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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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Appeal from Horry County Court of Common Pleas
The Honorable William H. Seals, Circuit Court Judge

---

Appellate Case No. 2018-000054

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Theodore Wills, Jr.,.....Petitioner,

v.

State of South Carolina,.....Respondent.

---

# APPENDIX

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# Horry County Courthouse
## RANDOM STRIKE SHEET

JUDGE NAME : John, Steven
TRIAL TYPE : Criminal
PANEL ID : JOHN
COURTROOM JAR

DESCRIPTION : JOHN

Sorted by: Random Nbr
Trial

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 24 | Holmes, Kimberly N | 140 | B | F | (✓) | (✓) ( ) | ✓ |
| 25 | Hill, Robert D | 136 | W | M | (✓) | (✓) ( ) | |
| 26 | Proehl, Eugenia J | 249 | W | F | (✓) | (✓) ( ) | ✓ |
| 27 | Zimpleman, Thomas A | 356 | W | M | (✓) | (✓) ( ) | ✓ |
| 28 | Martin, Howard Tony | 200 | W | M | (✓) | (✓) ( ) | |
| 29 | George, Michael T | 106 | W | M | (✓) | (✓) ( ) | ✓ |
| 30 | Stewart, Vanessa L | 298 | W | F | ( ) | ( ) ( ) | |
| 31 | Thomas, Clyde R | 308 | W | M | ( ) | ( ) ( ) | |
| 32 | Allen, Vollie C | 2 | W | M | ( ) | ( ) ( ) | |
| 33 | Harrelson, Sherry A | 125 | W | F | ( ) | ( ) ( ) | |
| 34 | Rabon, Savannah J | 322 | W | F | ( ) | ( ) ( ) | |
| 35 | Moore, James A | 220 | W | M | ( ) | ( ) ( ) | |
| 36 | Williams, Tina M | 345 | B | F | ( ) | ( ) ( ) | |
| 37 | Williamson, Rebecca A | 346 | W | F | ( ) | ( ) ( ) | |
| 38 | Booth, David E | 21 | W | M | ( ) | ( ) ( ) | |
| 39 | Earl, Washington C | 82 | W | M | ( ) | ( ) ( ) | |
| 40 | Varela, Gregory | 325 | W | M | ( ) | ( ) ( ) | |

**Total Number of Jurors:** 40

*** END OF REPORT ***

TRIAL #1

# Horry County Courthouse
## RANDOM STRIKE SHEET

SET ASIDE 2

JUDGE NAME : John, Steven
TRIAL TYPE : Criminal
PANEL ID : JOHN
COURTROOM JAR

DESCRIPTION : JOHN

Sorted by: Random Nbr
Trial

| | NAME | NBR | RACE | SEX | | | | REMARKS |
|---|---|---|---|---|---|---|---|---|
| 1 | Spivey, Lauretta C | 292 | W | F | (✓) | (✓) | ( ) | ✓ |
| 2 | Greenwald, Keith B | 119 | W | M | (X1) | ( ) | ( ) | |
| 3 | Jordan, April O | 164 | W | F | (✓) | (X J) | ( ) | |
| 4 | Lagaly, Kathleen A | 179 | W | F | (✓) | (X2) | ( ) | |
| 5 | Smith, Mary E | 286 | B | F | (✓) | (✓) | ( ) | ✓ |
| 6 | Mahoney, Wesley W | 194 | W | M | (✓) | (✓) | (✓) | ✓ |
| 7 | Carroll, Mace | 40 | W | M | (✓) | (X3) | ( ) | |
| ~~8~~ | ~~Bellamy, Stephanie R~~ | ~~11~~ CIVIL | ~~B~~ | ~~F~~ | ~~(.)~~ | ~~( )~~ | ~~( )~~ | |
| 9 | Earl, Washington C | 82 | W | M | (✓) | (X4) | ( ) | |
| 10 | Gollins, Tracey M | 55 | W | F | (✓) | (✓) | ( ) | ✓ |
| 11 | Furtick, Degwanda W | 101 | B | F | (✓) | (✓) | ( ) | ✓ |
| 12 | Henry, John L | 133 | B | M | (✓) | (✓) | ( ) | ✓ |
| 13 | Hughes, Samuel M | 146 | W | M | (✓) | (X5) | ( ) | |
| 14 | Weber, Lucille M | 333 | W | F | (✓) | (✓) | ( ) | ✓ |
| 15 | Duvall, David N | 80 | W | M | ( ) | ( ) | ( ) | |
| 16 | Hardwick, Rose B | 124 | W | F | (✓) | (✓) | ( ) | ✓ |
| 17 | Winningham, Faye C | 351 | W | F | (✓) | (✓) | ( ) | ✓ |
| 18 | Holmes, Kimberly N | 140 | B | F | (✓) | (✓) | ( ) | ✓ |
| 19 | Boward, Jack A | 24 | W | M | (✓) | (X6) | ( ) | |
| 20 | Gabriel, Laurie A | 102 | W | F | (✓) | (X7) | ( ) | |
| 21 | Martin, Howard Tony | 200 | W | M | (✓) | (X8) | ( ) | |
| 22 | Moore, James A | 220 | W | M | (✓) | (✓) | ( ) | ✓ |
| 23 | Allen, Vollie C | 2 | W | M | (✓) | (X9) | ( ) | |

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CALL OF CASE



THE COURT: ALL RIGHT, LADIES AND GENTLEMEN, WHAT WE'RE GOING TO DO IS WE'RE GOING TO PICK THE JURY FOR A COUPLE OF CASES. WE'LL PICK A JURY FOR A CIVIL CASE AND A CRIMINAL CASE. THE CLERK WILL NEED A LITTLE BIT OF TIME TO GET THAT ORGANIZED AND I ALSO NEED TO TALK TO JUDGE BAXLEY AS TO, IF HE'S GOING TO HAVE THE JURY REPORT THIS AFTERNOON OR IF HE NEEDS THEM RIGHT NOW, SO I NEED TO COMMUNICATE WITH JUDGE BAXLEY ABOUT THAT, SO IF YOU'LL GIVE US ABOUT TEN MINUTES OR SO, BE BACK IN YOUR SEATS IN ABOUT TEN MINUTES AND THEN WE'LL GET STARTED AGAIN, THANK YOU VERY MUCH.

(WHEREUPON, A RECESS WAS TAKEN AND THE FOLLOWING TAKES PLACE ON THE RECORD FOLLOWING THE RECESS.)

THE COURT: WE'RE GOING TO SELECT THE JURY IN THE CRIMINAL TRIAL OR THE CRIMINAL COURT MATTER FIRST BEFORE WE GO INTO THE SEPARATING THE JURIES OUT FOR POTENTIALLY BEING ON A JURY IN CIVIL COURT.

THE PROCESS THAT WE'RE GOING TO USE IS I'M GOING TO AGAIN BE ASKING YOU SOME QUESTIONS. NOW THESE ARE A LITTLE BIT MORE SPECIFIC QUESTIONS, SOME OF THEM, THOUGH, ARE GENERAL IN NATURE. ONCE AGAIN IF THE QUESTION PERTAINS TO YOU I'LL NEED FOR YOU TO STAND, TELL US YOUR NAME AND YOUR JUROR NUMBER, PLEASE.

THE FIRST THING THAT I'M GOING TO DO IS READ TO YOU SOME ALLEGATIONS THAT ARE CONTAINED IN THE INDICTMENT

AND I'M GOING TO TELL YOU FIRST THE INDICTMENT IS NOT EVIDENCE, CANNOT BE CONSIDERED BY ANYONE AS EVIDENCE IN THE CASE. IT IS THE CHARGING DOCUMENT, THE DOCUMENT WHICH BRINGS THE MATTER TO COURT. IN FACT THE ONLY REASON I'M READING IT TO YOU IS TO SEE IF YOU MIGHT HAVE SOME INFORMATION OR THERE MIGHT BE SOMETHING YOU NEED TO BRING TO THE COURT'S ATTENTION BECAUSE OF THE ALLEGATIONS THAT THE COURT WILL READ TO YOU IN THE INDICTMENT.

NOW, I'M SORRY, BEFORE WE GET STARTED, MR. DIGGS AND MR. RICHARDSON, COULD YA'LL COME TALK TO ME FOR ONE SECOND.

(WHEREUPON, A BENCH CONFERENCE WAS HELD OFF THE RECORD IN THE PRESENCE OF THE JURY PANEL, BUT OUT OF THE HEARING OF THE JURY PANEL AND THE COURT REPORTER.)

(WHEREUPON, THE FOLLOWING TAKES PLACE AFTER QUALIFICATION OF THE JURY VENIRE, AFTER SELECTION OF THE JURY PANEL FOR THE TRIAL OF THIS PARTICULAR CASE. A HORRY COUNTY RANDOM STRIKE SHEET WAS PREPARED DURING SELECTION OF THE JURY PANEL AS TO THE MAKE UP OF THE JURY PANEL AND THE FORM IS ATTACHED HERETO.)

THE COURT: LADIES AND GENTLEMEN OF THE JURY THAT POTENTIALLY WAS SELECTED IN THIS CASE, MADAM BAILIFF, IF YOU'LL TAKE THEM TO THE JURY ROOM AND YA'LL SIT THERE FOR A FEW MOMENTS AND I'VE GOT TO HEAR SOMETHING FROM THE ATTORNEYS AND YA'LL GO AHEAD.

(WHEREUPON, THE JURY RETIRED TO THE JURY ROOM AT 11:55 A.M.)

THE COURT: LADIES AND GENTLEMEN OF THE JURY PANEL, JURY VENIRE AS A WHOLE THAT WERE NOT SELECTED IN THIS PARTICULAR CASE, THERE ARE SOME MATTER I HAVE TO HEAR OUTSIDE OF YOUR PRESENCE. I KNOW THAT'S GOING TO BE AN INCONVENIENCE FOR YOU BUT I'M GOING TO HAVE YA'LL EXIT THE COURTROOM AND STAY IN THE HALLWAY. THERE'S SOME JUROR WAITING ROOMS; THERE'S SOME OFFICES, YA'LL CAN GO IN THOSE OUT THERE BUT, PLEASE, DO NOT GO ANYWHERE BECAUSE THE DEPUTIES WILL BE CALLING YOU BACK IN ABOUT FIVE OR TEN MINUTES SO DON'T GO ANYWHERE, PLEASE, THANK YOU.

(WHEREUPON, THE JURY VENIRE WERE EXCUSED AT 11:57 A.M.)

THE COURT: SOLICITOR, I UNDERSTAND YOU HAVE A MOTION FOR THE COURT AT THIS POINT IN TIME.

MR. RICHARDSON: YES, YOUR HONOR. YOUR HONOR, I HAVE TO OBJECT TO THE MAKE UP OF THE JURY. THE STRIKES APPEAR TO BE, LET'S SEE I'VE GOT NINE STRIKES HERE BY THE DEFENSE, ALL OF THEM APPEAR TO BE WHITE, THREE FEMALE, SIX MALE.

THE COURT: ALL RIGHT, SIR.

MR. RICHARDSON: FULL REVERSE BATSON.

THE COURT: SO AT THE PRESENT TIME YOU ARE CHALLENGING THE SELECTION PROCESS ---

MR. RICHARDSON: THAT'S CORRECT, YOUR HONOR.

THE COURT: --- EXERCISED BY THE DEFENSE AND THE COURT IS REQUIRED TO HOLD A BATSON HEARING WHEN MEMBERS OF A COGNIZABLE RACIAL GROUP OR GENDER ARE STRUCK AND THE OPPOSING PARTY REQUEST A HEARING WHICH HAS BEEN REQUESTED, THEREFORE, AT THIS POINT IN TIME, MR. DIGGS, I AM GOING TO REQUIRE OF YOU TO PRESENT A RACE NEUTRAL EXPLANATION FOR THE STRIKING OF AND I WILL GO OVER THE JURORS AT THIS POINT IN TIME WITH YOU.

NUMBER 164, APRIL O. JORDAN, A WHITE FEMALE,

JUROR NUMBER 179, KATHLEEN A. LAGALY, A WHITE FEMALE,

MR. DIGGS: YOUR HONOR, COULD YOU SLOW DOWN JUST A -- OKAY.

THE COURT: ALL RIGHT, SIR.

JUROR NUMBER 40, MACE CARROLL, A WHITE MALE,

JUROR NUMBER 82, WASHINGTON EARL, A WHITE MALE,

JUROR NUMBER 146, SAMUEL HUGHES, A WHITE MALE,

JACK BOWARD, JUROR NUMBER 24, A WHITE MALE,

MR. DIGGS: I'M SORRY, WHICH ONE?

THE COURT: THAT WAS JUROR NUMBER 24, JACK BOWARD, A WHITE MALE,

JUROR NUMBER 102, LAURIE GABRIEL, A WHITE FEMALE, LAURIE GABRIEL, A WHITE FEMALE,

JUROR NUMBER 200, HOWARD MARTIN, A WHITE MALE,

JUROR NUMBER 2, VOLLIE ALLEN, A WHITE MALE,

AND ALSO JUROR NUMBER 357, RONALD ZWINGELBERG, A WHITE MALE.

AND AS YOU EXERCISED A STRIKE IN THE SELECTION OF THE ALTERNATE, THAT WAS JUROR NUMBER 353, EDWARD YELENAC, A WHITE MALE.

ALL RIGHT, WE'LL START OFF WITH JUROR NUMBER 164, APRIL O. JORDAN, A WHITE FEMALE, YOUR ---

MR. DIGGS: YOUR HONOR, INITIALLY I'D LIKE TO STATE FOR THE RECORD THAT MOST OF THE JURORS, IF NOT ALL OF THEM, THERE WAS A DISCUSSION COLLECTIVELY BETWEEN MYSELF, MR. WILLS, AND MY PARALEGAL, MS. BUFORD, WHO SAT IN THE COURTROOM THROUGHOUT THE QUALIFICATION PROCESS AND THERE WERE ONLY ONE, THERE WAS ONLY ONE JUROR, THAT I RECALL, WHERE I SPECIFICALLY ALONE KIND MADE A DECISION ON MY OWN TO DISQUALIFY, THAT WAS NUMBER 146; AND I'LL COME BACK IN THE ORDER THAT YOUR HONOR CALLED, BUT I DID THAT BECAUSE I DIDN'T HAVE ANY INFORMATION. I HAD MISSED THE INFORMATION ON THAT JUROR WHEN HE STOOD UP AND PROVIDED THE INFORMATION TO THE COURT SO I DIDN'T REALLY HAVE ANYTHING TO GO BY AND RATHER THAN ---

THE COURT: WELL YOU CERTAINLY KNOW AND THIS COURT HAS DONE IN, IN THE PAST, IF YOU DON'T KNOW ANYTHING YOU JUST NEED TO ASK.

MR. DIGGS: WELL ---

THE COURT: AND I APPRECIATE THAT, BUT YOUR REASON, YOUR REASON FOR STRIKING JUROR NUMBER 146 IS FOR WHATEVER REASON YOU MISSED THE JUROR INFORMATION?

MR. DIGGS: YOUR HONOR, AND ALSO HE WAS AN OLDER MAN AND HE STRUCK ME AS BEING AN INDIVIDUAL THAT WOULD, THAT HAD POTENTIALLY THE ABILITY TO BE A STRONG LEADER IN THE CASE AND BECAUSE I DIDN'T KNOW VERY MUCH ABOUT HIM I DIDN'T WANT TO RISK IT.

THE COURT: ALL RIGHT, SIR, SO THE TWO REASONS THAT YOU'RE GIVING ME IS NO JUROR INFORMATION AND HE WAS AN OLDER MAN WAS THE TWO REASONS?

MR. DIGGS: HE GAVE ME THE IMPRESSION OF BEING A LEADER, YOUR HONOR, IN A SITUATION WHERE I DIDN'T REALLY KNOW ANYTHING ABOUT HIM.

THE COURT: ALL RIGHT, SIR.

MR. DIGGS: NOW, I'M SORRY, WHAT WAS THE NEXT?

THE COURT: ALL RIGHT, THE FIRST ONE THAT YOU STRUCK WAS APRIL O. JORDAN, JUROR NUMBER 164, WHITE FEMALE?

MR. DIGGS: YOUR HONOR, WHEN WE, I BELIEVE, THIS IS THE LADY THAT APPROACHED THE BENCH NOT ---

THE COURT: A LOT OF PEOPLE HAVE APPROACHED THE BENCH, MR. DIGGS.

MR. DIGGS: YOUR HONOR, IF I REMEMBER CORRECTLY THERE WAS A QUESTION THAT SHE HAD ASKED ABOUT WHETHER SHE KNEW ONE OF THE WITNESSES OR NOT. SHE SIMPLY STRUCK ME AT

THAT POINT AS BEING ALSO A STRONG OPINION OPINIONATED INDIVIDUAL THAT, THAT WE WOULD PREFER NOT TO HAVE ON THE JURY IN THIS PARTICULAR SITUATION.

THE COURT: ALL RIGHT, SIR. ALL RIGHT, THE NEXT ONE IS JUROR NUMBER 179, A WHITE FEMALE?

MR. DIGGS: YOUR HONOR, MS. BUFORD DIDN'T LIKE HER AND MR. WILLS DIDN'T HAVE A STRONG FEELING ONE WAY OR THE OTHER SO I DEFERRED TO MS. BUFORD'S —

THE COURT: ALL RIGHT, SO ---

MR. DIGGS: --- IMPRESSION.

THE COURT: ALL RIGHT, SO ---

MR. DIGGS: IMPRESSION.

THE COURT: ALL RIGHT, SO THE RACE NEUTRAL EXPLANATION THAT YOU'RE GIVEN ME IS YOUR ASSISTANT DIDN'T LIKE THE PERSON'S APPEARANCE?

MR. DIGGS: RIGHT, DIDN'T ---

THE COURT: OKAY.

MR. DIGGS: DIDN'T, SHE DIDN'T LIKE THE OVERALL IMPRESSION THAT SHE WAS GETTING FROM THAT PARTICULAR JUROR.

THE COURT: ALL RIGHT, THE NEXT ONE, JUROR NUMBER 40, WHITE MALE?

MR. DIGGS: YOUR HONOR, THIS WAS, THIS INDIVIDUAL WAS IN AN AGE GROUP, HE WAS A MALE IN AN AGE GROUP THAT I DIDN'T FEEL WOULD FIT ON THIS PARTICULAR CASE. I FELT --

THE COURT: GO AHEAD.

MR. DIGGS: AN OPINIONATED INDIVIDUAL, YOUR HONOR, THAT I DIDN'T FEEL COMFORTABLE WITH PUTTING ON THE JURY AND THAT'S THE REASON THAT I STRUCK HIM FOR THE STRIKE.

THE COURT: ALL RIGHT, SO MR. MACE, I'M JUST GOING TO PUT THESE BIRTHDAYS DOWN SINCE IT MAY BECOME AN ISSUE HERE, HE WAS BORN IN 1948, SO YOU'RE TELLING ME AN INDIVIDUAL BORN IN 1948 IS TOO OLD FOR YOU; IS THAT WHAT YOU'RE TELLING ME?

MR. DIGGS: YOUR HONOR, IN THIS SITUATION I'M SAYING THAT'S THE CASE BUT IT'S CERTAINLY NOT THE CASE IN EVERY TRIAL.

THE COURT: ALL RIGHT, FOR YOUR REASON FOR STRIKING THIS INDIVIDUAL IN THIS PARTICULAR CASE IS --

MR. DIGGS: AN OLDER, HE WAS AN OLDER INDIVIDUAL.

THE COURT: HE'S A WHITE MALE BORN IN 1948.

MR. DIGGS: AND I DIDN'T WANT TO, I DIDN'T WANT THAT KIND OF EXPERIENCE COMING IN DRIVING THE JURY IN THIS SITUATION.

THE COURT: ALL RIGHT, SIR.

MR. DIGGS: THAT PARTICULAR INDIVIDUAL.

THE COURT: ALL RIGHT, SIR, THE NEXT ONE IS JUROR NUMBER 82, A WHITE MALE?

MR. DIGGS: YOUR HONOR, THERE WAS A COLLECTIVE DECISION MADE IN THAT CASE BY THE THREE OF US TO NOT SEAT HIM ON THE JURY. HE'S AN OLDER INDIVIDUAL. HE'S YOUNGER, OF COURSE, THAN MR. MACE OR MR. CARROLL, BUT AGAIN HE KIND OF FELL INTO THAT SITUATION AND IN THAT CATEGORY WHERE YOU'VE GOT THESE OLDER MEN THAT, THAT TEND TO BE ABLE TO BE IN A POSITION TO TAKE OVER THE JURY ROOM AND FOR THAT REASON, AND I UNDERSTAND WE PUT, APPROVED ANOTHER INDIVIDUAL IN THE SIMILAR CATEGORY.

THE COURT: WE'LL GET TO THAT, LET'S, WE JUST NEED TO ---

MR. DIGGS: THIS INDIVIDUAL WE, WE STRUCK HIM.

THE COURT: ALL RIGHT, SIR.

MR. DIGGS: BECAUSE HE WAS AN OLDER MAN CAPABLE IN MY OPINION OF DRIVING THE JURY.

THE COURT: ALL RIGHT, SIR, HE WAS BORN IN 1953 FOR THE RECORD SO HE'S OLDER AND A WHITE MALE.

ALL RIGHT, THE NEXT ONE THAT WE HAVE, LET'S SEE, WE'VE TALKED ABOUT JUROR NUMBER 146, WE MIGHT AS WELL ESTABLISH THAT JUROR'S AGE, HE WAS BORN IN 1949.

THE, LET'S GO THE FEMALES THAT YOU STRUCK, LET'S SEE THAT'S 164, 164 WAS BORN IN 1974,

THE OTHER WHITE FEMALE 179 WAS BORN IN 1964.

ALL RIGHT, THE NEXT WHITE MALE YOU STRUCK WAS JUROR NUMBER 24, YOUR REASONS FOR JUROR NUMBER 24?

MR. DIGGS: YOUR HONOR, HE'S A RETIRED STEEL WORKER, AN OLDER GENTLEMAN, AND AGAIN I DIDN'T WANT, HE, HE APPEARED, HE HAD A VERY GOOD PRESENCE, JUST PRESENTED HIMSELF VERY WELL IN COURT, I DIDN'T WANT AN OLDER GENTLEMAN DRIVING THIS JURY AND POTENTIALLY DOMINATING WITH HIS PERSONALITY AND FOR THAT REASON WE STRUCK HIM.

THE COURT: ALL RIGHT, FOR THE RECORD THAT INDIVIDUAL WAS BORN IN 1936.

ALL RIGHT, THE NEXT ONE WAS A WHITE FEMALE, JUROR NUMBER 102.

THE COURT: YOUR HONOR, SHE'S A REALTOR AND AGAIN AN OLDER INDIVIDUAL EXPERIENCE, I JUST, I DIDN'T WANT HER IN A POSITION OF BEING ABLE TO DRIVE THE JURY BASED ON HER, PRIMARILY HER PROFESSION AND, YOU KNOW, SHE'S, SHE'S AN OUTWARD GOING INDIVIDUAL, OPINIONATED, STRONG PERSON. I DIDN'T WANT HER ON THE JURY IN THIS PARTICULAR CASE.

THE COURT: ALL RIGHT, FOR THE RECORD SHE WAS BORN IN 1956 AND YOUR REASONS BEING SHE'S AN OLDER LEADER, ALL RIGHT.

MR. DIGGS: YES, SIR, SHE WORKS IN REAL ESTATE INDUSTRY.

THE COURT: ALL RIGHT, THE NEXT ONE IS A WHITE MALE, JUROR NUMBER 200?

MR. DIGGS: YOUR HONOR, HE'S A FIREFIGHTER AND HIS BROTHER WAS A VICTIM OF A CRIME AND FOR THAT REASON WE

HAD CHALLENGED HIM OR MADE A MOTION TO STRIKE. IN MY OPINION IN THIS CASE THE FIREFIGHTER IS VERY CLOSE TO BEING A LAW ENFORCEMENT OFFICER.

THE COURT: ALL RIGHT, SIR, NEXT WHITE MALE WAS JUROR NUMBER 2?

MR. DIGGS: YOUR HONOR, WE DIDN'T KNOW PARTICULARLY WHAT HE HAD DONE IN THE PAST. HE, HE WAS AN OLDER WHITE MALE OR AN OLDER MALE. HE WAS RETIRED FROM THE CITY OF MYRTLE BEACH BUT I, I WASN'T ABLE TO ASK AND AGAIN, YOUR HONOR, I'M NOT BLAMING YOU, I'M BLAMING MYSELF, I DIDN'T FOLLOW UP AND ASK SPECIFICALLY WHAT IT WAS THAT HE DID FOR THE CITY BUT BECAUSE OF THE POSSIBILITY HE COULD HAVE BEEN INVOLVED IN LAW ENFORCEMENT OR SOMETHING OF THAT NATURE WE STRUCK HIM.

THE COURT: OKAY, WELL I MEAN WE DID ASK THE QUESTION ABOUT LAW ENFORCEMENT SO IT'S CLEAR HE WASN'T INVOLVED IN LAW ENFORCEMENT OR CAUSE HE WAS UNDER OATH AT THE TIME AND DID NOT RESPOND TO THE LAW ENFORCEMENT QUESTION.

MR. DIGGS: YOUR HONOR, THE BASICALLY IT'S THE SAME WITH HIM AS IT WAS WITH THE JUROR 146.

THE COURT: ALL RIGHT, SIR.

MR. DIGGS: I JUST DIDN'T KNOW ENOUGH ABOUT HIM.

THE COURT: ALL RIGHT, SIR, THE NEXT ONE WAS MR. ZWINGELBERG, JUROR NUMBER 357, WHITE MALE?

MR. DIGGS: I WANTED, ALL RIGHT, LET ME MAKE SURE, WE, DID WE STRIKE HIM?

THE COURT: YES, SIR.

MR. DIGGS: OKAY, IT'S ONLY BECAUSE MS. ---

THE COURT: THAT'S WHEN WE GOT TO THE ALTERNATES. NOW HE WAS THE FIRST, THE FIRST ONE TO BE AN ALTERNATE.

MR. DIGGS: YEAH, WE WERE, I, I THOUGHT WE SAT HIM TO BE HONEST WITH YOU.

THE COURT: NO, WE SAT JOELLA MOHR, A WHITE FEMALE AND STEVE RUTLEDGE, A BLACK MALE. THE TWO ALTERNATES YOU STRUCK WERE MR. —

MR. DIGGS: RIGHT.

THE COURT: --- ZWINGELBERG, A WHITE MALE, AND MR. YELENAC, A WHITE MALE.

MR. DIGGS: YEAH, I THINK IT WAS, WE, WE KNEW THAT THIS MAN, THIS GENTLEMAN JUROR 357 RAN AN AD AGENCY AND HIS WIFE WORKS THERE. I, I THOUGHT HE WOULD BE A GOOD JUROR AND I WAS GOING PUT HIM ON THE JURY BUT MR. WILLS AND MS. BUFORD OUTVOTED ME, YOUR HONOR. THEY ---

THE COURT: ALL RIGHT, SIR, SO YOUR CLIENT DID NOT, DID NOT LIKE HIM, DID HE GIVE YOU A REASON WHY?

MR. DIGGS: HE DIDN'T MAKE A STATEMENT ABOUT WHY, YOUR HONOR.

THE COURT: ALL RIGHT, SIR, THANK YOU. ALL

RIGHT, AND THEN THE OTHER ALTERNATE YOU STRUCK WAS EDWARD YELENAC, JUROR NUMBER 353?

MR. DIGGS: HE, HE ALSO HAD, HE WAS THE CLASSIC JUROR THAT WE WERE TRYING TO STAY FROM IN THIS CASE, YOUR HONOR. HE WAS AN OLDER GENTLEMAN. HE STRUCK ME AS, AS BEING A DRIVING PERSONALITY. HE HAS FAMILY, IF NOT HIMSELF, I THINK HIS BROTHER WAS RETIRED LAW ENFORCEMENT OFFICER AND SO JUST FOR THAT REASON WE, WE DIDN'T WANT HIM ON THE JURY.

THE COURT: ALL RIGHT, SIR.

MR. DIGGS: GIVEN, GIVEN OUR DRUTHERS.

THE COURT: ALL RIGHT, AND IT'S YOUR RESPONSIBILITY NOW, MR. RICHARDSON, AT THIS POINT IN TIME ALL MR. DIGGS HAS TO DO IS GIVE A RACE NEUTRAL EXPLANATION.

MR. RICHARDSON: OR RACIAL.

THE COURT: RACIAL GENDER NEUTRAL EXPLANATION AND IT'S NOW YOUR RESPONSIBILITY TO SHOW THAT THE EXPLANATION GIVEN WAS A MERE PRETEXT AND I ASSUME FROM YOUR ARGUMENT THERE WAS A MERE PRETEXT TO STRIKE WHITE MALES OR WHITE INDIVIDUALS, I'M SORRY.

MR. RICHARDSON: THANK YOU, YOUR HONOR, MAY IT PLEASE THE COURT. YOUR HONOR, I HEARD A WHOLE LOT OF OPINIONATED OLDER ARGUMENT. AS FAR AS THAT BEING PRETEXT LET'S SEE WE HAVE JUROR NUMBER 292 WAS SAT. SHE WAS BORN IN 1948, SHE'S A WHITE FEMALE.

BLACK FEMALE BORN IN 1950 WAS THE SECOND JUROR SET.

JUROR NUMBER 133 BORN IN 1963, SO I DON'T KNOW WHERE THE AGE CUT OFF IS ON THAT, BUT IT BEING ABOUT THE 45 YEAR OLD AGE IF I, OR 44 YEAR OLD AGE RIGHT NOW, HE WAS SIT, HE WAS THE SIXTH JUROR SET.

A WHITE FEMALE BORN IN 1928 JUROR NUMBER 333 WAS SET.

ALSO WHITE FEMALE BORN IN 1947 WAS SET, THAT WAS JUROR NUMBER 9, YOUR HONOR.

YOUR HONOR, I CAN UNDERSTAND THAT JUROR NUMBER 200 BEING STRUCK THAT HE'S A FIREFIGHTER, BUT OTHER THAN THAT THAT THESE PEOPLE ARE OPINIONATED MAY BE A DRIVING FORCE, THEY'RE ALSO BORN IN A CERTAIN TIME PERIOD THAT, I BELIEVE THAT AGE SHOULDN'T PROTECT A CLASS FROM CONSTITUTIONAL STANDARD MAYBE NOT FROM A JURY STANDARD, BUT I THINK THAT ALL THE STRIKES ARE A MERE PRETEXT. IT LOOKED LIKE THERE WAS CONCERTED EFFORT.

IF YOU LOOK AT THE STRIKES AS THEY STAND THERE'S A CONCERTED EFFORT TO STRIKE WHITE INDIVIDUALS PARTICULAR WHITE MALES INCLUDING THE ALTERNATES; IT WAS A TOTAL OF EIGHT MALES STRICKEN. WHETHER THEY FIT INTO THE DEMOGRAPHIC THEY WERE LOOKING FOR OR NOT THERE HAS TO BE SOMETHING MORE THAN I DON'T WANT A 50 YEAR OLD WHITE MAN UP THERE.

THE COURT: ALL RIGHT, THANK YOU. LET'S SEE NOW LOOKING AT SOME INDIVIDUALS THAT WERE STRUCK BY THE DEFENSE, LOOKING AT JUROR NUMBER 40, A WHITE MALE WHO WAS BORN IN 1948 THAT BASICALLY THE REASONS WERE GIVEN THAT HE WAS TOO OLD, HE WAS. HIS AGE AND HIS APPEARANCE AS A LEADER AS A WHITE MALE.

JUROR NUMBER 82 BORN IN 1953 THE SAME REASON,

JUROR NUMBER 146 BORN IN 1949 SAME REASON,

JUROR NUMBER 24 BORN IN 1936 SAME REASON WAS GIVEN TO STRIKE THAT WHITE MALE, ALL FOUR OF THOSE BEING WHITE MALES.

LEFT ON THE JURY OR SELECTED BY THE DEFENSE WAS A WHITE FEMALE BORN IN 1928,

A WHITE FEMALE BORN IN 1947,

A BLACK FEMALE BORN IN 1947,

AND ANOTHER WHITE FEMALE BORN IN 1948.

I FIND THE EXPLANATIONS GIVEN BY THE DEFENSE IN THIS, THIS MATTER ARE A MERE PRETEXT. I FIND THE STRIKES EXERCISED BY THE DEFENSE IN THIS PARTICULAR CASE EXHIBIT AGE AND RACE DISCRIMINATION AS AGAINST OLDER WHITE MALES, DEFINITELY A COGNIZABLE GROUP, NO REASON GIVEN BY THE DEFENSE SET FORTH A VALID REASON OTHER THAN THEIR AGE, THEY WERE WHITE, AND THEY WERE MALES AND FOR THAT THEY WOULD BE LEADERS. THE COURT FINDS THAT TO BE NOT ONLY DISCRIMINATORY BUT ABSOLUTELY PRETEXTUAL.

MR. DIGGS: YOUR HONOR, MAY I MAKE A STATEMENT FOR THE RECORD IF, IF YOU'RE THROUGH?

THE COURT: I WASN'T THROUGH.

MR. DIGGS: ALL RIGHT, I'M SORRY.

THE COURT: BUT IF YOU'D LIKE TO MAKE A STATEMENT I'LL BE GLAD FOR YOU TO DO SO?

MR. DIGGS: NO, I'LL ---

THE COURT: NO, SIR, GO AHEAD.

MR. DIGGS: NO, I JUST WANT TO PRESERVE THE RECORD, YOUR HONOR, AND I WANT TO ---

THE COURT: I'LL BE GLAD FOR YOU TO DO SO, GO AHEAD.

MR. DIGGS: I'LL WAIT UNTIL AFTER YOUR HONOR HAS MADE A FULL COMPLETED RULING.

THE COURT: ALL RIGHT, SIR. I FIND THAT A BLACK FEMALE IN THE SAME AGE GROUP, THERE WAS ALSO A BLACK MALE OR ANOTHER BLACK FEMALE BORN IN THE SAME AGE GROUP AS JUROR NUMBER 286 AND JUROR NUMBER 152.

IN THE SAME AGE AREAS AS THE WHITE MALES THAT WERE STRUCK I FIND ONCE AGAIN THE REASONS GIVEN FOR THOSE WHITE MALES THAT WERE STRUCK TO BE MERE PRETEXTUAL AND AS I INDICATED EXHIBITED RACIAL AND AGE DISCRIMINATION. YES, SIR?

MR. DIGGS: YOUR HONOR, WHEN WE WERE SELECTING A JURY I CAN HONESTLY SAY THERE WAS ONE JUROR THAT CAME UP

AND I WANT TO IDENTIFY HER FOR THE RECORD. IT WAS A YOUNG LADY WHO WAS, I THINK SHE'S A BANKER BUT SHE HAD ONE OR TWO FAMILY MEMBERS WHO HAD WORKED IN LAW ENFORCEMENT IN THE PAST. SHE WAS A BLACK FEMALE. WE SAT HER BY USE OF THE CRITERIA THAT WE WERE USING. I WOULD ORDINARILY WOULD NOT HAVE PUT HER ON THE JURY BUT BECAUSE OF HER RACE I DID NOT STRIKE HER.

OTHER THAN THAT JUROR, YOUR HONOR, I WANT TO STATE FOR THE RECORD THAT I AT NO TIME DID RACE EVER ENTER INTO THE DECISION MAKING PROCESS THAT I WAS INVOLVED IN.

SECONDLY, IN 1994 THEREABOUTS, I MEAN IT'S JUST BASED ON MY EXPERIENCE IN THIS KIND OF CASE, I DON'T WANT AN OLDER WHITE MAN OR A GROUP OF THEM RUNNING THE JURY BECAUSE MY EXPERIENCE HAS BEEN THAT THEY'RE MORE CONSERVATIVE, MORE PRO LAW ENFORCEMENT, MORE INCLINED TO TRY TO CONVICT AND PUNISH THAN OTHER PEOPLE IN THE COMMUNITY, THEY JUST ARE.

AS AN EXAMPLE I WAS INVOLVED IN ONE TRIAL ONE TIME WHEN THERE WAS A GROUP OF INDIVIDUALS IN THAT CATEGORY WHILE THEY WERE DELIBERATING ONE OF THE JURORS BROTHERS DIED OR A BROTHER DIED. RATHER THAN GO HOME AND GO TO THE FUNERAL AND BE WITH HIS FAMILY THAT PARTICULAR JUROR CHOSE TO STAY AND CONTINUE TO PARTICIPATE IN THE DELIBERATION PROCESS.

YOUR HONOR, I THINK THAT WITH ALL DUE RESPECT THE

PROCESS THAT WE USED HERE, AND I'D LIKE TO MAKE MY NOTES A PART OF THE RECORD BECAUSE I USED THESE NOTES, YOU KNOW, WHEN WE WERE GOING THROUGH THE PROCESS, AND I WOULD POINT OUT FOR THE COURT THAT THERE WAS NOT A SINGLE TIME WHEN WE LOOKED AT A PERSPECTIVE JUROR AND MADE A DECISION TO EITHER STRIKE THAT JUROR OR TO SEAT THAT JUROR WITHOUT REFERRING TO THESE NOTES. NOT A SINGLE TIME WAS IT DONE BASED SOLELY ON LOOKING AT THAT JUROR AND MAKING A DECISION BASED ON THE RACE OR THE AGE AND I WOULD SUBMIT THAT WITH ALL DUE RESPECT THE COURT'S RULING GOES BEYOND WHAT IS REQUIRED IN THE BATSON LINE OF CASE TO PRESERVE THE INTEGRITY OF THE JURY SELECTION PROCESS AND THAT THE COURT'S RULING WITH ALL DUE RESPECT VIOLATES THE SIXTH AMENDMENT RIGHT TO A JURY AND HIS CONSTITUTIONAL RIGHT, OR THE RIGHT THAT HISTORICALLY CRIMINAL DEFENDANTS HAVE HAD IN USING PEREMPTORY CHALLENGES FOR ANY REASON OR NO REASON.

YOUR HONOR, I UNDERSTAND YOUR HONOR'S RULING BUT I REALLY AM AT A LOSS AS TO HOW TO GO ABOUT PICKING A JURY UNDER THE, WITH THE RULING THAT'S BEEN ENTERED BY THE COURT AND --

THE COURT: WHAT YOU NEED TO DO IS WHATEVER CRITERIA YOU HAVE APPLY IT EQUALLY TO MALE AND FEMALE, BLACK AND WHITE ---

MR. DIGGS: BUT, YOUR HONOR ---

THE COURT: --- THAT'S WHAT YOU NEED TO DO. YOU

HAVE A CRITERIA THAT YOU HAVE, YOU APPLY IT EQUALLY TO MEN, YOU APPLY IT EQUALLY TO WOMEN, YOU APPLY IT EQUALLY TO WHITE PEOPLE AND YOU APPLY IT EQUALLY TO BLACK PEOPLE. IT'S THE SAME CRITERIA. IT HAS NOTHING TO DO WITH THEIR RACE OR THEIR GENDER.

MR. DIGGS: WELL, YOUR HONOR, WITH ALL DUE RESPECT IT DOES HAVE TO DO SOME ---

THE COURT: WHAT THEN AM I SUPPOSED TO DO ABOUT WHAT, WHAT BATSON SAYS IN JEB V. ALABAMA?

MR. DIGGS: WELL ---

THE COURT: SHOULD I JUST IGNORE BATSON IN JEB V. ALABAMA?

MR. DIGGS: NO, SIR, THAT'S NOT WHAT I'M ASKING THE COURT TO DO. BUT WHEN WE TAKE INTO THOSE CONSIDERATIONS WHAT, WHAT THE COURT'S DONE AND IF WE LAY DOWN A HARD LINE IN TERMS OF WHAT THE CRITERIA ARE GOING TO BE, THEN WE HAVE TO IGNORE GENERAL PERSONALITY IMPRESSIONS THAT WE GET WHEN WE'RE ASKING QUESTIONS OR MAKING EVALUATION ABOUT A PARTICULAR JUROR. THERE MAY BE A JUROR THAT YOU WOULD WANT TO SIT ON THE CASE BUT DOESN'T, WOULDN'T OTHERWISE FALL WITHIN THE CRITERIA THAT YOU GENERALLY ARE USING IN THAT PARTICULAR SELECTION PROCESS. THAT'S WHAT'S BEING AFFECTED HERE.

I'M NOT -- WE'RE NOT ABLE TO PICK OUT -- WE CAN'T USE A GENERAL SELECTION PROCESS THAT'S RACE NEUTRAL OR ANY

OTHER NEUTRAL WITH RESPECT TO ANY OTHER CRITERIA. IF WE CAN'T LOOK AT A PARTICULAR INDIVIDUAL'S PERSONALITIES AND SAY, YEAH, WE WANT TO DO THAT EVEN THOUGH IT MIGHT NOT BE CONSISTENT WITH THE GENERAL CRITERIA. AND SO I THINK, I UNDERSTAND THE SITUATION YOUR HONOR'S IN ---

THE COURT: WELL I APPRECIATE THAT BUT, BUT YOU SAT A BLACK FEMALE THAT, THAT'S BORN IN 1947. YOU SAT A BLACK FEMALE THAT'S BORN IN 1950. YOU SAT A WHITE FEMALE THAT'S BORN IN 1948. YOU SAT A WHITE FEMALE THAT'S BORN IN 1928.

MR. DIGGS: YOUR HONOR, THERE'S A ---

THE COURT: YOU'RE JUST TELLING ME THAT THE ONLY DIFFERENCE BETWEEN THOSE FOUR PEOPLE AND ALL OF THE OLDER WHITE MALES YOU STRUCK WAS, OTHER THAN THE OBVIOUS DIFFERENCE THEY'RE WHITE MALES, IS BECAUSE THEY'RE WHITE MALES THEY'VE GOT TO BE LEADERS AND BECAUSE THESE ARE OLDER BLACK LADIES AND OLDER WHITE -- BLACK LADIES THEY CAN'T BE LEADERS. THAT, THAT'S JUST, THAT IS, IF THAT'S NOT THE DEFINITION OF PRETEXTUAL I DON'T KNOW WHAT IS ---

MR. DIGGS: YOUR HONOR ---

MR. DIGGS: --- AND THAT'S THE ONLY, THAT'S THE ONLY DEFINITION YOU'VE GIVEN ME.

MR. DIGGS: I'D SAY FOR THE RECORD I'M 57 YEARS OLD. I KNOW WHERE THESE WOMEN CAME UP IN AMERICAN SOCIETY IN TERMS OF WHAT THE, WHAT THEIR LIFE EXPERIENCES WERE AND

IT'S THOSE WOMEN BRING DIFFERENT LIFE EXPERIENCES TO THIS JURY POOL THAN THE MEN DO, THEY SIMPLY DO. IT'S NOT BASED ON A GENDER AT ALL. IT'S BASED ON WHAT THEIR LIFE EXPERIENCES HAVE BEEN OVER THE COURSE OF THEIR LIVES AND IT'S, IT'S, IT GOES TOO FAR TO PREVENT US FROM BEING ABLE TO TAKE THOSE TYPES OF CONSIDERATIONS INTO ACCOUNT IN MAKING A SELECTION. I MEAN OTHERWISE WE'D JUST DO IT BY COMPUTER TO MAKE SURE THAT EVERYTHING IS DONE, YOU KNOW, BY THE NUMBERS AND, AND TAKE OUR JUDGMENT PERSONAL DISCRETION AND JUDGMENT OUT OF. BUT, YOUR HONOR, I DON'T, I DON'T KNOW HOW ELSE TO PUT IT OTHER THAN MAYBE MY PERSONAL OPINIONS ARE CLASHING WITH THE LAW HERE AT THIS POINT. BUT THAT WOULD BE, THAT WOULD BE WHAT I HAVE TO STATE.

THE COURT: ALL RIGHT, SIR, THANK YOU VERY MUCH.

MR. DIGGS: THANK YOU.

THE COURT: ALL RIGHT, LET'S FIND ALL THE JURORS WHO ARE OUT IN THE HALL AND HAVE THOSE JURORS THAT ARE BACK IN THE JURY ROOM TELL THEM TO COME BACK AND COME BACK IN THE, IN THE AUDIENCE AREA. WE'LL GO STRIKE THE JURY AGAIN, GO AHEAD AND RUN ME ANOTHER LIST, PLEASE, MA'AM.

MR. DIGGS: YOUR HONOR, I JUST WANT TO MAKE SURE WE'RE COVERED ON THE RECORD, I WOULD SUBMIT THE COURT'S RULING VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS. IT GOES BEYOND WHAT THE RULE IN BATSON REQUIRES OF THE COURT.

THE COURT: ALL RIGHT, SIR, AND AS I INDICATED I

DO BELIEVE I'M FOLLOWING BATSON AND JEB V. ALABAMA.

MR. RICHARDSON: SPECIFICALLY THE JURORS THAT WERE STRUCK PREVIOUSLY?

THE COURT: YA'LL NEED TO COME UP HERE AND TALK TO ME. I DON'T KNOW WHAT YOU'RE SAYING, MR. RICHARDSON.

(WHEREUPON, A BENCH CONFERENCE WAS HELD OFF THE RECORD OUT OF THE HEARING OF THE COURT REPORTER.)

(WHEREUPON, COURT'S EXHIBIT NUMBER 1 MARKED AND DEFENDANT'S EXHIBIT NUMBER 1 MARKED AND ENTERED INTO EVIDENCE.)

(WHEREUPON, THE JURY VENIRE RETURNS TO THE COURTROOM.)

THE COURT: I APPRECIATE IF THERE'S BEEN ANY CONFUSION OR INCONVENIENCE FOR YOU. BECAUSE OF A RULING OF THE COURT WE WILL NEED TO RE-STRIKE THE JURY IN THE CASE AT HAND, THAT IS THE STATE OF SOUTH CAROLINA V. THEODORE DAVID WILLS, JR. AND THAT'S AS A RESULT OF A RULING BY THE COURT AND WE WILL NOW GO FORWARD WITH THAT STRIKING OF THE JURY, THANK YOU.

MR. DIGGS: YOUR HONOR, WHILE WE'RE WAITING, I THINK I'LL HAVE A COPY OF MY NOTES MADE.

THE COURT: ALL RIGHT, SIR.

MR. DIGGS: HE'LL BE BACK IN JUST A SECOND.

THE COURT: ALL RIGHT. EVERYBODY IS IN.

MADAM CLERK: 240, KURT PETERS.

WHAT SAY THE STATE?

MR. RICHARDSON: PLEASE PRESENT MR. PETERS.

MADAM CLERK: DEFENSE?

MR. DIGGS: PLEASE EXCUSE THE JUROR FROM THE TRIAL OF THIS CASE.

MADAM CLERK: YOU'RE EXCUSED IN THIS PARTICULAR CASE.

85, DOREEN EBERT.

WHAT SAY THE STATE?

MR. RICHARDSON: PLEASE PRESENT MS. EBERT.

MADAM CLERK: DEFENSE?

MR. DIGGS: YOUR HONOR, WE DIDN'T PICK UP THE NUMBER ON THIS JUROR.

MADAM CLERK: 85.

MR. DIGGS: 85. WE'D EXCUSE THE JUROR FROM THE TRIAL OF THIS CASE.

THE COURT: THANK YOU.

MADAM CLERK: THANK YOU.

57, KATHARINE COOPER.

WHAT SAY THE STATE?

MR. RICHARDSON: PLEASE PRESENT MS. COOPER.

MR. DIGGS: SWEAR THE JUROR.

MADAM CLERK: HAVE A SEAT IN THE JURY BOX, PLEASE.

353, EDWARD YELENAC.

WHAT SAY THE STATE?

MR. RICHARDSON: PLEASE PRESENT MR. YELENAC.

MADAM CLERK: DEFENSE?

MR. DIGGS: WE'LL EXCUSE THE JUROR FROM THE TRIAL OF THIS CASE.

MADAM CLERK: YOU'RE EXCUSED IN THIS PARTICULAR CASE.

124, ROSE HARDWICK.

WHAT SAY THE STATE?

MR. RICHARDSON: PLEASE PRESENT MS. HARDWICK.

MADAM CLERK: DEFENSE?

MR. DIGGS: SWEAR THE JUROR.

MADAM CLERK: HAVE A SEAT IN THE JURY BOX, PLEASE.

28, WILLIAM BROGDON.

WHAT SAY THE STATE?

MR. RICHARDSON: PLEASE PRESENT MR. BROGDON.

MADAM CLERK: DEFENSE?

MR. DIGGS: EXCUSE THE JUROR FROM THE TRIAL OF THIS CASE.

MADAM CLERK: YOU'RE EXCUSED IN THIS PARTICULAR CASE.

190, JAMES LOVELL.

WHAT SAY THE STATE?

MR. RICHARDSON: PLEASE PRESENT MR. LOVELL.

MADAM CLERK: DEFENSE?

MR. DIGGS: SWEAR THE JUROR.

MADAM CLERK: HAVE A SEAT IN THE JURY BOX, PLEASE.

164, APRIL JORDAN.

WHAT SAY THE STATE?

MR. RICHARDSON: PLEASE PRESENT MS. JORDAN.

MADAM CLERK: DEFENSE?

MR. DIGGS: EXCUSE THE JUROR FROM THE TRIAL OF THIS CASE.

MADAM CLERK: YOU'RE EXCUSED IN THIS PARTICULAR CASE.

155, SHERRI JAMES.

WHAT SAY THE STATE?

MR. RICHARDSON: PLEASE PRESENT MS. JAMES.

MADAM CLERK: DEFENSE?

MR. DIGGS: SWEAR THE JUROR.

MADAM CLERK: HAVE A SEAT IN THE JURY BOX, PLEASE.

329, SUSAN WALKER.

WHAT SAY THE STATE?

MR. RICHARDSON: PLEASE PRESENT MS. WALKER.

MADAM CLERK: DEFENSE?

MR. DIGGS: WE'D EXCUSE THE JUROR FROM THE TRIAL OF THIS CASE.

MADAM CLERK: YOU'RE EXCUSED IN THIS PARTICULAR CASE.

24, JACK BOWARD.

WHAT SAY THE STATE?

MR. RICHARDSON: PLEASE PRESENT MR. BOWARD.

MADAM CLERK: DEFENSE?

MR. DIGGS: SWEAR THE JUROR.

MADAM CLERK: HAVE A SEAT IN THE JURY BOX, PLEASE.

152, GLENDA ISOM.

WHAT SAY THE STATE?

MR. RICHARDSON: PLEASE PRESENT MS. ISOM.

MADAM CLERK: DEFENSE?

MR. DIGGS: SWEAR THE JUROR.

MADAM CLERK: HAVE A SEAT IN THE JURY BOX, PLEASE.

357, RONALD ZWINGELBERG.

WHAT SAY THE STATE?

MR. RICHARDSON: PLEASE PRESENT MR. ZWINGELBERG.

MADAM CLERK: DEFENSE?

MR. DIGGS: SWEAR THE JUROR.

MADAM CLERK: HAVE A SEAT IN THE JURY BOX, PLEASE.

119, KEITH GREENWALD.

WHAT SAY THE STATE?

MR. RICHARDSON: PLEASE EXCUSE MR. GREENWALD.

MADAM CLERK: YOU'RE EXCUSED IN THIS PARTICULAR CASE.

15, STEPHANIE, EXCUSE ME, 11, STEPHANIE BELLAMY.

MR. RICHARDSON: YOUR HONOR?

THE COURT: YES, SIR, DO YOU HAVE A MATTER? YA'LL COME AROUND, PLEASE.

(WHEREUPON, A BENCH CONFERENCE WAS HELD OFF THE RECORD IN THE PRESENCE OF THE JURY PANEL, BUT OUT OF THE HEARING OF THE JURY PANEL.)

THE COURT: MS. BELLAMY, YOU, I EXCUSED YOU FROM THIS PARTICULAR CASE ONLY, YOU CAN HAVE A SEAT.

MADAM CLERK: 30, WANDA BROOME.

WHAT SAY THE STATE?

MR. RICHARDSON: PLEASE EXCUSE MS. BROOME.

MADAM CLERK: YOU'RE EXCUSED IN THIS PARTICULAR CASE.

216, JOELLA MOHR.

WHAT SAY THE STATE?

MR. RICHARDSON: PLEASE PRESENT MS. MOHR.

MADAM CLERK: DEFENSE?

MR. DIGGS: SWEAR THE JUROR.

MADAM CLERK: HAVE A SEAT IN THE JURY BOX, PLEASE.

323, BRIAN VANAERNEM, I'M SORRY, I ACCIDENTALLY

SKIPPED THAT ONE.

WHAT SAY THE STATE?

MR. RICHARDSON: PLEASE PRESENT MR. VANAERNEM.

MADAM CLERK: DEFENSE?

MR. DIGGS: WE'D EXCUSE THE JUROR FROM THIS PARTICULAR CASE.

MADAM CLERK: YOU'RE EXCUSED IN THIS PARTICULAR CASE.

146, SAMUEL HUGHES.

MR. DIGGS: YOUR HONOR, COULD WE ASK THIS JUROR I MISSED IT FIRST TIME AROUND, WHAT ---

THE COURT: AS HIS EMPLOYMENT?

MR. DIGGS: HIS EMPLOYMENT?

THE COURT: YES, SIR, MR. HUGHES, WHAT IS YOUR EMPLOYMENT, PLEASE, SIR?

JURY PANEL MEMBER: RETIRED MAILMAN AND I'M A SALESMAN FOR BLUE GREEN TIMESHARING.

THE COURT: THANK YOU VERY MUCH.

MADAM CLERK: WHAT SAY THE STATE?

MR. RICHARDSON: PLEASE PRESENT MR. HUGHES.

MADAM CLERK: DEFENSE?

MR. DIGGS: SWEAR THE JUROR.

MADAM CLERK: HAVE A SEAT IN THE JURY BOX, PLEASE.

120, CARMEN HAGELGANS.

WHAT SAY THE STATE?

MR. RICHARDSON: PLEASE PRESENT MR. HAGELGANS.

MADAM CLERK: DEFENSE?

MR. DIGGS: EXCUSE THE JUROR FROM THE TRIAL OF THIS CASE.

MADAM CLERK: YOU'RE EXCUSED IN THIS PARTICULAR CASE.

19, MARY BOLKA.

WHAT SAY THE STATE?

MR. RICHARDSON: PLEASE PRESENT MS. BOLKA.

MADAM CLERK: DEFENSE?

MR. DIGGS: SWEAR THE JUROR.

MADAM CLERK: HAVE A SEAT IN THE JURY BOX, PLEASE.

333, LUCILLE WEBER.

WHAT SAY THE STATE?

MR. RICHARDSON: PLEASE PRESENT MS. WEBER.

MADAM CLERK: DEFENSE?

MR. DIGGS: WE'D EXCUSE THE JUROR FROM THE TRIAL OF THIS CASE.

MADAM CLERK: YOU'RE EXCUSED IN THIS PARTICULAR CASE.

72, INELL DEWITT.

WHAT SAY THE STATE?

MR. RICHARDSON: PLEASE PRESENT MS. DEWITT.

MADAM CLERK: DEFENSE?

MR. DIGGS: WE'D EXCUSE THE JUROR FROM THE TRIAL OF THIS CASE.

MADAM CLERK: YOU'RE EXCUSED IN THIS PARTICULAR CASE.

140, KIMBERLY HOLMES.

WHAT SAY THE STATE?

MR. RICHARDSON: PLEASE PRESENT MS. HOLMES.

MADAM CLERK: DEFENSE?

MR. DIGGS: SWEAR THE JUROR.

MADAM CLERK: HAVE A SEAT IN THE JURY BOX, PLEASE.

136, ROBERT HILL.

WHAT SAY THE STATE?

MR. RICHARDSON: PLEASE PRESENT MR. HILL.

MADAM CLERK: DEFENSE?

MR. DIGGS: WE'D EXCUSE THE JUROR FROM THE TRIAL OF THIS CASE.

MADAM CLERK: YOU'RE EXCUSED IN THIS PARTICULAR CASE.

249, EUGENIA PROEHL.

MR. RICHARDSON: WHAT'S THAT NUMBER, MADAM CLERK?

THE COURT: 249.

MADAM CLERK: WHAT SAY THE STATE?

MR. RICHARDSON: PLEASE PRESENT MS. PROEHL.

MADAM CLERK: DEFENSE?

MR. DIGGS: COULD I INQUIRE OR HAVE WE USED 10 AT THIS POINT?

THE COURT: HOLD ON A SECOND. YOU HAVE EXCEEDED.

MR. DIGGS: I'VE DONE 11.

THE COURT: YES, SIR, YOU'VE EXCEEDED IT.

MR. DIGGS: OKAY, WELL I APOLOGIZE, WE HAVE NO OBJECTIONS.

THE COURT: ALL RIGHT.

MADAM CLERK: HAVE A SEAT IN THE JURY BOX, PLEASE.

THE COURT: TWO ALTERNATES, I'M SORRY.

MADAM CLERK: 356, THOMAS ZIMPLEMAN.

WHAT SAY THE STATE?

MR. RICHARDSON: PLEASE PRESENT MR. ZIMPLEMAN.

MR. DIGGS: SWEAR THE JUROR.

MADAM CLERK: HAVE A SEAT IN THE JURY BOX, PLEASE.

NUMBER 200, HOWARD MARTIN.

WHAT SAY THE STATE?

MR. RICHARDSON: PLEASE PRESENT MR. MARTIN.

MADAM CLERK: DEFENSE?

MR. DIGGS: WE'D EXCUSE THE JUROR FROM THE TRIAL

OF THIS CASE.

MADAM CLERK: YOU'RE EXCUSED IN THIS PARTICULAR CASE.

106, MICHAEL GEORGE.

WHAT SAY THE STATE?

MR. RICHARDSON: PLEASE PRESENT MR. GEORGE.

MR. DIGGS: SWEAR THE JUROR.

MADAM CLERK: HAVE A SEAT IN THE JURY BOX, PLEASE.

THE COURT: ALL RIGHT, MR. ZIMPLEMAN AND MR. GEORGE, PLEASE REMEMBER THAT YA'LL ARE ALTERNATES IN THIS PARTICULAR MATTER.

ALL RIGHT, IS THERE ANY OBJECTIONS TO THE JURY THAT HAS BEEN PANELED BY THE STATE?

MR. RICHARDSON: NONE FROM THE STATE, YOUR HONOR.

THE COURT: FROM THE DEFENSE?

MR. DIGGS: YOUR HONOR, I HAVE A MATTER TO RENEW WHAT I HAD PUT ON THE RECORD EARLIER.

THE COURT: ALL RIGHT, THAT GOES TO THE PREVIOUS COURT'S RULING?

MR. DIGGS: YES, SIR.

THE COURT: IT'S NOT A NEW MATTER?

MR. DIGGS: YOUR HONOR, IT'S JUST FOLLOWING UP?

THE COURT: ALL RIGHT, SIR, THAT'S FINE, THAT'S

FINE, OKAY.

LADIES AND GENTLEMEN OF THE JURY IN THIS PARTICULAR MATTER, I'M GOING TO HAVE YOU GO BACK TO YOUR JURY ROOM AND I'M GOING TO ASK THAT YOU DO ONE THING FOR ME AND THAT IS TO SELECT YOUR FOREPERSON FOR THIS PARTICULAR JURY.

NOW REGARDING THIS PARTICULAR MATTER LET ME TELL YOU BRIEFLY WHAT THE FOREPERSON'S RESPONSIBILITIES ARE. IF WE'RE HERE IN THE COURTROOM AND THERE'S SOMETHING THAT THE JURY NEEDS ATTENTION TO, THE JURY, A WITNESS NEEDS TO SPEAK UP, THE ATTORNEYS NEED TO SPEAK UP, WHATEVER IT MIGHT BE, THE FOREPERSON RAISE THEIR HAND, GETS THE COURT'S ATTENTION, WE'LL HANDLE IT WHATEVER IT IS. IF YOU'RE BACK IN YOUR JURY ROOM THE FOREPERSON WRITES OUT A NOTE, SIGNS IT AND HANDS IT TO THE BAILIFF, IT WILL COME TO ME, ONCE AGAIN WE'LL HANDLE THE MATTER WHATEVER IT IS.

ONCE THE EVIDENTIARY PORTION OF THE TRIAL HAS BEEN CONCLUDED AND THE COURT HAS GIVEN YOU THE LAW TO APPLY TO THE FACTS AS YOU SO FIND THEM TO BE IN THIS CASE AND YOU'RE BACK IN YOUR JURY ROOM CONDUCTING YOUR DELIBERATIONS THE FOREPERSON RESPONSIBILITIES ARE TO MAKE SURE THAT EVERYBODY'S VOICE HAS AN OPPORTUNITY TO BE HEARD, EVERYBODY HAS AN OPPORTUNITY TO SPEAK ON THE ISSUE TO BE DECIDED.

UNDERSTAND THE FOREPERSON'S VOICE AND VOTE ON THE MATTER TO BE DECIDED CARRIES NO MORE WEIGHT THAN ANY OTHER

MEMBER OF THE JURY. EVERYBODY IS ON AN EQUAL PLAIN IN THAT REGARD AS TO THAT PARTICULAR MATTER BUT SOMEBODY DOES NEED TO BE IN CHARGE.

THE FINAL RESPONSIBILITY, AND BEFORE THAT OBVIOUSLY AGAIN IF THERE'S ANY MATTER THAT YOU NEED ATTENTION TO YOU AGAIN WRITE OUT A NOTE, SIGN IT, HAND IT TO THE BAILIFF, IT'LL COME TO ME AND WE'LL HANDLE THE MATTER WHATEVER IT MIGHT BE.

THE FINAL RESPONSIBILITY OF THE FOREPERSON IS TO TAKE THE VERDICT FORM THAT THE COURT WILL PROVIDE TO YOU AND ONCE THE JURY HAS WELL AND TRULY DELIBERATED IN THIS CASE AND REACHED ITS UNANIMOUS VERDICT IN THIS PARTICULAR MATTER THE FOREPERSON WILL TAKE THE VERDICT FORM, CHECK THE APPROPRIATE BLOCK OR WRITE THE APPROPRIATE WORD, THEREAFTER SIGN THEIR NAME AS THE FOREPERSON PUTTING THE CORRECT DATE INDICATING THAT THAT INDEED IS THE UNANIMOUS VERDICT OF THE JURY IN THIS PARTICULAR MATTER.

SO WITH THAT I'LL ASK YOU TO RETIRE TO YOUR JURY ROOM, SELECT YOUR FOREPERSON, KNOCK ON THE DOOR, LET THE BAILIFF KNOW WHO THAT PERSON IS. REMEMBER, MR. ZIMPLEMAN AND MR. GEORGE YA'LL ARE THE ALTERNATES. YOU CAN VOTE ON THE FOREPERSON BUT OBVIOUSLY CANNOT BE THE FOREPERSON, THANK YOU VERY MUCH.

(WHEREUPON, THE JURY RETIRED TO THE JURY ROOM AT 12:53 P.M.)

THE COURT: ALL RIGHT, MR. DIGGS, ARE THERE ANY MOTIONS THAT YOU HAVE?

MR. DIGGS: YOUR HONOR, NOT WITH RESPECT TO THE SELECTION OF THE JURY BY THE PROSECUTION BUT I DID WANT TO RENEW OUR OBJECTION TO THE PRIOR PROCESS. I WOULD SUBMIT THAT WE WERE ENTITLED TO THE JURORS THAT WERE SELECTED AND SEATED INITIALLY.

THE COURT: ALL RIGHT, SIR.

MR. DIGGS: WITH ALL DUE RESPECT, YOUR HONOR, THERE ARE A COUPLE OF JURORS HERE, MR. BOWARD AND ZWINGELBERG, THAT WE WOULD LIKE TO HAVE STRUCK BUT I DIDN'T BECAUSE WE DID LAST TIME AND IT GOT US INTO A DISPUTE.

THE COURT: OKAY, AND I APPRECIATE THAT. I'M SORRY, WERE YOU DONE?

MR. DIGGS: YES, SIR.

THE COURT: OKAY.

MR. DIGGS: SO I RENEW MY OBJECTION.

THE COURT: AND IT IS, YOU KNOW AS WE HAD IN DISCUSSION HERE AT THE BENCH YOU UNDERSTAND AND IT WAS CLEAR THAT YOU COULD STRIKE ANYBODY YOU WANTED TO AND IF THERE WAS A BATSON MOTION AGAIN WE'D REHEAR IT AND DECIDE WHATEVER IT MIGHT BE. BUT THE COURT SPECIFICALLY TOLD YOU I WASN'T TELLING YOU HOW TO STRIKE OR NOT TO STRIKE, YOU COULD STRIKE ANYBODY YOU WANTED TO OR NOT STRIKE ANYBODY YOU WANTED TO.

I UNDERSTAND WHAT THE COURT'S RULING WAS IN THE PREVIOUS MATTER BUT THAT WAS AS TO THE OBJECTION MADE BY THE STATE AND THERE MAY OR MAY NOT BE AN OBJECTION THIS TIME FROM THE STATE AND THERE WASN'T.

JUST SO THE RECORD IS CLEAR THE STATE DIDN'T OBJECT BUT SO THE RECORD, YOU SAID YOU INDICATED THERE MIGHT BE A COUPLE OF PEOPLE YOU STRUCK YOU GOT TWO MORE THAN YOU WERE SUPPOSED TO. YOU GOT 12 STRIKES INSTEAD OF 10. NOW THE STATE DIDN'T OBJECT AND I DIDN'T STOP THEM BUT YOU KNOW I DON'T, YOU KNOW, IF YOU DON'T HAVE A FAIR JURY NOW I DON'T KNOW, I THINK EVERYTHING THAT WAS DONE THAT COULD BE DONE SO ---

MR. DIGGS: YOUR HONOR ---

THE COURT: YOU HAD A COUPLE MORE THAN YOU SHOULD HAVE.

MR. DIGGS: THAT'S ALL I HAVE AT THIS TIME.

THE COURT: ALL RIGHT, SIR, THANK YOU VERY MUCH. ALL RIGHT, LADIES AND GENTLEMEN OF THE JURY THAT IS OUT THERE -- DID WE GET ANY INSTRUCTIONS FROM JUDGE BAXLEY?

ALL RIGHT, LADIES AND GENTLEMEN, I'M GOING TO, IT'S 1:00 AND THE SELECTION PROCESS IN THE CIVIL WILL TAKE A WHILE AND I DON'T THINK THAT WE OUGHT TO HOLD YOU ANY LONGER THAN WE ARE WHICH IS GOING TO MEAN THAT YOU'RE GOING TO HAVE TO COME BACK SO IF YOU WOULD COME BACK AT 2:15, PLEASE, COME BACK AT 2:15. YOU'LL COME BACK TO THIS

COURTROOM. THERE WILL BE BASICALLY I THINK TWO LISTS; WE'LL DESCRIBE TO YOU HOW WE'RE GOING TO SPLIT YOU UP WHEN YOU COME BACK AT 2:15, WHICH GROUP OF YOU IMMEDIATELY GOES INTO THE COURTROOM WITH JUDGE BAXLEY AND THE OTHER GROUP WILL HAVE TO, HAVE TO WAIT A LITTLE BIT LONGER.

PLEASE REMEMBER AGAIN I EXPECT EITHER TOMORROW AFTERNOON OR WEDNESDAY YOU ARE GOING TO GET CALLED BACK SO, PLEASE, LISTEN TO THE PHONE NUMBER OR THE CALL BACK AFTER 6 P.M. TONIGHT AND MAKE SURE YOU FOLLOW THOSE INSTRUCTIONS WHATEVER THEY MAY BE, THANK YOU VERY MUCH, YOU'RE EXCUSED, BE BACK IN THE COURTROOM AT 2:15, THANK YOU.

(WHEREUPON, THE JURY VENIRE WERE EXCUSED.)

THE COURT: THE FOREMAN IS JUROR, I'M TRYING TO FIND THE NUMBER, NUMBER 357, RONALD H. ZWINGELBERG, JUROR NUMBER 357, RONALD H. ZWINGELBERG IS THE FOREPERSON. ALL RIGHT, SO ---

MR. RICHARDSON: JUDGE ---

THE COURT: --- WE'RE GOING TO EXCUSE THE JURY AND LET THEM COME BACK AT QUARTER TO FOUR. I WILL SEE YA'LL BACK LET'S SAY AT ABOUT 2:05 OR SOMETHING LIKE THAT. OKAY, THANK YOU VERY MUCH.

MR. DIGGS: THANK YOU.

(WHEREUPON, THE JURY AND COURT PERSONNEL WERE EXCUSED FOR LUNCH AND THE FOLLOWING TAKES PLACE ON THE RECORD AFTER THE LUNCH RECESS.)

MR. RICHARDSON: THANK YOU, YOUR HONOR, MAY IT PLEASE THE COURT? YOUR HONOR, WITH REGARD TO THE MATTER OF THE STATE OF SOUTH CAROLINA COUNTY OF HORRY V. THEODORE DAVID WILLS THE STATE DOES INTEND TO USE A STATEMENT PROVIDED BY THE DEFENDANT BY WAY OF PROFFER. I PASS UP AT THIS TIME A COPY OF THE PROFFER AGREEMENT; I'VE ALSO GIVEN A COPY TO MR. DIGGS. I BELIEVE HE'S REVIEWED IT AND ---

THE COURT: JUST A SECOND, SIR, SHE'S GOT TO TAKE TIME TO MARK THE EXHIBITS.

MR. RICHARDSON: YES, SIR.

(WHEREUPON, STATE'S EXHIBITS NUMBERS 1, 2, 3, 7, 8, 9, 10, 12, 13, 14, 18, 19, AND 20 MARKED FOR IDENTIFICATION.)

THE COURT: ALL RIGHT, SOLICITOR?

(WHEREUPON, STATE'S EXHIBIT NUMBER 15 MARKED FOR IDENTIFICATION.)

MR. RICHARDSON: YOUR HONOR, BY THE TERMS OF THE PROFFERED AGREEMENT REACHED BETWEEN THE DEFENDANT, MR. WILLS, AND HIS ATTORNEY PRESENT, MR. DIGGS, AND SCOTT HIXSON, FOR THE SOLICITOR'S OFFICE, THE DEFENDANT AGREED TO PROVIDE A PROFFERED STATEMENT AND SUBSEQUENTLY TAKE A POLYGRAPH EXAMINATION. I'LL PASS UP A COPY OF THIS AGREEMENT RIGHT NOW; IT'S BEEN MARKED STATE'S NUMBER 15 FOR IDENTIFICATION PURPOSES ONLY.

THE COURT: ALL RIGHT, SIR, THANK YOU.

MR. RICHARDSON: YOUR HONOR, TO PREFACE EVERYTHING THE DEFENDANT SIGNED THIS PROFFERED AGREEMENT ON AUGUST 26TH, 2005, AS CAN BE SEEN ON THE FINAL PAGE, PAGE 3 OF THAT PROFFER AGREEMENT. IT'S ALSO SIGNED BY SCOTT HIXSON OF THE FIFTEENTH CIRCUIT SOLICITOR'S OFFICE AND MR. DIGGS AS COUNSEL FOR THE DEFENDANT.

THE DEFENDANT SUBSEQUENTLY GAVE A PROFFERED STATEMENT THAT DAY, YOUR HONOR, AND AGREED TO TAKE A POLYGRAPH EXAM SUBJECT TO PARAGRAPH 2 SUBSECTION 2 OF THAT PROFFER AGREEMENT WHICH STATES THAT THEODORE DAVID WILLS, JR., SHALL SUBMIT HIMSELF TO A POLYGRAPH EXAMINATION TO VERIFY ALL INFORMATION PROVIDED TO THE STATE AT THE ELECTION OF THE STATE.

THIS POLYGRAPH EXAMINER SHALL BE SELECTED BY THE STATE AND FOR THE PURPOSES OF THIS PROFFER A DESIGNATED AGENT FOR THE STATE.

UPON EXAMINATION BY POLYGRAPH IF THE RESPONSES GIVEN BY THEODORE DAVID WILLS, JR., SHOWED DECEPTION OR INCONSISTENT WITH INFORMATION PREVIOUSLY PROVIDED OR INDICATES HE OR SHE IS THE PERSON OR ONE OF THE PERSONS THAT SHOT THE VICTIM, THE TERMS OF THIS PROFFER ARE NULL AND VOID AND ANY STATEMENTS MADE BY THEODORE DAVID WILLS, JR., MAY BE USED AGAINST HIM BY THE STATE FOR ANY LEGAL PURPOSE INCLUDING BUT NOT LIMITED TO CONSIDERATIONS FOR CHARGING, BOND, DISPOSITION OF THE CHARGES THROUGH PLEA OR

TRIAL OF THEODORE DAVID WILLS AND IMPEACHMENT.

YOUR HONOR, ON SEPTEMBER 19TH, 2005, THE DEFENDANT DID UNDERGO A POLYGRAPH EXAMINATION. I DO HAVE THE AGENT HERE, AGENT RICK CHARLES OF THE SOUTH CAROLINA LAW ENFORCEMENT DIVISION. HE WAS THE SUPERVISORY AGENT AND I BELIEVE HE'S PREPARED TO RENDER TESTIMONY AT THIS TIME, YOUR HONOR.

