS: Yes, 1973.

MS. ARMSTRONG: All right.

MR. MABRY: I'm sorry, go ahead.

MS. ARMSTRONG: That's all right.

- 1 BY MS. ARMSTRONG:
- 2 Q. And are you married, sir?
- 3 A. No, I'm not.
- 4 Q. Okay. And are you employed?
- 5 A. No, I'm not at this time.
- 6 Q. Okay. And do you know Richard Moore?
- 7 A. Yes, I do, that's my brother.
- 8 Q. That's your brother?
- 9 A. Yes.
- 10 Q. Okay. Would he be your older brother?
- 11 A. Yes.
- 12 Q. And how many years separate you and Richard?
- 13 A. I'm 37, so how old is Richard again, forty what, 45, 46,
- 14 I think.
- 15 Q. Okay. So about eight or nine years?
- 16 A. About eight or nine years.
- 17 Q. So you're the baby of the family?
- 18 A. Yes.
- 19 Q. Okay. And where do you live, sir?
- 20 A. I live on [REDACTED]
- 21 Q. Okay. Is that in Mt. Clemens?
- 22 A. Yes.
- 23 Q. Okay. Have you lived here your whole life?
- 24 A. Yes.
- 25 Q. And at some point did you become aware that your brother

1 was charged with murder in South Carolina?

2 A. Yes, I was aware of that.

3 Q. Okay. Do you have any idea approximately, I'm not
4 asking for a specific, you know, an absolute date and
5 time, but do you have a general idea about when you
6 first heard of his murder charges?

7 A. To be honest with you, no.

8 Q. Okay.

9 MR. MABRY: I can't hear his answers.

10 MS. ARMSTRONG: Okay. I'll ask him to
11 speak up.

12 MR. MABRY: Okay.

13 THE WITNESS: I have a cold.

14 MS. ARMSTRONG: And he has a cold, so
15 we're going to have to move the mike up.

16 MR. MABRY: Okay. If you could put the
17 mike up and he can speak up so we can hear what he said.

18 MS. ARMSTRONG: Yes, sir, we're moving
19 the mike right now.

20 MR. MABRY: Okay. Have him repeat that
21 last answer when he found out about the murder.

22 BY MS. ARMSTRONG:

23 Q. Okay. Mr. Moore, approximately when did you find out?

24 A. I really can't recall.

25 Q. Would you say it was shortly after the event or after he

1 was convicted and on death row?

2 A. After he was convicted.

3 Q. Okay. So you didn't know anything about the murder
4 until after you heard he was on death row.

5 A. Exactly.

6 Q. Do you know how you came to get this knowledge, was it
7 family, was it friends, who was it?

8 A. My brothers and sisters told me, eventually they told
9 me. By me being the youngest and the, you know, the
10 baby boy they kept a lot of, you know, stuff from me.

11 Q. So you think your siblings tried to shelter you because
12 of your being the baby?

13 A. More likely, but, you know, eventually I was going to
14 find out because I am of age now.

15 MR. MABRY: You have to speak up, I can't
16 hear you. He has a soft voice. I'm sorry, you're going
17 to have to speak up a little louder.

18 MS. ARMSTRONG: Okay. I'm sorry, I'll
19 try to get Mr. Moore to get a little closer to the
20 microphone.

21 THE WITNESS: Okay, okay.

22 BY MS. ARMSTRONG:

23 Q. Okay. Mr. Moore, I think what you said is eventually
24 they were going to have to tell you, but at first they
25 tried to shelter you somewhat?

1 A. Exactly.

2 Q. All right. Now, let me ask you this. If somebody
3 had -- did any lawyers ever contact you about your
4 brother?

5 A. None, no.

6 Q. Okay. How about an investigator?

7 A. No.

8 Q. Do you remember any, receiving ever any phone calls?

9 A. No.

10 Q. Okay. If someone had called you, would you have been
11 willing to speak to them the way you were willing to
12 speak with me?

13 A. Of course.

14 Q. Okay. And if somebody had called and asked you to come
15 to South Carolina to testify on behalf of your brother,
16 would you have been willing to do that?

17 A. Yes.

18 Q. Okay. And -- okay. Assuming you'd been asked and you
19 were brought to South Carolina, what would you have
20 wanted a jury that was going to sentence your brother,
21 what is it about Richard you'd want them to know?

22 A. Wow. I could go on, it's a lot. My brother was a real
23 nice, nice man as I can remember growing up, 'cause I
24 was the baby. So I just want the Jury to know that, you
25 know, just to have mercy on my brother's life and that

1 he's a good man and a lot of people love him, still do
2 love him, you know. I haven't seen my brother in I
3 don't know how many years, you know, it's hurting me.

4 Q. What are some of the things you remember about your
5 brother?

6 A. Wow. My brother was a, I guess you could say a ladies'
7 man. I mean, like I say, I was the baby so I didn't
8 really, you know, see a lot of stuff. I was always into
9 sports and playing my video games but, you know, Richard
10 was like a ladies' man from what I was told, you know,
11 and --

12 Q. He had lots of girlfriends?

13 A. Lots, I mean just women friends in general, you know.
14 He had a lot of brothers as far as buddies that he calls
15 brothers, we call them brothers, buddies, you know, that
16 was, you know, still talk about Richard how good of a
17 friend he was back then, you know. Actually I was young
18 so, you know, my memory as far as, you know --

19 MR. MABRY: We move to strike the
20 testimony about what people have told him, that's
21 hearsay, but he can go ahead and testify. Please
22 continue your answer.

23 BY MS. ARMSTRONG:

24 Q. Okay. So you would have wanted to tell the Jury that he
25 was a good brother and you would ask them to spare his

1 life.

2 A. Please, yes. I miss him so much.

3 MS. ARMSTRONG: Okay. Please answer any
4 questions Mr. Mabry may have.

5 CROSS EXAMINATION

6 BY MR. MABRY:

7 Q. Okay. Which name do you go by?

8 A. James.

9 Q. James? Okay. James, when is the last time you saw your
10 brother, how old were you?

11 A. Wow, it's been so long, I think I was probably about 18.

12 Q. Okay. And why did you no longer see him when you were
13 18, did he move away?

14 A. Yes, he moved, I guess we can say down south.

15 Q. Detroit?

16 A. I think he did live in Detroit for a short time, then he
17 moved down south, yeah, I think that's what it was.

18 Q. All right. So you lost touch with him when he moved
19 down south?

20 A. Yes, basically, yeah, yes.

21 Q. After he got charged with this murder, did he call you?

22 A. We start contacting, writing each other, you know, no
23 phone calls though.

24 Q. Okay. When did he start writing you, after he got
25 arrested?

1 A. Maybe I guess after, you know, how he got settled in,
2 you know, finally reality set in and whatnot, I don't
3 know how the situation may be, but it was maybe a couple
4 months later when he found my address 'cause I, you
5 know, I moved around.

6 Q. Okay. And where did he write to you from?

7 A. It was from South --

8 Q. Where was he when he'd write you, Spartanburg County
9 Jail?

10 A. No, it was a penitentiary.

11 Q. Okay. So he didn't start writing you until after he had
12 been sentenced to death?

13 A. Yes, exactly.

14 Q. Okay. Do you know why the family did not or was not
15 really interested in coming down and testifying at
16 Richard's trial?

17 A. No, I don't.

18 Q. Was your father upset with Richard after he got charged
19 with murder?

20 A. I have no idea.

21 Q. What about your brother Maurice?

22 A. No. I don't know that, no, I mean I have no idea. I
23 mean I don't know how my family felt towards that, you
24 know, I can't even answer that how their feelings are
25 towards that.

- 1 Q. Okay. Well, where were you living in 1999 when he was
2 charged with murder?
- 3 A. Where was I living?
- 4 Q. Where were you living?
- 5 A. Mt. Clemens, Michigan, [REDACTED]
- 6 Q. Where is that?
- 7 A. Mt. Clemens, Michigan, [REDACTED]
- 8 Q. Were you living around your family?
- 9 A. Yes, my father.
- 10 Q. But they didn't talk about it around you.
- 11 A. No.
- 12 Q. After he was arrested.
- 13 A. I mean it was brought up, but not really.
- 14 Q. Okay. Well, tell me how it was brought up.
- 15 A. I mean, you know, we were just I guess, you know, we
16 would just be talking about certain family members and,
17 you know, Richard's name would be brought up in the
18 conversation and, you know.
- 19 Q. Okay. And what would people say in the family in your
20 presence?
- 21 A. It would be something in the past or something, it
22 wouldn't be nothing pertaining to his case. It would
23 just be like, you know, that's his son or, you know,
24 pictures on the walls, just general talk.
- 25 Q. Okay. Well, I was asking you about what was the

1 family's reactions after he was arrested for murder, and
2 I thought you said his name would come up and there was
3 some general conversation about him.

4 A. I don't understand your question.

5 Q. Okay. What I'm asking is after he got arrested for this
6 murder, was there discussion in the family about the
7 family being upset about him killing somebody?

8 A. I mean of course we would be upset, but I mean it was
9 never as far as feelings being expressed at that time
10 about, you know, the situation, you know, I guess. I
11 can't even really, I can't even tell you how I actually
12 really feel about the situation, if you really want to
13 know.

14 Q. Okay.

15 A. I'm still mind-boggled.

16 Q. Okay. Are you upset at your brother for killing
17 somebody?

18 A. No.

19 Q. No?

20 A. No, I mean I'm upset of the situation, but I mean, you
21 know, of course I'm up -- I mean that's a hard question
22 to be asking me.

23 Q. Well, you're under oath. My question is, are you upset
24 with your brother for killing somebody?

25 A. Put it like this. I'm upset that my brother's in this

1 situation that a life was taken.

2 Q. Okay. Well, you talked to him; did he ever tell you he
3 killed somebody? Did he ever admit to you that he
4 killed that man in the store?

5 A. No.

6 Q. Okay. Did he ever deny he killed that man?

7 A. Never was brought up.

8 Q. Okay. So you're upset he's in the situation he's in,
9 but you're not upset at him for being the person
10 responsible for killing somebody. Is that your answer?

11 A. Repeat that again?

12 Q. You're upset because of the situation he's in, not
13 because he killed somebody.

14 A. I don't want to see nobody life taken, if that's what
15 you're asking me.

16 Q. All right. So the answer is you're upset with your
17 brother for killing somebody.

18 A. You're not going to ever hear me say that my brother
19 killed somebody, I'm not going to admit to that.

20 Q. So you're not going to admit he killed somebody.

21 A. Exactly, so you're not going to, don't try to get that
22 out of me. You're not going to get that out of me.

23 Q. And that's because you don't believe that he killed
24 anybody; is that right?

25 A. I'm not even going to answer that question.

- 1 Q. Well, I'm asking you, you don't believe he killed
2 anybody; is that right?
- 3 A. I don't know.
- 4 Q. Okay. At the time he was arrested -- after he was
5 arrested for this murder, were people in the family
6 upset that he had killed somebody? I'm not talking
7 about you, but were other people in the family upset,
8 your father, your brother, your aunts and your uncles,
9 anybody?
- 10 A. I don't know.
- 11 Q. Okay.
- 12 A. Like I told you, I can't tell you how their feelings
13 are.
- 14 Q. All right. And you haven't seen your brother since you
15 were about 18 years old?
- 16 A. Exactly.
- 17 Q. When would you have been 18?
- 18 A. Pardon me?
- 19 Q. You were born in what year, '73?
- 20 A. Yes.
- 21 Q. All right. When he was arrested in 1985 and convicted
22 of possession of a weapon you would have been 12. Do
23 you remember that?
- 24 A. No, I do not.
- 25 Q. Okay. He was -- did you live at home?

- 1 A. Yes.
- 2 Q. In 1985?
- 3 A. Yes.
- 4 Q. With your mom and dad?
- 5 A. Yes.
- 6 Q. Did you live at home with your mom and dad in 1985?
- 7 A. Yes.
- 8 Q. Okay, I'm sorry. In 1987 he was convicted of attempted
9 breaking and entering of a building in Michigan. Do you
10 remember that? You would have been 15.
- 11 A. No, I don't remember that.
- 12 Q. Do you remember if you had to go to court with your mom
13 and dad 'cause your brother was in trouble?
- 14 A. I don't remember.
- 15 Q. You don't remember. Okay. In 1991 he was convicted of
16 grabbing a purse belonging to a Michelle Crowder and
17 beating and kicking her. Do you remember that?
- 18 A. In '91? No.
- 19 Q. Okay. You would have been 18. That would have been
20 around the last time you saw him, around that time.
- 21 A. Yes.
- 22 Q. So you don't remember that.
- 23 A. No.
- 24 Q. Did you hear about it?
- 25 A. No.

1 Q. In 1991 he was arrested and later convicted for robbing
2 the Rack Room in Spartanburg. I think he was convicted
3 of common law robbery and he went to prison for that.

4 Were you even aware he went to prison?

5 A. I don't remember --

6 Q. For robbing the Rack Room?

7 A. I don't recall that either.

8 Q. Okay. Did you -- now going back before the murders -- I
9 mean before the murder he was convicted of, did your
10 family ever talk about your brother Richard and the
11 problems that he was having?

12 A. No.

13 Q. Ever talk about him being the black sheep of the family
14 or being in trouble with the law or anything like that?

15 A. No, never.

16 Q. All right. Do you think they just kept it from you?

17 A. I never heard that in my entire life.

18 Q. This is the first time you heard all this?

19 A. Yes. Being the black sheep and all these felonies, yes,
20 or whatever.

21 Q. Did you know in 1993 to 1996 he was convicted of driving
22 under suspension six different times?

23 A. And where is this all taking place at?

24 Q. I couldn't understand your answer. What was that?

25 A. And where was all these taking place at, South Carolina?

- 1 Q. Yes.
- 2 A. No.
- 3 Q. Okay. In 1997 he was convicted of assault and battery
4 of a high and aggravated nature on Sonya Harrison. Were
5 you ever made aware of that?
- 6 A. No.
- 7 Q. Did anybody ever tell you about that?
- 8 A. No.
- 9 Q. Okay. Do you even know who Sonya Harrison is?
- 10 A. Never heard of him.
- 11 Q. Okay. That's the lady he assaulted and battered in a
12 high and aggravated nature, that's what he was convicted
13 of. I just wondered if you knew who she was, if she was
14 a girlfriend or wife or don't know.
- 15 A. Don't know.
- 16 Q. So your family, did you say your family, nobody ever
17 told you about any of this stuff; is that right?
- 18 A. No, I guess not. I don't know.
- 19 Q. Has your brother ever told you about all these
20 convictions he had before the murder?
- 21 A. No, I mean no.
- 22 Q. All right. Did your brother come from a good family?
- 23 A. Yes.
- 24 Q. Did your mom and dad teach him right from wrong?
- 25 A. Yes, yes.

- 1 Q. And make him go to church?
- 2 A. Yes.
- 3 Q. If he did all these things he's been convicted of, he
- 4 had been taught not to do these kind of things; is that
- 5 right?
- 6 A. Yes.
- 7 Q. Did you hear my question?
- 8 A. I answered yes.
- 9 Q. Okay. I didn't hear your answer.
- 10 Did you ever come down here to see him in
- 11 South Carolina?
- 12 A. No.
- 13 Q. Are you telling me the first time you heard about him
- 14 being convicted of murder and armed robbery and
- 15 sentenced to death was after he was on death row?
- 16 A. Exactly, yes.
- 17 Q. Okay. Did you ever talk to a woman named Drucy Glass,
- 18 she was an investigator from South Carolina?
- 19 A. Never heard -- who? No.
- 20 Q. Okay. Did you ever talk to a social worker or anybody
- 21 like that from South Carolina who was acting on your
- 22 brother's behalf?
- 23 A. No.
- 24 Q. And where were you living from 1999 to 2001?
- 25 A. [REDACTED] Mt. Clemens, Michigan.

- 1 Q. Is that where your mom and dad lived?
- 2 A. Still to this day, yes, sir.
- 3 Q. Okay. Now, your mother passed away in 1997 before your
- 4 brother got charged with murder.
- 5 A. Exactly.
- 6 Q. There's some -- after she died, then did your father
- 7 maintain contact with her, with your mother's family or
- 8 did they kind of separate or not have a lot of contact?
- 9 A. We have contact, we all stay in Mt. Clemens.
- 10 Q. Okay. So you're all right there together.
- 11 A. Yes.
- 12 Q. Do you know any reason why your father wouldn't, your
- 13 father or your brothers would not tell your brother's
- 14 lawyers to talk to you and your aunts and your uncles?
- 15 A. I have no idea.
- 16 Q. That live right there.
- 17 A. I don't know.
- 18 Q. I didn't hear your answer.
- 19 A. No, I don't know.
- 20 Q. Okay. Do you remember an investigator coming up there
- 21 from South Carolina back around 1999, 2000, 2001, a
- 22 white lady from South Carolina named Drucy Glass coming
- 23 up there and talking to, she may not have talked to you,
- 24 but talking to members of your family?
- 25 A. No, I don't.

- 1 Q. You don't remember anybody else coming up there, social
2 worker or anybody talking to your family.
- 3 A. No, I don't.
- 4 Q. To get a life history of your brother?
- 5 A. No, I don't.
- 6 Q. Is that a no?
- 7 A. No.
- 8 Q. Okay. Do you remember anybody strange coming up to your
9 parents' home right there where you all live and talking
10 to your family around that period of time?
- 11 A. No.
- 12 Q. But you think that they kept this stuff from you. They
13 would have had to have, wouldn't they?
- 14 A. No.
- 15 Q. No? You were living there, when your brother was
16 charged in with murder in '99 you were living with your
17 mom and dad, right?
- 18 A. Yes.
- 19 Q. So if -- I'm sorry, your mom is deceased, but you were
20 living with -- in your dad's house.
- 21 A. Yes.
- 22 Q. And if he new about the murder and your brother Maurice
23 knew about the murder, then they would have had to have
24 kept it from you intentionally, right?
- 25 A. Not necessarily.

1 Q. Okay. Well, tell me how else you wouldn't have found
2 out about it if everybody else knew about it?

3 A. Well, maybe they just, you know, I'm the baby so they
4 kept a lot of stuff from me, I guess, yeah, they kept a
5 lot of stuff from me, I guess you can say that.

6 MR. MABRY: All right. That's all I
7 have. Thanks.

8 Wait a minute. Let me just, give me just
9 a break, if we could have the witness step out for a
10 second, please.

11 MS. ARMSTRONG: Certainly.

12 MR. MABRY: Okay. I've got to look at
13 something real quick and I may not have anymore
14 questions.

15 MS. ARMSTRONG: Do you need for him to
16 step out of the room?

17 MR. MABRY: Yeah, just for a second. It
18 won't take a second.

19 MS. ARMSTRONG: Okay.

20 (The witness left the room.)

21 (Discussion held off the record.)