THE COURT: ALL RIGHT, SO I UNDERSTAND, WE HAVE THE POLYGRAPH AS AN ISSUE BUT THE BASIC PREMISE OF THIS IS WHETHER OR NOT THE DEFENDANT'S STATEMENT CAN BE USED AGAINST HIM ---

MR. RICHARDSON: YES, SIR.

THE COURT: --- IN THE TRIAL OF THIS CASE?

MR. RICHARDSON: YES, SIR.

THE COURT: OKAY, I MEAN THAT'S THE PURPOSE, REAL PURPOSE OF THIS MOTION HEARING IS TO DETERMINE WHETHER OR NOT THE STATEMENT OF MR. WILLS WHICH HE GAVE PURSUANT TO THIS PROFFER CAN BE USED IN THE COURSE OF THIS TRIAL?

MR. DIGGS: YES, SIR.

MR. RICHARDSON: YES, SIR.

MR. DIGGS: WE DO PLACE ON THE RECORD AT THIS TIME AN OBJECTION TO THE STATEMENT.

THE COURT: ALL RIGHT, SIR. SO YOU'RE REQUIRING THEN THE ---

MR. DIGGS: YES, SIR.

THE COURT: --- STATE TO GO FORWARD PURSUANT TO A JACKSON V. DENO AND TO HAVE A HEARING THEN?

MR. DIGGS: YES, AND, YOUR HONOR, BASICALLY THE REASON THAT WE ARE DOING THAT IS BECAUSE WE GOT INTERTWINED HERE THE USE OF THE POLYGRAPH, THAT POLYGRAPH PROCEDURE, WITH THE VOLUNTARINESS, THE QUESTION OF THE VOLUNTARINESS OF THE DEFENDANT'S STATEMENT.

YOUR HONOR, IT WOULD BE OUR POSITION THAT IT'S INEXTRICABLY INTERTWINED. HE GAVE THE STATEMENT, MR. WILLS GAVE THE STATEMENT IN EXCHANGE FOR PARTICIPATION BY THE STATE IN A PLEA AGREEMENT PROCESS. HE GAVE A STATEMENT TO THE BEST OF HIS ABILITY AND NOW IT'S, WE FIND THAT THE STATE HAS DETERMINED THAT MR. WILLS DID NOT TELL THE TRUTH IN THE STATEMENT THAT WAS GIVEN AS A RESULT OF THE PROFFER.

YOUR HONOR, I WOULD SUBMIT THAT UNDER THOSE CIRCUMSTANCES THAT PROCESS IS SIMPLY APPARENTLY UNFAIR. MR. WILLS HAS GIVEN A STATEMENT TOTALLY RELIANCED ON THE COOPERATION THAT HE'S GIVEN UNDER AN AGREEMENT THAT HE'S MADE WITH THE STATE IN ORDER TO GIVE AS MUCH INFORMATION AS HE KNOWS ABOUT THIS CASE.

MR. WILLS TELLS ME HE'S TELLING THE TRUTH AND IN THIS SITUATION ALL OF THE INFORMATION THAT HE GAVE TO AGENTS FOR THE STATE WAS TRUTHFUL. HE TELLS ME THERE WAS ONE QUESTION AT ONE TIME DURING THE EXAM AS TO WHETHER OR NOT HE HAD DISCLOSED EVERYTHING THAT HE HAD EVER DONE TO

THE STATE WAS ILLEGAL. HE SAID THAT HE HAD DONE SOME WHEN IN FACT HE HAD NOT.

YOUR HONOR, IF THAT PROCEDURE DID OCCUR WE HAVE A PROFFER THAT'S INHERENTLY FLAWED AND UNFAIR AND WE WOULD OBJECT TO THE USE OF THE STATEMENT EVEN IF THE REFERENCE TO THE POLYGRAPH IS EXCLUDED.

THE JURY WHO IS THE ULTIMATE DETERMINATE AUTHOR OF WHETHER OR NOT THE STATEMENT WAS VOLUNTARILY GIVEN COULDN'T POSSIBLY MAKE THAT DETERMINATION WITHOUT KNOWING THE WHOLE CIRCUMSTANCES SURROUNDING THE GIVING OF THE STATEMENT. THE STATE'S THE ONE, NOT THIS ATTORNEY BUT THE SOLICITOR'S OFFICE, CHOSE TO FOLLOW THIS PROCEDURE AND I WOULD SUBMIT THAT BECAUSE IT'S INHERENTLY UNFAIR, BECAUSE YOU CANNOT EXTRICATE THE REFERENCE TO THE POLYGRAPH FROM THE DETERMINATION OF WHETHER MR. WILLS GAVE A VOLUNTARY STATEMENT THE STATEMENT SHOULD BE SUPPRESSED AS BEING INVOLUNTARY.

THE COURT: ALL RIGHT, LET ME ASK A QUESTION HERE. FOR THE PURPOSES OF THIS HEARING IS YOUR POSITION THAT WHAT MR. WILLS TOLD THE STATE THE STATEMENT HE GAVE THEM THE TRUTH OF WHAT OCCURRED; IS THAT, IS THAT WHAT YOU'RE SAYING TO ME?

MR. DIGGS: YES, SIR, YES, SIR.

THE COURT: ALL RIGHT, ALL RIGHT, NOW, AND I'M TRYING TO HAVE YA'LL PRESENT THIS TO ME AND I WANT TO KNOW

WITHOUT GETTING INTO THE POLYGRAPH AND HOW THE STATE DETERMINED THE STATEMENT TO BE UNTRUE -- IT COULD STILL BE LEFT TO THE JURY, AND I HAVEN'T MADE ANY DECISIONS AS TO WHAT I'M GOING TO DO -- I'M JUST TRYING TO PRESENT THIS TO YOU FOR THE STATE'S FEEDBACK AND THE DEFENSE'S FEEDBACK COULD THE JURY CONSIDER THE STATEMENT WITH AN UNDERSTANDING THAT THE DEFENDANT MR. WILLS MADE THIS STATEMENT AS BEING THE TRUTH. THE STATE FOR WHATEVER REASONS, REASONS OF ITS OWN, DETERMINED THIS STATEMENT WAS NOT THE TRUTH. IT DID NOT GO FORWARD WITH THE OFFER TO HIM AND NOW IS USING THIS STATEMENT AGAINST HIM IN THE TRIAL. THAT WOULD BE PRESENTED TO THE JURY WITHOUT TELLING THEM THE STATE DETERMINED IT NOT TO BE TRUTHFUL BECAUSE HE FLUNKED THE POLYGRAPH BUT THE STATE DETERMINED FOR ITS REASONS, WHATEVER THEY MAY BE, THAT THEY BELIEVE THE STATEMENT NOT TO BE TRUE EVEN THOUGH THE DEFENDANT SAYS THIS IS WHAT OCCURRED AND NOW THEY ARE USING THE STATEMENT AGAINST HIM IN THE PROSECUTION OF THIS CASE AND IT'S ULTIMATELY UP TO YOU THE JURY TO DETERMINE WHETHER OR NOT THE STATEMENT WAS FREELY GIVEN PURSUANT TO MIRANDA, IS VOLUNTARY AND ULTIMATELY THE BELIEVABILITY OR THE CREDIBILITY OF IT IS COMPLETELY AND TOTALLY UP TO THEM,. JUST BASICALLY WE'RE ELIMINATING POLYGRAPH FROM THE TRIAL OF THIS CASE. WHAT WOULD BE THE DEFENSE'S POSITION TO THAT?

MR. DIGGS: YOUR HONOR, I CAN SEE THE POINT THAT

YOU MAKE, IT'S A VERY GOOD POINT. BUT I STILL SUGGEST THAT IT'S IMPOSSIBLE FOR THE JURY TO COMPLETELY KNOW OR MAKE THE DETERMINATION OF VOLUNTARINESS OF THE QUESTION WITHOUT KNOWING THE FULL CONTENT. I THINK THE COURT'S SUGGESTION GOES A LONG WAY BUT IT DOESN'T QUITE GET US THERE.

THE COURT: ALL RIGHT, SIR, WHAT'S THE STATE'S POSITION?

MR. RICHARDSON: YOUR HONOR, THE ONLY REASON WE HAVE ANYTHING TO DO WITH THE POLYGRAPH EXAMINATION AS TIME BEGAN ALL CASE SITES SEEMED TO BE ON THE FEDERAL SIDE WITH REGARD TO PROFFERS BUT A POLYGRAPH IS A USEFUL TOOL IN DETERMINING THE RELIABILITY OF STATEMENTS GIVEN IN PROFFER. OFTENTIMES DEFENDANTS ARE TRYING TO HELP THEMSELVES OUT. WE NEED TO BE ABLE TO FIND OUT MORE THAN BY A CRIMINAL STATEMENT WHAT THEY'RE TELLING US IS TRUE.

THEY CHOSE THE TERMS OF THIS, OF THIS PROFFER STATEMENT. THEY AGREED TO THE TERMS OF THAT AND VIOLATED THE TERMS IN THAT DECEPTION WAS NOTED BY OUR STATE LAW ENFORCEMENT DIVISION WHEN THEY DID POLYGRAPH LESS THAN A MONTH AFTERWARDS OR, YES, LESS THAN A MONTH AFTER HE GAVE THE STATEMENT. I BELIEVE AGENT CHARLES CAN SPEAK ON MORE ELOQUENTLY WITH REGARD TO ANY QUESTIONING AS TO THE POLYGRAPH AND ITS RELIABILITY. THE STATE WAS NOT SEEKING TO INTRODUCE ANY TESTIMONY FROM AGENT CHARLES OR EVEN ENTER INTO ANYTHING REGARDING THE POLYGRAPH DURING THE CASE IN

CHIEF.

THE COURT: WELL I UNDERSTAND THAT BUT YOU WANT TO INTRODUCE HIS STATEMENT?

MR. RICHARDSON: YES, SIR.

THE COURT: OKAY, YOU WANT TO INTRODUCE THE STATEMENT ---

MR. RICHARDSON: YES, SIR.

THE COURT: --- SO THE TERMS OF HIS STATEMENT BASICALLY BESIDES THE JACKSON V. DENO ISSUES AND THEN THE, YOU KNOW, RULES OF EVIDENCE AS TO RELEVANT EVIDENCE AND THEN JUDGING THE PREJUDICIAL VALUE TO THE DEFENDANT, WE HAVE ALL THOSE AND OBVIOUSLY I NEED TO CONSIDER ALL THOSE; BUT WE ALSO IN AFFECT HAVE AN AGREEMENT, A WRITTEN AGREEMENT, BETWEEN THE STATE AND THE DEFENSE THAT YOU CAN USE MY STATEMENT AGAINST ME PURSUANT TO THE TERMS OF THIS CONTRACT, THIS AGREEMENT.

YOU CONDITIONED THE USE OF HIS STATEMENT ON HIM PASSING OR FAILING A POLYGRAPH WITHOUT DELINEATING SPECIFICALLY, PROBABLY OR POTENTIALLY WITHOUT DELINEATING SPECIFICALLY WHO GETS TO DETERMINE WHETHER OR NOT HE PASSED OR FAILED THE EXAM AND IF IT CAN BE CONSTRUED TO SAY THE STATE HAS THE ABILITY TO DO SO. WHAT REFERENCE, IF ANY, REGARDING THE HOW THE STATEMENT WAS GARNERED, THE FULL EXTENT OF THE FACTS, HOW THAT SHOULD BE VIEWED BY THE JURY BECAUSE ULTIMATELY IF I ALLOW THE STATEMENT INTO EVIDENCE

ALL I'VE DONE IS ALLOW IT INTO EVIDENCE? IT'S ULTIMATELY UP TO THE JURY TO MAKE THE ULTIMATE DETERMINATION, ONE, ABOUT THE STATEMENT MADE PROPERLY PURSUANT TO MIRANDA; WHETHER IT WAS VOLUNTARY, KNOWINGLY, INTELLIGENTLY MADE; WHETHER IT IS THE STATEMENT OF THE DEFENDANT, ALL THOSE THINGS AS FAR AS CREDIBILITY AND BELIEVABILITY. ALL THOSE THINGS ARE ULTIMATELY UP TO THE JURY AND I, AND I HAVE SOME CONCERNS HERE EVEN IF I USED THE PROCEDURE AS I OUTLINED TO MR. DIGGS THAT WHETHER OR NOT THE JURY HAS ALL THE INFORMATION IN FRONT OF IT TO BE ABLE TO PROPERLY DETERMINE THE THINGS THAT IT MUST REGARDING ANY STATEMENT TO BE USED AGAINST HIM, THAT'S THE QUESTION HERE.

MR. RICHARDSON: YOUR HONOR, THE STATE WOULD HAVE NO OBJECTION TO PUTTING SPECIAL AGENT CHARLES UP ON THE STAND IN THE CASE OF THE TRIAL. IT'S JUST THAT --

THE COURT: WELL THE PROBLEM I'VE GOT IS THE UNITED STATES SUPREME COURT AND THE SOUTH CAROLINA SUPREME COURT IS SAYING THAT THERE BEING NO CONSENSUS AS TO THE RELIABILITY OF POLYGRAPH EVIDENCE, THAT AND THE SCIENTIFIC COMMUNITY AS THE CASE, THE STATE REMAINED EXTREMELY POLARIZED AS TO THE RELIABILITY THAT YOU'RE NOT SUPPOSED TO EVEN MENTION THE WORD IN A CRIMINAL TRIAL MUCH LESS GO INTO IT IN FRONT OF THE JURY.

MR. DIGGS: YOUR HONOR --

THE COURT: YES, SIR?

MR. DIGGS: IF I COULD ADD, PARAGRAPH 2 FROM THE STATE RELIES ON THIS ONE ADMISSIBILITY. THE STATE REALLY DOESN'T PROVIDE FOR ITS USE IN THAT FASHION. IT SAYS THAT IT MAY BE USED AGAINST HIM FOR ANY LEGAL PURPOSE INCLUDING BUT NOT LIMITED TO CONSIDERATIONS FOR CHARGING ON DISPOSITION OF CHARGES THROUGH PLEA OR TRIAL.

NOW IN TERMS OF WHAT MR. RICHARDSON JUST SAID IT'S COMPLETELY TRUE. IT'S USED AS AN INVESTIGATING TOOL. IT WOULD BE CERTAINLY PROPER TO USE THE STATEMENT IN TERMS OF MAKING A DECISION OF HOW TO CHARGE MR. WILLS OR HOW TO MAKE A PLEA NEGOTIATION MAKING CHARGE OR SENTENCING CONCESSIONS BUT IT DOESN'T SPECIFICALLY SAY WE'RE GOING TO USE THIS AND INTRODUCE IT AT TRIAL IN FRONT OF THE JURY SO THAT THE JURY CAN MAKE A DETERMINATION ON THE GUILT OR INNOCENCE AT TRIAL.

IT MAY BE WHY THE LIMITATION AND THE EXPLANATION OF THAT KIND OF LIMITATION WOULD BE THE RECOGNITION BY THE SOLICITOR'S OFFICE IN A INHERENTLY UNFAIR NATURE OF THIS KIND OF PLEA PROCEEDING PROCEDURE WHEN YOU END UP WITH A DISPUTE IN THE END ABOUT WHETHER OR NOT HE PASSED A POLYGRAPH OR DID NOT PASS IT. BUT TO GO AHEAD I WOULD SUBMIT TO USE THIS KIND OF PROCEDURE THEN ULTIMATELY YOU LET THE STATE MAKE THE DECISION THAT HE'S NOT TELLING THE TRUTH OR SHOWING DECEPTION IN SOME FASHION, SOME GENERAL FASHION. WE DON'T KNOW SPECIFICALLY IN WHAT REGARD. IT'S

APPARENTLY UNFAIR AND VIOLATES DUE PROCESS WHEN YOU ALLOW THE STATE TO EXPAND BEYOND THE SCOPE OF LITERAL LANGUAGE CONTAINED IN THE AGREEMENT. THAT WOULD BE THE BASIS OF OUR OBJECTION ---

THE COURT: ALL RIGHT.

MR. DIGGS: --- REGARDLESS OF WHAT'S SAID IN THE STATEMENT.

THE COURT: YES, SIR.

MR. RICHARDSON: YOUR HONOR, I BEG TO DIFFER ON THE INTERPRETATION OF THE CONSIDERATIONS FOR CHARGING BY DISPOSITION THROUGH PLEA OR TRIAL, IT SPEAKS FOR ITSELF.

THE COURT: WELL AND I, I APPRECIATE THAT, YOU KNOW, AND I UNDERSTAND. I DON'T KNOW THAT I HAVE A PROBLEM WITH THAT. I THINK I REALLY WISH THAT PARAGRAPH 2 WOULD BE MORE SPECIFIC AS TO THE CONSEQUENCES AND DETERMINATION OF WHETHER HE'S TELLING THE TRUTH OR IT COULD BE A COMPLETELY ARBITRARY DECISION BY THE STATE OF SOUTH CAROLINA TO USE IT HOWEVER YOU WANT TO DEFINE IT. PARAGRAPH 2 TO ME LACKS SOME SPECIFICITY ---

MR. RICHARDSON: YOUR HONOR, I ---

THE COURT: --- AS TO THE CONSEQUENCES AND WHO GETS TO DETERMINE AND UNDER WHAT CIRCUMSTANCES THEY GET TO DETERMINE WHETHER OR NOT HE WAS TELLING THE TRUTH OR NOT TELLING THE TRUTH.

ANYWAY, ALL RIGHT, WELL I NEED TO HEAR ALL THIS

SO ---

MR. RICHARDSON: YES, SIR.

THE COURT: --- LET'S, LET'S GO FORWARD WITH THE HEARING. LET ME HEAR ALL OF IT AND THEN WE CAN, THEN WE CAN MOVE ALONG AFTER THAT.

MR. RICHARDSON: YOUR HONOR, IF WE MAY CALL SPECIAL AGENT CHARLES FIRST.

THE COURT: ALL RIGHT, SIR. COME AROUND AND BE SWORN, THANK YOU.

**SPECIAL AGENT RICKY W. CHARLES**

**BEING FIRST DULY SWORN, TESTIFIED IN CAMERA AS FOLLOWS:**

MADAM CLERK: SPEAK INTO THE MICROPHONE, PLEASE STATE YOUR FULL NAME AND SPELL YOUR LAST NAME FOR THE COURT.

THE WITNESS: RICKY W. CHARLES, C-H-A-R-L-E-S.

**DIRECT EXAMINATION**

**BY MR. RICHARDSON:**

Q SPECIAL AGENT CHARLES, WOULD YOU TELL US YOUR PLACE OF EMPLOYMENT?

A I WORK FOR THE SOUTH CAROLINA LAW ENFORCEMENT DIVISION.

Q OKAY, FOR HOW LONG AND IN WHAT CAPACITY?

A I'VE BEEN WITH THE STATE FOR SEVEN YEARS AND I'M A POLYGRAPH EXAMINER.

Q AND PRIOR, YOU'VE BEEN A POLYGRAPH EXAMINER

WITH SLED FOR SEVEN YEARS?

A THAT'S CORRECT.

Q PRIOR TO THAT WHAT IS YOUR EXPERIENCE WITH POLYGRAPH EXAMINATION?

A I'VE BEEN A POLYGRAPH EXAMINER FOR 20 YEARS AND A CRIMINAL INVESTIGATOR FOR 24 YEARS.

Q AND WITH WHAT OTHER AGENCIES HAVE YOU WORKED?

A THE SPARTANBURG COUNTY SHERIFF'S OFFICE FOR SEVEN YEARS AND I WAS IN THE UNITED STATES AIR FORCE FOR 20 YEARS AS A CRIMINAL INVESTIGATOR.

Q AND CAN YOU, CAN YOU TELL US A LITTLE BIT ABOUT POLYGRAPH EXAMINATION, WHAT GOES INTO EXAMINING ANYTHING OR ANY WITNESS?

A THERE ARE THREE PHASES IN THE POLYGRAPH EXAMINATION. ONE IS CALLED THE PRETEST PHASE, ONE IS THE IN TEST AND ONE IS THE POST TEST.

IN THE PRETEST PHASE CERTAIN THINGS HAVE TO TAKE PLACE. ONE IS A MIRANDA FORM THAT IS READ AND SIGNED. ONE IS A POLYGRAPH STATEMENT OF CONSENT WHICH MEANS THAT THE EXAMINEE IS VOLUNTARILY TAKEN THE TEST.

THERE IS AN EXPLANATION OF THE INSTRUMENT HOW IT WORKS, A LITTLE BIT ABOUT HUMAN PHYSIOLOGY, HOW THE BODY REACTS TO CERTAIN THINGS.

THERE IS A REVIEW OF THE CASE ITSELF AND THE LAST

THING WE DO BEFORE WE ACTUALLY COLLECT CHARTS IS REVIEW EVERY SINGLE QUESTION WITH THE EXAMINEE PRIOR TO THE TEST.

Q AND WERE ALL THOSE STEPS CARRIED OUT WHENEVER YOU POLYGRAPHED THE DEFENDANT THEODORE DAVID WILLS, JR.?

A YES.

Q WITH REGARD TO, YOU SAID YOU READ A MIRANDA?

A THAT'S CORRECT.

Q AND YOU EXPLAIN POLYGRAPH TO HIM AND GET HIM TO SIGN AN ACCEPTANCE TO BE POLYGRAPHED?

A A CONSENT FORM, THAT'S CORRECT.

Q THAT'S TO ENSURE THE WILLINGNESS TO BE POLYGRAPHED?

A THAT'S CORRECT.

Q THERE'S AN EXPLANATION OF HOW ALL THE MECHANICS WORK?

A THAT'S CORRECT.

Q AND THEN YOU REVIEW THE CASE WITH HIM?

A YES.

Q AND IT'S PRIOR TO THE ACTUAL QUESTIONING?

A THAT'S CORRECT.

Q WITH REGARD TO THE MECHANICAL PHYSIOLOGICALLY HOW THE POLYGRAPH WORKS, COULD YOU EXPLAIN THAT A LITTLE BIT?

A SURE, THE POLYGRAPH BASICALLY IS BASED ON WHAT WE CALL FEAR OF DETECTION OF DECEPTION. WE MONITOR THREE SEPARATE PHYSIOLOGICAL PHENOMENON IN THE BODY. ONE IS THE CARDIOVASCULAR SYSTEM, BLOOD PRESSURE AND PULSE RATE. ONE IS WHAT WE CALL GSR, GALVONIC SKIN RESPONSE, WHICH RELATES TO SWEAT GLAND ACTIVITY, AND ONE IS THE BREATHING A RESPIRATORY SYSTEM.

Q AND HOW LONG DID YOU MONITOR HIM?

A THE RESPIRATORY SYSTEM IS MONITORED BY TWO CONVOLUTED TUBES THAT GO AROUND THE UPPER TORSO.

THE GALVONIC SKIN RESPONSE IS RECORDED VIA TWO FINGER PLATES, ONE ON THE RING AND ONE ON THE INDEX FINGER, AND THE CARDIOVASCULAR RESPONSES ARE MONITORED WITH A TYPICAL BLOOD PRESSURE CUP.

Q AND HAVE YOU TESTIFIED MOTIONS OR IN A TRIAL PRIOR TO THIS WITH REGARDS TO POLYGRAPH EXAMINATION?

A YES.

Q CAN YOU TELL US ABOUT THAT?

A WELL I'VE TESTIFIED IN NUMEROUS HEARINGS. I'VE TESTIFIED IN GENERAL SESSIONS COURT IN THIRD CIRCUIT IN FRONT OF JUDGE NEWMAN AND WAS DECLARED AN EXPERT WITNESS BY JUDGE NEWMAN.

Q WITH REGARD TO POLYGRAPH EXAMINATION?

A THAT'S CORRECT.

Q ARE YOU, WHAT KIND OF TRAINING HAVE YOU HAD

WITH REGARD TO POLYGRAPH EXAMINATION?

A I WENT TO THE DEPARTMENT OF DEFENSE POLYGRAPH INSTITUTE IN 1987. WE HAVE TO HAVE AT LEAST 40 HOURS OF TRAINING, UP GRADE TRAINING, EVERY THREE YEARS SO I USUALLY ATTEND TRAINING THREE TO FOUR TIMES A YEAR SINCE 1987.

Q HAVE YOU GOTTEN CONTINUING EDUCATION?

A YES, THAT IS A CONTINUING EDUCATION.

Q AND HAVE YOU, HAVE YOU ACTUALLY TRAINING ANYONE OR HAVE YOU DONE EDUCATION TRAINING FOR AS IT REGARDS TO POLYGRAPH?

A YES, I'VE INTERNED FIVE POLYGRAPH EXAMINERS SINCE I'VE BEEN A CERTIFIED EXAMINER IN THE STATE OF SOUTH CAROLINA.

Q AND ARE YOU A MEMBER OF ANY ASSOCIATIONS OR --

A I'M A MEMBER OF THE AMERICAN POLYGRAPH ASSOCIATION AND THE SOUTH CAROLINA ASSOCIATION FOR POLYGRAPH EXAMINERS.

MR. RICHARDSON: YOUR HONOR, FOR THE PURPOSES OF THIS HEARING I WOULD LIKE TO HAVE THIS WITNESS QUALIFIED AS AN EXPERT FOR PURPOSES OF POLYGRAPH EXAMINATION INTERPRETATION.

MR. DIGGS: YOUR HONOR, I DON'T HAVE ANY QUESTIONS AND I DON'T OBJECT, I STIPULATE TO IT.

THE COURT: ALL RIGHT, SIR, HE'S QUALIFIED TO GIVE HIS OPINION.

Q AGENT CHARLES, IN LATE AUGUST, EARLY SEPTEMBER OF 2005, DID YOU RECEIVE A REQUEST TO ADMINISTER A POLYGRAPH EXAM FOR THE DEFENDANT?

A YES, I DID.

Q AND WHO, WHO MADE THAT REQUEST?

A THE SOLICITOR'S OFFICE, FIFTEENTH CIRCUIT.

Q AND DID YOU EVER HAVE THE OPPORTUNITY TO ACTUALLY ADMINISTER A POLYGRAPH EXAM TO THIS DEFENDANT?

A THAT'S CORRECT.

Q AND DO YOU REMEMBER THE STATE?

A IT WAS SEPTEMBER 19TH, 2005.

Q OKAY, DID YOU PERSONALLY ADMINISTER THE POLYGRAPH EXAM?

A NO, ONE OF MY INTERNS, MY INTERN AT THE TIME CONDUCTED THE TEST.

Q AND HER NAME IS?

A JULIE DUFF.

Q AND DID YOU REMAIN IN THE ROOM DURING THE POLYGRAPH EXAMINATION?

A NO, ONLY DURING THE RIGHTS ADVISEMENT AND CONSENT FORM. I STEPPED OUT OF THE ROOM FOR HER TO CONDUCT THE TEST AND THEN LATER LOOKED AT THE TEST, REVIEWED THE CHARTS AFTER THE TEST WAS ADMINISTERED.

Q DID YOU OBSERVE IN ANY WAY DURING THE COURSE OF THE POLYGRAPH EXAM?

A IF THE ROOM THAT WE ARE WORKING IN IS, HAS AUDIO VIDEO CAPABILITY, YES, THIS ONE DID NOT.

Q OKAY, DID YOU HELP SGT. DUFF, SERGEANT, CORRECT?

A SHE'S CORRECT, THAT'S CORRECT, SHE'S A SERGEANT NOW.

Q DID YOU HELP HER IN DEVELOPING THE QUESTIONS THAT WOULD BE ASKED?

A YES.

Q AND YOU REVIEWED THOSE QUESTIONS?

A YES.

Q PRIOR TO THE EXAM?

A YES, WHICH IS A REQUIREMENT FOR ANYONE WHO IS AN INTERN A CERTIFIED EXAMINER MUST BE PHYSICALLY PRESENT AND MUST REVIEW THE QUESTIONS WITH THE EXAMINER AHEAD OF TIME AND MAKE SURE THEY'RE APPROVED QUESTIONS.

Q AND THE EXAMINATION QUESTIONS THEMSELVES HOW MANY QUESTIONS WERE ASKED?

A APPROXIMATELY 10 QUESTIONS AND WE CAN ASK UP TO 4 RELEVANT QUESTIONS WHICH DEAL SPECIFICALLY WITH THE ISSUE BEING TESTED.

Q DO YOU HAVE A COPY OF THOSE QUESTIONS?

A YES, SIR, I DO.

THE COURT: BEFORE WE GO ANY FURTHER, SOLICITOR --

MR. RICHARDSON: YES, SIR.

THE COURT: WAS THERE SOME AGREEMENT THAT YOU AND THE DEFENSE ATTORNEY HAD -- AS I UNDERSTAND IT MS. DUFF IS NOT GOING TO BE HERE?

MR. RICHARDSON: THAT'S CORRECT, YOUR HONOR.

THE COURT: AND SHE'S NOT GOING TO TESTIFY AT THIS HEARING, CORRECT?

MR. RICHARDSON: THAT'S CORRECT, YOUR HONOR.

THE COURT: ALL RIGHT, AND SO I UNDERSTAND IT AS TO WHAT OCCURRED --

MR. RICHARDSON: YES, SIR.

THE COURT: -- AND YA'LL CORRECT ME IF I'M WRONG AND IF I'M JUMPING AHEAD I APOLOGIZE, THAT THIS EXAMINER HELPED MS. DUFF DRAFT THE QUESTIONS ---

MR. RICHARDSON: YES, SIR.

THE COURT: --- BUT THAT DURING THE QUESTIONING ITSELF OR THE QUESTIONING PROCESS OF MR. WILLS MR. CHARLES WAS NOT PRESENT IN THE ROOM?

MR. RICHARDSON: THAT'S CORRECT, YOUR HONOR.

THE COURT: NOR DID HE OBSERVE THE PROCESS, YOU KNOW, THROUGH AN ADJACENT ROOM OR ANY OTHER WAY?

MR. RICHARDSON: THAT IS MY UNDERSTANDING, YOUR HONOR.

THE COURT: ALL RIGHT, IS THERE SOME AGREEMENT HERE?

MR. DIGGS: YOUR HONOR, WHAT WE OBJECT TO DOESN'T REALLY INVOLVE ANY OF THOSE ITEMS. THE FACT THAT THIS WITNESS WAS NOT PRESENT AT THE TIME THAT THE QUESTIONS WERE ACTUALLY ASKED DOESN'T FORM A BASIS FOR THE OBJECTIONS THAT WE HAVE WITH RESPECT TO THIS PROCEEDING.

THE COURT: OKAY.

MR. DIGGS: SO FOR THOSE PURPOSES I ADVISED THE SOLICITOR I WOULDN'T OBJECT IF HE DID NOT CALL MS. DUFF, AGENT, SGT. DUFF, TO COME TO TESTIFY AT THIS PARTICULAR HEARING ABOUT THOSE MATTERS. WHAT WE DO CONTEST IS THE ACCURACY IF THIS WITNESS PUTS ON THE TEST RESULTS LIABILITY UPON CROSS EXAMINING HIM AND THE EXTENT THAT THEY WENT TO TRY TO VERIFY OR HAVE A COMPETENCY RESULTS.

THE COURT: WELL, OKAY, THEN THAT GOES TO MY QUESTION.

MR. RICHARDSON: YOUR HONOR, SGT. DUFF WAS UNDER SUBPOENA WAS WILLING TO COME.

THE COURT: AND I UNDERSTAND THAT AND I UNDERSTAND THAT, BUT ULTIMATELY YOU'RE ASKING I MIGHT HAVE TO IN ANALYZING THIS UNDER THE RULES OF EVIDENCE AND TWO OF THEM THAT COME TO MIND RIGHT NOW, AND I KNOW I'M FORGETTING ONE OR TWO OF THEM BUT, YOU KNOW, RULE 403, RULE 702, IN EXAMINING WHETHER OR NOT HOW THIS MATTER SHOULD BE

PRESENTED TO THE, TO THE JURY THE DEFENSE IS QUESTIONING THE ACCURACY OF THE TEST RESULTS SAYING ULTIMATELY YOUR DETERMINATION, THE STATE'S DETERMINATION THAT HE WAS NOT TRUTHFUL DURING THE EXAMINATION AND YOU HAVE THIS WITNESS, AND I HAVE QUALIFIED HIM TO GIVE HIS OPINION AND CERTAINLY HE CAN, AND HE CAN BASE THAT UPON THE STANDARD RULES OF EVIDENCE, HE CAN BASE IT UPON ALL OF THE EVIDENCE AND ALL OF THE MATTERS BEFORE HIM TO BASE HIS OPINION, NOT THAT HE HAD TO BE PRESENT BUT I, I GUESS I'VE GOT SOME CONCERN AS TO HOW HE'S SUPPOSED TO BE JUDGING THE ACCURACY OF THE RESULTS WHEN HE WASN'T THERE.

MR. DIGGS: YOUR HONOR, IF IT'S GOING TO RESULT IN, IF THE COURT'S INCLINED TO SAY THE DEFENSE HAS WEIGHED THE ISSUE OUT REQUIRING THE WITNESS MS. DUFF TO BE HERE THEN I CERTAINLY WOULD ASK THAT THE STATE PROVIDE THAT WITNESS, YOU KNOW, IT'S TOO MUCH OF A CONCESSION TO THE SOLICITOR EARLIER. I APOLOGIZE, I CAN'T PUT MY CLIENT IN THAT POSITION.

THE COURT: WELL I APPRECIATE THAT. HOW ARE YOU EXPECTING TO HAVE THIS WITNESS TESTIFY AS TO THE ACCURACY OF THE TEST RESULTS?

MR. RICHARDSON: YOUR HONOR, I BELIEVE THE WITNESS MIGHT BE ABLE TO GO THROUGH ACTUALLY WHAT HE DID TO VERIFY THE RESULTS.

THE COURT: ALL RIGHT, WELL LET'S HEAR HIM ABOUT

THAT THEN BEFORE WE GO INTO ANYTHING ELSE.

THE WITNESS: (CONTINUING)

A SLED, I'M SORRY, GO AHEAD.

Q AGENT CHARLES, YOU WERE SAYING THAT YOU HELPED PREPARE THE QUESTIONS?

A THAT'S CORRECT.

Q YOU REVIEWED THEM PRIOR TO THOSE QUESTIONS BEING ASKED?

A THAT'S CORRECT.

Q YOU OBSERVED EVERYTHING THAT OCCURRED BEFORE ---

A THAT'S CORRECT.

Q --- THE EXAMINATION? COULD YOU TELL US WHAT ALL WENT ON?

A WELL AFTER, FIRST OF ALL EVERY TEST THAT IS RUN FOR SLED IS QUALITY CONTROLLED BY AT LEAST TWO OTHER EXAMINERS. THE EXAMINER WHO RUNS THE TEST AND THERE ARE TWO OTHER EXAMINERS WHO REVIEW THE CHARTS AND THE QUESTIONS TO DETERMINE IF THE QUESTIONS WERE PROPER FOR THAT ISSUE BEING TESTED.

NUMBER TWO, THE CHARTS THAT WERE COLLECTED DURING THE EXAMINATION ARE EVALUATED BY TWO OTHER EXAMINERS IN THE BLIND WHICH MEANS THEY DID NOT LOOK AT ANY OTHER EXAMINERS RESULT TO DETERMINE IF THAT PERSON WAS TRUTHFUL OR NOT TRUTHFUL.

WE'RE ALL TAUGHT TO EVALUATE CHARTS THE SAME WAY, WHAT CRITERIA THAT WE ARE LOOKING FOR. AND THAT'S HOW AN EXAMINER WHO WAS NOT EVEN PRESENT CAN REVIEW THE CHARTS TO DETERMINE IF THE PERSON WAS BEING TRUTHFUL OR NOT TRUTHFUL.

THE QUESTIONS THAT WERE ASKED OUT OF MY PRESENCE ARE PUT INTO A COMPUTER. THERE'S NO WAY TO ALTER THAT AND WHEN THE EXAMINER ASKS THE QUESTION THAT QUESTION POPS UP ON THE COMPUTER SCREEN AND IT IS RECORDED AS A MATTER OF RECORD AS TO WHAT QUESTION WAS BEING ASKED AT THAT TIME.

Q SO YOU VERIFY WHAT QUESTIONS WERE ASKED?

A YES, DEFINITELY.

Q YOU DID THAT IN THIS CASE?

A THAT'S CORRECT.

Q DO YOU HAVE A LIST OF THE QUESTIONS THAT WERE ASKED?

A I HAVE A LIST OF THE TOTAL QUESTIONS BUT I ALSO HAVE THE REPORT OF THE RELEVANT QUESTIONS.

Q AND THOSE LISTS DIFFER?

A I'M SORRY, I DIDN'T UNDERSTAND YOU?

Q THE LISTS ARE DIFFERENT BETWEEN THE TOTAL QUESTIONS ASKED AND THE PERTINENT QUESTIONS?

A THAT'S CORRECT BECAUSE, BECAUSE THE ONLY QUESTIONS THAT ARE EVALUATED TO DETERMINE IF THERE WAS AN ATTEMPT TO DECEIVE ARE THE RELEVANT QUESTIONS, QUESTIONS THAT HAVE TO DO WITH THE ISSUE AT HAND.

Q PART OF DETERMINING, PART OF ASKING THE PERTINENT QUESTIONS IS THERE ANY WAY TO DEVELOP A BASELINE?

A THERE ARE WHAT WE CALL IRRELEVANT QUESTIONS, QUESTIONS THAT ARE NON THREATENING, NON EMOTIONAL, HAVE NOTHING TO DO WITH THE ISSUE AT HAND. FOR INSTANCE, IS TODAY MONDAY, DO YOU SOMETIMES WATCH T.V., IS, YOU KNOW, DO YOU LIVE IN SOUTH CAROLINA, THOSE KINDS OF THINGS.

Q THOSE KINDS OF QUESTIONS WERE ASKED IN THIS PARTICULAR INCIDENT?

A THAT'S CORRECT.

Q YOUR OPINION NO DOUBT IN YOUR MIND THOSE QUESTIONS WERE ASKED?

A THEY WERE ASKED, IN FACT THEY'RE LISTED ON THE CHART ITSELF. WHEN YOU ASK A QUESTION ON THE COMPUTER YOU HIT A BUTTON TO START THE QUESTION, YOU HIT A BUTTON TO END THE QUESTION AND AT THE BOTTOM IT TELLS YOU WHAT QUESTION WAS ASKED.

Q ALL RIGHT, AND THESE IRRELEVANT QUESTIONS ALONG WITH THE PERTINENT QUESTIONS ARE THEY LIKE ALL IRRELEVANT QUESTIONS AND THEN TWO OR FOUR PERTINENT?

A NO, THEY ARE INTERSPERSED IN THE QUESTIONS.

Q WHAT'S THE REASONING FOR THAT?

A WELL BECAUSE YOU DO NOT WANT THE PERSON TO ANTICIPATE WHAT QUESTION IS GOING TO BE ASKED NEXT. ALL

THE QUESTIONS ARE REVIEWED AHEAD OF TIME BUT, YOU KNOW, YOU DO NOT WANT TO ESTABLISH A PATTERN AS TO WHERE YOU ASK THIS QUESTION FIRST EVERY TIME, YOU ASK THIS QUESTION SECOND EVERY TIME. WE REVIEW THE QUESTION BUT WE DO NOT REVIEW THE ORDER THAT THE QUESTIONS WILL BE ASKED IN.

Q AND THESE CHARTS YOU TALKED ABOUT TELL US HOW IT WORKS, SAY WHEN A QUESTION IS ASKED IS YOUR NAME RICK CHARLES?

A RIGHT.

Q THESE CHARTS DO THEY COME ACROSS THE COMPUTER SCREEN ---

A YES.

Q --- IN SPIKES?

A YES, THEY'RE BEING, THEY'RE BEING DEPICTED ON A COMPUTER SCREEN AND THEY'RE LATER PRINTED OUT ON A PRINTER.

Q AND YOU REVIEWED THE RECORDS IN THIS CASE?

A YES.

Q AND CAN YOU TELL US WHAT WERE THE PERTINENT QUESTIONS THAT WERE ASKED OF MR. WILLS?

A THE RELEVANT QUESTIONS WERE ---

Q RELEVANT QUESTIONS, I APOLOGIZE?

A RELEVANT QUESTION NUMBER 4 WAS, ARE YOU LYING ABOUT MARK WILLARD SHOOTING JULIAN LEE IN THAT FIELD, IN WHICH THE EXAMINEE ANSWERED, NO.

RELEVANT QUESTION 6 WAS, DID YOU SHOOT JULIAN LEE? THE EXAMINEE ANSWERED, NO.

RELEVANT QUESTION 8 WAS, ARE YOU LYING ABOUT DONNELL GREEN THROWING THAT GUN USED IN THAT SHOOTING IN THE WATER? THE EXAMINEE ANSWERED, NO.

AND RELEVANT QUESTION 10, DID YOU LIE ABOUT BEING PAID BY THE JOHNSON BROTHERS TO SHOOT JULIAN LEE IN WHICH THE EXAMINEE ANSWERED, NO.

Q AND YOUR REPORT WHAT DID IT INDICATE?

A IT INDICATED THAT THE EXAMINEE SHOWED DECEPTION ON THE TEST.

Q HOW CAN YOU -- WHAT GOES INTO THE INTERPRETATION OF THESE CHARTS TO SHOW WHETHER ---

A OKAY, THROUGH ---

Q --- DECEPTION IS NOTED OR NOT?

A THROUGH RESEARCH MANY, MANY RESEARCH STUDIES WE KNOW WHAT PHYSICAL CRITERIA THAT ARE ASSOCIATED WITH DECEPTION, OKAY, AND BASICALLY WE'RE TRAINED IN WHAT TO LOOK FOR, THE KINDS OF PHYSIOLOGICAL REACTIONS THAT WE'RE LOOKING FOR THAT WOULD SHOW, ARE TYPICAL OF A PERSON ATTEMPTING TO DECEIVE.

Q AND THESE, I GUESS, ARE EARMARKED AND SHOW UP ON THE COMPUTER?

A YES.

Q AND SO YOU STATED YOU NOTED DECEPTION WITH

RESPONSE TO, ARE YOU LYING ABOUT MARK WILLARD SHOOTING JULIAN LEE IN THAT FIELD?

MR. DIGGS: YOUR HONOR, I OBJECT, I WOULD SUBMIT THAT'S A MISCHARACTERIZATION OF WHAT THE TESTIMONY WAS.

THE COURT: WHY DON'T YOU REPHRASE YOUR QUESTION AND DETERMINE WHETHER OR NOT HIS REPORT INDICATES HE SHOWED DECEPTION ON THE TEST OR ON THOSE PARTICULAR QUESTIONS. I DON'T THINK THAT'S CLEAR, IT'S CERTAINLY NOT CLEAR TO ME.

MR. RICHARDSON: YES, SIR, YOUR HONOR.

Q (CONTINUING) AGENT CHARLES, IS THERE ANYWAY TO DETERMINE IF DECEPTION IS NOTED ON A PARTICULAR QUESTION?

A YES.

Q QUESTION NUMBER, I BELIEVE, DID YOU HAVE A COPY OF THE REPORT?

A YES.

Q ARE YOU LOOKING AT THAT REPORT NOW?

A YES.

MR. RICHARDSON: MR. DIGGS, DO YOU HAVE A COPY OF POLYGRAPH EXAM?

MR. DIGGS: YES.

THE COURT: ALL RIGHT, THANK YOU.

MR. RICHARDSON: YOUR HONOR, QUESTION R-4.

THE COURT: FOR THE PURPOSES OF THIS HEARING, MR. DIGGS, IS THERE ANY PROBLEM WITH THE POLYGRAPH REPORT

BEING MADE A PART OF THE RECORD FOR THE PURPOSES OF THE MOTION?

MR. DIGGS: NO, YOUR HONOR.

THE COURT: ALL RIGHT, YOU'VE GOT A COPY OF THIS DOCUMENT, IS THAT RIGHT?

MR. DIGGS: YES, SIR, I JUST WANT TO LOOK AT IT AND MAKE SURE IT'S THE SAME.

THE COURT: YES, SIR. ALL RIGHT, SOLICITOR, LET'S MARK THAT, MARK THAT AS A STATE'S EXHIBIT.

MR. RICHARDSON: YOUR HONOR, STATE'S EXHIBIT 16 FOR IDENTIFICATION PURPOSES ONLY.

THE COURT: ALL RIGHT, SIR.

MR. RICHARDSON: FOR THIS ---

THE COURT: JUST BE REAL CLEAR JUST MAKE SURE THAT THAT MATCHES THE REPORT HE HAS.

(WHEREUPON, STATE'S EXHIBIT NUMBER 16 MARKED FOR IDENTIFICATION.)

MR. RICHARDSON: (CONTINUING)

Q AGENT CHARLES, I'M SHOWING YOU A COPY OF WHAT'S BEEN PREVIOUSLY MARKED STATE'S EXHIBIT FOR IDENTIFICATION PURPOSES NUMBER 16. IS THAT A TRUE AND ACCURATE COPY OF THE REPORT FROM THE STATE LAW ENFORCEMENT DIVISION REGARDING THE POLYGRAPH OF MR. WILLS?

A YES, IT IS.

THE COURT: ALL RIGHT, SIR, YOU MAY PROCEED.

MR. RICHARDSON: THIS IS IT.

THE COURT: THANK YOU.

MR. RICHARDSON: (CONTINUING)

Q AGENT CHARLES, WITH REGARD TO QUESTION R-4, ARE YOU LYING ABOUT MARK WILLARD SHOOTING JULIAN LEE IN THAT FIELD, WHAT WAS THE EXAMINEE'S RESPONSE?

A HE ANSWERED, NO.

Q AND WHAT WERE YOU ABLE TO DISCERN FROM THAT ANSWER?

A WHEN WE NUMERICALLY EVALUATED THE CHART WE DETERMINED THAT HE WAS DECEPTIVE TO THAT QUESTION WHEN HE ANSWERED NO.

Q AND IN RESPONSE TO R-6 DID YOU SHOOT JULIAN LEE WHAT WAS THE EXAMINEE'S RESPONSE?

A HE ANSWERED, NO.

Q AND WERE YOU ABLE TO DETERMINE WHETHER THE DEFENDANT WAS SHOWING DECEPTION OR NOT ON THAT QUESTION?

A NUMERICALLY WHEN THE CHARTS WERE EVALUATED IT WAS DETERMINED THAT HE WAS DECEPTIVE WITH THAT QUESTION.

Q FINALLY TO SPEED THINGS UP, WITH REGARD TO QUESTION R-8 AND R-10, ARE YOU LYING ABOUT DONNELL GREEN THROWING THAT GUN USED IN THE SHOOTING IN THE WATER? TWELVE IS, DID YOU LIE ABOUT BEING PAID BY THE JOHNSON BROTHERS TO SHOOT JULIAN LEE, WHAT WERE THE DEFENDANT'S

RESPONSES WITH REGARD TO THOSE QUESTIONS?

A HE ANSWERED, NO, TO BOTH.

Q AND WERE YOU ABLE TO DETERMINE ANYTHING WITH REGARD TO THAT QUESTION?

A NO, NUMERICALLY BOTH OF THOSE WERE SCORED INCONCLUSIVE OR NO OPINION.

Q INCONCLUSIVE?

A YES.

Q SO THE TOP TWO QUESTIONS R-4 AND R, I BELIEVE, 6, HE ANSWERED, NO, AND DECEPTION WAS NOTED ON THOSE QUESTIONS?

A THAT'S CORRECT.

Q NUMERICALLY?

A NUMERICALLY.

Q AND THIS, THESE RESULTS WERE REVIEWED BY YOU?

A YES.

Q ANYONE ELSE REVIEW THESE RESULTS?

A YES, LT. DENNIS COGGINS WHO IS THE CHIEF OF THE SLED POLYGRAPH PROGRAM ALSO DID WHAT WE CALL A BLIND ANALYSIS ON THE CHARTS AND HE DETERMINED THAT THERE WAS DECEPTION.

Q AND YOU RENDERED THIS REPORT TO THE FIFTEENTH CIRCUIT JUDICIAL CIRCUIT?

A THAT'S CORRECT.

Q AND WAS THE DEFENDANT INFORMED OF HIS RESULTS?

A YES.

Q WAS HE ASKED ANY OTHER QUESTIONS?

A NO, BECAUSE HE HAD AN ATTORNEY NO POST INTERVIEW WAS CONDUCTED.

Q SO IT'S YOUR EXPERT OPINION THROUGH THE POLYGRAPH THAT THE DEFENDANT ON THOSE RELEVANT QUESTIONS SHOWED DECEPTION IN HIS ANSWERS?

A ABSOLUTELY.

Q AND DID YOU REVIEW HIS STATEMENT PRIOR TO THAT?

A YES, WE DID.

Q OKAY, AND IN YOUR OPINION HIS ANSWERS BEING DECEPTIVE ON THAT ARE THEY THEN POSITIVE AND OPPOSITE OF HIS STATEMENTS ON HIS PRIOR STATEMENT?

A YES, THEY ARE.

MR. RICHARDSON: THANK YOU.

THE COURT: ALL RIGHT, BEFORE YOU START, MR. DIGGS, LET ME, LET ME HAVE YOU COVER TWO THINGS, SOLICITOR, IF YOU WOULD?

MR. RICHARDSON: YES, SIR.

THE COURT: I WANT YOU TO COVER WITH THE WITNESS WHO DETERMINED THE ORDER OF THE QUESTIONS THAT WERE POSED TO MR. WILLS, WHO ACTUALLY DID THAT THE ORDER OF THE

QUESTIONS THAT WERE ACTUALLY ASKED AND HAVE HIM REVIEW THE MIRANDA WARNING THAT WAS GIVEN TO THIS DEFENDANT IF HE KNOWS ABOUT IT, IF HE WAS PRESENT WHO DID THAT, IF THERE'S ANY DOCUMENTATION OF THAT, PLEASE GO OVER ALL THAT.

MR. RICHARDSON: I'LL GO IN A LITTLE BIT REVERSE ORDER ON THAT.

Q (CONTINUING) WITH REGARD TO MIRANDA YOU STATED THAT MIRANDA WAS READ TO THE DEFENDANT PRIOR TO HIM BEING ADMINISTERED A POLYGRAPH?

A THAT'S CORRECT.

Q AND THAT WAS DONE IN THIS CASE?

A YES, IT WAS.

Q DID YOU PERSONALLY WITNESS THAT?

A YES, I DID.

Q AND WAS THE DEFENDANT PROVIDED WITH ANY KIND OF, ANYTHING TO SIGN, ANY FORMS?

A YES.

Q DO YOU HAVE A COPY OF THAT?

A YES, I DO, I HAVE THE ORIGINAL.

Q AND THIS IS THE ORIGINAL MIRANDA FORM THAT THE DEFENDANT SIGNED?

A THAT'S CORRECT.

MR. RICHARDSON: MAY I HAVE IT MARKED?

(WHEREUPON, STATE'S EXHIBIT NUMBER 17 MARKED FOR IDENTIFICATION.)

Q (CONTINUING) AGENT CHARLES, I'M GOING TO HAND TO YOU WHAT HAS BEEN PREVIOUSLY MARKED AS STATE'S NUMBER 17 FOR IDENTIFICATION PURPOSES, PLEASE TELL ME WHAT THAT IS?

A THIS IS A MIRANDA FORM.

Q AND WHAT IS THE PURPOSE OF THAT?

A IT IS TO ADVISE A SUBJECT OF HIS CONSTITUTIONAL RIGHTS.

Q AND IS THIS JUST HANDED TO THE DEFENDANT OR ---

A NO.

Q --- WHAT MANNER IS IT PRESENTED TO HIM?

A NO, IT IS READ WORD FOR WORD VERBATIM TO HIM OR HER.

Q AND WAS THIS FORM READ TO THIS DEFENDANT BACK IN SEPTEMBER OF '05?

A YES, IT WAS.

Q AND ARE YOU SURE THIS IS THE FORM THAT HE SIGNED?

A HAS HIS NAME AT THE BOTTOM OF IT, HE SIGNED IT.

Q AND HOW DO YOU KNOW THAT THIS IS THE ONE YOU AND AGENT DUFF, I'M SORRY, SGT. DUFF, PRESENTED TO THE DEFENDANT?

A IT'S GOT SGT. DUFF'S SIGNATURE AT THE

BOTTOM WHERE SHE WITNESSED IT.

Q DOES IT HAVE YOUR NAME ANYWHERE ON IT?

A NO, THERE'S NOT A PLACE FOR A SECOND WITNESS BUT I WAS PHYSICALLY THERE WHEN I SAW IT.

Q SO YOU DID OBSERVE THIS MIRANDA RIGHT BEING READ TO THIS DEFENDANT?

A THAT'S CORRECT.

Q AND YOU OBSERVED THE DEFENDANT SIGN OFF THAT HE UNDERSTOOD?

A THAT'S CORRECT.

Q ALSO THAT HE'S WAIVING HIS RIGHTS FOR THIS PORTION?

A THAT'S CORRECT, EXCEPT FOR THE EXCEPTION THERE WHERE WE MARKED OUT AND SO IT READ I DO HAVE AN ATTORNEY AT THIS TIME AND WE HAD HIM INITIAL THAT CHANGE.

Q THAT HE DOES HAVE AN ATTORNEY?

A YES.

Q AND, AGENT CHARLES, WITH REGARD TO THE ORDER OF THE QUESTIONING WHO DETERMINED THAT?

A THE, THE EXAMINER WHO RUNS THE TEST DETERMINES THE ORDER, HOWEVER, THE ORDER CAN CHANGE EACH TIME THAT WE RUN A CHART, OKAY. SO THE EXAMINER AFTER THEY'RE IN THERE CAN DETERMINE WHICH ORDER I'M GOING TO RUN THE NEXT CHART IN WHICH IS JUST STANDARD, THAT'S STANDARD POLYGRAPH PROCEDURE.

Q SO SGT. DUFF DETERMINED?

A YES.

Q IN THIS CASE WHAT ORDER SHE ASKED THE QUESTIONS?

A THAT'S CORRECT.

Q AND I BELIEVE YOU STATED BEFORE THAT YOU INTERSPERSED RELEVANT QUESTIONS WITH IRRELEVANT QUESTIONS?

A THAT'S CORRECT. THERE IS A, A APPROVED FORMAT THAT WE CONDUCT THE TEST IN, YES.

Q AND YOU TRAINED AGENT DUFF?

A YES.

Q SO SHE WAS TRAINED AT THIS POINT?

A OH, YES, WELL SHE RECEIVED THAT TRAINING WHEN SHE WENT THROUGH HER POLYGRAPH SCHOOL WHICH SHE WENT TO AND THEN AFTER THAT AN INTERN IS REQUIRED TO RUN 150 EXAMINATIONS UNDER DIRECT SUPERVISION OF A CERTIFIED EXAMINER TO GET THEIR STATE LICENSE.

Q AND, AGENT CHARLES, APPROXIMATELY HOW MANY POLYGRAPH HAVE YOU RUN?

A FIVE THOUSAND.

Q 5,000, AND HAVE YOU EVER RUN A POLYGRAPH THAT KIND OF KNOCKS THE LEGS OUT OF A STATE'S CASE?

A YES.

Q AND SO INFORMED THE STATE?

A YES.

Q BUT IN THIS CASE IT'S YOUR OPINION THE DEFENDANT SHOWED DECEPTION ON HIS QUESTIONING?

A ABSOLUTELY.

MR. RICHARDSON: THANK YOU.

THE COURT: ALL RIGHT, BEFORE YOU START, MR. DIGGS, I'M GOING TO TALK TO THE BAILIFF. IT'S 3:15. I DON'T SEE HOW WE'RE GOING TO GET TO ANY OF THIS CASE THIS AFTERNOON WITH ME HAVING TO REVIEW THE HOUR LONG VIDEO IN THIS MATTER SO I'M GOING TO TALK TO THE BAILIFFS AND WHEN THOSE JURORS ARRIVE I'M JUST GOING TO HAVE HIM EXCUSE THEM UNTIL TOMORROW MORNING AT 9:30. THANK YOU, WE'LL TAKE A SHORT BREAK.

MR. RICHARDSON: THANK YOU, YOUR HONOR.

(WHEREUPON, A RECESS WAS TAKEN AND THE FOLLOWING TAKES PLACE ON THE RECORD AFTER THE RECESS.)

**CROSS EXAMINATION**

**BY MR. DIGGS:**

Q AGENT CHARLES, DO YOU HAVE OR WOULD IT BE FAIR TO SAY YOU'VE POLYGRAPHED INDIVIDUALS BEFORE AND THE RESULTS SHOWED DECEPTION WHEN YOU KNEW THEY WERE TELLING THE TRUTH; HAVE YOU EVER SEEN A SITUATION LIKE THAT?

A NO, SIR.

Q YOU NEVER HAVE?

A ME PERSONALLY?

Q RIGHT?

A NO, SIR.

Q WOULD YOU AGREE WITH ME THAT THAT CAN HAPPEN?

A SURE.

Q AND YOU AGREE WITH ME THE POLYGRAPH IS NOT 100 PERCENT FOOL PROOF?

A THAT'S CORRECT.

Q WHY IS THAT, FROM YOUR POSITION AS AN EXPERT IN THIS AREA WHY CAN WE GET RESULTS THAT ARE NOT RELIABLE?

A THERE COULD BE A COUPLE OF DIFFERENT REASONS. A LOT OF IT IS DEPENDENT UPON DID THE EXAMINER ASK THE RIGHT QUESTIONS THAT WERE PERTINENT TO THE ISSUE. IF THE EXAMINER WHAT WE CALL MISSES THE TARGET AND DOESN'T ASK THE CORRECT QUESTIONS YOU CAN GET EITHER A FALSE POSITIVE WHICH MEANS THAT THE PERSON IS TELLING THE TRUTH BUT SHOWED DECEPTION OR A FALSE NEGATIVE WHERE THE PERSON WAS ACTUALLY DECEPTIVE BUT DID NOT SHOW DECEPTION.

Q OKAY, ARE THERE ANY OTHER CIRCUMSTANCES THAT MIGHT RESULT IN FALSE READINGS?

A SURE, IF A PERSON IS MENTALLY HANDICAPPED OR MENTALLY ILL, A, SOMEONE WHO IS MENTALLY IMMATURE, DOESN'T UNDERSTAND WHAT IS GOING ON YOU CAN DEFINITELY GET A FALSE POSITIVE OR A FALSE NEGATIVE.

Q HOW ABOUT OTHER SITUATIONS, ARE THERE ANY

OTHERS YOU CAN THINK OF?

A THOSE ARE THE ONLY ONES I CAN THINK OF. AGAIN PROBABLY THE MOST COMMON ERROR, IF YOU WILL, IS IF THE EXAMINER EITHER ASKS QUESTIONS THAT WERE NOT PERTINENT TO THE ISSUE OR DOESN'T HAVE ALL THE INFORMATION FROM THE INVESTIGATOR OR, OR WHOEVER PROVIDED THEM THE INFORMATION AND THEY, THEY DON'T ASK THE CORRECT QUESTIONS.

Q WELL, WHAT DID YOU DO IN THIS CASE TO MAKE SURE THE CORRECT QUESTIONS WERE ASKED?

A WELL, WE REVIEWED THE STATEMENT, THE CASE BEFORE WE CONSTRUCTED THE TEST QUESTIONS. MS. DUFF AND I CONFERRED ON WHAT QUESTIONS NEEDED TO BE ASKED IN ORDER TO ANSWER THE MAIL, IF YOU WOULD, FOR THIS CASE AND THEN WE DECIDED ON THE QUESTIONS THEMSELVES.

Q ALL RIGHT, DID YOU, DID YOU KNOW WHETHER OR NOT THIS DEFENDANT FITS THE REQUIREMENTS OF MENTAL INTELLECTUAL STATE, STATE OR MATURITY STATUS IN ORDER TO GIVE A RELIABLE RESULT ON THE POLYGRAPH?

A ME PERSONALLY?

Q YES?

A NO, NO, I DO NOT KNOW.

Q WAS ANYTHING DONE TO YOUR KNOWLEDGE TO MAKE SURE THAT HE WAS A SUITABLE CANDIDATE FOR A POLYGRAPH?

A WE HAVE A FORM THAT WE FILL OUT THAT WE ASK THE EXAMINEE QUESTIONS IN AN ATTEMPT TO DETERMINE IF THEY

ARE PHYSICALLY AND MENTALLY CAPABLE OF TAKING THE TEST, YES.

Q DID YOU DO THAT IN THIS CASE?

A MS. DUFF DID, YES.

Q ALL RIGHT, DO YOU HAVE THAT QUESTIONNAIRE WITH YOU?

A YES, I DO.

Q OKAY, DO YOU MIND IF WE HAVE THIS MARKED?

A NOT AT ALL.

(WHEREUPON, DEFENDANT'S EXHIBIT NUMBER 2 MARKED FOR IDENTIFICATION.)

MR. DIGGS: (CONTINUING)

Q DO YOU KNOW, AGENT CHARLES, IF OTHER THAN THAT QUESTIONNAIRE WAS ANYTHING ELSE DONE TO MAKE A DETERMINATION AS TO WHETHER OR NOT THIS DEFENDANT WAS A SUITABLE CANDIDATE FOR THE POLYGRAPH?

A NO, THE ONLY THING WE DO IS GO THROUGH THE QUESTIONNAIRE AND ASK IF THEY HAVE ANY MEDICAL PROBLEMS, HAD HE BEEN TREATED BY A PSYCHIATRIST OR PSYCHOLOGIST FOR ANYTHING, DETERMINE WHAT THEIR GRADE LEVEL IS, CAPABILITY TO READ AND WRITE AND UNDERSTAND.

Q HAVE YOU EVER SAW, MET INDIVIDUALS OR HEARD OF INDIVIDUALS IN YOUR AREA OF EXPERTISE, AGENT CHARLES, THAT JUST DIDN'T PASS POLYGRAPHS, COULDN'T DO WELL ON THE POLYGRAPH?

A NO.

Q YOU NEVER HAVE?

A NO.

Q WOULD YOU AGREE WITH ME THAT IF SOMEONE FEELS AN EXCEPTIONAL AMOUNT OF ANXIETY WITH RESPECT TO A PARTICULAR QUESTION OR EVENT RELATED TO THE CASE WHICH IS THE SUBJECT OF THE POLYGRAPH THAT THAT FEELING CAN AFFECT AND SPILL OVER INTO THE RESPONSES GIVEN TO OTHER QUESTIONS IN THAT TEST?

A NO, MR. DIGGS, I DISAGREE WITH YOU ON THAT.

Q YOU DISAGREE WITH THAT?

A AND I, AND I HAVE A WAY TO EXPLAIN THAT.

Q ALL RIGHT, PLEASE DO.

A ALL RIGHT. WHAT WE DO IS WHEN WE GO THROUGH THE PRETEST PORTION OF THE EXAMINATION WE TALK ABOUT THE CASE. WE EXPLAIN TO THEM EXACTLY, WE GET THEIR SIDE OF THE STORY BASICALLY, WHAT HAPPENED, TELL ME WHAT HAPPENED, WHAT WAS YOUR ROLE, IF ANY. WE TALK ABOUT, WE ASK WHAT WE CALL COMPARISON QUESTIONS TO, AND, AND THESE ARE USED TO COMPARE RESPONSES TO THE RELEVANT ISSUE. THOSE ARE NOT EVALUATED OTHER THAN TO USE AS A COMPARISON RESPONSE VERSUS RESPONSE AGAINST THE RELEVANT ISSUE AND AS AN EXAMPLE IF IT WAS A THEFT CASE WE WOULD ASK, THE RELEVANT ISSUE MIGHT BE DID YOU STEAL THAT MONEY.

THE COMPARISON OR CONTROLLED QUESTION WOULD BE

BEFORE THIS YEAR DID YOU EVER STEAL ANYTHING IN YOUR LIFE AND THE WAY THAT IS EXPLAINED IS LOOK THE KIND OF PERSON WHO STOLE THIS MONEY PROBABLY THEY'VE STOLEN IN THE PAST AND WE GET A COMMITMENT FROM THE PERSON THAT THEY'RE NOT THAT KIND OF PERSON.

THE THEORY IS THAT IF THE PERSON STOLE THE MONEY THEIR PSYCHOLOGICAL SET IS GOING TO GO TO THE QUESTION THAT IS THE MOST THREATENING TO THEM. IF THEY DID NOT STEAL THE MONEY THEY'RE GOING TO RESPOND TO QUESTIONS THAT HAVE TO DO WITH PAST TRANSGRESSIONS THAT MIGHT LEAD US TO BELIEVE THAT THEY STOLE THIS MONEY SO THAT'S WHAT WE CALL PSYCHOLOGICAL SET. THE PERSON IS GOING TO RESPOND TO THE QUESTION THAT IS THE MOST THREATENING AT THE TIME.

Q LET'S APPLY THAT TO R-4?

A OKAY.

Q LET'S ASSUME THAT THE DEFENDANT HAD LIED IN THE PAST ABOUT KNOWING THE IDENTITY OF A SHOOTER IN ANOTHER CASE WOULD THAT AFFECT HIS RESPONSE ON THIS QUESTION?

A NO, SIR, BECAUSE THE OTHER SHOOTERS NAME IS NOT USED IN THAT QUESTION, MARK WILLARD'S IS.

Q NO, BUT IN THE CONTROLLED QUESTION?

A OKAY, I'M NOT SURE ---

Q YOU ASKED ---

A I'M NOT SURE I UNDERSTAND YOUR QUESTION.

Q YOU ASKED A CONTROLLED QUESTION ABOUT THAT

PARTICULAR SET OF CIRCUMSTANCES?

A I'M SURE.

Q DO YOU KNOW WHAT IT WAS?

A YES, SIR, BEFORE THE YEAR ~~2000~~ DID YOU EVER TRY TO SERIOUSLY HURT OR HARM ANYONE.

Q AND WHAT WAS HIS RESPONSE?

A HE ANSWERED NO.

Q COULD YOU, DID YOU GET A READING ON THAT?

A WELL, YEAH, WE HAD TO BECAUSE WE HAD TO USE THAT AS A COMPARISON TO THE RELEVANT QUESTION.

Q WHAT WAS THE, WHAT DID YOU DETERMINE ABOUT THAT READING, COULD YOU, FOR EXAMPLE COULD YOU DETERMINE WHETHER HE WAS BEING TRUTHFUL?

A NO, ~~WE~~ COULDN'T BECAUSE HE'D RESPONDED GREATER TO THE RELEVANT ISSUE THAN HE DID THAT QUESTION SO YOU DON'T, YOU DON'T EVALUATE THE COMPARISON QUESTIONS TO DETERMINE IF THEY'RE, THEY'RE BEING TRUTHFUL ABOUT THAT. YOU USE THE COMPARISON QUESTIONS AS, AS A BASE LINE SO TO SPEAK AGAINST THE RELEVANT ISSUE.

IF THE RESPONSES TO THE COMPARISON QUESTIONS ARE GREATER CONSISTENTLY ACROSS THE BOARD AND ON ALL THREE CHARTS IT'S OBVIOUS TO US THAT HE'S BEING TRUTHFUL. HE'S NOT SCARED OF THE ISSUE AT HAND. HE'S MORE CONCERNED ABOUT PAST TRANSGRESSIONS, SO I CAN'T TELL YOU THAT, THAT, YOU KNOW, HE SCORED 100 ON THAT QUESTION. WHAT I CAN TELL YOU

IS CONSISTENTLY THE QUESTIONS CONCERNING THE RELEVANT ISSUE THE RESPONSES WERE GREATER NUMERICALLY THAN THEY WERE TO — THE QUESTIONS CONCERNING PAST TRANSGRESSIONS.

Q LET ME ASK ABOUT THAT SINCE YOU BRING THAT UP TO HOW MUCH GREATER?

A YOU WANT, YOU WANT TO KNOW HOW WE SCORE THE CHARTS?

Q YES?

A OKAY, WE SCORE THE CHARTS ON WHAT'S CALLED A 7 POINT SCALE.

Q DID YOU BRING THE CHARTS WITH YOU?

A YEAH, HAVE THEM RIGHT HERE.

Q SHOW, SHOW US AND THE COURT, IF YOU WOULD, THE CHARTS WHICH WERE USED IN THIS CASE, GENERATED IN THIS CASE?

MR. DIGGS: YOUR HONOR, MAY I GO AROUND?

THE COURT: YES, SIR.

THE WITNESS: (CONTINUING)

A WHAT CAN I SHOW YOU?

Q ALL RIGHT, CAN YOU POINT OUT FOR US WHERE THE RELEVANT QUESTIONS WERE ASKED ON THAT CHART?

A YES.

Q AND IF YOU WOULD, PLEASE SIR, DO THAT AND SHOW US WHAT THE RESPONSE WAS?

A OKAY, EACH QUESTION THAT HAS A (C) BEHIND

IT IS A COMPARISON QUESTION; EACH QUESTION THAT HAS AN (R) BEHIND IT IS A RELEVANT QUESTION. THE (X) HERE IS WHERE THE TEST BEGAN AND THE (XX) AT THE END IS WHERE THE TEST WAS OVER, THAT PARTICULAR CHART.

Q OKAY, SHOW US THE SECTION OF THE CHART THAT DEALS WITH R-4?

A WELL THERE'S GOING TO BE THREE SEPARATE ONES. THERE'S GOING TO BE ONE ON EACH CHART.

Q OKAY?

A ALL RIGHT, HERE'S THE FIRST CHART, R-4 IS HERE.

Q NOW WHEN YOU SAY THE FIRST CHART WHICH CHART IS THIS?

A THE FIRST GRADED CHART.

Q ALL RIGHT, WHAT ARE WE, WHAT ARE WE GRADING?

A WE'RE LOOKING AT RESPONSES. THE TOP TWO TRACINGS HERE ARE THE RESPIRATION. THE MIDDLE TRACING HERE IS THE SWEAT GLAND ACTIVITY. THE BOTTOM TRACING HERE IS THE CARDIOVASCULAR TRACING, BLOOD PRESSURE AND PULSE RATE.

Q ALL RIGHT, GO AHEAD AND SHOW ME WHERE R-4 WAS ASKED AND WHAT HIS RESPONSE WAS?

A THIS IS R-4. THE MINUS BEHIND EACH QUESTION MEANS THAT HE ANSWERED, NO. YOU'LL SEE HERE IF THERE WAS A YES ANSWER THERE WOULD BE A PLUS THERE.

Q SHOW ME, HOW DO YOU DETERMINE THAT THERE IS DECEPTION SHOWN?

A OKAY. PROBABLY THE EASIEST ONE TO SEE IS THE ELECTRODERMELER GSR, HERE. THIS IS THE MIDDLE LINE, OKAY, YOU CAN SEE HERE THE RESPONSE AT QUESTION 3 AND THE RESPONSE AT QUESTION 4 HOW MUCH LARGER THAT IS. IT'S, IT'S THREE TIMES BIGGER, OKAY. YOU CAN SEE THAT ---

Q WHY WOULD YOU SAY THREE TIMES BIGGER?

A WELL COUNT THE CHARTS.

Q WHAT ARE WE ---

A COUNT THE CHART DIVISIONS.

Q WHAT ARE WE MEASURING HERE?

A WE'RE MEASURING, WE'RE RECORDING REACTION.

Q GO BACK TO CONTROLLED QUESTION?

A UH-HUH.

Q WHAT IS THE, WHAT'S THE BASELINE THERE THAT YOU'RE USING?

A THERE IS NO BASELINE, I MEAN HE STARTS, HE STARTS HERE.

Q WHAT DO YOU, WHAT IS THE SCORE WITH THE CONTROLLED QUESTION?

A THERE IS NO SCORE.

Q WELL I'M SORRY, YOU SAID IT WAS THREE TIMES GREATER, GREATER THAN WHAT?

A ALL RIGHT, OKAY.

Q LET ME ASK IT THAT WAY?

A ALL RIGHT, SEE THE CHART DIVISIONS HERE, THE SECTIONS, 1, 2, 3, 4, 1, 2, 3, 4, 5, 6, 7, 8, 9, OKAY, TWO AND A HALF TIMES.

Q WELL LET ME ASK YOU THIS, WHAT IS ONE STEP, WHAT DIFFERENTIATES THE ONE STEP TO THE NEXT TWO THINGS?

A I DON'T UNDERSTAND THE QUESTION?

Q ALL RIGHT, WHAT'S THE DIFFERENCE?

A WELL ---

Q IS THERE A SIGNIFICANT DIFFERENCE ---

A SURE.

Q --- BETWEEN ONE LINE AND THE NEXT?

A SURE, HE RESPONDED TWO AND A HALF TIMES GREATER TO THAT REACTION THERE.

Q TWO AND A HALF TIMES WHAT?

A CHART POSITIONS.

Q DO YOU SEE WHAT I'M SAYING?

A NO, I CERTAINLY DON'T. I DON'T SEE WHAT YOU'RE 'SAYING.