22 MR. MABRY: You can bring him back in.

23 MS. ARMSTRONG: All right, Anthony, Mr.
24 Moore is coming.

25 MR. MABRY: Okay.

1 BY MR. MABRY:

2 Q. Mr. Moore, I'm going to ask you a couple more questions.

3 I'm looking at an FBI rap sheet that we
4 ran on you based on your date of birth and Social
5 Security number that have been provided to us and I show
6 that you were convicted in 2000 -- well, you were
7 charged in -- I'm sorry, hang on just a second -- 1991,
8 I believe, and convicted approximately 1994 of
9 possession of a controlled substance and you got two to
10 20 years in the state prison; is that correct?

11 A. Yes.

12 Q. Okay. Then you were charged again in the year 2000 with
13 possession of a controlled substance, cocaine, heroin or
14 narcotic less than 50 grams, and you received a sentence
15 of two years to 240 months in the state prison; is that
16 correct?

17 A. Yes.

18 Q. I'm sorry, that was 1994, I believe; is that correct?

19 A. Yes.

20 Q. Okay. And then in the year 2000 you were charged with
21 possession of a controlled substance and you got a
22 sentence of two years - 240 months in the state prison,
23 a controlled substance; is that correct?

24 A. Yes, yes.

25 Q. Did you say yes?

1 A. Yes.

2 Q. Okay. And what I show is that one of those times, the
3 last time you went to court and received that sentence,
4 appears to be a prison sentence would have been in the
5 year 2000; is that right?

6 A. Repeat the question?

7 Q. The last time you went to court for drugs was in the
8 year 2000 and there was a parole violation as well.

9 A. I can't recall.

10 Q. Okay.

11 A. It's been so long ago.

12 Q. All right. Well, the sentence states that you were
13 sentenced on March 27th of 2000.

14 A. Okay.

15 Q. How much time did you get that time?

16 A. I don't remember.

17 Q. How long did you stay in prison?

18 A. A couple years.

19 Q. Okay. So when your brother was tried in 2001 you were
20 in the state prison; is that right?

21 A. Exactly.

22 Q. I couldn't hear you.

23 A. Yes.

24 Q. Okay. So the answer was yes.

25 MR. MABRY: All right. That's all the

1 questions I have and -- well, he's admitted it so I
2 don't need to attach it to the record. That's all the
3 questions I have, Lisa.

4 MS. ARMSTRONG: Okay. Just one follow-up
5 question.

6 RE-DIRECT EXAMINATION

7 BY MS. ARMSTRONG:

8 Q. James, to your knowledge, did anyone ever come to speak
9 with your family prior to your brother's trial?

10 A. No.

11 MS. ARMSTRONG: Thank you. That's all I
12 have.

13 RE-CROSS EXAMINATION

14 BY MR. MABRY:

15 Q. But you don't know whether they did or didn't, correct?

16 A. I know they didn't.

17 Q. Sir?

18 A. No, they didn't.

19 Q. Okay. But they kept from you that your brother was even
20 charged, right? With murder.

21 A. Yes.

22 Q. I mean you didn't even know your brother was charged
23 with murder, right?

24 A. No.

25 Q. I can't hear you.

1 A. No.

2 Q. Okay. So they could have kept from you the fact that an
3 investigator came up there and talked to them about it,
4 right?

5 A. I don't know.

6 Q. You don't know?

7 A. I don't know.

8 Q. Okay. That's fine.

9 MR. MABRY: That's all the questions I
10 have. Thank you, sir.

11 THE WITNESS: Thank you.

12 MS. ARMSTRONG: Thank you. We're off the
13 record.

14 (Deposition concluded 4:20 p.m.)

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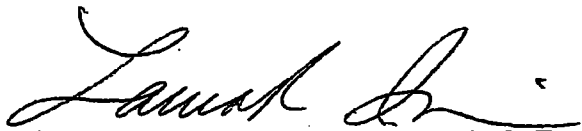
1 STATE OF MICHIGAN)
2) ss.
3 COUNTY OF MACOMB)

4 Certificate of Notary Public

5 I, the undersigned, do hereby certify that
6 the witness, whose attached deposition was taken before
7 me in the above-entitled matter, was by me first duly
8 sworn to testify to the truth; that the testimony
9 contained herein was by me reduced to writing in the
10 presence of the witness by means of stenography;
11 afterwards transcribed; and that the deposition is a
12 true and complete transcript of the testimony given by
13 the witness.

14 I do further certify that I am not connected
15 by blood or marriage with any of the parties; their
16 attorneys or agents; that I am not an employee of either
17 of them; and that I am not interested, directly or
18 indirectly, in the matter of controversy.

19 In witness whereof, I have hereunto set my
20 hand and affixed my notarial seal at Mt. Clemens,
21 Michigan, County of Macomb, State of Michigan.

22 

23 Laura R. Inman, CSR-2272, RPR
24 Certified Shorthand Reporter
25 Notary Public, Macomb County, Michigan
My commission expires: 08/25/2012

1 IN THE COURT OF COMMON PLEAS

2
3 STATE OF SOUTH CAROLINA
4 COUNTY OF SPARTANBURG
5 RICHARD BERNARD MOORE,

6 Applicant,

7 vs.

04-CP-42-2715

8 STATE OF SOUTH CAROLINA,
9 Commissioner, South Carolina
10 Department of Corrections, and
11 Henry Dargan McMaster, Attorney
12 General, State of South Carolina,

13 Respondents.
14 _____/

15 The Deposition of MAURICE MOORE, taken pursuant to
16 Notice of Taking Deposition, before Laura R. Inman, Certified
17 Shorthand Reporter, CSR-2272, RPR, a Notary Public within and
18 for the County of Macomb, acting in the County of Macomb,
19 State of Michigan, at 67 N. Walnut, Mt. Clemens, Michigan, on
20 Thursday, January 20, 2011, commencing at about 3:05 o'clock
21 in the afternoon.
22
23
24
25

1 APPEARANCES:

2

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4 BY: MELISSA J. ARMSTRONG, ESQ.
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7 (803) 765-2796

8 Appearing on behalf of the Applicant.

9

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16 Appearing (via Skype) on behalf of the Respondents.

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I N D E X

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1 Mt. Clemens, Michigan

2 Thursday, January 20, 2011

3 * * *

4 MS. ARMSTRONG: All right. Anthony,
5 would you like to proceed with the questions about the
6 rap sheet on Maurice Moore?

7 MR. MABRY: Yeah, I mean it's not really
8 questions, but the statements in to impeach Mr. Moore
9 with prior convictions. They are over ten years old.
10 He has a conviction in 1988 for conspiracy and I was
11 trying to see if there was something else that went with
12 that.

13 MS. ARMSTRONG: It was a larceny,
14 Anthony, it was January 11th of 1988.

15 MR. MABRY: Okay. I'm trying to see if
16 he was convicted of a larceny. It looks like he was,
17 yeah. Yeah, he had a conspiracy and a larceny in 1988
18 and this case was tried, my understanding is in 2001; is
19 that right?

20 MS. ARMSTRONG: Yes, sir, I believe it
21 is.

22 MR. MABRY: Okay. If I'm wrong, the
23 record will reflect when the trial was, but our argument
24 is that while the larceny is a crime of dishonesty and
25 under Rule 609 it automatically comes in, but the

1 opponent, which would be you, could argue that the
2 conviction is too remote, while we argue the opposite,
3 that its probative value substantially outweighs any
4 danger of unfair prejudice 'cause this is not a
5 defendant being tried for a crime, this is a witness in
6 this case and he has been, in his subsequent conduct he
7 has been rearrested according to his rap sheet for
8 several other criminal violations, they were traffic
9 violations in, I believe, 2003 --

10 MS. ARMSTRONG: Yeah, and I believe we
11 need to --

12 MR. MABRY: -- the file indicates, and
13 there were some other charges that I will show a
14 disposition on are one in 2007, a traffic offense and
15 then some offense in 2004, '04 that I show for
16 disposition.

17 So we're offering his conviction in '88
18 for conspiracy and for larceny, that's our position.

19 MS. ARMSTRONG: Okay. And obviously the
20 Applicant's position is that it's too remote in time, it
21 was disposed of in February of 1988, that's almost 13
22 years before the trial, and so obviously our position is
23 it shouldn't come in. And I believe it would be helpful
24 to the Court for us to just agree and stipulate that the
25 rap sheet that was submitted from your office --

1 MR. MABRY: Right.

2 MS. ARMSTRONG: -- is, in fact, the
3 record for Mr. Maurice Moore.

4 MR. MABRY: That would be fine. Can you
5 just have it marked for I.D.?

6 MS. ARMSTRONG: You may have to re-fax
7 that to me, Anthony. I apologize, but I marked through
8 it in trying to figure it out.

9 MR. MABRY: Marked through any of the
10 stuff or you just underlined it or what?

11 MS. ARMSTRONG: Yeah, I mean I didn't
12 block out anything, but I wrote on the side like, "no
13 disposition."

14 MR. MABRY: I don't have a problem with
15 that.

16 MS. ARMSTRONG: Okay. If the Court
17 wants --

18 MR. MABRY: Why don't you circle the ones
19 that I'm offering, you know, so the Judge can pick out
20 the ones that we're offering.

21 MS. ARMSTRONG: Certainly. I will circle
22 what's called Cycle 8, I've got a check mark beside it.
23 I'll put a star by it to denote that this is the
24 conviction that the State wishes to have considered.

25 MR. MABRY: Okay.

1 MS. ARMSTRONG: All right?

2 MR. MABRY: And we don't have, and that's
3 really the only convictions we can impeach him with.

4 MS. ARMSTRONG: Yes, sir.

5 MR. MABRY: Another reason that we offer
6 it, even though it's 10 years old, and I guess that
7 since we're doing this on the record outside the Judge I
8 won't need to ask him about it, the Judge can just
9 decide if he wants to consider it. Is that okay?

10 MS. ARMSTRONG: Oh, sure.

11 MR. MABRY: I don't even need to ask him
12 and you can just object. It may not be preserved if I
13 don't.

14 MS. ARMSTRONG: That's fine, that's fine,
15 I have no problem with that.

16 All right. I'm going to go ahead and
17 give this exhibit to the Court Reporter and if the
18 Judge, why don't we go ahead and agree on the record
19 that if the Judge wants a clean copy --

20 MR. MABRY: Right.

21 MS. ARMSTRONG: -- that we will
22 substitute a clean copy at the hearing.

23 MR. MABRY: That would be fine.

24 MS. ARMSTRONG: Okay, great. And can we
25 go off the record briefly so I can tell the first

1 witness that it's time for him to come in?

2 MR. MABRY: Yes.

3 MS. ARMSTRONG: Okay. And this will be
4 Mr. Maurice Moore since we just brought up the
5 conviction issue.

6 MR. MABRY: Okay.

7 MS. ARMSTRONG: Thank you, Anthony. I'll
8 be right back.

9 MR. MABRY: Okay.

10 (Off the record.)

11 (Deposition Exhibit No. 1 marked for
12 identification.)

13 MAURICE MOORE,
14 was called as a witness herein, and after
15 having first been duly sworn to tell the
16 truth, the whole truth, and nothing but the truth,
17 was examined and testified as follows:

18 DIRECT EXAMINATION

19 BY MS. ARMSTRONG:

20 Q. Good afternoon, Mr. Moore.

21 A. How are you doing?

22 Q. Great. Can you please give me your full name?

23 A. Maurice Moore.

24 Q. Okay. Mr. Moore, when were you born?

25 A. June 15th, 1957.

- 1 Q. Okay. And where do you live, sir?
- 2 A. [REDACTED] Mt. Clemens, Michigan.
- 3 Q. Like a fruit orchard?
- 4 A. Right.
- 5 Q. Okay. And Mr. Moore, are you married?
- 6 A. No, I'm not.
- 7 Q. Okay. And are you employed?
- 8 A. Yes, I am.
- 9 Q. Okay. What do you do for a living, sir?
- 10 A. Landscaping.
- 11 Q. Okay. And do you know Richard Bernard Moore?
- 12 A. Yes, I do.
- 13 Q. How do you know him?
- 14 A. That's my brother.
- 15 Q. Okay. Would he be an older brother or younger brother?
- 16 A. A younger brother.
- 17 Q. Okay. And were you aware that Richard was charged with
- 18 murder in the State of South Carolina?
- 19 A. Yes.
- 20 Q. Do you have any idea about when you became aware of this
- 21 fact?
- 22 A. Probably a few months after it happened.
- 23 Q. Okay. So you became aware of it prior to Richard being
- 24 tried and sent to death row?
- 25 A. Yes.

1 Q. Okay. Did anyone ever come and speak to you before
2 Richard's trial?

3 A. No.

4 Q. And when I say that I want to be very specific.

5 Did any lawyers ever come speak to you?

6 A. No.

7 Q. How about any investigators?

8 A. No.

9 Q. Was there ever some woman named Drucy Glass who would
10 have been a type of investigator, do you ever remember
11 that name?

12 A. I don't remember.

13 Q. Okay. Do you remember any phone calls asking you to
14 call back?

15 A. Yes, I did, I remember a phone call.

16 Q. Okay. And who was the phone call from, do you remember?

17 A. I believe she said she was Richard's lawyer at one time
18 when the case first happened.

19 Q. Okay. So you think a woman called you at one point?

20 A. Yeah, I think it was a woman, she said she was Richard's
21 lawyer and do I know that he's been in this trouble and
22 this and that.

23 MR. MABRY: Can't hear you.

24 MS. ARMSTRONG: Okay. Well --

25 THE WITNESS: Okay.

1 MR. MABRY: All I heard was him saying it
2 was a woman and then he said something, I couldn't hear
3 that.

4 BY MS. ARMSTRONG:

5 Q. Okay. So please repeat that for Mr. Mabry.

6 A. Oh, are you talking to me?

7 Q. Yes.

8 A. It was a woman called, said that she was Richard's
9 lawyer, and I think that was once, she gave me one phone
10 call, said she was going to call back, and that was way
11 before the trial, I believe.

12 Q. Okay.

13 A. I never heard nothing else.

14 Q. Okay. You don't remember her name?

15 A. No, I don't remember.

16 Q. And you believe it was lawyer?

17 A. I believe.

18 Q. But you're not sure?

19 A. I believe, I'm not sure.

20 Q. All right, that's fine. So you received a, would it
21 have been a voicemail?

22 A. No, she called on the phone.

23 Q. Okay. So she would have left it on an answering machine
24 or did you speak to her personally?

25 A. No, I spoke to her.

1900

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1 Q. All right. And she never called back.

2 A. No.

3 Q. Okay, all right. So did anyone ever call and let you
4 know when the trial was going to happen?

5 A. No.

6 Q. Okay. If someone had called you back and wanted to
7 interview you, would you have been willing to speak to
8 them?

9 A. Yes, I would have.

10 Q. Okay. And if after speaking to them they had asked you
11 to come to South Carolina to testify on behalf of your
12 brother, would you have been willing to make that trip
13 and give testimony?

14 A. Yes, I would have.

15 Q. Okay. Well, in that regard let me follow up here.

16 What would you have wanted the jury that
17 was sentencing your brother, had to make the decision
18 between life and death, what would you want that jury to
19 know about your brother?

20 A. That he was a loving person. I know he got in a little
21 bit of trouble, but as far as I know as my brother, he
22 didn't go around looking for trouble, you know, it
23 seemed like, you know, sometimes, you know, you be in a
24 certain situation where you be around the wrong people
25 and I know he would do that a couple times, but other

1 than that, I can't see him in the crime that he's in now
2 to do something like that.

3 Q. Okay.

4 A. He don't seem, he is not that type of person.

5 Q. You said he didn't go around looking for trouble?

6 A. No.

7 Q. Okay. But you were aware that he did get in some
8 trouble.

9 A. Yes, he did get into minor trouble.

10 Q. Would there be anything you'd want the Jury to know in
11 addition to the fact that as your brother you didn't
12 think he went looking for trouble, is there anything
13 else about Richard that you think the Jury would want to
14 know?

15 A. I know he's a caring, loving person, you know. I taught
16 him how to hunt and fish, he would go hunting and
17 fishing, he was active, you know, loved sports, you
18 know, he kept a job, you know, worked all the time.

19 Q. Okay. He was friendly?

20 A. Very friendly, he had a few friends.

21 Q. And would you consider him a good brother?

22 A. A good brother.

23 Q. Okay.

24 A. I love him.

25 Q. You love your brother?

1 A. I love him. But one thing I would want to say is I
2 would, for the Jury, I would like them to have mercy for
3 my brother for his life.

4 Q. Okay.

5 A. Because it's -- I can't see him, you know, his life, I
6 know, you know, somebody else's life was taken, I'm
7 sorry for that but, you know, taking a life and taking
8 somebody else's life, you know, he's not a monster or
9 nothing like that, you know. He didn't go around
10 carrying a gun and look for trouble. I guess he was
11 just in bad situations.

12 I love my brother. I wish the Jury would
13 spare his life. You know, I know he did a bad thing and
14 he have to deal with it, you know, he have to be
15 punished, I know that, but I don't --

16 MR. MABRY: I lost you. I can see
17 Mr. Moore's mouth moving but I can't hear anything.

18 MS. ARMSTRONG: Oh, I'm sorry. We'll get
19 him to repeat it.

20 MR. MABRY: Okay. Just, I can't hear
21 anything.

22 MS. ARMSTRONG: What was the last thing
23 you heard, Anthony?

24 MR. MABRY: I can't remember exactly what
25 I heard. Wait just a second, maybe I can. He didn't go

1 around carrying a gun or looking for trouble.

2 BY MS. ARMSTRONG:

3 Q. Okay, all right. Well, can you pick up from there, Mr.
4 Moore? I'm sorry, we're having a few technical
5 difficulties here.

6 MR. MABRY: It's not the witness's fault.
7 Go ahead.

8 A. And like I say, he didn't go around looking for trouble.
9 I love my brother. I wish the Court would spare his
10 life, the Jury anyway, and he was a kind person, a good
11 person, a good loving person, a good loving husband. He
12 loved his children. 'Cause to me it's just unfortunate
13 that he had to get in the situation, and I know he has
14 to pay his, you know, for what he did, but I don't, you
15 know, I can't see him his life being taken. I know
16 another life was taken, but that just don't, that don't
17 solve everything. I just, I love him, I don't want him
18 to die, you know. I know he going to have to do his
19 time in there, whatever, but I just don't want him to
20 die.

21 MS. ARMSTRONG: Thank you, Mr. Moore.
22 Please answer any questions that Mr. Mabry may have for
23 you.

24 CROSS EXAMINATION

25 BY MR. MABRY:

1 Q. Mr. Moore, you testified that a woman called you and you
2 thought it was a lawyer and you talked to her on the
3 telephone. Do you remember what you talked about?

4 A. No, she asked me did I know that -- she asked me who I
5 was, I told her who I was, and then she said are you
6 aware of your brother has been charged with such and
7 such and such? And I said yes. And she said well, I'll
8 be calling you back and give you information on this
9 case, and I told her okay, but I never heard nothing
10 else from them.

11 Q. Okay. There was a woman, a white woman by the name of
12 Drucy Glass. Did you ever talk to her?

13 A. I can't remember the name.

14 Q. Say what?

15 A. I don't remember the name.

16 Q. Okay. Well, I'm not talking about that first phone call
17 when she said she would call you back. Did you ever
18 talk to a woman by the name of Drucy Glass who was a
19 mitigation investigator for your brother after he was
20 charged with murder?

21 A. I don't remember.

22 Q. You don't remember.

23 A. No.

24 Q. Okay. Could you have talked to her?

25 A. I talked to one woman that I can remember.

- 1 Q. Okay. So is your answer you couldn't have talked to her
2 or you could or you just don't remember?
- 3 A. I don't remember.
- 4 Q. Okay. How did you first find out your brother was
5 charged? You said she told you, but when the woman did
6 call you you said you already knew about it. How did
7 you find out about it?
- 8 A. That was from his wife.
- 9 Q. Okay. And did you have contact with his wife from the
10 time he was arrested for this murder until the trial?
- 11 A. Yes.
- 12 Q. Okay. And did she tell you when the trial was?
- 13 A. No, she didn't, 'cause we lost contact after that.
- 14 Q. When? When did you lose contact with his wife?
- 15 A. Probably about three or four months after that happened.
- 16 Q. After the murder happened?
- 17 A. Yes.
- 18 Q. Or after the trial?
- 19 A. No, after she called and told me what happened. Well,
20 she didn't actually call me, she called my girlfriend
21 and told her and then she told me.
- 22 Q. Okay. And did you have your brother's telephone number
23 where he and his wife lived?
- 24 A. Yes, I did.
- 25 Q. Okay. And after she called and talked to you in those

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1 three or four months after the murder happened, why did
2 you not call her back and ask her what was going on with
3 the case?

4 A. She didn't call me back.

5 Q. No, I'm asking why did you not call her back?

6 A. I was waiting for her to call 'cause I didn't have the
7 number, you know, she must have changed her number
8 because we didn't have the number anymore.

9 Q. You didn't have the number anymore. Do you know, did
10 she move?

11 A. I don't know.

12 Q. And you're telling me that she never called you back to
13 tell you when the trial was going to be, or did she tell
14 you when the trial was going to be?

15 A. No, she didn't.

16 Q. She didn't.

17 A. No.

18 Q. Did you ever call down to South Carolina?

19 A. No, I didn't.

20 Q. To the Solicitor's Office or to the police to find out
21 when your brother was going to be tried?

22 A. No, I didn't.

23 Q. Did you ever try to call your brother at the jail or
24 write him to see when his trial was going to be?

25 A. Yes.

- 1 Q. Okay. Tell me about that.
- 2 A. He wrote a letter to my girlfriend.
- 3 Q. All right. What was in the letter?
- 4 A. I didn't read the letter.
- 5 Q. Why?
- 6 A. Huh?
- 7 Q. Why did you not read the letter?
- 8 A. I don't know, I just didn't read it.
- 9 Q. Well, it was from your brother and he was in jail
- 10 awaiting trial in a capital case. I'm asking you why
- 11 would you not read the letter?
- 12 A. I let my girlfriend do that. She told me about what
- 13 everything was going on.
- 14 Q. Okay. Did she tell you what was in the letter?
- 15 A. Yeah, she told me the incident what happened.
- 16 Q. No, I'm asking did she tell you what your brother wrote
- 17 in the letter to her?
- 18 A. No.
- 19 Q. Okay. Why didn't you read the letter to see what he
- 20 says?
- 21 A. I didn't want to at the time.
- 22 Q. At the time you didn't want to?
- 23 A. No, I didn't.
- 24 Q. Why?
- 25 A. I was upset.

1 Q. Okay. You were upset with your brother?

2 A. Yes.

3 Q. Okay. And tell me why you were upset with your brother?

4 A. Because he was, he should have wrote me. He wrote her,
5 so I let him talk to her about it. Later on after, then
6 he would talk to me afterwards.

7 Q. Okay. All right. Well, tell me about that. Are you
8 saying that then he would talk to you after that?

9 A. Yes.

10 Q. And how would he talk to you?

11 A. He was letting me know how he felt about everything and
12 he messed up and, you know, the situation that he was
13 in, he didn't mean to do it and it's something that's
14 happening, he didn't want me to be mad at him. And I
15 told him little brother, everything is going to be all
16 right, you know, and that's the conversation we had.

17 Q. And how was he communicating with you?

18 A. What did you say?

19 Q. How was he telling you these things?

20 A. Oh, that was on the phone.

21 Q. Okay. So he's calling you from the jail.

22 A. Yes, one time.

23 Q. One time.

24 A. Yeah.

25 Q. Did he tell you when the trial was going to be?

- 1 A. I don't remember.
- 2 Q. All right. And did you write him any letters?
- 3 A. No.
- 4 Q. Why not?
- 5 A. 'Cause I don't write letters.
- 6 Q. Well, did you try to call him at any time?
- 7 A. Yes, we talked on the phone.
- 8 Q. How many times did you talk on the phone?
- 9 A. About three times.
- 10 Q. Okay. Can you give me some idea of when those times
- 11 were?
- 12 A. No, I can't, I can't give you no exact dates.
- 13 Q. Were they all before he went to trial?
- 14 A. Yes, they were.
- 15 Q. They were?
- 16 A. Yeah, they were before he went to trial.
- 17 Q. Okay. And did he tell you when the trial was going to
- 18 be?
- 19 A. He didn't know. No, he didn't know, he didn't tell me.
- 20 Q. Did he ask you to come down and testify for him?
- 21 A. No, he didn't.
- 22 Q. Did you ever offer to come down and testify for him?
- 23 A. No, I didn't.
- 24 Q. Why not?
- 25 A. I don't know, I don't have no reason for that.

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1 Q. When he first got charged with this murder and you
2 didn't want to talk to him and you said you were upset,
3 were you upset with what he had done?

4 A. Yes, yes.

5 Q. Do you remember ever telling his lawyers or his
6 mitigation investigator that you were upset with what he
7 had done?

8 A. No.

9 Q. And when he called you how long did you all talk?

10 A. About five minutes.

11 Q. Would he ever call your girlfriend too?

12 A. No, he'd write letters.

13 Q. Write letters to her?

14 A. Yes.

15 Q. How many letters do you think he wrote to your
16 girlfriend?

17 A. He's been writing ever since he's been in there.

18 Q. Okay. Did he ever tell her through those letters when
19 the trial was going to be?

20 A. No.

21 Q. Do you know anything that stopped him from telling her
22 when the trial was going to be?

23 A. No, he probably forgot.

24 Q. In any of those letters or the phone calls to you did he
25 ever tell you he was upset about the way the family was

- 1 talking to his lawyers or his investigators?
- 2 A. I don't remember.
- 3 Q. Okay. Did he ever complain about your family and how
- 4 they were treating him after he got charged with this
- 5 murder?
- 6 A. No.
- 7 Q. And he continues, he's still writing your girlfriend?
- 8 A. What did you say?
- 9 Q. Is he still writing your girlfriend?
- 10 A. Yes.
- 11 Q. Has he been, after he got arrested for this murder was
- 12 he talking to other members of your family, was he
- 13 calling them?
- 14 A. Yes.
- 15 Q. So he's calling your mother? Well, your mother had
- 16 passed away, right?
- 17 A. Right.
- 18 Q. Was he calling your father?
- 19 A. No.
- 20 Q. No?
- 21 A. No.
- 22 Q. Did he --
- 23 A. I mean he called him a couple times, but they didn't
- 24 have no conversation.
- 25 Q. Okay. And why is that?

1 A. I don't know.

2 Q. Did you say he called him or he wrote him?

3 A. He called him.

4 Q. Okay. And your father would have talked to him?

5 A. Well, I don't know nothing about that.

6 Q. Okay. Did he contact any of your aunts and uncles by
7 phone or by letter?

8 A. I don't know.

9 Q. Well, he knew where they lived, right?

10 A. Yes.

11 Q. They all lived right there in the same area, right?

12 A. Yes.

13 Q. Do you know anything that would have stopped him from
14 calling them or writing them?

15 A. As far as I know he might have wrote them, he might have
16 called them, I don't know.

17 Q. Is there anything that would have stopped him from
18 writing them or calling them?

19 A. No.

20 Q. Were they mad at him about what had happened? Were they
21 upset?

22 MS. ARMSTRONG: Objection, calls for
23 speculation.

24 MR. MABRY: If he knows.

25 A. I don't know.

1 BY MR. MABRY:

2 Q. Do you know why, if you know, why any of the other
3 family members would have been reluctant or just refused
4 to come down to testify for your brother?

5 A. I wouldn't know.

6 Q. When did your brother first start getting in trouble?

7 A. I really don't know.

8 Q. Well, you said, you testified a minute ago that he was
9 never a person to carry a gun or a weapon and look for
10 trouble. Were you aware he got convicted in 1985 of
11 possession of a weapon in Michigan?

12 A. No, I didn't know that.

13 Q. Well --

14 A. No, I didn't know that.

15 Q. When he graduated from high school did he move to
16 Detroit?

17 A. He might have lived in Detroit, I don't know if he moved
18 to Detroit. He might have been back and forth.

19 Q. Okay. Well, where were you living at that time?

20 A. I was living on Sixteen and Harper in Mt. Clemens.

21 Q. Okay. Did you know he was convicted in 1987 of
22 attempted breaking and entering in Michigan?

23 A. Oh yes, I knew that.

24 Q. Okay. Tell me about that. How did you find out about
25 that and what happened?

- 1 A. He told -- I don't know, I don't have any details. He
2 just told me he had got in trouble and they got him for
3 breaking and entering and that's all I know.
- 4 Q. Did he go to prison for that?
- 5 A. I don't remember.
- 6 Q. Okay. Well, would you say breaking and entering was
7 looking for trouble?
- 8 A. I guess you could say that.
- 9 Q. Okay. Did you know he was convicted in 1991 of grabbing
10 a purse from a Michelle Crowder and he beat her and
11 kicked her?
- 12 A. No, I didn't.
- 13 Q. And did you know he was convicted in 1991 of robbing the
14 Rack Room in Spartanburg?
- 15 A. No, I didn't know that one either.
- 16 Q. Okay. He was convicted of common law robbery, did you
17 know that?
- 18 A. No. In Spartanburg?
- 19 Q. Yes, sir.
- 20 A. No, I didn't know that.
- 21 Q. When did he leave Michigan and come down here?
- 22 A. I believe early nineties.
- 23 Q. Okay.
- 24 A. I don't know exactly.
- 25 Q. Did you lose touch with him we he came down here?

- 1 A. Yes, I did.
- 2 Q. So you really don't know what his life, what kind of
3 life he was living down here once he left Michigan.
- 4 A. No, I don't.
- 5 Q. Did you know he got convicted of driving under
6 suspension six times?
- 7 A. No, I wouldn't know that.
- 8 Q. What about habitual traffic offender, I think twice?
- 9 A. No.
- 10 Q. In South Carolina, did you know that?
- 11 A. No, I didn't.
- 12 Q. He wasn't that way when he lived in Michigan?
- 13 A. All I knew when he lived in Michigan I think, all I knew
14 I think he got in trouble about three times.
- 15 Q. Okay. And what did he get in trouble for?
- 16 A. I don't remember.
- 17 Q. What did he get in trouble for in Michigan?
- 18 A. I don't remember.
- 19 Q. Okay. Do you know what led to him getting in trouble?
- 20 A. No, I don't.
- 21 Q. Did you know he was convicted in 1997 of assault and
22 battery of a high and aggravated nature on Sonya
23 Harrison?
- 24 A. No.
- 25 Q. Do you know who Sonya Harrison is?

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28

1 A. No, I don't.

2 Q. That would have been down in South Carolina.

3 Did you know your brother was using
4 crack?

5 A. Well, I've heard of that, but I don't, I couldn't tell
6 you that he was on drugs or not.

7 Q. Who did you hear that from?

8 A. That was in the streets.

9 Q. In the streets?

10 A. Yes.

11 Q. Was that before he moved down here?

12 A. Yes.

13 Q. Okay. Did you try to do anything about that when you
14 heard about it?

15 A. No, I wasn't around.

16 Q. Okay. Where were you?

17 A. I was working.

18 Q. Were you all raised in a good family?

19 A. Yes, we were.

20 Q. Did your mama and daddy teach you all the difference
21 between right and wrong?

22 A. Yes, they did.

23 Q. Your brother knew the difference between right and
24 wrong.

25 A. Yes, he did.

- 1 Q. Did he?
- 2 A. Yes, he did.
- 3 Q. Did he know it was wrong to steal from people?
- 4 A. Yes, we all know that.
- 5 Q. Did he know it was wrong to break into businesses?
- 6 A. Yes.
- 7 Q. Did he know it was wrong to assault other people?
- 8 A. Yes.
- 9 Q. Did your mama and daddy make him go to church?
- 10 A. Yes, we all went to church.
- 11 Q. Do you remember what age your brother was when he first
- 12 started getting in trouble?
- 13 A. I can't, I don't remember.
- 14 Q. Was he a teenager or was he a grown man?
- 15 A. He probably was grown.
- 16 Q. I couldn't hear you.
- 17 A. He probably was a grown man.
- 18 Q. A grown man? Teenager, young man, something like that?
- 19 A. Yes, young man.
- 20 Q. Okay.
- 21 MR. MABRY: We lost you.
- 22 (Off the record.)
- 23 BY MR. MABRY:
- 24 Q. I'm going to ask you something now about your record,
- 25 okay?

1918

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1 A. Okay.

2 Q. We ran a rap sheet based on your name and Social
3 Security number and I show you being convicted in 1988
4 of larceny and conspiracy and you got a sentence of
5 six-month confinement, a fine, and two years probation;
6 is that correct?

7 A. That's correct.

8 Q. Was there, when your mother died in '97, was there some
9 like disconnect between your family and your aunts and
10 uncles after that?

11 A. Not that I can remember.

12 Q. Okay. Is there any reason why your father or your
13 brothers -- how many brothers and sisters do you have?

14 A. I have five brothers and two sisters.

15 Q. Okay. Is there any reason that they would tell
16 Mr. Moore's lawyers or Mr. Moore's investigators not to
17 talk to your aunts and uncles, some of them at least?

18 A. No, I don't see them doing that.

19 Q. Okay. But your mom's family is nine brothers and
20 sisters, right?

21 A. Right.

22 MR. MABRY: That's all the questions I
23 have. Thank you, sir.

24 THE WITNESS: Thank you.

25 MS. ARMSTRONG: Anthony, it will be just

1 one second. I just actually have just one question.

2 MR. MABRY: Okay.

3 RE-DIRECT EXAMINATION

4 BY MS. ARMSTRONG:

5 Q. Maurice, the Attorney General asked you if you had ever
6 offered to come down to South Carolina for your brother
7 and you said no.

8 Did anyone ever tell you you could have
9 come down to South Carolina?

10 A. No.

11 Q. Had they told you, would you have been willing to come
12 down to South Carolina?

13 A. Yes, I would, but I would have, you know, I have to, I
14 would have to get the money to go down there. I'm not
15 financially fit to go down there.

16 Q. Okay. But if somebody had made it possible, you would
17 have been willing to come down to South Carolina.

18 A. Oh, yeah.

19 Q. Had you known.

20 A. Yes.

21 MS. ARMSTRONG: Okay. Thank you. That's
22 all the questions I have.

23 MR. MABRY: I just have one question on
24 Re-Direct.

25 RE-CROSS EXAMINATION

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1 BY MR. MABRY:

2 Q. Did anyone tell you you couldn't come to South Carolina?

3 A. No.

4 Q. Your brother didn't tell you not to come, did he?

5 A. No, he didn't, he didn't say nothing like that. He was
6 wanting me to come.

7 Q. He did.

8 A. But I wasn't financially fit to go down there.

9 Q. Sir? I didn't hear the last answer. What?

10 A. I said he would love for me to go down there to come to
11 the trial and everything, but I wasn't financially fit
12 to go.

13 Q. Okay. So you all talked about you coming down and
14 testifying but you couldn't afford to come down, is that
15 what you're telling me?

16 A. No, we didn't talk about that.

17 Q. I thought that's what you just said. You said he wanted
18 you to come down and testify and you weren't financially
19 fit.

20 A. No, I said he would have wanted me to come.

21 Q. Who?

22 A. He would have, I'm speaking on my behalf of what I think
23 he would have wanted me to do.

24 Q. All right. But there was nothing that, are you telling
25 me there was nothing that prevented you from coming?

1 A. What did you say? I didn't hear you.

2 Q. Was there anything that stopped you or prevented you
3 from coming to your brother's trial?

4 A. Money.

5 Q. Money. Okay.

6 MS. ARMSTRONG: Is that all your
7 questions? I have one.

8 MR. MABRY: I got a few more.

9 MS. ARMSTRONG: Okay.

10 BY MR. MABRY:

11 Q. Did you have a driver's license then?

12 A. No, I don't.

13 Q. Did you have one at the time of trial?

14 A. No, I don't.

15 Q. You didn't have one in 2001?

16 A. No.

17 Q. Okay. Did your girlfriend have one?

18 A. Yes.

19 Q. All right. She could have drove you down here, correct?

20 A. She could have.

21 Q. Okay. You could have stayed with your brother's wife,
22 correct?

23 A. Yes, I could have.

24 MR. MABRY: Okay. Thank you. Nothing
25 further.

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1 MS. ARMSTRONG: Okay. I just have one or
2 two quick questions.

3 RE-DIRECT EXAMINATION

4 BY MS. ARMSTRONG:

5 Q. Maurice, if the funds had been made available for you to
6 come to South Carolina, would you have been willing to
7 come down and testify for your brother at trial?

8 A. Yes, I would have.

9 Q. Okay. And your girlfriend, if I understand your
10 testimony, she would have been able to drive you to
11 South Carolina.

12 A. Yes, she would have.

13 Q. Okay. You believe she would have done that for you.

14 A. Yes.

15 MS. ARMSTRONG: Okay. That's all the
16 questions I have.

17 MR. MABRY: Nothing further.

18 MS. ARMSTRONG: Thank you.

19 May this witness be excused?

20 MR. MABRY: Yeah.

21 MS. ARMSTRONG: Okay, great.

22 (Deposition concluded 3:45 p.m.)

23

24

25

1 STATE OF MICHIGAN)
) ss.
2 COUNTY OF MACOMB)

3 Certificate of Notary Public

4 I, the undersigned, do hereby certify that
5 the witness, whose attached deposition was taken before
6 me in the above-entitled matter, was by me first duly
7 sworn to testify to the truth; that the testimony
8 contained herein was by me reduced to writing in the
9 presence of the witness by means of stenography;
10 afterwards transcribed; and that the deposition is a
11 true and complete transcript of the testimony given by
12 the witness.