Q YOU'RE ~~LOOK~~ING AT GRAPH, GRAPH PAPER ---

A DO YOU SEE THESE ---

Q THESE ---

A ALL RIGHT, DO YOU SEE ---

THE COURT: ALL RIGHT, GENTLEMEN, GENTLEMEN, STOP, STOP, YOU'RE TALKING ON TOP OF EACH OTHER, ALL RIGHT.

MR. DIGGS, I THINK IT WOULD BE HELPFUL IF YOU MOVED BACK DOWN AND STOOD IN FRONT OF THAT MICROPHONE RIGHT THERE, PLEASE SIR, ALL RIGHT. YOU ASK THE QUESTION AND YOU STOP AND ALLOW THE WITNESS TO ANSWER FULLY AND COMPLETELY. WHEN THE WITNESS IS, WITNESS STOPS THEN ASK ANOTHER QUESTION, ALL RIGHT, GO AHEAD.

Q WHEN YOU LOOK AT THE CONTROLLED QUESTION THERE AND YOU'RE LOOKING AT A SCORING LEVEL ---

A RIGHT.

Q --- CHART, WHAT I'M TRYING TO GET AT IS WHAT IS INDICATED BY THAT LEVEL, WHAT ARE WE MEASURING?

A OKAY, WHAT WE'RE LOOKING AT IS THE SEVERITY OR DEGREE OF A REACTION, OKAY. IF THE REACTION IS LARGER TO THE RELEVANT ISSUE, OKAY, THAT, THAT INDICATES DECEPTION TO US. THAT'S WHERE HE RESPONDED THE GREATEST AS TO THE RELEVANT ISSUE AND THE -- WHAT YOU WERE LOOKING I THINK, AND I'M NOT TRYING TO DODGE YOUR QUESTION I'M JUST TRYING TO UNDERSTAND IT, THE EASIEST WAY TO LOOK AT IT IS THE NUMBER OF DIVISIONS THAT IT GOES UP, OKAY.

ON THIS PARTICULAR QUESTION THAT YOU ASKED ME ABOUT HIS RESPONSE WAS ABOUT TWO AND A HALF TIMES GREATER TO THE RELEVANT ISSUE THAN IT WAS TO THE COMPARISON ISSUE WHICH INDICATES THAT HIS BIGGEST FEAR WAS THAT QUESTION THERE, OKAY, WHICH IS AN INDICATION OF DECEPTION. THE SAME THING OCCURRED THROUGHOUT ---

Q ALL RIGHT, I THINK MY QUESTION ---

A --- THE EXAMINATION.

Q --- ALSO GOES TO, AGENT CHARLES, HOW THAT PARTICULAR MACHINE WAS CALIBRATED WHAT WE'RE LOOKING AT HERE. WOULD YOU AGREE WITH ME A MACHINE CAN BE CALIBRATED IN A WAY SO THAT THE SAME RESPONSE MIGHT SHOW DIFFERENTLY DEPENDING ON HOW IT WAS ---

A ABSOLUTELY NOT, ABSOLUTELY NOT BECAUSE ---

Q --- SET?

A OKAY, THE COMPUTER SOFTWARE CALIBRATES IT, OKAY. THAT ELIMINATES ANY SUBJECTIVITY ON THE EXAMINERS PART, SO THAT COMPUTER SOFTWARE TAKES CARE OF THAT. YOU CANNOT CHANGE, ANY TIME YOU MAKE A CHANGE TO A SENSITIVITY ON THAT IT'S NOTED, OKAY, ON HERE. ALSO THE COMPUTER WILL NOT ALLOW YOU TO, TO MESS WITH THOSE KINDS OF THINGS.

Q NO, I'M NOT ---

A YOU CAN'T DO THAT.

Q AND I'M NOT ASKING YOU ABOUT WHETHER OR NOT IT WAS MESSED WITH.

A OKAY, I'M SORRY.

Q I'M TRYING TO GET A ---

A I MISUNDERSTOOD YOU.

Q IS THERE A STANDARD OF DEVIATION HERE OR VARIATION FROM ONE TEST TO THE NEXT SO THAT WE KNOW IN THIS TEST WE'VE GOT THIS TYPE OF DEVIATION AND THAT'S WHAT IS

TYPICALLY SHOWN ON EVERY OTHER TEST THAT'S DONE ---

A ARE YOU TALKING ABOUT OTHER TESTS BESIDES --

Q --- TO TEST DECEPTION? YES?

A NO, NO, YOU CAN'T COMPARE. I CAN'T COMPARE A TEST I RAN ON YOU VERSUS A TEST -- THE ONLY PERSON YOU'RE BEING COMPARED AGAINST IS THE PERSON WHO'S TAKEN THE TEST. YOU'RE NOT COMPARED AGAINST ANYBODY ELSE.

Q WELL IN THIS CASE WE'RE LOOKING AT TWO AND HALF, DID YOU SAY TWO AND HALF TO THREE TIMES --

A RIGHT.

Q VARIATION?

A SURE.

Q IS THAT SOMETHING, THAT'S SOMETHING WE CAN CERTAINLY LOOK AT ON OTHER TESTS, IS IT NOT, TO SEE IF THERE'S A, TWO, TWO TO THREE TIMES?

A UH-UH, NO, BECAUSE IF IT'S ONE ---

Q WHY IS THAT?

A BECAUSE IF IT'S ONE DIVISION, ONE SMALL CHART DIVISION BIGGER ON ONE THAN IT IS THE OTHER WE'RE ALLOWED TO LOOK AT THAT.

Q OKAY?

A SO HIS WAS TWO AND A HALF TIMES BIGGER SO IT'S CERTAINLY ---

Q SO, LET ME, LET ME ASK YOU THIS ---

A --- AN EVALUATOR.

Q --- HOW MANY TESTS DID YOU RUN ON DAVID WILLS?

A EXPLAIN WHAT YOU MEAN BY TEST. WE RAN ONE EXAMINATION, WE CONDUCTED THREE CHARTS.

Q YOU DID ONE, ONE SPECIFICALLY?

A YES.

Q OKAY, HOW DO YOU KNOW, DID HE SHOW DECEPTION ON EVERY THREE, EACH OF THE THREE?

A YES, HE DID.

Q ALL RIGHT, IF YOU CAN'T COMPARE ONE TEST TO ANOTHER HOW DO YOU KNOW THIS IS NOT THE WAY HE WOULD DO TYPICALLY EVERY TIME THE TEST WAS DONE EVEN IF HE WERE TELLING THE TRUTH?

A I DON'T UNDERSTAND THAT QUESTION AT ALL.

Q LET ME ASK YOU THIS. YOU KNEW AT THAT TIME, OR LET ME, MAYBE YOU DIDN'T, DID YOU KNOW WHETHER OR NOT AT THAT TIME MR. WILLS HAD BEEN CHARGED WITH MURDER?

A I DON'T REMEMBER, I DON'T REMEMBER. I DO REMEMBER THAT THERE WAS A PROFFER AND THIS REQUEST TO CONDUCT THE EXAMINATION WAS A RESULT OF THAT PROFFER BUT I DO NOT REMEMBER ---

Q DID YOU READ THE PROFFER?

A I'M SORRY?

Q DID YOU READ THE PROFFER?

A NO, ALL I READ WAS HIS STATEMENT.

Q OKAY, DID YOU KNOW THAT ULTIMATELY HE COULD BE CHARGED WITH MURDER IN THIS CASE?

A I DON'T REMEMBER.

Q WOULD YOU AGREE WITH ME THAT OF THE THREE RESPIRATION, YOU SAID HEARTBEAT AND SKIN --

A YEAH, SKIN RESPONSE, GALVONIC SKIN RESPONSE.

Q IS THERE A INDICATION ON YOUR CHART THAT WOULD SHOW SOMETHING THAT WAS NEAR AUTONOMIC IN RESPONSE, SOMETHING THAT WOULD BE IMPOSSIBLE TO FAKE; DO YOU KNOW WHAT I'M TALKING ABOUT?

A YOU'RE TALKING ABOUT COUNTERMEASURES IS WHAT YOU'RE TALKING ABOUT.

Q TELL US ABOUT THAT.

A SOMETIMES PEOPLE ATTEMPT TO USE WHAT WE CALL PHYSICAL COUNTERMEASURES IN AN ATTEMPT TO DEFEAT THE TEST. IT CAN BE SOMETHING LIKE CONTROLLING YOUR BREATHING, MOVEMENTS, CURLING UP YOUR TOES IN YOUR SHOES, BITING YOUR TONGUE, THOSE KINDS OF THINGS THAT SOMETIMES PEOPLE TRY.

Q WAS THERE ANYTHING NOTED IN THE CHARTS HERE THAT SHOWED DECEPTION THAT WOULD BE POSSIBLE TO MISREPRESENT HIM?

A ARE YOU ASKING DID HE ATTEMPT TO USE ANY COUNTERMEASURES IN THIS EXAMINATION, IS THAT THE QUESTION?

Q LET ME, YEAH, GO AHEAD AND ANSWER THAT, IF YOU WOULD?

A OKAY, NO, NO.

Q TYPICALLY WHEN YOU DO A TEST, AGENT CHARLES, IF YOU GET DECEPTION AS YOU TESTIFIED TO IN THIS CASE DO YOU EVER FOLLOW IT UP AGAIN FOR A SECOND INTERVIEW TO SEE WHAT ---

A DEFINE INTERVIEW?

Q ANOTHER SITTING.

A ANOTHER POLYGRAPH?

Q GO BACK ON ANOTHER DAY AND REDO THE TEST?

A IF YOU DIDN'T BELIEVE MY FIRST TEST WHY WOULD YOU BELIEVE MY SECOND ONE.

Q ALL RIGHT, HAVE YOU EVER DONE THAT?

A ONLY IN AN INCONCLUSIVE. IF WE, IF WE HAD WHAT WE CALL IS AN INCONCLUSIVE WE MIGHT BE ASKED TO ATTEMPT ANOTHER TEST IN AN ATTEMPT TO DETERMINE WHETHER A PERSON WAS BEING TRUTHFUL OR NOT.

Q YOUR TESTIMONY IS THAT HE CAN, YOU COULD ASK FOUR QUESTIONS AS YOU DID HERE?

A WE DON'T LIKE TO ASK ANY MORE THAN FOUR RELEVANT QUESTIONS, THAT'S CORRECT.

Q ARE THERE OTHER EXPERTS THAT SAY FOUR ARE TOO MANY?

A NOT TO MY KNOWLEDGE.

Q NOT TO YOUR KNOWLEDGE. YOU AREN'T AWARE OF ANY EXPERTS THAT SAY THAT ONE QUESTION AND CERTAINLY NOT MORE THAN TWO?

A I'M SURE THERE PROBABLY ARE BUT WE DON'T ADHERE TO THAT.

MR. DIGGS: YOUR HONOR, WE MOVE TO INTRODUCE THE CHARTS INTO EVIDENCE AS A PART OF THE RECORD.

MR. RICHARDSON: WITHOUT OBJECTION.

THE COURT: ALL RIGHT, WE'RE GOING TO MAKE COPIES OF THESE OR --

MR. DIGGS: YOUR HONOR, I DON'T KNOW HOW THEY COULD BE COPIED.

THE COURT: OKAY, ALL RIGHT, GO AHEAD AND HAVE THEM MARKED.

MR. RICHARDSON: YOUR HONOR, WE CAN ENTER THE ORIGINALS.

THE COURT: ALL RIGHT, GO AHEAD AND HAVE THEM MARKED. SOLICITOR, CAN YOU HELP THE WITNESS, PLEASE?

MR. RICHARDSON: SORRY, YOUR HONOR, I WAS TRYING TO LOOK AT A QUESTION.

THE COURT: THAT'S ALL RIGHT.

(WHEREUPON, DEFENDANT'S EXHIBIT NUMBER 3 MARKED FOR IDENTIFICATION.)

THE COURT: ALL RIGHT, ANY FURTHER QUESTIONS AT THIS POINT IN TIME, MR. DIGGS?

MR. DIGGS: NOT OF THIS WITNESS.

THE COURT: ALL RIGHT, SIR. ANY REDIRECT, SOLICITOR?

MR. RICHARDSON: JUST TWO QUESTIONS.

**REDIRECT EXAMINATION**

**BY MR. RICHARDSON:**

Q AGENT CHARLES, YOU SAID THAT YA'LL DO HAVE QUALITY CONTROL TO CONTROL ON THE IRRELEVANT QUESTIONS, CORRECT, QUALITY CONTROL WITH REGARD TO SLED'S CALLIGRAPHY STANDARDS?

A EVERY TEST THAT WE RUN IS QUALITY CONTROLLED BY A SUPERVISOR EXAMINER, YES, THAT'S CORRECT.

Q MR. DIGGS JUST ASKED ABOUT HIS POLYGRAPH 100 PERCENT RELIABLE, YOU'VE GIVEN US SOME REASONS WHY IT MIGHT BE UNRELIABLE?

A RIGHT.

Q YA'LL DO EVERYTHING THAT YOU CAN TO ENSURE RELIABILITY?

A THAT'S, THAT'S WHY WE HAVE, THAT'S WHY WE RUN MORE THAN ONE CHART AND THAT'S WHY WE HAVE MORE THAN ONE EXAMINER WHO REVIEWS THE CHARTS.

Q AND I DON'T KNOW YOU AND MR. DIGGS WERE TALKING I BELIEVE YOU WERE TRYING TO SAY THAT WHAT YOU ACTUALLY MEASURE IS THE REACTION OF SOMEONE TO A QUESTION?

A THAT'S RIGHT, THE QUESTION ITSELF IS WHAT

WE CALL A STIMULUS AND WHEN THEY ANSWER THE QUESTION THE ANSWER IS NOTED AND WE LOOK AT THE RESPONSE TO THAT ANSWER.

Q SO A QUESTION LIKE, HAVE YOU EVER BEAT UP SOMEONE BEFORE AND THEY ANSWERED, NO, YOU'RE NOT THAT WORRIED ABOUT IT THAT'S GOING TO BE KIND OF LOW? AND THEN, DID YOU BEAT UP JOHN DOE ON SEPTEMBER 12TH, 1942, IF THEY'RE WORRIED ABOUT THAT QUESTION THAT'S GOING TO SPIKE IT?

A THE REACTION WILL, THEY WILL RESPOND TO THE REACTION THAT CAUSES THEM THE GREATEST FEAR, THAT'S CORRECT.

Q OKAY, SO THE GREATEST FEAR OF MR. WILLS BY YOUR EXAMINATION IS, DID YOU SHOOT JULIAN LEE?

A THAT WAS ONE OF THEM, YES, SIR.

Q AND DID YOU LIE DURING YOUR PROFFER STATEMENT BASICALLY, PARAPHRASED?

A THAT'S CORRECT.

MR. RICHARDSON: THANK YOU.

THE COURT: ALL RIGHT, LET ME ASK A QUESTION SO THAT I UNDERSTAND IT. YOU'VE GOT THREE CHARTS. WAS ONE OF THEM GRADED BY SERGEANT DUFF, YOU DID ONE AND THEN THE OTHER SUPERVISOR DID ONE, IS THAT WHAT HAPPENED?

A NO, SIR, WHAT HAPPENED --

THE COURT: ALL RIGHT, TELL ME WHAT HAPPENED?

THE WITNESS: (CONTINUING)

A WHAT HAPPENS IS MS. DUFF IS THE FIRST ONE TO REVIEW THE CHARTS, TO ANALYZE THE CHARTS AND RENDER AN OPINION, OKAY. THE NEXT EXAMINER WHICH WAS ME REVIEWS THOSE CHARTS, ALL THREE, INDEPENDENTLY OF WHAT, I DIDN'T KNOW WHAT MS. DUFF HER OPINION WAS, OKAY. WE DO THAT ON PURPOSE. WE DON'T WANT ONE EXAMINER TRYING TO SWAY ANOTHER ONE. I REVIEW THE CHARTS INDEPENDENTLY OF HER, RENDERED AN OPINION.

THE COURT: OKAY.

A THE CHARTS WERE THEN TAKEN TO SLED HEADQUARTERS IN COLUMBIA REVIEWED BY A SUPERVISOR EXAMINER WHO KNEW NEITHER OF OUR OUTCOMES AND HE EVALUATED THE CHARTS INDEPENDENTLY OF MYSELF AND SERGEANT DUFF.

THE COURT: ALL RIGHT, THOSE OUTCOMES, THE ONE BY MS. DUFF, THE ONE BY YOU AND ONE BY THAT OTHER SUPERVISOR?

A YES, SIR.

THE COURT: WERE THOSE OUTCOMES REDUCED TO WRITING?

A YES, SIR, I HAVE A SCORE SHEET.

THE COURT: FOR EACH ONE OF YOU?

A YES, SIR.

THE COURT: ALL RIGHT, AND YOU HAVE THAT WITH YOU?

A YES, SIR.

THE COURT: ALL RIGHT, AND, ALL RIGHT. THEN I WANT US TO MARK COPIES OF THOSE THEN.

MR. RICHARDSON: YES, SIR, YOUR HONOR.

MR. DIGGS: YOUR HONOR, I DON'T HAVE THEM AND I'D LIKE LOOK AT THEM

THE COURT: WELL THAT'S FINE, I'M GOING TO GIVE YA'LL THE OPPORTUNITY TO ASK SOME QUESTIONS AFTER, AFTER I'M DONE CAUSE YA'LL ARE GOING TO HAVE TO HAVE HIM IDENTIFY WHO'S WHO AND THEN ASK SOME QUESTIONS ABOUT EACH ONE OF THEM. LET'S GO MAKE SOME, CAN YOU MAKE SOME COPIES RIGHT NOW, MA'AM?

MADAM CLERK: YES, SIR.

THE COURT: OKAY, JUST ONE COPY OF EACH ONE OF THEM.

MR. RICHARDSON: YOUR HONOR, AGENT CHARLES HAS INDICATED WE CAN KEEP, THAT THESE BE MADE PART OF THE COURT'S.

THE COURT: ALL RIGHT, THAT'S FINE THEN, ALL RIGHT.

MR. RICHARDSON: IF MR. DIGGS NEEDS COPIES ---

THE COURT: NO, I MEAN HE CAN LOOK AT THE ORIGINALS. YOU CAN GET COPIES LATER. LET'S MOVE THIS ALONG THEN IF WE CAN. ALL RIGHT, HAVE THE COURT REPORTER MARK THEM NOW. NO, STATE'S EXHIBITS.

MR. RICHARDSON: STATE'S EXHIBITS.

THE COURT: JUST MARK ALL THREE OF THEM AND THEN YOU CAN HAVE THIS WITNESS IDENTIFY WHO'S WHO AND WHAT THEY SAY.

(WHEREUPON, STATE'S EXHIBITS NUMBERS 4, 5, AND 6 MARKED FOR IDENTIFICATION.)

MR. RICHARDSON: THANK YOU, MA'AM.

THE COURT: ALL RIGHT, AND BEFORE YOU, BEFORE YOU START, REGARDING THESE THREE AGENT, AGENT, DID EACH OF YOU MAKE YOUR OWN DETERMINATION AS TO WHETHER OR NOT MR. WILLS HERE WAS TRUTHFUL OR DECEPTIVE ON EACH ONE OF THESE FOUR QUESTIONS? YOU'VE GOT THEM AS 4, 6, 8 AND 10, DID EACH OF YOU DO THAT?

A YES, SIR, INDEPENDENTLY.

THE COURT: AND THAT'S INDICATED ON THOSE REPORTS?

A THAT'S CORRECT, YOUR HONOR.

THE COURT: ALL RIGHT, SOLICITOR, HAVE HIM IDENTIFY WHO'S WHO AND WHAT THOSE REPORTS SAY AS TO THOSE FOUR QUESTIONS?

Q AGENT CHARLES, AT THIS TIME I'M HANDING YOU WHAT'S BEEN PREVIOUSLY MARKED AS STATE'S EXHIBIT 4, 5, AND 6. IF YOU COULD JUST TELL US WHAT THOSE ARE, SPECIFICALLY WHOSE REPORTS THEY ARE?

A EXHIBIT 4 IS A NUMERICAL ANALYSIS FORM THAT WAS FILLED OUT BY SERGEANT DUFF.

STATE'S EXHIBIT 5 IS A QUALITY ASSURANCE EVALUATION FORM THAT WAS COMPLETED BY ME.

AND STATE'S EXHIBIT 6 IS A QUALITY ASSURANCE EVALUATION FORM THAT WAS COMPLETED BY LIEUTENANT DENNIS COGGINS AT SLED HEADQUARTERS.

Q AND WHAT WAS THE PURPOSE OF THESE CHARTS? WHAT IS THE PURPOSE OF THESE CHARTS? WHAT DO THEY, WHAT DO THEY INTEND TO SHOW?

A THE PURPOSE OF THE SCORE SHEETS, NUMBER ONE, IS TO EVALUATE NUMERICALLY THE QUESTIONS ON THE CHARTS AND WHAT THEY INDICATE IS THAT EACH EXAMINER DETERMINED THAT THE EXAMINEE WAS DECEPTIVE CONCERNING THE RELEVANT ISSUES THAT WERE TESTED.

Q AND I BELIEVE I SEE AT THE TOP, I SEE 4, 5, 4, 6, 8 AND 10, IS THAT THE ---

A THOSE ARE THE RELEVANT QUESTIONS THAT WERE ASKED, CORRECT.

Q QUESTIONS THAT CAN BE FOUND ON --

A ON THE, ON THE POLYGRAPH REPORT, CORRECT.

Q AND AT THE BOTTOM IS THE SUBTOTALS?

A THAT'S CORRECT.

Q YOU HAVE SOME CHARTS, I SEE 1, BUT 2, 3 AND 4 ACTUALLY HAVE NUMERICAL?

A RIGHT.

Q ESTIMATIONS AND WHAT, WHAT, WHAT DO, LOOKS

LIKE THEY'RE A BUNCH OF NEGATIVE NUMBERS. WHAT DO THOSE NEGATIVE NUMBERS TELL US?

A OKAY, WELL LET ME BACK UP AND EXPLAIN THE SCORING SYSTEM. WE USE WHAT IS CALLED A 7 POINT SCALE THAT GOES FROM PLUS 3 TO MINUS 3 AND 0 IS IN THE MIDDLE. IN ORDER TO CALL A PERSON DECEPTIVE WE NEED A CALL OF MINUS 3 OR LESS ON THE NEGATIVE SIDE. IN ORDER TO DETERMINE OR CALL A PERSON NON DECEPTIVE WE NEED A SCORE OF PLUS 3 OR GREATER. ANYTHING IN BETWEEN PLUS 3 AND MINUS 3 WOULD BE INCONCLUSIVE AND WE DO THAT PURPOSELY.

WE BUILD IN A LARGE INCONCLUSIVE AREA BECAUSE WE WANT TO SAY DEFINITIVELY THAT A PERSON IS BEING TRUTHFUL OR NOT AND WE DON'T WANT JUST TO GRADE IT ON A PLUS 1 OR A MINUS 1.

Q SO YOU WANT TO BE FAIR?

A YES.

Q AND WHEN YOU SAY YOU HAVE A PLUS 3 OR A NEGATIVE 3 IS THAT THE FINAL NUMBER WE'RE LOOKING FOR?

A THAT IS, THAT IS THE TOTAL. WE DON'T JUST RUN ONE CHART AND EVALUATE ONE CHART. BASICALLY THE PERSON GETS THREE CHANCES TO GET IT RIGHT. WE ASK THE SAME QUESTIONS THREE SEPARATE TIMES AND THEN THE TOTAL OF THOSE THREE CHARTS, THE SCORES OF EACH CHART ARE TOTALLED UP.

Q FOR EXAMPLE, THE DEFENDANT WAS ASKED IF HE SHOT JULIAN LEE THREE SEPARATE TIMES?

A THAT'S CORRECT.

Q THE SAME THING WITH THE OTHER RELEVANT QUESTION ---

A THAT'S CORRECT, EVERY ---

Q -- AND MARK WILLARD?

A EVERY QUESTION, EVERY RELEVANT QUESTION WAS ASKED THREE TIMES.

Q AND THEN YOU ADD UP THE TOTAL?

A CORRECT.

Q THAT'S WHERE YOU GET THE NEGATIVE NUMBERS?

A THAT'S CORRECT.

Q OKAY, WITH REGARD TO QUESTION, LET'S SEE QUESTION 4 I BELIEVE THAT WAS ---

THE COURT: YOU'RE REFERRING BACK TO STATE'S EXHIBIT 16, CORRECT?

MR. RICHARDSON: YES, SIR, AT THE POLYGRAPH 4.

THE COURT: ALL RIGHT.

MR. RICHARDSON: (CONTINUING)

Q REFER BACK TO STATE'S EXHIBIT 16 I BELIEVE THE QUESTION R-4 WAS, ARE YOU LYING ABOUT MARK WILLARD SHOOTING JULIAN LEE IN THAT FIELD, WHAT WAS THE SCORE ON SGT. DUFF'S?

A MINUS 6.

Q WHAT WAS THE SCORE ON YOUR CHART?

A MINUS 5.

Q AND HOW ABOUT LIEUTENANT COGGINS?

A MINUS 2.

Q MINUS 2, SO BETWEEN YOU AND SERGEANT DUFF YOU CAME UP WITH DEFINITELY WHAT WOULD BE CONSTRUED AS A DECEPTIVE NUMBER?

A THAT'S CORRECT.

Q WHAT ABOUT R-6, DID YOU SHOOT JULIAN LEE, EXAMINEE'S RESPONSE NO. WHAT WAS THE SCORE ON SERGEANT DUFF'S?

A MINUS 5.

Q MINUS 5, HOW ABOUT ON YOURS?

A MINUS 5.

Q MINUS 5, HOW ABOUT ON LIEUTENANT COGGINS?

A MINUS 6.

Q MINUS 6, SO ON THREE REPORTS DECEPTION NOTED ON THAT?

A THAT'S CORRECT.

Q REMAINING QUESTION, ARE YOU LYING ABOUT DONNELL GREEN THROWING A GUN, THROWING THAT GUN USED IN THE SHOOTING IN THE WATER, EXAMINEE'S RESPONSE NO, WHAT WAS THE SCORE THAT SGT. DUFF?

A THAT WAS, THAT WAS RELEVANT QUESTION 8?

Q RELEVANT QUESTION 8?

A OKAY, MINUS 3 FOR MS. DUFF.

Q MINUS 3, YOURSELF?

A MINUS 1.

Q MINUS 1, AND FOR LT. COGGINS?

A MINUS 2.

Q MINUS 2, AND FINALLY DID YOU LIE ABOUT, QUESTION R-10, DID YOU LIE ABOUT BEING PAID BY THE JOHNSON BROTHERS TO SHOOT JULIAN LEE, EXAMINEE'S RESPONSE NO, WHAT WAS SERGEANT DUFF'S SCORE?

A MINUS 1.

Q MINUS 1, HOW ABOUT YOURS?

A ZERO.

Q ZERO, AND HOW ABOUT LT. COGGINS?

A ZERO.

Q ZERO, SO INCONCLUSIVE ON THAT?

A THAT'S CORRECT.

Q AND INCONCLUSIVE REALLY ON R-8?

A THAT'S CORRECT.

Q BUT DECEPTION NOTED BY THE TWO OF YOU ON QUESTION R-4?

A YES.

Q DECEPTION NOTED BY ALL THREE OF YOU ON QUESTION R-6?

A CORRECT.

Q AND ONCE AGAIN THESE SCORES YOUR OPINION WOULD INDICATE THAT HE WAS NOT BEING TRUTHFUL IN HIS PROFFERED STATEMENT?

A NO DOUBT ABOUT IT.

MR. RICHARDSON: THANK YOU.

THE COURT: AND ONE FINAL QUESTION BEFORE I ALLOW YOU TO EXAMINE HIM AGAIN, MR. DIGGS. YOU'VE BEEN QUALIFIED AS AN EXPERT, QUALIFIED TO GIVE YOUR OPINION IN THIS MATTER. AS I UNDERSTAND YOUR OPINION IS THAT THE DEFENDANT MR. WILLS WAS DECEPTIVE IN HIS RESPONSES TO THE RELEVANT QUESTIONS, THAT'S YOUR OPINION?

A THAT'S CORRECT, YOUR HONOR.

THE COURT: ALL RIGHT, SIR, AND YOU USED, IN COMING UP WITH YOUR OPINION YOU REVIEWED ALL OF THIS INFORMATION, YOUR RESULTS, SGT. DUFF'S RESULTS, THE INDIVIDUAL FROM SLED HEADQUARTERS, YOU USED ALL OF THAT TO COME UP WITH YOUR OPINION; IS THAT CORRECT?

A THAT'S CORRECT, SIR.

THE COURT: ALL RIGHT, SIR, THANK YOU VERY MUCH. MR. DIGGS?

**RECROSS EXAMINATION**

**BY MR. DIGGS:**

Q ALL RIGHT, HOW DO YOU GET DIFFERENT SCORES EACH, YOU KNOW, THE THREE OF YOU?

A UH-HUH, YOU MEAN HOW ARE THEY, WHY ARE THEY --

Q WHY IS IT, WHY CAN THEY DIFFER?

A BECAUSE ONE EXAMINER MAY SEE SOMETHING THAT

ANOTHER EXAMINER DOESN'T. ONE EXAMINER MAY SAY, WELL I DON'T THINK THAT'S QUITE THERE, IT'S ALMOST THERE, I'M NOT GOING TO CALL THAT ONE, I'M NOT GOING TO GIVE IT AS HIGH A POINT OR, OR AS MUCH WEIGHT, BUT THAT'S WHY WE HAVE QUALITY CONTROL

Q ALL RIGHT, SO WOULD YOU SAY, WELL ONE EXAMINER GAVE HIM A MINUS 6, ANOTHER A MINUS 5 AND ANOTHER MINUS 6 ON THAT RELEVANT QUESTION REGARDING THE SHOOTING?

A OKAY.

Q IT WAS STILL A, YOU WERE USING A JUDGMENT, EXERCISING A JUDGMENT BASED ON WHAT YOU WERE SEEING IN THE CHARTS?

A I'M NOT, I'M NOT QUITE SURE I UNDERSTAND YOUR QUESTION.

Q YOU'RE EXERCISING JUDGMENT? IN OTHER WORDS SOMEONE MIGHT SEE IT, SOMEONE MAY NOT SEE IT?

A RIGHT.

Q THAT'S WHY THERE'S A VARIANCE IN THE SCALE?

A SURE, SURE.

Q NOW IS THERE ANYTHING THAT, I ASKED YOU THIS EARLIER AND I WANT TO MAKE SURE THAT WE'VE COVERED IT. IS THERE ANYTHING TO YOUR KNOWLEDGE THAT COULD INFLUENCE AN INDIVIDUALS RESPONSE TO ASSIST OR TO SHOW DECEPTION WHEN NO DECEPTION WAS ACTUALLY INTENDED BY THE SUBJECT?

A THE ONLY, THE ONLY QUESTION, THE ONLY TIME

I CAN THINK OF SOMETHING LIKE THAT IS IF AGAIN IF YOU ASK THE WRONG QUESTION OR IF THERE'S SORT, SOME SORT OF MENTAL HANDICAP WHERE THE PERSON DOES NOT UNDERSTAND A QUESTION FULLY.

Q DO YOU BELIEVE THAT THE QUESTION, DID YOU SHOOT JULIAN LEE WAS AN APPROPRIATE QUESTION ---

A SURE.

Q --- IN THIS CASE? WHO FORMULATED THAT QUESTION, WHO CAME UP WITH IT?

A I WOULD ASSUME THAT, AND I DON'T REMEMBER. YOU HAVE TO UNDERSTAND I RUN 300 POLYGRAPHS A YEAR SO I DON'T REMEMBER SPECIFICALLY. BUT WHEN I INTERN WITH SOMEONE OR SOMEONE INTERNS WITH ME WE SIT DOWN AND DISCUSS THE QUESTIONS TOGETHER TO DETERMINE IF IT'S A PROPER QUESTION OR NOT AND I'M GOING TO HAVE TO SAY THAT THAT'S THE WAY THAT WE DID IT THIS TIME, I MEAN WE'RE TALKING TWO YEARS AGO.

MR. DIGGS: I DON'T HAVE ANYTHING FURTHER.

THE COURT: ALL RIGHT, SIR, ANY FOLLOW UP, SOLICITOR?

MR. RICHARDSON: NO, SIR, YOUR HONOR.

THE COURT: YOU MAY STEP DOWN, SIR. ALL RIGHT, OTHER WITNESSES THAT YOU WOULD HAVE BESIDES THE VIDEO?

MR. RICHARDSON: NO, SIR, YOUR HONOR, JUST DETECTIVE LARGE TO GET IN THE VIDEO TO GO OVER

ADMINISTRATION OF THE MIRANDA PRIOR TO THE TAKING OF THE STATEMENT.

THE COURT: ALL RIGHT, SIR. WELL, LET'S REVIEW THAT. LET'S HAVE, LET'S HAVE, LET'S GET THAT DONE.

MR. DIGGS: YOUR HONOR, THERE'S ONE THING ---

THE COURT: YES, SIR?

MR. DIGGS: --- I THING WE NEED TO DO FOR THE RECORD. I DON'T KNOW IF YOU WANT TO PUT MR. WILLS ON THE STAND FOR THIS BUT WITH RESPECT TO PUTTING THE TESTIMONY OF AGENT CHARLES IN CONTEXT, AT THE TIME OF THIS POLYGRAPH MR. WILLS WAS NOT CHARGED WITH MURDER. HE WAS CHARGED WITH OBSTRUCTION OF JUSTICE AND I WANTED TO MAKE THAT CLEAR IN THE RECORD. I CAN PUT MR. WILLS ON THE STAND.

THE COURT: IS THERE ANY QUESTION ABOUT THAT, SOLICITOR?

MR. RICHARDSON: NO, SIR, YOUR HONOR.

THE COURT: OKAY, I MEAN THAT, YOU ACCEPT THAT AS BEING THE CIRCUMSTANCES THAT WERE IN EXISTENCE AT THE TIME HE TOOK THE POLYGRAPH EXAM?

MR. RICHARDSON: I BELIEVE AT THE TIME HE WAS CHARGED WITH ACCESSORY AFTER THE FACT, IT MIGHT HAVE BEEN BEFORE THE FACT AND OBSTRUCTION OF JUSTICE AND HE ALSO HAD SOME OTHER CHARGES THAT ARE NOT PERTINENT TO THIS CASE.

THE COURT: BUT HE WAS NOT CHARGED WITH MURDER AT THAT POINT IN TIME?

MR. RICHARDSON: NO, SIR, HE WAS NOT.

THE COURT: OKAY, BUT IT COULD VERY WELL HAVE BEEN ACCESSORY; IS THAT CORRECT?

MR. RICHARDSON: HE WAS CHARGED ---

MR. DIGGS: ACCESSORY AFTER THE FACT. IT'S MY UNDERSTANDING HE WAS NOT BEING CHARGED AS ACCESSORY BEFORE THE FACT AND OBSTRUCTION OF JUSTICE.

THE COURT: OKAY, OBSTRUCTION OF JUSTICE AND ACCESSORY AFTER THE FACT, OKAY, AND SO THERE'S NO, NO QUESTION ABOUT THAT THEN, RIGHT?

MR. RICHARDSON: NO, SIR.

THE COURT: ALL RIGHT, OKAY. LET'S CALL THE, LET'S CALL THE NEXT WITNESS THEN ABOUT THE MIRANDA STATEMENT THEN.

MR. RICHARDSON: THE STATE CALLS DETECTIVE ALLEN LARGE.

THE COURT: ALL RIGHT, SIR, PLEASE COME AROUND TO BE SWORN.

**DETECTIVE ALLEN LARGE**

**BEING FIRST DULY SWORN, TESTIFIED IN CAMERA AS FOLLOWS:**

MADAM CLERK: STATE YOUR NAME AND SPELL LAST NAME FOR THE RECORD.

THE WITNESS: TROY ALLEN LARGE, L-A-R-G-E.

THE COURT: GO AHEAD, SOLICITOR.

**DIRECT EXAMINATION**

BY MR. RICHARDSON:

Q DETECTIVE LARGE, COULD YOU, PLEASE, TELL US ABOUT YOUR PLACE OF EMPLOYMENT AND IN WHAT CAPACITY AND HOW LONG?

A I WORK AT THE HORRY COUNTY POLICE DEPARTMENT, I'M ASSIGNED TO THE VIOLENT CRIME DIVISION OF INVESTIGATIONS. I'VE BEEN WITH THE DEPARTMENT 20 YEARS, 15 OF WHICH I'VE WORKED IN INVESTIGATIONS.

Q OKAY, AND THE CASE THAT'S HERE TODAY THAT BEING THEODORE DAVID WILLS WERE YOU THE CHIEF INVESTIGATOR ON THAT CASE WITH REGARD TO THE MURDER?

A NO, OUR LIEUTENANT RAUL DENNIS WAS THE LEAD INVESTIGATOR. I ASSISTED WITH SOME OF THE INVESTIGATION WHEN IT OCCURRED BACK IN 2001. LIEUTENANT RAUL DENNIS AT THE TIME OF THE MURDER WAS ASSIGNED TO THE VIOLENT CRIME DIVISION. HE HAS SINCE BEEN PROMOTED SEVERAL TIMES AND ASSUMES THE RANK OF LIEUTENANT IN THE SOUTH PRECINCT OF HORRY COUNTY.

Q SOMETIME IN 2005 WERE YOU CONTACTED BY THE SOLICITOR'S OFFICE?

A YES, SIR.

Q AND WITH REGARD TO MR. WILLS?

A YES, SIR.

Q AND WHAT WAS THE PURPOSE OF THAT?

A THE PURPOSE WAS WE WERE GOING TO MEET WITH

MR. DIGGS WHO WAS REPRESENTING MR. WILLS AT J. REUBEN LONG DETENTION CENTER I BELIEVE IT WAS AUGUST 2005 ON THE 26TH, TO DO A PROFFER AGREEMENT TO COME FORTH WITH WHAT HAPPENED TO THE VICTIM WHOSE STREET NAME WAS "J ROCK" GOES BY JULIAN LEE, A HOMICIDE THAT HORRY COUNTY POLICE HAD WORKED BACK IN 2001.

Q THAT WAS A PROFFER STATEMENT?

A YES, SIR.

Q OKAY, AND AT THE TIME DO YOU REMEMBER THE DATE IN WHICH YOU DID MEET WITH THE DEFENDANT?

A YES, SIR, WE MET ON 8-26, 2005 AT J. REUBEN LONG, THE FORM WAS READ AND SIGNED AT 2:39 P.M. WITNESSED BY DETECTIVE NEIL LIVINGSTON WHO ALSO WORKS WITH ME OUT OF THE VIOLENT CRIME SECTION OF THE HORRY COUNTY POLICE DEPARTMENT.

Q OKAY, AND YOU SAY THE FORM, WAS IT A MIRANDA FORM?

A YES, SIR.

Q WHO ELSE WAS PRESENT AT THIS MEETING?

A ASSISTANT SOLICITOR SCOTT HIXSON AND MR. BILL DIGGS AND MR. WILLS.

Q MR. WILLS HAD HIS ATTORNEY WITH HIM?

A YES, SIR.

Q SO HE WAS REPRESENTED NO DOUBT ABOUT THAT?

A YES, SIR.

Q AND HE WAS GIVEN A STATEMENT UNDER A PROFFER AGREEMENT?

A YES, SIR.

Q AND YOU STILL READ THE MIRANDA?

A YES, SIR.

Q WOULD YOU, PLEASE, TELL US HOW EXACTLY HE WAS ADMINISTERED THE MIRANDA?

A WENT THROUGH IT, THIS IS OUR STANDARD FORM THE HORRY COUNTY POLICE USES AS ADVISEMENT OF MIRANDA RIGHTS. IT SAYS:

YOU HAVE THE RIGHT TO REMAIN SILENT, ANYTHING YOU SAY CAN AND WILL BE USED AGAINST YOU IN A COURT OF LAW;

YOU HAVE THE RIGHT TO TALK TO AN ATTORNEY AND HAVE HIM PRESENT WITH YOU WHILE YOU'RE BEING QUESTIONED;

IF YOU CANNOT AFFORD TO HIRE AN ATTORNEY ONE WILL BE APPOINTED TO REPRESENT YOU BEFORE ANY QUESTIONS IF YOU MAKE A STATEMENT OR DO DESIRE;

IF YOU MAKE A STATEMENT OF ANSWER QUESTIONS YOU MAY HAVE THE RIGHT TO STOP AT ANY TIME;

AND THEN WE HAVE TWO SECTIONS ON THE FORM IT SAYS,

DO YOU UNDERSTAND YOUR RIGHTS AS I'VE READ THEM AND HAS A YES AND NO, IT'S CHECKED AND INITIALED;

AND THEN THE SECOND QUESTION IS, UNDERSTANDING YOUR RIGHTS DO YOU WISH TO WAIVE THEM AND MAKE THE

STATEMENT OR ANSWER ANY QUESTIONS AT THIS TIME.

THIS FORM WAS INITIALED OR CHECKED YES AND INITIALED, MR. WILLS SIGNATURE, HANDWRITING HERE IS MINE WHERE IT FILLS IN THE DATE, TIME, LOCATION AND WITNESSES.

(WHEREUPON, STATE'S EXHIBIT NUMBER 21 MARKED FOR IDENTIFICATION.)

MR. RICHARDSON: YOUR HONOR, AT THIS TIME FOR IDENTIFICATION PURPOSES STATE'S NUMBER 22 HORRY COUNTY POLICE DEPARTMENT CRIMINAL INVESTIGATIONS DIVISION ADVISEMENT AND MIRANDA RIGHT.

THE COURT: IS THERE ANY PROBLEM WITH THAT EXHIBIT BEING MADE A PART OF THE RECORD FOR THE PURPOSES OF THIS MOTION HEARING, MR. DIGGS?

MR. DIGGS: NO, YOUR HONOR.

THE COURT: ALL RIGHT, LET ME HAVE THAT DOCUMENT, PLEASE?

MR. RICHARDSON: YES, SIR, YOUR HONOR.

(WHEREUPON, STATE'S EXHIBIT NUMBER 22 MARKED FOR IDENTIFICATION.)

MR. RICHARDSON: (CONTINUING)

Q DETECTIVE LARGE, DID YOU DO ANYTHING TO ASCERTAIN THE DEFENDANT'S EDUCATION LEVEL?

A NOT ANYTHING THERE. I HAD HAD DEALINGS WITH HIM ON OUR ORIGINAL INVESTIGATION BACK IN 2001. MYSELF AND RAUL DENNIS, DETECTIVE DENNIS, HAD DONE AN

INTERVIEW AND THEN THAT DAY THAT ARRANGEMENT OR MEETING AT J. REUBEN LONG WAS SCHEDULED WITH MR. DIGGS. I FELT, YOU KNOW, THERE WAS NO NEED TO RUN ANY STANDARD QUESTIONS THAT WE USUALLY ASK LIKE, ARE YOU UNDER THE INFLUENCE OF ANY DRUGS OR ALCOHOL OR WHAT THE EDUCATIONAL LEVEL, THOSE ARE SOME OF THE ADDITIONAL QUESTIONS WE MIGHT ASK BEFORE WE CONDUCT AN INTERVIEW IF A PERSON'S NOT THERE WITH THEIR ATTORNEY.

Q SO HE SEEMED TO BE ABLE TO UNDERSTAND THE ENGLISH LANGUAGE?

A YES, SIR.

Q OKAY, SEEMED TO BE ABLE TO COMMUNICATE?

A YES, SIR.

Q HE WAS IN CUSTODY AT J. REUBEN LONG?

A YES, SIR.

Q TO YOUR KNOWLEDGE ARE ALCOHOL OR DRUGS PROHIBITED THERE?

A YES, SIR, THEY ARE NOT ALLOWED.

Q DID HE APPEAR TO BE UNDER THE INFLUENCE?

A NO, SIR.

Q AND SPOKE COHERENTLY?

A YES, SIR.

Q AND HE SIGNED THE MIRANDA?

A YES, SIR.

Q YOU GAVE HIM MIRANDA?

A YES, SIR.

Q DID YOU DO ANYTHING, DID HE MAKE A STATEMENT THAT DAY?

A YES, SIR, WE, WE DID A TAPED STATEMENT AT, AT THE FACILITY.

Q DID YOU DO ANYTHING TO RECORD OR MEMORIALIZE THE STATEMENT?

A YES, IT WAS DONE WITH A DIGITAL RECORDER.

Q I'M GOING TO SHOW YOU WHAT'S BEEN PREVIOUSLY MARKED AS NUMBER 21, STATE'S 21 FOR IDENTIFICATION PURPOSES, DO YOU RECOGNIZE THAT ITEM?

A YES, SIR, THAT IS A DIGITAL RECORDING CD.

Q AND WHAT DOES THE RECORDED CD DEPICT?

A IT SHOULD BE THE, THE ACTUAL INTERVIEW THAT WAS CONDUCTED AT J. REUBEN LONG WITH MYSELF AND DETECTIVE LIVINGSTON PRESENT WITH THE DEFENDANT, MR. HIXSON, AND MR. DIGGS PRESENT.

Q HAVE YOU REVIEWED THIS CD?

A A WHILE BACK WHEN IT FIRST, WHEN WE FIRST DID IT REVIEWED IT.

Q DOES IT CONTAIN THE ENTIRE STATEMENT?

A YES, SIR.

Q AND SO THERE'S NO MISSING PARTS?

A NO, SIR.

MR. RICHARDSON: YOUR HONOR, AT THIS TIME THE

STATE WOULD SEEK PUBLISH THE STATEMENT.

THE COURT: ALL RIGHT, FIRST, MR. DIGGS, DO YOU HAVE ANY QUESTIONS YOU WANT TO ASK DETECTIVE LARGE ABOUT THE MIRANDA RIGHTS OR THE ADVISEMENT OF THE RIGHTS OR QUESTION HIM IN ANY FASHION ABOUT THAT?

MR. DIGGS: WELL NOT WITH RESPECT TO MIRANDA RIGHTS, JUST A COUPLE OF QUESTIONS.

THE COURT: ALL RIGHT, SIR.

**CROSS EXAMINATION**

**BY MR. DIGGS:**

Q DETECTIVE LARGE, THERE'S NO QUESTION MR. WILLS WAS RESPONDING TO AN OFFER OF PLEA OFFER THAT HAD BEEN EXTENDED TO HIM BY THE STATE; IS THAT CORRECT?

A I BELIEVE SO.

Q AND HE GAVE THIS STATEMENT AS A RESULT OF THAT OFFER THAT HAD BEEN EXTENDED TO HIM?

A YES, SIR, THAT STANDARD PROCEDURE IS MADE UNDER PROFFER TO SEE IF THE PERSON CAN OFFER INFORMATION AND BE TRUTHFUL.

Q AND BUT FOR THAT PROFFER AGREEMENT MR. WILLS WOULD NOT HAVE SPOKEN TO YOU; WOULD YOU AGREE WITH ME THERE?

A PROBABLY.

Q BECAUSE HE HAD NO REASON ---

A YEAH, I MEAN HE WAS, LIKE I SAID HE WAS

UNDER CHARGES AND, AND HE HAD INVOKED HIS RIGHT FOR COUNSEL.

Q HE HAD BEEN LOCKED UP FOR SOME TIME BY THAT PERIOD OF TIME, BY THAT DATE; ISN'T THAT TRUE?

A I GUESS, I DIDN'T KNOW THAT HE, I MEAN I KNEW WHEN HE WAS LOCKED UP WHEN WE WENT OVER THERE BUT I DON'T KNOW FROM, I BELIEVE HE MADE BOND IN REFERENCE TO THE INITIAL CHARGES, IN REFERENCE TO THE HOMICIDE.

Q ALL RIGHT, BUT YOU DON'T KNOW IF HE WAS LOCKED UP AT THE TIME OF THE INTERVIEW?

A NO, I'M SAYING HE WAS LOCKED UP AT THE TIME, I'M JUST SAYING I DON'T KNOW THE DURATION IF IT WAS FOR SOMETHING ELSE BUT --

MR. DIGGS: THAT'S ALL I HAVE, THANK YOU.

THE COURT: ALL RIGHT, ALL RIGHT, COUNSEL, YA'LL COME UP AND TALK TO ME ONE SECOND, PLEASE.

MR. RICHARDSON: YES, SIR.

(WHEREUPON, A BENCH CONFERENCE WAS HELD OFF THE RECORD.)

MR. RICHARDSON: I'D ASK THAT AGENT CHARLES BE EXCUSED?

THE COURT: IS THERE ANY REASON THAT HE CANNOT BE EXCUSED?

MR. DIGGS: NO, SIR.

THE COURT: ALL RIGHT, THAT AGENT IS EXCUSED AND

RELEASED FROM HIS SUBPOENA. ALL RIGHT, GENTLEMEN, WHAT WE'RE GOING TO IS WE'RE GOING TO RECESS AT THIS POINT IN TIME. WE'RE GOING TO BE BACK IN THE COURTROOM TOMORROW MORNING AT 8:30, AT 8:30 WE WILL RESUME THIS MOTION HEARING.

I'VE ALREADY EXCUSED THE JURY TO COME BACK TOMORROW MORNING AT 9:30 SO HOPEFULLY WE WON'T KEEP THAT JURY TOO LONG BETWEEN, YOU KNOW, AFTER 9:30 AND WE'LL BE ABLE TO CALL THEM IN AND GET THEM STARTED BUT I WANT YA'LL HERE IN THE COURTROOM READY TO GO AT 8:30.

DEFENDANT, I WANT THE DEFENDANT IN THE COURTROOM AT OR BEFORE 8:30. I DON'T WANT TO COME IN HERE AND, YOU KNOW, HE'S COMING, AND HE'S COMING, HE'S IN THE COURTROOM BY 8:30. ALL RIGHT, AND WE'LL START AGAIN AT THAT POINT IN TIME. WE'LL RECESS UNTIL THEN, THANK YOU.

(WHEREUPON, COURT WAS ADJOURNED FOR THE EVENING AND RESUMES ON OCTOBER 2, 2007 AT 8:30 A.M.)

THE COURT: ALL RIGHT, WE'RE GOING TO RESUME THE JACKSON V. DENO HEARING REGARDING THE STATEMENT OF MR. WILLS IN THIS PARTICULAR MATTER AND I THINK WE'RE AT THE POINT IN TIME, SOLICITOR, WHERE YOU WERE GOING TO PLAY THE RECORDED STATEMENT OF MR. WILLS; IS THAT CORRECT?

MR. RICHARDSON: THAT'S CORRECT, YOUR HONOR, WOULD YOU LIKE ---

THE COURT: ALL RIGHT, IF YOU WANT TO PROCEED.

MR. RICHARDSON: WOULD YOU LIKE DETECTIVE LARGE TO RETAKE THE STAND OR --

THE COURT: YOU COULD JUST GO AHEAD AND -- IS THERE NECESSITY DURING THE PLAYING OF THAT FOR HIM TO BE ON THE STAND?

MR. DIGGS: NO, YOUR HONOR.

THE COURT: ALL RIGHT, SO LET'S JUST GO AHEAD AND PLAY THE STATEMENT AND THEN WE CAN GO FROM THERE.

DO YOU NEED THE SCREEN PUT DOWN?

MR. RICHARDSON: YES, SIR. I'VE BEEN LOOKING AT THIS SAME VIEW FOR A WHILE.

(WHEREUPON, THE RECORDED CD STATEMENT OF THEODORE DAVID WILLS, JR., WAS PLAYED IN CAMERA FOR THE COURT AND THE FOLLOWING TAKES PLACE FOLLOWING THE PLAYING OF THE CD.)

THE COURT: ALL RIGHT, ANYTHING FURTHER FROM THE STATE AS TO THE PRESENTATION OF THE JACKSON V. DENO HEARING?

MR. RICHARDSON: NOTHING FURTHER FROM THE STATE, YOUR HONOR.

THE COURT: ALL RIGHT, MR. DIGGS, ANY PRESENTATION THE DEFENDANT WOULD LIKE TO MAKE REGARDING THIS JACKSON V. DENO HEARING?

MR. DIGGS: YOUR HONOR, I'D CALL THE DEFENDANT TO THE STAND?

THE COURT: ALL RIGHT, SIR, PLEASE COME AROUND

TO BE SWORN, SIR.

THEODORE DAVID WILLS, JR.

BEING FIRST DULY SWORN, TESTIFIED IN CAMERA AS FOLLOWS:

MADAM CLERK: STATE YOUR FULL NAME AND SPELL YOUR LAST NAME FOR THE COURT.

THE WITNESS: THEODORE DAVID WILLS.

THE COURT: ALL RIGHT, SIR, YOU'RE GOING TO HAVE TO SPEAK UP AND ---

THE WITNESS: THEODORE DAVID WILLS.

THE COURT: ALL RIGHT, SIR.

THE WITNESS: W-I-L-L-S.

THE COURT: ALL RIGHT, MR. DIGGS.

DIRECT EXAMINATION

BY MR. DIGGS:

Q DAVID, DO YOU REMEMBER DOING THE INTERVIEW WITH DETECTIVE LARGE?

A YES.

Q AND WOULD YOU TELL THE COURT WHY IT WAS THAT YOU DECIDED TO GO AHEAD AND PARTICIPATE IN THE INTERVIEW?

A CAUSE THEY MADE ME AN OFFER.

Q OKAY, AND DID YOU UNDERSTAND THAT THEY WERE GOING TO DO A POLYGRAPH?

A NOT AT THAT TIME.

Q WELL DID YOU EVER DISCUSS THAT WITH

ANYBODY, ME OR ANYONE ELSE?

A NOT THAT I RECALL.

Q ALL RIGHT, WELL LET ME ASK YOU THIS, DID YOU UNDERSTAND THAT YOU WERE SUPPOSED TO TELL THE TRUTH?

A YES.

Q AND DURING THE COURSE OF THAT INTERVIEW DID YOU TELL THE TRUTH?

A YES.

Q ALL RIGHT, AND IN THE COURSE OF THAT INTERVIEW DID YOU DO THAT IN RELIANCE OF THE PROFFER AGREEMENT THAT WAS OFFERED TO YOU BY THE PROSECUTION?

A YES.

Q NOW IF THEY HADN'T MADE YOU AN OFFER WOULD YOU HAVE MADE A STATEMENT?

A NO.

MR. DIGGS: YOUR HONOR, THAT'S ALL I HAVE.

THE COURT: DO YOU WANT HIM TO, SINCE I HAVE THE EXHIBITS UP HERE, DID YOU WANT HIM TO IDENTIFY THE PROFFER AGREEMENT?

MR. DIGGS: WELL ---

THE COURT: IF YOU DON'T WANT TO THAT'S FINE, I JUST WANTED TO INDICATE I HAD THE DOCUMENT ---

MR. DIGGS: WELL LET'S GO AHEAD.

THE COURT: --- IN FRONT OF ME.

MR. DIGGS: LET ME HAND THAT TO HIM.

THE COURT: ALL RIGHT, SIR.

MR. DIGGS: (CONTINUING)

Q DAVID, IF YOU WOULD I WANT YOU TO LOOK AT THIS AND TELL US IF THAT'S YOUR SIGNATURE ON THAT?

A YES.

Q OKAY, THIS IS THE AGREEMENT THAT YOU RELIED ON AND ENTERED INTO THAT DAY BEFORE YOU GAVE YOU STATEMENT?

A YES.

MR. DIGGS: OKAY, THANK YOU.

THE COURT: AND FOR THE RECORD, COUNSEL, THAT'S EXHIBIT WHICH?

MR. DIGGS: IT IS EXHIBIT 15.

THE COURT: ALL RIGHT, THANK YOU. ALL RIGHT, MR. RICHARDSON, I'M SORRY, MR. RICHARDSON, ANY QUESTIONS THAT YOU HAVE, SIR?

MR. RICHARDSON: VERY BRIEFLY, YOUR HONOR.

**CROSS EXAMINATION**

**BY MR. RICHARDSON:**

Q MR. WILLS, YOU JUST STATED YOU DID SIGN THE POLYGRAPH, THE PROFFER AGREEMENT, RIGHT?

A YES, I DID.

Q HAVE YOU REVIEWED IT AT THIS TIME?

THE COURT: DO YOU WANT HIM TO LOOK AT IT?

MR. RICHARDSON: FOR THE RECORD IT'S STATE'S FOR I.D. NUMBER 15.

THE COURT: DO YOU WANT HIM TO READ THROUGH THE WHOLE THING OR IS THERE SOME PARTICULAR PART THAT YOU WANT HIM TO LOOK AT?

MR. RICHARDSON: (CONTINUING)

Q I'M ASKING HIM, HAVE YOU READ THROUGH THIS, MR. WILLS?

A NOT RECENTLY.

Q BUT HAVE YOU READ THROUGH IT IN THE PAST?

A I SKIMMED THROUGH IT.

Q PARAGRAPH 1 SAYS TO BE TRUTHFUL, CORRECT?

A YES.

Q AND IF YOU'LL FLIP TO THE SECOND PAGE AT PARAGRAPH 2, SKIM THROUGH IT REAL QUICK? IT TALKS ABOUT A POLYGRAPH, DOESN'T IT?

A YES.

Q AND YOU SIGNED IT? YOU SIGNED IT MR. WILLS?

A YES, I DID.

Q PRIOR TO GIVING THAT INTERVIEW WE JUST SAW?

A YES.

Q YOU WERE READ MIRANDA, YOU WERE READ YOUR MIRANDA RIGHTS?

A YES.

Q YOU UNDERSTOOD THOSE RIGHTS?

A YES.

Q YOU EVEN HAD YOUR ATTORNEY PRESENT?

A YES, I DID.

Q AND YOU READ AND UNDERSTAND THE ENGLISH LANGUAGE, CORRECT?

A YES.

MR. RICHARDSON: YOUR HONOR, NO FURTHER QUESTIONS.

THE COURT: ANYTHING ON THOSE QUESTIONS, MR. DIGGS?

**REDIRECT EXAMINATION**

**BY MR. DIGGS:**

Q ON THE POLYGRAPH DURING THAT POLYGRAPH DID YOU TELL THE TRUTH?

A YES, I DID.

Q ALL RIGHT, DO YOU HAVE ANY EXPLANATION FOR THE JUDGE, OR THE COURT, AS TO WHY THE STATE ALLEGES YOU SHOWED DECEPTION?

A I MEAN I REALLY CAN'T MAKE NO STATEMENT ON THAT BUT AT THE SAME TIME I TOOK THE POLYGRAPH TEST I WAS TOLD BY THE D.A. THAT, I MEAN I WASN'T TOLD BY THE D.A. THAT IF I DIDN'T PASS THAT THEY WAS GOING TO HOLD ME ACCOUNTABLE FOR WHATEVER WENT ON. LIKE I SAID I, I BRIEFLY SKIMMED THROUGH THE PROFFER.

MR. DIGGS: THAT'S ALL I HAVE.

THE COURT: ALL RIGHT, SIR, YOU MAY STEP DOWN,

THANK YOU VERY MUCH. FURTHER PRESENTATION FROM THE DEFENSE AS TO THE JACKSON V. DENO HEARING?

MR. DIGGS: NO, YOUR HONOR.

THE COURT: ALL RIGHT, SIR, ALL RIGHT. I'LL BE GLAD TO HEAR ANY ARGUMENTS THAT YOU MIGHT HAVE, MR. DIGGS.

MR. DIGGS: WELL AS I STATED YESTERDAY, YOUR HONOR, THE PROFFER AGREEMENT ITSELF REALLY DOESN'T TELL ME OR DAVID THAT THIS STATEMENT IS GOING TO BE INTRODUCED DURING THE TRIAL, THE COURSE OF THE TRIAL FOR THE JURY TO HEAR. IT SAYS IT'LL BE USED IN, IN A MANNER THAT POLYGRAPHS ARE CONSISTENTLY USED FOR OR IN AND THAT IS WITH RESPECT TO DECISIONS ON WHETHER OR NOT TO PROSECUTE, DECISIONS WHETHER, WHETHER TO ENTER INTO CERTAIN CONCESSIONS, CHARGE, OR SENTENCING CONCESSIONS THAT KIND OF THING. AND SO THE POLYGRAPH, THE LANGUAGE IN THE AGREEMENT IS NOT CLEAR. JUST TO USE FOR A COMMON LAW PRINCIPLES IT SHOULD BE CONSTRUED STRICKLY AGAINST THE STATE.

YOUR HONOR, IT'S NOT A VOLUNTARY, KNOWING, INTELLIGENT DECISION THAT EITHER OF US MADE WITH RESPECT TO ENTERING INTO THE AGREEMENT.

SECONDLY, THE, IT'S INEXTRICABLE. IT'S INTERTWINED TO THE POINT IT CAN'T BE SEPARATED. DAVID'S RELIANCE ON THE, THE AGREEMENT, THE PROFFER AGREEMENT AND THE VOLUNTARINESS OF HIS STATEMENT THERE'S NO WAY THAT ONE CAN, CAN MAKE A DETERMINATION AS TO WHETHER OR NOT THIS

STATEMENT WAS VOLUNTARILY MADE AND NOT GET INTO THE CONSIDERATION OF THE POLYGRAPH ITSELF AND WHETHER THE EXAMINERS HAD A MOTIVATION FOR READING OR INTERPRETING IT IN, IN A CERTAIN WAY. THERE'S JUST NO WAY. AND, AND WE DIDN'T CHOOSE TO SET UP THIS FRAMEWORK; THE PROSECUTION SET UP THE FRAMEWORK. THE ONLY THING WE DID WAS TRY TO COOPERATE TO THE BEST OF OUR ABILITY AND THE PROCESS DIDN'T WORK.

FOR SOME REASON THE SLED AGENT ONLY DECIDED TO TEST MR. WILLS IN ONE SETTING. THERE WAS AN OPPORTUNITY, HE WAS IN FOR ABOUT 3 YEARS INCARCERATED, THEY CERTAINLY COULD HAVE WORKED WITH US. THEY COULD HAVE COME BACK AND SAID, LOOK WE WANT TO REDO THIS BECAUSE IT'S AN IMPORTANT FACTOR.

WE'VE GOT A SITUATION HERE WHERE THIS DEFENDANT IS A WITNESS TO A MURDER THAT'S PROBABLY A CAPITAL MURDER, A MURDER FOR HIRE. IT'S AN EXTREMELY IMPORTANT, IT'S AN EXTREMELY IMPORTANT STORY OR EVIDENCE THAT HE HAS. WE WANT TO MAKE SURE ABOUT WHAT WE'RE DEALING HERE WITH WHETHER IT'S RELIABLE.

THE STATE NEVER WENT BACK, THEY HAD THIS ONE SETTING, AND I WOULD SUBMIT TO YOU THAT THE OFFICER, THE AGENT YESTERDAY WHEN I ASKED HIM WHY DIDN'T YOU GO BACK AND HAVE A SECOND SITTING WITH HIM TO SEE, YOU KNOW, IF WE COULD WORK AND, AND DEVELOP THIS THING SO THAT YOU'VE GOT A

RESPONSE THAT YOU WERE CONFIDENT IN THAT WAS CONSISTENT WITH THE PHYSICAL EVIDENCE THAT YOU HAD? AND HE DIDN'T REALLY HAVE A RESPONSE FOR THAT OTHER THAN TO SAY, WELL IF YOU DIDN'T BELIEVE THE FIRST ONE WHY YOU WOULD BELIEVE THE SECOND ONE, SO THE STATE, THE BOTTOM LINE IS THE STATE'S GOT TO SHOW A VOLUNTARY, INTELLIGENT, KNOWING WAIVER. THEY HAVEN'T DONE THAT.

THE WRITTEN CONTRACT IS VAGUE FOR ONE THING. SECONDLY, IT INCORPORATES AN INADMISSIBLE FACTOR, THAT BEING THE POLYGRAPH, AND THERE'S NO WAY THAT WE CAN LET THE JURY MAKE A DETERMINATION ABOUT THE VOLUNTARINESS OF THE STATEMENT WITHOUT SAYING THAT THE STATE ALLEGES THAT HE FAILED THE POLYGRAPH. SO WE WOULD ASK THE JUDGE, THE COURT TO KEEP THE STATEMENT OUT OF THE EVIDENCE THAT'S PRESENTED TO THE JURY.

THE COURT: ALL RIGHT, SIR, LET ME ASK A QUESTION. DID YOU ASK THE STATE TO RETEST THE DEFENDANT WHEN, WHEN YOU KNEW, WHEN YOU KNEW, I'M NOT SAYING WHETHER OR NOT YOU HAD AN OBLIGATION TO DO SO OR NOT, BUT I'M JUST ASKING, WHEN YOU KNEW THAT THEY WERE INDICATING TO YOU THAT HE DIDN'T PASS THIS TEST? DID YOU SAY, WE NEED TO RETEST THIS. YOU KNOW, I'M CONVINCED HE IS TELLING ME THE TRUTH OR TELLING THE TRUTH. WILL YOU RETEST HIM?

MR. DIGGS: YOUR HONOR, LET ME STATE, YES, AND LET ME EXPLAIN IT.

THE COURT: ALL RIGHT.

MR. DIGGS: YOUR HONOR KNOWS HOW THINGS OPERATE HERE. THERE'S A LOT OF COMING AND GOING. WE HAVE A LOT OF ROLL CALLS AND THAT KIND OF THING BUT YOU HAVE AN OPPORTUNITY TO PASS BY SOLICITORS IN THE HALLWAY. WHEN YOU MAKE COMMENTS LIKE, YOU KNOW, WE NEED TO WORK ON THAT, WE, THIS AND THAT, AND IN THAT TYPE OF SETTING AND ON A NUMBER OF OCCASIONS, NOT WITH THIS SOLICITOR BUT WITH OTHER SOLICITORS, I'D ASK FOR THE CHARTS OF THE STORY, THE PAPERWORK AND THAT KIND OF THINGS SO THAT WE COULD SIT DOWN AND LOOK AT IT, REEVALUATE IT AND MAYBE SET UP SOME KIND OF PROCESS WHERE WE COULD REVISIT THIS AND GET SOMETHING THAT WE FELT, THAT I FELT AS THE DEFENSE ATTORNEY THAT WOULD BE MORE RELIABLE OR CONSISTENT WITH WHAT I THOUGHT I UNDERSTOOD ABOUT THE CASE.

THE COURT: ALL RIGHT, SO AND, AND WHEN, WHEN, WHEN, WHEN THE STATE DIDN'T DO THAT DID YOU COME TO THE CIRCUIT COURT AND SAY, JUDGE, I NEED THESE DOCUMENTS, THIS IS IMPORTANT TO ME?

MR. DIGGS: NO, I DIDN'T.

THE COURT: OKAY, ALL RIGHT, ALL RIGHT, SOLICITOR, ANY BRIEF COMMENTS YOU WANT TO MAKE?

MR. RICHARDSON: VERY BRIEFLY, YOUR HONOR. WITH REGARD TO THE PROFFER AGREEMENT ITSELF PARAGRAPH 1 CLEARLY INDICATES THE DEFENDANT SHOULD BE COMPLETELY TRUTHFUL. THE

DEFENDANT SAID HE UNDERSTOOD THAT AND THEN HE SAYS, DIDN'T UNDERSTAND THE REST OF IT. HE DOES SIGN THE AGREEMENT WITH HIS ATTORNEY PRESENT BUT THEY WANT TO SAY THAT THEY DIDN'T KNOW ABOUT THE POLYGRAPH; IT'S IN PARAGRAPH 2.

YOUR HONOR, WITH REGARD TO PARAGRAPH 2 IT INDICATES THAT THE POLYGRAPH EXAMINER SHALL BE SELECTED BY THE STATE. OBVIOUSLY IF THE STATE IS SELECTING THE POLYGRAPHER THEN THE POLYGRAPHER IS GOING TO BE THE ULTIMATE DETERMINER OF WHETHER A DEFENDANT OR ANY PERSON TAKING A POLYGRAPH IS SHOWING DECEIT OR NOT SHOWING DECEIT AND DECEPTION OR NO DECEPTION.

FURTHER, IN PARAGRAPH 2 IT INDICATES THAT WHETHER DECEPTION, WHETHER DECEPTION IS NOTED OR STATEMENTS THAT ARE MADE THAT ARE INCONSISTENT WITH PROFFER TESTIMONY WE WOULD BE ABLE TO USE THOSE STATEMENTS, USE HIS STATEMENT, IT STATES CLEARLY THAT MAY BE USED AGAINST HIM INCLUDING BUT NOT LIMITED TO DISPOSITION THROUGH PLEA OR TRIAL. YOUR HONOR, I DON'T KNOW HOW TO USE A STATEMENT FOR DISPOSITION OF A TRIAL EXCEPT TO PLAY IT IN FRONT OF A JURY.

CLEARLY FROM AGENT CHARLES' TESTIMONY YESTERDAY THE DEFENDANT SHOWED DECEPTION AND INCONSISTENT STATEMENTS SPECIFICALLY WITH HE WAS ASKED DURING THE STATEMENT. HE STATED I DID NOT SHOOT THE GUN. HE ALSO STATES THAT MARK WILLARD DID SHOOT JULIAN LEE. THOSE ARE THE TWO QUESTIONS THAT HE FAILED AND FAILED MISERABLY.

YOUR HONOR, AGENT CHARLES WAS ADMITTED AS AN EXPERT AND HE SAID THAT THE STATEMENTS WERE DECEPTIVE AND IN STATING OPPOSITE TO THE STATEMENTS HE GAVE TO THE POLICE DETECTIVES.

THE COURT: ALL RIGHT, SIR, LET ME, LET ME ASK YOU A QUESTION ---

MR. RICHARDSON: YES, SIR?

THE COURT: --- SO THAT I UNDERSTAND EXACTLY WHAT YOU INTEND OR WANT TO PROFFER TO OR SHOW TO THE JURY IN THIS PARTICULAR MATTER.

WHAT YOU WANT TO DO IS SHOW THE HOUR LONG STATEMENT THAT WE JUST VIEWED, THAT'S WHAT YOU INTEND TO SHOW TO THE JURY?

MR. RICHARDSON: YES, SIR, ALL I WISH TO SHOW IS THIS ---

THE COURT: ALL RIGHT, AND YOU DON'T INTEND AND IT'S NOT THE STATE'S INTENTION IN ITS CASE IN CHIEF TO CALL AGENT CHARLES OR ANY OTHER, MS. DUFF OR ANYBODY ELSE REGARDING THE POLYGRAPH NOR DOES THE STATE INTEND TO TALK ABOUT THE RESULTS OF THE POLYGRAPH EXAM OR ANYTHING OF THAT NATURE; IS THAT CORRECT?

MR. RICHARDSON: YOUR HONOR, IT'S MY INTENTION NOT TO MENTION THE WORD POLYGRAPH.

THE COURT: ALL RIGHT, SIR, OKAY. ALL RIGHT, ANYTHING, ANY OTHER FINAL STATEMENTS YOU WANT TO MAKE

BEFORE I MAKE A RULING, MR. DIGGS, ANYTHING ELSE YOU WANT TO SAY TO ME?

MR. DIGGS: WELL, JUST THAT I RESPECTFULLY DISAGREE WITH THE SOLICITOR'S CONSTRUCTION OF PARAGRAPH 2 AND TO SUGGEST IT'S NOT AS CLEAR AS HE WOULD LIKE TO THINK THAT IT IS. IT DOES NOT SAY THAT THAT STATEMENT WILL BE PLAYED FOR THE JURY. IT INDICATES, IN THE CONTEXT IT INDICATES IT'LL BE USED IN A DECISION MAKING PROCESS NOT DISPOSITION OF THE CASE AND AT THIS POINT I THINK THAT'S THE EXTENT OF WHAT I HAVE.

THE COURT: ALL RIGHT, SIR, ALL RIGHT. I UNDERSTAND THAT WE HAVE THE ISSUE OF THE POLYGRAPH AS TO THE DEFENDANT BEING GIVEN A POLYGRAPH AND THE STATE'S DECISION THAT HE WAS NOT TRUTHFUL AND THEIR INTENTION TO PROSECUTE HIM FOR THE, AND AS THEY ARE, THE OFFENSE OF MURDER, AND USING THIS STATEMENT AGAINST HIM.

I AM NOT CONVINCED THAT NEED TO GET TO THE ISSUE OF THE POLYGRAPH AND HOW IT RELATES TO THIS PARTICULAR STATEMENT. NUMBER ONE, IF WE WERE TO TALK ABOUT THE POLYGRAPH I WOULD HAVE TO DO AN EXAMINATION UNDER RULE 702, SOUTH CAROLINA RULES OF EVIDENCE, AS TO THE ADMISSIBILITY OF SCIENTIFIC EVIDENCE, ALSO PURSUANT TO STATE V. COUNCIL AND STATE V. JONES.