13 I do further certify that I am not connected
14 by blood or marriage with any of the parties; their
15 attorneys or agents; that I am not an employee of either
16 of them; and that I am not interested, directly or
17 indirectly, in the matter of controversy.

18 In witness whereof, I have hereunto set my
19 hand and affixed my notarial seal at Mt. Clemens,
20 Michigan, County of Macomb, State of Michigan.

21

22

23

24

25


Laura R. Inman, CSR-2272, RPR
Certified Shorthand Reporter
Notary Public, Macomb County, Michigan
My commission expires: 08/25/2012

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 NLETS
LEMS.Web
CR 0008C079A7 from NLETS

SGJSC409
.CR.0008C079A7.NLETS.20110120 10:56:32
TO: SGJSC409-9378 20110120 10:56:32 0008C079A7
FROM: NLETS-12614055 20110120 10:56:31
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08:52 04448
01/20/2011 75176 SC040035A
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TXT
HDR/2L012972001D7F2QR
ATN/DONNA ALEGESSI
***** CRIMINAL HISTORY RECORD *****

Data As Of 2011-01-20

***** Introduction *****

This rap sheet was produced in response to the following request:

State Id Number 0794343A (MI)
Purpose Code C
Attention DONNA ALEGESSI

The information in this rap sheet is subject to the following caveats:

***** IDENTIFICATION *****

Subject Name(s)

MOORE, MAURICE
MORRIS, MAURICE (AKA)
MOORE, MAURICE NMN (AKA)

Subject Description

FBI Number 133583R7 State Id Number 0794343A (MI)

Social Security Number

Sex
Male

Race
Black

Height
5'08"

Weight
180

Date of Birth

Hair Color
Black

Eye Color
Brown

Place of Birth

EXHIBIT

M. Moore #1
1-20-11

***** CRIMINAL HISTORY *****

===== Cycle 1 =====
Tracking Number 907502985601
Earliest Event Date 1975-01-30 Incident Date 1975-01-30

Arrest Date 1975-01-30
Arrest Case Number 17619
Arresting Agency MI5059700 MT CLEMENS POLICE DEPT
Charge Literal FAMILY OFFENSES
Statute (;)
State Offense Code 3800
Counts 1
Severity Unknown
Disposition (; Warrant issued by Prosecutor)

Court Disposition (Cycle 1)
Court Agency MI500045J 41B DISTRICT COURT CLINTON TWP
Charge 1
Charge Literal CHILDREN - CONTRIBUTING TO DELINQUENCY
Statute (750.145;)
Severity Misdemeanor
Disposition (; Found Guilty by Jury or Judge)

Sentencing (Cycle 1)
Sentencing Agency MI500045J 41B DISTRICT COURT CLINTON TWP
Charge 1
Charge Literal CHILDREN - CONTRIBUTING TO DELINQUENCY
Statute (750.145;)
Severity Misdemeanor
Sentence CONF-15D

===== Cycle 2 =====
Tracking Number 907603091601
Earliest Event Date 1976-10-24 Incident Date 1976-10-24

Arrest Date 1976-10-24
Arrest Case Number 19133
Arresting Agency MI5071300 ROSEVILLE POLICE DEPT
Charge Literal DANGEROUS DRUGS
Statute (;)
State Offense Code 3500
Counts 1
Severity Unknown
Disposition (; Warrant issued by Prosecutor)

Court Disposition (Cycle 2)
Court Agency MI390035J 8TH DISTRICT COURT PORTAGE
Charge 1
Severity Unknown
Disposition (; Dismissed)

===== Cycle 3 =====
Tracking Number 907802120801
Earliest Event Date 1978-03-24 Incident Date 1978-03-24

1926

Arrest Date 1978-03-24
Arrest Case Number 24-1757-78
Arresting Agency MI5002400 MSP-POST 24
Charge Literal DANGEROUS DRUGS
Statute (;)
State Offense Code 3500
Counts 1
Severity Unknown
Disposition (; Warrant issued by Prosecutor)

Court Disposition (Cycle 3)
Court Agency MI740025J 72ND DISTRICT COURT PORT HURON
Charge 1
Charge Literal "MARIJUANA, POSSESS"
Statute ~~MI 3362~~
Severity Unknown
Disposition (; Found Guilty by Jury or Judge)

Sentencing (Cycle 3)
Sentence Date 1979-06-13
Sentencing Agency MI740025J 72ND DISTRICT COURT PORT HURON
Charge 1
Charge Literal "MARIJUANA, POSSESS"
Statute (AC-3562)
Severity Unknown
Sentence F/C/R-\$55

----- Cycle 4 -----
Tracking Number 908002646701
Earliest Event Date 1980-03-12 Incident Date 1980-03-12

Arrest Date 1980-03-12
Arrest Case Number 17619
Arresting Agency MI5059700 MT CLEMENS POLICE DEPT
Charge Literal ASSAULT EXCLUDING SEXUAL
Statute (;)
State Offense Code 1300
Counts 1
Severity Unknown
Disposition (; Warrant issued by Prosecutor)

Court Disposition (Cycle 4)
Charge 1
Severity Unknown
Disposition (; Dismissed)

----- Cycle 5 -----
Tracking Number 908302875401
Earliest Event Date 1983-12-02 Incident Date 1983-12-02

Arrest Date 1983-12-02
Arrest Case Number 49980
Arresting Agency MI5015000 MACOMB COUNTY SHERIFF DEPARTMENT
Charge Literal STOLEN PROPERTY
Statute (;)
State Offense Code 2800
Counts 1
Severity Unknown

Disposition (; Warrant issued by Prosecutor)

1927

Court Disposition (Cycle 5)
Charge 1
Severity Unknown
Disposition (; Dismissed)
----- Cycle 6 -----
Tracking Number 908702244201
Earliest Event Date 1987-01-23 Incident Date 1987-01-23

Arrest Date 1987-01-23
Arrest Case Number 17619
Arresting Agency MI5059700 MT CLEMENS POLICE DEPT
Charge Literal ASSAULT EXCLUDING SEXUAL
Statute (;)
State Offense Code 1300
Counts 2
Severity Unknown
Disposition (; Warrant issued by Prosecutor)

Court Disposition (Cycle 6)
Charge 1
Charge Literal ASSAULT (FELONIOUS/AGGRAVATED) OTHER
Statute (AC-1399;)
Severity Unknown
Disposition (; Dismissed)
Charge 2
Charge Literal ASSAULT OR ASSAULT AND BATTERY
Statute (750.81;)
Severity Misdemeanor
Disposition (; Found Guilty by Jury or Judge)

Sentencing (Cycle 6)
Sentence Date 1987-02-03
Charge 1
Charge Literal ASSAULT (FELONIOUS/AGGRAVATED) OTHER
Statute (AC-1399;)
Severity Unknown
Sentence Charge 2
Charge Literal ASSAULT OR ASSAULT AND BATTERY
Statute (750.81;)
Severity Misdemeanor
Sentence F/C/R-\$250 CONF-10D PROB-2Y
----- Cycle 7 -----

Tracking Number 908702244301
Earliest Event Date 1987-01-25 Incident Date 1987-01-25

Arrest Date 1987-01-25
Arrest Case Number 17619
Arresting Agency MI5059700 MT CLEMENS POLICE DEPT
Charge Literal BURGLARY
Statute (;)
State Offense Code 2200
Counts 1
Severity Unknown
Disposition (; Warrant issued by Prosecutor)

1928

Sentence
 ----- Cycle 10 -----
 Earliest Event Date 2004-10-23 Incident Date 2004-10-23
 Arrest Date 2004-10-23
 Arrest Case Number 10175
 Arresting Agency MI5015000 MACOMB COUNTY SHERIFF DEPARTMENT
 Charge Literal ASSAULT EXCLUDING SEXUAL
 Statute (;)
 State Offense Code 1300
 Counts 1
 Severity Misdemeanor
 Disposition (; Warrant Requested from Prosecutor)
 ----- Cycle 11 -----

no dispr

Earliest Event Date 2009-02-07 Incident Date 2009-02-07
 Arrest Date 2009-02-07
 Arrest Case Number 09-10321
 Arresting Agency MI5015000 MACOMB COUNTY SHERIFF DEPARTMENT
 Charge Literal TRAFFIC OFFENSE
 Statute (;)
 State Offense Code 5400
 Counts 1
 Severity Misdemeanor
 Disposition (; Warrant Requested from Prosecutor)
 ***** INDEX OF AGENCIES *****

no dis

Agency MACOMB COUNTY PROSECUTING ATT; MI500013A;

Agency MSP-POST 24; MI5002400;

Agency MACOMB COUNTY SHERIFF DEPARTMENT; MI5015000;

Agency MT CLEMENS POLICE DEPT; MI5059700;

Agency ROSEVILLE POLICE DEPT; MI5071300;

Agency ST CLAIR CO PROSECUTING ATT; MI740013A;

Agency 8TH DISTRICT COURT PORTAGE; MI390035J;

Agency 41B DISTRICT COURT CLINTON TWP; MI500045J;

Agency 41B DISTRICT COURT MT CLEMENS; MI500115J;

Agency 72ND DISTRICT COURT PORT HURON; MI740025J;

* * * END OF RECORD * * *

SGJSC409

.QR:0035DDDF8F.III.20110120 10:56:28

TO: SGJSC409-9377 20110120 10:56:28 0035DDDF8F

FROM: III-14540687 20110120 10:56:28

EL012972001D7F2QR

SC040035A

THIS INTERSTATE IDENTIFICATION INDEX RESPONSE IS THE RESULT OF YOUR
RECORD REQUEST FOR FBI/133583R7. THE FOLLOWING WILL RESPOND TO YOUR
AGENCY:

MICHIGAN - STATE ID/MI0794343A
END

1930

 LEADS
LEADS.Web
ICHR 003F9D4B51 from SCCH

SGJSC409

.ICHR.003F9D4B51.SCCH.20110120 10:56:23

TO: SGJSC409-9376 20110120 10:56:23 003F9D4B51
FROM: SCCH-10308433 20110120 10:56:23

ICHR REQUEST FOR RAP SHEET

ORI-SC040035A FBI- 133583R7 PUR-C

ATN-DONNA ALEGESSI

NO RECORD FOUND TO DISSEMINATE USING FBI/ 133583R7
REQUESTED FOR CRIMINAL JUSTICE PURPOSES

INQUIRY FORWARDED TO INTERSTATE IDENTIFICATION INDEX

** S C CJIS END OF RECORD **□

QH 0035DDDF25 from III

1931

SGJSC409

.QH.0035DDDF25.III.20110120 10:47:58

TO: SGJSC409-9370 20110120 10:47:58 0035DDDF25

FROM: III-14540581 20110120 10:47:58

7L012972001D792QH

SC040035A

THIS NCIC INTERSTATE IDENTIFICATION INDEX RESPONSE IS THE RESULT OF YOUR
INQUIRY ON NAM/MOORE, MAURICE SEX/M RAC/U DOB/19570115 SOC/365664282

PUR/C

NAME	FBI NO.	INQUIRY DATE
MOORE, MAURICE	133583R7	2011/01/20

SEX	RACE	BIRTH DATE	HEIGHT	WEIGHT	EYES	HAIR	PHOTO
M	B	1 [REDACTED] 5	508	147	BRO	BLK	N

BIRTH PLACE
MICHIGAN

FINGERPRINT CLASS	PATTERN CLASS
DO PI PM PO 16	WU WU WU WU RS LS LS LS LS LS
17 17 17 19 17	RS WU WU WU WU

ALIAS NAMES

MOORE, MAURICE NMN MORRIS, MAURICE

OTHER

BIRTH DATES SOCIAL SECURITY
1957/06/16 3 [REDACTED]

IDENTIFICATION DATA UPDATED 2010/11/18

THE CRIMINAL HISTORY RECORD IS MAINTAINED AND AVAILABLE FROM THE
FOLLOWING:

MICHIGAN - STATE ID/MI0794343A

THE RECORD(S) CAN BE OBTAINED THROUGH THE INTERSTATE IDENTIFICATION
INDEX BY USING THE APPROPRIATE NCIC TRANSACTION.

END

1932

LEADS
LEADS.Web
ICHS 003F9D4AD8 from SCCH

SGJSC409

.ICHS.003F9D4AD8.SCCH.20110120 10:47:56

TO: SGJSC409-9369 20110120 10:47:56 003F9D4AD8

FROM: SCCH-10308312 20110120 10:47:56

ICHS/QH INQUIRY OF SCLED CCH FILES USING:

ATN-DONNA ALEGESSI

ORI-SC040035A PUR-C

NAM-MOORE, MAURICE

SOC- [REDACTED] SEX-M RAC-U DOB-19570115

DATE-01/20/2011 TIME-10:49 PAGE-01 OF 01

ORI-SC040035A

SCLED IDENT RESPONSE TO ICHS/QH INQUIRY

THIS RESPONSE CONTAINS POSSIBLE HITS ONLY AND DOES NOT IMPLY A POSITIVE MATCH WITH THE INDIVIDUAL IN QUESTION

NAME-MOORE, MICHAEL DEAN

SEX-M RACE-W

HEIGHT-511 WEIGHT-176 EYES-GRN HAIR-BRO SKIN-FAR BORN-NC

FPC: HENRY-12 M 1 U IIO 15 NCIC-1207041715130511PI15

M 2 U IOI

SID-SC00567548

1-FINGERPRINT IMAGES ON THIS SUBJECT ARE STORED ON SCAFIS

DATE RECORD ENTERED--01/08/1987 DATE OF LAST UPDATE--01/12/1987

BIRTH DATES-[REDACTED] 7

MARKS, ETC-SC R EYE

SOC SEC NUMBERS-[REDACTED]

** END OF IDENT **

NAME-MOORE, MITCHELL LEE

SEX-M RACE-B

HEIGHT-604 WEIGHT-165 EYES-BRO HAIR-BLK SKIN- BORN-SC

FPC: HENRY- 9 O 5 U IIO 10 NCIC-DO09091210DI13130909

I 17 U OOI

SID-SC00539584 FBI-425982JA6

PHOTOGRAPH AVAILABLE

1-FINGERPRINT IMAGES ON THIS SUBJECT ARE STORED ON SCAFIS

DATE RECORD ENTERED--06/09/1986 DATE OF LAST UPDATE--01/30/2008

ALIAS NAMES-MOORE, MITHCELL ERIC

MOORE, MITCHELL ERIC

MOORE, MITCHEL ERIC

MOORE, MITCHELL E

BIRTH DATES-[REDACTED] 01 [REDACTED]

SOC SEC [REDACTED]

SCLED CJIS RECORD INDICATES SUBJECT HAS OUT-OF-STATE ARREST INFORMATION

INDIVIDUAL PROHIBITED FROM POSSESSING OR ACQUIRING HANDGUN IN
SOUTH CAROLINA

INFORMATION SUBMITTED TO SLED CCH PURSUANT TO 16-23-10 (C) AND 23-31-110

<http://10.1.2.28/lems/default.asp?Category=MessageManager&Service=PrMsgMulti&MR...> 1/20/2011

(C) OF THE SOUTH CAROLINA CODE OF LAWS INDICATES THIS INDIVIDUAL HAS BEEN CONVICTED OF A CRIME OF VIOLENCE AND IS NOT PERMITTED TO POSSESS OR ACQUIRE A HANDGUN.

1933

INDIVIDUAL PROHIBITED FROM POSSESSING OR ACQUIRING FIREARM OR AMMUNITION PURSUANT TO FEDERAL GUN CONTROL ACT OF 1968

INFORMATION SUBMITTED TO SLED CCH INDICATES THIS INDIVIDUAL HAS BEEN CONVICTED OF A FELONY ACCORDING TO THE SOUTH CAROLINA CODE OF LAWS. THEREFORE, THIS PERSON IS INELIGIBLE TO SHIP, TRANSPORT, OR RECEIVE ANY FIREARM OR AMMUNITION AFFECTED BY INTERSTATE OR FOREIGN COMMERCE, AS DEFINED BY THE GUN CONTROL ACT OF 1968 (18.U.S.C. 922(G)).

** END OF IDENT **

REQUESTED FOR CRIMINAL JUSTICE PURPOSES MAY OCCUR DAILY, A NEW INQUIRY SHOULD BE MADE AND NO SUBSEQUENT USE OF THIS RECORD IS ALLOWED.

FOR COMPLETE CRIMINAL HISTORY, PERFORM ICHR INQUIRY USING SID NUMBER OR FBI NUMBER.

REQUEST FORWARDED TO NCIC

ANY OUT-OF-STATE IDENT INFORMATION TO FOLLOW FROM NCIC VIA YOUR TERMINAL

** END OF MESSAGE **

1934

Court Disposition (Cycle 7)
 Court Agency MI500045J 41B DISTRICT COURT CLINTON TWP
 Charge 1
 Charge Literal DAMAGE TO PROPERTY
 Statute (AC-2999;)
 Severity Unknown
 Disposition (; Found Guilty by Jury or Judge)

Sentencing (Cycle 7)
 Sentence Date 1987-01-26
 Sentencing Agency MI500045J 41B DISTRICT COURT CLINTON TWP
 Charge 1

Charge Literal DAMAGE TO PROPERTY
 Statute (AC-2999;)
 Severity Unknown

Sentence P/C/R-\$200 PROB-2Y

Tracking Number 508700606301
 Earliest Event Date 1988-01-11 Incident Date 1988-01-11

Arrest Date 1988-01-11
 Arrest Case Number 17619
 Arresting Agency MI5059700 MT CLEMENS POLICE DEPT
 Charge Literal LARCENY
 Statute (;)
 State Offense Code 2300
 Counts 1
 Severity Unknown
 Disposition (; Warrant issued by Prosecutor)

Prosecutor Disposition (Cycle 8)
 Prosecution Date
 Prosecutor Agency MI500013A MACOMB COUNTY PROSECUTING ATT
 Charge Literal LARCENY FROM THE PERSON
 Statute (750.357;)
 Counts 1
 Severity Unknown

Court Disposition (Cycle 8)
 Court Case Number 872064MC
 Court Agency MI500115J 41B DISTRICT COURT MT CLEMENS
 Charge 2
 Charge Literal LARCENY \$100 OR LESS
 Statute (750.356 B;)
 Severity Misdemeanor
 Inchoate Charge Conspiracy
 Disposition (; Found Guilty by Jury or Judge)

Sentencing (Cycle 8)
 Sentence Date 1988-02-04
 Sentencing Agency MI500115J 41B DISTRICT COURT MT CLEMENS
 Court Case Number 872064MC
 Charge 2
 Charge Literal LARCENY \$100 OR LESS

Statute (750.356-B;)
 Severity Misdemeanor
 Inchoate Charge Conspiracy
 Sentence 6 MO CONF, F/R \$440, AND 2 YRS PROB
 Cycle 9
 Tracking Number 740300415501
 Earliest Event Date 2003-10-29 Incident Date 2003-10-29
 Arrest Date 2003-10-29
 Arrest Case Number 24503803
 Arresting Agency MI5002400 MSP-POST 24
 Charge Literal TRAFFIC OFFENSE
 Statute (;)
 State Offense Code 5400
 Counts 1
 Severity Misdemeanor
 Disposition (; Warrant issued by Prosecutor)

Prosecutor Disposition (Cycle 9)
 Prosecution Date 2003-10-29
 Prosecutor Agency MI740013A ST CLAIR CO PROSECUTING ATT
 Charge Literal OPERATING WHILE INTOXICATED
 Statute (257.6251-A;)
 Counts 1
 Severity Unknown

Court Disposition (Cycle 9)
 Court Case Number 03P08555SD
 Court Agency MI740025J 72ND DISTRICT COURT PORT HURON
 Charge 1
 Charge Literal OPERATING ALLOWING INTOXICATED PERSON TO OPERATE MOTOR
 VEH
 Statute (257.6253;)
 Severity Misdemeanor
 Disposition (; Convicted)
 Charge 2
 Charge Literal OPERATING-LIC SUSPENDED-REVOKED-DENIED/ALLOWING A SUSPE
 NDED PERSON OPER
 Statute (257.9041;)
 Severity Misdemeanor
 Disposition (; Convicted)

Sentencing (Cycle 9)
 Sentence Date 2004-01-30
 Sentencing Agency MI740025J 72ND DISTRICT COURT PORT HURON
 Court Case Number 03P08555SD
 Charge 1
 Charge Literal OPERATING ALLOWING INTOXICATED PERSON TO OPERATE MOTOR
 VEH
 Statute (257.6253;)
 Severity Misdemeanor
 Sentence PROB-6 F/C/R-\$1269
 Charge 2
 Charge Literal OPERATING-LIC SUSPENDED-REVOKED-DENIED/ALLOWING A SUSPE
 NDED PERSON OPER
 Statute (257.9041;)
 Severity Misdemeanor

STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

Richard B. Moore,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS

C/A No.: 04-CP-42-2715

Motion for Recusal of Counsel

Background:

On September 16, 1999, at around 3:00 a.m., Richard Moore entered Nikki's Convenience Store on Hwy. 221 in Spartanburg S.C. Present were James Mahoney, the cashier, and Terry Hadden, a customer, who was playing video poker. At the time Moore entered the store, Hadden was facing a poker machine with his back to Mahoney and Moore. Based on the available evidence, Moore attempted to purchase two beers and a pack of cigarettes that Mahoney bagged and rang up the total on the cash register.

The State claims Moore attempted to rob Mahoney, prompting Mahoney to retrieve a gun from underneath the shop counter, which Moore somehow wrestled away and fired at Terry Hadden. Hadden, who was blind in his right eye, would later tell law enforcement that when he looked around, Moore told him to not move and fired a shot at him. Hadden testified he dropped to the floor and "played dead." Mahoney produced another gun and a shoot-out ensued between Mahoney and Moore. Moore was seriously wounded when Mahoney shot him in the arm.

There is undisputed evidence that both guns involved in the shootings belonged to the clerk, Mahoney, and that, at some point, Moore wrestled Mahoney's first gun from him. At the eleventh hour, the State theorized that Moore went to Nikki's for purposes of robbing the store

for drug money. How an unarmed and unmasked man was going to rob a well-armed clerk in a store with obvious video camera surveillance and "get away with it" was a difficult question posed for the jury's deliberation, and belies the state's cobbled together theory as to Moore's motive for taking money and intent when entering the store. Moore disputed any such theory, though admitted to the post-shooting theft of cash in the store register, and claimed the shooting was, at most manslaughter, if not a pure act of self-defense. Moore's position at trial was that, based on the fact that Mahoney instigated the gun battle resulting in his own death, Moore acted upon sufficient legal provocation in a sudden heat of passion.

Immediately after the shooting, and while bleeding and in apparent distress, Moore drove to the residence of George Gibson. Moore asked Gibson for a ride to the hospital, and Gibson refused to take him there. Moore then left Gibson's residence and crashed his vehicle into a telephone pole, presumably on his way to the hospital. Moore was arrested almost immediately and transported to Spartanburg Regional Medical Center for emergency treatment of his gunshot wound.

Factual Basis for Relief Requested:

Immediately after the incident, George Gibson was interviewed by law enforcement and never mentioned anything about Moore wanting drugs. Defense counsel was aware of Gibson's first version of events. What defense counsel was not made aware of was the fact that then assistant solicitor, Anthony Mabry, made a follow-up visit to George Gibson's home and, as before, Gibson again never mentioned any drug requests by Moore on the night of the shooting. Moreover, counsel was never advised by the state that Mabry told Gibson he did not believe his story. Subsequent to his prior statements to law enforcement and Mr. Mabry, Mr. Gibson got into serious trouble with the law, and the trouble involved his drug dealing. Specifically, in

March, 2000, George Gibson was charged with trafficking crack cocaine, and later in July, 2001, Gibson was charged with drug possession.

Not surprisingly, in light of his pending legal troubles—which left him poised for a lengthy prison sentence—George Gibson changed his story about Richard Moore's statements to him on the night of shooting. On September 25, 2001, Gibson made an oral statement to the prosecution that Moore came to his home to purchase crack after the shooting. This new version of events was clearly given to curry favor with the state and in particular the Seventh Circuit Solicitor's Office, where Gibson had been re-questioned by a higher-up in the solicitor's office as to his story on the Moore case. Now, Gibson was facing prosecution by the very same office, and for drug offenses that could net him a hefty term of active prison time.

Moore's death penalty trial began on Oct 18, 2001. On the first day of trial, defense attorney, Michael Morin, stated to the court that he had just learned of Gibson's new and more state-friendly version of events involving Moore seeking cocaine immediately before and after the shooting:

**"Up until last week when I received the State's supplemental notice of additional evidence in support of aggravating circumstances, this wasn't an issue."
(Tr. Transcript pg. 1149).**

The very next day, Gibson testified that Moore came to his house before and after the robbery to buy cocaine, (providing the State with a much needed explanation of how Mahoney was killed with his own gun: that it occurred due to Moore's desperation for money to underwrite his cocaine habit "armed," initially at least, with a mere pocket knife, that was never linked with the crime scene, but found in Moore's truck after the shooting.)

At the time of his testimony and unbeknownst to Moore's lawyer, George Gibson was in the Dept of Corrections for traffic charges and had been transported to trial at the direction of the

solicitor. Moore was convicted of the armed robbery and murder of Mahoney and sentenced to death on Oct 22, 2001. On appeal his appointed counsel failed to raise Gibson's eleventh hour cocaine statement and testimony as an issue and Moore's death sentence was affirmed.

Evidence Discovered during Post-Conviction Relief Proceedings:

In preparation for this action, Gibson's deposition was taken on December 16, 2010. Present were Gibson, Moore's deposing attorney, James Morton, Senior Asst. Atty. General Wm. Edgar Salter and Asst. Atty. General Anthony Mabry. At the conclusion of Gibson's deposition, Asst. Atty. General Mabry informed Mr. Morton that, at the time of this incident in 1999, he was the Deputy Solicitor for the Seventh Circuit and had participated in the original investigation of this case, including interviewing Gibson in the days following Moore's arrest.

In pertinent part to the motion now made to this Court, the substance of Mr. Mabry's involvement with the Moore case is as follows: (1) Mr. Mabry went to George Gibson's house a few days after the shooting incident to talk with Gibson because "we (the solicitor's office)" knew he was lying and they believed Moore went to Gibson's house to purchase "crack;" (2) that Mabry was met at the door and was told that Gibson was inside, but did not wish to speak; (3) that Mabry was able to persuade Gibson to come to the door and talk with him; (4) that Mabry then questioned Gibson about his statement and Gibson stuck by his story and reiterated: Moore came by to get a ride to the hospital.

Subsequent to this interview, Mabry's "boss," then Solicitor Holman Gossett lost his bid for re-election in 2000 to Trey Gowdy. Subsequent to the change in leadership, Mr. Mabry resigned as Deputy Solicitor.

For reasons unknown, Mr. Mabry's interview with George Gibson were never reduced to writing, either as a subsequent statement by Gibson, or as an investigative memo by the

Solicitor's office. In fact, it is only because Mr. Mabry willingly disclosed his prior involvement to counsel Morton on January 18, 2011, that this issue arose. And, as a consequence of Gibson's retooled and highly-prejudicial third statement concerning Moore's alleged drug seeking immediately before and after the crime, Mr. Mabry's interview of Gibson was impeaching as to Gibson and should have been disclosed (in some way) to defense counsel. The state's failure to do so was a violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

Undersigned Counsel maintains Mr. Mabry is a necessary witness in Mr. Moore's post-conviction relief action. Mr. Mabry's information concerning his interview of George Gibson forms the basis of a *Brady* violation. That there is absolutely no evidence Mr. Mabry intentionally failed to reveal impeachment evidence to Mr. Moore's attorneys is irrelevant to the question of a *Brady* violation, which can occur without any ill intent of the prosecution. In this case, Counsel believes it is most likely that Mr. Mabry's information fell through the cracks after then Solicitor Gossett was deposed and Mr. Mabry resigned. In this regard, it is significant to note that Mr. Mabry had left the Seventh Circuit Solicitor's Office prior to the trial of Moore's case.

Gibson's statement to Mr. Mabry was highly relevant to Moore's defense at trial. As of the date of Moore's trial, Gibson had made a total of three statements. Gibson's first statement was made on the night of the robbery, and the second to Mr. Mabry was made shortly thereafter. Gibson's third statement was extremely prejudicial to Mr. Moore's defense, was disclosed on the eve of trial, and was impeachable by his two prior statements.

There is a critical and material difference between Gibson's first statement and his second one to Mr. Mabry. While maintaining his original story was the truth, the important significance of Mr. Mabry's interview with George Gibson stems from the fact that Mabry

thought he was lying about Moore and, hence, the solicitor's office re-interviewed him. After Gibson's drug charges arose, Gibson had an enormous incentive to change his story in the hope of helping himself with serious drug charges, and he knew the prosecutor's were looking for a different version of events on Richard Moore's visit to Gibson's residence after the shooting. Under these circumstances, Gibson's changed story lacked even a shred of credibility.

Presently, counsel for Mr. Moore intends to call Mabry as a witness in this action. To his credit, Mabry mentioned his involvement without being directly asked, and may well have been unaware that the fruits of his interview were never memorialized or disclosed to the defense when they became relevant as impeachment. In this post conviction relief action, Mabry is now advocating for the state in its defense of Mr. Moore's conviction and death sentence. Mr. Mabry's continued involvement in service of the state in this case presents insurmountable ethical problems.

Relevant Legal Principles/ Rules:

Rule 3.7 Rules of Professional Conduct

- a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
 - 1) The testimony relates to an uncontested issue;
 - 2) The testimony relates to the nature and value of legal services rendered in the case; or
 - 3) Disqualification of the lawyer would work substantial hardship on the client.

Conclusion:

Gibson's statement to Mr. Mabry forms the basis for a *Brady* claim and requires Mr. Moore's current counsel to call Mr. Mabry as a witness. Further, Mr. Mabry's current duty to zealously represent the state, and to (potentially at least) defend the actions of the solicitor's

office in failing to disclose information they had a duty to provide, places Mr. Mabry in an impossible position fraught with conflicting duties to provide information relevant to a claim against his former employer while at the same time defending his former employer's omission for failing to provide *Brady* material.

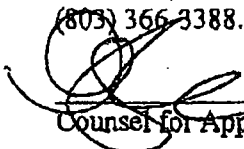
Prayer for Relief:

Counsel hereby respectfully moves this Court to recuse Assistant Attorney General Anthony Mabry from participation as an advocate on behalf of the state in the post-conviction relief case of *Richard Moore v. State of South Carolina*, 04-CP-42-2715, and allow post-conviction relief counsel the opportunity to call Mr. Mabry as a witness on behalf of the applicant Richard Moore.

Respectfully submitted,

Melissa Jane Armstrong, Esq.
1830 Marion St.
Columbia, S.C. 29201
(803) 765-2796.

James M. Morton, Esq.
Morton and Gettys LLP
Post Office Box 707
Rock Hill, S.C. 29731
(803) 366-3388.


Counsel for Applicant

January 25, 2011.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	
Richard Bernard Moore,	)	04-CP-42-2715
	)	
Applicant,	)	RESPONSE TO MOTION
	)	FOR RECUSAL OF COUNSEL
-vs-	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

Applicant, Richard Bernard Moore (Moore) moves to recuse Assistant Attorney General J. Anthony Mabry and states his supposed intention to call Mr. Mabry as a witness based upon a conversation between collateral counsel James M. Morton Esquire, and Mr. Mabry that occurred following the deposition of State's witness George Gibson on December 16, 2010. Respondent opposes the motion and asks the Court to deny it because the proposed testimony would relate solely to matters that are not contested and to which Gibson testified at trial. Also, the decision for Solicitor Gowdy and his staff to re-interview Gibson was made long after Mr. Mabry had left the Seventh Circuit Solicitor's Office and Mr. Mabry cannot have any first-hand knowledge of why that decision was made. However, Moore is free to call former-Solicitor Gowdy, any members of his Office involved in interviewing Gibson or Gibson and Moore can question them further about the re-interview, to the extent the Court finds that such testimony is relevant and otherwise admissible. Respondent would show the Court that:

A. Criteria for calling a prosecutor as a witness.

Rule 3.7, RPC, Rule 407, SCACR, prohibits a lawyer from acting as an advocate at a trial

FILED
CLERK OF COURT
SPARTANBURG COUNTY
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MOORE CLACKLEY

in which the lawyer is likely to be a necessary witness unless certain exceptions are met. Specifically, Rule 3.7 provides, in pertinent part, as follows:

RULE 3.7. LAWYER AS WITNESS

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

See also State v. Sanders, 341 S.C. 386, 389-90, 534 S.E.2d 696, 697-98 (2000) (Court granted a new trial because the record did not support defense counsel's removal before trial on ground that she was necessary witness, where trial judge removed counsel because state indicated it would call her as witness with respect to allegation that she stated she intended to talk to state's witnesses "to get them to change their statements," but state produced no evidence that counsel attempted to influence any witness's testimony, and when she was called as prosecution witness, she was never questioned regarding nature of her interaction with state's witnesses).¹

¹In *Sanders*, the Court set forth the proper procedure to follow in criminal trials where the prosecution seeks counsel's removal under Rule 3.7 over the defendant's assertion of his Sixth Amendment right to counsel of his own choosing. "As a procedural safeguard, an evidentiary hearing is appropriate to determine whether there is evidence to support counsel's removal. This procedure will enable the trial judge to fully assess counsel's anticipated role as a necessary witness before restricting the defendant's exercise of his right to counsel. Further, it will provide a record for meaningful review of the issue on appeal." *Sanders*, 341 S.C. 386, 390-91, 534 S.E.2d at 698.

While Moore's PCR is a civil action challenging the constitutionality of his conviction and sentence in the analogous context of jury trials "[T]he federal courts have almost universally frowned upon the practice of a Government prosecutor testifying at the trial of the case he is prosecuting, whether for . . . or against . . . the defendant, and have stated that the practice should be permitted only in extraordinary circumstances or for compelling reasons." *United States v. Birdman*, 602 F.2d 547, 553 (3rd Cir. 1979) (footnotes omitted), *cert. denied*, 445 U.S. 906, 100 S.Ct. 1084, 63 L.Ed.2d 322 (1980). *See also United*

In the present case, Moore contends that Mr. Mabry's testimony is necessary because "Gibson's statement to Mr. Mabry forms the basis for a *Brady*² claim and requires Mr. Moore's current counsel to call Mr. Mabry as a witness." However, there has not been any *Brady* violation and Mr. Mabry's testimony cannot support such a claim.

B. There has not been any *Brady* violation and Mr. Mabry's testimony cannot support such a claim.

"A *Brady* violation occurs when the government fails to disclose evidence materially favorable to the accused." *Youngblood v. West Virginia*, 547 U.S. 867, 869, 126 S.Ct. 2188 (2006). Evidence is favorable if it is either exculpatory or impeaching. *See, e.g., Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936 (1999). Evidence is material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Youngblood*, 547 U.S. at 870, 126 S.Ct. 2188 (internal quotation marks omitted); *Strickler*, 527 U.S. at 281, 119 S.Ct. 1936 (the term 'Brady violation' is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence;" however, "strictly speaking,

States v. Tamura, 694 F.2d 591, 601 (9th Cir. 1982); *United States v. Schwartzbaum*, 527 F.2d 249, 253 (2nd Cir. 1975), *cert. denied*, 424 U.S. 942, 96 S.Ct. 1410 (1976); *Gajewski v. United States*, 321 F.2d 261, 268 (8th Cir. 1963), *cert. denied*, 375 U.S. 968, 84 S.Ct. 486 (1964).

In *Tamura*, the Court found that "[n]o compelling reasons exist[ed]" to warrant calling the prosecutor. "As the trial court noted, the prosecutor could not properly testify that Ellis had seemed unsure of his story and that the prosecutor had been skeptical; these were merely the prosecutor's opinions about Ellis's credibility. The prosecutor's account of what he and Ellis had actually said during the interviews in question was consistent with Ellis's testimony in every respect except one. On cross-examination Ellis had denied that the prosecutor had told him to "go back and think real hard" about his testimony. To impeach Ellis on this point, the trial court admitted into evidence a stipulation that if the prosecutor were to testify he would state that he had told Ellis to go back and think really hard. Because this was the only point on which the admissible portions of the prosecutor's statements at oral argument diverged from Ellis's testimony, *Tamura* had no compelling need to call the prosecutor." 694 F.2d at 601.

² *See Brady v. Maryland*, 373 U.S. 83 (1963).

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there is never a real 'Brady violation' unless the non-disclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict"). However, a " 'showing of materiality does not require demonstration by a preponderance of the evidence that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal,' " *Youngblood*, 547 U.S. at 870, 126 S.Ct. 2188 (quoting *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555 (1995)), but only a " 'showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict,' " *Youngblood*, 547 U.S. at 870, 126 S.Ct. 2188 (quoting *Kyles*, 514 U.S. at 435, 115 S.Ct. 1555). The assessment of materiality is made in light of the entire record. *United States v. Agurs*, 427 U.S. 97, 112, 96 S.Ct. 2392 (1976).

An individual asserting a *Brady* violation must demonstrate that evidence: (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was impeaching. *Strickler*, 527 U.S. at 282, 119 S.Ct. 1936; *Riddle v. Ozmint*, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006). In the present case, there cannot be a *Brady* violation because Gibson was a collateral witness, rather than an eyewitness.