FROM THE INFORMATION PROVIDED TO ME AND READING THE SOUTH CAROLINA SUPREME COURT DECISIONS AS WELL AS

UNITED STATES SUPREME COURT DECISION IN UNITED STATES V. SCHEFFER OR -- I'M NOT SURE EXACTLY HOW IT'S PRONOUNCED, IT'S S-C-H-E-F-F-E-R -- AT 523 U. S. 303 1998 UNITED STATES SUPREME COURT DECISION, I CERTAINLY CAN'T FIND THAT FROM THE PRESENTATION MADE BEFORE ME THAT THE, AS TO THE POLYGRAPH, THE UNDERLYING SCIENCE IS RELIABLE SO THAT I WOULD ALLOW A JURY TO HEAR ANY EVIDENCE ABOUT A POLYGRAPH IN ANY FASHION AND IT'S GOING TO BE MY RULING THAT THAT NOT BE DISCUSSED IN ANY FASHION BEFORE THIS JURY, THAT THE WORD POLYGRAPH NOT BE MENTIONED BY ANY OF THE PARTICIPANTS IN THIS TRIAL. IT IS NOT A PART OF THIS CASE, THAT IS GOING TO BE MY RULING, AND IT IS NOT TO BE DISCUSSED BEFORE THE JURY IN THIS PARTICULAR MATTER. THAT BEING SAID I DON'T KNOW THAT WE NEED TO GET TO THAT ISSUE.

THERE'S NO QUESTION THAT ON AUGUST 26TH, 2005, MR. WILLS CAME BEFORE DETECTIVES OF HORRY COUNTY AND WAS ADVISED OF HIS MIRANDA RIGHTS. THERE'S NO QUESTION THAT THOSE MIRANDA RIGHTS WERE PROPERLY GIVEN AND ADMINISTERED TO MR. WILLS. THERE'S NO QUESTION THAT HE UNDERSTOOD HIS MIRANDA RIGHTS.

AFTER HIS ADVISEMENT OF HIS MIRANDA RIGHTS, WHICH AT THE VERY TOP OF THE DOCUMENT AND AT THE VERY TOP OF THE, OR BEGINNING OF THE STATEMENT TO HIM, IT INDICATES THAT ANYTHING YOU SAY CAN AND WILL BE USED AGAINST YOU IN A COURT OF LAW.

RIGHT BEFORE THAT IT HAS, YOU HAVE THE RIGHT TO REMAIN SILENT AND GOES ON TO TALK ABOUT, YOU HAVE THE RIGHT TO TALK TO A LAWYER AND HAVE HIM QUESTION, AND OBVIOUSLY HE HAD A LAWYER WITH HIM, AND IF YOU MAKE A STATEMENT OR ANSWER ANY QUESTIONS YOU HAVE THE RIGHT TO STOP AT ANY TIME. THERE'S NO QUESTION HE UNDERSTOOD THESE RIGHTS.

THERE'S NO QUESTION THAT HE UNDERSTOOD THEM AND HE MADE THE VOLUNTARY DECISION TO WAIVE HIS CONSTITUTIONAL RIGHTS AFTER BEING ADVISED OF HIS MIRANDA STATEMENTS OR MIRANDA RIGHTS. THEREFORE, PURSUANT TO JACKSON V. DENO AND A NUMBER OF OTHER CASES CLEARLY, AS AN ASIDE, CLEARLY THE DEFENDANT WAS IN CUSTODY HE HAD TO BE ADVISED OF HIS MIRANDA RIGHTS SO THERE'S NO QUESTION ABOUT THAT. BUT I DO FIND THAT AFTER THE INQUIRY AND EXAMINATION HERE THAT HE MADE A VOLUNTARY STATEMENT TO THE POLICE. THEY COMPLIED WITH THE DICTATES AND THE MANDATES OF MIRANDA. HE KNEW THE RISK OF COMMUNICATING WITH THE POLICE IN TELLING THEM A STORY WHICH THEY HAD THE RIGHT TO BELIEVE OR NOT TO BELIEVE. HOWEVER THEY CHOSE TO TEST THAT BELIEF DOES NOT AFFECT THE FACT THAT HE WAS ADVISED OF HIS MIRANDA RIGHTS. HE UNDERSTOOD THEM AND HE VOLUNTARILY WAIVED HIS MIRANDA RIGHTS KNOWING THAT ANYTHING HE SAID IN ANY CONTEXT COULD BE USED AGAINST HIM IN A COURT OF LAW. THEREFORE, I FIND THAT THE STATE WILL BE ALLOWED TO PLAY THE STATEMENT OF THE DEFENDANT BEFORE THE JURY IN THIS PARTICULAR MANNER WITH

THE UNDERSTANDING THAT NONE OF THE PARTIES IN THIS CASE SHALL COMMUNICATE TO THE JURY IN ANY FASHION ABOUT A POLYGRAPH, POLYGRAPH EXAM, THE RESULTS THEREOF. WE'RE NOT GOING TO TALK ABOUT IT BEFORE THIS JURY IN ANY FASHION.

NOW, I WILL ALLOW THE DEFENSE, EITHER THROUGH QUESTIONING, AND QUESTIONS WILL HAVE TO BE TAILORED SO THAT WE DON'T TALK ABOUT POLYGRAPH, BUT THE DEFENSE CAN BRING OUT BEFORE THE JURY THAT THE DEFENDANT MADE THIS STATEMENT WITH THE UNDERSTANDING THAT HE HAD AN AGREEMENT WITH THE STATE OF SOUTH CAROLINA BASED UPON THE TRUTHFULNESS OF HIS STATEMENTS AND THAT THE STATE HAS DETERMINED FOR WHATEVER REASONS THAT THEY BELIEVE HE IS NOT TELLING THE TRUTH AND THEY HAVE MADE THE DETERMINATION TO USE THIS STATEMENT AGAINST HIM, BUT THAT THE DEFENDANT MADE THE STATEMENT WITH THE UNDERSTANDING THAT HE WAS MAKING AN AGREEMENT WITH THE, WITH THE STATE TO, AS FAR AS THE PROFFER OR THE STATEMENT THAT HE DID MAKE.

NOW, MR. DIGGS, I'M GOING TO GIVE YOU LATITUDE IN THAT REGARD AS LONG AS YOU DON'T TOUCH ON THE ISSUE OR BRING UP ABOUT THE POLYGRAPH, ALL RIGHT.

MR. DIGGS: I THINK WE UNDERSTAND THAT.

THE COURT: YOU'RE GOING TO HAVE A LOT OF LATITUDE. I DON'T CARE HOW YOU APPROACH IT, YOU KNOW, APPROACH IT FROM A COUPLE OF DIFFERENT WAYS. I DON'T HAVE A PROBLEM WITH THAT BUT JUST DON'T BRING UP POLYGRAPH ALL

RIGHT, SIR?

MR. DIGGS: WE'RE NOT GOING TO BRING IT UP.

THE COURT: I APPRECIATE THAT AND I KNOW YOU WON'T BUT I'M JUST SAYING, AND I WANT THE STATE TO UNDERSTAND, I'M GOING TO ALLOW YOU TO EXAMINE THE CIRCUMSTANCES EXCEPT FOR THAT ONE ISSUE.

MR. DIGGS: YOUR HONOR, ON THE ISSUE OF ADMISSIBILITY FOR THE RECORD I WOULD RESPECTFULLY SUGGEST THAT THE PROFFER AGREEMENT WAS MORE SPECIFIC. IT SUPERSEDED THE MIRANDA, THE GENERAL MIRANDA WARNINGS ABOUT ANYTHING YOU MAY SAY CAN AND WILL BE USED AGAINST YOU IN A COURT OF LAW. I UNDERSTAND THE COURT'S RULING. I JUST WANTED TO MAKE THAT STATEMENT ON THE RECORD.

THE COURT: AND I APPRECIATE THAT. I UNDERSTAND THAT, THAT, THAT THERE'S AN AGREEMENT AND, AND SOME AGREEMENT BETWEEN THE STATE AND THE DEFENDANT AND I DO NOT HAVE A PROBLEM WITH YOU EXAMINING THAT AGREEMENT AND ALL OF ITS DETAILS EXCEPT FOR THAT ONE ISSUE OF THE POLYGRAPH AND YOU'LL CERTAINLY BE ALLOWED TO GO INTO THAT FULLY BEFORE THE JURY ABOUT THAT AND THAT THAT AGREEMENT WAS MADE WITH THE STATE, AND CLEARLY IT WAS, THE DAY BEFORE HE WENT AND HAD HIS MIRANDA RIGHTS GIVEN AND HE MADE THIS STATEMENT TO, TO THE POLICE. THERE'S NO QUESTION HE, HE WAS ADVISED OF HIS MIRANDA RIGHTS REGARDING THE STATEMENT RIGHT BEFORE HE MADE THE STATEMENT ON AUGUST 26TH, 2005, AND THE PROFFER IS

DATED AUGUST 25TH, 2005, AND SIGNED BY THE ASSISTANT SOLICITOR, MR. WILLS, AND MR. DIGGS.

MR. DIGGS: YOUR HONOR, CAN I ASK YOU ARE YOU GOING TO ADMIT THE VIDEO ITSELF OR JUST THE AUDIO?

THE COURT: OR THE WHAT?

MR. DIGGS: THE VIDEO AND THE AUDIO OR JUST THE AUDIO BECAUSE HE'S APPEARING THERE, I JUST WANTED THE COURT IF YOU'RE GOING TO SHOW THE VIDEO ---

THE COURT: I WAS GOING TO ALLOW IT AS IT WAS PRESENTED TO ME UNLESS YOU HAD SOME OBJECTION TO IT BEING PRESENTED IN SOME OTHER FASHION.

MR. DIGGS: WELL, NO, I THINK WE CAN DEAL WITH HIS CLOTHING, HIS DRESS THERE, WITH SOME INSTRUCTIONS THAT THEY'RE NOT TO, YOU KNOW, HE'S INCARCERATED AT THAT MOMENT.

THE COURT: AND, PLEASE, REMIND ME AT THE TIME THAT THAT IS MADE AT THE TIME RIGHT BEFORE WE PLAY THAT TO, TO THE JURY BUT IT WAS MY INTENTION THAT WE SHOW IT AS IT WAS PRESENTED TO ME. NOW IF YOU JUST WANTED THE AUDIO PLAYED IF THAT'S YOUR REQUEST I'LL CERTAINLY LISTEN TO THAT AS TO JUST THE AUDIO BEING PLAYED TO, TO THE JURY IF THAT'S WHAT YOU WANT ON BEHALF OF THE DEFENDANT.

MR. DIGGS: WELL I, I WOULD ACTUALLY PREFER THE VIDEO TO BE PLAYED BUT I THINK IT WOULD BE FAIR TO INSTRUCT THE JURY NOT TO DRAW ANY NEGATIVE ADVERSITY.

THE COURT: ALL RIGHT, AND I'LL BE GLAD TO DO

THAT JUST, PLEASE, HELP ME AND REMIND ME ABOUT THAT RIGHT BEFORE THE VIDEO IS PLAYED TO THE JURY.

MR. DIGGS: THEY'RE TWO THINGS MAYBE THE COURT MIGHT WANT TO CONSIDER HAVING THE STATE TO REDACT, IN FACT I WOULD ASK THE JUDGE, THE COURT TO DO THIS. THERE'S A REFERENCE BY MY CLIENT TO HIS BEING IN PRISON AND HE HAD JUST GOTTEN OUT OF PRISON. I WOULD ASK THAT, IT'S REALLY, IT HAS NOTHING TO DO WITH THE CONTENT OF THE STATEMENT.

THE COURT: IF WE CAN FIND THAT AND ---

MR. DIGGS: YOUR HONOR, WE DO HAVE A TRANSCRIPT OF IT AND I CAN SHOW THE SOLICITOR BASICALLY EXACTLY WHERE THAT IS.

THE COURT: OKAY, AND IF WE COULD BASICALLY GET TO THAT POINT AND STOP IT AND FAST FORWARD IT I THINK ---

MR. DIGGS: AND I ---

THE COURT: --- THAT'S PROPER.

MR. DIGGS: AND I THINK THERE'S ALSO ---

THE COURT: I DON'T THINK THERE'S ANY REASON WHY THERE SHOULD BE AT THIS POINT IN TIME IN THE TRIAL.

MR. DIGGS: I THINK THERE'S ALSO REFERENCE TO THE POLYGRAPH ITSELF IN THERE THAT NEEDS TO BE REDACTED.

THE COURT: I BELIEVE THERE IS AND I WAS GOING TO BEFORE WE GOT TOO FAR I WAS GOING TO MENTION THAT. IF YA'LL HAVE GOT A TRANSCRIPT OF IT I SUPPOSE ---

MR. RICHARDSON: YOUR HONOR, IT'S A ---

THE COURT: --- YOU CAN PINPOINT WHERE THAT IS SO RIGHT BEFORE THAT WHEN YA'LL KNOW WE'RE GETTING TO THAT POINT IF WE CAN, YA'LL LOOK AT YOUR TRANSCRIPT STOP IT AT THE END OF A SENTENCE, FAST FORWARD IT PAST THE NEXT SENTENCE AND THEN CONTINUE IT ON. THAT WOULD BE, YOU'RE CORRECT, MR. DIGGS, WE NEED TO ADDRESS BOTH THOSE ISSUES AND MAKE SURE WE DON'T PLAY EITHER ONE OF THOSE TO THE JURY.

MR. RICHARDSON: YOUR HONOR, WITH REGARD TO THE PRISON STATEMENT I'VE MARKED WHERE THAT IS.

THE COURT: ALL RIGHT, SIR.

MR. RICHARDSON: IT'S ACTUALLY A MINUTE 55 INTO THE SECOND PART OF THE STATEMENT.

THE COURT: OKAY, AND YOU'VE ALSO GOT A TRANSCRIPT, I MEAN YOU CAN TELL FROM HIS WORDS AND THE QUESTIONS YOU KNOW WHERE IT'S COMING.

MR. DIGGS: EXACTLY.

MR. RICHARDSON: YES, SIR, YES, SIR, AND I CAN MUTE THAT OUT THE WAY THIS SYSTEM WORKS, I'VE TRIED TO FAST FORWARD AND UNTIL IT PLAYS YOU CAN'T FAST FORWARD SO I CAN MUTE THAT OUT AT THAT POINT.

THE COURT: OKAY.

MR. RICHARDSON: LIKE I SAY THERE AT THE DIAL AND DIAL THAT DOWN FOR THE TWO SECONDS.

THE COURT: ALL RIGHT, WELL HOWEVER, JUST MAKE

SURE THAT, YOU KNOW, WHEN, WHEN YOU DO THAT THAT YOU ARE ELIMINATING IT, YOU KNOW, FOR THE, SO THE JURY DOES NOT HEAR IT.

MR. RICHARDSON: YES, SIR.

THE COURT: AND DO YOU KNOW WHERE THE REFERENCE IS REGARDING THE POLYGRAPH?

MR. RICHARDSON: YOUR HONOR, I'LL LOOK THROUGH THIS TO SEE IF THERE'S A REFERENCE TO THE POLYGRAPH.

THE COURT: THERE IS SOMETHING SAID ABOUT IT. THERE WAS SOME ---

MR. RICHARDSON: THEY MENTION PROFFER I KNOW BUT I DON'T RECALL WHERE THEY SAY POLYGRAPH AND I WAS TRYING TO FOLLOW ALONG WITH THE TRANSCRIPT. UNFORTUNATELY THIS IS NOT ---

THE COURT: WELL IT STRUCK ME THAT THERE WAS AND IT WAS SOMEWHERE AROUND THE TIME THEY WERE TALKING ABOUT THE PROFFER. YA'LL LOOK AT IT AND MAKE SURE, OKAY.

MR. DIGGS: THANK YOU, YOUR HONOR.

THE COURT: ALL RIGHT, ANY OTHER MOTIONS THAT WE NEED TO TAKE UP AT THIS POINT IN TIME?

MR. RICHARDSON: YOUR HONOR, WE MAY WANT TO LOOK AT THE EXHIBITS, I BELIEVE MR. DIGGS HAS SOME OBJECTIONS TO THE PICTURES.

THE COURT: ALL RIGHT.

MR. DIGGS: YOUR HONOR ---

THE COURT: YES, SIR?

MR. DIGGS: I HAVE OBJECTED TO THE PHOTOGRAPHS OF THE BODY.

THE COURT: OKAY, YOU'VE GOT THEM NUMBERED THERE?

MR. RICHARDSON: THEY HAVE NUMBERS.

THE COURT: WHY DON'T WE GET TO THE NUMBERS, YA'LL POINT TO THE NUMBERS.

MR. DIGGS: STATE'S NUMBER 11, 18, 19, AND 20.

THE COURT: ALL RIGHT, HAND THOSE TO ME, PLEASE?

MR. RICHARDSON: YES, SIR, YOUR HONOR. YOUR HONOR, WITH RESPECT TO STATE'S NUMBER 11 IT ACTUALLY SHOWS THE ENTRANCE OF THE ENTRANCE WOUNDS TO THE BACK AND I BELIEVE IT WILL BE USEFUL FOR THE JURY BUT I UNDERSTAND THE MEDICAL TESTIMONY WILL COME FROM DR. CYNTHIA SCHANDL, THE PATHOLOGIST, TO UNDERSTAND WHERE THE BULLETS ENTERED. I'M NOT SEEKING TO PUT ANY OTHER PICTURES WHERE SHE SHOWS HOW THE BULLETS TRANSECTED THE BODY ---

THE COURT: GET THAT ONE OUT.

MR. RICHARDSON: --- BECAUSE IT'S TOO GORY.

THE COURT: THERE WAS SOME OTHER PHOTOGRAPH.

MR. DIGGS: THERE WAS ONE YOU HAD ---

THE COURT: DID YOU TAKE THAT OUT OR IS IT STILL IN THERE?

MR. RICHARDSON: IT'S STILL IN HERE, YOUR HONOR.

MR. DIGGS DID NOT HAVE A QUESTION. THIS ACTUALLY SHOWS AN EXIT WOUND, STATE'S NUMBER 13.

THE COURT: LET ME SEE 13.

MR. DIGGS: YOUR HONOR, THE REASON I DIDN'T OBJECT TO THAT IS BECAUSE I REALLY COULDN'T TELL MAYBE BY --

THE COURT: WELL WE'RE JUST NOT GOING TO HAVE 13 GO INTO EVIDENCE, I'M JUST TELLING YOU, THAT'S, THAT IS NOT GOING INTO EVIDENCE.

MR. DIGGS: TO ME IT'S CONFUSING.

THE COURT: WELL 13 IS NOT GOING INTO EVIDENCE.

MR. RICHARDSON: YES, SIR.

THE COURT: ALL RIGHT, NOW ---

MR. RICHARDSON: WITH REGARD TO ---

THE COURT: WITH, LET'S BEFORE WE GET TO 11 LET'S, LET'S DEAL WITH 20, 19, AND 18, THEY SHOW VIRTUALLY THE SAME SCENE.

MR. RICHARDSON: YES, SIR.

THE COURT: WHY IS IT WE NEED THREE OF THEM TO BEGIN WITH?

MR. RICHARDSON: YOUR HONOR, IT'S JUST, I WAS GOING TO USE THAT TO SHOW THE POSITION OF THE BODY. THERE IS A SCENE LATER ON WHERE THE STUMP THAT HE'S LAYING OVER HAD BEEN REMOVED SO THEY CAN DIG UP AROUND. CERTAINLY THE STATE CAN BY WITH JUST ONE PICTURE AND ---

THE COURT: WELL NUMBER, I DON'T REALLY SEE ANY REASON WHY WE HAVE TO HAVE NUMBER 20 IN, IN HERE. I THINK 18 AND 19 THEY'RE TWO DIFFERENT VIEWS. THEY, THEY SHOW THE POSITION, ONE OF THEM YOU CAN'T REALLY SEE AS FAR AS IF THE LOG OR WHATEVER IT IS THAT YOU HAVE TO MAKE REFERENCE TO, IT'S KIND OF, YOU CAN SEE IT IN 19 BUT IT'S MUCH EASIER TO DETERMINE WHAT YOU'RE TALKING ABOUT IN 18. I DO NOT FIND THAT THE VIEWS OF 18 AND 19 SO UNFAIRLY PREJUDICE THE DEFENDANT THAT IT SHOULD NOT BE USED SO WE'LL ---

MR. RICHARDSON: YOUR HONOR, THERE WAS ONE MORE NUMBER 3 AND THAT JUST SHOWS THE POSITION WITHIN THE CRIME SCENE.

MR. DIGGS: YOUR HONOR, I OBJECT TO NUMBER 3. I APOLOGIZE I DIDN'T SEE THAT IN THE SHADOWING.

THE COURT: ALL RIGHT.

MR. DIGGS: I MEANT TO OBJECT TO IT.

THE COURT: OKAY, THAT'S ALL RIGHT.

MR. RICHARDSON: ONCE AGAIN, YOUR HONOR, THAT SHOWS THE SCENE AS A WHOLE WHERE IT SHOWS WHERE THE BODY IS AT IN RELATION TO THE REST OF THE SCENE.

THE COURT: ALL RIGHT, SIR.

MR. DIGGS: YOUR HONOR, I'D POINT OUT THAT, OF COURSE, THAT'S TAKEN IN THE DAYLIGHT, IT'S NOT, IT DOESN'T SHOW THE SCENE THE WAY IT WAS THE NIGHT OF THE SHOOTING.

THE COURT: I UNDERSTAND, UNDERSTAND, OKAY.

MR. DIGGS: AND I WOULD SUBMIT THAT THE PREJUDICE OUTWEIGHS THE PROBATIVE VALUE OF EACH OF THOSE.

THE COURT: ALL RIGHT, SIR.

MR. DIGGS: THEY'RE INFLAMMATORY.

THE COURT: SO, OKAY, WE'RE NOT GOING TO USE 20.

MR. RICHARDSON: YES, SIR.

THE COURT: I'M GOING TO TELL IT TO YOU NOW WE'RE NOT USING 20. I AM GOING TO ALLOW YOU TO USE 3, 18, 19. I DO FIND THAT THOSE ARE, DISPLAY THE POSITION OF THE BODY, WILL HELP THE WITNESSES IN EXPLAINING WHAT OCCURRED AND THAT THE PROBATIVE VALUE DOES OUTWEIGH THE PREJUDICE TO THE DEFENDANT IN THIS PARTICULAR MATTER. I AM GOING TO ALLOW 3, 18, AND 19 INTO EVIDENCE.

NOW AS TO 11, BEFORE YOUR EXPERT WITNESS TESTIFIES TO THE JURY WE'RE GOING TO TAKE A FEW MINUTES OUT OF THE PRESENCE OF THE JURY TO HAVE THE EXPERT WITNESS TALK ABOUT EXHIBIT 11 TO SEE WHETHER OR NOT I BELIEVE FROM THAT WITNESSES TESTIMONY IT IS NECESSARY TO HAVE EXHIBIT 11 IN EVIDENCE OR NOT. I'M NOT GOING TO MAKE A RULING ON 11 AT THIS POINT IN TIME, ALL RIGHT, SO ---

MR. RICHARDSON: YES, SIR, YOUR HONOR.

THE COURT: --- THESE ARE THE TWO THAT ARE NOT COMING IN. THAT'S THE ONE THAT WE HAVE TO HAVE REGARDING THE EXPERT AND THESE THREE ARE COMING. I WILL ALLOW THESE INTO EVIDENCE OVER THE OBJECTION OF THE DEFENSE AT THE

APPROPRIATE TIME WHEN THEY ARE PROPER.

ALL RIGHT, NOW I NEED TO GIVE YOU BACK, SOLICITOR, OR GIVE BACK, I'M SORRY, GIVE BACK TO THE COURT REPORTER THESE EXHIBITS THAT WE HAD REGARDING THE MOTION SO THAT SHE HAS THEM AND THEY'RE AVAILABLE FOR YOUR USE IF YOU NEED THEM.

ALL RIGHT, ANYTHING ELSE BEFORE WE WOULD GET STARTED IN THIS PARTICULAR MATTER?

MR. RICHARDSON: YOUR HONOR, IF I COULD JUST HAVE A MOMENT?

THE COURT: WELL WE'RE GOING TO HAVE A MOMENT BECAUSE I'M GOING TO HAVE TO, I NEED TO, WE'LL TAKE A SHORT BREAK AND I ALSO HAVE TO HAVE A HEARING ON ANOTHER MATTER QUICKLY ABOUT TO RELIEVE COUNSEL. I'M GOING TO DO THAT BEFORE WE GET STARTED WITH THE TRIAL SO, BUT I JUST WANT TO MAKE SURE WE'RE DONE WITH THE MOTIONS BEFORE WE GET STARTED, FROM THE STATE?

MR. RICHARDSON: NO MORE, NO OTHER MOTIONS FROM THE STATE.

MR. DIGGS: NO MOTIONS, YOUR HONOR.

THE COURT: ALL RIGHT, WE'LL TAKE A VERY SHORT BREAK AND THEN WE'LL COME BACK AND COME BACK ON THE MATTER OF THE STATE V. LEMOND BLACKMON AND THE MOTION REGARDING RELIEVING COUNSEL. WE'LL COME BACK IN ABOUT FIVE MINUTES AND DO THAT, THANK YOU VERY MUCH.

MR. RICHARDSON: THANK YOU, YOUR HONOR.

(WHEREUPON, A RECESS WAS TAKEN AND THE FOLLOWING TAKES PLACE ON THE RECORD AFTER THE RECESS.)

(WHEREUPON, JUROR 155 ENTERS THE COURTROOM.)

THE COURT: YOU HAD INDICATED TO ONE OF THE CLERKS IN THE CLERK OF COURT'S OFFICE THAT YOU WANTED TO SPEAK TO ME ABOUT SERVING ON THIS PARTICULAR JURY; IS THAT CORRECT?

JUROR 155: YES.

THE COURT: COULD YOU TELL ME, WHAT IS THAT YOU WANTED TO TELL ME?

JUROR 155: WELL I WAS A GOOD FRIEND OF LT. RANDY GERALD AND I DON'T THINK I CAN BE FAIR IN THIS TRIAL.

THE COURT: ALL RIGHT, MA'AM, YOU BELIEVE THAT THOUGH THIS PARTICULAR MATTER DOES NOT INVOLVE A POLICE OFFICER AS FAR AS A VICTIM IN THIS PARTICULAR CASE THAT YOU CAN'T SET THAT ASIDE TO GIVE MR. WILLS A, A FAIR TRIAL IN THIS PARTICULAR MATTER; IS THAT WHAT YOU'RE SAYING TO ME?

JUROR 155: YES, I UNDERSTAND THAT. IT'S JUST THE NATURE OF THE TRIAL THAT ---

THE COURT: THAT'S IT'S A MURDER TRIAL?

JUROR 155: YES.

THE COURT: AND YOUR RELATIONSHIP WITH THE OFFICER THAT WAS, WAS KILLED YOU BELIEVE WOULD AFFECT YOU IN MAKING YOUR DECISION IN MR. WILLS CASE?

JUROR 155: YES.

THE COURT: ALL RIGHT, ANY, ANY QUESTIONS FROM THE STATE?

MR. RICHARDSON: JUROR NUMBER AGAIN, YOUR HONOR?

THE COURT: YOUR JUROR NUMBER IS 155?

JUROR 155: YES.

THE COURT: ALL RIGHT, JUROR NUMBER 155, ANY QUESTIONS?

MR. RICHARDSON: NO, QUESTIONS FROM THE STATE, YOUR HONOR.

THE COURT: MR. DIGGS, ANY QUESTIONS?

MR. DIGGS: I DON'T HAVE ANY QUESTIONS AT THIS TIME, YOUR HONOR.

THE COURT: ALL RIGHT, WHAT I'M GOING TO DO, MS. JAMES, IS I'M GOING TO SET YOU ASIDE FOR THIS PARTICULAR CASE ONLY. WHAT, YOU STILL WILL REMAIN REGARDING THE CIVIL COURT AND THE REMAINDER OF THE CRIMINAL COURT WORK THAT WE HAVE. I'VE INSTRUCTED THE JURY THAT'S NOT IN THIS PARTICULAR CASE AND THE ONE NOT BEING USED BY JUDGE BAXLEY RIGHT NOW TO CALL THAT JUROR INFORMATION LINE TODAY AFTER 12 NOON. SO IF YOU WOULD, PLEASE, CALL THAT, THAT JUROR INFORMATION LINE AFTER 12 NOON, FOLLOW THOSE INSTRUCTIONS WHATEVER THEY ARE. THEY'LL TELL YOU AT SOME POINT IN TIME TO REPORT BACK TO FOR JURY DUTY TO BE IN THE PROCESS TO BE SELECTED AGAIN. DON'T KNOW THAT YOU WILL BE BUT THAT YOU

WILL BE IN THERE WITH EVERYBODY ELSE'S AS POTENTIALLY BEING SELECTED ON ANOTHER JURY, ALL RIGHT.

JUROR 155: OKAY.

THE COURT: SO JUST CALL BACK AFTER 12 NOON TODAY, OKAY.

JUROR 155: OKAY, THANK YOU.

THE COURT: ALL RIGHT, THANK YOU, MA'AM. NOW DOES SHE NEED TO GIVE HER BADGE TO THE DEPUTY RIGHT NOW?

MADAM CLERK: I'LL TAKE IT.

THE COURT: OKAY, YOU CAN GIVE IT TO THE CLERK, PLEASE.

ALL RIGHT, NOW I HAVE INSTRUCTED THE CLERK TO, THE TWO ALTERNATES IN THIS CASE ARE MR. ZIMPLEMAN AND MR. GEORGE. I HAVE -- IS THAT RIGHT, ZIMPLEMAN OR IS IT, YEAH, ZIMPLEMAN AND GEORGE, RIGHT, ARE THE TWO ALTERNATES, OKAY. I'VE INSTRUCTED THE CLERK TO, TO WRITE MR. ZIMPLEMAN'S NAME AND MR. GEORGE'S NAME ON A SEPARATE PIECE OF PAPER. SHE HAS FOLDED THOSE PIECES OF PAPER SO THAT SHE CANNOT TELL WHOSE NAME IS WHOSE AND PURSUANT TO THE STATUTE I'M GOING TO HAVE HER RANDOMLY PICK ONE OF THE TWO SO IF YOU WOULD DO THAT, MA'AM, JUST RANDOMLY PICK ONE OF THE TWO, AND WHO DID YOU PICK?

MADAM CLERK: MR. ZIMPLEMAN.

THE COURT: ZIMPLEMAN, ALL RIGHT. SO WE'RE GOING TO SUBSTITUTE MR. ZIMPLEMAN AS THE JUROR FOR JUROR

155, MS. JAMES, AND HAVE HIM AS PART OF THE REGULAR JURY AND MR. GEORGE WILL REMAIN AS THE ALTERNATE IN THIS PARTICULAR MATTER, ALL RIGHT. ALL RIGHT, IS THE STATE READY TO PROCEED THEN?

MR. RICHARDSON: YES, YOUR HONOR, IF I MAY INQUIRE WHAT'S THE INDICTMENT NUMBER, I HAVE 2006 ---

THE COURT: INDICTMENT NUMBER, HOLD ON ONE SECOND, IT IS 2006-GS-26-1652, 1652.

MR. RICHARDSON: THANK YOU, YOUR HONOR.

THE COURT: YES, SIR, SO THE STATE IS READY TO PROCEED?

MR. RICHARDSON: THE STATE IS PREPARED TO PROCEED, YOUR HONOR.

THE COURT: ALL RIGHT, IS THE DEFENSE READY TO GO FORWARD?

MR. DIGGS: YES, SIR.

THE COURT: ALL RIGHT, SIR, ASK THE JURY TO COME IN, PLEASE.

(WHEREUPON, THE JURY RETURNS TO THE COURTROOM AT 10:31 A.M.)

THE COURT: ALL RIGHT, LADIES AND GENTLEMEN, A COUPLE OF THINGS BEFORE WE GET STARTED, MR. ZIMPLEMAN?

JUROR ZIMPLEMAN: YES, SIR.

THE COURT: COULD YOU AND MR. GEORGE SWITCH SEATS, PLEASE, THANK YOU. WHAT I HAVE DONE IN THIS

PARTICULAR MATTER FOR REASONS THAT WERE ACCEPTABLE TO THE COURT MS. JAMES HAS BEEN EXCUSED BY THE COURT AS A JUROR IN THIS PARTICULAR CASE ONLY. WITH THAT I HAVE NOW SUBSTITUTED MR. ZIMPLEMAN IN AS THE JUROR TO REPLACE HER SO, MR. ZIMPLEMAN, YOU ARE A REGULAR MEMBER OF THE 12 MEMBERS OF THE JURY. MR. GEORGE, YOU REMAIN AS THE LONE ALTERNATE IN THIS PARTICULAR CASE. JUST SO THAT YOU KNOW IT WAS A BLIND DRAW. I DIDN'T, WE JUST PUT YOUR NAMES IN A, ON A PIECE OF PAPER AND RANDOMLY DREW ONE AND JUST HAPPENED TO MR. ZIMPLEMAN IN ACCORDANCE WITH THE, WITH THE STATUTE SO THAT'S HOW, HOW THAT WAS DONE.

THE OTHER THING IS I APPRECIATE THE FACT THAT I'VE KEPT YOU BACK THERE. I'LL LET YOU KNOW THAT BEFORE 8:30 WE WERE HERE IN THE COURTROOM WORKING ON MATTERS IN THIS, IN THIS TRIAL. THEY, THEY WERE MATTERS THAT WE WORKED ON YESTERDAY AFTERNOON. THAT'S WHY I DIDN'T HAVE YOU STAY WITH US YESTERDAY AFTERNOON, WE WORKED ON THEM AGAIN THIS MORNING. THEY WERE MATTERS THAT HAD TO BE TAKEN UP OUTSIDE YOUR PRESENCE. I TRIED NOT TO INCONVENIENCE YOU AS LITTLE AS POSSIBLE BUT, PLEASE, UNDERSTAND THAT WE WERE WORKING ON THIS PARTICULAR CASE AND I HAD TO CONDUCT THOSE MATTERS OUTSIDE YOUR PRESENCE.

ALL RIGHT, THE FIRST THING THAT WE'RE GOING TO DO RIGHT THEN IS THE CLERK WILL ADMINISTER YOUR OATH TO YOU SO IF YOU WOULD, PLEASE, STAND.

(WHEREUPON, THE JURY WAS SWORN.)

THE COURT: NOW IS THERE ANY MEMBER OF THE JURY THAT DID NOT AFFIRMATIVELY TAKE THE OATH AS GIVEN BY THE CLERK OF COURT, IF SO PLEASE STAND?

ALL RIGHT, I FIND THE JURY HAS BEEN PROPERLY SWORN IN THIS PARTICULAR MATTER.

NOW, MR. ZWINGELBERG AND MR. GEORGE, MR. ZWINGELBERG, YOU HAVE BEEN SELECTED BY THE JURY AS THE FOREPERSON OF THIS JURY, IS THAT CORRECT?

FOREPERSON: YES, SIR.

THE COURT: ALL RIGHT, SIR, YOU WILL ALWAYS OCCUPY THAT PARTICULAR SEAT WHEN WE COME BACK FROM THE JURY ROOM AND, MR. GEORGE, IF YOU JUST ALWAYS OCCUPY THAT PARTICULAR SEAT. THE REST OF YOU, LADIES AND GENTLEMEN, CAN FILL IN WHEREVER IT IS THAT YOU HAPPEN TO COME IN, I JUST NEED TO KNOW WHERE THE FOREPERSON AND THE ALTERNATE ARE AT ALL TIMES.

I INDICATED TO YOU WHEN WE WERE SELECTING THE JURY IN THIS CASE THAT THE STATE OF SOUTH CAROLINA HAS CHARGED THE DEFENDANT THEODORE DAVID WILLS, JR., WITH THE OFFENSE OF MURDER AND YOU REMEMBER WHEN I WAS DOING THE, THE QUALIFICATIONS TO, TO SEE WHO MIGHT BE SELECTED AS A JUROR I READ SOME ALLEGATIONS THAT WERE IN THE INDICTMENT TO YOU. I TOLD YOU THEN AND I'LL TELL YOU AGAIN THAT IS NOT EVIDENCE IN THIS CASE, CANNOT BE CONSIDERED BY ANYONE

AS EVIDENCE IN THE CASE.

THE EVIDENCE THAT WILL BE PRESENTED IN THIS CASE AND THE EVIDENCE THAT YOU WILL CONSIDER IN THIS CASE WILL COME FROM THE WITNESS STAND HERE, FROM WITNESSES UNDER OATH AND FROM ANY DOCUMENTARY EVIDENCE THAT WILL BE PRESENTED AND THAT THE COURT FINDS IS PROPER TO BE PRESENTED TO YOU IN THIS PARTICULAR MATTER.

AT THIS POINT IN TIME YOU KNOW NOTHING ABOUT THIS CASE AND THAT IS HOW IT SHOULD BE BECAUSE YOU'RE GOING TO HAVE TO BASE YOUR DECISION BASED UPON THE EVIDENCE, THE TESTIMONY, AND THE DOCUMENTS THAT ARE PRESENTED IN THIS TRIAL AND YOU MAKE YOUR DECISION SOLELY FROM THAT.

YOU CANNOT USE ANY KIND OF OUTSIDE SOURCES, ANYTHING THAT YOU THINK YOU MAY KNOW OR BELIEVE. YOU HAVE TO MAKE YOUR DECISION BASED UPON WHAT HAS BEEN PRESENTED IN THIS PARTICULAR MATTER.

NOW TO THE INDICTMENT, THE CHARGE THAT HAS BEEN MADE BY THE STATE OF SOUTH CAROLINA AGAINST THE DEFENDANT ON THE CHARGE OF MURDER THE DEFENDANT HAS PLED NOT GUILTY. THAT PUTS THE BURDEN OF PROOF ON THE STATE OF SOUTH CAROLINA TO PROVE THE DEFENDANT GUILTY OF THE CRIME CHARGED BEYOND A REASONABLE DOUBT.

THE DEFENDANT HAS NO BURDEN. THE DEFENDANT HAS NOTHING TO PROVE TO YOU. THE DEFENDANT NEED NOT TESTIFY. THE DEFENDANT HAS ABSOLUTELY NOTHING TO SHOW TO YOU IN THIS

PARTICULAR CASE.

THE STATE MUST PROVE ITS CASE TO YOU BEYOND A REASONABLE DOUBT. THE STATE HAS THE BURDEN OF PROOF.

IT IS YOUR JOB TO DECIDE BASED UPON THE EVIDENCE, THE TESTIMONY, DOCUMENTS PRESENTED WHETHER OR NOT THE STATE HAS CARRIED THAT BURDEN OF PROOF AND BASED UPON YOUR VIEW OF THE FACTS AND EVIDENCE AS TO WHETHER OR NOT THE DEFENDANT IS GUILTY OF THE CRIME CHARGED BEYOND A REASONABLE DOUBT.

IN THIS PARTICULAR MATTER WE WILL HAVE BESIDES MY OPENING COMMENTS WE WILL HAVE SOME BRIEF OPENING STATEMENTS BY THE ATTORNEYS. THOSE OPENING STATEMENTS ARE NOT EVIDENCE, CANNOT BE CONSIDERED BY YOU AS EVIDENCE. THEY'RE IMPORTANT. THEY'RE EACH SIDES INITIAL STATEMENT TO YOU AS WHAT THEY BELIEVE THE EVIDENCE WILL SHOW TO YOU DURING THE COURSE OF THE TRIAL.

AFTER THAT WE'LL HAVE THE EVIDENTIARY PORTION OF THE TRIAL. WITNESSES WILL BE CALLED, DOCUMENTS WILL BE INTRODUCED INTO EVIDENCE.

WHEN THAT IS CONCLUDED WE'LL HAVE THE CLOSING ARGUMENTS OF THE ATTORNEYS. THOSE CLOSING ARGUMENTS AGAIN ARE NOT EVIDENCE, CANNOT BE USED AND CONSIDERED BY YOU AS EVIDENCE IN THE CASE. AGAIN THEY ARE IMPORTANT. THEY'RE EACH SIDES SUMMATION, EACH SIDES PRESENTATION TO YOU OF WHAT THEY BELIEVE THE EVIDENCE HAS SHOWN TO YOU DURING THE

COURSE OF THE TRIAL AND THEN ULTIMATELY WHAT THEY'RE ASKING YOU TO DO AS A RESULT OF YOUR UNANIMOUS VERDICT IN THIS PARTICULAR MATTER.

WHEN THAT'S DONE I'LL GIVE YOU THE LAW THAT YOU WILL APPLY TO THE FACTS AS YOU SO FIND THEM TO BE IN THIS PARTICULAR CASE.

NOW IN THAT, IN OUR RELATIVE POSITIONS OR JOBS IN THIS PARTICULAR CASE IT IS MY JOB TO GIVE YOU THE LAW AND IT'S MY JOB TO GOVERN THE PROCEEDINGS IN THIS MATTER BUT IT'S YOUR JOB TO BE THE JUDGES OF THE FACTS.

YOU DETERMINE WHAT YOU BELIEVE, WHAT YOU BELIEVE ARE THE FACTS OF THIS PARTICULAR MATTER. THAT IS YOUR JOB, THAT IS YOUR RESPONSIBILITY, THE, COLLECTIVELY THE JUDGES OF THE FACTS IN THIS PARTICULAR CASE.

SO IN DOING SO DURING THE COURSE OF THE TRIAL THE ATTORNEYS MAY MAKE SOME OBJECTIONS OR HAVE SOME REQUEST OF THE COURT, PLEASE UNDERSTAND THAT IF I MAKE A RULING IN YOUR PRESENCE AS TO THE MOTION OR REQUEST OF THE DEFENSE I AM MERELY TELLING THE LAWYERS HOW THE TRIAL WILL BE CONDUCTED, HOW THEY WILL PROCEED. I'M NOT MAKING ANY COMMENTS ON THE FACT BECAUSE I DON'T HAVE AN OPINION, THAT'S NOT MY JOB, THAT'S YOUR JOB, THAT'S YOUR RESPONSIBILITY.

I WILL NOT INDICATE TO YOU, I WILL NOT INTIMATE TO YOU IN ANY FASHION WHAT I BELIEVE THE FACTS OF THIS CASE

MAY BE BECAUSE AGAIN THAT'S NOT MY JOB, THAT'S YOUR JOB, SO PLEASE UNDERSTAND WHEN I MAKE STATEMENTS IN THE COURT OR MAKE RULINGS IN THE COURT I'M GOVERNING THE CONDUCT OF THE TRIAL, HOW IT WILL PROCEED NOT AS TO WHAT THE COURT MAY OR MAY NOT BELIEVE ABOUT ANY EVIDENCE THAT IS PRESENTED IN THIS PARTICULAR MATTER.

SO WITH THAT I'LL TURN IT OVER TO THE LAWYERS FOR THEIR OPENING STATEMENTS. SOLICITOR?

OPENING STATEMENT

**BY MR. RICHARDSON:**

GREED, BETRAYAL, GREED AND BETRAYAL, TWO HUMAN VICES OLD AS TIME. EITHER OF THESE GREED OR BETRAYAL STANDING ON THEIR ON IS INHERENTLY WRONG. IT TENDS TO LEAD US DOWN THE PATHS THAT, THAT ARE NO GOOD FOR US. THEY'RE BAD, BUT WHEN YOU TAKE GREED AND BETRAYAL AND THEY COME TOGETHER IT FORMS SOMETHING NEW, SOMETHING MALIGNANT, SOMETHING UGLY.

ON OCTOBER 13TH, 2001, GREED AND BETRAYAL CAME TOGETHER, THEY TOOK A NEW FORM, SOMETHING FULL OF MALICE, SOMETHING FULL OF HATE AND EVIL. IT TOOK THE FORM OF MURDER IN A COLD BLOODIED CONTRACT KILLING OF JULIAN LEE.

FOLKS, AS WE GO THROUGH THIS CASE I WANT YOU TO KEEP A, KEEP A STORY IN IT. IMAGINE, IF YOU WILL, A YOUNG MAN SITTING AT HOME ON A FRIDAY EVENING THE TELEPHONE RINGS. HE GETS A CALL FROM HIS BUDDY, HIS FRIEND, A GUY HE

TRUSTS, BUDDY ON THE OTHER END OF THE LINE SAYS, HEY MAN, YOU WANT TO GO PLAY SOME BASKETBALL. THIS YOUNG MAN SITTING AT HOME HE SAYS, YEAH, LOVE BASKETBALL, LET'S GO, HANGS UP THE PHONE GRABS HIS GYM SHORTS, GRABS HIS FAVORITE BASKETBALL JERSEY, MAYBE A SIX'ERS, MAYBE A NETS JERSEY, GRABS HIS BASKETBALL SNICKERS, LACES THEM UP, GRABS HIS BASKETBALL AND HE GOES OUTSIDE AND HE WAITS, WAITS FOR THE FRIEND OF HIS TO PICK HIM UP CAUSE HE'S GOING TO GO PLAY BASKETBALL AND HIS BUDDY ARRIVES. IT'S A MAN THAT HE TRUST, PICKS HIM UP IN HIS CAR AND THERE'S A COUPLE OF OTHER PEOPLE IN THERE AND THIS FRIEND DRIVES THIS YOUNG MAN WHO WANTS TO GO PLAY BASKETBALL ON DOWN THE ROAD OUT TO THE NEW BASKETBALL COURT, WAY OUT IN THE COUNTRY. THEY'RE GOING TO GO PLAY BASKETBALL.

THEY GET TO THE COURT, PARK THE CAR, THIS YOUNG MAN THAT LOVES BASKETBALL. HE HOPS OUT OF THE CAR AND HE STARTS TO JUST GO RIGHT DOWN TO THE BASKETBALL COURT AND HE'S GOING TO THE BASKETBALL COURT READY TO PLAY BASKETBALL, BAM. HE FEELS A 9MM SLUG RIP THROUGH HIS LOWER BACK, DRIVING HIM INTO THE GROUND. HE'S IN SHOCK. IT'S RIPPED THROUGH HIS LIVER. HE'S ON THE GROUND WONDERING WHY, WHAT'S GOING ON, AND HE STARTS CRAWLING, CRAWLED FORWARDS JUST A LITTLE BIT, FEELS THE SHADOW OF EVIL COME OVER. HIS LAST THOUGHT WHY, WHY HAVE I BEEN BETRAYED, BAM, THE KILL SHOT.

I WANT YOU KEEP THAT STORY IN MIND BECAUSE THE LAW SERVES TO PROTECT THAT YOUNG MAN GOING TO PLAY BASKETBALL. THE LAW PROTECTS EVERY, EACH OF US AND YOU NEED TO BE COGNIZANT OF THAT FOR ONE SIMPLE REASON, JULIAN LEE WAS NOT GOING TO PLAY BASKETBALL THAT NIGHT. IT WOULD BE NICE IF HE WAS.

THAT NIGHT ON OCTOBER 12TH, 2001, JULIAN LEE RECEIVED A PHONE CALL FROM THE DEFENDANT, IT WASN'T TO PLAY BASKETBALL, IT WAS, HEY, MAN, LET'S GO PULL A RIP, LET'S GO RIP OFF SOME DRUG DEALERS. JULIAN LEE SAID, OKAY, HE LIKES DOING THAT, WAS GOING TO SCORE SOME QUICK CASH, BUT JULIAN LEE WAS NOT WEARING BASKETBALL SHORTS AND A JERSEY. HE HAD ON DARK JEANS AND A BLACK LONG SLEEVE TEE SHIRT, DIDN'T HAVE ON SNEAKERS AND A BASKETBALL. HE HAD ON BLACK DOO RAG AND A STOCKING CAP, LONG GLOVES. HE WAS NOT DRESSED FOR BASKETBALL; HE WAS DRESSED TO GO ROB DRUG DEALERS.

HE DID GO OUTSIDE AND WAIT FOR THIS BUDDY, THIS FRIEND WHO CALLED HIM, WAS GOING TO HELP HIM GET SOME QUICK CASH, GOING TO HELP HIM SCORE SOME MONEY AND HE GOT IN THE CAR WHENEVER DAVID WILLS ARRIVED EARLY IN THE MORNING ON OCTOBER 13TH.

YOU'LL HEAR DAVID WILLS TELL YOU HE PICKED HIM UP SOMETIME BETWEEN ONE AND TWO AT HIS HOUSE ON OCTOBER 13TH, 2001, AND THAT THEY DROVE OUT AWAY FROM JULIAN LEE'S HOUSE DOWN HIGHWAY 9 PAST HIGHWAY 22 TO A LITTLE PLACE CALLED

PINT CIRCLE... THAT'S WHAT THE AREA IS CALLED OUT ON VEREEN AVENUE AND THAT'S, THAT'S WHERE IT STARTS GETTING EXCITING BECAUSE JULIAN KNOWS HE'S GOING TO MAKE SOME MONEY SO HE DOES GET OUT OF THE CAR.

YOU'RE GOING TO HEAR THE DEFENDANT'S OWN TESTIMONY, YOU'RE GOING TO HEAR A STATEMENT HE GAVE TO THE POLICE, JULIAN GOT OUT OF THE CAR AND WALKED FORWARD AND HE'S GOING AND HE'S GOING AND BAM, SHOT IN THE BACK, AND THE DEFENDANT STATES THAT HE WATCHED AS JULIAN IS SHOT IN THE BACK, DROVE HIM OUT THERE TO WHERE HE WAS SHOT IN THE BACK.

THE PHYSICAL EVIDENCE WILL TELL YOU HE WAS SHOT YET A SECOND TIME THROUGH THE UPPER BACK. THE PATHOLOGIST WILL TELL YOU THAT BULLET RIPPED THROUGH HIS UPPER BACK OUT HIS THROAT, INTERSECTED HIS AORTA, HE BLED OUT, AND HE LAY THERE IN THE MIDDLE OF A DESOLATE REMOTE AREA WHERE NOBODY KNEW HIM AND THAT'S WHERE HE DIED. THAT'S WHERE HIS FINAL MOMENTS WERE SPENT.

NOW YOU'RE NOT GOING TO HEAR THE DEFENDANT SAY HE WAS THE SHOOTER BUT YOU DO HEAR THAT BETRAYAL, HE DROVE HIM TO THAT PLACE OF EXECUTION.

I BEGAN THIS COLLOQUY BY SAYING GREED AND BETRAYAL SO YOU'RE WONDERING WHERE THE GREED IS. WELL YOU'LL GET THAT INFORMATION FROM THE DEFENDANT AS WELL.

HE'LL TELL YOU THAT HE WAS PAID $10,000 TO MAKE SURE JULIAN LEE DIED. HE'LL TELL YOU THAT HE CONSPIRED WITH MARK WILLARD TO MAKE SURE JULIAN LEE WAS EXECUTED AND HE'LL TELL YOU THAT MARK WILLARD WAS ONE OF THE PASSENGERS IN THE CAR THAT JUST HAPPENED TO BE GOING OUT TO THAT DRUG DEAL OR THAT RIP THAT NIGHT AND IN HIS STATEMENT HE SAYS, I DIDN'T KNOW MARK WILLARD WAS GOING TO SHOOT HIM. FOLKS, USE YOUR COMMON SENSE YOU KNOW THAT IT'S NOT TRUE.

THE DEFENDANT PICKED UP JULIAN LEE FOR ONE REASON AND PICKED UP MARK WILLARD FOR ONE REASON TO DRIVE THEM OUT TO THE PLACE OF EXECUTION AND TO MAKE SURE JULIAN LEE DID NOT RETURN ALL FOR THE SUM OF $10,000, 5,000 FOR THE DEFENDANT AND 5,000 FOR MARK WILLARD.

FOLKS, THERE IT IS GREED AND BETRAYAL AND THE LAW PROTECTS EACH OF US FROM IT. THE LAW PROTECTS US ALL FROM THESE EVIL ACTS AND THE LAW SHOULD SERVE AND PROTECT JULIAN LEE FROM THE GREED AND BETRAYAL THAT LED TO THE COLD CONTRACT KILLING OF THIS YOUNG MAN.

THE COURT: ALL RIGHT, MR. DIGGS?

MR. DIGGS: MAY IT PLEASE THE COURT?

THE COURT: YES, SIR.

**OPENING STATEMENT**

**BY MR. DIGGS:**

GOOD MORNING LADIES AND GENTLEMEN. MY NAME IS

BILL DIGGS, I'M AN ATTORNEY AND I PRACTICE IN MYRTLE BEACH AND I HAVE AN OPPORTUNITY TO REPRESENT DAVID WILLS IN THE TRIAL OF THIS CASE.

I WANT YOU TO THINK FOR JUST A MOMENT THAT THE SOLICITOR IS NOT A WITNESS IN THIS CASE. HE DOESN'T KNOW WHAT HAPPENED. WE DO KNOW THAT JULIAN LEE WAS SHOT AND THAT HE WAS KILLED AND THAT HE SHOULD NOT HAVE BEEN. WE KNOW THAT HE WAS MURDERED BUT THE SOLICITOR WAS NOT THERE THAT NIGHT AND HE'S NOT GOING TO BE ABLE TO STAND UP HERE AND TELL YOU WHAT HAPPENED.

YOU'RE GOING TO HAVE TO MAKE THAT DETERMINATION DURING THE TRIAL OF THE CASE AND WHEN YOU BEGIN TO DELIBERATE AT THE END OF THIS CASE AFTER ALL OF THE EVIDENCE HAS BEEN PRESENTED AND SO IT WOULD BE WRONG FOR YOU TO BEGIN TO MAKE A DECISION RIGHT NOW ABOUT WHAT HAPPENED. IT WOULD BE WRONG FOR YOU TO SAY THE SOLICITOR'S TOLD ME WHAT HAPPENED NOW, I DON'T NEED TO LISTEN TO THE EVIDENCE. I KNOW THAT DAVID WILLS IS GUILTY. THAT WOULD BE A MISTAKE, AND IT WOULD BE DEVIATED FROM WHAT HIS HONOR HAS CHARGED YOU ABOUT YOUR RESPONSIBILITIES AS A JURY.

DAVID WILLS WAS THERE THAT NIGHT, DAVID WAS THERE. HE KNOWS WHO SHOT JULIAN LEE. THE EVIDENCE IS GOING TO SHOW THAT DAVID AND JULIAN WERE FRIENDS FOR YEARS AND YEARS.

DAVID IS GOING TO TESTIFY OR YOU'RE GOING TO HEAR EVIDENCE THAT DAVID HAS INDICATED THAT A GENTLEMAN NAMED MARK WILLARD WAS THE SHOOTER IN THIS CASE AND THAT DAVID HAD NO IDEA, HAD NO IDEA THAT MARK WILLARD WAS GOING TO PULL OUT A GUN AND KILL JULIAN LEE BY SHOOTING HIM IN THE BACK. I WANT YOU TO THINK ABOUT THAT DURING THE TRIAL OF THE CASE AND LOOK AT THE EVIDENCE TO SEE WHAT SUGGESTS TO YOU THE CONTRARY.

NOW IN THIS SITUATION THERE WERE TRAGEDIES THAT HAPPENED, A YOUNG MAN WAS SHOT AND KILLED. AND THE TESTIMONY, I BELIEVE, IS GOING TO SHOW THAT SOME PEOPLE WERE ANGRY AT JULIAN BECAUSE JULIAN HAD ROBBED THEIR HOME AND HAD STOLEN ABOUT $50,000 IN CASH AND OTHER ITEMS FROM THESE TWO INDIVIDUALS. THEY WERE ANGRY, THEY WANTED JULIAN SHOT.

MARK WILLARD WAS THE INDIVIDUAL WHO KILLED, COMMITTED THE ACT ON BEHALF OF THE INDIVIDUALS WHO WANTED JULIAN DEAD. DAVID TELLS US THAT AND SO YOU CAN SEE FROM WHAT THE SOLICITOR HAS SAID AND WHAT I'M SAYING NOW WE'RE GOING TO HAVE TO GET REAL SPECIFIC HERE ABOUT WHO DID WHAT WHEN AND WHO KNEW WHAT WAS GOING TO HAPPEN ON WHAT OCCASION.

SOMETIMES THE LAW GETS VERY SPECIFIC, REQUIRES US TO LOOK AT DETAILS, THE SMALLEST DETAIL. BUT AT THE END OF

THE CASE HIS HONOR IS GOING TO CHARGE US, HE'S GOING TO CHARGE YOU THAT MURDER HAS SPECIFIC ELEMENTS, SPECIFIC THINGS THAT HAVE TO HAPPEN FOR A HOMICIDE TO CONSTITUTE MURDER, FOR THE KILLING OF ANOTHER HUMAN BEING TO CONSTITUTE MURDER. AND IN ORDER TO GET TO THAT CONCLUSION YOU HAVE TO LOOK SPECIFICALLY AT THE EVIDENCE IN THE CASE, SPECIFICALLY WHO KNEW WHAT WAS GOING TO HAPPEN WHEN.

FOR EXAMPLE, IN THE INDICTMENT IT ALLEGES THAT DAVID WILLS IN CONCERT WITH OTHERS WILLFULLY, FELONIOUSLY, AND INTENTIONALLY KILLED THE VICTIM, OKAY, THAT'S PART OF MURDER. THEY'RE GOING TO HAVE TO PROVE THAT TO SHOW THAT DAVID WILLS COMMITTED MURDER, NOT THAT HE WAS JUST THERE, WE KNOW HE WAS THERE, THAT'S NOT GOING TO MAKE HIM GUILTY OF MURDER. YOU'RE GOING TO HAVE TO DECIDE WAS HE WILLFULLY, FELONIOUSLY, AND INTENTIONALLY KILLING THE VICTIM AND THE EVIDENCE IS GOING TO SHOW, NO, HE WASN'T.

HE WAS THERE AND THIS SHOOTING WAS ABSOLUTELY A SURPRISE TO HIM, THAT HE WAS AFRAID, HE HAD HEARD STORIES ABOUT THIS WILLARD FELLOW BEFORE. HE LEFT WITH HIM BECAUSE HE DIDN'T KNOW IF HE WAS GOING TO BE KILLED. HE HAD JUST WITNESSED A MURDER.

HE DID TAKE THE MONEY, SOME MONEY AFTER THE FACT TO KEEP HIS MOUTH SHUT AND THAT'S A CRIME PROBABLY BUT IT'S NOT MURDER AND SO YOU'RE GOING TO HAVE TO MAKE A DECISION

ABOUT WHAT THE SPECIFIC FACTS ARE IN THIS CASE AND NOT JUST LOOK INTO A CLOUD OF DUST AND NOT BE ABLE TO REALLY SEE WHAT'S GOING ON IN THERE AND JUST SAY, WELL JULIAN'S DEAD SO AND HE WAS THERE HE MUST BE GUILTY. YOUR JOB IS NOT GOING TO BE THAT EASY. IT'S GOING TO BE MORE DIFFICULT.

YOU'RE GOING TO HAVE TO ANALYZE THE EVIDENCE AND MAKE INFERENCES, WHAT'S REASONABLE AND WHAT'S NOT. DOES IT REALLY MAKE SENSE WHAT THE PROSECUTOR IS SAYING BEYOND A REASONABLE DOUBT? YOU HAVE TO ANSWER THOSE QUESTIONS SO, PLEASE, I WOULD ASK YOU AS COUNSEL FOR DAVID, IF DAVID WOULD ASK YOU, PLEASE WHEN YOU RAISED YOUR HAND AND TOOK THAT OATH AS A JUROR TO FOLLOW THAT OATH TRULY AND HOLD THE STATE TO THE BURDEN OF PROOF BEYOND A REASONABLE DOUBT ON THIS OFFENSE. DID DAVID WILLS WILLFULLY, FELONIOUSLY, AND INTENTIONALLY KILL JULIAN LEE OR WAS HE JUST THERE ON THAT OCCASION WHEN MARK WILLARD ACTED ON HIS OWN AND KILLED JULIAN LEE? THAT'S YOUR JOB.

WE APPRECIATE YOUR WILLINGNESS TO BE HERE. IT IS BY FAR I ASSURE YOU THE MOST IMPORTANT DAY IN MY CLIENT'S LIFE. THIS IS HIS ONE DAY IN COURT. THIS IS HIS ONE OPPORTUNITY TO HAVE A JURY OF HIS PEERS. JUDGE WHAT THE FACTS ARE IN THIS CASE. WITH ALL THE POWER THAT THE JUDGES HAVE IN THIS STATE AND IN THE UNITED STATES THE JUDGE CANNOT TELL YOU WHAT THE FACTS ARE IN THIS CASE BUT THAT'S YOUR ROLE. IT'S GOING TO BE A DIFFICULT ONE. YOU'RE NOT

JUST LOOKING AT A CLOUD OF DUST AND GUESSING WHAT HAPPENED BUT BEING ABLE TO INFER BEYOND A REASONABLE DOUBT WHAT SPECIFICALLY HAPPENED AND WHAT WAS IN THIS YOUNG MAN'S MIND AND WHAT DID HE KNOW AT THAT TIME WHEN JULIAN LEE WAS KILLED.

WE WILL NOT TAKE ANY MORE TIME; WE UNDERSTAND YOUR TIME IS VALUABLE. WE'RE NOT GOING TO DRAG IT OUT ANY LONGER THAN IT NEEDS TO BE FOR YOU TO KNOW EVERYTHING YOU NEED TO KNOW ABOUT THIS CASE SO YOU CAN MAKE A TRUE AND JUST VERDICT IN THE CASE, THANK YOU.

THE COURT: ALL RIGHT, SOLICITOR, YOUR FIRST WITNESS, PLEASE.

MR. RICHARDSON: THANK YOU, YOUR HONOR, PLEASE THE COURT THE STATE WOULD CALL FORMER DETECTIVE ANN HAYES PITTS.

THE COURT: ALL RIGHT, PLEASE COME AROUND AND BE SWORN, MA'AM.

**ANN HAYES PITTS**

**BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:**

MADAM CLERK: STATE YOUR FULL NAME AND SPELL YOUR LAST NAME FOR THE COURT.

THE WITNESS: ANN HAYES PITTS, P-I-T-T-S.

**DIRECT EXAMINATION**

**BY MR. RICHARDSON:**

Q GOOD MORNING, ANN?

A GOOD MORNING.

Q TELL US A LITTLE BIT ABOUT YOURSELF, WHERE ARE YOU EMPLOYED CURRENTLY, HOW LONG?

A I'M EMPLOYED WITH THE SOUTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, I'VE BEEN THERE ONE MONTH.

Q AND WHERE, WHERE, WHERE IS THAT THAT YOU'RE EMPLOYED?

A CURRENTLY EMPLOYED OUT OF SPARTANBURG, SOUTH CAROLINA.

Q AS A MATTER OF FACT YOU RECENTLY MOVED, CORRECT?

A THAT'S CORRECT.

Q AND PRIOR TO THAT MOVE WHERE WERE YOU EMPLOYED?

A AT THE HORRY COUNTY POLICE DEPARTMENT.

Q WHAT WAS THE PURPOSE OF THAT RELOCATION?

A MY HUSBAND WAS TRANSFERRED TO SPARTANBURG.

Q YOUR HUSBAND IS IN LAW ENFORCEMENT, CORRECT?

A THAT'S CORRECT.

Q NOW YOU STATED YOU WORKED WITH THE HORRY COUNTY POLICE DEPARTMENT?

A YES, SIR.

Q HOW LONG WERE YOU WITH HORRY COUNTY?

A JUST OVER 9 YEARS.

Q AND IN WHAT CAPACITY OR CAPACITIES DID YOU SERVE WITH HORRY COUNTY?

A I STARTED THERE IN 1997 IN THE UNIFORM PATROL DIVISION; I SERVED APPROXIMATELY THREE YEARS THERE. I WAS THEN MOVED TO CRIME SCENE WHERE I WAS A CRIME SCENE TECHNICIAN FOR APPROXIMATELY THREE YEARS AND THEN I WAS PROMOTED TO DETECTIVE AND SERVED IN THE VIOLENT CRIME SECTION FOR APPROXIMATELY THREE YEARS BEFORE LEAVING NOVEMBER OF '06.

Q BACK IN OCTOBER OF 2001 YOU WERE WORKING --

A AS A CRIME SCENE TECHNICIAN.

Q WHAT WERE YOUR, WHAT WERE YOUR DUTIES AS A CRIME SCENE TECHNICIAN?

A TO RESPOND TO CRIME SCENES AND PHOTOGRAPH THEM, COLLECT ANY EVIDENCE, PROCESS THE SCENE.

Q KIND OF LIKE CSI?

A SIMILAR.

Q DO YOU RECALL BACK IN OCTOBER, 2001, BEING CALLED OUT TO A MURDER CASE AROUND OCTOBER 13TH, 2001?

A I DO.

Q AND WHERE WAS THAT?

A IT WAS LOCATED IN THE WAMPEE SECTION OF HORRY COUNTY WHICH IS OFF HIGHWAY 90, IT WAS VEREEN AVENUE.

Q AND THAT'S HERE IN HORRY COUNTY?

A IT IS.

Q AND IS THERE ANYTHING, ARE THERE ANY OTHER NAMES FOR THAT AREA?

A THE NEWEST MAJOR ROAD, IF YOU WILL, IS PINT CIRCLE AND MOST PEOPLE THAT ARE FAMILIAR WITH THAT AREA KNOW WHERE PINT CIRCLE IS. IT'S A, HAS TWO SEPARATE ENTRANCES AND IS NEAR THE MAIN GROCERY STORE IN THAT AREA.

Q ANN --

MR. RICHARDSON: THE COURT'S INDULGENCE.

THE COURT: YES, SIR

MR. RICHARDSON: (CONTINUING)

Q I'LL JUST HOLD THIS UP, IT'S FOR THE PURPOSE OF IDENTIFICATION STATE'S 14, ANN, DO YOU RECOGNIZE THIS ITEM?

A I DO.

Q AND WHAT DOES, WHAT DOES THIS EXHIBIT DEPICT?

A IT'S A 2005 TOPOGRAPHICAL MAP OF THE VEREEN AVENUE AREA OF HIGHWAY 90 AREA.

Q THIS CASE OCCURRED BACK IN 2001?

A THAT'S CORRECT.

Q AND IS THIS THE CRIME SCENE AREA TO WHICH YOU WERE CALLED?

A YES, SIR.

Q THE MURDER SCENE, AND THIS FAIRLY AND ACCURATELY DEPICTS THAT AREA?

A THERE'S BEEN SOME DEVELOPMENT, IT'S DIFFERENT THAN IT WAS IN '01 BUT IT'S THE SAME AREA, SIR.

MR. RICHARDSON: YOUR HONOR, PERMISSION TO PUBLISH AT THIS TIME?

THE COURT: ANY OBJECTION?

MR. DIGGS: NO OBJECTION.

THE COURT: I'LL ALLOW STATE'S 14 INTO EVIDENCE AND ALLOW PUBLICATION.

(WHEREUPON, STATE'S EXHIBIT NUMBER 14 ENTERED INTO EVIDENCE.)

MR. RICHARDSON: (CONTINUING)

Q ANN, WHEN YOU, WHEN YOU FIRST ARRIVED ON THE SCENE TO THIS MURDER INVESTIGATION WHAT WERE YOUR INITIAL OBSERVATIONS?

A THERE WAS A YOUNG MALE LYING IN A VACANT LOT FACE DOWN.

MR. RICHARDSON: YOUR HONOR, I'M GOING TO ASK THAT IF MS. PITTS CAN COME DOWN OFF THE STAND?

THE COURT: ANY OBJECTION?

MR. DIGGS: NO, YOUR HONOR.

THE COURT: YOU MAY DO SO, NOW MAKE SURE THAT YA'LL STAND EITHER IN FRONT OF THAT MICROPHONE OR THE ONE ON THE JURY BOX ONE OF THE TWO.

MR. RICHARDSON: YES, SIR.

Q (CONTINUING) ANN, TO HELP US GET A BETTER

UNDERSTANDING COULD YOU INDICATE ON THIS MAP APPROXIMATELY WHERE THE BODY WAS AT?

A RIGHT AT THIS AREA HERE WHERE THIS HOUSE --

-

THE COURT: YOU NEED TO SPEAK UP, MA'AM.

THE WITNESS: (CONTINUING)

A IN THE AREA WHERE THIS RESIDENCE IS SHOWN HERE.

Q WAS THAT RESIDENCE THERE BACK IN 2001?

A NO, SIR.

MR. RICHARDSON: YOU CAN HAVE A SEAT.

Q WHAT, WHAT WAS THE SCENE LIKE BACK IN 2001, THAT AREA?

A IT'S A, NOT A VERY POPULATED AREA, NOT A LOT OF RESIDENCES OR BUSINESSES IN THAT AREA AND IT WAS A DARK ROAD.

Q AND YOU SAID YOU FOUND A YOUNG MAN AS YOU ARRIVED ON THE SCENE?

A YES, SIR.

Q WHAT WAS HIS CONDITION AGAIN?

A HE WAS DEAD.

Q HE WAS DEAD. DID YOU EVER DETERMINE THE IDENTITY OF THAT MURDER VICTIM?

A NOT WHILE WE WERE ON THE SCENE, LATER HIS IDENTITY WAS DETERMINED BY FINGERPRINTS.

Q AND DO YOU KNOW THE IDENTITY?

A YES, SIR.

Q AND WHO WAS THAT?

A JULIAN LEE.

Q AND YOU DESCRIBED THE AREA WHERE JULIAN WAS FOUND AS REMOTE?

A YES, SIR.

Q OKAY, AND THAT HOUSE WASN'T THERE IN 2001?

A THAT'S CORRECT.

Q HOW DID YOU DESCRIBE THE AREA IN GENERAL?

A IT'S A PRETTY MUCH HEAVILY WOODED AREA WITH SPARSE RESIDENCES. IT'S, LIKE I SAID IT'S NOT VERY POPULATED.

Q BUT THE PEOPLE THERE DO THEY KEEP TO THEMSELVES, DO THEY ---

MR. DIGGS: YOUR HONOR, SHE WOULDN'T KNOW, I OBJECT ON THAT BASIS.

THE COURT: WELL I DON'T KNOW IF SHE KNOWS OR NOT BUT YOU NEED TO REPHRASE YOUR QUESTION, SOLICITOR.

MR. RICHARDSON: (CONTINUING)

Q WHAT'S THE OCCUPATIONS OF THE POPULATION IN THAT GENERAL AREA?

A FOR THE MOST PART THE PEOPLE THAT LIVE IN, IN THAT COMMUNITY PRETTY WELL KNOW EACH OTHER. LIKE I WAS MENTIONING THERE'S ONE SUPERMARKET THAT'S PRETTY WELL FOR

THE AREA. THERE'S NOT A LOT OF PLACES TO SHOP SO THE MOST PEOPLE THAT LIVE IN THAT AREA PRETTY WELL KNOW EACH OTHER.

Q DO YOU KNOW WHERE JULIAN WAS FROM?

A I BELIEVE CONWAY, BUT I'M NOT SURE.

Q SO HE MAY NOT KNOW THE PEOPLE THERE, DID YOU EVER SPEAK TO ANY OF THE PEOPLE ON THE SCENE THERE THE LOCAL POPULATION?

A I DID NOT, THE DETECTIVES DID BUT I DIDN'T PERSONALLY SPEAK TO ANY WITNESSES.

Q BUT WHILE YOU WERE ON THE SCENE NO ONE THERE COULD IDENTIFY WHO THE VICTIM WAS?

A CORRECT.

Q SO LET ME SEE IF UNDERSTAND THIS CORRECT, THE AREA IS SPARSELY POPULATED?

A YES, SIR.

Q PEOPLE THERE TEND TO KNOW ONE ANOTHER?

A YES, SIR.

Q JULIAN WAS NOT FROM THAT AREA?

A YES, SIR.

Q AND IT'S A REMOTE AREA?

A CORRECT.

Q ALL IN ALL A PRETTY GOOD PLACE TO SET UP AN EXECUTION, CORRECT?

MR. DIGGS: YOUR HONOR, I OBJECT.

THE COURT: SUSTAINED.

MR. DIGGS: I MOVE THAT IT BE STRICKEN.

THE COURT: YOU'LL STRIKE THE LAST COMMENT OF THE SOLICITOR AND, LADIES AND GENTLEMEN, YOU WILL NOT CONSIDER IT IN THIS CASE, THANK YOU

MR. RICHARDSON: (CONTINUING)

Q ANN, I'M GOING TO SHOW YOU WHAT'S PREVIOUSLY BEEN MARKED AS STATE'S 1, 2, AND 3 FOR PURPOSE OF IDENTIFICATION, DO YOU RECOGNIZE THESE ITEMS?

A YES, SIR, I DO.

Q AND HOW DO YOU RECOGNIZE THOSE ITEMS?

A THESE ARE PHOTOGRAPHS I TOOK ON THE ORIGINAL CRIME SCENE.

Q DO THEY FAIRLY AND ACCURATELY DEPICT THE CRIME SCENE AS YOU FOUND IT?

A YES, SIR.

MR. RICHARDSON: YOUR HONOR, AT THIS TIME THE STATE WOULD SEEK TO PUBLISH THESE STATE'S 1, 2, AND 3?

THE COURT: ANY OBJECTION TO INTRODUCTION OF EVIDENCE OF STATE'S 1, 2, AND 3?

MR. DIGGS: NOT IN ADDITION TO OUR PRIOR POSITION, YOUR HONOR.

THE COURT: ALL RIGHT, SIR.

MR. DIGGS: SUBJECT TO THAT.

THE COURT: SUBJECT TO, HOLD ON A SECOND, LET ME LOOK AT THESE.

MR. RICHARDSON: I MOVE TO INTRODUCE THESE ITEMS.