1. Gibson's trial testimony reflects that he was a collateral witness.

Prior to the guilt phase, lead trial counsel, Michael Morin, Esquire, moved to exclude testimony from Gibson and another witness related to Moore's efforts to purchase crack from Gibson and a nurse's testimony that he had crack in his system. Mr. Morin noted that "[u]p until last week when I received the state's supplementary notices of additional evidence in support of aggravating circumstances, this wasn't an issue." However, in the State's "listing of some of their witnesses the

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issue about Mr. Moore's alleged drug use in or around the time of this incident, they indicated in here there were two specific people who have given statements, but apparently they have supplemented their statements at some point, which I do not know, but apparently they have, because the summaries that they have given me had in it information that I hadn't previously received." He argued that this evidence should be excluded because the State could not establish a nexus between the crimes with which Moore was charged and his drug use. R. pp. 1149-51; 1153-54.

The State explained the substance of Mr. Gibson's proposed testimony and argued that the evidence was relevant and admissible, citing *State v. Dickerson*, 341 S.C. 391, 535 S.E.2d 119 (2000) (prior bad acts evidence of defendant's drug use during time period of murder was admissible under *Lyle* and under the *res gestae* of the crime charged). R. pp. 1151-52. Although the trial judge was inclined to rule that the testimony was admissible, he deferred his ruling until after hearing an *in camera* proffer of Gibson's testimony. R. pp. 1153-54. Following the State's *in camera* proffer and further arguments by the parties (R. pp. 1166-75), the trial judge ruled that Gibson's testimony was admissible. R. pp. 1175-76.

Mr. Gibson subsequently testified before the jury that Moore (or "Mo") had been by his house between 8:00 and 10:00 p.m. on September 15, 1999, the night before the murder. At that time Moore asked Gibson to get him some crack cocaine but Gibson refused because Moore did not have any money with which to buy drugs. Gibson also refused to get Moore the crack on credit. Before leaving Gibson's house, Moore told Gibson that "he was going to work, that he would see me the next day." R. pp. 1246-47; 1253.

Around 3:00 a.m. on September 16th, Gibson heard a truck pull up outside of his house and someone yelled for him. Eventually, Gibson's roommate answered a knock on the door and

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Gibson out of bed. When Gibson went to the door, he saw Moore. Again, Moore asked Gibson to get him some crack. Gibson refused because of the late hour. During their conversation, Moore told Gibson, "I done something bad, and I got to go turn myself in, and I got money." R. pp. 1247-49.

Moore was obviously bleeding and Gibson asked him what had occurred. Moore told him that he had been shot, and he asked Gibson to take him to the emergency room. Gibson refused because he did not want to become involved. When Moore tried to back his truck out of Gibson's driveway, he struck a telephone pole. R. pp. 1249-50; 1256-57.

Thus, while Gibson's testimony was properly admitted to show motive for the crimes under *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923) and as part of the *res gestae* of the crimes (see *Dickerson, supra* and *State v. Adams*, 322 S.C. 114, 470 S.E.2d 366 (1996)), he was not an eyewitness to the crimes. Rather, he was a collateral witness. Moore's purported Brady claim also fails for a more fundamental reason: the information at issue was disclosed and presented at trial.

2. **The jury heard that Gibson had given to a statement to police that conflicted with his testimony and that, within days of the murder, he had spoken to the Solicitor's Office and told the person(s) with whom he spoke the same story that he had told the police initially. The jury heard that Gibson did not change his version of what had occurred until roughly a month before the trial.**

Notwithstanding Moore's current motion, it cannot be seriously disputed that Moore's jury was well aware that Gibson had given to a statement to police that conflicted with his testimony and that, within days of the murder, he had spoken to the Solicitor's Office and told the person(s) with whom he spoke the same story that he had told the police initially. The jury was likewise aware that Gibson did not change his version of what had occurred until roughly a month before the trial.

On direct examination, the State established that Gibson had given a statement to the police on September the 16, 1999 in which Gibson did not mention Moore's September 15th visit.

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Gibson's house because Gibson "was just scared to get involved." R. pp. 1251-52. Trial counsel

Morin thereafter cross-examined Gibson. R. pp. 1254-59.

In pertinent part, counsel established the following:

Q Now, the night that this happened you went down to the police station, is that right?

A That morning, yes, after, you know.

Q You gave a statement to the police.

A Yes.

Q Didn't say anything about the drugs, did you? If you need to see a copy of it, I can give it to you.

A I know. Uh-huh.

Q You didn't say anything about it. Didn't say anything about Steve or Dollar or the other gentleman, did you?

A No.

Q You had crack in the house that night, didn't you?

A No.

Q You told the jury that he wanted to give you -

A I said . . . wanted me to get something for him.

Q Okay.

A That is why.

Q So there wasn't any reason for you to leave that part out then, was there?

A At the time I wasn't thinking about it like that, because . . . this man was bleeding. I was concerned about it. I wasn't thinking about it like that.

Q Well, yeah. I understand.

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A Okay.

Q Now, **this part that you now say that you remember that's not in your statement about the drugs, when did you first tell police or the solicitors about that?**

A About - -

Q **About this drugs and him wanting to get it on the credit and that kind of stuff. Do you remember when you first told them about that?**

A A month ago.

Q A month ago?

A September, I guess.

Q **Two years after this happened, is that right?**

A Well.

Q September of 2001 . . . ?

A Yeah, yeah, whatever.

See App. pp. 1254-55 (emphasis added).

On redirect examination, the State elicited that:

Q **Mr. Gibson, did you give a written statement the night this happened?**

A Yes, sir.

Q **When is the next time you talked to somebody about this case?**

A About as far as a statement or anything?

Q About the case itself, when you talked to somebody about your statement or your - -

A **About three days later. The investigator and the solicitor stopped by and asked me, you know, and, about three or four days later, about two or three days later, I think. In fact, it wasn't long. That was -- you know, it was just a brief statement, a brief moment, you know, stopped by. And then this**

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time. That's it.

Q So when was the next time after that you talked to anybody else about that case?

A The 25th of December, of September rather.

Q When you came and talked to the solicitor?

A Yes, sir. That's when I - - yes.

Q And the time that you are talking about happened two or three days afterward, was we any of those three solicitors that was - -

A Sir?

Q Was any of us one of those solicitors that came and talked to you two or three days afterwards?

A Really, I'm going to be honest with you. All I remember is Officer -- policeman. He's the one I really saw, you know, because it was hot, and the window was up in the car. That's who I remember talking to. That's the only one that really I could, you know, place his face.

Q But, you know, it was three gentlemen in the car, and they said they were with the solicitor's office. So, you know, that's the only one I recognized at the time.

See App. pp. 1260-61 (emphasis added).

Trial counsel Morin subsequently launched a scathing attack on Gibson's credibility, which included Gibson's failure to mention crack in either his original statement to police or to the Solicitor's Office several days after the offense:

Mr. Gowdy called it a crack house in his own closing. When it helps him, it's a crack house. But the fact of the matter is he never said anything to any police about, or authorities about, any drugs being mentioned.

Mr. Barnette asked him after I sat down did you ever talk to anybody after the police, and he said, oh, yes. Somebody from the solicitor's office, an investigator, came out there and talked to me about three days later. He didn't say one single thing about any drugs being mentioned. But he did remember it three weeks ago when he met with

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them again.

What changed? Well, 18 months ago he got a charge for trafficking crack. Eighteen months ago. And has anything happened to that? No. That case is still pending. But, by the way, I just remember that before Mr. Moore said he needed help, he wanted to talk about the crack.

R. p. 1565, ll. 2-19.

Thus, the information that Moore asserts the prosecution withheld was, in fact, disclosed and presented to Moore's jury. This is readily apparent from a casual reading of George Gibson's trial testimony. As a result, there cannot be any violation of *Brady* or its progeny. Further, Moore cannot show the "materiality" of any supposed non-disclosure, even if there had been non-disclosure. Again, "evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different,' " *Strickler*, 527 U.S. at 280, 119 S.Ct. 1936 (quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375 (1985) (opinion of Blackmun, J.))

Gibson was not an eyewitness to the murder. Nor was his testimony essential to prove the murder beyond a reasonable doubt, although it was very probative of Moore's motive. Rather, he was merely a collateral witness and his credibility was thoroughly assailed by defense counsel, through cross-examination and closing argument. In addition to the portions of counsel's cross-examination and argument discussed above, Respondent would note that trial counsel argued that Gibson lacked credibility because of the pending charge of trafficking in cocaine and that the State's photograph (*State's Ex. 23*) demonstrated that Gibson had lied about seeing Moore in the roadway after Moore collided with a telephone pole. R. pp. 1564-66. Thus, he cannot show materiality for any supposed non-disclosure. See *State v. Gunn*, 313 S.C. 124, 136-38, 437 S.E.2d 75, 82 (1993) (given abundance

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of other evidence detailing witness' disrespect for law, defendants could not show failure to disclose evidence witness bribed or attempted to bribe magistrate was "material" under *Brady*). See also *Mills v. Singletary*, 161 F.3d 1273, 1288 (11th Cir. 1998) (defendant's Sixth Amendment right to confront witnesses is satisfied where the cross-examination permitted exposes the jury to facts sufficient to evaluate the witness' credibility and "enables defense counsel to establish a record from which he can properly argue why the witness is less than reliable").

Additionally, there was overwhelming evidence establishing that Moore was guilty of murder, assault with intent to kill (AWIK), armed robbery and possession of a firearm during the commission of a violent crime, as well as the statutory aggravating circumstances that the murder was committed while in the commission of robbery while armed with a deadly weapon; that Moore, by his act of murder, had knowingly created a risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person; and that Moore had committed the murder for the purpose of receiving money or a thing of monetary value.³

Moore contends that Mr. Mabry told Gibson that Mr. Mabry did not believe Gibson's statement. However, neither the undersigned nor, more importantly, Mr. Mabry, recall that he said

³ This included the eyewitness testimony of Terry Hadden (the AWIK victim), R. pp. 1193-1209; 1309; 1215-17; 1288-89; 1424; evidence that Moore's DNA was found on the .45 caliber weapon that was used to kill the victim and which Moore had discarded after he left the crime scene; evidence that Moore's blood (established through DNA testing was found on the victim's clothing, the money (\$1,408.00) that was recovered from his truck, a meat cleaver that was found at the scene (at the victim's feet) but which did not belong to the business and a trail of his blood leading out of the business, R. pp. 1271-93; 1305-50; 1152-53; 1364-65; 1368; 1421-32; and evidence that Moore's admission of "I did it, I did it, I give up, I give up" when Spartanburg County Deputy Sheriff Bobby Rollins came across Moore after the truck had hit the pole, R. pp. 1238-40; 1311-18; that Moore had told the emergency room nurse that he was using alcohol and cocaine that evening, R. pp. 1377-78.

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this to Gibson. Also, the decision for Solicitor Gowdy and his staff to re-interview Gibson was made long after Mr. Mabry had left the Seventh Circuit Solicitor's Office and Mr. Mabry cannot have any first-hand knowledge of why that decision was made. However, Moore is free to call former-Solicitor Gowdy, any members of his Office involved in interviewing Gibson or Gibson and Moore can question them further about the re-interview, to the extent the Court finds that such testimony is relevant and otherwise admissible.

Under these circumstances, no "compelling reasons exist" to allow Moore to call Mr. Mabry. Even if called as a witness, Mr. Mabry "could not properly testify that . . . [Mr. Mabry] had been skeptical [of Gibson's statement]" because this was merely Mr. Mabry's opinion about Gibson's credibility. Thus, Moore has "no compelling need to call the prosecutor." *See Tamura*, 694 F.2d at 601.

Moreover, contrary to Moore's claim that Mr. Mabry first disclosed his prior conversation with Gibson on January 18, 2011, there were no depositions taken on that date. The conversation upon which the motion is premised occurred following Gibson's December 16, 2010 deposition. (A copy of Gibson's deposition has not yet been provided to Respondent by the Court Reporter even though Respondent requested a copy). Moore's delay in filing the current motion for over a month after Mr. Mabry disclosed that he had a conversation with Moore and on the eve of the PCR hearing demonstrates that this motion is without merit.

Wherefore, Respondent asks the Court to deny Moore's motion to recuse.

ALAN WILSON
Attorney General

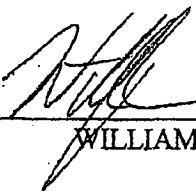
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Chief Deputy Attorney General

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By: 

WILLIAM EDGAR SALTER, III

ATTORNEY FOR RESPONDENT

January 26, 2011.

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STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

Richard Bernard Moore,)
Applicant,)

04-CP-42-2715

-vs-

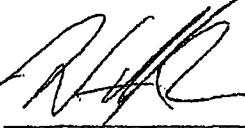
State of South Carolina,)
Respondent.)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 26th day of January, 2011, a copy of the Respondent's Response to Motion for Removal of Counsel was served on counsel for the Applicant by depositing same in the United States mail, postage prepaid, and addressed as follows:

Melissa J. Kimbrough, Esquire
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James M. Morton, Esquire
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WILLIAM EDGAR SALTER, III
ATTORNEY FOR RESPONDENT

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STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

Richard B. Moore,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS

C/A No.: 04-CP-42-2715

Reply to Response to
Motion for Recusal of Counsel

Respondent misapprehends both the facts and law related to Applicant's Motion for Recusal of Counsel.

As an initial matter, the Respondent alleges George Gibson was a "collateral witness" and that his testimony was "immaterial." Nothing could be further from the truth. George Gibson gave the state it's only plausible argument as to Moore having a motive to rob Nikki's Convenience Store. Without the *res gestae* testimony provided by George Gibson, the state was left with nothing other than its continually evolving theory of how and why the shooting at Nikki's occurred. The state did not even have a coherent or consistent theory as to whether Moore was armed with a weapon. There was testimony about a tire iron, or lug wrench, and and/a pocket knife and/or a "meat cleaver" (that was never sent for analysis to SLED) being possible weapons with which Moore was armed, but no real coherent theory as to which, if any of these, was used prior to the shooting.

The only motive the State had for Moore wanting to rob Nikki's convenience store came from George Gibson's testimony. George Gibson became, in effect, the lynchpin of the state's case in the guilt phase. Ergo, Gibson's credibility was critical to the guilt phase and necessitates

the taking of Mr. Mabry's testimony as to what Gibson said and what was said to Gibson prior to Gibson providing a new and improved and state-friendly statement to the solicitor's office.

Second, the Respondent misapprehends what is required for purposes of disclosure of evidenced under *Brady v. Maryland*, 373 U.S. 83 (1963). The Respondent alleges that *Gibson*, a convicted felon, was a sufficient provider of evidence as to Mabry's interview, such as to relieve the state from it's obligation to disclose the information. This argument is fatuous. Gibson testified on cross-examination during the heat of battle in trial. How in the world could evidence in the form of testimony blurted out mid-trial, by a convicted felon no less, suffice to provide counsel with the information they need to *prepare* their case and to defense against the state's case? The obvious answer is that it could not do so. Moreover, Gibson never indicated who spoke with him or what he said to that person or persons and/or what Gibson was told.

Respondent's argument that Gibson's testimony cures any alleged non-disclosure is further undermined by the state's questions on re-direct. On re-direct, the State had Gibson reiterate he had spoken with law enforcement a few days after the crime, and this response left the jury with the false impression that Gibson had told law enforcement three days after the crime of Moore's alleged drug seeking immediately after the crime. Clearly, the state's reason for emphasizing the follow-up interview was to undermine the defense's credibility in arguing that Gibson had made an eleventh hour disclosure and that it was false. The state's re-direct was aimed at bolstering Gibson's shaky credibility, and it was accomplished by way of misleading the jury and creating a false impression as to when Gibson gave his new story about Moore's visit to his home after the shooting. Thus, if anything, Gibson's testimony only worsened the state's failure to disclose Mabry's follow-up interview with Gibson.

The respondent should not be allowed to retroactively boot-strap cross-examination testimony from a felon so as to aid the state in avoiding responsibility for non-disclosure of critical impeachment evidence from a key witness, especially when the state's re-direct left the jury with the false impression that Gibson had revealed the drug information to them a mere three days after the crime.

Third, the Respondent argues that the non-disclosure is somehow excusable because Mr. Mabry left the Seventh Circuit Solicitor's Office prior to Moore's trial. This argument is not rooted in law, but rather appears to be an effort on Respondent's part to make excuses for the state's non-disclosure. There is absolutely no legal or ethical foundation for arguing that the state may side-step its obligation to disclose *Brady* material on the basis that its staff member failed to disclose it to them and/or had left that particular office prior to trial. Respondent argues, by way of an alternative to having Mr. Mabry serve as a witness, that Applicant can call Mr. Gowdy and/or other members of the prosecution team who served on Moore's case, rather than the impeaching witness himself (Mabry). This is an inappropriate solution to a readily solvable problem, as neither Solicitor Gowdy nor his staff were (evidently) made aware of what Gibson told Mabry or vice-versa. If Gowdy and his staff were aware of what was said, then they clearly violated *Brady* by their non-disclosure of the information.

Finally, Respondent makes the argument that post-conviction relief counsel has "delayed" in filing the Motion for Recusal of Counsel and that this "delay" shows the motion is "without merit." This argument is absurd. Counsel Morton first learned the substance of Mabry's involvement prior to a deposition of Rusty Clevenger dated December 16, 2010. After the initial disclosure, Counsel Morton discussed the fact with undersigned counsel. Counsel Morton then contacted Counsel Salter and made it known to him that Applicant's counsel

believed Mabry would need to be a witness for Applicant. Counsel for Moore did not reflexively fire off a Motion to Recuse. Counsel for Moore, instead, discussed the situation and the potential consequences of not calling Mabry as a witness, and decided, after thoughtful consideration—as well as a discussion with Respondent's counsel—that a motion was justified and necessary. The lapse of a mere few weeks from initial notice of potential issue and formal filing of a motion related to this issue is not “delay.” Further, it is astonishing that Respondent alleges “delay” when it is the state that took almost twelve years to finally disclose Mr. Mabry's involvement. Respondent's argument is thus not only absurd but a fine example of the pot calling the kettle black.

Applicant thoroughly agrees with Respondent's recitation of law on page 11 of their Reply, that a “defendant's Sixth Amendment right to confront witnesses is satisfied where the cross-examination permitted exposes the jury to facts sufficient to evaluate the witness' credibility and “enables defense counsel to establish a record from which he can properly argue why the witness is less than reliable.” This Sixth Amendment guarantee is precisely why Mr. Mabry is a necessary witness. It is not for the Respondent to decide who is and who is not a necessary witness and/or possesses material evidence. Applicant is entitled to his “one bite at the apple” and that one bite should afford him access to all available evidence supporting his claims for relief.

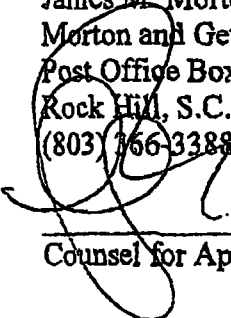
Conclusion

Based on the foregoing, as well as Applicant's Motion for Recusal of Counsel, this Court should grant Applicant's Motion to Recuse Attorney Mabry and permit his testimony as a witness on behalf of Applicant.

Respectfully submitted,

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January 27, 2011.

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STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

} COURT OF COMMON PLEAS NONJURY

RICHARD B. MOORE,
APPLICANT,
VS.
STATE OF SOUTH CAROLINA,
RESPONDENT.

}

TRANSCRIPT
OF
RECORD
04-CP-42-2715

January 31st, 2011
Spartanburg, South Carolina

B E F O R E :

THE HONORABLE ROGER L. COUCH, Judge.

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ESQ.
Attorneys for the Applicant

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Attorneys for the Respondent

PAMELA E. GREEN
Circuit Court Reporter
Seventh Judicial Circuit

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P R O C E E D I N G S

1

2

3

MR. MORTON: Good morning, Your Honor.

4

THE COURT: Good morning.

5

MR. MORTON: I'm Jim Morton --

6

THE COURT: Yes, sir.

7

MR. MORTON: -- for Mr. Moore. This is Lisa Armstrong

8

--

9

THE COURT: Morning.

10

MR. MORTON: -- and I think you know everybody else.

11

THE COURT: I do.

12

MR. SALTER: I'm Ed Salter with the Attorney General's

13

office.

14

THE COURT: Yes.

15

Mr. Mabry, how are you doing?

16

MR. MORTON: Your Honor, we had a, I think a motion I

17

think we needed to take care of.

18

THE COURT: We need to have your client in the

19

courtroom before we start.

20

MR. MORTON: Oh, yes. Yes, sir. I'm sorry. I

21

wondered, judge, we were gonna try to, which we haven't had

22

an opportunity to do yet, maybe agree on some stipulations

23

that would maybe shorten this situation --

24

THE COURT: All right.

25

MR. MORTON: -- and preclude the need for some of these

1 witnesses to come in here.

2 THE COURT: All right. Again, do we need to have your
3 client present before we do anything on the matter?

4 MR. MORTON: We do before we do the motion.

5 THE COURT: Okay.

6 MR. MORTON: Yes, sir.

7 THE COURT: All right. Well, go ahead and let's do the
8 stipulations if you feel he doesn't need to be present.

9 MR. MORTON: Well, Your Honor, can we have just a
10 minute?

11 THE COURT: Yes, sir.

12 (Pause.)

13 MR. MORTON: Beg the Court's indulgence just one
14 second, Your Honor.

15 THE COURT: Yes, sir.

16 (Pause.)

17 (WHEREUPON, Mr. Moore comes into the courtroom at this
18 time.)

19 MS. ARMSTRONG: I guess we should go ahead and place
20 this on the record, Your Honor, that Mr. Moore is now
21 present in the courtroom.

22 THE COURT: Yes, I was going to indicate that when we
23 started, but I thank you.

24 MS. ARMSTRONG: Okay.

25 THE COURT: All right. Do we have stipulations you'd

1 like to announce into the record?

2 MR. MORTON: No, sir, we don't right now.

3 THE COURT: All right.

4 MR. SALTER: Yes, sir, we do. We have---

5 MR. MORTON: Okay.

6 MR. SALTER: We had the one from yesterday.

7 MR. MORTON: Okay.

8 MR. SALTER: Donald. Donald Girndt.

9 MR. MORTON: Right.

10 MR. SALTER: The stipulation being that Mr. Girndt was
11 retained as, to do crime scene analysis, and when contacted,
12 he did not have any recollection of the case and did not
13 have any records pertaining to this case.

14 THE COURT: All right. Is that correct?

15 MR. MORTON: Yes, sir, Your Honor.

16 THE COURT: All right. Now, I believe there's a
17 defense motion before the Court concerning recusal of
18 counsel?

19 MR. MORTON: Yes, sir.

20 THE COURT: I'll be happy to hear from you.

21 MR. MORTON: All right, sir.

22 THE COURT: And I guess I should say it's an
23 appellate's motion, Applicant's.

24 MR. MORTON: Yes, sir.

25 THE COURT: Applicant's motion.

1 MR. MORTON: Your Honor, I'm not sure, so I will just
2 assume that Your Honor is not aware of any of the facts in
3 this case. I'm not trying to ask Your Honor. But if you
4 would---

5 THE COURT: Well, I received a package of information
6 last week, and I have reviewed it, and I've received the
7 motions concerning recusal of counsel, and I have reviewed
8 those motions. In there is contained statements of facts.
9 So, I am familiar with what's in those motions and what's in
10 the documents.

11 MR. MORTON: All right, sir. I would just be prepared,
12 at this time, to argue the motion.

13 THE COURT: Yes, sir.

14 MR. MORTON: I don't know that we -- if we need to have
15 Mr. Mabry as a witness, we are certainly prepared to do
16 that.

17 But, Your Honor, this incident happened on September
18 the 16th of 1999 at Nikki's Convenience Store where
19 Mr. Moore and the victim both engaged in a shoot-out.
20 Unfortunately, Mr. Mahoney was killed. Mr. Moore -- and
21 they're lots of Moore's and Mahoney's and Morin's and
22 Mabry's. So, if the Court -- I'll try and, I'll try and not
23 mix the, intermix the two. But if I misspeak, I'm sure
24 co-counsel will, will help me.

25 Mr. Moore and Mr. Mahoney were the primary people

1 involved in this incident. After the shoot-out, and after
2 Mr. Mahoney was killed, I don't think there's much argument
3 that Mr. Moore took the money from the cash register and
4 left. I think we can all agree to that. At which time
5 Mr. Moore left Nikki's on 221. He went over to a man's
6 house, who is present in the courtroom, and I'm gonna ask
7 him if we would be, if we could excuse the witnesses while
8 we discuss this, Your Honor.

9 THE COURT: Probably would be a good idea.

10 Any objections from the State?

11 MR. SALTER: None, Your Honor.

12 THE COURT: All right. Any individuals in the
13 courtroom who might later serve as a witness in this matter,
14 I'm going to ask you to step outside, have a seat in the
15 lobby. During the time that you're there, I will caution
16 you not to discuss your testimony, either the testimony that
17 you've given in the past in this case or the testimony that
18 you might give at this particular proceeding with each other
19 or with anyone else.

20 So, anyone who is here in the capacity or serving as a
21 potential witness should, at this time, have a seat in the
22 lobby.

23 (Pause.)

24 THE COURT: All right. Mr. Morton.

25 MR. MORTON: Thank you, Your Honor.

1 Let me correct one thing. The money was taken from a,
2 from a blue pouch that was later recovered. Was not taken
3 from the cash register.

4 In any event, after the incident, Mr. Moore went to Mr.
5 Gibson's house, who lived on Hillside Drive, which is about
6 a mile or so from the incident I believe, and there the
7 stories sort of diverge, and this is the reason for our
8 recusal motion.

9 On the night of the incident, Mr. Gibson, to whom
10 Mr. Moore's house arrived, told the police that when
11 Mr. Moore came to his side door at his house that Mr. Gibson
12 was there with several of his friends, it was three o'clock
13 in the morning, some of them were awake, some of them were
14 asleep. Mr. Gibson would state that he knocked at the door.
15 He eventually got to the door, and he told the police that
16 on that night that Mr. Moore came, had been shot through the
17 arm, was bleeding, and that Mr. Moore asked him, asked
18 Mr. Gibson to take him, Mr. Moore, to the hospital.

19 Mr. Moore, after this conversation with Mr. Gibson,
20 Mr. Gibson refused. Said no, man, you've been shot. I'm
21 not taking you anywhere. Didn't let him in the door. Said
22 I can't help you, see you later, at which point Mr. Moore
23 got back in the truck that he was driving. He backed down
24 the driveway of Mr. Gibson's home, and he backed into a
25 telephone pole at which point the police had already been

1 notified of the incident involving Mr. Mahoney at Nikki's
2 Store. They were already looking for the perpetrator and
3 were riding in that neighborhood.

4 When Mr. Moore backed into the pole, police were
5 immediately on the scene, he got out, he surrendered, he
6 said I did it, I did it, they arrested him, put him in an
7 ambulance, took him to, to the hospital. The police
8 responded to the scene. They secured the scene. That being
9 the truck. They went in and they talked to Mr. Gibson about
10 what had happened, and they asked Mr. Gibson to come down to
11 the police station and give a statement, which he did.

12 They took Mr. Gibson down to the police station, and he
13 gave a signed written statement, which was introduced in
14 evidence, which is part of the record on appeal I believe.
15 If not, we have a copy of it that we can put up. That
16 statement said, just as I've stated before, that when
17 Mr. Moore got to Mr. Gibson's house that Mr. Moore was
18 interested in a ride to the hospital. He asked Mr. Gibson,
19 man, I been shot, please take me to the hospital, and
20 Mr. Gibson told the police that he refused to do that, he
21 refused to help Mr. Moore with his gunshot wound, and
22 refused to take him to the hospital.

23 well, that was the story, Your Honor, on that night.
24 To kind of jump ahead a little bit, at the time this
25 incident happened on September the 16th, 1999, and I

1 didn't realize this until a couple of, a few weeks ago,
2 Mr. Mabry, who is now obviously the assistant attorney
3 general representing the state on behalves of Mr. Kelly and
4 Mr. Morin, Mr. Mabry was the deputy attorney general for the
5 Seventh Circuit, deputy solicitor for the Seventh Circuit
6 and was involved in the investigation of this case.
7 Mr. Mabry later left office I believe. They had a change in
8 administration in the Year 2000 after the election at which
9 point Mr. Gossett and Mr. Mabry, I think Mr. Mabry left when
10 Mr. Gossett, when Mr. Gowdy assumed the Solicitor's Office
11 in 2001.

12 But going back to September 16th, 1999, Assistant
13 Attorney General Mabry, at that point, was the deputy
14 solicitor for the Seventh Circuit, and a few days after this
15 incident, it -- he disclosed to me, at a deposition in
16 December, that he was involved in the investigation of this
17 case, and that he had, in fact, gone and talked to
18 Mr. Gibson regarding the incident that night. That came --
19 Mr. Mabry volunteered that, volunteered that to me when we
20 were doing a deposition of Mr. Gibson.

21 And, so, at that time I didn't really know what my
22 response should be or needed to be. I conferred with
23 co-counsel as well as some other attorneys, and after
24 thought and deliberation, I called Mr. Mabry and Mr. Salter
25 and they were on speaker phone, and I asked Mr. Mabry what

1 his involvement in this case was, and he told me, and I'm
2 doing my best to -- I took notes on Mr. Mabry. I'm not
3 trying to -- if you disagree obviously with anything I say
4 I'm sure you'll tell the Court.

5 I asked Mr. Mabry what his involvement in this case
6 was, and he told me that he had gone to Mr. Gibson's house
7 three or four days after this incident, and that he went
8 there because he did not believe Mr. Moore's or Mr. Gibson's
9 story that Mr. Moore had gone to Mr. Gibson's house to get a
10 ride to the hospital. Mr. Mabry explained to me that they,
11 being the solicitors, thought that Mr. Moore went to Mr.
12 Gibson's house for other reasons. That being to purchase
13 crack cocaine.

14 He went to Mr. Gibson's door, Mr. Gibson was inside,
15 but wouldn't come to the door. Mr. Mabry spoke with another
16 resident who told him that Mr. Gibson did not wish to speak
17 to anybody. Mr. Mabry persisted and was able to get Mr.
18 Gibson to the door during, at which point, he confronted
19 Mr. Gibson with what he believed to, what Mr. Mabry believed
20 to be the truth in that he said, and I don't know exactly
21 his words, but could, but expressed the, the idea that, in
22 fact, Mr. Moore had been over there not to get a ride to the
23 hospital, but to purchase crack cocaine.

24 So, there was three or four days after this incident on
25 September the 16th of 1999. We never knew that. They're

1 a couple of different threads to this story.

2 Number one is that we made a motion for Mr. Mabry to be
3 recused, and, number two, that it was a, I think a, a,
4 probably an inadvertent discovery, Brady statement by a key
5 witness in this case to Mr. Mabry.

6 what happened in this case, Your Honor, was---

7 THE COURT: Well, now, now, did Mr. Gibson, at that
8 time, change the story he had given to the police?

9 MR. MORTON: I'm, I'm -- that's -- that was my next
10 enlightenment if you will.

11 THE COURT: All right.

12 MR. MORTON: That was September the 16th of 1999. It
13 also turns out that, on that night, and two witnesses that
14 we were prepared to call, but we can probably stipulate to
15 the introduction of what Mr. Gibson told them that night,
16 were two police officers, Officer Tony Brown and
17 Investigator or Detective Steve Denton, and they also
18 both -- they talked to Mr. Moore, I'm sorry, talked to
19 Mr. Gibson that night.

20 Mr. Gibson told Mr. Denton exactly what he told
21 Mr. Brown in that Richard Moore came by his house that night
22 to get a ride to the hospital. He told Detective Denton
23 that. He told Mr. Brown that. He wrote that in a
24 statement, a sworn signed written statement to the police,
25 and then three days later he told Mr. Mabry the same thing.

1 On June the 5th of 2001, this case was tried in October
2 of 2001, and I just discovered, quite honestly over the
3 weekend, a note from a, from a, an email in the
4 Seventh Circuit Solicitor's Office from an unsigned
5 investigator to Mr. Barnette, who was then the deputy
6 solicitor, that that investigator had, on June the 5th of
7 2001, in fact, gone also to Mr. Gibson's house and talked to
8 him about why Mr. Moore came to his house on September the
9 16th of '99 at which point Mr. Gibson told this
10 investigator, from the note apparently, told that Richard
11 Moore came over there for a ride to the hospital.

12 So, what we have is we have Mr. Moore's statement on
13 the night that it happened that, Mr. Gibson's statement on
14 the night that it happened that Mr. Moore came by for a ride
15 to the hospital. We have Mr. Gibson's statement to Officer
16 Tony Brown that Mr. Moore came by for a ride to the
17 hospital. We have his statement also on that night to
18 Mr. Denton that Mr. Moore came by for a ride to the
19 hospital. We have Mr. Gibson's statement to Mr. Mabry three
20 days later that Mr. Moore came by for a ride to the
21 hospital. Nothing about crack was ever mentioned. We have
22 a statement from an investigator in the Solicitor's Office
23 on June the 5th of 2001 that Mr. Gibson told him that
24 Mr. Moore came by for a ride to the hospital.

25 Okay. This trial began, Your Honor, on October, I

1 believe, the 18th of 2001 at which date Mr. Morin, the
2 attorney for Mr. Moore, stated to the Court, outside the
3 presence of the jury, before the jury came in, that he had
4 just been told the week before, in his words, that the
5 solicitor's Office, by way of a supplemental notice of
6 aggravating circumstances that they may present during the
7 penalty phase, that Mr. Gibson was now saying that Mr. Moore
8 came by the house to get crack cocaine.

9 Judge Clary, at the time, listened to the lawyers,
10 listened to Mr. Morin, and listened to Mr. Gowdy. He asked
11 that there -- Mr., Mr. Gowdy moved -- that, that then became
12 the motive for this shooting at Nikki's Store. Mr. Gibson,
13 at that time, to the solicitors had indicated, at this late
14 moment, that, in fact, that Richard Moore had been by his
15 house earlier that night, that, to get cocaine, that
16 Mr. Gibson had told Mr. Moore that he didn't have any
17 cocaine, and that Mr. Gibson told, and that Mr. Moore told
18 Mr. Gibson that he would, he's going to work and he would be
19 back later.

20 So, at that point, Mr. Gibson then was testifying for
21 the Court. There was no signed written sworn statement.
22 Judge Clary asked Mr. Gibson to come in and testify.
23 Mr. Gowdy had indicated to the Court---

24 THE COURT: Now, was this a proffer of testimony---

25 MR. MORTON: This is a proffer of testimony.

1 THE COURT: ---concerning the motion?

2 MR. MORTON: Yes, sir.

3 THE COURT: All right.

4 MR. MORTON: It's a proffer of testimony.

5 THE COURT: I see.

6 MR. MORTON: Mr. Gowdy had told the Court that
7 Mr. Gibson was gonna say Mr. Moore had been over there
8 earlier at midnight that night. The incident happened at
9 three o'clock, and that Mr. Gibson would say that Mr. Moore
10 came over at midnight, and then, after this shooting, both
11 in attempts to get cocaine. Mr. Gibson testified in camera
12 and he testified that Mr. Moore had been by about 8:00 or
13 9:00, between eight o'clock and ten o'clock the previous
14 night, and that he, after the shooting when he came to the
15 door, he asked for help and a ride to the hospital, and that
16 he asked Mr. Gibson to "get him something."

17 They, on examination, they said well, what was
18 something that he wanted you to get for him?

19 And Mr. Gibson said he wanted me to get cocaine for
20 him.

21 And did you get it for him?

22 He said no, I didn't have any, and he got back in his
23 truck and backed down the driveway.

24 There was a discussion -- this becomes so important,
25 Your Honor, because -- again, I don't want to, I don't want

1 to testify here, but there was a shoot-out in this store.
2 There is, I think, can also be stipulated that, during the
3 shoot-out, that Mr. Moore was shot through and through his
4 left arm and across his chest, that Mr. Mahoney was shot
5 through the chest, and died.

6 There's no dispute that the guns that were involved did
7 not belong to Richard Moore. That -- there, there were
8 three guns in the store. There was a .45, there was a .44,
9 and there was a .32. The .32, the .32 was not involved.
10 The .45 was shot five or six times. The .44, the testimony
11 was, was shot once.

12 So, the case really was about what precipitated this
13 fight. The State had a witness who was a poker player in
14 the store, who was a video poker player in the back of the
15 store who came to Court and testified that Richard Moore
16 came in, he went to the beer cooler, he got beer, sat it on
17 the counter, that he then turned around, told Mr. Hadden not
18 to move, Mr. Hadden being the witness at the back of the
19 video poker machine, and that he fired a gun at Mr. Hadden
20 which missed, Mr. Hadden testified, he fell on the floor and
21 played dead.

22 The -- there's no dispute, and, again, I'm taking --
23 I'm -- I guess I'm speaking in evidence most favorable to
24 the attorney general here, but there is no dispute that
25 Mr. Moore was shot in the arm with Mr. Mahoney's weapon, and

1 that Mr. Mahoney was shot with Mr. Mahoney's weapon by
2 Mr. Moore. And the defense theory at the case was that
3 there had been a argument, there had been, at which point
4 Mr. Mahoney had pulled his .45 on Mr. Moore at which point a
5 struggle ensued between the two at which point Mr. Moore was
6 able to take, was, was shot at by Mr. Mahoney. The shot --
7 there's -- his beer bag is on the counter. The bag is in
8 evidence. They're pictures of that.