THE COURT: YES, SIR.

MR. RICHARDSON: THEN PUBLISH THEM.

THE COURT: ALL RIGHT, SIR. AS I UNDERSTAND IT THAT WAS STATE'S 3 NOT 1 AND 2, CORRECT?

MR. DIGGS: RIGHT, 3.

THE COURT: ALL RIGHT, SIR, SO IT'S OVER THE OBJECTION OF THE DEFENSE I'M GOING TO ALLOW NUMBER 3 INTO EVIDENCE AND WITHOUT OBJECTION STATE'S 1 AND 2, THANK YOU.

MR. RICHARDSON: THANK YOU, YOUR HONOR.

(WHEREUPON, STATE'S EXHIBITS NUMBERS 1, 2, AND 3 ENTERED INTO EVIDENCE.)

MR. RICHARDSON: (CONTINUING)

Q ANN, FOR EVERYBODY OVER HERE AS WE GO THROUGH STATE'S 1 WOULD YOU, PLEASE, TELL US WHAT THIS DEPICTS?

A THAT'S A MOBILE HOME THAT WAS TO THE RIGHT OF THE VACANT LOT WHERE JULIAN LEE WAS FOUND.

MR. RICHARDSON: I'LL HAND THIS OUT TO THE JURY IN JUST A MINUTE SO THEY CAN GET A GOOD LOOK.

Q (CONTINUING) HOW ABOUT STATE'S NUMBER 2?

A THAT'S AN OVERVIEW PICTURE OF THE LOT THAT'S TO THE LEFT OF WHERE THE BODY WAS.

Q AND FINALLY STATE'S NUMBER 3. WHAT DOES

THIS DEPICT?

A THAT'S THE BODY POSITION AS JULIAN LEE WAS FOUND IN THE FIELD.

Q THAT'S THE POSITION HE WAS FOUND?

A YES, SIR.

Q LAYING DEAD IN THE FIELD?

A CORRECT.

Q JULIAN WAS LAYING IN THAT FIELD WHEN YOU FOUND HIM?

A YES, SIR, WHEN I ARRIVED ON SCENE.

Q DID YOU MAKE ANY INITIAL OBSERVATIONS, YOU SAID HE WAS MURDERED, AS TO CAUSE OF DEATH DID YOU EVER DETERMINE INITIALLY WHAT WAS THE CAUSE OF DEATH?

A YES, SIR, I OBSERVED WHAT APPEARED TO BE TWO GUNSHOT WOUNDS.

Q TWO GUNSHOT WOUNDS TO WHAT PART OF HIS BODY?

A TO HIS BACK, BOTH TO HIS BACK.

Q AND CAN YOU BE ANY MORE SPECIFIC ON WHERE THEY WERE LOCATED ON HIS BACK?

A ONE WAS TO THE LEFT SIDE ALMOST THE LOWER BACK APPROXIMATE MIDDLE LOWER BACK ON THE LEFT SIDE. THE SECOND ONE WAS MUCH HIGHER NEAR THE LEFT SHOULDER BLADE.

Q AND THAT PICTURE IS A LITTLE BIT FAR AWAY WERE THERE ANY LANDMARKS WHERE JULIAN WAS, ANYTHING THAT

DISTINGUISH IT FROM THE REST OF THE FIELD?

A IT WAS, HE WAS IN A CLEARED SECTION, THERE WASN'T REALLY ANY LANDMARKS CLOSE TO HIM.

Q ANN, I'M GOING TO SHOW YOU WHAT'S BEEN PREVIOUSLY MARKED FOR IDENTIFICATION STATE'S NUMBER 18 AND 19, DO YOU RECOGNIZE THOSE PHOTOGRAPHS?

A I DO.

Q HOW DO YOU RECOGNIZE THOSE PHOTOGRAPHS?

A THESE ARE ALSO PHOTOGRAPHS I TOOK THE DAY I RESPONDED TO THE CRIME SCENE.

Q AND ONCE AGAIN DO THEY FAIRLY AND ACCURATELY REPRESENT THE CRIME SCENE AS YOU FOUND IT?

A YES, SIR, THEY DO.

MR. RICHARDSON: YOUR HONOR, AT THIS TIME THE STATE WOULD SEEK TO INTRODUCE 18 AND 19.

THE COURT: ALL RIGHT, ANY OBJECTION?

MR. DIGGS: YES, SIR, PRIOR.

THE COURT: ALL RIGHT, SIR, I'M GOING TO ALLOW STATE'S 18 AND 19 INTO EVIDENCE OVER THE OBJECTION OF THE DEFENSE. DO YOU WISH TO PUBLISH?

MR. RICHARDSON: YES, SIR, YOUR HONOR.

THE COURT: ANY OBJECTION TO PUBLICATION?

MR. DIGGS: SUBJECT TO OUR --

THE COURT: I UNDERSTAND BUT THEY'RE ALREADY IN EVIDENCE NOW. ALL RIGHT, YOU MAY PUBLISH, THANK YOU.

(WHEREUPON, STATE'S EXHIBITS NUMBERS 18 AND 19 ENTERED INTO EVIDENCE.)

MR. RICHARDSON: (CONTINUING)

Q ANN, COULD YOU TELL US WHAT'S DEPICTED IN STATE'S NUMBER 18?

A THAT'S A CLOSE UP OF JULIAN LEE AND IT ALSO SHOWS THE PINE TREE LIMB WHERE HIS CHIN WAS RESTING.

Q AND HOW ABOUT STATE'S NUMBER 19?

A THAT'S JUST A DIFFERENT ANGLE SHOWING HOW THE BODY WAS AS WE FOUND IT.

Q SO A DIFFERENT ASPECT?

A YES, SIR.

Q BUT THE BODY WASN'T DISTURBED PRIOR TO THAT?

A ONLY BY FIRE RESCUE THAT CHECKED HIM FOR VITAL SIGNS.

Q SO WHEN HORRY COUNTY FOUND JULIAN HE WAS LAYING THERE IN A PINE BRANCH?

A CORRECT.

Q ANN, DID YOU FIND, BESIDES THE BODY DID YOU FIND ANYTHING ELSE OF EVIDENTIARY VALUE OR WHAT, WHAT METHODS DID YOU USE TO SEARCH FOR EVIDENCE?

A I SEARCHED THE FIELD VISUALLY AND ALSO A METAL DETECTOR WAS USED TO TRY TO LOCATE ADDITIONAL EVIDENCE.

Q AND WERE YOU LOOKING FOR ANYTHING SPECIFIC?

A YES, SIR, LOOKING FOR SPENT SHELL CASINGS, PROJECTILES, THINGS WITH THAT, THOSE THINGS.

Q DID YOU GET TO USE ANY OF THAT COOL STUFF WE SEE ON T.V. THE U.V. LIGHTS AND POWDERS AND LASERS AND STUFF?

A NO, SIR.

Q HOW ABOUT FINGERPRINTS, DID YOU LOOK FOR FINGERPRINTS?

A NO, SIR, THERE WAS NO ITEMS TO FINGERPRINT. IT WAS AN OPEN FIELD.

Q HELP EDUCATE US A LITTLE BIT, YOU SAID YOU DIDN'T LOOK FOR FINGERPRINTS BECAUSE IT WAS AN OPEN FIELD, WHAT SIGNIFICANCE DOES AN OPEN FIELD HAVE ON FINGERPRINTS?

A THE BEST WAY PROBABLY TO EXPLAIN IT IS THAT SOME CRIME SCENES ARE WITHIN A BUILDING, A STRUCTURE, OR A HOUSE OF THAT NATURE AND YOUR EVIDENCE IS CONTAINED BASICALLY IN FOUR WALLS. THERE'S ALSO A LOT OF ITEMS THAT PEOPLE MAY HAVE TOUCHED IN THE PROCESS OF, OF BEING AT THE CRIME SCENE AND WHEN YOU HAVE AN OUTDOOR LOCATION LIKE THIS THERE, THERE ARE NO ITEMS TO BE FINGERPRINTED. BASICALLY IT WAS A CLEARED LOT WITH NOTHING FOR ANYONE TO HAVE TOUCHED OR LEFT FINGERPRINTS.

Q AND HOW ABOUT SURFACES DO THEY TAKE FINGERPRINTS DIFFERENTLY?

A YES, SIR.

Q THIS LOG WHERE JULIAN WAS FOUND WOULD THAT BE A GOOD AREA FOR FINGERPRINTS?

A NO, SIR.

Q NOW DID YOU USE ANY SPECIALIZED TOOLS OR ANYTHING IN HELPING LOCATE THE EVIDENCE?

A THE METAL, METAL DETECTOR.

Q AND USING THIS METAL DETECTOR DID YOU FIND ANYTHING?

A YES, A PROJECTILE WAS LOCATED USING THE METAL DETECTOR.

Q NOW PRIOR TO FINDING THE PROJECTILE DID YOU FIND ANY OTHER ITEMS?

A A SPENT CASING, SHELL CASING.

Q ANN, I'M GOING TO SHOW YOU WHAT'S BEEN PREVIOUSLY MARKED AS STATE'S NUMBER 7 FOR IDENTIFICATION, DO YOU RECOGNIZE THAT PICTURE?

A I DO.

Q AND HOW DO YOU RECOGNIZE THAT PICTURE?

A THIS IS A CLOSE UP PHOTOGRAPH I TOOK OF THE SPENT SHELL CASING I LOCATED AT THE CRIME SCENE THAT DAY.

Q DOES THAT FAIRLY AND ACCURATELY DEPICT THAT SHELL CASING AS YOU FOUND IT?

A IT DOES.

Q DID YOU TURN IT UP ON THE SIDE OR ANYTHING?

A NO, SIR.

Q WAS IT HARD TO FIND?

A EXTREMELY HARD TO FIND.

Q LIKE A NEEDLE IN A HAYSTACK?

A YES, SIR.

Q AND COULD YOU TELL US WHERE THE SHELL CASING --

MR. RICHARDSON: I'M SORRY, YOUR HONOR, MOVE TO INTRODUCE STATE'S 7.

THE COURT: ANY OBJECTION? MR. DIGGS, ANY OBJECTION TO STATE'S 7 INTO EVIDENCE?

MR. DIGGS: NO, YOUR HONOR, I'M SORRY.

THE COURT: THAT'S ALL RIGHT, IN EVIDENCE WITHOUT OBJECTION.

MR. RICHARDSON: PERMISSION TO PUBLISH?

THE COURT: ANY OBJECTION TO THAT?

MR. DIGGS: NO, YOUR HONOR.

THE COURT: YOU MAY DO SO.

(WHEREUPON, STATE'S EXHIBIT NUMBER 7 ENTERED INTO EVIDENCE.)

MR. RICHARDSON: (CONTINUING)

Q NOW THIS SHELL CASING, NUMBER ONE, WERE YOU ABLE TO DETERMINE WHAT KIND OF WEAPON FIRED IT?

A NO, SIR.

Q IS THERE ANYTHING TO INDICATE WHAT CALIBER

IT WAS?

A I BELIEVE IT WAS STAMPED WITH 9MM ON THE RIM OF THE CASING.

Q 9MM, AND ONCE AGAIN WHERE WAS IT LOCATED?

A IT WAS, AS THE PICTURE SHOWS THERE WAS A BLOOD POOL TO THE LEFT OF IT, IT WAS JUST TO THE RIGHT OF THAT BLOOD POOL. THAT HAD BEEN WHERE THIS PHOTOGRAPH WAS TAKEN AFTER MR. LEE HAD BEEN REMOVED FROM THE SCENE. THAT'S THE AREA WHERE HIS HEAD HAD BEEN SO THE CASING IS JUST TO THE RIGHT OF WHERE HIS HEAD WOULD HAVE BEEN.

Q SO THE SHELL CASING LANDED TO THE RIGHT?

A CORRECT.

Q OF MR. LEE'S HEAD?

A CORRECT.

Q NOW YOU SAY YOU FOUND A SHELL, A ROUND AS WELL?

A YES, SIR, A PROJECTILE SPENT.

Q USED A METAL DETECTOR FOR THAT?

A CORRECT.

Q AND THAT PROJECTILE, LET'S GO SO WE CAN FULL EXPLAIN EVERYTHING. STATE'S 8, 9, 8 AND 9 FOR IDENTIFICATION PURPOSES, LET'S TAKE A LOOK AT THAT. ANN, WHAT, DO YOU RECOGNIZE THOSE ITEMS?

A I DO.

Q AND HOW DO YOU RECOGNIZE THOSE ITEMS?

A THESE ARE PHOTOGRAPHS I TOOK THE DAY I RESPONDED TO THE CRIME SCENE.

Q AND WHAT DO THESE PHOTOGRAPHS DEPICT?

A NUMBER 8 DEPICTS, YOU CAN STILL SEE PART OF THE MAIN BLOOD POOL AND JUST BELOW THAT IS AN AREA THAT I HAD DUG UP AFTER THE METAL DETECTOR ALERTED TO TRY TO FIND OUT WHAT THE DETECTOR WAS HITTING ON.

NUMBER 9 DEPICTS A LARGER ANGLED VIEW OF THAT SAME SCENE.

Q SO THAT TURNED UP DIRT IN THERE THAT'S WHERE YA'LL WERE DIGGING?

A CORRECT.

Q DUE TO HITS BY THE METAL DETECTOR?

A CORRECT.

MR. RICHARDSON: YOUR HONOR I'D SEEK TO INTRODUCE STATE'S 8 AND 9 INTO EVIDENCE?

THE COURT: ANY OBJECTION?

MR. DIGGS: NO, SIR, YOUR HONOR.

THE COURT: THEY'RE IN EVIDENCE WITHOUT OBJECTION.

(WHEREUPON, STATE'S EXHIBITS NUMBERS 8 AND 9 ENTERED INTO EVIDENCE.)

MR. RICHARDSON: AND PERMISSION TO PUBLISH?

THE COURT: ANY OBJECTION TO PUBLICATION?

MR. DIGGS: NO, SIR.

THE COURT: YOU MAY DO SO.

MR. RICHARDSON: (CONTINUING)

Q ONCE AGAIN THAT TURNED UP DIRT IS WHERE YA'LL HAD BEEN DIGGING?

A CORRECT.

Q AND THAT WAS DUE TO THE METAL DETECTOR?

A YES, SIR.

Q NOW YA'LL DUG UP THE DIRT AS STATED PREVIOUSLY WHEN YOU FOUND THE PROJECTILE?

A YES, SIR.

Q I'M GOING TO SHOW YOU STATE'S NUMBER 10 FOR IDENTIFICATION, DO YOU RECOGNIZE THAT ITEM?

A I DO.

Q AND HOW DO YOU RECOGNIZE THAT ITEM?

A THIS IS ALSO A PHOTOGRAPH I TOOK THE DAY OF THE CRIME SCENE.

Q AND DOES IT FAIRLY AND ACCURATELY DEPICT WHAT YOU SAW AT THE CRIME SCENE?

A YES, SIR.

MR. RICHARDSON: YOUR HONOR, THE STATE WOULD SEEK TO INTRODUCE NUMBER 10 INTO EVIDENCE.

THE COURT: ANY OBJECTION TO STATE'S 10?

MR. DIGGS: NO OBJECTION.

THE COURT: IT'S IN EVIDENCE WITHOUT OBJECTION.

(WHEREUPON, STATE'S EXHIBIT NUMBER 10 ENTERED INTO EVIDENCE.)

MR. RICHARDSON: (CONTINUING)

Q WHAT IS THIS, DETECTIVE PITTS?

A THAT'S THE PROJECTILE THAT WAS LOCATED IN THE DIRT THAT WAS BELOW THE MAIN BLOOD POOL.

MR. RICHARDSON: YOUR HONOR, PERMISSION TO PUBLISH?

THE COURT: ANY OBJECTION TO PUBLICATION?

MR. DIGGS: NO, SIR.

THE COURT: YOU MAY DO SO.

MR. RICHARDSON: (CONTINUING)

Q SO THIS IS THE ROUND THAT YOU DUG OUT FROM OTHER THERE FROM THE MAIN BLOOD POOL?

A CORRECT.

Q AND THE MAIN BLOOD POOL WAS, USING STATE'S NUMBER 18 WHERE WAS THE MAIN BLOOD POOL?

A DO YOU WANT ME TO STEP DOWN OR JUST --

Q WELL IF YOU CAN JUST POINT OUT, WHAT PART OF THE BODY WAS IT FOUND?

A HIS HEAD.

Q SO BASICALLY THIS ROUND WAS DUG UP FROM WHERE JULIAN'S HEAD WAS LAYING?

A BELOW, YES, BELOW WHERE HIS HEAD WAS POSITIONED.

Q SO IT WAS HIS HEAD, BLOOD POOL, ROUND?

A YES, HEAD, BLOOD POOL WAS AROUND HIS HEAD AND THEN THE PROJECTILE WAS LOCATED FURTHER DOWN THAN THAT.

Q AND BY LOOKING AT THAT ROUND COULD YOU DETERMINE THE CALIBER OF THAT?

A NO, SIR.

Q ANN, WE LOOKED AT THE, WE LOOKED AT THE SHELL CASINGS, WE'VE LOOKED AT THE ROUND, ARE YOU FAMILIAR WITH, WITH GUN POWDER?

A YES, SIR.

Q AND WHEN A GUN IS FIRED WHAT HAPPENS, AN AUTOMATIC IS FIRED WHAT HAPPENS?

A A CASING IS EJECTED FROM THE PORT TO THE RIGHT.

Q DOES IT TRAVEL A LONG WAYS?

A TYPICALLY IT DOESN'T GO VERY FAR.

Q SO DO THOSE SHELL CASINGS BOUNCE VERY MUCH ON DIRT LIKES WE SEE IN THIS PICTURE?

A NO.

Q SO FROM YOUR EXPERIENCE THE SHOOTER WOULD HAVE HAD TO HAVE BEEN STANDING PRETTY CLOSE?

A YES, SIR.

MR. DIGGS: YOUR HONOR, I OBJECT, I DON'T, I OBJECT TO THE QUALIFICATIONS OF THIS WITNESS TO GIVE AN OPINION ABOUT THAT.

THE COURT: I'LL SUSTAIN THE OBJECTION. IF YOU WANT TO QUESTION HER FURTHER AS TO HER EXPERIENCE I'LL BE GLAD FOR YOU TO DO SO.

MR. DIGGS: AND, YOUR HONOR, ALSO WHAT WE'RE OBJECTING TO WAS THE MOTION THAT THE SOLICITOR USED WHEN HE WAS ASKING THE QUESTION.

THE COURT: ALL RIGHT, THE JURY WILL DISREGARD THE QUESTION AND HOW THE SOLICITOR ASKED THE QUESTION AND I'LL ALLOW YOU TO REPHRASE IT AND TO EXPLORE FULLY, SOLICITOR.

MR. RICHARDSON: (CONTINUING)

Q DETECTIVE PITTS, FORMER DETECTIVE PITTS, HAVE YOU FIRED A SEMI AUTOMATIC PISTOL?

A I HAVE.

Q HAVE YOU FIRED ONE OVER DIRT?

A I HAVE.

Q AND OVER GRASS BEFORE?

A YES, SIR.

Q IN YOUR EXPERIENCE OF YOUR FIRING AN AUTOMATIC PISTOL, SEMI AUTOMATIC PISTOL, THE SHELL CASINGS WHERE DID THEY FALL?

A IN CLOSE PROXIMITY TO WHERE I WAS STANDING.

Q THANK YOU, HOW DEEP WAS THAT ROUND BURIED?

A FROM WHAT I CAN RECALL MAYBE AN INCH, TWO INCHES AT MOST MAYBE.

Q BACK TO THE SHELL CASING, ANN, YOU SAID IT WAS HARD AREA TO FINGERPRINT OR YOU WOULDN'T BE ABLE TO FINGERPRINT IN AN OPEN FIELD LIKE THAT, WOULD THERE HAVE BEEN ANY REASON TO TRY AND FINGERPRINT A SPENT SHELL CASING?

A YOU CAN BUT MY EXPERIENCE HAS NOT BEEN ABLE TO LOCATE PRINTS ON CASINGS.

Q AND ONCE AGAIN WHEN A, WHEN A ROUND IS FIRED OUT OF AN AUTOMATIC WEAPON DOES IT CREATE A LOT OF HEAT?

A IT DOES.

Q DOES THAT AFFECT OILS THAT LEAVE FINGERPRINTS?

A IT CAN.

Q WOULD IT BE DIFFICULT TO FINGERPRINT A SPENT SHELL CASING?

A YES, SIR.

Q AND JUST A COUPLE MORE QUESTIONS, YOU STATED YOU CAME ON THE SCENE AND FOUND JULIAN'S BODY AND IT HAD TWO GUNSHOT WOUNDS?

A CORRECT.

Q TO YOU IT WAS APPARENT WHAT IS CALLED THE DEATH BLOOD?

A YES, SIR.

Q DID YOU DO ANYTHING TO CONFIRM HIS CAUSE OF

DEATH?

A YES, SIR, I ATTENDED HIS AUTOPSY AT THE UNIVERSITY, MUSC IN CHARLESTON.

Q AND YOU OBSERVED THE AUTOPSY?

A I DID.

MR. RICHARDSON: ANN, THAT'S ALL THE QUESTIONS I HAVE FOR YOU, ANSWER ANY QUESTIONS MR. DIGGS MIGHT HAVE.

THE COURT: ALL RIGHT, CROSS EXAMINATION.

MR. DIGGS: MAY IT PLEASE THE COURT?

THE COURT: YES, SIR.

**CROSS EXAMINATION**

BY MR. DIGGS:

Q YES, MA'AM, COULD YOU COME DOWN AND WITH THE COURT'S PERMISSION POINT OUT FOR US WHERE IT WAS ON THIS EXHIBIT NUMBER 14 THAT YOU FOUND JULIAN'S BODY?

A IN THIS AREA HERE.

THE COURT: ONCE AGAIN, MA'AM, YOU HAVE TO SPEAK UP BECAUSE YOU HAD YOUR HEAD BENT DOWN LOW.

A THIS AREA HERE.

Q OKAY, RIGHT UNDER WHAT IS PRINTED ON THE EXHIBIT THE WORD NO NAME, RIGHT BELOW THAT IN THE CENTER OF THE PHOTOGRAPH WHERE THERE IS NOW A DWELLING, CORRECT?

A YES, SIR.

Q OKAY, NOW AT THAT TIME WERE THESE OTHER RESIDENCES LOCATED THAT WE NOW SEE IN THE AREA, WERE THOSE

RESIDENCES THERE TO YOUR KNOWLEDGE?

A I CAN RECALL THIS HOUSE ALMOST ACROSS, THAT'S THE ONLY, THE ONLY ONE I CAN RECALL BEING IN THE AREA. THERE'S NOT MANY HOUSES OTHER THAN THE TRAILER THAT WAS, TWO TRAILERS NEXT DOOR FROM THE LOT.

Q BUT THERE COULD HAVE BEEN OTHER RESIDENCES, TRAILERS, HOUSES THAT WE SEE THERE NOW THAT YOU JUST WEREN'T CONCERNED WITH, IF YOU RECALL THAT?

A CORRECT.

MR. DIGGS: ALL RIGHT, YOUR HONOR, THAT'S ALL I HAVE.

THE COURT: ALL RIGHT, YOU CAN RETAKE THE WITNESS STAND, PLEASE. ANY REDIRECT, SOLICITOR?

MR. RICHARDSON: NO, SIR, THE STATE WOULD ASK THAT ANN BE EXCUSED?

THE COURT: ALL RIGHT, DO YOU WISH THE WITNESS TO BE EXCUSED, IS THERE ANY OBJECTION TO THE WITNESS BEING EXCUSED?

MR. DIGGS: I DON'T HAVE ANY OBJECTION.

THE COURT: ALL RIGHT, MA'AM, YOU ARE EXCUSED RELEASED FROM YOUR SUBPOENA, YOU MAY GO BACK TO YOUR REGULAR DUTIES, THANK YOU, MA'AM. YOUR NEXT WITNESS, SOLICITOR?

MR. RICHARDSON: YOUR HONOR, THE STATE WOULD CALL DR. CYNTHIA SCHANDL.

THE COURT: ALL RIGHT, MA'AM, PLEASE COME AROUND TO BE SWORN.

MR. RICHARDSON: APPROACH, YOUR HONOR.

THE COURT: YES, SIR, MR. DIGGS.

(WHEREUPON, A BENCH CONFERENCE WAS HELD OFF THE RECORD IN THE PRESENCE OF THE JURY, BUT OUT OF THE HEARING OF THE JURY AND THE COURT REPORTER.)

THE COURT: ALL RIGHT, LADIES AND GENTLEMEN OF THE JURY, IF YOU WOULD. IF YOU DON'T MIND IF YOU WOULD GO TO YOUR JURY ROOM FOR JUST A FEW MOMENTS -- YOU CAN HAVE A SEAT -- IF YA'LL WOULD GO TO YOUR JURY ROOM FOR JUST A FEW MOMENTS, PLEASE. CALL YOU BACK IN JUST A SECOND.

(WHEREUPON, THE JURY RETIRED TO THE JURY ROOM AT 11:27 A.M.)

THE COURT: ALL RIGHT, MA'AM, WE'LL RE-SWEAR THE WITNESS WHEN THE JURY COMES BACK IN, BUT IF YOU'D RAISE YOUR RIGHT HAND, PLEASE, MA'AM.

**DR. CYNTHIA A. SCHANDL**

**BEING FIRST DULY SWORN, TESTIFIED IN CAMERA AS FOLLOWS:**

THE COURT: ALL RIGHT, SOLICITOR, IF YOU WOULD EXAMINE THE WITNESS ABOUT THE EXHIBIT, PLEASE.

MR. RICHARDSON: ABOUT THE QUALIFICATIONS, JUDGE, OR JUST THE EXHIBIT?

THE COURT: YES, SIR, WELL FOR THE PURPOSES OF THIS AS YOU OBJECTED TO, WHAT'S THE EXHIBIT NUMBER AGAIN?

MR. RICHARDSON: IT'S STATE'S 11.

THE COURT: ALL RIGHT, THE DEFENSE HAS OBJECTED TO THE INTRODUCTION OF STATE'S 11 AND I WANTED US TO TALK TO THIS WITNESS ABOUT THE USE OF THIS PARTICULAR PHOTOGRAPH BEFORE I RULED ON ITS ADMISSION. DO WE NEED TO GO THROUGH HER QUALIFICATIONS AT THIS POINT IN TIME?

MR. DIGGS: NO, YOUR HONOR.

THE COURT: ALL RIGHT, SIR.

**DIRECT EXAMINATION**

**BY MR. RICHARDSON:**

Q GOOD MORNING, DR. SCHANDL, THANKS FOR COMING IN?

A GOOD MORNING, YOU'RE WELCOME.

MR. RICHARDSON: YOUR HONOR, THE STATE, THE STATE WOULD INTRODUCE NUMBER 11 FOR IDENTIFICATION.

THE COURT: ALL RIGHT, SIR.

(WHEREUPON, STATE'S EXHIBIT NUMBER 11 MARKED FOR IDENTIFICATION.)

MR. RICHARDSON: (CONTINUING)

Q DR. SCHANDL --

A YES.

Q DO YOU RECOGNIZE THAT PHOTOGRAPH?

A YES, SIR.

Q AND --

A THIS IS A PHOTOGRAPH TAKEN DURING THE POST

MORTEM EXAMINATION OF MR. JULIAN LEE.

Q DOES THAT ITEM FAIRLY AND ACCURATELY DEPICT JULIAN LEE?

A YES, SIR.

Q AS YOU FOUND HIM?

A YES, SIR.

Q AND SPECIFICALLY WHAT DOES IT DEPICT?

A IT'S LOOKING AT THE INDIVIDUAL'S BACK AND YOU CAN IDENTIFY TWO ENTRANCE GUNSHOT WOUNDS TO THE BACK.

Q AND WOULD THIS ITEM ASSIST YOU IN EXPLAINING TO THE JURY THE GUNSHOT TO THE BACK?

A CERTAINLY THEIR PLACEMENT ON THE BODY.

Q AND WHY WOULD THEY?

A WELL IT DOES CLEARLY DEPICT WHERE THE ENTRANCE WOUNDS ARE.

Q IS THAT SIGNIFICANT IN YOUR FINDINGS?

A IT IS.

THE COURT: ALL RIGHT, SIR, ANY QUESTIONS THAT YOU'D LIKE TO ASK, MR. DIGGS?

**CROSS EXAMINATION**

**BY MR. DIGGS:**

Q WELL, DOCTOR, YOU HAD THE BODY THERE AT THE TIME THE PHOTOS WERE TAKEN, CORRECT?

A YES, SIR.

Q SO YOU USED THE BODY MORE THAN THE

PHOTOGRAPHS IN ORDER TO MAKE A DETERMINATION OF WHERE THE SHOTS ENTRANCE WOUNDS WERE MADE?

A THAT'S CORRECT, BUT, YEAH.

Q SO YOU COULD DEMONSTRATE TO THE JURY JUST AS EASILY ON A DIAGRAM WHERE THOSE ENTRANCE WOUNDS WOULD BE LOCATED ON MR. LEE'S BODY?

A I CAN DO THAT ON A DIAGRAM.

Q YOU DON'T NEED TO HAVE THAT PARTICULAR PHOTOGRAPH SHOWING MR. LEE'S BODY IN ORDER TO GET THAT TESTIMONY ACROSS EFFECTIVELY TO THE JURY?

A I CAN, I CAN DEMONSTRATE WHERE THE ENTRANCE WOUNDS WERE ON A DIAGRAM.

MR. DIGGS: THAT'S ALL I HAVE.

THE COURT: ALL RIGHT, SIR, ALL RIGHT, I'M GOING TO ALLOW, IS IT STATE'S 11 AGAIN?

MR. RICHARDSON: YES, SIR, YOUR HONOR.

THE COURT: ALL RIGHT.

MR. DIGGS: YOUR HONOR, MAY WE APPROACH FOR A SECOND?

THE COURT: YES, ABSOLUTELY.

(WHEREUPON, A BENCH CONFERENCE WAS HELD OFF THE RECORD OUT OF THE PRESENCE OF THE COURT REPORTER.)

THE COURT: I'M GOING TO ALLOW STATE'S EXHIBIT 11 IN TO BE USED IN EVIDENCE IN THIS CASE OVER THE OBJECTION OF THE DEFENSE. I DO NOT FIND THE, USING THE

BALANCING TEST I DO NOT FIND THE PHOTOGRAPH TO BE UNDULY GRUESOME IN ANY FASHION OR IN ANY WAY WOULD INFLAME THE PASSIONS, PREJUDICE OF THE JURY BY ITS USE.

THE WITNESS, WHO I ANTICIPATE WILL BE QUALIFIED AS AN EXPERT IN THIS MATTER, HAS INDICATED THAT IT WILL AID HER IN EXPLAINING THE MATTERS TO THE JURY AS FAR AS THE LOCATION OF THE, THE WOUNDS AND THEREAFTER WHAT OCCURRED AS A RESULT OF THE, THE WOUNDS TO THE VICTIM IN THIS MATTER AND, THEREFORE, OVER THE OBJECTIONS OF THE DEFENSE I'M GOING TO ALLOW STATE'S EXHIBIT 11 INTO EVIDENCE.

IS THERE ANY NEED, FURTHER NEED FOR THE STATE TO MAKE A MOTION TO INTRODUCE THIS INTO EVIDENCE BEFORE, BEFORE THE JURY TO RAISE THE OBJECTION, THE OBJECTION HAS BEEN RAISED AND I'VE OVERRULED IT AT THIS POINT IN TIME.

MR. DIGGS: NO, YOUR HONOR, I THINK FOR MY PURPOSES WE'RE ---

THE COURT: YES, ALL RIGHT, SO FOR, FOR THE PURPOSES OF THIS TRIAL THEN STATE'S 11 IS IN EVIDENCE OVER THE OBJECTION OF THE DEFENSE AND, AND THE DEFENSE HAS PROPERLY OBJECTED AND MADE ITS MATTER AS A PART OF THE RECORD AND THE COURT HAS DECLINED TO RULE IN THEIR FAVOR REGARDING THAT, ALL RIGHT. WE'LL TAKE A SHORT BREAK FOR ABOUT FIVE MINUTES AND THEN COME BACK, THANK YOU VERY MUCH.

(WHEREUPON, STATE'S EXHIBIT NUMBER 11 ENTERED INTO EVIDENCE.)

MR. DIGGS: THANK YOU, YOUR HONOR.

(WHEREUPON, A RECESS WAS TAKEN AND THE FOLLOWING TAKES PLACE ON THE RECORD AFTER THE RECESS.)

THE COURT: SOLICITOR, IS THE STATE READY TO PROCEED?

MR. RICHARDSON: THE STATE IS READY, YOUR HONOR.

THE COURT: DEFENSE?

MR. DIGGS: THE DEFENSE IS READY.

THE COURT: GREAT, ASK THE JURY TO COME IN, PLEASE.

DOCTOR, COME BACK, PLEASE, AND RESUME THE WITNESS STAND OR JUST COME UP HERE AND, AND THEN THE CLERK WILL ADMINISTER THE OATH TO YOU IN JUST A SECOND.

(WHEREUPON, THE JURY RETURNS TO THE COURTROOM AT 11:45 A.M.)

MADAM CLERK, IF YOU'D SWEAR THE WITNESS, PLEASE.

**DR. CYNTHIA A. SCHANDL**

**BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:**

MADAM CLERK: STATE YOUR FULL NAME AND SPELL YOUR LAST NAME FOR THE COURT.

THE WITNESS: CYNTHIA ANNA SCHANDL, S-C-H-A-N-D-L.

**DIRECT EXAMINATION**

**BY MR. RICHARDSON:**

Q DR. SCHANDL --

A YES.

Q HOW ARE YOU DOING TODAY?

A WELL, THANK YOU.

Q GOOD, THANK YOU FOR COMING DOWN TODAY, PLEASE TELL US A LITTLE BIT ABOUT YOUR WORK, SPECIFICALLY WHERE AND IN WHAT CAPACITY?

A YES, SIR, I'M CURRENTLY EMPLOYED BY THE MEDICAL UNIVERSITY OF SOUTH CAROLINA IN THE DEPARTMENT OF PATHOLOGY AND LABORATORY MEDICINE AUTOPSY AND FORENSIC DIVISION AS A FORENSIC PATHOLOGIST.

Q EDUCATE US A LITTLE BIT, DOCTOR, COULD YOU TELL US EXACTLY WHAT FORENSIC PATHOLOGY IS?

A YES, FORENSIC PATHOLOGY IS ESSENTIALLY DETERMINING THE CAUSE AND MANNER OF DEATH WHEN INDIVIDUALS ARE DEAD BY MEANS OTHER THAN NATURAL, NATURAL BEING SOMEBODY WHO MAY HAVE BEEN SICK FOR A LONG PERIOD OF TIME AND WAS EXPECTED TO DIE AS IN CANCER. THOSE SORTS OF DEATH WE DON'T INVESTIGATE.

IF SOMEBODY HAS BEEN SHOT OR SOMEBODY KILLS THEMSELVES OR SOMETIMES IN CAR CRASHES AND OTHER ACCIDENTS THEY MAY SEND THOSE INDIVIDUALS TO US WHERE WE CAN CONDUCT AN AUTOPSY IN ORDER TO DETERMINE THE CAUSE OF DEATH AND THE MANNER OF DEATH.

Q DOCTOR, COULD YOU COVER YOUR EDUCATION, EDUCATIONAL BACKGROUND JUST A LITTLE BIT?

A YES, ABSOLUTELY. SO AS A FORENSIC PATHOLOGIST I'VE GRADUATED AT COLLEGE SO I HAVE A BACHELORS DEGREE; I THEN GRADUATED FROM MEDICAL SCHOOL, I WENT TO THE MEDICAL UNIVERSITY OF SOUTH CAROLINA AND HAVE MY MEDICAL DEGREE. I ALSO HAVE A DOCTORAL DEGREE FROM THE MEDICAL UNIVERSITY OF SOUTH CAROLINA ALSO IN PATHOLOGY AND IN ORDER TO ACTUALLY BECOME A PATHOLOGIST YOU HAVE TO DO A RESIDENCY PROGRAM WHICH IS AN ADDITIONAL FOUR YEARS OF TRAINING AND IN ORDER TO BECOME A FORENSIC PATHOLOGIST YOU NEED TO DO AN ADDITIONAL YEAR OF FELLOWSHIP IN SPECIFICALLY FORENSIC PATHOLOGY AND IN ORDER TO PRACTICE IN THIS CAPACITY AS A FORENSIC PATHOLOGIST YOU ALSO MAY BECOME BOARDED BY THE AMERICAN BOARD OF PATHOLOGY WHICH IS A NATIONAL ORGANIZATION, AND WHICH I'M BOARDED IN IN ANATOMIC PATHOLOGY, CLINICAL PATHOLOGY, AND FORENSIC PATHOLOGY.

Q ARE YOU LICENSED HERE IN THIS STATE?

A I AM LICENSED IN THE STATE OF SOUTH CAROLINA AND FLORIDA.

Q AND ARE YOU, YOU ALREADY STATED THAT YOU'RE A MEMBER OF THE AMERICAN BOARD OF PATHOLOGY?

A THAT IS THE BOARDING ORGANIZATION, YES, THAT'S CORRECT.

Q HAVE YOU PERFORMED ANY LECTURES, WRITTEN ANY ARTICLES, OR TREATISES WITH REGARD TO YOUR PROFESSION?

A YES. IN, IN THE, IN FORENSIC PATHOLOGY I

SERVE ON THE COLLEGE OF AMERICAN PATHOLOGIST FORENSIC COMMITTEE AND UNDER THAT CAPACITY WE DO MONTHLY CASE REPORTS. IN ADDITION I HAVE SEVERAL PUBLICATIONS IN PEER REVIEW JOURNALS IN, IN FORENSIC PATHOLOGY AND IN ADDITION TO THAT I HAVE A COUPLE OF BOOK CHAPTERS IN, IN THE FIELD OF FORENSIC PATHOLOGY.

Q DOCTOR, I'M NOT SURE IF I HEARD IT BEFORE BUT SPECIFICALLY WHAT ARE YOUR DUTIES AS A MEDICAL EXAMINER, WHAT TYPES OF PROCEDURES DO YOU PERFORM?

A AS A FORENSIC PATHOLOGIST MY DUTIES ARE TO EXAMINE DEAD INDIVIDUALS THAT ARE REFERRED TO US IN THIS STATE BY THE CORONERS SYSTEM SO THE CORONER WILL REFER THE DEAD INDIVIDUALS TO OUR OFFICE AND THEN IT IS MY DUTY TO EXAMINE THAT INDIVIDUAL AND DETERMINE THE CAUSE AND MANNER OF DEATH AND THE WAY WE DO THAT IS THROUGH THE AUTOPSY.

Q AND HAVE YOU PREVIOUSLY TESTIFIED AS AN EXPERT IN THE FIELD OF FORENSIC PATHOLOGY?

A YES, I HAVE.

Q APPROXIMATELY HOW MANY TIMES?

A APPROXIMATELY 20 TIMES.

Q AND THAT'S IN GENERAL SESSIONS COURT?

A IN, IN VARIOUS COURTS THROUGHOUT THE STATE, CORRECT.

MR. RICHARDSON: YOUR HONOR, AT THIS TIME THE STATE WOULD SEEK TO HAVE DR. SCHANDL ADMITTED AS AN EXPERT

IN THE FIELD OF FORENSIC PATHOLOGY CAUSATION OF DEATH.

THE COURT: DO YOU WISH TO VOIR DIRE THE WITNESS AS TO HER QUALIFICATIONS?

MR. DIGGS: NO, YOUR HONOR, WE STIPULATE TO THE DOCTOR'S QUALIFICATIONS.

THE COURT: ALL RIGHT, SIR, I QUALIFY THE DOCTOR TO GIVE HER OPINION.

MR. RICHARDSON: THANK YOU, YOUR HONOR.

Q (CONTINUING) DR. SCHANDL, BACK IN OCTOBER 2001 WHERE WERE YOU EMPLOYED?

A I WAS AT THE MEDICAL UNIVERSITY OF SOUTH CAROLINA AND IN 2001 I WAS PERFORMING AT FELLOWSHIP HERE, THAT FELLOWSHIP IN FORENSIC PATHOLOGY.

Q COULD YOU TELL US ABOUT THE NATURE OF YOUR DUTIES BACK IN OCTOBER OF 2001?

A YES, AS THE FELLOW, THERE'S ONLY ONE FELLOW EMPLOYED BY THE DEPARTMENT SO ESSENTIALLY EVERY CASE THAT CAME INTO OUR OFFICE I WAS PRIMARILY RESPONSIBLE FOR WITH THE ASSISTANCE OF AN ATTENDING PATHOLOGIST.

Q AND BACK IN MID OCTOBER 2001 DURING THE COURSE OF YOUR DUTIES AS A MEDICAL EXAMINER DID YOU HAVE AN OPPORTUNITY TO PERFORM AN AUTOPSY ON JULIAN LEE?

A YES, SIR.

Q AND THAT WAS AT THE REQUEST OF WHOM?

A THAT WAS AT THE REQUEST OF THE DEPUTY

CORONER OF HORRY COUNTY MR. DAN BELLAMY.

Q SO JULIAN CAME FROM HORRY COUNTY?

A THAT'S CORRECT.

Q TAKE US BACK TO THAT DAY IN OCTOBER, DO YOU REMEMBER THE SPECIFIC DATE ON WHICH YOU CONDUCTED THE AUTOPSY?

A I DON'T RECOLLECT THE DATE BUT I DO BRING NOTES TO FILL IN THE DETAILS, YES.

Q THOSE ARE YOUR NOTES?

A THAT'S CORRECT.

Q HOW DO YOU RECOGNIZE THOSE?

A THESE ARE PULLED FROM OUR FILE AT THE MEDICAL UNIVERSITY OF SOUTH CAROLINA AND THEY'RE COPIED AND CERTIFIED TRUE COPY BY A NOTARY PUBLIC.

Q AND DOES YOUR SIGNATURE APPEAR ANYWHERE OR ANY MARKINGS THAT MAKES THEM YOURS?

A YES, YES, BOTH MYSELF AND MY ATTENDING PATHOLOGIST SIGNED THE REPORT.

Q WOULD REVIEWING THOSE NOTES HELP REFRESH YOUR RECOLLECTION?

A YES, OF THE DETAILS, YES, SIR.

MR. RICHARDSON: YOUR HONOR --

THE COURT: IS THERE ANY OBJECTION TO THE WITNESS REFRESHING HER MEMORY FROM THE USE OF THOSE DOCUMENTS?

MR. DIGGS: NO FURTHER OBJECTION, YOUR HONOR, THE ONE OBJECTION THAT I HAD PREVIOUS I WOULD RENEW BUT THAT'S IT.

THE COURT: ALL RIGHT, SIR, YOU'RE ALLOWED TO DO SO, YOU MAY DO SO, MA'AM, THANK YOU.

MR. RICHARDSON: (CONTINUING)

Q WHAT IS THE DATE OF THAT AUTOPSY?

A THE DATE WAS OCTOBER 13TH, 2001, I'M SORRY, OCTOBER 14TH, 2001.

Q AND DO YOU RECALL WHEN, WHAT THE DATE OF DEATH WAS?

A THE DATE OF DEATH IS LISTED HERE AS OCTOBER 13TH OF 2001.

Q YOU GOT THAT INFORMATION FROM THE CORONER?

A THAT'S CORRECT, WE GET THAT INFORMATION FROM THE CORONER SO THE CORONER WILL CALL US AND GIVE US A BRIEF BACKGROUND OF WHAT THE CASE WILL BE BEFORE THEY SEND THE INDIVIDUAL.

Q AND I KNOW THIS MAY SEEM LIKE A SILLY QUESTION BUT YOU ARE A DOCTOR AND YOU'RE HERE, JULIAN LEE WHEN HE ARRIVED AT YOUR OFFICE?

A YES, SIR.

Q WAS HE DEAD OR ALIVE?

A HE WAS DEAD.

Q CAN YOU TAKE US BACK TO OCTOBER 14TH, 2001,

TELL US WHAT WENT ON DURING THE EXAMINATION, WAS IT A TYPICAL AUTOPSY?

A YEAH, ESSENTIALLY A TYPICAL AUTOPSY. WHAT WE DO ROUTINELY IS THE DECEDENT, THE DEAD INDIVIDUAL WILL BE BROUGHT UP TO THE AUTOPSY SUITE AS HE IS RECEIVED SO FULLY CLOTHED AND UN, UNWASHED THEY'LL BRING THE DECEDENT UP SO THAT I CAN EXAMINE HIM.

WE EXAMINE HIM EXTERNALLY FIRST, LOOK AT THE CLOTHING, TAKE PHOTOGRAPHS OF THE INDIVIDUAL HOW HE COMES TO US AND THEN WE'LL REMOVE ALL THE CLOTHING AND EXAMINE THE CLOTHING AS WELL, TAKE PHOTOGRAPHS OF THE CLOTHING.

WE FREQUENTLY WILL GET X-RAYS TO ASSIST US WHEN THERE'S BEEN A SHOOTING AS IN THIS CASE IN ORDER TO DETERMINE WHETHER THERE ARE ANY PROJECTILES THAT ARE STILL IN THE BODY AND THEIR LOCATION SO THAT WE CAN RETRIEVE THEM FOR LAW ENFORCEMENT.

AFTER ALL THAT IS DONE THEN WE LOOK AT THE INDIVIDUAL WOUNDS AND DOCUMENT WHERE THEY ARE. AFTER WE'VE DONE THAT AND THEIR CHARACTERISTICS THEN WE BEGIN THE INTERNAL EXAMINATION. SO WE ACTUALLY DO WHAT MOST PEOPLE CONSIDER THE AUTOPSY, OPENING THE BODY, AND THROUGH THAT PROCESS WE'LL DETERMINE THE WOUND PATHWAY. SO WE HAVE, WE'VE IDENTIFIED IN THIS CASE ENTRANCE WOUNDS AND EXIT WOUNDS, SO THEN WHAT WE NEED TO DO IS DETERMINE WHAT THE PATHWAY IS BETWEEN THE ENTRANCE WOUND AND THE EXIT WOUND.

SO WE DO THAT BY OPENING THE BODY AND LOOKING AT THE INTERNAL ORGANS AND STRUCTURES, SO AFTER WE'VE ALL OF THAT THEN WE ALSO WE'LL LOOK AT TISSUES UNDER THE MICROSCOPE.

WE SEND OUT USUALLY BLOOD AND URINE FOR TOXICOLOGY STUDIES AND THEN WE TAKE ALL OF THOSE THINGS INTO CONSIDERATION BEFORE WE ISSUE OUR FINAL REPORT WHICH, WHICH PUTS DOWN OUR OPINION AS TO THE CAUSE AND MANNER OF DEATH.

Q ALL THAT WAS DONE IN THIS CASE?

A THAT'S CORRECT.

Q DOCTOR, IN YOUR EXPERT OPINION WHAT WERE YOUR SIGNIFICANT FINDINGS WITH REGARD TO THE DEATH OF JULIAN LEE?

A WITH REGARD TO HIS DEATH THE SIGNIFICANT FINDINGS WERE TWO GUNSHOT WOUNDS THAT ENTERED THE BACK IN DIFFERENT PLACES ON THE BACK AND TRAVELED THROUGH THE BODY AND EXITED THROUGH THE FRONT OF THE BODY.

Q AND NOW YOU SAY THE CAUSE OF DEATH WAS, WAS TWO GUNSHOT WOUNDS, CORRECT?

A YES, THAT'S CORRECT.

Q TO THE BACK?

A THAT'S CORRECT.

Q HOW WERE YOU ABLE TO DETERMINE THE GUNSHOT WOUNDS ENTERED THE BACK?

A ONE OF THE THINGS THAT, THAT WE'RE TRAINED

TO DO IS MAKE A DETERMINATION OF WHICH GUNSHOT WOUNDS ARE ENTRANCE WOUNDS IN WHICH GUNSHOT WOUNDS ARE EXIT WOUNDS. THEY HAVE CHARACTERISTIC PHYSICAL FINDINGS THAT YOU CAN SEE. SO IN THIS CASE THE ENTRANCE WOUNDS WERE QUITE TYPICAL FOR ENTRANCE WOUNDS MEANING THAT THERE WAS AN ACTUAL DEFECT IN THE SKIN AND A NICE ABRASION BORDER AROUND THE ENTRANCE WOUND. SO AS THE BULLET IS TRAVELING THROUGH SPACE IT'S ALSO TURNING SO AS IT GOES THROUGH AN ENTRANCE WOUND IT'S ACTUALLY MAKING A HOLE THROUGH THE SKIN AND ABRADING THE SKIN AS IT GOES THROUGH. SO WE CAN, FREQUENTLY WE CAN, WE CAN MAKE THAT DETERMINATION OF AN ENTRANCE WOUND.

THE EXIT WOUNDS ON THE OTHER HAND OFTEN THE EDGE OF THE EXIT WOUNDS RATHER THAN BEING A HOLE THAT YOU WOULD SEE AT THE ENTRANCE WOUND MAY REAPPROXIMATE SO THERE'S NO LOST SKIN IN THOSE CASES AND ALSO THE ABRASION BORDER IS USUALLY ABSENT.

IN THIS CASE THERE WAS AN ABRASION BORDER AT THE EXIT WOUNDS WHICH WE CALLED A SHORED ABRASION BORDER AND THAT SUGGESTS THAT HE WAS UP AGAINST SOMETHING. SO RATHER THAN THE ABRASION BORDER AS IT'S GOING IN AND TURNING WHEN IT'S COMING OUT OF AN EXIT WOUND IF, IF THE, IF THE TARGET IS UP AGAINST SOMETHING SOLID IT MAY MAKE AN ABRASION AS THE SKIN RUBS AGAINST THAT SOLID OBJECT SO IT'S A DIFFERENT NATURE OF AN ABRASION.

SO TAKING ALL OF THOSE THINGS INTO CONSIDERATION WE WERE ABLE TO DETERMINE THAT THE WOUNDS ON THE BACK, THE TWO WOUNDS ON THE BACK WERE THE ENTRANCE WOUNDS AND THE TWO WOUNDS ON THE FRONT WERE THE EXIT WOUNDS.

Q EITHER ONE OF THOSE GUNSHOT WOUNDS THAT YOU FOUND THERE IN THE BACK COULD THEY HAVE BEEN FATAL ON THEIR OWN?

A YES, SIR.

Q AND THE TRAJECTORY OF THE PROJECTILES COULD, COULD YOU DETERMINE THE TRAJECTORY OF THE PROJECTILES ONCE THEY ENTERED THE BODY?

A YES, THAT'S ANOTHER, ANOTHER DETERMINATION THAT WE MAKE. ESSENTIALLY WE MATCH UP ONE, YOU KNOW, THE ENTRANCE WOUND TO THE EXIT WOUND AND YOU CAN COME UP WITH AN ANGLE WITH THE BODY IN WHAT WE CALL ANATOMICAL POSITION. SO WE DO WRITE DOWN THOSE NUMBERS OF ANGLES THROUGH THE BODY, BUT THAT'S ONLY GOOD FOR, YOU KNOW, THE WIDTH OF THE BODY SO WE KNOW THAT, YOU KNOW, IT'S GOING THIS WAY THROUGH THE BODY. THAT'S ALL THAT THAT TELLS US.

Q WITH REGARD TO THE SHOT TO THE LOWER BACK DO YOU KNOW WHAT THE ANGLE WOUND WAS ON THAT SHOT?

A IF I CAN REFER TO MY NOTES?

MR. RICHARDSON: ONCE AGAIN I'D ASK THAT THE DOCTOR BE ALLOWED TO REFRESH HER RECOLLECTION?

THE COURT: SHE MAY DO SO.

THE WITNESS: (CONTINUING)

A THE LOWER BACK WAS 40 DEGREES UPWARDS, 25 DEGREES TO THE RIGHT AND FORWARD.

Q SO THE ROUND TRAVELED INTO THE BACK, TRAVELING IN AN UPWARD MOTION?

A UP AND RIGHT.

Q WOULD THAT BE CONSISTENT WITH SOMEONE KNEELING AND FIRING UP AT THE BODY?

A IT WOULD, I, I CAN'T REALLY PUT TWO BODIES IN SPACE BECAUSE I DON'T KNOW, YOU KNOW, HOW THE BODIES WERE MOVING SO I, I CAN'T REALLY GIVE YOU THAT ANSWER.

Q CAN YOU TELL FROM THAT, THOUGH, THE DEFENDANT, THE SHOOTER WAS MORE THAN LIKELY NOT BEHIND THE VICTIM?

A THE SHOOTER ---

MR. DIGGS: YOUR HONOR, I OBJECT TO THE LEADING ON THAT QUESTION.

THE COURT: REPHRASE YOUR QUESTION, SOLICITOR.

MR. RICHARDSON: (CONTINUING)

Q COULD YOU TELL ME ANYTHING ABOUT THE POSITION OF THE SHOOTER AS HE EXECUTED JULIAN LEE?

A I, I CAN'T REALLY TELL YOU WHERE THE SHOOTER WAS. ALL I CAN TELL YOU IS THAT THE, YOU KNOW, THAT, YOU KNOW, IN THAT VERY NARROW SPACE BETWEEN THE INDIVIDUAL'S BACK AND HIS FRONT IT WAS TRAVELING FROM THE

BACK TO THE FRONT SO THE PROJECTILE HAD TO BE TRAVELING FROM, AGAIN FROM HIS BACK TO HIS FRONT. AS FAR AS WHERE THE TWO PEOPLE WERE STANDING THAT I CANNOT TELL YOU.

Q SO IF I UNDERSTAND YOU THE SHOOTER LIKELY WAS STANDING BEHIND THE VICTIM?

A IT'S, IT'S THE MOST LIKELY SCENARIO.

Q OR AT LEAST THE PISTOL WAS BEHIND THE VICTIM?

A EXACTLY.

Q HOW ABOUT THE SECOND GUNSHOT WOUND IN YOUR REPORT THE ONE TO THE UPPER BACK?

A THE ONE TO THE UPPER BACK WAS ALSO TRAVELING SLIGHTLY UPWARDS AND, WELL SLIGHTLY, ABOUT 30 DEGREES UPWARDS, 10 DEGREES TO THE RIGHT AND FORWARD SO THE SAME GENERAL DIRECTION UP TO THE RIGHT AND FORWARD.

Q AND YOU COULDN'T TELL ABOUT, ONCE AGAIN YOU CAN'T TELL THE POSITION OF THE SHOOTER?

A THAT'S CORRECT.

Q OTHER THAN THE SHOT ENTERED THE BACK?

A THAT'S CORRECT.

Q DID YA'LL ATTEMPT TO DO ANY GUNSHOT RESIDUE TESTS AND STIPPLING TESTS?

A WE DON'T DO GUNSHOT RESIDUE TESTING. THE LAW ENFORCEMENT, WE LEAVE THAT TO THE LAW ENFORCEMENT OFFICIALS. THAT'S WHERE THEY TAKE SWABS AND SEE IF THERE'S

RESIDUE ON HANDS AND SO FORTH.

AS FAR AS STIPPLING THAT WOULD INDICATE A RANGE OF FIRE SO WE DO ATTEMPT TO MAKE A DETERMINATION OF THE RANGE OF FIRE. IF IT'S A CONTACT WOUND WE EXPECT TO FIND SOOT IN THE WOUND. IF IT'S CLOSE RANGE WE EXPECT TO FIND STIPPLING INTO THE SKIN AROUND THE WOUND. THAT'S ACTUAL ABRASIONS OF LITTLE PARTICLES LEAVING THE END OF THE BARREL, THE MUZZLE OF THE GUN, AND ABRADING THE SKIN SO THAT WOULD BE A CLOSE RANGE, AND IF YOU DON'T SEE ANYTHING THEN THAT WOULD BE CONSIDERED DISTANT SO WE DO ATTEMPT TO MAKE THAT DETERMINATION.

IN THIS CASE WE DID NOT SEE SOOT AND WE DID NOT SEE STIPPLING, HOWEVER, THE INDIVIDUAL WAS ALSO WEARING A BLACK SHIRT. SO WAS THERE SOOT ON THAT BLACK SHIRT? I CANNOT TELL YOU. SO IN THIS CASE I CHOSE NOT TO MAKE A DETERMINATION OF THE RANGE OF FIRE BECAUSE ALTHOUGH I DID NOT SEE ANY SOOT IT DID NOT MEAN TO ME THAT THERE WAS NO SOOT ON THAT SHIRT.

Q DOCTOR, YOU SAID CLOTHES AND CONTACT, DEFINE CLOTHES WITH REGARD TO STIPPLING?

A STIPPLING IS GENERALLY SEEN NOT BEYOND 18 TO 24 INCHES SO ANYWHERE FROM VERY NEAR THE WOUND TO 18 TO 24 INCHES AWAY YOU REALLY CAN'T MAKE A SPECIFIC DETERMINATION OF RANGE OF FIRE WITHOUT ACTUALLY TEST FIRING A WEAPON AND SEEING WHAT THAT SPREAD IS WITH THE SPECIFIC

WEAPON THAT WAS USED AND THE SPECIFIC AMMUNITION THAT WAS USED. BUT THAT'S USUALLY WHAT WE'RE SAYING WHEN WE'RE SAYING CLOSE RANGE WE MEAN LESS THAN 18 TO 24 INCHES FROM THE INDIVIDUAL.

Q SO IF THE FIREARM IS HELD A FOOT AND A HALF TO TWO FEET AWAY LIKELY TO HAVE STIPPLING?

A IF IT'S HELD ---

MR. DIGGS: YOUR HONOR, I OBJECT AGAIN. I DON'T IF YOU REALIZED IT BUT THE SOLICITOR KEEPS POINTING DOWN AND I WANT TO OBJECT TO HIM LEADING THE WITNESS.

THE COURT: ALL RIGHT, SOLICITOR, DON'T MAKE ANY ---

MR. RICHARDSON: YOUR HONOR, I HAD TO BE ABLE TO EXPLAIN ---

THE COURT: NO, SIR, YOU CAN EXPLAIN IT WITH YOUR WORDS.

MR. RICHARDSON: (CONTINUING)

Q FOOT AND A HALF TO TWO FEET AWAY NO STIPPLING?

A GREATER THAN THAT DISTANCE AND YOU WOULDN'T SEE STIPPLING, HOWEVER AGAIN IF SOMEBODY HAS THICK CLOTHING ON YOU MAY NOT SEE STIPPLING IN ANY CASE.

Q DOCTOR, I'M GOING TO SHOW YOU WHAT'S BEEN PREVIOUSLY MARKED STATE'S NUMBER 11 FOR IDENTIFICATION, AND I BELIEVE IT'S BEEN INTRODUCED INTO EVIDENCE, DO YOU

RECOGNIZE THAT ITEM?

A YES, SIR, THIS IS A PHOTOGRAPH TAKEN DURING THE POST MORTEM EXAMINATION OF MR. JULIAN LEE'S BACK.

Q AND DOES IT FAIRLY AND ACCURATELY DEPICT JULIAN LEE AS YOU FOUND HIM?

A YES, SIR, IT DOES.

MR. RICHARDSON: YOUR HONOR, PERMISSION TO PUBLISH?

THE COURT: YOU MAY DO SO.

MR. RICHARDSON: (CONTINUING)

Q DOCTOR, I'LL REFER TO THE LOWER BACK AS 1, UPPER BACK 2?

A YES, SIR.

Q THESE ARE THE WOUNDS YOU TALKED ABOUT 1 AND 2, CORRECT?

A YES, SIR.

Q AND THOSE ARE DEFINITELY ENTRANCE WOUNDS?

A ENTRANCE WOUNDS, YES, SIR.

Q NO DOUBT ABOUT IT, NOW WE TALKED ABOUT THE ENTRANCE WOUNDS, DID YOU FIND ANY EXIT WOUNDS?

A YES, SIR.

Q AND WHAT WAS THE EXIT WOUND FOR THE LOWER BACK SHOT, SHOT 1?

A THE EXIT WOUND WAS TO THE FRONT OF THE BODY TO THE UPPER RIGHT ABDOMEN REGION FOR THE LOWER WOUND.

Q AND THAT SHOT WHAT KIND OF DAMAGE DID IT TO DO INSIDE THE BODY?

A THAT SHOT WENT THROUGH THE LIVER AND IT ALSO WENT THROUGH THE SACRAL VERTEBRAE SO ONE OF THE VERTEBRAL BONES AND THEN THROUGH THE LIVER.

Q THAT SHOT STANDING ALONE IF YOU COULD, COULD YOU GIVE A PRESUMPTION AS TO HOW LONG SOMEONE COULD SURVIVE A SHOT LIKE THAT UNTREATED?

A NO, NOT, NOT DIRECTLY. IT'S, COULD BE, IT COULD BE SECONDS, IT COULD BE HOURS.

Q AND HOW ABOUT THE SHOT TO THE UPPER BACK WERE YOU ABLE TO DETERMINE THE EXIT WOUND FROM THAT SHOT?

A YES, THE EXIT WOUND TO THAT ENTRANCE WOUND WAS RIGHT TO THE, RIGHT ABOVE THE CLAVICLE HERE AT THE NECK.

Q SO ENTERED IN THE MID TO UPPER BACK AND EXITED BELOW THE ADAMS APPLE?

A THAT'S CORRECT.

Q WHAT KIND OF DAMAGE DID THAT DO TO THE BODY?

A THAT, THAT WENT THROUGH THE AORTA AND THE TRACHEA. THE AORTA IS BASICALLY THE LARGEST VESSEL, LARGEST BLOOD VESSEL IN THE BODY, AND THE TRACHEA IS THE LARGEST BREATHING TUBE IN THE BODY SO IT WENT THROUGH BOTH OF THOSE STRUCTURES.

Q AND COULD YOU GIVE AN IDEA ABOUT APPROXIMATE AMOUNT OF TIME SOMEONE COULD SURVIVE FROM A SHOT LIKE THAT?

A THAT ONE IS MORE, THE TIME PERIOD WOULD BE CERTAINLY SHORTER MOST LIKELY THAN THE, THAN THE OTHER WOUND SIMPLY BECAUSE OF THE BLEEDING THAT WOULD OCCUR WHEN YOU DAMAGE THE AORTA SUCH A VERY LARGE BLOOD VESSEL. THE BLEEDING THAT WOULD OCCUR WOULD BE A GREAT DEAL IN A SHORT AMOUNT OF TIME BUT I CAN'T GIVE YOU A SPECIFIC TIME.

Q SO THE SHOT NUMBER 2 TO, FOR LACK OF A BETTER TERM, MORE CATASTROPHIC?

A POTENTIALLY, YES.

Q DOCTOR, WERE THERE ANY OTHER WOUNDS THAT YOU SAW THAT APPEARED TO BE GUNSHOT WOUNDS ON THE BODY?

A NOT THAT I COULD SAY FOR CERTAIN THAT WERE GUNSHOT WOUNDS, NO, SIR.

Q NONE YOU CAN SAY FOR CERTAIN, WERE THERE ANY THAT YOU HAD AN IDEA APPEARED TO BE GUNSHOT WOUNDS?

A THERE WERE INJURIES TO THE HAND THAT WERE PERFORATING THROUGH THE FINGER THAT I COULDN'T RULE OUT AS, AS POTENTIALLY BEING IN THE, IN A GUNSHOT PATHWAY.

Q DOCTOR SCHANDL, I'M GOING TO SHOW YOU WHAT'S BEEN PREVIOUSLY MARKED FOR IDENTIFICATION PURPOSES ONLY STATE'S NUMBER 12?

A YES, SIR.

Q DO YOU RECOGNIZE THAT ITEM?

A YES, SIR.

Q AND HOW DO YOU RECOGNIZE THAT ITEM?

A THIS IS AGAIN A PHOTOGRAPH TAKEN DURING THE POST MORTEM EXAMINATION OF MR. JULIAN LEE AND THIS IS HIS, HIS HAND.

Q WHICH HAND IS THAT?

A THIS IS HIS LEFT HAND I BELIEVE, IS THAT RIGHT, LOOKS LIKE A RIGHT HAND, RIGHT HAND.

Q AND YOU BASE THAT ON --

A VISUALLY LOOKING AT THE PICTURE.

Q POSITION OF THE THUMB?

A CORRECT.

Q AND DOES IT FAIRLY, YOU'RE SAYING IT FAIRLY AND ACCURATELY REPRESENT, OR DEPICT JULIAN LEE'S RIGHT HAND?

A YES, SIR.

Q AS YOU FOUND IT?

A YES, SIR.

MR. RICHARDSON: YOUR HONOR, PERMISSION TO PUBLISH?

THE COURT: IS THERE ANY OBJECTION TO THE INTRODUCTION OF THIS EXHIBIT INTO EVIDENCE?

MR. DIGGS: NO OBJECTION.

THE COURT: STATE'S 12 IS IN EVIDENCE WITHOUT

OBJECTION.

(WHEREUPON, STATE'S EXHIBIT NUMBER 12 ENTERED INTO EVIDENCE.)

THE COURT: ANY OBJECTION TO PUBLICATION?

MR. DIGGS: NO, SIR.

THE COURT: YOU MAY DO SO.

Q THE WOUND ON THAT HAND APPEARS TO BE IN BETWEEN THE WEB?

A THERE'S ACTUALLY THREE WOUNDS TO THAT, TO THAT HAND. BASICALLY IT LOOKED LIKE IT WENT THROUGH THE POINTING FINGER OR THE SECOND FINGER AND THEN INTO THE THIRD FINGER.

Q DOCTOR, I'M GOING TO ASK YOU A HYPOTHESIS HERE, I REALIZE YOU'RE NOT A BODY MECHANICS EXPERT, COULD THAT WOUND HAVE BEEN ADMINISTERED WHILE THE HAND WAS ON THE BACK?

A I REALLY COULD NOT COME TO A CONCLUSION ABOUT FIRST OF ALL IF THAT WAS A GUNSHOT WOUND AT ALL OR CERTAINLY WHERE THAT HAND WOULD HAVE BEEN DURING THE, WHEN THE INJURY WAS SUSTAINED I DON'T KNOW.

Q THERE'S NOTHING ELSE YOU CAN TELL ABOUT THAT WOUND?

A NO, SIR.

Q DOCTOR, LET'S SEE IF WE CAN SUMMARIZE YOUR FINDINGS, IT'S YOUR EXPERT OPINION THAT JULIAN LEE RECEIVED

TWO GUNSHOT WOUNDS?

A YES, SIR.

Q THAT THEY DEFINITELY ENTERED HIS BACK?

A YES, SIR.

Q THAT, YOU SAID THAT HE HAD LESS ABRASIVE WOUNDS ON THE EXIT WOUND ON HIS THROAT?

A HE HAD EXIT WOUNDS ON THE FRONT, ONE TO THE, TO THE AREA OF THE THROAT AND ONE TO THE AREA OF THE ABDOMEN, YES.

Q YOU MENTIONED SOMETHING ABOUT THE CHARACTERISTICS OF THOSE EXIT WOUNDS?

A RIGHT, THEY, THEY DEMONSTRATED SHORED, WHAT WE CALL SHORED, S-H-O-R-E-D, SHORED ABRASIONS.

Q SO HE COULD HAVE BEEN AGAINST SOMETHING?

A CORRECT, THAT'S WHAT THAT SUGGESTS IS THAT THE SKIN OR THE INDIVIDUAL WAS UP AGAINST SOMETHING.

Q IT'S FURTHER YOUR OPINION THAT THE LOWER BACK SHOT ENTERED AND WENT IN AT AN UPWARD ANGLE?

A YES.

Q WENT THROUGH HIS LIVER?

A YES.

Q THE SECOND SHOT ENTERED HIS BACK, UPPER BACK?

A YES.

Q AND TRAVELED AT AN UPWARD ANGLE AS WELL?

A YES.

Q BUT LESS OF AN ANGLE?

A CORRECT.

Q EITHER OF THESE SHOTS COULD HAVE BEEN FATAL?

A THAT'S CORRECT.

Q BOTH TOGETHER WERE DEFINITELY FATAL?

A CLEARLY.

Q IT'S YOUR OPINION THAT JULIAN LEE DIED AS A RESULT OF BEING SHOT IN THE BACK TWICE?

A THAT'S CORRECT.

MR. RICHARDSON: THANK YOU, DOCTOR, PLEASE ANSWER ANY QUESTIONS MR. DIGGS MAY HAVE.

THE WITNESS: YES, SIR.

THE COURT: CROSS EXAMINATION, MR. DIGGS.

MR. DIGGS: THANK YOU, YOUR HONOR.

**CROSS EXAMINATION**

**BY MR. DIGGS:**

Q DOCTOR, DID YOU TESTIFY THAT YOU HAD REMOVED THE CLOTHING OR NOT, WAS THE BODY STILL CLOTHED WHEN YOU RECEIVED IT?

A HE IS STILL CLOTHED, THAT'S CORRECT.

Q DO YOU RECALL IF HE HAD ANYTHING ON HIS HANDS?

A HE DID, HE, HE DID NOT HAVE ANYTHING ON HIS

HANDS, NO, SIR.

Q YOU DIDN'T NOTICE ANY GLOVES OR ANYTHING OF THAT NATURE?

A NO, SIR, HE WAS NOT WEARING GLOVES.

Q ALL RIGHT, WOULD YOU DESCRIBE FOR US, PLEASE, MA'AM, THE CLOTHING THAT YOU SAW HIM WEARING?

A YES, HE HAD TWO WHITES SOCKS, BLUE JEANS, STRIPED BOXER SHORTS, A SLEEVELESS WHITE TEE SHIRT, A WHITE TEE SHIRT OVER THAT AND A BLACK TEE SHIRT OVER THAT.

Q OKAY, WHAT COLOR WERE HIS BLUE JEANS, WERE THEY LIGHT COLORED, DARK COLORED, OR CAN YOU DESCRIBE THEM FOR US?

A I'M SORRY, I DON'T RECOLLECT.

Q OKAY, NOW YOU NOTICED NO EVIDENCE THAT THIS WAS A CLOSE CONTACT SHOOTING?

A I HAVE NO EVIDENCE TO FORM THAT OPINION, THAT'S CORRECT.

Q I'M SORRY?

A I CANNOT TELL YOU THE DISTANCE OF THE SHOT, CORRECT.

Q ALL RIGHT ---

A THAT'S CORRECT.

Q --- AND BASED ON YOUR EXPERTISE IF THE SHOTS HAD BEEN CLOSE CONTACT IT WOULD BE LIKELY SOME EVIDENCE OF THAT ON THE CLOTHING OR THE BODY?

A THERE, THERE USUALLY IS, YES.

Q AND WHAT TYPE OF EVIDENCE WOULD THAT BE?

A IF IT WAS A CONTACT GUNSHOT WOUND YOU WOULD EXPERT TO FIND SOOT ON THE CLOTHING OR ON THE BODY.

Q OKAY, AND SO WE DIDN'T HAVE ANY SOOT ON JULIAN LEE'S CLOTHING OR HIS SKIN?

A HE DID NOT HAVE ANY ON HIS SKIN. AGAIN THE OUTER TEE SHIRT WAS BLACK SO I COULD NOT MAKE A DETERMINATION OF WHETHER SOOT WAS PRESENT ON THAT TEE SHIRT.

Q IF MR. LEE HAD BEEN WEARING ANY GLOVES WOULD THOSE ITEMS HAVE BEEN TRANSPORTED WITH HIS BODY TO YOUR OFFICE; CAN YOU SPEAK TO THAT?

A I, I BELIEVE THAT THEY WERE TAKEN PRIOR TO HIS TRANSPORT. I WAS UNDER, AGAIN WE GET A BRIEF DESCRIPTION OF THE CASE FROM THE CORONER BEFORE THEY SEND THE BODY AND IN THIS CASE I WAS INFORMED THAT HE HAD BEEN WEARING GLOVES THAT THOSE HAD BEEN REMOVED.

Q OKAY, SO YOU KNEW AT SOME POINT HE HAD GLOVES ON HIS HAND?

A THAT'S CORRECT.

Q ALL RIGHT --

MR. DIGGS: IF YOU'D BEAR WITH ME FOR JUST A MINUTE, YOUR HONOR.

THE COURT: YES, SIR.

MR. DIGGS: (CONTINUING)

Q ALL RIGHT, DOCTOR, I'D LIKE TO ASK YOU TO LOOK AT STATE'S EXHIBIT NUMBER 12?

A YES, SIR.

Q AND YOUR TESTIMONY WAS THAT WAS A, THAT'S A PHOTOGRAPH OF MR. LEE'S HAND?

A YES, SIR.

Q COULD YOU TELL US WHETHER OR NOT THERE WAS ANY INDICATION ON THE SKIN AT THAT TIME WHEN YOU VIEWED THE BODY TO WHETHER OR NOT THAT WOUND ON MR. LEE'S HAND HAD INITIALLY BEEN COVERED BY A GLOVE OR A PIECE OF CLOTH?

A NO, ONLY BY THE INFORMATION THAT I WAS PROVIDED WITH, NOT BY LOOKING AT THE HAND.

Q OKAY, DO YOU, CAN YOU DRAW ANY INFERENCES FROM THAT AT ALL?

A I'M NOT SURE OF WHAT THE QUESTION IS, SIR?

Q OKAY, YOU, IN OTHER WORDS YOU CAN'T BY LOOKING AT THAT PHOTOGRAPH OR THE BODY IN THAT CONDITION PRIOR TO THE PHOTOGRAPH DETERMINE WHETHER HE HAD GLOVES ON OR NOT?

A NO, SIR.

Q YOU COULDN'T MAKE THAT DETERMINATION?

A NO, I, I, NO, THAT'S CORRECT.

Q ALL RIGHT, AND YOUR EXPERTISE IS LIMITED TO FORENSIC PATHOLOGY TO EXPLAIN TO US WHAT THE CAUSE OF DEATH

WAS IN THIS CASE?

A YES, SIR.

Q BASICALLY, AND YOU'RE NOT HERE TO TELL US WHO DID THE SHOOTING OR WHO CAUSED THE DEATH?

A THAT IS CORRECT.

MR. DIGGS: THAT'S ALL I HAVE.

THE COURT: ANY REDIRECT?

MR. RICHARDSON: NO, SIR, YOUR HONOR.

THE COURT: DO YOU WISH THE WITNESS TO BE EXCUSED?

MR. RICHARDSON: YES, SIR, I WOULD REQUEST IT.

THE COURT: ANY OBJECTION?

MR. DIGGS: NO OBJECTION.

THE COURT: ALL RIGHT, MA'AM, YOU ARE RELEASED FROM YOUR SUBPOENA AND YOU'RE EXCUSED TO GO BACK TO YOUR REGULAR DUTIES, THANK YOU.

THE WITNESS: THANK YOU, SIR.

THE COURT: ALL RIGHT, LADIES AND GENTLEMEN, KNOWING THE NEXT WITNESS BY THE STATE, I BELIEVE, WILL TAKE SOME PERIOD OF TIME WE'RE GOING TO BREAK AT THIS POINT IN TIME. I'M GOING TO HAVE YOU COME BACK, PLEASE BE BACK IN YOUR JURY ROOM AT 1:30. PLEASE, BE BACK IN YOUR JURY ROOM AT 1:30. THANK YOU VERY MUCH.

ALSO, JUST A SECOND. PLEASE REMEMBER DON'T TALK ABOUT THE CASE, DON'T ALLOW ANYBODY TO TALK TO YOU ABOUT

THE CASE. I WOULD ASK THAT YOU DO NOT DISCUSS THE CASE AMONG YOURSELVES UNTIL I GIVE IT TO YOU AT THE END FOR YOUR DELIBERATIONS, THANK YOU VERY MUCH.

(WHEREUPON, THE JURY WAS EXCUSED FOR LUNCH AT 12:18 P.M.)

THE COURT: ALL RIGHT, SOLICITOR, IS THERE ANYTHING WE NEED TO DO AT THIS POINT IN TIME THAT YOU KNOW OF?

MR. RICHARDSON: I NEED TO HOOK UP THAT PROJECTOR AND MAKE SURE IT'S WORKING.

THE COURT: ALL RIGHT, SIR, WELL I'LL LEAVE THAT TO YOU. FROM THE DEFENSE?

MR. DIGGS: NOT AT THIS TIME, YOUR HONOR.

THE COURT: ALL RIGHT, THANK YOU. SOLICITOR, CAN I SEE STATE'S EXHIBIT 20.

(WHEREUPON, COURT WAS RECESSED FOR LUNCH)

REPORTER'S NOTE: THE HORRY COUNTY COURTHOUSE WAS EVACUATED WITH INSTRUCTIONS FOR NO ONE TO ENTER THE COURTHOUSE FOR THE REMAINDER OF THE AFTERNOON.)

(WHEREUPON, COURT RESUMED ON OCTOBER 3, 2007 AT 9:30 A.M.)

THE COURT: NOW WE ARE RESUMING THE MATTER OF THE STATE OF SOUTH CAROLINA V. THEODORE DAVID WILLS, IS THE STATE READY TO PROCEED IN THIS MATTER?

MR. RICHARDSON: WE ARE, YOUR HONOR, I JUST

WANTED TO ADDRESS ONE MATTER QUICKLY WITH THE ---

THE COURT: YES, SIR.

MR. RICHARDSON: --- WITH THE REDACTED PORTIONS. I'VE SPOKEN WITH MR. DIGGS REGARDING PORTIONS THAT NEED TO BE STRICKEN THAT I SAW. IT'S AT, ON THE SECOND INTERVIEW AND IT'S AT ONE MINUTE 50 SECONDS TO TWO MINUTES, WE'LL CUT THAT OUT AT THAT POINT. THAT'S WHERE THEY MAKE A MENTION OF PRISON.

AT 1555 TO 1605 THERE'S A STATEMENT WE CAN ASSESS WHERE WE'RE AT WITH THE POLYGRAPHS, OF COURSE I'LL MUTE DURING THAT PORTION.

THE COURT: YES, SIR.

MR. RICHARDSON: AND ALSO 2709 THROUGH 2719 THERE'S LIKE I SAID GET THE POLYGRAPH SET UP AND LIKE I SAID THAT WOULD BE STRICKEN AT THAT POINT AND THE METHOD I INTEND TO USE IS JUST TURN THE VOLUME DOWN AT THAT POINT.

THE COURT: I DON'T HAVE, IS THERE ANY PROBLEM WITH THAT, MR. DIGGS?

MR. DIGGS: NO, SIR, I THINK ---

THE COURT: SO, SO ---

MR. DIGGS: --- WE'VE GONE OVER THAT AND THAT'S ACCEPTABLE TO US.

THE COURT: ALL RIGHT, CAUSE WHERE THE DIFFICULTY IS WHAT YA'LL HAVE DESCRIBED TO ME IF WE TRY TO FAST FORWARD IT WE'RE GOING TO ENCOUNTER A LOT OF PROBLEMS

SO ---

MR. RICHARDSON: IT MAY NOT CATCH UP IN TIME AND, YOUR HONOR, I, I, I LOOKED LAST NIGHT AND PLAYED THE VIDEO AND I COULD NOT FIND A MENTION OF DON'T LIE BUT IT WAS ADDRESSED YESTERDAY.

THE COURT: ALL RIGHT, ALL RIGHT. WELL, IS THERE ANYTHING IN THE TRANSCRIPT THAT YOU HAVE, MR. DIGGS, THAT YOU COULD FIND THAT WOULD INDICATE THAT THERE WAS SOME STATEMENT TO MR. WILLS TO THE EFFECT? AND I'M JUST GIVING EXAMPLES HERE, I DON'T KNOW LIKE YOU, YOU KNOW, YOU NEED TO TELL THE TRUTH ON THE POLYGRAPH OR YOU NEED, AT THE VERY END OF IT SOMETHING LIKE THAT?

MR. DIGGS: YOUR HONOR, WE WENT BACK, I LOOKED AT IT LAST NIGHT AND DISCUSSED IT WITH COUNSEL THIS MORNING. WE'RE OKAY WITH WHAT THE SOLICITOR HAS ASKED.

THE COURT: VERY GOOD.

MR. RICHARDSON: THE CLOSEST THING ---

MR. DIGGS: I WOULD ASK THAT YOU INSTRUCT THE JURY, SAY LOOK HE WAS ARRESTED. HE'S, HE'S IN A JAILED ISSUED CLOTHING.

THE COURT: WELL WHAT I CAN SAY IS THE, THE, THE INTERVIEW WAS TAKEN SHORTLY AFTER HE WAS ARRESTED FOR THE CHARGES AND, AND OBVIOUSLY YOU CAN TAKE NO IMPRESSION FROM EITHER THAT FACT OR WHAT CLOTHING HE MIGHT BE WEARING AT THE TIME.

MR. DIGGS: THANK YOU.

THE COURT: ALL RIGHT.

MR. RICHARDSON: AND, YOUR HONOR ---

THE COURT: ALL RIGHT, WITH THAT -- I'M SORRY, YES, SIR?

MR. RICHARDSON: I WOULD JUST ASK FOR AN INSTRUCTION TO THE JURY THAT THERE ARE PORTIONS OF THE INTERVIEW WHICH WILL HAVE TO BE MANUALLY REDACTED DURING THE TIME SO THEY'RE NOT, THE JURY IS NOT LEFT TRYING TO FIGURE OUT WHY WE'RE MUTING.

THE COURT: I WILL TELL THEM THAT I INSTRUCTED YA'LL TO, THAT FOR THE COURT'S REASONS THAT CERTAIN PORTIONS HAD TO BE MUTED, ALL RIGHT.

MR. RICHARDSON: THANK YOU, YOUR HONOR.

MR. DIGGS: THANK YOU, YOUR HONOR.

THE COURT: ALL RIGHT, ASK THE JURY TO COME IN, PLEASE.

(WHEREUPON, THE JURY RETURNS TO THE COURTROOM AT 9:40 A.M.)

THE COURT: ALL RIGHT, LADIES AND GENTLEMEN, I'M GLAD THAT WITH YESTERDAY'S EXCITEMENT WE FOUND OURSELVES BACK HERE TODAY. I NEED TO TELL YOU A COUPLE OF THINGS. WE'RE AT A STAGE IN THE PROCEEDINGS WHERE THE, THE COURT IS ALLOWING A INTERVIEW TO BE PLAYED THAT THE STATE CONDUCTED WITH THE DEFENDANT MR. WILLS.

NOW REGARDING THAT YOU WOULD SEE FROM THE VIDEO MR. WILLS HAD BEEN RECENTLY ARRESTED AND OBVIOUSLY HE WAS IN CUSTODY AT THAT POINT IN TIME AND WHEN THAT HAPPENS YOU OBVIOUSLY MUST WEAR THE JAIL ISSUED CLOTHING. YOU ARE TO TAKE NO, GAIN NO IMPRESSION FROM THAT. YOU'RE GOING TO GAIN NOTHING FROM THAT OR TAKE ANYTHING FROM THAT. THAT'S JUST A CIRCUMSTANCE WHEN SOMEBODY IS ARRESTED THAT'S WHAT HAPPENS, SO OBVIOUSLY YOU DON'T LET THAT AFFECT YOUR JUDGMENT AS TO WHAT THE PROCEEDINGS ARE REGARDING THAT.

ALSO DURING THE PLAYING OF THE VIDEO AND AUDIO DISK I HAVE INSTRUCTED COUNSEL TO MUTE THE VOLUME AT SEVERAL PLACES, THAT IS THE COURT'S DOING AND THE COURT'S RULING. THOSE MATTERS ARE NOT FOR YOUR, THAT ARE BEING TALKED ABOUT OR STATED AT THAT TIME ARE NOT FOR YOUR CONCERN IN THIS TRIAL AND THE COURT HAS INSTRUCTED AND ORDERED THAT THOSE PORTIONS BE MUTED, THAT THERE BE NO VOLUME, ALL RIGHT. YOU MAY PROCEED, SOLICITOR.

MR. RICHARDSON: THANK YOU, YOUR HONOR. AT THIS TIME THE STATE WOULD CALL DETECTIVE NEIL LIVINGSTON.

THE COURT: ALL RIGHT, SIR, PLEASE COME AROUND, SIR.

**DETECTIVE NEIL LIVINGSTON**

**BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:**

MADAM CLERK: STATE YOUR FULL NAME AND SPELL YOUR LAST NAME FOR THE COURT.

THE WITNESS: NEIL LIVINGSTON, L-I-V-I-N-G-S-T-O-N.

MR. RICHARDSON: THE COURT'S INDULGENCE FOR ONE MOMENT.

THE COURT: YES, SIR.

MR. RICHARDSON: THANK YOU, YOUR HONOR.

THE COURT: YES, SIR.

**DIRECT EXAMINATION**

**BY MR. RICHARDSON:**

Q DETECTIVE LIVINGSTON, COULD YOU, PLEASE, TELL US A LITTLE BIT ABOUT YOUR, YOUR OCCUPATION, WHERE YOU'RE EMPLOYED, HOW LONG AND IN WHAT CAPACITY?

A OKAY, I'M A DETECTIVE WITH THE HORRY COUNTY POLICE DEPARTMENT PRESENTLY IN THE VIOLENT CRIMES UNIT AND I'VE BEEN EMPLOYED WITH THEM FOR APPROXIMATELY 22 YEARS.

Q AND YOU'RE WITH VIOLENT CRIMES, WHAT KIND OF, WHAT KIND OF DUTIES DO YOU PERFORM AS A DETECTIVE WITH THE VIOLENT CRIMES DIVISION?

A TO FOLLOW UP WHERE THE ROAD OFFICERS STOP. THEY HAVE CALLS TO CONTINUE ON TO AND WE HAVE MORE TIME TO DEVOTE TO THEM SO AT THAT POINT WE POINT TO OR WE CONTINUE ON WITH CRIME SCENE. WE FOLLOW UP FROM THE EVIDENCE THAT'S COLLECTED AND DO INTERVIEWS AND TRY AND COME TO A CONCLUSION FOR A CASE.

Q SO IN THE PRESENT CASE THE STATE OF SOUTH

CAROLINA V. DAVID WILLS TO THE CHARGE OF MURDER, DID YOU EVER HAVE THE OPPORTUNITY TO INTERVIEW THE DEFENDANT?

A YES, SIR, I WAS PRESENT DURING AN INTERVIEW.

Q OKAY, AND DID YOU ---

THE COURT: COULD YOU SPEAK UP JUST A LITTLE BIT, MR. LIVINGSTON.

THE WITNESS: (CONTINUING)

A YES, SIR.

Q DO YOU RECALL WHAT THE DATE OF THAT WAS?

A NOT RIGHT OFF HAND, NO, SIR.

Q DETECTIVE LIVINGSTON, I'M GOING TO HAND UP TO YOU WHAT HAS BEEN PREVIOUSLY BEEN MARKED FOR IDENTIFICATION PURPOSES AS STATE'S NUMBER 22; DO YOU RECOGNIZE THIS ITEM?

A YES, SIR, I DO.

Q AND HOW DO YOU RECOGNIZE THIS ITEM?

A THAT'S MIRANDA RIGHTS THAT WERE READ TO MR. WILLS AND I WAS PRESENT, IT BEARS MY SIGNATURE AS A WITNESS ON IT.

Q AND YOU PERSONALLY WATCHED MR. WILLS SIGN THAT?

A YES, SIR, I DID.

Q YOU OBSERVED IT BEING ADMINISTERED TO HIM?

A YES, SIR.

Q AND WHO ADMINISTERED THAT MIRANDA WARNING?

A DETECTIVE ALLEN LARGE, HIS SIGNATURE IS ALSO ON HERE.

MR. RICHARDSON: YOUR HONOR, AT THIS TIME THE STATE WOULD SEEK TO INTRODUCE STATE'S NUMBER 22.

MR. DIGGS: YOUR HONOR, SUBJECT TO OUR PRIOR OBJECTION.

THE COURT: ALL RIGHT, SIR, STATE'S 22 IS IN EVIDENCE OVER THE OBJECTION OF DEFENSE.

(WHEREUPON, STATE'S EXHIBIT NUMBER 22 ENTERED INTO EVIDENCE.)

MR. RICHARDSON: PERMISSION TO PUBLISH, YOUR HONOR.

THE COURT: ANY OBJECTION TO PUBLICATION?

MR. DIGGS: NO, SIR.

THE COURT: YOU MAY DO SO.

MR. RICHARDSON: (CONTINUING)

Q DETECTIVE LIVINGSTON, COULD YOU, PLEASE, DEMONSTRATE TO THE JURORS HOW DETECTIVE LARGE ADMINISTERED THIS MIRANDA WARNING?

A TO READ IT FROM THE FORM, IT'S A FORM THAT WE HAVE WITH OUR POLICE DEPARTMENT. DO YOU WANT ME TO READ IN ITS ENTIRETY?

Q PLEASE?

A IT SAYS, ADVISEMENT OF MIRANDA RIGHTS:

YOU HAVE THE RIGHT TO REMAIN SILENT;

ANYTHING YOU SAY CAN AND WILL BE USED AGAINST YOU IN A COURT OF LAW;

YOU HAVE THE RIGHT TO TALK WITH A LAWYER AND HAVE HIM PRESENT WITH YOU WHILE YOU ARE BEING QUESTIONED;

IF YOU CANNOT AFFORD TO HIRE A LAWYER ONE WILL BE APPOINTED TO REPRESENT YOU BEFORE ANY QUESTIONING IF YOU SO DESIRE;

IF YOU MAKE A STATEMENT OR ANSWER ANY QUESTIONS YOU HAVE THE RIGHT TO STOP AT ANY TIME.

THEN IT HAS TWO BLOCKS, IT WOULD SAY:

DO YOU UNDERSTAND YOUR RIGHTS AS READ TO YOU, AND IT'S GOT A PLACE FOR, YES OR NO, IN THIS PARTICULAR ONE IT'S CHECKED, YES.

IT ALSO BEARS MR. WILLS INITIALS BESIDE THE CHECK.

BELOW THAT IT SAYS, UNDERSTANDING YOUR RIGHTS DO YOU WISH TO WAIVE THEM MAKE A STATEMENT OR ANSWER ANY QUESTIONS, THERE AGAIN IT HAS A, YES OR NO, BLOCK. IT'S CHECKED AND HAS MR. WILLS INITIALS AND BELOW THAT IT HAS HIS SIGNATURE THEN IT GOES ON TO HAVE THE DATE OF 8-26-2005 AND THE TIME OF 2:39 P.M.

Q THANK YOU, DETECTIVE. MR. WILLS SIGNED IT?

A YES, SIR.

Q DID HE APPEAR TO BE COHERENT THAT DAY?

A YES, SIR.

Q APPEAR TO UNDERSTAND THE ENGLISH LANGUAGE?

A YES, SIR, HE DID.

Q DID HE HAVE ANY QUESTIONS REGARDING HIS MIRANDA RIGHTS TO YOUR MEMORY?

A NO, SIR.

Q SO HE SAID HE COULD UNDERSTAND IT?

A YES, SIR, HE DID.

Q AND WHO WAS PRESENT DURING THAT INTERVIEW?

A HIS ATTORNEY WAS PRESENT DURING THE ENTIRE INTERVIEW.

Q MR. DIGGS?

A YES, SIR.

Q SO HE WAS REPRESENTED BY COUNSEL?

A YES, SIR.

Q HE WAS ADVISED OF HIS MIRANDA RIGHTS?

A CORRECT.

Q AND HE GAVE A STATEMENT?

A YES, SIR, HE DID.

Q DETECTIVE LIVINGSTON, NOW I'M GOING TO SHOW YOU WHAT HAS BEEN PREVIOUSLY MARKED FOR IDENTIFICATION PURPOSES STATE'S NUMBER 21, TAKE A MOMENT TO LOOK AT THAT? DO YOU RECOGNIZE THAT ITEM?

A YES, SIR, I DO.

Q AND HOW DO YOU RECOGNIZE THAT ITEM?

A IT BEARS A CASE NUMBER AND MY INITIALS ON IT.

Q OKAY, AND WHAT IS THAT?

A IT'S A COMPACT DISK WHICH CONTAINS AUDIO AND VIDEO RECORDINGS OF THE INTERVIEW PERTAINING TO THAT MIRANDA.

Q AND IS IT A TRUE AND ACCURATE DEPICTION OF THAT INTERVIEW?

A YES, SIR, IT IS.

Q IN ITS ENTIRETY?

A YES, SIR.

MR. RICHARDSON: YOUR HONOR, AT THIS TIME THE STATE WOULD SEEK TO INTRODUCE STATE'S NUMBER 21 INTO EVIDENCE.

THE COURT: MR. DIGGS?

MR. DIGGS: YOUR HONOR, JUST SUBJECT TO THE PRIOR OBJECTION.

THE COURT: ALL RIGHT, SIR, I'M GOING TO ALLOW THE, BRING STATE'S 21 IN EVIDENCE, I'M GOING TO ALLOW IT INTO EVIDENCE AND ALLOW THE STATE TO PLAY THAT INTERVIEW AT THAT TIME.

(WHEREUPON, STATE'S EXHIBIT NUMBER 21 ENTERED INTO EVIDENCE.)

MR. RICHARDSON: YOUR HONOR, DO YOU WISH DETECTIVE LIVINGSTON TO REMAIN ON THE STAND DURING THE

PLAYING OF THIS?

THE COURT: I DON'T, THAT'S NOT NECESSARY, IS IT, MR. DIGGS, CAN HE HAVE A SEAT BACK?

MR. DIGGS: NO, SIR.

THE COURT: ALL RIGHT, SIR, YOU MAY DO SO.

MR. DIGGS: THAT'S PERFECTLY FINE.

THE WITNESS: THANK YOU, YOUR HONOR.

THE COURT: ALL RIGHT, SIR, THANK YOU.

MR. RICHARDSON: THANK YOU, YOUR HONOR. AT THIS TIME I'M GOING TO INSERT THE DISK FOR PUBLICATION, YOUR HONOR.

THE COURT: ALL RIGHT, SIR. ARE YOU READY, SOLICITOR?

MR. RICHARDSON: I'VE GOT TO WAIT FOR THE FILE, YOUR HONOR, IT TAKES A MINUTE TO LOAD.

THE COURT: ALL RIGHT, WELL I DIDN'T WANT TO CUT THE LIGHT ---

MR. RICHARDSON: SHE CAN GO AHEAD AND ---

THE COURT: I DIDN'T WANT TO CUT THE LIGHTS OUT UNTIL THEN.

MR. RICHARDSON: I'LL BE ABLE TO SEE FROM THE COMPUTER SCREEN.

THE COURT: ALL RIGHT, SIR.

MR. RICHARDSON: AND, YOUR HONOR, THIS INTERVIEW IS IN TWO PARTS SO WE'LL PLAY BOTH PARTS.

THE COURT: YES, SIR.

MR. RICHARDSON: AND, FOLKS, I'M JUST TELLING YA'LL IF YA'LL CAN'T HEAR.

MR. FOREMAN: JUDGE --

THE COURT: YES, SIR?

MR. FOREMAN: THE BACK ROW IS SAYING THAT IT'S DIFFICULT TO HEAR BECAUSE OF THE AIR CONDITIONER SO CAN WE MAKE SURE IT'S TURNED UP LOUD.

THE COURT: ALL RIGHT.

MR. RICHARDSON: I'LL SPEAK UP AND I'LL MAKE SURE THIS IS TURNED UP LOUD.

THE COURT: ALL RIGHT, SIR.

(WHEREUPON, THE TAPED STATEMENT BY CD OF THEODORE DAVID WILLS WAS PLAYED IN OPEN COURT.)

MR. RICHARDSON: YOUR HONOR, I'LL STOP.

MR. DIGGS: YOUR HONOR, MAY WE APPROACH FOR A SECOND?

THE COURT: ABSOLUTELY.

(WHEREUPON, A BENCH CONFERENCE WAS HELD OFF THE RECORD IN THE PRESENCE OF THE JURY, BUT OUT OF THE HEARING OF THE JURY AND THE COURT REPORTER.)

THE COURT: ASK THE WITNESS.

MR. RICHARDSON: (CONTINUING)

Q ONCE AGAIN, DETECTIVE LIVINGSTON, THAT WAS THE ENTIRE INTERVIEW?

A YES, SIR, IT WAS.

MR. RICHARDSON: THANK YOU, I HAVE NO FURTHER QUESTIONS.

THE COURT: ALL RIGHT.

MR. RICHARDSON: ANSWER ANY QUESTIONS MR. DIGGS MIGHT HAVE.

THE COURT: MR. DIGGS, CROSS EXAMINATION.

MR. DIGGS: YOUR HONOR, I JUST HAVE ONE ---

THE COURT: YES, SIR.

MR. DIGGS: --- CLARIFICATION.

THE COURT: ABSOLUTELY.

**CROSS EXAMINATION**

**BY MR. DIGGS:**

Q DETECTIVE LIVINGSTON, CORRECT?

A YES, SIR.

Q CAN YOU IDENTIFY FOR US WHO IT WAS THERE AGAIN, THERE WERE SEVERAL PEOPLE ASKING QUESTIONS, WHO WERE THOSE PEOPLE?

A THERE WAS DETECTIVE LARGE, MYSELF, ASSISTANT SOLICITOR SCOTT HIXSON, YOUR CLIENT, YOURSELF, AND ONE OF YOUR STAFF.

Q ALL RIGHT, SO THERE WERE THREE QUESTIONERS, YOURSELF, DETECTIVE LARGE, AND SOLICITOR HIXSON?

A AT THE END, YES, SIR, IT WAS ASSISTANT SOLICITOR HIXSON.

MR. DIGGS: THAT'S ALL I HAVE.

THE COURT: ALL RIGHT, MR. DIGGS, COULD YOU COME FORWARD AND MR. RICHARDSON?

MR. RICHARDSON: YES, SIR, YOUR HONOR.

(WHEREUPON, A BENCH CONFERENCE WAS HELD OFF THE RECORD IN THE PRESENCE OF THE JURY, BUT OUT OF THE HEARING OF THE JURY AND THE COURT REPORTER.)

MR. RICHARDSON: I WOULD ASK THAT DETECTIVE LIVINGSTON BE EXCUSED.

THE COURT: ALL RIGHT, MR. DIGGS, ANY REASON THAT THIS WITNESS SHOULD NOT BE EXCUSED?

MR. DIGGS: NO, NO, YOUR HONOR.

THE COURT: YOU CAN STEP DOWN, YOU'RE RELEASED FROM YOUR SUBPOENA, SIR.

THE WITNESS: THANK YOU, YOUR HONOR.

THE COURT: THANK YOU. ALL RIGHT, SOLICITOR, FURTHER WITNESSES ON BEHALF OF THE STATE?

MR. RICHARDSON: NO FURTHER WITNESSES FROM THE STATE, YOUR HONOR, AT THIS TIME THE STATE RESTS.

THE COURT: THE STATE RESTS AT THIS TIME, ALL RIGHT.

MR. RICHARDSON: YES, SIR.

THE COURT: ALL RIGHT, MR. DIGGS, YOU HAVE SOME MATTERS FOR THE COURT AT THIS POINT IN TIME THEN?

MR. DIGGS: YES, SIR.

THE COURT: ALL RIGHT, LADIES AND GENTLEMEN OF THE JURY, IF YOU WOULD GO TO YOUR JURY ROOM FOR A LITTLE BIT AND WE'LL CALL YOU BACK OUT JUST AS SOON AS I CAN.

(WHEREUPON, THE JURY RETIRED TO THE JURY ROOM AT 10:50 A.M.)

THE COURT: WE'LL COME BACK IN HERE IN ABOUT 10 MINUTES. I'LL HEAR ALL YOUR MOTIONS AT THAT POINT IN TIME, MR. DIGGS. IF I DO NOT DECIDE TO GRANT YOUR MOTIONS LET'S AT LEAST ANTICIPATE THAT POSSIBILITY AND TALK TO YOUR CLIENT ABOUT HIS RIGHT TO TESTIFY SO THAT WE CAN GO INTO THAT PARTICULAR MATTER WHEN WE COME BACK, ALL RIGHT.

MR. DIGGS: THANK YOU, YOUR HONOR.

THE COURT: THANK YOU VERY MUCH, WE'LL COME BACK IN ABOUT 10 MINUTES, THANK YOU.

(WHEREUPON, A RECESS WAS TAKEN AND THE FOLLOWING TAKES PLACE ON THE RECORD AFTER THE RECESS.)

THE COURT: ALL RIGHT, MR. DIGGS, YOU HAVE SOME MOTIONS REGARDING THE STATE'S CASE?

MR. DIGGS: YOUR HONOR, WE WOULD MOVE FOR A DIRECTED VERDICT AT THIS TIME BECAUSE THERE'S NOT EVIDENCE IN THE RECORD UPON WHICH A RATIONAL TRIER OF FACT COULD CONCLUDE GUILT BEYOND A REASONABLE DOUBT.

THE ONLY EVIDENCE, WE'VE HAD THREE WITNESSES IN THE CASE. WE'VE HAD THE INVESTIGATOR THAT DISCOVERED, OR INITIALLY WENT TO THE CRIME SCENE. WE HAVE THE DOCTOR THAT

TALKED ABOUT THE CAUSE OF DEATH. WE HAVE DETECTIVE LIVINGSTON WITH THE AUDIO STATEMENT AND VIDEO STATEMENT.

YOUR HONOR, IN THAT STATEMENT THE ONLY REASONABLE INFERENCE THAT CAN BE GLEANED FROM THE STATEMENT IS THE FACT THAT THIS WAS A SHOOTING THAT WAS DONE ON THE SPUR OF THE MOMENT BY ANOTHER INDIVIDUAL NOT MY CLIENT, THAT HE WAS NOT THERE TO PARTICIPATE IN ANY KIND OF MURDER AND WAS NOT AT THAT POINT ENGAGED IN ANY ACTIVITY IN A NATURAL AND PROBABLE CONSEQUENCE OF WHICH WOULD RESULT IN DEATH OR KILLING. SO BASED ON THAT STATE OF THE RECORD WE'D MOVE FOR A DIRECTED VERDICT ON THE CHARGE OF MURDER.

THE COURT: ALL RIGHT, SIR. SOLICITOR?

MR. RICHARDSON: THANK YOU, YOUR HONOR. AS THE BURDEN IS ON THE DEFENSE ON THAT MOTION, YOUR HONOR. THE STATE WOULD RESPECTFULLY SUBMIT THAT, NUMBER ONE, NO DOUBT A MURDER TOOK PLACE. MR. DIGGS CONCEDED THAT IN HIS OPENING AND, OF COURSE, WE'VE HEARD AMPLE TESTIMONY BOTH FROM ANN PITTS, WHO WAS THE CRIME SCENE TECHNICIAN ON THE SCENE, AS WELL AS DR. SCHANDL.

WITH REGARD TO THE DEFENDANT'S GUILT AND HIS TESTIMONY IN HIS STATEMENT THAT WE HEARD. THE DEFENDANT SAYS THAT HE WAS PRESENT DURING THE TIME, THAT HE HEARD THAT THERE WAS A CONTRACT OUT OR BOUNTY ON THE VICTIM'S HEAD. HE ACCEPTED THAT, TALKED TO THE SHOOTER, MARK WILLARD, ABOUT IT, PICKS MARK WILLARD UP PRIOR TO PICKING

UP THE VICTIM, AND DRIVES THEM OUT TO A REMOTE AREA AND THEN THE KILLING OCCURS.

NOW HE TRIES TO MITIGATE AND SAYS, I DIDN'T KNOW IT WAS GOING TO GO ON. BUT THERE'S ONLY ONE INFERENCE YOU CAN TAKE FROM THAT, THAT HE GOES TO A REMOTE AREA WHERE NONE OF THEM LIVE. THEY TAKE ONE GUN TO A DRUG RIP, TO A DRUG ROBBERY, THAT ONE GUN AIN'T TO ROB ANYBODY. IT'S TO EXECUTE JULIAN LEE AND THAT'S EXACTLY WHAT THEY DID.

THEY FULFILLED THEIR PLAN. HE GOT PAID HIS MONEY ON THAT. HE TELLS YOU HE GOT $5,000. HE SAYS IT WAS HUSH MONEY SO HE GETS HALF OF ALL THE MONEY TO REMAIN QUITE. HIS BROTHER GETS A PITTANCE, I ASSUME, AND THE SHOOTER GETS LESS THAN THE HUSH MONEY. YOUR HONOR, IT'S JUST SIMPLY RIDICULOUS TO BELIEVE THAT PORTION OF THE STATEMENT.

THIS DEFENDANT CAN'T DENY BY ANY MOTION HE IS THE MURDERER. THE ONLY DIFFERENCE IS THE WEAPON HE CHOSE TO USE TO EXECUTE JULIAN LEE WAS MARK WILLARD.

THE COURT: ALL RIGHT, SIR. ALL RIGHT, MR. DIGGS, I'M SORRY, YES, SIR?

MR. DIGGS: YOUR HONOR, I ALSO FOR THE RECORD I THINK IT WOULD BE APPROPRIATE FOR ME TO RENEW MY OBJECTION TO THE ADMISSIBILITY OF THAT STATEMENT AND SAY THAT YOUR HONOR SHOULD NOT CONSIDER THAT STATEMENT. I KNOW WHAT YOUR PRIOR RULING WAS THAT IT WAS ADMITTED, BUT I'D ASK YOUR HONOR TO RECONSIDER THAT AND RECONSIDER IT IN CONJUNCTION

WITH THIS MOTION TO DISMISS THE MURDER CHARGE AGAINST MR. WILLS.

YOUR HONOR, ESPECIALLY, I DON'T KNOW IF YOU HAVE A TRANSCRIPT OF THE STATEMENT IN FRONT OF YOU, BUT FOR THE RECORD I THINK MAYBE THE SOLICITOR AND I BOTH WOULD LIKE TO MAKE THIS TRANSCRIPT A COURT EXHIBIT MAYBE SO THAT IT WOULD BE AVAILABLE. BUT AT PAGE 30 SCOTT HIXSON, WHO IS AN ASSISTANT SOLICITOR HERE IN THIS CIRCUIT, PREFACES A QUESTION WITH, YOU DON'T HAVE ANYTHING TO WORRY ABOUT ANSWERING IT AND FOR, YOUR HONOR, FOR CLARIFICATION THE ENTIRE QUESTION WAS, "CAN YOU TELL ME A LITTLE BIT MORE ABOUT, UM, CAUSE ON THE SURFACE IT WILL LOOK LIKE CERTAINLY YOU GOT PAID BUT HIT ON SOMEBODY THAT YOU HAD A LOT TO DO WITH THE HIT. NOW THIS IS ALL PART OF THE PROFFER SO YOU UNDERSTAND THAT SO YOU DON'T HAVE ANYTHING TO WORRY ABOUT ANSWERING IT."

NOW CLEARLY THAT STATEMENT IS A PROMISE, CONTAINS A PROMISE TO MR. WILLS WITH RESPECT TO ANY KIND OF RESPONSE THAT'S ELICITED THAT AND I WOULD ASK THE COURT TO RECONSIDER. AND MAYBE I DIDN'T CLARIFY IT AS, AS CLEARLY AS I COULD HAVE DONE PRIOR TO TRIAL BEFORE WE ACTUALLY GOT INTO THE TRIAL OF THE CASE BUT IT'S CLEARLY A PROMISE THAT IS TELLING MR. WILLS YOU CAN FEEL FREE TO BE TRUTHFUL HERE AND BE COMPLETELY OPEN AND HONEST WITH ME. YOU DON'T HAVE TO WORRY ABOUT THE RAMIFICATIONS AS LONG AS YOU WERE NOT

THE TRIGGER MAN, GO BACK TO THAT INITIAL CAVEAT. AND SO IMMEDIATELY, IMMEDIATELY IS WHEN MR. WILLS RESPONDS AND ACKNOWLEDGES IN, IN ONE WAY, WHICH THE SOLICITOR IS CONSTRUING THE STATEMENT, ACKNOWLEDGES THAT, YES, MAYBE HE POINTED OUT TO MARK, I CAN'T REMEMBER THE GENTLEMAN'S NAME, AS BEING SOMEONE WHO COULD, COULD BE A HIT MAN, SO TO SPEAK IF YOU CONSTRUE IT THAT WAY, AND I WOULD SUBMIT THAT'S NOT THE ONLY WAY YOU CAN CONSTRUE THAT STATEMENT. BUT I WOULD ASK THE COURT NOT TO CONSIDER THAT PORTION OF THE STATEMENT IN RULING ON THIS DIRECTED VERDICT MOTION AND, AND RELY SOLELY ON THE TESTIMONY OF THE OTHER TWO WITNESSES AND THE PORTION OF MR. WILLS STATEMENT THAT HE WAS NOT THE SHOOTER IN THIS CASE AND, AND DID, DID NOT KNOW THAT THERE WAS A SHOOTING THAT WAS GOING TO OCCUR THAT EVENING.

THE COURT: ALL RIGHT, SIR. IN GOING BACK TO THE MOTION TO ALLOW THE STATEMENT INTO EVIDENCE IN THIS PARTICULAR MATTER I WOULD REAFFIRM MY PREVIOUS RULING TO ALLOW THE STATEMENT INTO EVIDENCE. I BELIEVE THAT IT WAS PROPER, THAT THE STATEMENT WAS MADE KNOWINGLY, WAS MADE AFTER ADVISEMENT OF HIS MIRANDA RIGHTS, AFTER ADVICE OF COUNSEL, ACTUALLY HAVING COUNSEL PRESENT DURING THE QUESTIONING AND THE MAKING OF THE STATEMENT.

I WILL CHARGE THE JURY, OF COURSE, THAT THEY MAKE THE ULTIMATE DECISION AS TO WHETHER OR NOT THE STATEMENT WAS MADE VOLUNTARILY AND OF THE DEFENDANT'S OWN FREE WILL

AND IN THAT, AND I WILL TELL THEM THAT, THAT MEANS THAT THE STATEMENT WAS NOT CAUSED BY PRESSURE, FORCE, FEAR OF THREATS, COERCION OR BY HOPE OF PROMISE OF LENIENCY OR REWARD OF ANY KIND, AND THAT WILL BE PART OF THE JURY'S DETERMINATION TO DECIDE WHETHER OR NOT THEY BELIEVE THE STATEMENT WAS VOLUNTARY. BUT I BELIEVE THAT IN ACCORDANCE WITH THE LAW OF THIS STATE THAT IT WAS PROPER FOR THE JURY TO HEAR THE STATEMENT AND I INDICATED TO YOU, MR. DIGGS, THAT I WAS, YOU WERE FREE TO BRING UP ANY CIRCUMSTANCES SURROUNDING THE GIVING OF THE STATEMENT AS TO HOW THEY, HOW IT MIGHT HAVE COME ABOUT EXCEPT FOR THE MENTION OF POLYGRAPH BUT THAT THERE WAS A PROFFER AND THAT HE WAS GIVING IT PURSUANT TO DISCUSSIONS WITHIN A WRITTEN AGREEMENT WITH THE STATE OF SOUTH CAROLINA AS LONG AS WE REDACTED THE PART ABOUT THE POLYGRAPH, HAD NO PROBLEM WITH THAT COMING INTO, TO EVIDENCE. SO I BELIEVE IT WAS PROPER FOR THE JURY TO HEAR AND I WOULD REAFFIRM MY PREVIOUS RULING TO ALLOW THAT.

MR. DIGGS: YOUR HONOR, WOULD YOU REPEAT THAT LAST POINT THAT YOU WERE MAKING. I'M NOT SURE I FOLLOWED?

THE COURT: WHICH, WHICH PART?

MR. DIGGS: THE COURT IS AWARE THAT WE HAD OBJECTED, THOUGH, TO THE STATEMENT COMING INTO EVIDENCE.

THE COURT: I UNDERSTAND THAT, AND I UNDERSTAND THAT, AND, AND I, I'M REAFFIRMING MY PREVIOUS RULING TO

ALLOW THE STATEMENT INTO EVIDENCE. BUT I WAS INDICATING THAT IN THAT, IN ALLOWING IT INTO EVIDENCE I ALSO MADE IT CLEAR TO YOU THAT YOU WERE FREE TO BRING TO THE JURY ALL THE SURROUNDING CIRCUMSTANCES OF THE STATEMENT AS TO ANY PROMISES THAT MIGHT HAVE BEEN MADE TO HIM OR STATEMENTS MADE TO HIM OR ANY REASON THAT HE MAY BE GIVING THE STATEMENT EXCEPT AS TO THE ISSUE OF THE, THE POLYGRAPH INCLUDING THAT YOU WERE FREE TO HAVE IN EVIDENCE THE PROFFER AGREEMENT ENTERED INTO BETWEEN THE DEFENDANT AND THE STATE AS LONG AS WE REDACTED IT TO MAKE SURE THAT THE JURY DOES NOT SEE THE PART ABOUT THE POLYGRAPH TEST OR VERIFICATION BY A POLYGRAPH. OTHER THAN THAT THE ENTIRETY OF THE PROFFER AGREEMENT BETWEEN THE STATE CAN COME INTO EVIDENCE AND I HAVE NO PROBLEM WITH THAT AND WOULD, YOU KNOW ---

MR. DIGGS: YOUR HONOR ---

THE COURT: --- SO STILL ALLOW.

MR. DIGGS: --- FOR PURPOSES DOWN THE ROAD I WANT TO GET, YOUR HONOR'S CORRECT AND I MADE A DECISION. I WANT TO MAKE CLEAR IT WASN'T AN OVERSIGHT. I MADE A DECISION TO LEAVE IT EXACTLY THE WAY IT IS.

THE COURT: ALL RIGHT, SIR, AND, AND I APPRECIATE THAT AND, AND UNDERSTANDING THAT, THAT'S YOUR DECISION BUT, BUT, YOU KNOW, I WANTED IT CLEAR THAT, THAT --

MR. DIGGS: YES, SIR.

THE COURT: --- YOU WERE FREE, FREE TO DO SO IF YOU SO CHOSE TO DO SO, BUT ONCE AGAIN I REAFFIRM MY PREVIOUS ---

MR. DIGGS: THANK YOU, YOUR HONOR.

THE COURT: --- RULING IN THIS MATTER.

NOW AS TO YOUR MOTIONS FOR A DIRECTED VERDICT I WOULD RESPECTFULLY DECLINE TO GRANT YOUR MOTION FOR A DIRECTED VERDICT FINDING THAT THERE IS SUFFICIENT EVIDENCE IF SO BELIEVED BY THE JURY THAT WOULD SUPPORT A CONVICTION FOR THE OFFENSE OF MURDER BY NO MEANS SETTING FORTH ALL THE FACTS THAT WOULD SUPPORT IT, BUT THAT THERE IS EVIDENCE OF A PREARRANGEMENT FOR A MURDER TO TAKE PLACE AT SOME POINT IN TIME IN THE FUTURE WHETHER OR NOT THE TIME AND DATE ARE CERTAIN BUT THAT FOR A MURDER IN FACT TO, TO OCCUR KNOWING THAT THERE WAS MONEY TO BE HAD FOR, FOR DOING SO.

OBVIOUSLY THERE WAS A MURDER AS SET FORTH BY THE EVIDENCE THAT THE JURY COULD BELIEVE A MURDER OCCURRED AS SET FORTH BY THE EVIDENCE, SET FORTH BY THE MEDICAL DOCTOR AND THE CRIME SCENE INVESTIGATOR, THAT IT WAS DONE WITH A 9MM WEAPON, AND THOSE ARE FACTS THAT ARE OUTSIDE OF THE DEFENDANT'S STATEMENT AND WHEN YOU COMBINE THOSE WITH THE DEFENDANT'S STATEMENT THAT THERE IS EVIDENCE IF THE JURY BELIEVES IT WITH THEIR ULTIMATE RESPONSIBILITY TO DETERMINE THE VOLUNTARINESS OF THE STATEMENT TO SUPPORT A CONVICTION

FOR MURDER. THEREFORE, I RESPECTFULLY DECLINE TO GRANT YOUR MOTION FOR A DIRECTED VERDICT.

FURTHER MOTIONS ON BEHALF OF THE DEFENSE AT THIS POINT IN TIME?

MR. DIGGS: NOTHING FURTHER AT THIS TIME.

THE COURT: ALL RIGHT, SIR.

MR. DIGGS: I'M SORRY, YOUR HONOR?

THE COURT: YES, SIR?

MR. DIGGS: YES, AT SOME POINT I WOULD ASK THE COURT TO DISCUSS WITH THE DEFENDANT WHETHER OR NOT HE INTENDS TO TESTIFY.

THE COURT: YES, SIR, I WAS JUST GOING TO DO THAT RIGHT NOW SO I WAS GOING TO, I WAS GOING TO ASK YOU ARE YOU, IS YOUR CLIENT PREPARED FOR THE COURT TO TALK TO HIM ABOUT HIS CONSTITUTIONAL RIGHTS ---

MR. DIGGS: YES, SIR.

THE COURT: --- AND HIS RIGHT TO TESTIFY?

MR. DIGGS: WE ARE.

THE COURT: ALL RIGHT, SIR. ALL RIGHT, MR. WILLS, IF YOU DON'T MIND, IF YOU'D RAISE YOUR RIGHT HAND, SIR.

**THEODORE DAVID WILLS**

**BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:**

THE COURT: AND COULD YOU SLIDE THE MICROPHONE IN FRONT OF MR. WILLS SO THAT AND WHEN I ASK YOU A

QUESTION, MR. WILLS, IF YOU COULD JUST SPEAK UP MAKE SURE I HEAR YOU AND THE COURT REPORTER HEARS YOU, OKAY, IS THAT ALL RIGHT?

A YES.

THE COURT: THANK YOU, SIR. ALL RIGHT, NOW AT THIS POINT IN TIME, MR. WILLS, I'M GOING TO EXPLAIN TO YOU CERTAIN OF YOUR RIGHTS. IF YOU DON'T UNDERSTAND ANYTHING I SAY I WANT YOU TO TELL ME RIGHT NOW, TELL YOUR ATTORNEY, RAISE YOUR HAND IN SOME WAY, INDICATE THAT YOU DON'T UNDERSTAND WHAT WE'RE TALKING ABOUT; IS THAT AGREEABLE TO YOU?

A YES.

THE COURT: ALL RIGHT, SIR, WE'VE REACHED THE STAGE OF THE TRIAL AND YOU UNDERSTAND THAT WHERE YOU CAN PRESENT YOUR DEFENSE. YOU CAN TESTIFY, YOU CAN CALL WITNESSES ON YOUR BEHALF AND IN THAT YOU HAVE THE RIGHT TO CLAIM THE PROTECTION GIVEN TO YOU BY THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

NOW THAT AMENDMENT STATES IN PART THAT NO PERSON SHALL BE COMPELLED IN ANY CRIMINAL CASE TO BE A WITNESS AGAINST THEMSELVES. THAT MEANS NOBODY CAN MAKE YOU TESTIFY, NOBODY CAN FORCE YOU TO TESTIFY IN THIS CASE. YOU CAN TESTIFY IF YOU WANT TO BUT IT'S YOUR CHOICE. YOU CAN DECIDE TO TESTIFY OR YOU CAN DECIDE I WANT TO EXERCISE MY CONSTITUTIONAL RIGHTS AND NOT TESTIFY IN THIS PARTICULAR

CASE; DO YOU UNDERSTAND THAT?

A YES.

THE COURT: ALL RIGHT, SIR, NOW IF YOU DECIDE TO TESTIFY YOU'LL BE UNDER THE SAME RULES THAT YOU'VE SEEN OTHER WITNESSES IN THIS CASE. YOU WOULD BE EXAMINED OR QUESTIONED BY YOUR ATTORNEY. YOU WOULD BE CROSS EXAMINED BY THE STATE AS TO ANY FACTS THE COURT WOULD DEEM TO BE PROPER OR RELEVANT TO THIS CASE.

NOW IN THIS PARTICULAR MATTER DOES MR. WILLS HAVE ANY PRIOR RECORD THAT THE STATE WOULD REQUEST TO QUESTION HIM ABOUT?

MR. RICHARDSON: YOUR HONOR, THE DEFENDANT'S SOLE CONVICTION THAT I SEE ON HIS RECORD IS AN ASSAULT WITH A CONCEALED WEAPON. HE GOT A CONVICTION IN 1996. HE GOT 1 YEAR SUSPENDED TO 2 YEARS PROBATION, THAT WAS IN MARCH OF '96.

THE COURT: ALL RIGHT, SIR, AND SO THAT WOULD BE THE ONE MATTER THAT YOU WOULD INTEND TO EXAMINE THE DEFENDANT ABOUT; IS THAT RIGHT?

MR. RICHARDSON: YES, SIR, YOUR HONOR.

THE COURT: ALL RIGHT, SIR. WOULD THE DEFENSE PRESENT ANY OBJECTION?

MR. DIGGS: YES.

THE COURT: ALL RIGHT, SIR, AND, AND WHAT WOULD THAT OBJECTION BE TO THE STATE BEING ALLOWED TO DO SO?

MR. DIGGS: LENGTH OF TIME.

THE COURT: ALL RIGHT, SIR, IN 1996, YOU SAID IT WAS 1996?

MR. RICHARDSON: 1996 AND HE GOT 2 YEARS PROBATION, YOUR HONOR, SO THE PROBATION WOULD NOT HAVE BEEN UP UNTIL '98.

THE COURT: ALL RIGHT, SIR.

MR. RICHARDSON: SO THAT STILL PUTS IT WITHIN THE TIME.

THE COURT: AND THE ACTUAL OFFENSE WAS WHAT, TELL ME AGAIN, PLEASE?

MR. RICHARDSON: THE OFFENSE WAS ASSAULT WITH A CONCEALED WEAPON OUT OF HORRY COUNTY.

THE COURT: ALL RIGHT, AS I UNDERSTAND THE RULE OF EVIDENCE IN THIS PARTICULAR MATTER, MR. DIGGS, THE 10 YEAR BRIGHT LINE TEST DOESN'T MEAN THAT SOMETHING BEYOND 10 YEARS CAN'T BE USED. BUT THERE IS A DATE THAT IS IN THE RULE ABOUT 10 YEARS, BUT AS I UNDERSTAND IT AND UNDERSTAND THE, HOW THE RULE HAS BEEN DEFINED IS THAT IT STARTS, THAT 10 YEARS STARTS WHEN THE SENTENCE EXPIRES AND THE TWO YEARS OF PROBATION, EVEN THOUGH IT WAS IN 1996, THE TWO YEARS OF PROBATION WOULD HAVE HAD IT EXPIRE IN 1998 AND THAT WOULD NOT YET, THOUGH CLOSE, WOULD NOT YET BE 10 YEARS AND; THEREFORE, NOT ONLY THAT BUT I DO FIND THAT IT IS AN OFFENSE WHERE THE POTENTIAL PUNISHMENT COULD BE AND COULD

HAVE BEEN MORE THAN ONE YEAR AND DO FIND THAT IT IS AN OFFENSE WHEREBY THE PROBATIVE VALUE OF THE STATE BEING ALLOWED TO ASK ABOUT THE CONVICTION OUTWEIGHS ANY PREJUDICIAL AFFECT TO THE DEFENDANT IN THIS PARTICULAR MATTER TO JUDGE THE CREDIBILITY AND THE BELIEVABILITY AND; THEREFORE, I WOULD ALLOW THE STATE TO ASK HIM THE ONE QUESTION IF HE HAD BEEN CONVICTED OF THAT PARTICULAR OFFENSE.

I MIGHT HEAR YOU FURTHER IF, AS TO SINCE WE'RE TALKING ABOUT A MURDER HERE TO DEFINE IT FURTHER THAT WERE YOU CONVICTED OF A CRIME FOR WHICH THE PUNISHMENT EXCEEDED 1 YEAR IN 1996, I MIGHT, I MIGHT LIMIT THE STATE IN THAT REGARD BUT I WOULD ALLOW THEM TO ASK, ASK THE QUESTION, THERE'S NO QUESTION ABOUT THAT.

MR. DIGGS: RIGHT.

THE COURT: ALL RIGHT, SIR, NOW UNDERSTANDING THAT, MR. WILLS, THE COURT'S MADE A RULING THAT I'LL ALLOW THE STATE IN SOME FASHION TO ASK ABOUT YOUR PRIOR CONVICTION; YOU UNDERSTAND THAT?

A YES.

THE COURT: ALL RIGHT, SIR, IF YOU DECIDE TO TESTIFY IT'S GOT TO BE YOUR DECISION. THAT'S GOT TO BE MADE KNOWING EVERYTHING WE'VE TALKED ABOUT AND YOU UNDERSTANDING THE SITUATION. AT THIS POINT IN TIME DO YOU WANT TO TALK TO YOUR ATTORNEY OR ASK YOUR ATTORNEY ANY

QUESTIONS ABOUT TESTIFYING?

A YES.

THE COURT: ALL RIGHT, BEFORE YOU DO THAT LET ME TELL YOU ONE MORE THING AND ONE THING THAT'S IMPORTANT FOR YOU TO KNOW.

IF YOU DECIDE NOT TO TESTIFY I WILL PUT OR GIVE TO THE JURY AS PART OF MY INSTRUCTIONS THAT THEY CANNOT GIVE THE FACT THAT YOU DO NOT TESTIFY ANY CONSIDERATION WHATSOEVER.

I WILL IN FACT TELL THE JURY THAT THEY CAN'T EVEN TALK ABOUT IT IN THE JURY ROOM, THAT, THAT THE FACT THAT YOU DO NOT TESTIFY CANNOT BE USED IN THEIR DELIBERATIONS IN ANY FASHION IN THIS CASE AND YOU INDICATED AT THIS POINT IN TIME YOU WANT TO TALK TO YOUR ATTORNEY; IS THAT CORRECT, PLEASE DO SO.

ALL RIGHT, MR. WILLS, YOU'VE HAD AN OPPORTUNITY TO TALK TO YOUR ATTORNEY. I'M NOT ASKING YOU WHAT YOU ASKED HIM OR HIS ADVISE, BUT DID YOU HAVE AN OPPORTUNITY TO SPEAK TO HIM AND DID HE ANSWER YOUR QUESTIONS?

A YES.

THE COURT: ALL RIGHT, SIR, HAVE YOU UNDERSTOOD EVERYTHING WE'VE TALKED ABOUT?

A YES.

THE COURT: ALL RIGHT, SIR, AT THIS POINT IN TIME DO YOU WISH TO EXERCISE YOUR CONSTITUTIONAL RIGHT OR

DO YOU WANT TO TESTIFY IN THIS PARTICULAR CASE?

A I'M GOING TO EXERCISE MY CONSTITUTIONAL RIGHT.

THE COURT: ALL RIGHT, SIR, THANK YOU VERY MUCH.

MR. DIGGS: THANK YOU, YOUR HONOR.

THE COURT: YOU MAY BE SEATED, THANK YOU. ALL RIGHT, UNDERSTANDING THAT MR. WILLS WILL NOT TESTIFY IN THIS PARTICULAR CASE ARE THERE OTHER WITNESSES OR OTHER MATTERS THAT THE DEFENSE WOULD PUT UP FOR IN THE DEFENSE OF MR. WILLS AS THIS POINT IN TIME?

MR. DIGGS: YOUR HONOR, WE'RE NOT GOING TO CALL ANY WITNESSES AND WE'RE GOING TO REST WHEN THE JURY COMES BACK IN.

THE COURT: ALL RIGHT, SIR, IF YOU WOULD THEN WE WILL CERTAINLY DO THAT AGAIN IN FRONT OF THE JURY BUT IF WE'RE GOING TO DO THAT I'D APPRECIATE IT IF YOU WOULD DO IT NOW SO THAT I DON'T HAVE TO BRING THEM IN AND SEND THEM OUT AND THEM BRING THEM BACK, BACK IN.

PROBABLY WHAT I'M GOING TO DO IS IT'S QUARTER OF 12, MOST LIKELY WHAT I'M GOING TO DO AT THIS POINT IN TIME IS SEND THEM TO LUNCH. WE'LL TAKE A LITTLE BIT OF TIME TO TALK ABOUT THE CHARGE AND LOOK AT THE VERDICT FORM AND THEN I'LL EXCUSE YA'LL FOR SOME PERIOD OF TIME, BUT AS I UNDERSTAND IT THE, THE DEFENSE RESTS AT THIS POINT IN TIME; IS THAT CORRECT?

MR. DIGGS: YES, SIR. AND WE RENEW OUR DIRECTED VERDICT.

THE COURT: ALL RIGHT, AND THEN, THEREFORE, YOU ARE RENEWING THE TWO MOTIONS THAT YOU MADE AS FAR AS THE MOTION FOR A DIRECTED VERDICT AND FOR ME TO RECONSIDER MY DECISION THAT I MADE UNDER THE JACKSON V. DENO HEARING; IS THAT RIGHT?

MR. DIGGS: YES, SIR.

THE COURT: ALL RIGHT, SIR, I WILL RESPECTFULLY DECLINE TO GRANT EITHER OF THOSE MOTIONS. I BELIEVE I'VE STATED IN THE RECORD MY REASONS ADEQUATELY FOR DOING SO BOTH AS TO YOUR DIRECTED VERDICT MOTION AND REGARDING THE MOTION AS TO THE STATEMENT BY THE DEFENDANT IN ALLOWING THAT INTO EVIDENCE AND, THEREFORE, I REAFFIRM THOSE PRIOR RULINGS AND WOULD RESPECTFULLY DECLINE TO GRANT YOUR MOTION FOR A DIRECTED VERDICT AND RESPECTFULLY DECLINE TO RECONSIDER MY DECISION TO ALLOW THE STATEMENT OF MR. WILLS TO BE PLAYED IN EVIDENCE IN THIS CASE. ALL RIGHT, SIR, ANYTHING FURTHER FROM THE DEFENSE AT THIS POINT IN TIME?

MR. DIGGS: NO, YOUR HONOR.

MR. RICHARDSON: YOUR HONOR?

THE COURT: YES, SIR?

MR. RICHARDSON: JUST ---

THE COURT: I'M ASSUMING THERE'S, WELL THERE IS NO DEFENSE SO THERE WOULD BE, I MEAN THERE WAS NO DEFENSE

WITNESSES SO THERE WOULDN'T BE ANY REPLY TESTIMONY, ALL RIGHT.

MR. RICHARDSON: YES, SIR, WELL WHENEVER, AND THIS MAY BE A LITTLE BIT IN ADVANCE, BUT WHENEVER THE EVIDENCE DOES GO BACK TO THE JURY ---

THE COURT: YES, SIR?

MR. RICHARDSON: --- I WOULD REQUEST THAT THE C.D. STAY OUT HERE. I DON'T THINK THEY HAVE ANYTHING TO PLAY IT BACK THERE BUT WITHOUT US TO REDACT THOSE PORTIONS OF THE C.D. I DON'T, THE ONLY I WOULD FEEL COMFORTABLE ---

THE COURT: WELL WE DON'T HAVE ANY, THEY DON'T HAVE ANY ABILITY TO PLAY IT, OKAY. THERE IS NO ABILITY FOR THEM TO PLAY IT IN THE JURY ROOM. I DON'T REALLY HAVE ANY PROBLEM WITH THE C.D. GOING BACK THERE BECAUSE THEY CAN'T PLAY IT ANY FASHION ---

MR. RICHARDSON: YES, SIR.

THE COURT: --- AND IF THEY INDICATED THEY WANTED TO, YOU KNOW, IF THEY SAY THEY WANT SOME, YOU KNOW, EQUIPMENT TO PLAY IT THEN WE'LL JUST INSTRUCT THEM THAT, NO, YOU'LL HAVE TO COME BACK OUT HERE AND WE'LL REPLAY IT OUT HERE IN THE COURTROOM SO I, I THINK IT'S PROPER FOR THEM TO GO BACK THERE.

MR. RICHARDSON: YES, SIR.

THE COURT: THERE'S NO POSSIBILITY THEY CAN VIEW IT CAUSE THEY HAVE NO EQUIPMENT TO DO SO, SO I, THERE'S NO

PREJUDICE AND, AND IT DOES REMIND THEM THAT IT'S A VISIBLE SIGN THAT THERE IS A STATEMENT AND IF THEY HAVE ANY QUESTIONS AND THEY THINK THEY WANT TO HEAR ANYTHING AGAIN THEN IT'S RIGHT THERE IN FRONT OF THEM AND IT REMINDS THEM THAT THERE WAS A STATEMENT AND THEY CAN, THEY CAN ASK ABOUT IT.

MR. RICHARDSON: YES, SIR, THAT WAS JUST OUT OF AN ABUNDANCE OF CAUTION.

THE COURT: AND I APPRECIATE THAT, NO, I APPRECIATE THAT.

MR. RICHARDSON: THANK YOU, YOUR HONOR.

THE COURT: ALL RIGHT, WHAT I'M GOING TO DO THEN IS I'M GOING TO ASK THE JURY TO COME BACK IN. I'M GOING TO EXCUSE THEM, LET'S EXCUSE THEM TILL 2:00. THAT WILL GIVE US PLENTY OF TIME TO TALK ABOUT THE CHARGE AND THE VERDICT FORM AND GIVE YA'LL PLENTY OF TIME FOR A BREAK AND THEN WE WILL START AGAIN AT 2:00, ALL RIGHT, ASK THE JURY TO COME IN, PLEASE.

(WHEREUPON, THE JURY RETURNS TO THE COURTROOM AT 11:49 A.M.)

THE COURT: ALL RIGHT, THE STATE HAVING RESTED ITS WHAT IS THE POSITION OF THE DEFENDANT AT THIS POINT IN TIME?

MR. DIGGS: YOUR HONOR, THE DEFENSE IS GOING TO REST AT THIS TIME.

CHARGE CONFERENCE

THE COURT: ALL RIGHT, SIR. ALL RIGHT, LADIES AND GENTLEMEN, WE HAVE CONCLUDED THE EVIDENTIARY PORTION OF THE TRIAL. WHAT NOW REMAINS WILL BE THE CLOSING ARGUMENTS OF THE ATTORNEY AND THE CHARGE ON THE LAW.

THERE ARE A FEW MATTERS THAT I DO NEED TO DISCUSS WITH THE ATTORNEYS AS TO ADVISE THEM OF WHAT MY INTENTIONS ARE AS TO THE CHARGE OF THE LAW SO THERE WILL BE, KNOW THAT BEFORE THEY GIVE YOU THEIR CLOSING ARGUMENTS AND TO REVIEW THE VERDICT FORM WITH THEM.

WHAT I'M GOING TO DO IS ASK YA'LL TO GO TO LUNCH; I'M GOING TO HAVE YOU COME BACK IN YOUR JURY ROOM AT 2:00. THAT WILL GIVE ME SUFFICIENT TIME TO TALK TO THE LAWYERS ABOUT THE MATTERS I NEED TO DISCUSS WITH THEM AND TO GIVE THEM AN OPPORTUNITY TO, TO ALSO HAVE LUNCH SO YA'LL ARE EXCUSED UNTIL 2:00.

PLEASE REMEMBER WHAT I TOLD YOU BEFORE ABOUT NOT TALKING ABOUT THE CASE OR ALLOW ANYBODY TO TALK TO YOU. WHEN WE COME BACK AT 2:00 WE'LL COME BACK IN, YOU'LL HEAR THE CLOSING ARGUMENTS. I WILL GIVE YOU THE LAW THAT YOU'LL APPLY TO THE FACTS THAT YOU SO FIND THEM TO BE IN THIS PARTICULAR CASE AND THEN I WILL SUBMIT THE CASE TO YOU FOR YOUR DELIBERATIONS AND YOUR UNANIMOUS DECISION IN THIS PARTICULAR MATTER, SO UNTIL 2:00 YOU ARE EXCUSED, THANK YOU VERY MUCH.

(WHEREUPON, THE JURY WAS EXCUSED FOR LUNCH AT

11:50 A.M.)

THE COURT: ARE THERE ANY PARTICULAR REQUESTS TO CHARGE THAT EITHER THE STATE OR DEFENSE WANTED TO PRESENT TO ME? I MEAN I'VE PUT SOMETHING TOGETHER THAT I INTEND TO GO OVER WITH YOU BUT I JUST WANTED TO HEAR, SEE IF YA'LL HAD ANYTHING THAT YOU WANTED TO TELL ME ABOUT.

MR. RICHARDSON: I ASSUME YOU'RE GOING TO CHARGE ABOUT HAND OF ONE?

THE COURT: I WILL AND I'LL DISCUSS THAT WITH YOU.

MR. DIGGS: YOUR HONOR --

THE COURT: YES, SIR, MR. DIGGS?

MR. DIGGS: IN CONJUNCTION WITH THAT I WOULD ASK YOUR HONOR TO GO AHEAD AND CHARGE A LITTLE BIT FURTHER THAT CHARGE THAT'S VERY COMMONLY CALLED THE PETERSON CHARGE.

THE COURT: WELL LET ME, I TELL YOU WHAT LET ME JUST REVIEW WHAT I, MY INTENTIONS ARE TO THE CHARGE AND THEN YA'LL CAN TELL ME IF YOU WANT TO ADD ANYTHING OR DELETE ANYTHING FROM IT, WHY DON'T WE DO THAT, THAT WOULD PROBABLY BE THE EASIEST WAY.

OBVIOUSLY WE'RE GOING TO TALK TO THE JURY ABOUT THE THINGS THAT WE TALKED TO THEM ABOUT IN ANY, ANY CRIMINAL CASE AS FAR AS THE CREDIBILITY AND BELIEVABILITY.

WE DID HAVE AN EXPERT WITNESS AND I'LL TELL THEM THAT OBVIOUSLY THEY JUDGE ALL THE EVIDENCE THE SAME, DON'T

GIVE ANY SPECIAL WEIGHT JUST BECAUSE I QUALIFIED SOMEBODY TO GIVE THEIR OPINION.

DESCRIBE TO THEM USING THE STATE V. GRIPPON THE DIFFERENCE OR REALLY THE NO DIFFERENCE BETWEEN DIRECT AND CIRCUMSTANTIAL EVIDENCE.

I WILL GIVE THE JURY THE CHARGES I TOLD MR. WILLS ABOUT THE FACT HE DID NOT TESTIFY AND I'LL CERTAINLY EXPLAIN THAT TO THE JURY.

TALK TO THEM ABOUT THE PRESUMPTION OF INNOCENCE, REASONABLE DOUBT, USING THE BASIC DEFINITION THAT REASONABLE DOUBT IS THE KIND OF DOUBT THAT WOULD CAUSE A REASONABLE PERSON TO HESITATE TO ACT.

I WILL TALK TO THEM ABOUT THE STATEMENT OF THE DEFENDANT AS I INDICATED AGAIN MAKING IT CLEAR TO THEM THAT ULTIMATELY IT'S UP TO THEM TO DETERMINE THE VOLUNTARINESS OF THE STATEMENT. I DON'T THINK THERE'S ANY QUESTION THERE IS A STATEMENT MADE BY THE DEFENDANT. I MEAN THAT, THAT'S CLEAR. THEY WILL DECIDE WHETHER OR NOT THE STATEMENT WAS, WAS MADE VOLUNTARILY, WHETHER THERE WAS ANY KIND OF HOPE OR PROMISE OF LENIENCY OR REWARD OF ANY KIND AND I WILL CERTAINLY TELL THEM ABOUT THAT AND INDICATING THAT THE STATE HAS THE BURDEN OF PROOF OF PROVING BEYOND A REASONABLE DOUBT THAT THE ALLEGED STATEMENT WAS VOLUNTARY AND IF THEY DETERMINED IT WAS NOT THEN THEY COULD NOT CONSIDER THE STATEMENT AT ALL.

I WILL DEFINE MURDER TO THEM, THAT THE STATE HAS TO PROVE BEYOND A REASONABLE DOUBT THE DEFENDANT KILLED ANOTHER PERSON WITH MALICE AFORETHOUGHT DESCRIBING MALICE, MALICE AFORETHOUGHT, TALKING ABOUT EXPRESSED OR INFERRED, AND THEN AFTER THAT I WOULD TELL THEM THE STATEMENT THAT MOTIVE IS NOT AN ELEMENT OF THE OFFENSE OF MURDER AND THE STATE DOES NOT NEED TO PROVE THAT.

I WILL GIVE THEM A CHARGE ABOUT MERE PRESENCE, THAT MERE PRESENCE AT THE SCENE IS NOT SUFFICIENT TO PROVE SOMEONE GUILTY OF A CRIME AND DEFINE THAT TO THEM.

I WILL ALSO INDICATE TO THEM THAT THE DEFENDANT'S MERE PRESENCE WHERE A CRIME IS BEING COMMITTED OR MERE ASSOCIATION WITH A PERSON WHO COMMITS A CRIME DOES NOT IN AND OF ITSELF MAKE THE DEFENDANT AN ACCOMPLICE WHO HAS AGREED TO JOIN IN THE COMMISSION OF A CRIME.

I WILL ALSO TALK TO THEM ABOUT THE HAND OF ONE IS THE HAND OF ALL AND IN TALKING ABOUT THAT TELLING THEM THAT IF A CRIME IS COMMITTED BY TWO OR MORE PEOPLE WHO ARE ACTING TOGETHER IN COMMITTING A CRIME THE ACT OF ONE IS THE ACT OF ALL AND DEFINE THAT TO THEM.

IN THAT CHARGE I ALSO, ALSO WILL AGAIN TELL THEM THAT PRIOR KNOWLEDGE THAT A CRIME IS GOING TO BE COMMITTED WITHOUT MORE IS NOT SUFFICIENT TO MAKE A PERSON GUILTY OF THAT CRIME.

MERE KNOWLEDGE THAT ANOTHER PERSON IS GOING TO

COMMIT A CRIME EVEN IF THE DEFENDANT IS PRESENT WHEN THE CRIME IS COMMITTED IS NOT SUFFICIENT TO CONVICT THE DEFENDANT AND THE STATE HAS TO PROVE BEYOND A REASONABLE DOUBT THE THEORY OF THE HAND OF ONE THE HAND OF ALL AND THAT WILL ALSO BE IN THE, THE DEFINITION BESIDES THE, THE MERE PRESENCE AND THE OTHER CHARGE THAT I INDICATED THAT I WOULD TELL THE JURY ABOUT.

I'VE GOT A VERDICT FORM -- MADAM CLERK, COULD YOU HAND ONE COPY TO THE STATE AND THE DEFENSE, PLEASE?

MADAM CLERK: YES, SIR.

THE COURT: ALL RIGHT, AS TO THE CHARGE AS I HAVE DESCRIBED IT TO YOU IS THERE ANYTHING IN ADDITION FROM THE STATE?

MR. RICHARDSON: YOUR HONOR, THE VERDICT FORM APPEARS TO BE IN ORDER, I WAS GOING TO ASK ABOUT REASONABLE DOUBT AND YOU INDICATED YOU WERE GOING TO USE THE REASONABLE DOUBT IS A DOUBT THAT WOULD CAUSE A REASONABLE PERSON TO HESITATE TO ACT.

THE COURT: HESITATE TO ACT, AND I, I WILL DEFINE IT FURTHER BUT I MEAN THAT'S THE FIRST THING THAT I'M GOING TO TELL THEM WHEN I TALK ABOUT REASONABLE DOUBT. IT'S THE KIND OF DOUBT THAT WOULD CAUSE A REASONABLE PERSON TO HESITATE TO ACT.

MR. RICHARDSON: WILL YOU GO INTO THE FIRMLY CONVINCED STANDARD AS WELL?

THE COURT: NO, WHAT I'M GOING TO -- AND LET ME JUST READ IT TO YOU.

MR. RICHARDSON: YES, SIR.

THE COURT: SO THAT YA'LL KNOW IN ITS ENTIRETY WHAT I'M GOING TO TELL THEM ABOUT REASONABLE DOUBT.

MR. RICHARDSON: YES, SIR, THANK YOU, YOUR HONOR.

THE COURT: IT'S, ONCE AGAIN REASONABLE DOUBT IS THE KIND OF DOUBT THAT WOULD CAUSE A REASONABLE PERSON TO HESITATE TO ACT.

THE STATE HAS THE BURDEN OF PROVING THE DEFENDANT GUILTY BEYOND A REASONABLE DOUBT.

PROOF BEYOND A REASONABLE DOUBT IS PROOF THAT LEAVES YOU FIRMLY CONVINCED OF THE DEFENDANT'S GUILT.

IF BASED UPON YOUR CONSIDERATION OF THE EVIDENCE YOU ARE FIRMLY CONVINCED THAT THE DEFENDANT IS GUILTY OF THE CRIME CHARGED YOU MUST FIND THE DEFENDANT GUILTY.

ON THE OTHER HAND IF YOU ARE NOT FIRMLY CONVINCED THAT THE DEFENDANT IS GUILTY YOU MUST GIVE THE DEFENDANT THE BENEFIT OF THE DOUBT AND FIND HIM NOT GUILTY.

THAT IN ESSENCE IS WHAT I'M GOING TO TELL THE JURY SO THAT, THAT'S, THAT WILL BE WHAT I INTEND TO TELL THE JURY AND I BELIEVE THAT'S IN COMPLIANCE WITH WHAT REASONABLE DOUBT HAS BEEN DEFINED BY THE U. S. SUPREME COURT IN VICTOR V. NEBRASKA AND THE SOUTH CAROLINA SUPREME

COURT IN STATE V. NEEDS.

MR. RICHARDSON: THANK YOU, YOUR HONOR.

THE COURT: ALL RIGHT, MR. DIGGS?

MR. DIGGS: I DON'T THINK I HAVE ANYTHING FURTHER AT THIS POINT. YOUR HONOR, IS IT, IS THERE GOING TO BE ANY OPPORTUNITY TO LOOK AT YOUR HONOR'S LANGUAGE ON THE HAND OF ONE IS THE HAND OF ALL?

THE COURT: WELL I, I TOLD YOU CERTAINLY ABOUT MERE PRESENCE ---

MR. DIGGS: RIGHT.

THE COURT: I'M DEFINITELY DOING MERE PRESENCE AND ALSO GOING A LITTLE BIT BEYOND A DEFINITION OF OR, OR THE STANDARD IN INDICATING THAT ONE SENTENCE THAT I TOLD YOU ABOUT WITH MERE PRESENCE.