9 There's a shot going through the beer bag out from
10 the -- and I have some pictures and I have some displays
11 that we can get into later. I'm trying to, trying to give
12 the Court a little summary of the case to explain why Mr.
13 Gibson's statement to Mr. Mabry and others is so important,
14 and that is that there was a shot from the customer side
15 through the bag that hit Mr. Moore, that Mr. Moore was able
16 to gain control of the .45 at which point Mr. Mahoney, who
17 carried a .44 in his back waistband, pulled out another gun,
18 pulled it out, and shot Mr. Moore at which point Mr.,
19 Mr. Moore returned fire hitting Mr. Mahoney one time.

20 So that the State, in an effort to determine that this
21 was a robbery attempt on Mr. Moore's part, okay, the
22 testimony by Mr. Gibson at the eleventh hour, the week
23 before or ten days before this trial started, two years
24 after this incident, and after Mr. Gibson had been talked to
25 by Mr. Brown, Mr. Denton, Mr. Mabry, to another investigator

1 in the Solicitor's Office, and who had consistently told
2 them that Mr. Moore came to Mr. Gibson's house for a ride to
3 the hospital. At the eleventh hour Mr. Gibson then comes
4 forward and says no, he came by there wanting crack, which
5 became the lynchpin of the cases theory. It became the res
6 gestae theory. It became their theory for motive. It
7 became their theory that this was an armed robbery, which
8 Mr. Moore, after the shooting, did, I don't think there's
9 any dispute about that, went around, got the money bag, and
10 took it with him.

11 So, at this point I don't think there was any question
12 that Mr. Moore was armed with a weapon, that there was a
13 robbery that took place. The question became what was his
14 intent in going into the store and what was his motive. The
15 State desperately needed a motive, in my opinion, and they
16 obtained that motive from Mr. Gibson at the first hour.

17 Mr. Gibson came forward.

18 THE COURT: Well, at least some time between July and
19 September?

20 MR. MORTON: Some time -- Mr. Moore testified,
21 Mr. Gibson testified that he told the police or he told the
22 solicitors this on September the 25th of 2001.

23 THE COURT: Well, some -- cause July you said he talked
24 to the last investigator.

25 MR. MORTON: June the 5th.

1 THE COURT: June the 5th. Excuse me.

2 MR. MORTON: Yes, sir, Your Honor.

3 THE COURT: So, some time between June and September
4 his story changed?

5 MR. MORTON: During his testimony in front of the
6 Court, Your Honor, Mr. Gibson said that he first told the
7 solicitor's Office, this is after he had picked up a
8 trafficking in crack charge, after he picked up a possession
9 of crack charge, that on September the 25th he told the
10 solicitors for the first time that cocaine was involved,
11 that the reason Mr. Moore came by after this robbery was to
12 get Mr. Gibson to sell him some cocaine with the money that
13 he had just taken from Nikki's Store.

14 During the trial, the judge allowed the testimony,
15 allowed the res gestae evidence to come in, and part of our
16 position would be that Mr. Gibson was not thoroughly
17 cross-examined by Mr. Morin. He was not cross-examined --
18 to the extent that he wasn't cross-examined about Mr.
19 Gibson's most recent arrest for possession of crack. He
20 didn't know about Mr. Gibson's statement to Mr. Mabry, and
21 he didn't cross-examine Mr. Gibson about his statement to
22 this investigator on June the 5th.

23 It became very---

24 THE COURT: Now, I, I -- in reading the documents that
25 have been submitted to me in connection with this motion --

1 MR. MORTON: Yes, sir.

2 THE COURT: -- and looking at the cross-examination and
3 the examination that took place during the trial, there was
4 reference to the fact that he had spoken to some police
5 officers and a solicitor right within five days or so after
6 the incident.

7 MR. MORTON: Yes, sir, there was.

8 THE COURT: So, that was brought out in, in either the
9 examination---

10 MR. MORTON: Yes, sir.

11 THE COURT: ---or the cross-examination during this
12 trial?

13 MR. MORTON: Yes, sir, it was brought out during the,
14 the redirect, I believe, of Mr. Gibson.

15 THE COURT: Yes, sir.

16 MR. MORTON: It was. And the testimony speaks for
17 itself, Your Honor. Beg the Court's indulgence one second.

18 THE COURT: Certainly.

19 (Pause.)

20 MR. MORTON: On redirect, which is, if the Court has
21 the testimony, it's on Page 1258 of the, of our transcript.
22 I'm not sure if it's the same thing on the record on appeal.

23 THE COURT: Well, in the, in the---

24 MR. SALTER: Yes, sir, it's a little bit---

25 THE COURT: In the State's response to your motion,

1 Page 7, they quote from Pages 1254 through 1259 --

2 MR. MORTON: Yes, sir.

3 THE COURT: -- which I think would include the
4 testimony you're referring to.

5 MR. MORTON: Yes, sir.

6 THE COURT: So, I've got that in front of me.

7 MR. MORTON: All right, sir. And in the redirect
8 testimony by Mr., I'm sorry, on cross-examination by
9 Mr. Morin, Mr. Gibson, on Page 1259, Mr. Gibson, under
10 cross-examination---

11 THE COURT: Well, he said, he said apparently on, that
12 about three days later, the investigator from the solicitor
13 stopped by and asked me, you know, and about three or four
14 days later about, or about three days later I think, in
15 fact, it wasn't long, that was, you know, it was just a
16 brief statement, a brief moment, you know, stopped by and
17 then this time that's it. He indicated he didn't change his
18 story, that it's the same.

19 MR. MORTON: Well---

20 THE COURT: And apparently that's what you discovered,
21 that he didn't change his story?

22 MR. MORTON: Yes, sir.

23 THE COURT: Okay.

24 MR. MORTON: Yes, sir, he indicated, he indicated---

25 THE COURT: But at the trial Mr. Morin -- that's Mr.

1 Morin questioning him I believe from what I can tell.

2 MR. MORTON: Well, there was also some redirect, Your
3 Honor, by Mr. Barnette on Page 1261.

4 THE COURT: Yes, sir, but I understand this is Mr.
5 Morin. So, I don't think it's exactly accurate when you
6 said Mr. Morin was not aware that the solicitor had talked
7 to him two or three days later because that was Mr. Morin
8 questioning him.

9 MR. MORTON: Yes. Yes, sir.

10 THE COURT: All right.

11 MR. MORTON: I think that had been brought out, but, in
12 any event, the, the implication was that some others had
13 been out to talk to him. The substance of those, of that
14 statement from Mr. Gibson I submit Mr. Morin didn't know
15 about. I don't think that Mr. Morin knew, as far as the
16 discovery violation, and I don't think it was in any part of
17 Mr. Mabry's that---

18 THE COURT: All right. And at that, at that time, the
19 time of the trial, Mr. Mabry didn't work for the solicitor's
20 office.

21 MR. MORTON: No, sir.

22 THE COURT: In fact, substantially before this time he
23 no longer worked for the Solicitor's Office.

24 MR. MORTON: That's correct.

25 THE COURT: All right.

1 MR. MORTON: That's correct.

2 So, my argument is that not that Mr. Mabry
3 intentionally tried to withhold any kind of evidence. I
4 think it got lost in the shuffle in the change-over between
5 administrations.

6 THE COURT: And is it accurate there's, there's no
7 written memo of that second conversation, the one where
8 Mr. Mabry would of been present, that you've been able to
9 discover.

10 MR. MORTON: Not that I have been able to discover.

11 THE COURT: Okay.

12 MR. MORTON: What I have is Mr. Mabry's statement to me
13 that he confronted Mr. Moore, Mr. Gibson, I'm sorry, with
14 his September 16th, 1999, statement that Mr. Moore wanted
15 to ride to the hospital and that---

16 THE COURT: And the story didn't change?

17 MR. MORTON: The story didn't change.

18 THE COURT: All right.

19 MR. MORTON: And that, therefore, we would call
20 Mr. Mabry as a witness in this proceeding to substantiate
21 that Mr. Gibson's story was the same on September the
22 16th, as it was three or four days later, as it was on
23 June the 5th, as it was up until the eve of this trial.

24 THE COURT: That's already in the record of the case.

25 MR. MORTON: No, sir, it's not in the record of the

1 case as to what he told Mr. Mabry.

2 THE COURT: Well, it's in the record of the case that a
3 conversation took place with police officers and a solicitor
4 and at that time he was still saying the same thing.

5 MR. MORTON: Well, it doesn't really indicate
6 necessarily that that's what it was.

7 THE COURT: Well, I think the question later on---

8 MR. MORTON: In our---

9 THE COURT: The question went to the fact that he had
10 just changed his story.

11 MR. MORTON: Just changed his story on
12 September 25th, 2001.

13 THE COURT: Right, and Mr. Morin asked him about that.

14 MR. MORTON: Oh, yes, sir.

15 THE COURT: Okay. Go ahead.

16 MR. MORTON: What it was---

17 THE COURT: What I'm saying is Mr. Morin's
18 cross-examination indicated that his story had only changed
19 weeks before the trial.

20 MR. MORTON: Yes, sir.

21 THE COURT: Okay. And all the statements he made prior
22 to that time had been something different.

23 MR. MORTON: Which was not very clearly presented.

24 THE COURT: All right. Well---

25 MR. MORTON: Which would be the reason that I, we

1 submit that Mr. Morin was ineffective in that he didn't
2 call, as a witness, Mr. Mabry.

3 THE COURT: Yeah, but this motion is about recusal of
4 Mr.---

5 MR. MORTON: Yes, sir.

6 THE COURT: ---of I think---

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

8 THE COURT: ---the Attorney General's Office.

9 MR. MORTON: Yes, sir.

10 THE COURT: Okay.

11 MR. MORTON: So, our position is that Mr. Morin should
12 have called Mr. Mabry as a witness, and that now we have to
13 do that, which we plan on doing is to call Mr. Mabry as a
14 witness to tell the Court what Mr. Moore told him three or
15 four, what Mr. Gibson told him three or four days after this
16 incident.

17 THE COURT: All right.

18 MR. MORTON: I wanted to raise it for Your Honor. As
19 far as, you know -- you know, and our position, judge, is we
20 wanted to put it on the record. Okay. This is a death
21 penalty case, and I know I'm not telling the Court anything
22 that the Court doesn't know. We believe that Mr. Mabry, in
23 his capacity to now defend the actions of Mr. Morin and
24 Mr. Kelly, is put in a difficult situation in that he, there
25 may be an inclination or someone could later argue that

1 there was an inclination to, if he's a witness for -- if we
2 call him as a witness, is there a conflict in that Mr. Mabry
3 represents the actions of Mr. Morin and Kelly for not
4 calling himself as a witness to this trial?

5 THE COURT: All right. Let me hear from the State.

6 MR. MORTON: Your Honor, I want to finish up.

7 THE COURT: Yes, sir.

8 MR. MORTON: The reason it's so important is this whole
9 res gestae thing. Mr. Gibson is so---

10 THE COURT: Well, I understand very clearly that this
11 provided the motive --

12 MR. MORTON: Yes, sir.

13 THE COURT: -- that the State relied on in trial. I
14 understand that.

15 MR. MORTON: Yes, sir.

16 THE COURT: And my, my focus is on Mr. Mabry's
17 participation in the development of that story --

18 MR. MORTON: Yes, sir.

19 THE COURT: -- and whether or not he has some conflict.

20 MR. MORTON: Yes, sir.

21 THE COURT: And, quite frankly, so far it appears he
22 stayed on the same side of that argument. I do understand
23 your point about the fact that this inquiry is about the
24 effectiveness of counsel.

25 MR. MORTON: Yes, sir.

1 THE COURT: And I do understand that there, that may
2 change the inquiry somewhat, and I want to hear from the
3 State on that.

4 MR. MORTON: Yes, sir.

5 THE COURT: All right. Yes, sir.

6 MR. SALTER: Your Honor, obviously Mr. Mabry can make,
7 you know, any statements concerning the conversations that
8 he had, why, why he had the conversations, et cetera. But
9 under Rule 3.7 of the Rules of Conduct, the lawyer should
10 not act, act as an advocate in a trial when she is likely to
11 be a necessary witness unless the testimony relates to an
12 uncontested issue. I'll try to be very succinct.

13 That's our position. It's not contested that on
14 September, the morning of September 16th, Mr. Gibson gave
15 his statement. The statement was essentially as Mr. Morton
16 has said. He said that Mr. Moore came by asking him to take
17 him to the hospital. He refused because Mr. Moore,
18 Mr. Moore was bleeding. He didn't want to get involved.

19 Mr. Mabry, thereafter, three days later, went out and
20 had a conversation. It came out during the trial, as Your
21 Honor's already pointed out, it came out during the trial
22 that three days or five days after, after the incident he
23 was interviewed by somebody in the solicitor's office and
24 an, and an investigator. At that time there was obviously
25 no change because that was the whole point of Mr. Morin's

1 motion, that they, the State, had this change in September
2 of 2001.

3 So, we'll stipulate, throughout that entire time
4 period, he was not saying anything different than what he
5 said initially. He being Mr. Gibson. This was, in fact --
6 we submit it was effectively used both in cross-examination
7 and then later more so even in closing argument to impeach
8 the witness' credibility.

9 The jury was familiar, well aware of the fact that
10 Mr. Gibson had made, as Mr. Morton has described it, an
11 eleventh hour change in testimony. In a nutshell, that's
12 our position.

13 THE COURT: Yes, sir.

14 MR. MORTON: Your Honor, if I, if I may clarify, on
15 Page 1260 and on Page 1261 of the testimony, under redirect
16 testimony from, by Mr. Barnette, the implication I think can
17 be made that Mr. Gibson had, in fact, told Mr. Mabry exactly
18 what he's telling the Court on October the 18th of 2001.

19 THE COURT: You better quote that to me.

20 MR. MORTON: All right. On page -- on redirect
21 examination, Mr. Gibson, you gave a written statement the
22 night this happened?

23 Yes, sir.

24 When's the next time you talked to somebody about this?
25 About three days later.

1 Jumping, jumping down to Line 14.

2 The investigator and the solicitor stopped by and asked
3 me, you know, about three or four days later, about two or
4 three days later I think. In fact, it wasn't long. That
5 was, you know, it was just a brief statement, a brief
6 moment, you know, stop by and then this time. That's it.

7 When was the next time you talked to anybody else about
8 that case?

9 The 25th of September of 2001.

10 Bottom of Page 1260.

11 And the time that you are talking about happened two or
12 three days afterwards. Were any of us three solicitors that
13 was -- were any of us solicitors that came and talked to you
14 three or four days later?

15 Really, I'm going to be honest with you, all I remember
16 is a policeman. He's the only one I remember. Hot, the
17 windows were rolled up. But, you know, it's three gentlemen
18 in the car and they said they were with the Solicitor's
19 office. So, you know, that's the only one I recognize at
20 the time.

21 Thank you, Mr. Gibson.

22 Had Mr. Morin known of Mr. Mabry's, of Mr. Gibson's
23 statement to Mr. Mabry, that could of been cleared up
24 because, to me, the implication that the solicitor, on
25 redirect examination, was trying to make up about Mr.

1 Gibson's follow-up statement three or four days after that
2 was that it was, in fact, consistent with what he was
3 telling the Court on October the 18th of 2001. If you
4 read it the other way, which I certainly think the
5 interpretation on redirect by Mr. Barnette, this wasn't
6 cross-examination, this is a point that Mr. Barnette was
7 raising to Mr. Gibson, that you, in fact, talked to us three
8 or four days after this thing. The implication being that
9 he told us what he is telling us now.

10 Mr. Morin did not cross-examine Mr. Gibson because he
11 didn't know about Mr. Mabry, about his statement to
12 Mr. Mabry. Our point is, Your Honor, that should of been
13 memorialized. It should of been turned over to the State as
14 part, turned over to the defense as part of the Brady
15 motion, and at which point Mr. Mabry, Mr. Morin would have
16 had a statement from Mr. Mabry.

17 THE COURT: well, now I'm not sure about -- maybe it's
18 your opinion it should of memorialized. I've tried a lot of
19 cases where statements are taken from defendants that are
20 not memorialized. That happens quite often---

21 MR. MORTON: I understand.

22 THE COURT: ---with witnesses.

23 MR. MORTON: And, and any---

24 THE COURT: I don't know of a requirement, under the
25 law---

1 MR. MORTON: Yes, sir.

2 THE COURT: ---that anything has to be written down by
3 the---

4 MR. MORTON: Yes, sir.

5 THE COURT: ---investigators of the prosecution.

6 MR. MORTON: No doubt, yes, sir.

7 THE COURT: So, I understand that's your position.

8 MR. MORTON: Okay.

9 THE COURT: But---

10 MR. MORTON: Well, in a perfect world. But I
11 understand that too, and that's not the point---

12 THE COURT: Well, I guess, I guess I'm gonna get back
13 to the point the State made though.

14 What about Mr. Mabry's meeting with Mr. Gibson is
15 contested?

16 I mean so far all's I've heard is that everyone agreed
17 it happened. Everyone has agreed that, at that point in
18 time, Mr. Gibson basically confirmed his prior written
19 statement, sworn statement to the police. I'm trying to
20 find out what's contested about that, those facts, and I
21 haven't heard anything yet.

22 MR. MORTON: I don't, I don't think that Mr. Morin knew
23 what Mr. Gibson's statement to Mr. Mabry was. I don't know
24 that he knew the context in which it was made.

25 THE COURT: Well, the questioning during trial I think

1 indicates otherwise, that, that he, and his argument -- his
2 whole argument to Judge Clary that caused the proffer was
3 that he just, this, that the story just changed. He was
4 just aware of this, and that's the way I read it. Now,
5 maybe I'm missing something.

6 MR. MORTON: Your Honor?

7 THE COURT: Wasn't that his argument to Judge Clary?

8 MR. MORTON: Yes, sir, it was his argument. There's no
9 question that was his argument. But it is so important, in
10 this case, Mr. Gibson's statements and what Mr. Gibson is
11 saying about the whole motive for this shooting is the most
12 important thing in this case, and the facts---

13 THE COURT: I'm not, I'm not saying it's not important.
14 What I'm saying is that if you look at Rule 3.7 --

15 MR. MORTON: Yes, sir.

16 THE COURT: -- it talks about an attorney testifying in
17 a case in which he's participating as an advocate, and in
18 that it says that he can continue to participate as an
19 advocate if the testimony relates to an uncontested matter.
20 Now, I'm trying to find out what's contested about what was
21 said on that date.

22 MR. MORTON: Your Honor?

23 THE COURT: You took Mr. Gibson's deposition---

24 MR. MORTON: Yes, sir.

25 THE COURT: ---recently?