ONCE AGAIN I TOLD YOU ABOUT HAND OF ONE HAND OF ALL IS, IS, YOU KNOW, IF A CRIME IS COMMITTED BY TWO OR MORE PEOPLE WHO ARE ACTING TOGETHER AND COMMIT A CRIME THE ACT OF ONE IS THE ACT OF ALL.

THE PERSON WHO JOINS WITH ANOTHER TO ACCOMPLISH AN ILLEGAL PURPOSE IS CRIMINALLY RESPONSIBLE FOR EVERYTHING DONE BY THE OTHER PERSON WHICH OCCURS AS A NATURAL AND PROBABLE CONSEQUENCE OF THE ACTS DONE IN CARRYING OUT THE COMMON PLAN OR PURPOSE.

I WILL GO INTO, AS I PREVIOUSLY TOLD YOU ABOUT, THE PRIOR KNOWLEDGE THAT A CRIME IS GOING TO BE COMMITTED

WITHOUT MORE IS NOT SUFFICIENT AND I WILL GO INTO THAT WHOLE DEFINITION THERE.

MR. DIGGS: YOUR HONOR, THAT, THAT ANSWERS MY QUESTION.

THE COURT: ALL RIGHT, SIR.

MR. DIGGS: THANK YOU.

THE COURT: I WILL DEFINITELY PUT THAT IN, IN THERE AND I INTEND TO TELL THE JURY THAT, ALL RIGHT. ANYTHING ELSE, MR. DIGGS?

MR. DIGGS: NOT AT THIS TIME, YOUR HONOR.

THE COURT: ALL RIGHT, ALL RIGHT, GENTLEMEN, I'LL SEE YA'LL BACK THEN, SEE YOU BACK AT 2:00, WE'LL RESUME AT THAT POINT IN TIME AND THEN WE'LL GO FORWARD, ALL RIGHT.

MR. RICHARDSON: THANK YOU, YOUR HONOR.

THE COURT: THANK YOU VERY MUCH.

(WHEREUPON, COURT WAS RECESSED FOR LUNCH AND THE FOLLOWING TAKES PLACE ON THE RECORD FOLLOWING THE LUNCH RECESS.)

THE COURT: IS THE STATE READY TO GO FORWARD?

MR. RICHARDSON: THE STATE IS READY TO GO FORWARD, YOUR HONOR.

THE COURT: DEFENSE?

MR. DIGGS: YES, SIR.

THE COURT: ALL RIGHT, AND SINCE THE DEFENSE

RESTED ITS CASE I ASSUME THERE'S NO OBJECTION THAT THE DEFENSE HAS THE RIGHT OF LAST ARGUMENT IN THIS CASE, CORRECT?

MR. RICHARDSON: THAT'S CORRECT, YOUR HONOR.

THE COURT: ALL RIGHT, LET'S HAVE THE JURY, PLEASE, THANK YOU.

(WHEREUPON, THE JURY RETURNS TO THE COURTROOM AT 2:02 P.M.)

THE COURT: ALL RIGHT, LADIES AND GENTLEMEN, WE ARE AT THE STAGE OF THE TRIAL WHERE THE EVIDENTIARY PORTION OF THE TRIAL HAS BEEN CONCLUDED. WE ARE NOW GOING TO PROCEED INTO THE CLOSING ARGUMENTS OF THE ATTORNEYS AND THEN I WILL GIVE YOU THE LAW THAT APPLIES TO THIS PARTICULAR CASE THAT YOU WILL APPLY TO THE FACTS AS YOU SO FIND THEM TO BE IN THIS PARTICULAR MATTER.

PLEASE REMEMBER WHAT I TOLD YOU THAT THE CLOSING ARGUMENTS ARE NOT EVIDENCE. THEY CANNOT BE CONSIDERED BY YOU AS EVIDENCE IN THE CASE. THEY ARE IMPORTANT. THEY ARE EACH SIDES SUMMATION, EACH SIDES PRESENTATION TO YOU OF WHAT THEY BELIEVE THE EVIDENCE HAS SHOWN TO YOU DURING THE COURSE OF THE TRIAL AND WHAT THEY ARE ASKING YOU TO DO AS A RESULT OF YOUR UNANIMOUS VERDICT IN THIS PARTICULAR MATTER. SO I WOULD ASK THAT YOU PAY CLOSE ATTENTION TO THEIR CLOSING ARGUMENTS. WHEN WE GET DONE WITH THAT I WILL GIVE YOU THE LAW AND THEN I'M GOING TO SUBMIT THE CASE TO YOU

FOR YOUR DELIBERATIONS. SOLICITOR?

CLOSING ARGUMENT

BY MR. RICHARDSON:

THE DEFENDANT IS A GREEDY COLD BLOODIED CONTRACT KILLER. FOR SOME $10,000 CASH MONEY THE DEFENDANT BETRAYED THIS SO CALLED FRIEND OF HIS, THE DEFENSE SAYS THAT WAS A FRIEND OF HIS, JULIAN LEE WAS HIS FRIEND, AND HE SET HIM UP, CHOSE THE PLACE OF EXECUTION, THE WEAPON OF CHOICE, THAT BEING MARK WILLARD, AND THE TIME, AND THE DEED WAS DONE AND JULIAN WAS MURDERED.

IN JUST A LITTLE WHILE THE JUDGE IS GOING TO INSTRUCT YOU AS TO THE LAW THAT'S GOING TO BE USED IN THIS CASE. YOU NEED TO LISTEN CLOSELY. HE'S GOING TO TALK TO YOU ABOUT MURDER, WHAT, WHAT IS MURDER. IT'S SOMETHING WE'RE ALL FAMILIAR WITH, THAT, THAT TERM.

THE JUDGE I BELIEVE WILL INFORM YOU THAT MURDER IS THE UNLAWFUL KILLING OF ANOTHER HUMAN BEING WITH MALICE AFORETHOUGHT AND I ALSO BELIEVE THAT THE JUDGE WILL TELL YOU YOU CAN INFER THAT MALICE IS THERE WHENEVER A DEADLY WEAPON IS USED. IN THIS CASE THERE'S NO DOUBT A MURDER OCCURRED. THE DEFENSE IS OPEN, THEY TOLD YOU. THEY KNOW JULIAN LEE WAS MURDERED.

YOU HEARD ANN PITTS UP ON THE STAND. SHE SAID WHEN SHE WALKED UP TO THE CRIME SCENE JULIAN LEE LAY THERE DEAD OVER A PINE STONE OR A PINE BRANCH, BLOOD BELOW HIS

HEAD, TWO SHOTS TO HIS BACK, FOUND A 9MM SHELL CASING DOWN BESIDE HIS HEAD IN THE BLOOD POOL, FOUND A PROJECTILE BELOW HIS HEAD THAT EXITED OUT OF HIS THROAT.

DR. SCHANDL TOLD YOU THE CAUSE OF DEATH WAS THAT GUN, WERE THOSE TWO GUNSHOT WOUNDS. EITHER ONE OF THEM COULD HAVE BEEN LETHAL, TOGETHER DEFINITELY FATAL, SO THERE'S NO DOUBT THAT A MURDER OCCURRED BUT WHO DID IT.

THE JUDGE IS GOING TO TALK TO YOU ABOUT REASONABLE DOUBT. ONCE AGAIN THIS IS A TERM THAT, THAT WE'VE ALL HEARD BEFORE WHETHER IT'S ON T.V., BOOKS, NEWSPAPER, MOVIES, BUT WHAT IS REASONABLE DOUBT. IT'S NOT PROOF BEYOND ALL POSSIBLE DOUBT. IT'S NOT PROOF BEYOND AN UNREASONABLE DOUBT. WHAT THE JUDGE IS GOING TO TELL YOU THAT REASONABLE DOUBT IS THAT, IS THAT DOUBT WHICH WOULD CAUSE A REASONABLE PERSON TO HESITATE TO ACT, BUT HE'S GOING TO GO FURTHER. THAT'S A LITTLE CONVOLUTED SO HE'S GOING TO TELL YOU TO REACH A POSITION OF GUILTY BEYOND A REASONABLE DOUBT THE STATE MUST PRODUCE EVIDENCE WHICH LEAVES YOU FIRMLY CONVINCED OF DAVID WILLS GUILT IN THIS MURDER. I SUBMIT TO YOU THAT WE'VE DONE THAT.

FURTHER THE JUDGE WILL TELL YOU ABOUT A LAW CALLED HAND OF ONE HAND OF ALL AND BRIEFLY WHAT THAT MEANS IS, IS WHEN TWO OR MORE PERSONS COME TOGETHER TO COMMIT A CRIME THAT CRIME IS CARRIED OUT ANY ACT DONE BY ONE OF THOSE PLANNERS, ONE OF THOSE CRIMINALS, IS THE ACT OF ALL.

THE HAND OF ONE IS THE HAND OF ALL SO THAT IF YOU'RE THERE, YOU PLANNED IT, YOU PARTICIPATE IN IT AND IT HAPPENS YOU'RE JUST AS GUILTY AS ANYONE ELSE. IT DOESN'T MATTER IF YOU'RE THE SHOOTER OF IF YOU'RE MERELY THE MAN WHO DELIVERED THE SHOOTER AND YOU STAND THERE AND YOU KNOW THE MURDER IS GOING TO OCCUR. THAT'S WHAT HAPPENED HERE, WE ALL KNOW THAT AND WHO DO WE KNOW THAT.

FOLKS, WE SAT HERE AND WATCHED ABOUT AN HOURS WORTH OF THE STATEMENT GIVEN BY DAVID WILLS. FROM THE GET GO YOU HEARD IT, HE WAS MIRANDIZED, HAD HIS ATTORNEY PRESENT. THE STATEMENT WAS VOLUNTARILY GIVEN AND HE BEGAN TELLING US WHAT HAPPENED AND WHAT HE STARTED OFF WITH WAS PRETTY BENEVOLENT. HE SAID ME AND MY BROTHER MARK WILLARD AND JULIAN LEE, J ROCK, WE WENT, WE WENT OFF TO COMMIT A DRUG RIP AND MARK WILLARD SHOT HIM. WELL HE HAD TO GET A LITTLE MORE SPECIFIC.

WE WANTED TO KEEP IT AS SIMPLE AS POSSIBLE, WANTED TO MITIGATE WHAT HE HAD DONE. OOPS, HE HAD TO GET MORE SPECIFIC AND HE DID. SO THEN HE COMES IN AND HE SAYS, OKAY, WELL, YOU KNOW, I CALLED JULIAN AND TALKED TO HIM ABOUT LET'S GO OUT AND DO THIS ROBBERY AND, AND I HAD MARK WILLARD WITH ME, HAD MARK WILLARD WITH ME WHENEVER I PICKED UP JULIAN AND WE WENT OUT AND MARK SHOT HIM. I DIDN'T KNOW IT WAS GOING TO HAPPEN BUT THEN I JUST WAITED FOR MARK TO COME BACK IN THE CAR CAUSE I WAS SCARED. I WAITED 30 TO 45

SECONDS FOR THIS MAN WHO JUST MURDERED THIS SO CALLED FRIEND OF MINE TO GET BACK IN THE CAR BECAUSE I WAS SCARED.

WELL LOOK AT THE DEFENDANT, HE'S SIX FOOT THREE. HE'S A LARGE MAN AND HE'S SCARED. IMAGINE HE MIGHT BE SCARED BECAUSE THERE'S A GUN INVOLVED.

WELL HE TELLS YOU THAT THEY GO ON DOWN THE ROAD AND THEY DUMP IT OUT IN THE RIVER. MARK WILLARD DOESN'T HAVE A GUN ANYMORE AND HE'S GOT HIS BROTHER WITH HIM, TWO GROWN MEN AND THEY'RE SCARED OF THIS OTHER FELLOW AND WHAT DO THEY DO THE NEXT DAY. DO THEY GO RUN TO THE POLICE AND SAY, HEY, WE KNOW WHO SHOT JULIAN LEE. THIS GUY WE WENT OUT WITH HE SHOT HIM. NO, INSTEAD WHAT HE DOES IS HE GOES AND HE COLLECTS A BOUNTY OF $5,000 FOR HIMSELF AND $5,000 TO BE SPLIT BETWEEN MARK WILLARD AND THE DEFENDANT'S BROTHER AND WE KNOW THAT DOESN'T QUITE MAKE SENSE, OOPS, MESSED UP AGAIN, SO HE GOES BACK AND GIVES US A LITTLE MORE DETAIL AND THAT'S WHERE WE FIND THE TRUEST STATEMENTS.

HE TELLS YOU THAT HE KNEW THAT THERE WAS A BOUNTY OUT FOR JULIAN LEE BECAUSE HE KNOWS THAT JULIAN HAD STOLEN SOME $50,000 FROM THE JOHNSON BROTHERS. HE KNEW THE JOHNSON BROTHERS HAD PUT A BOUNTY OUT, $10,000 FOR THE DEATH OF JULIAN LEE. HEARD IT ON THE STREET AND WENT AND TALKED WITH THE JOHNSON'S ABOUT IT, ACCEPTED THAT CONTRACT AND THEN HE TALKED TO MARK WILLARD ABOUT IT AND THIS IS ALL PRIOR TO OCTOBER 13TH, 2001.

THIS IS WHAT HE KNEW AND THEN HE TELLS YOU THAT ON THE EARLY OR IN THE EARLY MORNING HOURS OCTOBER 13TH, 2001, HE HAD SPOKEN TO JULIAN AND SAID, LET'S GO, LET'S GO PULL THIS DRUG RIP, LET'S GO GET SOME QUICK MONEY, I'LL COME PICK YOU UP IN THE EARLY MORNING HOURS. THAT'S EXACTLY WHAT HE DID. HE WENT BY TO PICK UP JULIAN LEE AND WHO WAS IN THE CAR. IT JUST HAPPENS TO BE MARK WILLARD, THIS MAN, THIS ASSASSIN THAT HE HAS SUB-CONTRACTED TO SPLIT MONEY WITH TO KILL JULIAN LEE SO ---

MR. DIGGS: YOUR HONOR, WE OBJECT, IT'S OUTSIDE THE RECORD EVIDENCE.

THE COURT: I'M GOING TO ALLOW THE STATE TO CONTINUE HIS CLOSING. IT'S FOR THE JURY TO JUDGE THE EVIDENCE IN THIS CASE. I'M GOING TO ALLOW THE STATE TO CONTINUE, THANK YOU.

MR. RICHARDSON: THANK YOU, YOUR HONOR.

SO HE PICKS UP MARK WILLARD FIRST THEN HE PICKS UP JULIAN LEE. THEY HAVE ONE GUN DRUG IN THE CAR TO PULL A DRUG RIP. HE TELLS YOU JULIAN'S GOT ON HIS LONG GLOVES DRESSED FOR A ROBBERY BUT HE DOESN'T REMEMBER WHAT THE OTHER PEOPLE HAVE ON, PROBABLY DARK CLOTHES, BUT LET'S ADMIT JULIAN IS THE ONLY ONE DRESSED FOR A ROBBERY CAUSE HE THINKS THAT'S WHAT'S GOING TO GO ON.

THEY DRIVE OUT TO A REMOTE AREA OF THE COUNTY. JULIAN IS NOT GOING TO KNOW ANYBODY, WON'T KNOW WHAT'S

GOING ON. THEY WAIT UNTIL JULIAN GETS OUT OF THE CAR AND STARTS WALKING FORWARD IN A FIELD AND HE TELLS YOU HE'S RIGHT OUT THERE, ABOUT SEVEN YARDS AWAY, WHEN MARK WILLARD, "POP", SHOOTS JULIAN LEE, TELLS YOU HE SAW IT, TELLS YOU HE RUNS BACK TO THE CAR AND HE WAITS.

HE DOESN'T WAIT BECAUSE HE'S SCARED. HE WAITS BECAUSE HE'S PLANNED THIS KILLING. HE'S JUST AS GUILTY AS IF HE WOULD HAVE PULLED THE TRIGGER. HE DIDN'T CHOOSE TO USE THE PISTOL HIMSELF, HE CHOOSES TO USE MARK WILLARD TO KILL JULIAN LEE FOR $10,000.

FOLKS, IT'S GREED, IT'S A PORTRAYAL, IT'S WRONG. AND I TOLD YOU IN THE BEGINNING THAT THE LAW SERVES TO PROTECT US ALL FROM THE GREATEST AND TO THE LEAST. YOU MAY NOT LIKE WHAT JULIAN LEE WAS. HE RIPPED OFF DRUG DEALERS BUT THAT DID NOT GIVE DAVID WILLS THE RIGHT TO EXECUTE JULIAN LEE.

FOLKS, LET YOUR VERDICT SPEAK FOR JULIAN LEE. LET IT SPEAK TO THE FAMILY OF JULIAN LEE, HIS WIFE, HIS CHILD. LET THEM KNOW THAT THE LAW PROTECTS US ALL, WILL PROTECT US FROM THE GREED OF INDIVIDUALS THAT SEEK TO BETRAY US AND MURDER US, THANK YOU.

THE COURT: ALL RIGHT, MR. DIGGS?

MR. DIGGS: THANK YOU, MAY IT PLEASE THE COURT?

THE COURT: YES, SIR.

**CLOSING ARGUMENT**

CLOSING ARGUMENT BY DEFENSE

BY MR. DIGGS:

LADIES AND GENTLEMEN, THERE'S NO DOUBT THAT JULIAN LEE WAS MURDERED AND HE DIDN'T DESERVE TO BE MURDERED, THAT'S A TRAGEDY, AND WHAT'S UNFORTUNATE IS IT ALMOST BECOMES A SIDE ISSUE BECAUSE THE PERSON, WE ALL KNOW THAT THE PERSON WHO MURDERED JULIAN IS NOT HERE. HE'S NOT BEING PROSECUTED. JULIAN ---

MR. RICHARDSON: OBJECTION, YOUR HONOR, THAT FACT IS NOT. HE'S NOT BEING PROSECUTED THIS DAY

THE COURT: GENTLEMEN --

MR. DIGGS: YOUR HONOR ---

THE COURT: ONCE AGAIN -- GENTLEMEN, ALL RIGHT, COULD YOU STEP BACK FOR JUST ONE SECOND, MR. DIGGS.

LADIES AND GENTLEMEN, I REMIND YOU AGAIN ABOUT THE CLOSING ARGUMENTS BOTH THE STATE AND THE DEFENSE THOSE ARE NOT EVIDENCE AND CANNOT BE CONSIDERED BY THE JURY AS EVIDENCE. YOU ARE THE JUDGES OF THE FACTS OF THIS PARTICULAR CASE AND I'LL ALLOW THE DEFENSE TO CONTINUE WITH HIS CLOSING ARGUMENTS, THANK YOU VERY MUCH.

MR. DIGGS: (CONTINUING)

WE KNOW THERE HAS BEEN NO EVIDENCE TO SUGGEST THAT MARK WILLARD HAS BEEN OR IS BEING PROSECUTED. YOU HAVE NO EVIDENCE IN THIS CASE OF THAT. WE HAVE NO EVIDENCE THAT ANY OTHER PERSON THAT MIGHT BE INVOLVED IN THIS CASE WHETHER IT BE PEOPLE WHO PAID THE MONEY, PEOPLE WHO CARRIED

OUT THE SHOOTING OR PLANNED IT OR ANYTHING ELSE, WE HAVE, THERE'S NOTHING IN THIS RECORD ABOUT THAT, NOTHING.

LET ME REMIND YOU THIS YOUNG MAN IS SHOT IN OCTOBER OF 2001, SIX YEARS AGO. MY CLIENT GAVE HIS STATEMENT IN OCTOBER OR, EXCUSE ME, AUGUST OF 2005, TWO YEARS AGO, WHY HAS IT TAKEN SO LONG FOR THIS DAY TO COME FOR US TO HAVE A TRIAL, FOR MY CLIENT TO HAVE HIS DAY IN COURT. THAT'S A LEGITIMATE QUESTION, WHY DID IT TAKE SO LONG. IF THE PROSECUTION KNOWS SO MUCH ABOUT THIS CASE AND WHO'S RESPONSIBLE WHY DID IT TAKE SO LONG.

THE FIRST, ALL OF THE EVIDENCE IN THIS CASE CAN BE DISMISSED WHEN IT COMES TO THE ISSUE OF MY CLIENT'S GUILT OR INNOCENCE, ALL OF IT, BECAUSE NO ONE HAD ANY INFORMATION ABOUT WHO KILLED JULIAN LEE.

THE INVESTIGATORS THEY TOLD US JULIAN HAD BEEN SHOT AND WAS LEFT DEAD.

THE DOCTOR TOLD US THAT JULIAN HAD BEEN SHOT AND WAS KILLED AS A RESULT OF THOSE WOUNDS, BUT THE ONLY PERSON WHO IMPLICATES IN ANY CRIMINAL ACTIVITY DAVID WILLS IS DAVID WILLS.

IN THE OPENING OF THIS TRIAL I ENCOURAGED YOU TO THINK ABOUT THE TECHNICALITIES OF THE LAW, OKAY, BECAUSE THAT'S WHAT'S GOING TO BE REQUIRED IN THIS CASE. IT'S GOING TO BE DIFFICULT CAUSE IT'S NOT SOMETHING YOU HAVE TO DO EVERY DAY BUT YOU DO, ONE OF THE THINGS YOU DO

COLLECTIVELY AS HUMAN BEINGS IS MAKE DECISIONS BASED ON THE RATIONAL LOGIC ATTENTION TO DETAIL AND THAT'S WHAT YOU'RE GOING TO HAVE TO DO IN THIS CASE.

THE STATE IS SAYING, LOOK WE'VE GOT ELEMENTS OF MURDER AND HERE'S ONE OF THEM OVER HERE THAT OCCURRED AT SOME TIME IN THE PAST MONTHS AGO THEN WE'VE GOT SOMETHING ELSE THAT HAPPENED OVER HERE MONTHS LATER AND THEN WE'VE GOT SOMETHING OVER HERE THAT RESULTED IN JULIAN'S DEATH.

YOU PUT ALL THREE OF THOSE THINGS TOGETHER AND MAYBE YOU'VE GOT A MURDER NOT COMMITTED BY HIM BUT BY THE HAND OF ONE IS THE HAND OF ALL, PEOPLE ACTING IN A CONCERT, BUT THINK ABOUT THAT.

I WOULD SUBMIT TO YOU THAT HIS HONOR IS GOING TO TELL YOU THE LAW, ALL THOSE THINGS HAVE TO CONVERGE AT THAT MOMENT, THEY'RE, IT'S KIND OF LIKE TAKING A TAPE AND SPLICING IT, MAYBE YOU'VE GOT AN HOURS OF WORTH OF TAPE AND YOU SPLICE IT TOGETHER AND YOU HAVE THE PERSON SPEAKING THE WORDS BUT OUT OF CONTEXT. IT'S GOT TO BE IN CONTEXT, ALL HAPPENING AT THE SAME TIME.

WHEN JULIAN LEE WAS SHOT MY CLIENT HAD TO BE THERE ENCOURAGING AIDING AND ABETTING AND PLANNING, PARTICIPATING IN THAT MURDER. NOT IF HE HAD THE MIND SET SIX MONTHS AGO DID HE HAVE IT THAT NIGHT AT THE TIME JULIAN WAS SHOT, THAT'S THE ISSUE YOU'VE GOT TO RESOLVE AND THERE'S NO EVIDENCE OF THAT.

HIRED ASSASSIN THAT'S FANTASY, THERE'S NO EVIDENCE HE WENT OUT THERE THAT NIGHT TO KILL THAT YOUNG ~~BOY~~ A YOUNG MAN.

ALL OF US MIGHT HAVE HAD SOME ILL FEELING TOWARDS ANOTHER PERSON SIX MONTHS AGO OR SOME TIME IN THE PAST, HEAVEN HELP US IF WE HAPPEN TO BE PRESENT WHEN THAT PERSON GETS KILLED BECAUSE THE STATE'S ARGUMENT IS RETROACTIVELY YOU CAN GO BACK THERE AND BE PUNISHED FOR IT AND THAT'S NOT WHAT THE LAW IS.

THE LAW, HIS HONOR IS GOING TO TELL YOU FOREKNOWLEDGE, EVEN FOREKNOWLEDGE THAT SOMETHING IS GOING TO HAPPEN DOESN'T MAKE YOU GUILTY.

MERE PRESENCE DOESN'T MAKE YOU GUILTY.

YOU'VE GOT TO BE THERE ACTING AND PARTICIPATING AND INTENDING TO DO THOSE THINGS TO BE GUILTY AND THERE'S NO EVIDENCE THAT DAVID WILLS WAS DOING THAT.

MAYBE THEY WENT THERE TO ROB SOME OTHER PERSON THAT LIVES IN THE NEIGHBORHOOD, THAT THEY DIDN'T EVEN GET TO THE PLACE OF THE ROBBERY, JULIAN GOT SHOT BEFOREHAND, SO DON'T FALL FOR THE ARGUMENT OR THE SUGGESTION THAT JULIAN'S DEATH WAS A NATURAL AND LOGICAL CONSEQUENCE THAT SOME ROBBERY THEY HAD PLANNED LATER THE NIGHT, THAT NIGHT. IT'S NOT APPLICABLE HERE.

IT HAD NOTHING TO DO, WHAT, WHAT THAT LAW DOES IS SAY, IF WE GO OVER HERE AND ROB SOMEBODY AND IN THE PROCESS

SOMEBODY ACCIDENTALLY GETS SHOT AND KILLED THEN YOU'RE GUILTY OF MURDER, THAT MAKES SENSE, THAT'S NOT WHAT WE HAVE IN THIS CASE.

WE'VE GOT A YOUNG, MARK WILLARD WHO MAKES A DECISION TO PULL OUT A GUN AND KILL JULIAN LEE UNBEKNOWNST TO HIM, LADIES AND GENTLEMEN, THAT'S WHAT A BURDEN OF PROOF IS. THE DEFENSE DOESN'T HAVE TO CONVINCE YOU OF HIS INNOCENCE. WE DON'T HAVE THAT BURDEN UNDER THE LAW.

WHEN YOU RAISED YOUR HANDS AS JURORS YOU SAID, YES, YOUR HONOR, I CAN FOLLOW THE LAW EVEN IF I DON'T LIKE IT EXPLICITLY, EVEN IF I DON'T LIKE WHAT THE LAW IS I HAVE TO FOLLOW THE LAW AND THAT MEANS YOU HOLD THE STATE TO ITS BURDEN OF PROOF IN THIS CASE BEYOND A REASONABLE DOUBT.

REASONABLE DOUBT IS A DOUBT THAT WOULD HESITATE YOU TO ACT, HESITATE A REASONABLE PERSON TO ACT. DO YOU THINK THAT YOUNG MAN IS A KILLER OR DO YOU HESITATE TO CALL HIM THAT. LOOK AT HIM, DO YOU HESITATE TO LOOK AT HIM AND SAY, YOU'RE A KILLER YOUNG MAN. I SUBMIT TO YOU IT'S REASONABLE TO HESITATE. I DON'T KNOW IF ALL THOSE THINGS CAME IN CONVERSION THAT NIGHT.

THAT DAVID WILLS, THEODORE DAVID WILLS DID WHILE ACTING IN CONCERT WITH OTHERS ON OR ABOUT OCTOBER THE 13TH, WILLFULLY, FELONIOUSLY, AND INTENTIONALLY KILL JULIAN LEE; DO YOU BELIEVE THAT. HAS THE STATE PROVEN THAT BEYOND A REASONABLE DOUBT; I SUBMIT TO YOU THEY HAVE NOT AND I

SUBMIT TO YOU THEY NEVER COULD THAT'S WHY IT'S TAKEN SIX YEARS TO COME TO THE COURT TODAY. THAT'S WHY THEY ONLY HAD THREE WITNESSES OR SO IN THE CASE. THEY DON'T HAVE ANY EVIDENCE TO SUGGEST THAT. WHY WOULD ANYBODY WANT TO COOPERATE WHEN THEY'RE GOING TO BE PROSECUTED, LET'S TALK ABOUT THAT FOR A MINUTE.

I WAS LISTENING TO DAVID'S STATEMENT WHEN SCOTT HIXSON SAID, AND BY THE WAY THE JUDGE IS GOING TO TELL YOU THAT EVEN THOUGH THIS, THIS STATEMENT IS IN EVIDENCE IF YOU FIND IT'S NOT VOLUNTARY YOU CAN'T CONSIDER IT, OKAY. IF DAVID DIDN'T WILLFULLY, KNOWINGLY, AND INTELLIGENTLY MAKE THIS STATEMENT, IF HE DIDN'T MAKE THE STATEMENT NOT IN RESPONSE TO A PROMISE, IN OTHER WORDS IF THE STATE MADE ANY KIND OF PROMISE TO HIM AT ALL YOU CAN'T USE HIS STATEMENT.

BEFORE HE EVER SAID ANYTHING ABOUT MONEY OR MARK WILLARD THE SOLICITOR'S OFFICE, NOT THIS ONE BUT ANOTHER ONE, CAN YOU TELL ME A LITTLE BIT MORE ABOUT BECAUSE ON THE SURFACE IT WILL LOOK LIKE CERTAINLY YOU GOT PAID FOR A HIT ON SOMEBODY THAT YOU HAD A LOT TO DO WITH THE HIT. NOW THIS IS ALL PART OF THE PROFFER SO YOU UNDERSTAND THAT YOU DON'T HAVE ANYTHING TO WORRY ABOUT ANSWERING. YOU DON'T HAVE ANYTHING TO WORRY ABOUT BY ANSWERING SO DAVID ANSWERED. WHAT DID IT GET HIM, FOR HELPING THE POLICE IT GOT HIM PROSECUTED FOR MURDER, SO UNLESS YOU FIND THAT STATEMENT TO BE VOLUNTARY, GIVEN WITHOUT HOPE OF REWARD OR

PROMISE, YOU CAN'T CONSIDER IT AND YOU KNOW WITHOUT THAT STATEMENT YOU CAN'T CONVICT DAVID.

NOW THIS FAMILY, JULIAN'S FAMILY HAS A RIGHT TO JUSTICE. I CAN'T IMAGINE BEING IN THEIR SITUATION AND MY HEART, OF COURSE, AS A HUMAN BEING BLEEDS AND FEELS FOR THEM BUT THEY ARE ENTITLED TO JUSTICE AND THEY WOULD BE THE FIRST TO SAY WE DON'T WANT MORE THAN JUSTICE FOR JULIAN. WE WANT HIS KILLER PROSECUTED AND CONVICTED AND WE WANT IT DONE IN A LEGAL WAY.

NOW WE'VE SEEN, THERE'S A FIRE THAT BURNS HERE WITH RESPECT TO THE KILLER OF JULIAN LEE. WE SAW IT IN THE SOLICITOR'S VOICE AND IN HIS, THE ANGER THAT HE HAS WITH RESPECT TO THIS, THE LOSS OF THIS YOUNG MAN'S LIFE. BUT WE KNOW THAT DAVID WILLS IS NOT THE SHOOTER IN THIS CASE AND WE DO KNOW THAT THERE IS NOT PROOF BEYOND A REASONABLE DOUBT THAT HE CONSPIRED THAT HE WENT THERE AND PARTICIPATED IN CONCERT WITH OTHERS THAT NIGHT TO KILL JULIAN LEE.

THERE'S NOT THE EVIDENCE THERE TO REACH THAT BURDEN AND YOU DON'T HAVE TO WORRY ABOUT MARK WILLARD BECAUSE HE'S NOT ON TRIAL TODAY AND I BELIEVE THE SOLICITOR ACTS IN GOOD FAITH, MAYBE HE WILL BE OR HAS BEEN, I DON'T KNOW, WE DON'T HAVE ANY EVIDENCE ABOUT THAT, BUT THAT IS NOT, THAT'S NOT HERE OR THERE WITH RESPECT TO DAVID WILLS INNOCENCE OR GUILT IN THIS CASE.

I WOULD SUBMIT TO YOU, LADIES AND GENTLEMEN, THAT

THE STATEMENT SHOULD NOT BE USED AS A MATTER OF LAW BECAUSE WE DON'T TRICK OR PROMISE PEOPLE THINGS IN ORDER TO GET THEM TO TALK. DAVID WAS RESPONDING. THEY TOLD HIM YOU DON'T HAVE ANYTHING TO WORRY ABOUT. IT'S RIGHT HERE. I WAS LISTENING WHEN THE SOLICITOR SAID THAT, YOU DON'T HAVE ANYTHING TO WORRY ABOUT ANSWERING, AND SO HE ANSWERED. YOU SHOULDN'T USE THAT STATEMENT; IT IS INVOLUNTARY. IT CANNOT BE CONSIDERED AS A MATTER OF LAW AND IF YOU DON'T BELIEVE ME THE JUDGE, HIS HONOR, IS GOING TO INSTRUCT YOU EXACTLY HOW THE LAW APPLIES HERE AND WHAT THE LAW IS WITH RESPECT TO THAT ISSUE. SIMPLY BECAUSE THE STATEMENT COMES INTO EVIDENCE DOES NOT MEAN YOU MUST CONSIDER IT. YOU MAY CONSIDER IT ONLY AFTER YOU DETERMINE BEYOND A REASONABLE DOUBT IT'S VOLUNTARY, THAT IT WASN'T A RESULT OF A PROMISE AND DOES IT EVEN MAKES SENSE. WHY WOULD HE WALTZ IN THERE AND SAY STUFF LIKE THIS.

ALL RIGHT, DAVID WAS THERE, BUT MERE PRESENCE DOES NOT MAKE HIM GUILTY. EVEN PRIOR KNOWLEDGE THAT SOMETHING IS GOING TO HAPPEN DOESN'T MAKE HIM GUILTY.

ASSUMING YOU BELIEVE THE STATE'S THEORY OF THE CASE THAT MONTHS AGO DAVID WAS INVOLVED IN SOME KIND OF DISCUSSION ABOUT MARK WILLARD SHOOTING JULIAN LEE THAT WAS MONTHS AGO. HOW MANY TIMES HAD HE BEEN IN JULIAN LEE'S PRESENCE OR MARK WILLARD'S PRESENCE IN THOSE MONTHS. I MEAN THERE'S NO EVIDENCE TO SUGGEST TO US THAT THOSE

FACTORS AND ELEMENTS CONVERGE THAT EVENING THAT RESULTED IN THE MURDER OF JULIAN LEE. THERE'S NO EVIDENCE. LADIES AND GENTLEMEN, YOU CAN'T MAKE THAT LEAP ON FAITH. YOU CAN'T DISCARD REASONABLE DOUBT. DOUBT THAT WOULD CAUSE A REASONABLE PERSON TO HESITATE TO ACT, LOOK IN THAT YOUNG MAN'S FACE AND CALL HIM A KILLER AND DO IT WITHOUT HESITATION, I SUBMIT TO YOU THAT YOU CAN'T.

IT IS A COURT OF LAW. WE MUST FOLLOW THE LAW. WE MUST ABIDE BY THE LAW. THAT'S ALL WE HAVE AS A SOCIETY THAT MAKES US HUMAN.

YOU AS A JUROR AND JUROR, COLLECTIVELY A JURY, ARE REQUIRED BY THE LAW TO ABIDE BY YOUR OATH. THE QUESTION WHY SHOULDN'T, WHY SHOULDN'T WE BELIEVE YOU DID IT, MR. HIXSON ASKED DAVID THAT, BECAUSE I DON'T DO THAT KIND OF THING. THAT'S HIS ANSWER, I DON'T DO THAT KIND OF THING. WE LIVE IN A CRUEL WORLD. DAVID IS PART OF IT; WE'RE PART OF IT. DAVID DOESN'T DO THAT, I WOULD SUBMIT TO YOU HE'S NOT A KILLER, HE'S NOT A MURDERER, BUT FOR WHATEVER CRIME HE MIGHT HAVE COMMITTED THAT'S NOT AT ISSUE, OKAY. WE HAVE TO DECIDE TODAY, YOU HAVE TO DECIDE IS HE A MURDERER, IS HE A MURDERER, IS HE A MURDERER AND I WOULD SUBMIT TO YOU, NO, NOT UNDER THE LAW THAT'S APPLIED IN THIS CASE IN THIS COUNTRY AND THE STATE, NO, HE'S NOT BECAUSE THE STATE DIDN'T MEET ITS BURDEN OF PROOF. THAT'S WHY IT TOOK SO LONG TO TRY THE CASE, I CONGRATULATE THE SOLICITOR

FOR HAVING THE COURAGE TO EVEN BRING IT TO COURT. NONE OF THE SOLICITOR'S PRIOR HAD THAT COURAGE I WOULD SUBMIT BUT IT BECAME HIS RESPONSIBILITY. HE'S MADE AN EFFORT BUT HE CAN'T MEET THAT OBLIGATION TO THE LEE, TO JULIAN'S FAMILY BECAUSE HE DOESN'T HAVE THE EVIDENCE IN THIS CASE AND BECAUSE THIS MAN IS NOT GUILTY OF MURDER. HE'S NOT A KILLER; HE'S NOT A MURDERER. THE STATE HASN'T PROVEN THAT.

YOU CAN'T SAY HE MIGHT BE, HE MIGHT HAVE, HE COULD HAVE, THEY DIDN'T PROVE IT BEYOND A REASONABLE DOUBT. THAT IS THE STANDARD. IF HE MIGHT HAVE BEEN GUILTY YOU GOT TO ACQUIT IT; IF HE COULD HAVE BEEN GUILTY YOU'VE GOT TO ACQUIT IT. THAT IS THE LAW AND THAT IS WHAT WE ARE ALL REQUIRED TO FOLLOW.

LADIES AND GENTLEMEN, I WISH I COULD STAND UP HERE ALL DAY AND TALK TO YOU ABOUT THIS CASE BUT THOSE ARE THE POINTS THAT ARE APPLICABLE TO THIS CASE AND I TOLD YOU WE WEREN'T GOING TO TAKE MORE TIME THAN WAS NECESSARY TO MAKE OUR POINT. BUT I APPRECIATE YOUR ATTENTION THAT YOU'VE PAID TO THIS AND I WOULD SUGGEST THE ONLY VERDICT UNDER THE LAW IN THIS CASE IS NOT GUILTY, NOT GUILTY BECAUSE THE BURDEN OF PROOF IS NOT MET HERE, THANK YOU.

JURY CHARGE

THE COURT: ALL RIGHT, LADIES AND GENTLEMEN, IT'S NOW MY RESPONSIBILITY TO GIVE YOU THE LAW THAT YOU WILL APPLY TO THE FACTS AS YOU SO FIND THEM TO BE AND I

TOLD YOU THAT I WOULD NOT INTIMATE OR INDICATE TO YOU IN ANY WAY WHAT I BELIEVE THE FACTS OF THIS CASE TO BE AND I BELIEVE I'VE CARRIED FORWARD WITH THAT.

NOW IN THAT SAME VAIN IF YOU CAME INTO THIS COURTROOM WITH ANY PRECONCEIVED IDEAS OF WHAT THE LAW IS, WHAT IT OUGHT TO BE, WHAT IT SHOULD BE, WHAT YOU HOPED IT WOULD BE, YOU'RE GOING TO DISREGARD THAT. YOU WILL TAKE THE LAW AS I NOW GIVE IT TO YOU AND APPLY IT TO THE FACTS AS YOU SO FIND THEM TO BE IN THIS PARTICULAR CASE.

NOW ONE OF YOUR JOBS AS JURORS IN THIS PARTICULAR CASE IS TO JUDGE THE CREDIBILITY, THAT IS THE BELIEVABILITY OF THE WITNESSES THAT HAVE TESTIFIED BEFORE YOU IN THIS PARTICULAR MATTER.

NOW IN DOING SO YOU CAN BELIEVE ONE WITNESS AGAINST SEVERAL, SEVERAL AGAINST ONE. YOU CAN BELIEVE A PORTION OF WHAT A WITNESS SAYS AND DISREGARD THE REMAINING PORTION OF IT. IF YOU'VE GOT A GOOD SOUND REASON FOR DOING SO YOU COULD DISREGARD IN ITS ENTIRETY THE TESTIMONY OF A PARTICULAR WITNESS.

NOW HOW DO YOU DO THIS, HOW DO YOU JUDGE THIS CREDIBILITY AND BELIEVABILITY. REGARDING THAT YOU CONSIDER WHETHER OR NOT THAT WITNESS HAS EXHIBITED TO YOU ANY KIND OF INTEREST, BIAS, PREJUDICE, MOTIVE THEY MIGHT HAVE IN GIVING YOU THE TESTIMONY THAT THEY GAVE YOU IN THIS PARTICULAR MATTER.

YOU CAN CONSIDER THE APPEARANCE AND MANNER OF A WITNESS WHO HAS TESTIFIED BEFORE YOU IN THIS PARTICULAR MATTER AND, OF COURSE, YOU CONSIDER THE OPPORTUNITY FOR KNOWLEDGE, HOW DID THEY COME ABOUT THAT INFORMATION THAT THEY GAVE YOU FROM THE WITNESS STAND.

YOUR JOB, LADIES AND GENTLEMEN, IS TO FIND THE TRUTH, THAT IS YOUR OBJECTIVE, THAT IS YOUR CHARGE, THAT IS YOUR DUTY, THAT IS YOUR RESPONSIBILITY.

NOW IN DOING SO YOU WOULD THINK HOW DIFFICULT IS THAT AND IF YOU THINK ABOUT IT FOR A MINUTE IT'S SOMETHING YOU DO EVERY SINGLE DAY OF YOUR LIFE, JUDGING CREDIBILITY AND BELIEVABILITY. WHEN SOMEBODY TELLS YOU SOMETHING YOU AUTOMATICALLY JUDGE WHETHER OR NOT YOU BELIEVE THAT PERSON WHAT THEY'RE TELLING YOU AND HOW DO YOU DO THAT, YOU USE YOUR GOOD COMMON SENSE, YOUR GOOD JUDGMENT. THAT'S WHAT WE'RE ASKING YOU TO DO HERE TODAY. YOU APPLY YOUR GOOD COMMON SENSE, YOUR GOOD JUDGMENT TO THE FACTS AS YOU SO FIND THEM TO BE TO FIND THE TRUTH OF THIS PARTICULAR MATTER IN ACCORDANCE WITH THE LAW.

YOUR VERDICT CAN'T BE THE RESULT OF ANY KIND OF PASSION, PREJUDICE, OR SYMPATHY. YOU DON'T HAVE ANY FRIENDS TO REWARD. YOU DON'T HAVE ANY ENEMIES TO PUNISH. YOU HAVE TO LOOK AT THE EVIDENCE AND FIND THE EVIDENCE WHICH CONVINCES YOU OF ITS TRUTH.

IN THIS PARTICULAR CASE I QUALIFIED ONE WITNESS

TO GIVE HER OPINION, THAT'S SOMETIMES CALLED AN EXPERT WITNESS. WE DO NOT NORMALLY ALLOW WITNESSES TO GIVE THEIR OPINIONS BUT SOMETIMES AS A RESULT OF THEIR KNOWLEDGE, EXPERIENCE, TRAINING, WE ALLOW WITNESSES TO GIVE THEIR OPINION. NOW JUST BECAUSE I QUALIFIED A WITNESS TO GIVE HER OPINION DOES NOT NECESSARILY GIVE ANY SPECIAL STATUS TO THAT PARTICULAR WITNESS. YOU JUDGE ALL THE EVIDENCE IN THE SAME. YOU JUDGE ALL THE CREDIBILITY OR JUDGE THE CREDIBILITY AND BELIEVABILITY OF ALL THE WITNESSES THE SAME.

THERE ARE TWO TYPES OF EVIDENCE THAT HAS BEEN PRESENTED IN THIS PARTICULAR CASE AND THEY'RE PRESENTED IN VIRTUALLY EVERY CASE THAT IS TRIED AND THAT'S CALLED DIRECT AND CIRCUMSTANTIAL EVIDENCE.

DIRECT EVIDENCE THAT'S THE TESTIMONY OF A PERSON WHO ASSERTS OR CLAIMS TO HAVE ACTUAL KNOWLEDGE OF A FACT, WHAT THEY SAW, HEARD, SMELLED, TASTED, WHATEVER IT IS, SOMETHING THAT THEY OBSERVED WITH THEIR OWN SENSES.

THE OTHER TYPE OF EVIDENCE IS CALLED CIRCUMSTANTIAL EVIDENCE. THAT IS THE PROOF OF A CHAIN OF FACTS INDICATE THE EXISTENCE OF A FACT.

THE LAW DOESN'T MAKE ANY DISTINCTION BETWEEN DIRECT OR CIRCUMSTANTIAL EVIDENCE.

THE LAW DOESN'T REQUIRE A GREATER DEGREE OF PROOF OF ONE TYPE OF EVIDENCE OVER THE OTHER. YOU JUDGE ALL THE

EVIDENCE THE SAME. YOU WEIGH ALL THE EVIDENCE THE SAME TO FIND THAT EVIDENCE WHICH CONVINCES YOU OF ITS TRUTH.

NOW IN THIS PARTICULAR MATTER THE DEFENDANT DID NOT TESTIFY. I INSTRUCT AND EMPHASIZE TO YOU THE FACT THE DEFENDANT DID NOT TESTIFY IN THIS CASE IS NOT A FACTOR TO BE CONSIDERED BY YOU IN THIS CASE. YOU MAY DISCUSS IT IN YOUR JURY ROOM. IT IS NOT PART OF YOUR DELIBERATIONS. IT IS NOT PART OF YOUR DECISION MAKING PROCESS IN THIS PARTICULAR MATTER.

NO MATTER WHAT THE CRIME IS THAT SOMEONE IS CHARGED THEY HAVE THE CONSTITUTIONAL RIGHT TO REMAIN SILENT. THE CLAIM OR THE ASSERTION OF THIS RIGHT MAY NOT BE USED AGAINST THEM IN ANY FASHION.

THE BURDEN OF PROOF AS I TOLD YOU AT THE VERY BEGINNING IS ON THE STATE OF SOUTH CAROLINA. I TOLD YOU AT THE VERY BEGINNING THE DEFENDANT HAS NOTHING TO PROVE TO YOU. THE DEFENDANT HAS NOTHING TO SHOW TO YOU. THE STATE HAS TO PROVE ITS CASE. THE STATE MUST PROVE ITS CASE TO YOU BEYOND A REASONABLE DOUBT.

TO THE INDICTMENT, THAT IS THE CHARGE OF THE STATE OF THE DEFENDANT OF THE CRIME OF MURDER, THE DEFENDANT PLED GUILTY, I'M SORRY, PLED NOT GUILTY. WHEN THE DEFENDANT PLED NOT GUILTY TO THIS AS I TOLD YOU AT THE VERY BEGINNING PLEADING NOT GUILTY PUTS THE BURDEN OF PROOF UPON THE STATE OF SOUTH CAROLINA TO PROVE THE DEFENDANT

GUILTY BEYOND A REASONABLE DOUBT.

REGARDING THIS PARTICULAR MATTER THIS PRESUMPTION OF INNOCENCE IT STARTED AT THE BEGINNING OF THE TRIAL, IT REMAINS NOW. THAT PRESUMPTION OF INNOCENCE IS LIKENED TO A ROBE OF RIGHTEOUSNESS. IT'S PLACED UPON THE SHOULDERS OF THE DEFENDANT AND STAYS UPON THE SHOULDERS OF THE DEFENDANT UNTIL AND UNLESS IT IS STRIPPED FROM THE SHOULDERS OF THE DEFENDANT BY EVIDENCE PRESENTED BY THE STATE WHICH CONVINCES YOU OF THE GUILT OF THAT DEFENDANT BEYOND A REASONABLE DOUBT.

THIS PRESUMPTION OF INNOCENCE IS NOT A MERE LEGAL THEORY. IT'S NOT JUST SOME LEGAL PHRASE. IT'S A SUBSTANTIAL RIGHT TO WHICH THIS DEFENDANT TO WHICH EVERY AMERICAN IS ENTITLED WHEN THEY ARE CHARGED WITH A CRIMINAL OFFENSE.

THE STATE HAVING THE BURDEN OF PROOF TO PROVE THE DEFENDANT GUILTY BEYOND A REASONABLE DOUBT, WHAT IS REASONABLE DOUBT. REASONABLE DOUBT IS THE KIND OF DOUBT THAT WOULD CAUSE AN ORDINARY REASONABLE PERSON TO HESITATE TO ACT.

PROOF BEYOND A REASONABLE DOUBT IS PROOF THAT LEAVES YOU FIRMLY CONVINCED OF THE DEFENDANT'S GUILT.

NOW THERE'S VERY FEW THINGS IN THIS WORLD WE CAN KNOW WITH ABSOLUTELY CERTAINTY. THE LAW DOESN'T REQUIRE THAT KIND OF PROOF AND THAT DEGREE OF PROOF FROM THE STATE

OF SOUTH CAROLINA.

WHAT IS REQUIRED IS THAT BASED UPON YOUR VIEW OF THE EVIDENCE, YOUR EXAMINATION OF THE EVIDENCE, YOU ARE FIRMLY CONVINCED THAT THE DEFENDANT IS GUILTY OF THE CRIME CHARGED YOU MUST FIND THE DEFENDANT GUILTY.

ON THE OTHER HAND AFTER YOU HAVE REVIEWED THE EVIDENCE YOU ARE NOT FIRMLY CONVINCED THAT THE DEFENDANT IS GUILTY OF THE CRIME CHARGED YOU MUST GIVE THE DEFENDANT THE BENEFIT OF THE DOUBT AND FIND HIM NOT GUILTY.

A STATEMENT ALLEGED TO HAVE BEEN MADE BY THE DEFENDANT HAS BEEN ADMITTED INTO EVIDENCE BY THE COURT IN THIS PARTICULAR MATTER.

NOW WHILE I DETERMINED THAT THIS STATEMENT WAS ADMISSIBLE AS EVIDENCE IN THE CASE I INSTRUCT YOU AND CHARGE YOU THAT YOU THE JURY COLLECTIVELY MAKE THE ULTIMATE DECISION OF WHETHER OR NOT THE DEFENDANT MADE THE STATEMENT.

IF YOU FIND THE DEFENDANT MADE THE STATEMENT YOU HAVE TO DETERMINE WHETHER OR NOT THAT STATEMENT WAS MADE BY THE DEFENDANT VOLUNTARILY AND OF HIS OWN FREE WILL.

THIS MEANS THE STATEMENT WAS NOT CAUSED BY ANY KIND OF PRESSURE, FORCE, FEAR, THREATS, COERCION, INTIMIDATION, OR BY HOPE OR A PROMISE OF LENIENCY, OR BY REWARD OF ANY KIND.

IN DETERMINING WHETHER THE STATEMENT WAS

VOLUNTARY YOU SHOULD CONSIDER BOTH THE CHARACTERISTICS OF THE DEFENDANT AND THE DETAILS OF THE QUESTIONING.

SOME THINGS THAT YOU CAN LOOK AT IN LOOKING AT THIS MATTER MIGHT BE THE AGE OF THE DEFENDANT,

THE DEFENDANT'S EDUCATION OR LACK THEREOF,

THE DEFENDANT'S MENTAL ABILITY OR CAPACITY,

THE DEFENDANT'S INTELLIGENCE,

THE DEFENDANT'S BACKGROUND AND ENVIRONMENT,

THE PLACE AND LENGTH OF DETENTION,

THE NATURE OF THE QUESTIONING,

THE ADVICE OR LACK THEREOF TO THE DEFENDANT OF HIS CONSTITUTIONAL RIGHTS INCLUDING BUT NOT LIMITED TO THE RIGHT TO REMAIN SILENT,

THAT ANY STATEMENT CAN BE USED AGAINST YOU IN A COURT OF LAW,

THE RIGHT TO HAVE A LAWYER PRESENT DURING THE QUESTIONING, AND IF YOU CANNOT AFFORD ONE ONE WILL BE APPOINTED BEFORE YOU, AND THAT YOU CAN STOP MAKING A STATEMENT AT ANY TIME YOU WISH.

YOU CAN CONSIDER ALL OF THE CIRCUMSTANCES SURROUNDING THE MAKING OF THE STATEMENT AND IN DOING SO YOU UNDERSTAND ONCE AGAIN THE STATE HAS THE BURDEN OF PROOF OF PROVING BEYOND A REASONABLE DOUBT THAT THE STATEMENT WAS VOLUNTARY.

IF YOU DETERMINE THE STATEMENT WAS VOLUNTARY AND

THAT'S BEEN PROVEN TO YOU BEYOND A REASONABLE DOUBT YOU GIVE THAT STATEMENT ANY WEIGHT YOU DEEM IT SHOULD HAVE.

IF YOU DETERMINE THE STATEMENT WAS NOT FREE AND VOLUNTARY YOU DO NOT CONSIDER THAT STATEMENT AT ALL.

THE DEFENDANT HAVING BEEN CHARGED WITH THE CRIME OF MURDER THE STATE MUST PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT KILLED ANOTHER PERSON WITH MALICE AFORETHOUGHT.

MALICE IS HATRED, ILL WILL, HOSTILITY TOWARDS ANOTHER PERSON. IT IS THE INTENTIONAL DOING OF A WRONGFUL ACT WITHOUT JUST CAUSE OF EXCUSE AND WITH THE INTENT TO INFLICT AN INJURY OR UNDER CIRCUMSTANCES THE LAW WILL INFER AN EVIL INTENT.

NOW MALICE AFORETHOUGHT DOES NOT REQUIRE THAT THIS MALICE EXIST FOR ANY PARTICULAR TIME BEFORE THE ACT IS COMMITTED BUT IT HAS TO EXIST IN THE MIND OF THE DEFENDANT JUST BEFORE AND AT THE TIME THE ACT IS COMMITTED.

THERE HAS TO BE THIS COMBINATION OF EVIL INTENT AND ACT.

MALICE AFORETHOUGHT CAN BE EXPRESSED OR INFERRED.

NOW REGARDING THAT EXPRESSED MALICE IS SHOWN WHEN A PERSON SPEAKS WORDS WHICH EXPRESS A HATRED OR ILL WILL TO ANOTHER PERSON OR WHEN THE PERSON PREPARED BEFOREHAND TO DO THE ACT WHICH WAS LATER ACCOMPLISHED.

REGARDING INFERRED MALICE THAT IS SHOWN FROM

CONDUCT WHICH SHOWS A TOTAL DISREGARD FOR HUMAN LIFE.

INFERRED MALICE CAN ALSO ARISE WHEN THE DEED IS DONE WITH A DEADLY WEAPON.

A DEADLY WEAPON IS ANY ARTICLE, INSTRUMENT, OR SUBSTANCE WHICH IS LIKELY TO CAUSE DEATH OR GREAT BODILY HARM.

WHETHER OR NOT AN INSTRUMENT HAS BEEN USED AS A DEADLY WEAPON DEPENDS UPON THE FACTS AND CIRCUMSTANCES OF EACH CASE.

REGARDING THE CRIME OF MURDER MOTIVE IS NOT AN ELEMENT OF THE OFFENSE OF MURDER. THE STATE DOES NOT NEED TO PROVE MOTIVE.

MERE PRESENCE, ~~MERE PRESENCE~~ AT THE SCENE OF A CRIME IS NOT SUFFICIENT TO PROVE SOMEONE GUILTY OF THAT CRIME.

THE BURDEN IS ON THE STATE OF SOUTH CAROLINA TO PROVE EVERY ELEMENT OF THE CRIME CHARGED. IF YOU FIND AFTER REVIEWING ALL OF THE EVIDENCE THAT THE STATE HAS PROVED THAT THE DEFENDANT WAS ONLY ~~PRESENT AT THE SCENE~~ OF THE CRIME AND THEY HAVE NOT PROVED BEYOND A REASONABLE DOUBT ANY OTHER PARTICIPATION IN THE CRIME THEN YOU MUST FIND THE DEFENDANT NOT GUILTY.

THE DEFENDANT'S MERE PRESENCE WHERE A CRIME IS BEING COMMITTED OR MERE ASSOCIATION WITH A PERSON WHO COMMITS A CRIME DOES NOT IN AND OF ITSELF MAKE THE

DEFENDANT AN ACCOMPLICE WHO HAS AGREED TO JOIN IN THE COMMISSION OF A CRIME.

IF A CRIME IS COMMITTED BY TWO OR MORE PEOPLE WHO ARE ACTING TOGETHER IN COMMITTING THAT CRIME THE ACT OF ONE IS THE ACT OF ALL. IT IS SOMETIMES CALLED THE HAND OF ONE IS THE HAND OF ALL.

A PERSON WHO JOINS WITH ANOTHER TO ACCOMPLISH AN ILLEGAL PURPOSE IS CRIMINALLY RESPONSIBLE FOR EVERYTHING DONE BY THAT OTHER PERSON WHICH OCCURS AS A NATURAL CONSEQUENCE OF THE ACTS IN DONE IN CARRYING OUT THAT COMMON PLAN AND PURPOSE.

IF TWO OR MORE PEOPLE ARE TOGETHER ACTING TOGETHER, ASSISTING EACH OTHER IN THE COMMITTING OF A CRIME THE ACT OF ONE IS THE ACT OF ALL, THE HAND OF ONE IS THE HAND OF ALL.

PRIOR KNOWLEDGE THAT A CRIME IS GOING TO BE COMMITTED WITHOUT MORE IS NOT SUFFICIENT TO MAKE A PERSON GUILTY OF THAT CRIME.

MERE KNOWLEDGE THAT ANOTHER PERSON IS GOING TO COMMIT A CRIME EVEN IF THAT PERSON IS PRESENT WHEN THE CRIME IS COMMITTED IS NOT SUFFICIENT TO CONVICT THE DEFENDANT OF THAT PARTICULAR CRIME.

THE STATE MUST PROVE BEYOND A REASONABLE DOUBT BY COMPETENT EVIDENCE THE THEORY OF THE HAND OF ONE IS THE HAND OF ALL.

A PRINCIPAL IN A CRIME IS ONE WHO EITHER ACTUALLY COMMITS THE CRIME OR WHO IS PRESENT AIDING, ABETTING OR ASSISTING IN THE COMMITTING OF THAT CRIME.

WHEN A PERSON DOES AN ACT IN THE PRESENCE OF AND WITH THE ASSISTANCE OF ANOTHER THE ACT IS DONE BY BOTH.

WHERE TWO OR MORE ACTING WITH A COMMON PLAN OR INTENT ARE PRESENT AT THE COMMISSION OF A CRIME IT DOES NOT MATTER WHO ACTUALLY COMMITS THE CRIME, THE HAND OF ONE IS THE HAND OF ALL.

PRESENT AT THE COMMISSION OF A CRIME MEANS TO BE SUFFICIENTLY NEAR TO AID, ABET, AND ASSIST IN THE COMMISSION OF THAT CRIME. ONCE AGAIN MERE PRESENCE AT THE SCENE OF A CRIME IS NOT SUFFICIENT TO CONVICT A PERSON OF THAT PARTICULAR CRIME.

INTENT IS A NECESSARY ELEMENT FOR THERE MUST HAVE BEEN A COMMON DESIGN OR INTENT TO COMMIT THAT CRIME AND THE CRIME MUST HAVE BEEN COMMITTED PURSUANT TO AND WITH THE PERSON AIDING AND ABETTING BY SOME OVERT ACT.

INTENT MEANS INTENDING THE RESULT WHICH ACTUALLY OCCURS NOT ACCIDENTALLY OR INVOLUNTARY.

INTENT MAY BE SHOWN BY ACTS AND CONDUCT OF THE DEFENDANT AND ANY OTHER CIRCUMSTANCES FROM WHICH YOU COULD NATURALLY AND REASONABLY INFER INTENT REMEMBERING, OF COURSE, THAT THE STATE HAS THE BURDEN OF PROOF AND MUST PROVE ALL OF THESE ELEMENTS TO YOU BEYOND A REASONABLE

DOUBT.

THAT, LADIES AND GENTLEMEN, IS THE LAW THAT APPLIES TO THIS PARTICULAR CASE AND THE LAW THAT YOU WILL APPLY TO THE FACTS AS YOU SO FIND THEM TO BE IN THIS PARTICULAR CASE.

I'VE PREPARED A VERDICT FORM FOR YOUR USE. IT'S VERY STRAIGHTFORWARD, HAS THE CAPTION OF THE CASE. THE DOCUMENT, STATE OF SOUTH CAROLINA V. THEODORE DAVID WILLS, JR. DEFENDANT ON THE CHARGE OF MURDER, WE THE JURY BY UNANIMOUS CONSENT FIND THE DEFENDANT THEODORE DAVID WILLS, JR., AND I PUT ONE CHOICE BEFORE THE OTHER, OBVIOUSLY DON'T ASSIGN ANYTHING TO THAT, NOT GUILTY OR GUILTY.

AND, MR. FOREMAN, WHEN YOUR JURY HAS WELL AND TRULY DELIBERATED IN THIS CASE AND REACHED ITS UNANIMOUS VERDICT YOU WILL TAKE THIS VERDICT FORM, CHECK THE APPROPRIATE BLOCK AND SIGN YOUR NAME AS THE FOREPERSON OF THIS PARTICULAR JURY INDICATING THAT THIS INDEED IS THE UNANIMOUS VERDICT OF THE JURY IN THIS PARTICULAR MATTER.

NOW I SAID UNANIMOUS I DON'T KNOW HOW MANY TIMES AT THE VERY BEGINNING AND NOW, UNANIMOUS MEANS EXACTLY WHAT YOU THINK IT MEANS, 12-0. IT'S NOT 10-2, 11-1, ANY COMBINATION THEREOF. THIS VERDICT WHEN IT IS ARRIVED AT IS THE VERDICT OF EACH AND EVERYONE OF YOU, EVERYONE AGREES TO THAT VERDICT. IT IS UNANIMOUS, IT IS THE VERDICT OF ALL.

WHAT I'M GOING TO HAVE YOU DO, MR. FOREMAN, IS

I'M GOING TO ASK YOU TO TAKE YOUR JURY TO THE JURY ROOM. DO NOT BEGIN YOUR DELIBERATIONS UNTIL THE BAILIFF BRINGS INTO YOU THE EXHIBITS AND THE VERDICT FORM. AT THAT POINT YOU MAY BEGIN YOUR DELIBERATIONS AND IF YOU WOULD THE ALTERNATE, SIR, IF YOU WOULD REMAIN IN THE COURTROOM WITH US, MR. FOREMAN, PLEASE TAKE YOUR JURY TO THE JURY ROOM AT THIS TIME.

(WHEREUPON, THE JURY RETIRED TO THE JURY ROOM AT 2:50 P.M.)

MR. RICHARDSON: YOUR HONOR, MAY WE APPROACH?

THE COURT: JUST ONE SECOND. ALL RIGHT, OKAY, YA'LL COME UP HERE.

(WHEREUPON, A BENCH CONFERENCE WAS HELD OFF THE RECORD OUT OF THE PRESENCE OF THE JURY.)

THE COURT: ANY EXCEPTIONS OR ADDITIONS TO THE CHARGE AS GIVEN BY THE COURT FROM THE STATE?

MR. RICHARDSON: NONE FROM THE STATE, YOUR HONOR.

THE COURT: FROM THE DEFENSE?

MR. DIGGS: YOUR HONOR, WE DON'T HAVE ANY OBJECTIONS OR REQUESTS FOR ADDITIONS.

THE COURT: ALL RIGHT, SIR, THANK YOU VERY MUCH. ALL RIGHT, GENTLEMEN, PLEASE I BELIEVE YOU MIGHT HAVE ALREADY DONE THIS, BUT I WANT YOU TO GET WITH THE COURT REPORTER MAKE SURE WE HAVE ALL THE EXHIBITS IN AND THE ONES

THAT ARE PROPER TO GO BEFORE THE JURY AND AS SOON AS MY SECRETARY BRINGS IN THE VERDICT FORM WE'LL TAKE ALL THAT AND HAND IT TO THE JURY.

MR. RICHARDSON: THANK YOU, YOUR HONOR.

THE COURT: THANK YOU VERY MUCH, WE'LL BE AT EASE UNTIL THE JURY NEEDS US.

(WHEREUPON, THE VERDICT FORMS AND EXHIBITS WERE DELIVERED TO THE JURY ROOM WITH INSTRUCTIONS TO BE DELIBERATIONS AT 2:57 P.M.)

THE COURT: MR. GEORGE, YOUR JOB IS OBVIOUSLY AS THE ALTERNATE IS TO STEP INTO THE SHOES OF ONE OF THE 12 MEMBERS OF THE JURY IF THEY CAN'T PERFORM THEIR DUTIES. NOW THEY'RE BACK THERE DELIBERATING BUT THEY HAVEN'T REACHED A VERDICT YET. IN THE UNFORESEEN CIRCUMSTANCES THAT ONE OF THEM GETS ILL THEN I HAVE TO HAVE YOU READY TO STEP IN THERE SO THAT WE CAN ARRIVE AT A VERDICT IN THIS PARTICULAR CASE.

WHAT'S GOING TO HAPPEN IS ONE OF THE DEPUTIES AND BAILIFFS IS GOING TO HAVE TO TAKE YOU TO ONE OF OUR SPARE JURY ROOMS AND YOU'LL HAVE TO STAY THERE UNTIL THEY REACH A VERDICT. I PROMISE WE WON'T FORGET ABOUT YOU BUT I HAVE TO HAVE YOU AVAILABLE JUST IN CASE, ALL RIGHT, THANK YOU VERY MUCH.

(WHEREUPON, THE JURY KNOCKED WITH A VERDICT AT

4:05 P.M.)

THE COURT: I UNDERSTAND THE JURY HAS REACHED A VERDICT IN THIS MATTER. IS THE STATE READY TO RECEIVE IT?

MR. RICHARDSON: YES, SIR, YOUR HONOR. THE STATE IS PREPARED TO PROCEED.

THE COURT: IS THE DEFENSE READY?

MR. DIGGS: YES, SIR.

THE COURT: BEFORE I ASK THE JURY TO COME IN AND RECEIVE THE VERDICT IN THIS CASE LET ME TO TALK TO EVERYBODY THAT'S PRESENT'S IN THE COURTROOM AT THIS POINT IN TIME. I DO NOT KNOW WHAT THE VERDICT HAS RENDERED IN THIS PARTICULAR MATTER. ONLY THE JURY KNOWS AT THIS POINT IN TIME. WHAT I'M TELLING IS WHAT EVER THE VERDICT IS THAT IS RENDERED BY THE JURY IN THIS MATTER SHALL BE RECEIVED WITH RESPECT. IT SHALL BE RECEIVED IN SILENCE. THERE WILL BE NO OUTBURST OF ANY KIND. THERE WILL BE NO RESPONSE TO THE JURY'S VERDICT OF ANY KIND. IF YOU FAIL TO ABIDE BY THIS DIRECT ORDER I WILL HAVE YOU DETAINED BY THE HORRY COUNTY SHERIFF'S DEPARTMENT. THEREAFTER WHEN THESE MATTERS ARE CONCLUDED I WILL HOLD A CONTEMPT OF COURT PROCEEDING REGARDING THAT INDIVIDUAL. PLEASE UNDERSTAND, IF YOU VIOLATE THIS ORDER I CAN SEND YOU TO THE DEPARTMENT OF CORRECTIONS FOR A PERIOD OF ONE YEAR. PLEASE DO NOT PUT ME IN THAT POSITION. BUT MAKE NO MISTAKE, SHOULD YOU VIOLATE THIS ORDER I WILL ENFORCE IT. IF YOU CANNOT ABIDE BY THE

TERMS OF MY ORDER PLEASE THE COURTROOM NOW. NO ONE HAS LEFT. I UNDERSTAND THEN THAT EVERYBODY WILL ABIDE BY THE TERMS OF THIS ORDER. THANK YOU VERY MUCH. ASK THE JURY TO COME IN.

(WHEREUPON, THE JURY ENTERS THE COURTROOM AT 4:16 P.M.)

THE COURT: ALL RIGHT MR. FOREMAN, HAS YOUR JURY RENDERED A VERDICT IN THIS MATTER?

MR. FOREMAN: YES, SIR.

THE COURT: ALL RIGHT, SIR, COULD YOU HAND THE VERDICT TO THE CLERK, PLEASE, SIR.

ALL RIGHT, MADAM CLERK, YOU MAY PUBLISH THE VERDICT.

MADAM CLERK: INDICTMENT NUMBER 2006-GS-16-1652 [SIC], THE STATE V. THEODORE DAVID WILLS, JR., ON THE CHARGE OF MURDER, WE THE JURY, BY UNANIMOUS CONSENT FIND THE DEFENDANT, THEODORE DAVID WILLS, JR., GUILTY, DATED OCTOBER 3RD, 2007, SIGNED BY FOREPERSON RONALD H. ZWINGELBERG.

LADIES AND GENTLEMEN OF THE JURY, IF THIS IS YOUR VERDICT SO SIGNIFY BY RAISING YOUR RIGHT HAND.

(WHEREUPON, ALL JURORS RESPONDED BY RAISING THEIR RIGHT HAND.)

THANK YOU.

POLLING OF JURORS



THE COURT: THE JURY HAVING AFFIRMED THEIR VERDICT DOES EITHER THE STATE OR THE DEFENSE WISH THE JURY POLLED? FROM THE STATE?

MR. RICHARDSON: NO, SIR, YOUR HONOR.

THE COURT: FROM THE DEFENSE?

MR. DIGGS: YES, SIR.

THE COURT: ALL RIGHT. MADAM CLERK, IF WOULD YOU PLEASE POLL THE JURY AT THIS TIME.

MADAM CLERK: PLEASE STAND WHEN I CALL YOUR NAME. I'M GOING TO ASK YOU TWO QUESTIONS. AFTER YOU'VE ANSWERED THEM PLEASE BE SEATED.

RONALD ZWINGELBERG, 357.

IS THIS YOUR VERDICT?

MR. ZWINGELBERG: YES.

MADAM CLERK: IS THIS STILL YOUR VERDICT?

MR. ZWINGELBERG: YES.

MADAM CLERK: THANK YOU. KATHARINE COOPER, 77.

IS THIS YOUR VERDICT?

MS. COOPER: YES.

MADAM CLERK: IS THIS STILL YOUR VERDICT?

MS. COOPER: YES.

MADAM CLERK: THANK YOU. ROSE HARDWICK, 124.

IS THIS YOUR VERDICT?

MS. HARDWICK: YES, MA'AM.

MADAM CLERK: IS THIS STILL YOUR VERDICT?

MS. HARDWICK: YES, MA'AM.

MADAM CLERK: THANK YOU. JAMES LOVELL, 190. IS THIS YOUR VERDICT?

MR. LOVELL: YES, MA'AM.

MADAM CLERK: IS THIS STILL YOUR VERDICT?

MR. LOVELL: YES, MA'AM.

MADAM CLERK: THANK YOU. JACK BOWARD, 24. IS THIS YOUR VERDICT?

MR. BOWARD: YES, MA'AM.

MADAM CLERK: IS THIS STILL YOUR VERDICT?

MR. BOWARD: YES, MA'AM.

MADAM CLERK: THANK YOU. GLENDA ISOM, 152. IS THIS YOUR VERDICT?

MS. ISOM: YES.

MADAM CLERK: IS THIS STILL YOUR VERDICT?

MS. ISOM: YES.

MADAM CLERK: THANK YOU. JOELLA MOHR, 18. IS THIS YOUR VERDICT?

MS. MOHR: YES.

MADAM CLERK: IS THIS STILL YOUR VERDICT?

MS. MOHR: YES.

MADAM CLERK: THANK YOU. 146, SAMUEL HUGHES. IS THIS YOUR VERDICT?

MR. HUGHES: YES, MA'AM.

MADAM CLERK: IS THIS STILL YOUR VERDICT?

POLLING OF JURORS



MR. HUGHES: YES, MA'AM.

MADAM CLERK: THANK YOU. MARY BOLKA, 19. IS THIS YOUR VERDICT?

MS. BOLKA: YES, IT IS..

MADAM CLERK: IS THIS STILL YOUR VERDICT?

MS. HUGHES: YES, IT IS.

MADAM CLERK: THANK YOU. KIMBERLY HOLMES, 140. IS THIS YOUR VERDICT?

MS. HOLMES: YES.

MADAM CLERK: IS THIS STILL YOUR VERDICT?

MS. HOLMES: YES.

MADAM CLERK: THANK YOU. 249, EUGENIA PROEHL. IS THIS YOUR VERDICT?

MS. PROEHL: YES, IT IS.

MADAM CLERK: IS THIS STILL YOUR VERDICT?

MS. PROEHL: YES, IT IS.

MADAM CLERK: THANK YOU. 356 THOMAS ZIMPLEMAN. IS THIS YOUR VERDICT?

MR. ZIMPLEMAN: YES.

MADAM CLERK: IS THIS STILL YOUR VERDICT?

MR. ZIMPLEMAN: YES.

MADAM CLERK: THANK YOU.

THE COURT: THE JURY HAS AFFIRMED THEIR VERDICT. ANY FURTHER MATTERS AS TO THE JURY FROM THE STATE?

MR. RICHARDSON: NOT FROM THE STATE.

POST TRIAL MOTIONS BY DEFENSE

THE COURT: FROM THE DEFENSE?

MR. DIGGS: NO, YOUR HONOR.

THE COURT: LADIES AND GENTLEMAN, I WANT TO THANK YOU FOR YOUR SERVICE IN THIS PARTICULAR CASE. YOU DID EXACTLY WHAT THE COURT ASKED YOU TO DO, THAT IS TO FIND THE TRUTH IN THIS PARTICULAR MATTER AND BY YOUR UNANIMOUS VERDICT YOU HAVE RENDERED THE TRUTH IN THIS PARTICULAR MATTER. YOU HAVE DONE YOUR COUNTY AND YOUR FELLOW CITIZENS A GREAT SERVICE NOT ONLY BY SERVING IN THIS PARTICULAR CASE BUT AS BEING MEMBERS OF THE JURY VENIRE. THERE WERE A LARGE NUMBER OF CASES THAT WERE HANDLED IN CRIMINAL COURT AND IN CIVIL COURT. YOU AND ALL OF YOUR FELLOW JURORS WERE HERE READY WILLING AND ABLE TO BE JURORS IN THESE CASES. HAD YOU NOT BEEN HERE THESE CASES WOULD BE ONGOING, WOULD BE LANGUISHING WITHOUT RESOLUTION. MORE THAN ANYTHING, ALL THESE PARTIES NEED RESOLUTION OF THESE MATTERS. YOU HAVE DONE SO AND I WANT TO THANK YOU FOR YOUR EXEMPLARY SERVICE. YOU ARE NOW EXCUSED FOR YOUR SERVICE FOR THIS PARTICULAR WEEK. THERE IS NO NEED -- WE HAVE PICKED ALL OF THE JURORS WE NEED TO PICK AND THEREFORE YOU ARE EXCUSED. YOU HAVE EARNED AN EXEMPTION FOR THE NEXT THREE YEARS FOR COMING TO CIRCUIT COURT. NOW, IF YOU GET A SUMMONS FROM YOUR LOCAL CITY JUDGE OR MAGISTRATE OR FEDERAL JUDGE, YOU HAVE TO ANSWER THOSE. BUT IF OUR FINE CLERK OF COURT HERE SENDS YOU A SUMMONS FOR CIRCUIT COURT JURY DUTY PLEASE LET HER

KNOW FOR THE NEXT THREE YEARS YOU HAVE THAT EXEMPTION. YOU ARE NOW EXCUSED. IF YOU WILL ACCOMPANY THE DEPUTY OUTSIDE.

(WHEREUPON, THE JURY WAS EXCUSED AT 4:22 P.M.)

THE COURT: ALL RIGHT, MR. DIGGS I'LL HEAR ANY MOTIONS YOU MIGHT HAVE, SIR.

MR. DIGGS: NUMBER ONE, I WOULD REQUEST IS UNDER THE RULES TO BE PERMITTED TO FILE WRITTEN MOTIONS WITHIN TEN DAYS?

THE COURT: I WOULD APPRECIATE IT IF YOU WOULD MAKE YOUR MOTIONS AT THIS TIME, PLEASE, SIR.

MR. DIGGS: WELL, YOUR HONOR, UNDER THE PROVISO I MAY BE ABLE TO SUPPLEMENT.

THE COURT: I WOULD BE GLAD FOR YOU TO DO SO BUT I WOULD APPRECIATE IT IF YOU WOULD MAKE YOUR MOTIONS AT THIS POINT IN TIME.

MR. DIGGS: ALL RIGHT, INITIALLY, WE WOULD ASK FOR A NEW TRIAL, TO HAVE THE VERDICT BE SET ASIDE AND HAVE A NEW TRIAL ON THE GROUNDS THAT WE HAVE STATED IN THE RECORD THUS FAR WHICH WOULD INCLUDE THE, WHAT WE RESPECTFULLY SUBMIT WOULD BE AN OVER EXTENSION OF THE PRINCIPALS DISCUSSED IN BATSON AND SUBSEQUENT CASES. YOUR HONOR, ALSO, I WOULD SUBMIT THAT THE STATEMENT THAT WAS MADE IN THE CASE WAS NOT A VOLUNTARY STATEMENT. IT WAS MADE IN THE SETTING OF A PROFFER, NEGOTIATED CONTACT WITH THE STATE. THE LANGUAGE IN THE PROFFER WAS NOT CLEAR IN

TERMS OF WHAT WAS GOING TO HAPPEN WITH THE RESPECT TO THE STATEMENT IN THE EVENT THE POLYGRAPH EXAMINER DETERMINED THAT DECEPTION WAS INDICATED. WHAT IS HAVE IS VAGUENESS IN THAT PARAGRAPH 2 OF THE AGREEMENT THAT SAYS THEY WERE GOING TO USE THAT POLYGRAPH OUTCOME FOR CERTAIN THINGS. BUT IT DOES NOT WITH ANY CLARITY AT ALL STATE THAT THE STATEMENT WAS GOING TO BE USED AS EVIDENCE TO BE PRESENTED TO THE JURY DURING THE COURSE OF THE TRIAL. WHAT I SUGGEST, AS I'VE ARGUED BEFORE, SAYS THAT THE STATE CAN USE THAT EVIDENCE AGAINST THE DEFENDANT IN MAKING DECISIONS ABOUT HOW A CASE IS GOING TO BE DISPOSED OF THROUGH THE NEGOTIATION OR THE INVESTIGATION, PLEA PROCESS AND THE TRIAL, BUT IT DOESN'T SAY IT'S GOING TO BE USED AS EVIDENCE IN THE TRIAL. I WOULD SUBMIT THAT THE PLEA PROFFER THAT'S WRITTEN AND SIGNED BY REPRESENTATIVES OF THE STATE AND BY THE DEFENDANT AND HIS ATTORNEY FOCUSES MORE NARROWLY ON THE ISSUE OF VOLUNTARINESS TRUMPS THE BROAD FIFTH AMENDMENT, MIRANDA, SIXTH AMENDMENT APPLICATIONS OF THE CONSTITUTION, WOULD OTHERWISE BE APPLIED TO THE STATEMENT. YOUR, HONOR, I WOULD SUBMIT A DIRECTED VERDICT AT THE CLOSE OF THE CASE AND AGAIN AS IT WAS REVIEWED AT THE CLOSE OF ALL THE EVIDENCE WOULD, SHOULD PROPERLY BE GRANTED, WITH ALL DUE RESPECT, BECAUSE OF THE LACK OF EVIDENCE THAT SHOWS MALICE AT THAT TIME. YOUR HONOR, THE ONLY EVIDENCE WE HAVE IN THE CASE, AT ALL, THAT PLACES MY CLIENT AT THE SCENE AND

PARTICIPATING, IS THAT STATEMENT THAT HE MADE. HIS IMPLICATING OF HIMSELF WITH RESPECT TO BRANDING WILDER, MARK WILDER AS THE POSSIBLE SHOOTER -- HE SAID FOR MONTHS -- THERE'S NO EVIDENCE THAT CONTRADICTS THAT IN THE RECORD -- MONTHS EARLIER. YOUR HONOR, THERE'S NO EVIDENCE TO SHOW THAT ALL OF THOSE ELEMENTS THAT ARE REQUIRED TO BE SHOWN TO PROVE A MURDER OCCURRED ON THAT NIGHT. THERE'S JUST NOT ANY EVIDENCE THERE. HE WAS THERE. HE WAS GOING, UNCONTRADICTED, NO EVIDENCE IN THE RECORD TO SUGGEST OTHERWISE, THEY WERE GOING TO COMMIT A ROBBERY SOMEWHERE ELSE. NOW, THAT WASN'T A LEGITIMATE REASON TO BE THERE. BUT THAT DOESN'T KICK IN AS HAND OF ONE IS THE NATURAL AND PROBABLE CONSEQUENCE OF THE FAILURE, THE RESULTS OF THE CRIMINAL CONDUCT RULE. THAT DOESN'T KICK IN BECAUSE THAT HADN'T BEEN REACHED YET, THAT LOCATION. IN FACT, MARK WILLARD WAS GOING TO COMMIT A BURGLARY HE INDEPENDENT OF THE ROBBERY THAT WAS TALKED ABOUT IN AN UNRELATED AND SEPARATE LOCATION, DOESN'T INVOKE THAT RULE SO THE STATE CAN'T RELY ON THAT RULE OF LAW IN ORDER TO GET THE ISSUE OF MALICE TO THE JURY HERE. SO, I WOULD SUBMIT THERE'S NO EVIDENCE TO SUGGEST MALICE ON THE PART OF THIS DEFENDANT ON THE NIGHT OF THE SHOOTING AND A NEW TRIAL SHOULD BE GRANTED ON THOSE GROUNDS.

THE COURT: ALL RIGHT, SIR.

MR. DIGGS: YOUR HONOR, I BELIEVE THAT COVERS THE

ISSUES AND I WOULD ASK YOUR HONOR TO LET ME GO BACK AND REFLECT AND MAYBE SUPPLEMENT WITH MORE ARGUMENT.

THE COURT: I'LL BE GLAD FOR YOU TO DO SO.

MR. DIGGS: GO LOOK IF I'VE OVERLOOKED A POINT.

THE COURT: WELL, IF YOU'VE OVERLOOKED A POINT I'LL BE GLAD FOR YOU TO ALSO FILE IT WITH THE CLERK AND SERVE A COPY ON THE STATE AND GIVE THEM AN OPPORTUNITY TO RESPONSE AND I'LL BE GLAD TO RULE ON THAT. BUT AS THE ISSUES THAT YOU HAVE PRESENTED TO ME I WILL ADDRESS THOSE AT THIS POINT IN TIME.

MR. DIGGS: ALL RIGHT.

THE COURT: AS TO YOUR MOTION FOR A NEW TRIAL, THAT REQUEST IS DENIED.

AS TO THE REQUIREMENTS OF BATSON AND JEB V. ALABAMA AND ANY OTHER FEDERAL PROGENY FROM THERE OR STATE CASES, I DO BELIEVE THE COURT PROPERLY FOLLOWED THE RULES AS SET FORTH BY THE UNITED STATES SUPREME COURT AND ALSO AS ADOPTED IN SUBSEQUENT SOUTH CAROLINA SUPREME COURT DECISIONS. THEREFORE, I WOULD RESPECTFULLY DECLINE TO GRANT YOUR MOTION FOR A NEW TRIAL IN THAT REGARD.

AS TO THE VOLUNTARINESS OF THE STATEMENT COURT REAFFIRMS THE RULINGS THAT I MADE AFTER YOUR JACKSON V. DENO MOTION AND AFTER YOUR MOTIONS AT THE END OF THE STATE'S CASE AND WHEN THE DEFENSE RESTED. I DO BELIEVE THAT THE DEFENDANT WAS PROPERLY ADVISED OF HIS MIRANDA

WARNINGS. IT WAS CLEAR THAT ANY STATEMENTS THAT HE MADE COULD BE USED AGAINST HIM IN A COURT OF LAW. HE SIGNED THE DOCUMENT INDICATING SUCH. THE PROFFER YOU SPEAK OF I THINK THE TERMS WERE SUFFICIENTLY, MORE THAN SUFFICIENTLY CLEAR TO THE DEFENDANT THAT IT WAS UP TO THE STATE TO DETERMINE REGARDING THE TRUTHFULNESS OF THE MATTERS, KNEW THE RISKS WHEN HE MADE THE STATEMENT TO LAW ENFORCEMENT. HE DID SO WITH THE ADVISE OF COUNSEL AT ALL STAGES. COUNSEL WAS PRESENT. HE MADE NO STATEMENTS WITHOUT THE ADVISE OF COUNSEL. THEREFORE, I FIND, FOUND, THAT THE STATEMENT WAS VOLUNTARY AND WAS MADE KNOWING HIS CONSTITUTIONAL RIGHTS. FURTHER, IT WAS FOR THE JURY TO DETERMINE AGAIN BOTH THE VOLUNTARINESS OF THE STATEMENT REGARDING ANY PROMISE OR HOPE OF REWARD, ANY LENIENCY. I SPECIFICALLY SAID THAT TO THE JURY. I'M SURE THAT THEY CLEARLY UNDERSTOOD THAT. THEY DETERMINED ULTIMATELY, AS CAN BE REELECTED BY THE VERDICT, THAT THE STATEMENT WAS VOLUNTARY.

REGARDING THE MATTERS AS YOU SET FORTH IN YOUR MOTION FOR DIRECTED VERDICT AFTER THE STATE'S CASE, AFTER THE DEFENSE RESTED, THAT YOU HAVE REAFFIRMED AT THIS POINT IN TIME, THE COURT WOULD AGAIN RESPECTFULLY DECLINE TO GRANT YOUR MOTIONS IN THAT REGARD FOR A DIRECTED VERDICT, NEW TRIAL, JUDGMENT NOTWITHSTANDING THE VERDICT AND WOULD RESPECTFULLY DECLINE TO GRANT ANY OF THE POST TRIAL MOTIONS AS YOU HAVE STATED THEM. I AM ALLOWING YOU TO, IF YOU

WISH, TO FILE ANY WRITTEN MATTERS TO THE COURT. OBVIOUSLY AS INDICATED, FILE IT WITH THE CLERK, SEND THE COURT A COPY AND SEND A COPY TO THE SOLICITOR'S OFFICE SO HE CAN RESPOND. BUT AS TO THE MATTERS THAT YOU PRESENTED THOSE ARE RESPECTFULLY DECLINED.

MR. DIGGS: YOUR HONOR, THANK YOU FOR HEARING US.

THE COURT: YES, SIR. IS THE STATE READY TO PROCEED WITH SENTENCING IN THIS MATTER?

MR. RICHARDSON: YOUR HONOR, WE ARE, YOUR HONOR.

THE COURT: IS THE DEFENSE READY TO PROCEED WITH SENTENCING IN THIS MATTER?

MR. DIGGS: YOUR HONOR, I WOULD ASK THAT WE DELAY THAT UNTIL THE EXPIRATION OF THE TEN DAYS, WE HAVE THE CHANCE TO PUT TOGETHER ANY WRITTEN MOTIONS THAT WE HAVE, MAYBE TAKE UP SENTENCING AT THAT TIME, YOUR HONOR, CONSIDERS ANY WRITTEN MOTIONS THAT WE SUPPLEMENT WITH AFTER TODAY.

MR. RICHARDSON: YOUR HONOR, IF I MAY BE HEARD ON THAT?

THE COURT: YES, SIR, I'LL BE GLAD TO HEAR FROM YOU.

MR. RICHARDSON: THIS FAMILY HAS BEEN WAITING SIX YEARS FOR THIS DAY, ALMOST SIX YEARS, JUST SHY OF IT. MS. MINIBURK HAS BEEN PATIENTLY WAITING FOR THIS. WE'VE

GONE THROUGH EVERYTHING THAT I BELIEVE THAT SENTENCING WOULD PROPER TODAY.

THE COURT: I APPRECIATE THAT, SOLICITOR, AND I'M TAKING THAT INTO CONSIDERATION. THE FACT OF THE MATTER IS THE JURY HAD RENDERED A VERDICT IN THIS MATTER. THERE ARE MOTIONS THAT BY LAW CAN BE PRESENTED. DEFENDANT IS NOT GOING ANYWHERE. HE IS IN JAIL. HE WILL REMAIN IN JAIL. CERTAINLY, PENDING THE OUTCOME OF ANY MOTION WHAT I INTEND THEN IS, HOLD ON A SECOND. WHAT I'LL DO IS SET SENTENCING FOR MONDAY, OCTOBER 29TH AT 2 P.M. THAT'S A TERM OF CIVIL COURT. I WILL HOLD THIS MATTER OPEN UNTIL THAT TIME. THAT'S MONDAY, OCTOBER 29TH AT 2 P.M.

MR. DIGGS: THANK YOU, YOUR HONOR.

THE COURT: THANK YOU VERY MUCH.

MR. RICHARDSON: THANK YOU, YOUR HONOR

**SENTENCING - OCTOBER 29, 2007**

THE COURT: ALL RIGHT, I THINK WE NOW COME TO THE MATTER OF <u>THE STATE OF SOUTH CAROLINA V. THEODORE DAVID WILLS</u> REGARDING DEFENDANT'S MOTION FOR A NEW TRIAL SO COULD WE GET MR. WILLS, PLEASE?

ALL RIGHT, AS I SAY THIS IS THE MATTER OF <u>THE STATE OF SOUTH CAROLINA V. THEODORE DAVID WILLS</u> REGARDING 2006-GS-26-1652, THE DEFENDANT HAVING BEEN FOUND GUILTY AT A PREVIOUS JURY TRIAL OF THE OFFENSE OF MURDER THE DEFENDANT REQUESTED AND THE COURT ALLOWED THE DEFENDANT TO

FILE A, OR FILE WRITTEN MOTIONS FOR A NEW TRIAL IN THIS PARTICULAR MATTER WHICH THE DEFENDANT HAS DONE AND THE STATE HAS RESPONDED TO THAT WRITTEN MOTION.

AT THIS POINT IN TIME I'LL BE GLAD TO HEAR FROM YOU, MR. DIGGS, AND THEN I'LL TURN TO YOU, MR. RICHARDSON. GENTLEMEN, IF YOU'D, PLEASE, BOTH OF YOU MR. DIGGS AND MR. RICHARDSON, I HAVE GONE THROUGH AND READ YOUR WRITTEN DOCUMENTATION THAT YOU HAVE FILED IN THIS MATTER SO I'D APPRECIATE IT IF YOU WOULD, OBVIOUSLY DON'T READ TO ME FROM, FROM YOUR BRIEF AND TRY TO KEEP YOUR ARGUMENTS AS BRIEF AS YOU CAN.

OBVIOUSLY YOU NEED, BOTH OF YOU NEED TO REPRESENT THE INTEREST OF YOUR CLIENT, MR. DIGGS, AND YOU NEED TO REPRESENT THE INTEREST OF THE STATE OF SOUTH CAROLINA, MR. RICHARDSON. I APPRECIATE THAT AND, PLEASE, DO SO. ALL RIGHT, YOU MAY GO FORWARD, SIR.

MR. DIGGS: YOUR HONOR, THANK YOU ---

THE COURT: I'M SORRY.

MADAM COURT REPORTER: WOULD YOU PUT A MICROPHONE OVER TO MR. DIGGS, THANK YOU.

MR. DIGGS: YOUR HONOR, I APPRECIATE YOU LETTING US FILE THESE MOTIONS AND ARGUMENTS AFTER THE TRIAL AND CONSIDERING THEM TODAY BEFORE THE COURT IN THE EVENT THE COURT DECIDES NOT TO GRANT THE MOTIONS BEFORE THE COURT PROCEEDS WITH THE SENTENCING.

YOUR HONOR, THE INITIAL CASE OR THE INITIAL ISSUE THAT WE'VE RAISED IS THE QUESTION OF THE BATSON ISSUE THAT PRESENTED ITSELF DURING THE TRIAL OF THE CASE AND WE WENT BACK, YOUR HONOR, AND QUOTED THE CASE LAW THAT WE FELT WAS APPLICABLE TO THE CASE AND WHICH YOUR HONOR CITED IN PART IS ESPECIALLY THE JEB V. ALABAMA CASE.

YOUR HONOR, WHAT OUR POSITION IS IS SIMPLY THAT WE TARGETED FOR A PREEMPTORY CHALLENGE IN THE CASE ELDER OLDER WHITE MALES WHO HAD A PROPENSITY IN OUR OPINION TO DRIVE, BEING A DRIVING OR MOTIVATING FORCE IN THE DELIBERATION PROCESS.

WHILE WE REALIZE THE CASES SAY WE CAN'T STRIKE PEOPLE SOLELY BECAUSE OF GENDER, YOUR HONOR, THAT WOULD, I WOULD SUBMIT THAT'S NOT WHAT WE DID. WE STRUCK PEOPLE OF A PARTICULAR GENDER WITH A PARTICULAR KIND OF A BACKGROUND ASSOCIATED WITH IT.

AS THE COURT COULD SEE THERE WERE A NUMBER OF MALES ON THE JURY THAT WE DID NOT CHALLENGE AND SO WE WOULD ASK THE COURT TO RECONSIDER THE RULING THAT IT ENTERED ON THE BATSON ISSUE EARLIER AND GRANT US A NEW TRIAL ON THAT BASIS.

YOUR HONOR, THE CASE LAW THAT WE'VE CITED IN THE MEMORANDUM THAT WE'VE FILED INDICATES THAT PREJUDICE OCCURS IN THIS KIND OF SITUATION WHEN WE ARE PRESENTED WITH THE SAME OR SOME OF THE SAME JURORS THAT WERE STRUCK

PREVIOUSLY. THAT HAPPENED IN THIS CASE. IN FACT THE RECORDS WOULD SHOW THAT ONE OF THE, AT LEAST ONE OF THE JURORS WHO SAT ON THE SECOND TRIAL, OR SAT IN THE SECOND PANEL OR PETIT JURY WAS STRUCK BY THE DEFENDANT PREVIOUSLY.

UNDER THE CASE LAW THAT WE CITED IN OUR MEMORANDUM, YOUR HONOR, THAT WOULD CONSTITUTE PREJUDICE THAT WOULD ALLOW US TO CLAIM THE RIGHT TO A NEW TRIAL AND SO WE WOULD ASK THE COURT TO RECONSIDER.

YOUR HONOR I'LL BE HAPPY TO GO AHEAD AND ---

THE COURT: HOW ABOUT LET'S JUST ADDRESS EACH GROUND AS, AS WE GO ALONG SO, MR. RICHARDSON, YOUR RESPONSE?

MR. RICHARDSON: YOUR HONOR, I BELIEVE THE STATE ADEQUATELY REPRESENTS ITS POSITION ON THE STATE'S RESPONSE SPECIFICALLY THAT THIS CASE DENOTES NOW THE STATE V. EASLER WHICH THE DEFENDANT EXERCISED HIS PREEMPTORY STRIKES TO STRIKE BLACK MALE JURORS AND IN THAT THE COURT FOUND THAT WHILE ALLOWING SIMILARLY SITUATED WHITE MALE JURORS TO BE SEATED.

IN THAT, YOUR HONOR, THE COURT OF APPEALS REASON THAT EASLER WAS YET ANOTHER EXAMPLE OF STATE V. OGLESBY STATING THAT, THAT EVEN THOUGH THE DEFENSE GIVES A REASON, A NEUTRAL REASON FOR A PREEMPTORY STRIKE THAT, THAT REASON CAN BE SHOWN TO BE MERE PRETEXT WHEN IT'S NOT APPLIED IN AN EQUAL MANNER AND THAT'S WHAT HAPPENED HERE.

THERE WERE PEOPLE IN THE SAME AGE DEMOGRAPHIC THAT WERE SET THAT WERE BLACK FEMALE, WHITE FEMALE. YOUR HONOR, IT APPEARED TO ALL WHITE OLDER MALES THAT WERE THE ONES STRUCK EVEN BY MR. DIGGS STATEMENT AND THE STATE WOULD, WOULD RELY ON THE COURT'S PRIOR RULINGS IN ADDITION TO THE STATE V. EASLER AND OGLESBY.

THE COURT: ALL RIGHT. ALL RIGHT, I WOULD REAFFIRM THE PREVIOUS RULINGS THAT I MADE DURING THE TRIAL WHEN THIS MATTER ORIGINALLY CAME UP AND WOULD ADD TO THAT THAT I DID FIND THAT THE EXPLANATIONS GIVEN BY THE DEFENSE AS TO THEIR STRIKING OF OLDER WHITE MALES TO BE A MERE PRETEXT.

I DO FIND THAT THE DEFENSE EXERCISED ITS PREEMPTORY STRIKES IN A DISCRIMINATORY MANNER AS TO GENDER, AS TO RACE. THOSE BEING ISSUES THAT ARE CERTAINLY COVERED BY U. S. SUPREME COURT DECISIONS, FEDERAL COURT DECISIONS, AND CERTAINLY STATE COURT DECISIONS AND ALSO THE FACT THAT THE TARGETED GROUP WAS AN OLDER GROUP BUT THEY WERE EVERY OLDER WHITE MALE THAT CAME BEFORE THE DEFENSE WERE STRUCK AND THE REASON GIVEN WAS THAT THEY WERE AN OLD WHITE MALE. THAT'S NOT A PROPER REASON IN THE COURT'S MIND TO STRIKE THESE INDIVIDUALS WHEN FEMALES OF THE SAME AGE AND RACIAL COMPONENT ARE THE SAME AS WELL AS BLACK FEMALES OF THE SAME AGE WERE KEPT ON THE JURY AND WHITE FEMALES OF THE SAME AGE WERE KEPT ON THE JURY. I FIND IT WAS, IT WAS MERE

PRETEXTUAL AND, THEREFORE, I'D REAFFIRM THE RULING.

YOUR NEXT GROUND, SIR?

MR. DIGGS: YOUR HONOR, THE NEXT GROUND THAT WE HAVE IS ADDRESSING THE DEFENDANT'S STATEMENT. WE'RE ASKING THE COURT TO RECONSIDER THE ADMISSION OF THAT STATEMENT INTO EVIDENCE BECAUSE WE SIMPLY WOULD SUBMIT THAT IT SIMPLY CAN'T BE DETERMINED THAT THAT STATEMENT WAS GIVEN VOLUNTARILY.

IT WAS GIVEN AS THE COURT WILL RECALL IN RESPONSE TO A PROFFER AGREEMENT THAT WAS ENTERED INTO BETWEEN THE STATE AND THE DEFENSE.

THERE WERE REPRESENTATIONS IN THAT STATEMENT THAT IN THE, IN THE PROFFER AS TO HOW THAT STATEMENT COULD BE USED, BUT IT WAS UNCLEAR, YOUR HONOR, THAT, AND IT DID NOT SPECIFY DIRECTLY THAT THE STATEMENT WOULD BE USED AS EVIDENCE ITSELF IN THE TRIAL OF THE CASE AGAINST THE DEFENDANT IN THE EVENT THAT THE STATE DETERMINED THAT THE DEFENDANT WASN'T IN FULL COMPLIANCE WITH HIS OBLIGATIONS UNDER THE AGREEMENT.

AND, OF COURSE, YOU'LL RECALL, YOUR HONOR, THE TESTIMONY WAS THAT A POLYGRAPH WAS GIVEN TO MR. WILLS THAT HE DIDN'T PASS IT AND, THEREFORE, THE STATE TOOK THE POSITION THAT MR. WILLS WAS IN VIOLATION OF THE AGREEMENT AND THEY COULD USE THE STATEMENT THAT HE MADE AS A RESULT THEREOF BUT, YOUR HONOR, AGAIN I WOULD, I WOULD ARGUE THAT

THE AGREEMENT THAT IS IN EVIDENCE THAT YOUR HONOR READ IS NOT CLEAR.

IT DOES NOT SAY THE STATE CAN DO WHAT THEY WERE GOING TO DO OR WHAT THEY DECIDED THEY WERE GOING TO DO IN THIS CASE AND WHICH THE COURT PERMITTED THEM TO DO AND THAT IS TO USE THAT EVIDENCE AND USE THAT STATEMENT AS A PIECE OF EVIDENCE.

IN FACT THE ONLY PIECE OF EVIDENCE THAT THEY USED IT INCRIMINATED THE DEFENDANT AND SO WE WOULD ASK THE COURT TO RECONSIDER THE RULING ON THAT ISSUE AND GRANT US A NEW TRIAL AND SAY THAT THE STATEMENT IS NOT A VOLUNTARY BECAUSE IT WAS INDUCED BY PROMISES OF HOPE AND REWARD.

HE WAS TOLD, HE WAS TOLD BY THE SOLICITOR GO AHEAD AND YOU CAN ANSWER THAT BECAUSE YOU DON'T HAVE ANYTHING TO WORRY ABOUT AND, YOUR HONOR, THAT WOULD BE A PROMISE BY THE STATE, WE SUBMIT, AND A HOPE OF REWARD IN ORDER TO INDUCE HIM TO GIVE THAT INTERVIEW AND WE WOULD ASK THE COURT FOR A NEW TRIAL ON THAT GROUND.

THE COURT: ALL RIGHT, SIR. MR. RICHARDSON?

MR. RICHARDSON: THANK YOU, YOUR HONOR, WITH REGARD TO ANY PROFFER I BELIEVE ALL THAT WAS COVERED WELL DURING THE PRETRIAL MOTIONS, YOUR HONOR. I BELIEVE THE DECISION ON THE STATEMENT WAS MADE NOT DEALING SPECIFICALLY WITH THE PROFFER BUT I BELIEVE THE STATEMENT WAS DEEMED TO BE ADMISSIBLE DUE TO THE FACT THE DEFENDANT WAS PROPERLY

MIRANDIZED.

HE HAD MORE PROTECTION THAN MOST DEFENDANTS. NOT ONLY WAS HE PROPERLY MIRANDIZED HE INDICATED THAT HE UNDERSTOOD THAT HE WAS GIVING A STATEMENT AND IT COULD BE USED AGAINST HIM BUT HE HAD HIS LEGAL COUNSEL PRESENT AT THE TIME THAT STATEMENT WAS BEING GIVEN.

IN ADDITION, YOUR HONOR, ONCE THE COURT DETERMINED THAT THE STATEMENT WAS ADMISSIBLE IT BECAME THE JURY'S DUTY TO DETERMINE WHETHER OR NOT THE STATEMENT WAS VOLUNTARILY GIVEN AND IF THEY DETERMINED IN THEIR OWN CAPACITY IT WAS NOT VOLUNTARILY GIVEN THEN THEY HAD A DUTY TO THROW IT OUT.

I INCORPORATED INTO THE STATE'S RESPONSE THE, WHAT I BELIEVE THE CHARGE WAS TO THE JURY. IT WAS A PROPER CHARGE THE STATE BELIEVES AND THE STATE, AND MR. DIGGS EVEN ARGUED, WAS ALLOWED TO ARGUE THE VOLUNTARINESS OF THAT, OF THAT STATEMENT, ARGUED IT TO THE JURY AND THE JURY DECIDED THAT THE STATEMENT WAS VOLUNTARILY GIVEN AND GAVE THAT STATEMENT THE WEIGHT THAT IT DEEMED PROPER, YOUR HONOR, AS SUCH A NEW TRIAL SHOULD NOT BE GRANTED DUE TO THE ADMISSION OF THE DEFENDANT'S STATEMENT.

THE COURT: ALL RIGHT, WHEN THIS MATTER CAME BEFORE THE COURT PREVIOUSLY I FOUND THAT THE DEFENDANT WAS PROPERLY MIRANDIZED OR PROPERLY ADVISED OF ALL OF HIS CONSTITUTIONAL RIGHTS. I FURTHER FOUND THAT THE STATEMENT

BY THE DEFENDANT WAS VOLUNTARY. HE DID HAVE LEGAL COUNSEL PRESENT WHEN HE GAVE THE STATEMENT, THOUGH THAT CERTAINLY IS NOT NECESSARY, BUT HE CERTAINLY HAD THE AVAILABILITY OF LEGAL COUNSEL IF HE HAD ANY QUESTIONS. BUT IT WAS CLEAR THAT HE KNEW HIS RIGHTS, THAT HE VOLUNTARILY WAIVED THOSE RIGHTS AND WILLINGLY GAVE HIS STATEMENT TO THE POLICE AND TO THE STATE OF SOUTH CAROLINA UNDERSTANDING THAT IT COULD BE USED AGAINST HIM IN SUBSEQUENT PROSECUTION OR IT COULD BE USED AGAINST HIM IN A COURT OF LAW AND HE CLEARLY UNDERSTOOD THAT. HE VOLUNTARILY GAVE THE STATEMENT AND I ALLOWED IT INTO EVIDENCE.

I ALSO FIND THAT THE COURT PROPERLY LEFT IT TO THE JURY TO ULTIMATELY DETERMINE IF HE MADE THE STATEMENT, WHETHER OR NOT IT WAS VOLUNTARILY MADE, WHETHER OR NOT HE WAS PROPERLY ADVISED OF HIS CONSTITUTIONAL RIGHTS AND MADE THE STATEMENT ANYWAY. ALL THAT WAS CLEARLY LEFT TO THE JURY AND I SO INSTRUCTED THEM AND BY THEIR VERDICT IN THIS MATTER IT IS CLEAR THAT THE JURY FOUND THOSE ISSUES AS AGAINST THE DEFENDANT, THEREFORE, YOUR MOTION FOR A NEW TRIAL IS DENIED ON THAT GROUND?

ANY OTHER MATTERS?

MR. DIGGS: I'M NOT, YOUR HONOR, I THINK THE COURT UNDERSTANDS OUR ARGUMENT ON THAT ISSUE AND SO I'M NOT GOING TO ARGUE ANY FURTHER TO THE COURT, I UNDERSTAND THE COURT'S RULING.

THE COURT: ALL RIGHT, SIR.

MR. DIGGS: WITH RESPECT TO THE PHOTOGRAPHS, YOUR HONOR, THERE WERE A COUPLE OF PHOTOGRAPHS THAT WERE INTRODUCED INTO EVIDENCE THAT SHOWED THE BODY OF THE VICTIM IN THIS CASE. YOUR HONOR, THE DOCTOR WAS PERMITTED TO USE THOSE PHOTOGRAPHS TO EXPLAIN ENTRANCE, AT LEAST AN ENTRANCE WHERE PRIOR TO THE DEATH OF THE VICTIM IN THIS CASE, YOUR HONOR.

AS YOUR HONOR KNOWS USUALLY AUTOPSY TESTIMONY COMES ACCOMPANIED WITH DIAGRAMS AND DRAWINGS THAT HAVE BEEN PRODUCED BY THE WITNESS IN THE FORM OF THE AUTOPSY EXPLANATION OF THE CAUSE OF DEATH AND SO FORTH. THAT WASN'T DONE IN THIS CASE.

THE STATE ALLOWED THIS WITNESS TO COME IN AND TESTIFY USING ACTUAL PHOTOGRAPHS OF THE BODY, YOUR HONOR, IN THE GUILT PHASE OF THIS TRIAL AND, OF COURSE, THIS WAS NOT A CAPITAL CASE, SO I SAY GUILT PHASE, BUT ALLOWED THE USE OF THOSE PHOTOGRAPHS IN THE TRIAL OF THIS CASE AND, YOUR HONOR, I WOULD SUBMIT THAT IT WAS A CLOSE CASE HERE.

THERE WAS NO EVIDENCE OF MR. WILLS GUILT OTHER THAN SOME ALLEGED PORTIONS OF THE STATE TAKEN OUT OF CONTEXT TO PIECE TOGETHER. THERE WAS NO OTHER EVIDENCE SHOWING ANY CULPABILITY ON MR. WILLS PART.

THESE STATEMENTS, I MEAN THESE PHOTOGRAPHS CARRIED WITH THEM PREJUDICE, YOUR HONOR. WE, EVERYONE KNEW

THAT MR. LEE HAD BEEN SHOT, JULIAN HAD BEEN SHOT IN THIS CASE, THAT HE DIED FROM THAT GUNSHOT WOUND, AND WE WOULD SUBMIT THAT THE PHOTOGRAPHS OF THE BODY OF THE DECEDENT BOTH AT THE LOCATION OF THE SHOOTING ITSELF AND THEN THE AUTOPSY SHOULDN'T HAVE BEEN ADMITTED INTO EVIDENCE AND WE'D ASK FOR A NEW TRIAL ON THAT GROUND.

THE COURT: ALL RIGHT, SIR, THANK YOU. MR. RICHARDSON?

MR. RICHARDSON: THANK YOU, YOUR HONOR, THE STATE WOULD SUBMIT THE PHOTOGRAPHS ASSISTED THE, THE WITNESSES IN PRESENTING THEIR TESTIMONY, YOUR HONOR. IN FACT I BELIEVE IT WAS DR. SCHANDL THAT ACTUALLY STATED THAT THE PHOTOGRAPH, THAT ONE OF THE PHOTOGRAPHS THEY'RE TALKING ABOUT THAT DEPICTED TWO BULLETS WOUNDS TO THE BACK WOULD ASSIST HER IN EXPLAINING TO THE JURY THE, THE ENTRANCE WOUNDS.

YOUR HONOR, THESE, THESE PICTURES WERE NOT PARTICULARLY GRAPHIC. THEY WERE NOT EXTREME CLOSE UP PICTURES. THEY WERE NOT GORY, PARTICULARLY BLOODY, AND THE STATE WOULD, WOULD SUBMIT THAT, OF COURSE IT'S YOUR DETERMINATION AS TO THE ADMISSIBILITY OF THE PHOTOGRAPHS. THESE DID ASSIST THE, THE WITNESSES TESTIFYING EVEN ASSUMING ARGUMENT ANY OF THESE PHOTOGRAPHS WEREN'T NECESSARY, YOUR HONOR, IT WAS HELD IN THE STATE V. ROBINSON THAT, THAT DESCRIPTIVE TESTIMONY OF THE PROSECUTION WITNESS

EVEN WHEN DESCRIPTIVE TESTIMONY OF THE PROSECUTION'S WITNESS ADEQUATELY CONVEYS THE BRUTALITY AND MALICE OF THE CRIME PHOTOGRAPHS ARE NECESSARY. PHOTOGRAPHS MAY BE HARMLESS IN THEIR SURPLUSAGE OR SURPLUS USAGE.

YOUR HONOR, WHILE THAT IS A '42 CASE THESE PICTURES WERE PROPERLY ADMITTED AND THEY, THEY WERE NOT OVERLY PREJUDICIAL AND THE STATE WOULD SUBMIT THAT NO NEW TRIAL SHOULD BE GRANTED ON THAT, THAT ITEM.

THE COURT: ALL RIGHT, SIR. I WOULD RESPECTFULLY DECLINE TO GRANT A NEW TRIAL ON THAT PARTICULAR ISSUE. I REAFFIRM THE RULING I MADE DURING THE TRIAL. I DID NOT FIND THE PHOTOGRAPHS TO BE CERTAINLY OVERLY GRAPHIC, DID NOT REALLY FIND THEM TO BE GRAPHIC AT ALL. THEY WERE NOT GRUESOME. I DO NOT, DID NOT FIND THEM TO BE INFLAMMATORY. I WAS BALANCING THE PREJUDICE TO THE DEFENDANT AND THE PROBATIVE VALUE TO THE EVIDENCE TO, TO THE JURY.

I FOUND IT WAS NECESSARY TO PRESENT PROPER EVIDENCE TO THE JURY AND IN UNDERTAKING THAT, THAT BALANCING TEST AND I PROHIBITED THE USE OF AT LEAST ONE, ONE PHOTOGRAPH, IF NOT MORE, TO MAKE SURE THAT I WAS NOT ALLOWING MULTIPLE PHOTOGRAPHS IN AND ELIMINATING THE, ANY THAT WOULD BE, I CONSIDERED TO BE INFLAMMATORY OR GRUESOME OR, OR GRAPHIC, THEREFORE, YOUR MOTION FOR A NEW TRIAL ON THAT GROUND IS DENIED.

YOUR NEXT GROUNDS, PLEASE, SIR?

MR. DIGGS: YOUR HONOR, THE NEXT ISSUE THAT WE HAVE REVOLVES AROUND THE APPLICATION OF A REASONABLE DOUBT STANDARD TO OUR PRACTICE HERE IN SOUTH CAROLINA OF CRIMINAL PROCEDURE.

WHAT I'M ARGUING HERE, YOUR HONOR, IS THAT THE ANY EVIDENCE STANDARD THAT THE COURT'S TYPICALLY WILL USE, AND I BELIEVE THAT THE COURT USED IN THIS CASE, IN ORDER TO MAKE A DETERMINATION AS TO WHETHER A CASE IS GOING TO BE SUBMITTED TO A JURY IS UNCONSTITUTIONAL. WE GO THROUGH THE ANALYSIS AND THE MEMORANDUM WHY WE MAKE THAT, OR TAKE THAT POSITION.

YOUR HONOR, I MEAN I THINK THE BOTTOM LINE WOULD BE THAT IF, IF THE CASE IS SUBMITTED TO THE JURY UNDER PROPER INSTRUCTIONS OF THE COURT ABOUT THE APPLICATION OF A REASONABLE OUT STANDARD THAT IT WOULD CURE ANY CONSTITUTIONAL ERROR, BUT I WOULD SUBMIT IT'S, THAT'S NOT THE CASE. IT'S MUCH LIKE A DETERMINATION OF THE VOLUNTARINESS OF A CONFESSION, FOR EXAMPLE, TO, IT GOES TO A BASIC AND THE FUNDAMENTAL CONSTITUTIONAL RIGHT. WE DON'T USE CONFESSIONS THAT ARE NOT VOLUNTARY AND WE DON'T USE EVIDENCE THAT'S NOT BEYOND A REASONABLE DOUBT IN TERMS OF THE STANDARD THAT IT, IT MEETS.

WHEN WE MADE THE DIRECTED VERDICT MOTION HERE, YOUR HONOR, FIRST OF ALL I WOULD SUBMIT TO YOU, WE WOULD

SUBMIT THAT THE EVIDENCE WAS VERY THIN IN TERMS OF WHAT MY CLIENT'S FRAME OF MIND WAS ON THAT EVENING WHEN MR. LEE WAS SHOT.

THE STATE ADMITS IN THE CHARGING PAPERS AND THE INDICTMENT IN THIS CASE THAT MR. WILLS WAS NOT THE SHOOTER. IT WAS ANOTHER SHOOTER WHO WAS THERE COMMITTING THIS ACT, AT LEAST THAT IF I RECALL THE PRECISE TERMINOLOGY OF THE INDICTMENT, I BELIEVE THAT'S THE WAY IT READ.

MR. WILLS AT SOME POINT IN THE PAST MIGHT HAVE MADE A STATEMENT THAT SEEMED TO BE SETTING UP A SITUATION WHERE HE WAS FORMING, CONNECTING A SHOOTER WITH SOMEONE WHO WANTED THE INCIDENT OR THE DEED DONE.

THE EVIDENCE FOR THE MOST PART SHOWS THAT MY CLIENT WAS OUT IN THAT NEIGHBORHOOD THAT EVENING FOR A COMPLETELY DIFFERENT PURPOSE. IT HAD NOTHING TO DO WITH THE SHOOTING OF JULIAN LEE AND SO THE EVIDENCE, IF THERE'S ANY EVIDENCE WHATSOEVER, WELL THERE MAY BE BUT IT MIGHT BE UNREASONABLE IN TERMS OF WHAT THE CONCLUSIONS ULTIMATELY ARE THAT ARE SUPPORTED BY THAT ANY EVIDENCE, AND I WOULD SUBMIT THAT YOUR HONOR FOLLOWING THE CASE LAW IN SOUTH CAROLINA UNDERMINES THE FOURTEENTH AMENDMENT AND THE DUE PROCESS REQUIREMENTS OF PROOF BEYOND A REASONABLE DOUBT IN A CRIMINAL CASE WHEN IT ALLOWS A CASE TO GO TO THE JURY UNDER ANY EVIDENCE, UNDER THE ANY EVIDENCE STANDARD AND THE SAME IS VIOLATED AT THIS STAGE OF THE PROCEEDING WHEN THE

COURT REVIEWS THE JURY'S VERDICT TO DETERMINE IF THERE'S ANY EVIDENCE THAT SUPPORTS THE JURY'S VERDICT.

THE COURT: ALL RIGHT, SIR.

MR. DIGGS: I THINK, YOU KNOW, THE DIFFICULTY OF THIS ISSUE, YOUR HONOR, I'VE WRITTEN EIGHT PAGES ON IT, THE SOLICITOR ADDRESS, ADDRESSED IT IN A HALF A PAGE PROBABLY AS THOROUGHLY, HE JUST BOILED IT DOWN MORE SUCCINCTLY THAN I DID, BUT IT, IT IS A FUNDAMENTAL ISSUE, YOUR HONOR, THAT I SUBMIT IT'S A DEFECT IN THE PROCEDURAL NATURE OF OUR LAW IN SOUTH CAROLINA AND IT SHOULD BE REVERSED AND I WOULD ASK FOR THE DISMISSAL OF THE CHARGE ON THAT ERROR, BASED ON THAT ERROR, YOUR HONOR.

THE COURT: ALL RIGHT, SIR, SO YOU'RE INDICATING TO ME AND SO I UNDERSTAND THAT YOU TAKE ISSUE WITH THE REASONABLE DOUBT CHARGE THAT I GAVE TO THE JURY?

MR. DIGGS: NO, NO, YOUR HONOR, I TAKE ISSUE WITH THE STANDARD THAT'S APPLIED IN THE, AT THE DIRECTED VERDICT AND CONCLUSION OF THE, ALL OF THE EVIDENCE STAGE OF THE PROCEEDING THAT IF THERE'S ANY EVIDENCE IT SHOULD BE SUBMITTED TO THE JURY.

THE COURT: ALL RIGHT ---

MR. DIGGS: BUT WHAT I'M SAYING ---

THE COURT: BUT, AND, AND, AND ---

MR. DIGGS: --- IS THE COURT ---

THE COURT: OKAY, I SEND IT TO THE JURY AND THEN

I CHARGE TO THE JURY WHAT HAS BEEN ACCEPTED IN THIS STATE AS A PROPER REASONABLE DOUBT CHARGE SO YOU'RE INDICATING WE SEND IT TO THE JURY FOR THEM TO MAKE A DETERMINATION IF THERE IS SUFFICIENT EVIDENCE BEYOND A REASONABLE DOUBT TO CONVICT THE DEFENDANT OF THE CRIME CHARGED, SO WHEN I CHARGE THE JURY REASONABLE DOUBT YOU ARE ALSO TAKING ISSUE WITH THE REASONABLE DOUBT STANDARD THAT THE COURT GIVES TO THE JURY?

MR. DIGGS: NO, YOUR HONOR, WHAT I'M SAYING IS THERE NEEDS TO BE A COURT DETERMINATION INITIALLY THAT COULD ESTABLISH BEYOND A REASONABLE DOUBT IN THE RECORD BEFORE IT'S ADMITTED TO THE JURY.

THE COURT: SO YOU WANT, YOU WANT, YOU WANT THE TRIAL JUDGE TO DECIDE LOOKING AT THE EVIDENCE THAT THE TRIAL JUDGE BELIEVES THERE IS SUFFICIENT EVIDENCE BEYOND A REASONABLE DOUBT TO CONVICT THE DEFENDANT OF THE CRIME CHARGED BEFORE THE CASE IS SUBMITTED TO THE JURY?

MR. DIGGS: RIGHT.

THE COURT: THAT'S, THAT'S THE STANDARD THAT YOU WANT ADOPTED IN THIS STATE; IS THAT CORRECT?

MR. DIGGS: CORRECT.

THE COURT: ALL RIGHT, SIR. YES, SIR, MR. RICHARDSON?

MR. RICHARDSON: YOUR HONOR, SUCCINCTLY THE CURRENT STANDARD IN THIS STATE IS ANY EVIDENCE IT'S THE

BURDEN OF THE MOVING PARTY TO ESTABLISH THAT MOTION FOR A DIRECTED VERDICT. HERE, YOUR HONOR, I WOULD SUBMIT THAT THE STATE DID PRESENT AMPLE EVIDENCE THAT COULD LEAVE A JURY FIRMLY CONVINCED WHICH IS OUR STANDARD OF THE DEFENDANT'S GUILT.

THE DEFENDANT ADMITTED THAT HE ACCEPTED A CONTRACT TO MURDER JULIAN LEE, FORMED AN AGREEMENT, GOT WITH A ANOTHER MAN ABOUT SHOOTING JULIAN LEE, WENT AND PICKED UP THE SHOOTER, NEXT PICKED UP JULIAN LEE. THEY DROVE OUT TO A REMOTE AREA OF THE COUNTY, JULIAN GOT SHOT, THEN HE DROVE THE, THE SHOOTER BACK. THEY DUMPED THE GUN AND THEN HE WENT AND GOT PAID $10,000, YOUR HONOR. THAT'S MORE THAN SUFFICIENT EVIDENCE TO, TO LEAVE A JURY FIRMLY CONVINCED AS FAR AS REASONABLE DOUBT. THERE WAS SUFFICIENT EVIDENCE TO SUBMIT IT TO THE JURY AND THE STATE WOULD SUBMIT THAT THERE IS NO REASON FOR A NEW TRIAL BASED ON THE REJECTION OF THE DEFENDANT'S MOTION FOR A DIRECTED VERDICT.

MR. DIGGS: YOUR HONOR, COULD I FOLLOW UP VERY BRIEFLY?

THE COURT: YES, SIR.

MR. DIGGS: WHAT COUNSEL HAS DONE, THAT'S A PERFECT EXAMPLE OF WHAT I'M TRYING TO SAY HERE, COUNSEL DISTILLS THAT DOWN AND MAKES IT SOUND LIKE A LOGICAL UNFOLDING OF EVENTS BUT IN REALITY THOSE THINGS OCCURRED OVER SEVERAL MONTHS IN TIME.

WHAT, IN ORDER TO CONVICT SOMEONE OF MURDER YOU'VE GOT TO HAVE A CONVERGENT, A CONVERGENCE OF ALL OF THOSE ELEMENTS INCLUDING CRIMINAL INTENT AND MALICE AT THE SAME TIME OF THE KILLING.

WHILE MR. WILLS MAY HAVE HAD MALICE SIX MONTHS AGO WHEN HE ENGAGED IN A CONVERSATION WITH THE GENTLEMAN WHO ULTIMATELY PAID THE MONEY TO HAVE JULIAN KILLED THERE'S NOT ANY EVIDENCE TO SUGGEST BEYOND A REASONABLE DOUBT THAT HE WAS IN THAT MALICIOUS FRAME OF MIND THAT NIGHT AND EVEN KNEW THAT THE SHOOTING WAS GOING TO TAKE PLACE SO THAT'S, THAT'S WHAT I'M TALKING ABOUT HERE.

THE COURT: ALL RIGHT, BUT, BUT YOU ARE, BUT THE ISSUE THAT YOU'RE PRESENTING TO ME IS YOU WANT THE COURT AT THE DIRECTED VERDICT STAGE TO USE A REASONABLE DOUBT STANDARD ---

MR. DIGGS: EXACTLY.

THE COURT: --- CONCERNING THE EVIDENCE?

MR. DIGGS: YES, SIR.

THE COURT: I MEAN NOT, THE JURY CERTAINLY THE JURY WAS CHARGED ABOUT MALICE AND MALICE AFORETHOUGHT, IT HAS TO BE IN THE MIND AT OR, AT OR AT THE TIME OF THE, THE INCIDENT TAKING PLACE AND CERTAINLY THAT'S IN THE, IN THE MURDER CHARGE TO THEM AND THEY UNDERSTOOD THAT, THAT THE STATE HAS TO PROVE EVERYTHING BEYOND A REASONABLE DOUBT. I SAID IT MORE THAN ONCE BUT WHAT YOU'RE TELLING ME IS, AND

THE BASIS OF YOUR MOTION, SO I UNDERSTAND THE BASIS OF YOUR MOTION IS YOU WANT THE COURT AT THE DIRECTED VERDICT STAGE TO USE A REASONABLE DOUBT STANDARD?

MR. DIGGS: YES, SIR, EXACTLY FOR THE SAME REASON THAT YOUR HONOR HAS TO MAKE AN INDEPENDENT DETERMINATION OF A VOLUNTARINESS OF A CONFESSION BEFORE IT CAN COME INTO EVIDENCE AND THE JURY MIGHT CONSIDER THAT AS EVIDENCE IN THE CASE, WHEN A CASE, WHEN THE STATE SUBMITS A CASE OF MURDER AGAINST THE DEFENDANT TO THE JURY ALL THE EVIDENCE BEYOND A, THAT'S INSUFFICIENT TO MEET THAT REASONABLE DOUBT STANDARD.

WHAT I'M SAYING IS, YOUR HONOR, THAT THE SAFEGUARDS THAT ARE REQUIRED BY THE DUE PROCESS CLAUSE REQUIRES THE COURT INITIALLY TO EXAMINE THAT EVIDENCE AND ENSURE ITSELF THAT THERE'S EVIDENCE THERE BEYOND A REASONABLE DOUBT BEFORE THAT CASE IS SUBMITTED TO THE JURY. OTHERWISE YOU GET INTO A SITUATION WHERE THE JURY IS SAYING, LOOK WE'VE GOT EVIDENCE HERE, THE STATE SAYS IT'S SUFFICIENT, THE JUDGE HAS SAID WE CAN CONSIDER ALL THIS AND COME AWAY WITH A VERDICT OF GUILTY IF WE CHOOSE TO, IT'S, IT'S, IT'S INDISTINGUISHABLE I WOULD SUBMIT, YOUR HONOR, FOR THE SAME ANALYSIS THAT'S APPLIED TO THE FIFTH AMENDMENT WHERE THE STATEMENT IS MADE THAT'S CONSIDERED AGAINST A DEFENDANT IN TERMS OF THE VOLUNTARINESS.

I ARGUE THAT BY ANALOGY BUT WHAT WE'RE SAYING IS

THAT THERE SHOULD BE A DETERMINATION JUDICIALLY MADE WITH RESPECT TO THE STANDARD ELEMENTS THAT'S BEEN PRESENTED IN THE CASE BY THE JUDGE, THAT THE STANDARD SHOULD BE EVALUATED FIRST PRIOR TO ---

THE COURT: THAT THE JUDGE BELIEVES BEYOND A REASONABLE DOUBT ---

MR. DIGGS: BEFORE ---

THE COURT: --- THAT THERE IS ENOUGH EVIDENCE TO CONVICT THE DEFENDANT OF THE CRIME CHARGED?

MR. DIGGS: YES, SIR.

THE COURT: OKAY, AND THAT SHOULD BE IN ANY CRIMINAL CASE HEARD IN THIS STATE?

MR. DIGGS: YES, SIR.

THE COURT: ALL RIGHT, SIR, I MEAN CERTAINLY OBVIOUSLY AND YOU UNDERSTAND THAT YOU'RE ARGUING AGAINST PRECEDENCE IN THIS STATE AS TO THAT PARTICULAR ISSUE, THAT PARTICULAR ISSUE HAVING BEEN DECIDED NUMEROUS TIMES OTHERWISE, BUT THE COURT WOULD FIND THAT THAT IS NOT A REASONABLE POSITION FOR THE COURT TO ENGAGE IN THAT KIND OF FACT FINDING BECAUSE THAT THEN IN ESSENCE ELIMINATES THE WHOLE PURPOSE OF A JURY.

A JURY IS SUPPOSED TO DETERMINE WHETHER OR NOT THE STATE PRODUCES SUFFICIENT EVIDENCE TO FIND A DEFENDANT GUILTY BEYOND A REASONABLE DOUBT. IF YOU HAVE A JUDGE MAKING A DETERMINATION BEFOREHAND THERE'S ENOUGH EVIDENCE

TO CONVICT THIS DEFENDANT BEYOND A REASONABLE DOUBT OF THE EVIDENCE WHY HAVE A JURY.

MR. DIGGS: RIGHT, THAT, WITH ALL DUE RESPECT THAT'S NOT EXACTLY WHAT I'M SAYING.

THE COURT: THEN WHAT IS, WHAT IS IT THAT YOU WANT ME TO DO?

MR. DIGGS: IT'S MORE OF A NATURE OF A PRIMA FACIA CASE HERE. I'M NOT ASKING THE COURT TO ENGAGE IN FACT FINDING. I'M ASKING THE COURT TO MAKE A DETERMINATION CAN THIS EVIDENCE ESTABLISH GUILT BEYOND A REASONABLE DOUBT AND, AND THE TRIAL JUDGE BE FIRMLY CONVINCED IN HIS OR HER MIND THAT THE EVIDENCE CAN DO THAT AND THEN SUBMIT THAT TO THE JURY FOR FACTUAL DETERMINATIONS.

NOW IN OUR CASE THE ONLY EVIDENCE WE HAD WAS THE STATEMENT BY THE DEFENDANT HIMSELF WHEREIN HE TALKS ABOUT EVENTS THAT COVERED, THAT SPANNED SEVERAL MONTHS TIME, PERIOD OF TIME. I WOULD SUBMIT THAT, THAT THE JURY IS NOT AS SOPHISTICATED AS THE JUDGE AND THAT YOUR HONOR WOULD HAVE A DIFFICULT TIME IN SITTING DOWN AND DECIDING WHETHER OR NOT, LET'S ASSUME THIS CONVERSATION TOOK PLACE AS MR. WILLS RELAYED SEVERAL MONTHS AGO, WHETHER OR NOT HE WAS AWARE OF IT AND WHETHER IT WAS EVEN IN HIS MIND THAT NIGHT WHEN MR. LEE WAS SHOT.

HE MIGHT -- WHAT I'M SAYING IS, YOUR HONOR, YOU CAN'T MAKE THAT DETERMINATION BASED ON THE STATE OF THE

RECORD EVIDENCE IN THIS CASE AND SO THE EVIDENCE SHOULDN'T HAVE BEEN SUBMITTED TO THE JURY. EVEN THOUGH THERE WAS SOME EVIDENCE IT WAS, IT WAS INSUFFICIENT EVIDENCE AND IT SHOULDN'T HAVE BEEN SUBMITTED TO THE JURY.

THE COURT: ALL RIGHT, AS I UNDERSTAND YOUR ARGUMENT THE COURT MADE A DETERMINATION THAT THERE WAS SUFFICIENT EVIDENCE TO, FOR THE CASE TO BE SUBMITTED TO THE JURY FOR THE JURY'S DETERMINATION AS TO WHETHER OR NOT THE DEFENDANT WAS GUILTY BEYOND A REASONABLE DOUBT OF THE CRIME CHARGED, WHETHER THERE WAS ENOUGH EVIDENCE PRODUCED BY THE STATE IN ACCORDANCE WITH THE CHARGE OF THE LAW THAT THE COURT GAVE TO THEM TO CONVICT THE DEFENDANT BEYOND A REASONABLE DOUBT.

WHAT YOU'RE ASKING ME TO DO IS TO HAVE A INCREASED STANDARD OF REVIEW OF THE EVIDENCE PRESENTED DURING THE STATE FOR THE JUDGE TO MAKE A DETERMINATION OF THE STATE'S CASE THAT THE JUDGE BELIEVES THERE IS SUFFICIENT EVIDENCE TO CONVICT THE DEFENDANT BEYOND A REASONABLE DOUBT OF THE CRIME CHARGED BEFORE I WOULD SUBMIT THE CASE TO THE JURY.

MR. DIGGS: RIGHT.

THE COURT: I FIND THAT THAT IS NOT THE STANDARD AS SET FORTH BY THE SOUTH CAROLINA SUPREME COURT IN THIS CASE AND I WOULD RESPECTFULLY ON MY OWN DECLINE TO HAVE THAT AS THE STANDARD.

I WOULD SAY THAT INVADES THE CONSTITUTIONAL PREROGATIVE OF THE JURY TO BE THE ULTIMATE DETERMINER OF THE FACTS WHEN THE COURT DETERMINES THERE IS PROPER EVIDENCE THAT HAS BEEN SUBMITTED FOR THE JURY'S DETERMINATION, THEREFORE, I RESPECTFULLY DECLINE TO, TO GRANT YOUR MOTION FOR A NEW TRIAL ON THOSE ARGUMENTS.

YOUR OTHER, OTHER ARGUMENTS THAT YOU HAVE?

MR. DIGGS: YOUR HONOR, DURING THE SOLICITOR'S CLOSING ARGUMENT HE REFERRED TO MR. WILLS AS A PAID ASSASSIN. I'M TRYING TO SEE IF I'VE QUOTED HIS EXACT -- I DON'T HAVE A TRANSCRIPT YET. YOUR HONOR, WE, THIS IS THE ARGUMENT THAT WE MADE AT THE TRIAL ITSELF DURING THE CLOSING ARGUMENT OF THE PROSECUTOR.

THERE WAS A REFERENCE MADE TO MR. WILLS THAT INDICATING THAT HE WAS A PAID ASSASSIN IN THIS CASE AND WE OBJECTED ON THE GROUNDS THAT THAT WAS OUTSIDE OF THE RECORD EVIDENCE.

YOUR HONOR, WHAT WE WOULD SUBMIT AT THIS TIME IS THAT'S A PREJUDICIAL ARGUMENT. IT WAS NOT WHAT WAS SUPPORTED BY THE EVIDENCE AND DEPRIVED THE DEFENDANT OF A FAIR TRIAL AND SO WE WOULD ASK THE COURT TO GRANT A NEW TRIAL ON THE BASIS OF THAT ARGUMENT THAT WAS MADE BY THE SOLICITOR DURING CLOSING AT THE TIME OF THE CASE AND, YOUR HONOR, AS YOU CAN SEE IN THE MEMORANDUM WE SET OUT THE APPLICABLE CASE LAW THAT APPLIES TO ARGUMENT BY THE

SOLICITOR IN CLOSING OF THE CRIMINAL CASE.

THE COURT: RIGHT, REGARDING IMPERMISSIBLE ARGUMENTS BY THE STATE IN THE CLOSING, OKAY.

MR. DIGGS: WE WOULD ASK FOR A NEW TRIAL BASED ON THAT REFERENCE TO THE DEFENDANT.

THE COURT: ALL RIGHT, SIR. ALL RIGHT, SOLICITOR, WHAT ABOUT THAT?

MR. RICHARDSON: YOUR HONOR, WHEN SOMEBODY ACCEPTS $10,000 TO KILL ANOTHER HUMAN BEING I'D SUBMIT THAT CONTRACT ASSASSIN IS A PROPER TERM AS WOULD BE HIT MAN, BUTTON MAN, CONTRACT HITTER, OR LIKE I SAID CONTRACT ASSASSIN.

YOUR HONOR, IT IS, IT IS THE LAW IN THIS STATE THAT THE SOLICITOR HAS THE RIGHT TO STATE HIS VERSION OF THE TESTIMONY AND COMMENT ON THE WEIGHT OF SUCH GIVEN TESTIMONY.

I BELIEVE FROM THE STATEMENTS OF THE DEFENDANT HERE THAT HE, HE INDICATED HE ACCEPTED A SUM OF $10,000, WHICH HE SPLIT, TO CAUSE THE DEATH OF JULIAN LEE AND, YES, I ~~TERMED HIM AS A~~ CONTRACT ASSASSIN.

ASSUMING ARGUE INNUENDO THAT IT WAS INFLAMMATORY A NEW TRIAL IS NOT THE PROPER SOLUTION, YOUR HONOR, SO I MANDATE IN THIS INSTANCE THE RELEVANT QUESTION IS WHETHER OR NOT THE COMMENT SO INFECTED THE TRIAL WITH UNFAIRNESS AS TO MAKE THE RESULTING CONVICTION A DENIAL OF DUE PROCESS

AND IT COMES FROM RANDALL V. STATE 356 S.E. 639 2004 CASE, YOUR HONOR, AND THEY CITED HUMPHRIES V. STATE.

YOUR HONOR, DURING THE COURSE OF A 10 TO 12 MINUTE CLOSING I CITED ONE TIME, I SAID, CONTRACT ASSASSIN. YOUR HONOR, THAT'S HARDLY INFLAMMATORY OR PREJUDICIAL ENOUGH TO WARRANT A NEW TRIAL ---

THE COURT: ALL RIGHT, SIR.

MR. RICHARDSON: --- AND THE STATE WOULD SUBMIT NO NEW TRIAL WAS MANDATED DUE TO THAT ONE COMMENT.

THE COURT: ALL RIGHT, SIR. ALL RIGHT, YES, SIR, MR. DIGGS, YES, SIR?

MR. DIGGS: YOUR HONOR, JUST FOR CLARITY SAKE I WOULD SUBMIT THAT THE EVIDENCE SHOWS THAT WHEN MY CLIENT ACCEPTED ANY MONEY IT WAS AFTER THE FACT AND IT WAS TO KEEP HIM QUIET. THAT, THAT IS A DIFFERENT, AND IT WAS IN CONJUNCTION WITH BEING AFRAID AS WELL THAT HE HIMSELF MIGHT BE KILLED BY THESE PEOPLE, THAT WOULD BE A FAR CRY FROM BEING A PAID ASSASSIN AND I WOULD SUBMIT THAT'S WHAT REALLY THE EVIDENCE SHOWS. FROM OUR PERSPECTIVE IT SUPPORTS THAT HE WAS PAID TO BE QUIET AND HE DID SO BECAUSE HE WAS SCARED. THERE WAS NO EVIDENCE TO SUGGEST HE GOT PAID IN ADVANCE AND WAS PAID FOR THE KILLING.

THE COURT: ALL RIGHT, I, FIRST IT WOULD BE THE COURT'S DETERMINATION THAT MY ROLE HERE IS TO DETERMINE WHETHER OR NOT THE STATEMENT MADE BY THE SOLICITOR WAS SO

IMPROPER, SO UNFAIR AS TO PREJUDICE THE DEFENDANT TO AN EXTENT THAT HE RECEIVED A UNFAIR TRIAL, THAT HE DID NOT RECEIVE A FAIR TRIAL, AND THERE WAS A DENIAL OF DUE PROCESS TO HIM.

IN REGARDS TO THAT I WOULD FIND THAT THE SOLICITOR'S COMMENT WAS A COMMENT ON THE FACTS AS PRESENTED IN THIS PARTICULAR CASE. IT WAS A ACCEPTABLE AND PROPER COMMENT OF THE STATE'S VIEW OF THIS PARTICULAR FACT PATTERN.

I DO NOT FIND IT TO BE A INFLAMMATORY COMMENT. I DO NOT FIND IT TO BE A PREJUDICIAL OR UNFAIR COMMENT.

IF SUCH HAD OCCURRED IN OR HAS OCCURRED IN THIS PARTICULAR MATTER IT CERTAINLY DOES NOT RISE TO THE STANDARD WHERE THE DEFENDANT'S DUE PROCESS RIGHTS WERE VIOLATED OR THAT HE RECEIVED AN UNFAIR OR HE DID NOT RECEIVE A FAIR TRIAL IN THIS PARTICULAR MATTER, THEREFORE, I WOULD RESPECTFULLY DECLINE TO GRANT YOUR MOTION FOR A NEW TRIAL BASED UPON ALLEGED IMPROPER REMARKS BY THE STATE IN THIS PARTICULAR MATTER.

ANY OTHER ARGUMENTS THAT THE DEFENSE WOULD HAVE IN THIS MATTER, MR. DIGGS?

MR. DIGGS: NOT AT THIS TIME, YOUR HONOR.

THE COURT: ALL RIGHT, SIR. ALL RIGHT, IS THE STATE PREPARED FOR SENTENCING IN THIS MATTER?

MR. RICHARDSON: THE STATE IS PREPARED, YOUR

HONOR.

THE COURT: ALL RIGHT, DEFENSE?

MR. DIGGS: YES, SIR.

THE COURT: ALL RIGHT, SIR.

MR. DIGGS: STAND HERE?

THE COURT: YES, SIR, PLEASE.

ALL RIGHT, SOLICITOR, I'LL BE GLAD TO HEAR ANY COMMENTS THAT YOU'D LIKE TO MAKE IN THIS PARTICULAR MATTER.

MR. RICHARDSON: YOUR HONOR, I DO HAVE THE MOTHER DEBRA LEE. SHE DOES WISH TO ADDRESS THE COURT.

THE COURT: ALL RIGHT, SIR. MA'AM, IF YOU WOULD STATE YOUR NAME AND I'LL BE GLAD TO HEAR FROM YOU.

FAMILY MEMBER: MY NAME IS DEBRA LEE.

THE COURT: YES, MA'AM.

FAMILY MEMBER: I THINK THAT DAVID SHOULD GET THE MAXIMUM SO HE WON'T BE ABLE TO DO THIS TO ANYBODY ELSE.

THE COURT: ALL RIGHT, THANK YOU VERY MUCH, MA'AM. YES, SOLICITOR?

MR. RICHARDSON: YOUR HONOR, BACK THE FIRST OF OCTOBER THE JURY FOUND THAT THEODORE DAVID WILLS, JR. DID IN FACT TAKE, TAKE IN TO THIS MURDER. IT WAS A CONTRACT HIT, YOUR HONOR. THERE WAS MONEY PAID. FOR THE PALTRY SUM OF $10,000 BY THE DEFENDANT'S OWN ADMISSION HE AGREED TO MURDER JULIAN LEE, A YOUNG MAN, A YOUNG FATHER, THAT HE HAD PREVIOUSLY CALLED A FRIEND.

TWELVE GOOD MEN AND WOMEN SPOKE AND THIS IS WHAT THEY FOUND. THEY FOUND THAT HE ACCEPTED A CONTRACT TO KILL JULIAN LEE AND FORMED AN AGREEMENT WITH ANOTHER MAN TO ACTUALLY SHOOT JULIAN LEE. HE PICKED UP THAT SHOOTER. HE PICKED UP JULIAN LEE UNDER THE PRETENSE OF COMMITTING ARMED ROBBERY, DROVE TO A REMOTE LOCATION IN LONGS AREA OF THIS COUNTY, STOOD BACK AS JULIAN WAS SHOT IN THE BACK TWICE, DROVE THE SHOOTER AWAY, DISPOSED OF THE FIREARM, GOT PAID $10,000 FOR THE MURDER AND SPLIT THAT WITH THE SHOOTER, YOUR HONOR.

HE COMPLETED HIS CONTRACT. HE EARNED HIS $10,000 FROM THE CRIMINALS THAT HIRED HIM. YOUR HONOR, THAT'S WRONG.

THE STATE COMES BEFORE YOU TODAY WANTING TO ENSURE THE DEFENDANT RECEIVES WHAT HE HAS TRULY EARNED, YOUR HONOR, FOR THE COLD BLOODED MURDER FOR HIRE TO JULIAN LEE, THE STATE WOULD SUBMIT THAT DAVID WILLS DESERVES A SENTENCE OF LIFE IN PRISON, THANK YOU.

THE COURT: ALL RIGHT, SIR, THANK YOU. ALL RIGHT, MR. DIGGS, I'LL BE GLAD TO HEAR FROM YOU, SIR?

MR. DIGGS: YOUR HONOR, IT'S DIFFICULT TO KNOW THAT THE JURY FOUND ALL OF THE FACTS THAT THE SOLICITOR JUST OFFERED. FOR EXAMPLE, THE JURY COULD HAVE FOUND THE ELEMENTS OF MURDER HAD BEEN ESTABLISHED IN THE CASE BUT THERE WAS NO REQUIREMENT THAT THE JURY FIND THAT MR. WILLS

PARTICIPATED IN THIS EVENT WITH AFOREKNOWLEDGE WITH MALICE AFORETHOUGHT KNOWING HE WAS GOING TO BE PAID MONEY BECAUSE OF JULIAN LEE'S DEATH. THERE'S JUST NOT EVIDENCE IN THE RECORD TO SUPPORT THAT.

THERE'S NOT ANY SPECIAL INTERROGATORIES OR ANYTHING OF THAT NATURE TO THE JURY TO SUPPORT THAT FINDING BEYOND A REASONABLE DOUBT AND I WOULD ASK THE COURT TO CONSIDER, AND I WOULD URGE THE COURT TO REJECT THE SOLICITOR'S ARGUMENT IN THAT REGARD AND THAT IT WOULD BE IMPROPER FOR THIS COURT TO BASE ANY SENTENCE OF MR. WILLS BASED ON THE SOLICITOR'S ARGUMENT WHICH IS NOT BASED ON A JURY FINDING OF FACT.

NOW IN THIS CASE THEY DID FIND MR. WILLS GUILTY OF MURDER. THEY FOUND, THE JURY FOUND THAT MR. LEE HAD BEEN MURDERED AND THAT APPARENTLY MR. WILLS HAD PLAYED SOME PART IN BRINGING TOGETHER THE VICTIM AND THE MURDERER IN THIS CASE BUT, YOUR HONOR, I WOULD ASK YOU TO LIMIT THE SENTENCE THAT YOU IMPOSE IN THIS CASE TO THOSE FACTS AND NOT ANY OF THE AGGRAVATING MATTERS THAT THE SOLICITOR ARGUED TO YOU.

DAVID WILLS IS A YOUNG MAN, YOUR HONOR, I THINK HE'S 30 YEARS OLD TODAY. THIS SHOOTING OCCURRED, IF I'M NOT MISTAKEN, SEVEN YEARS AGO, ROUGHLY, HE WOULD HAVE BEEN ABOUT 23 YEARS OLD, YOUR HONOR. HE'S A YOUNG MAN THAT IS, YOUR HONOR, HE'S NOT HAD MANY ADVANTAGES IN HIS LIFE. A

23-YEAR OLD MAN, AND I'M ASKING YOUR HONOR TO GIVE HIM, TO, TO LOOK AT WHO MR. WILLS WAS AT HIS AGE OF 23 FROM RURAL SOUTH CAROLINA, POOR COMMUNITY.

HE'S BEEN, HE WASN'T ABLE TO MEET BOND IN THIS CASE, YOUR HONOR, SIMPLY BECAUSE HE DIDN'T HAVE THE MONEY. HIS FAMILY DIDN'T HAVE THE MONEY, THE MONEY TO EVEN BOND HIM OUT.

YOUR HONOR, I WOULD ASK YOU TO LOOK AT THIS YOUNG MAN AND SEE A YOUNG HUMAN BEING THAT IN SPITE OF BEING INVOLVED IN ONE OF THE WORST OFFENSES THAT CAN BE COMMITTED IN OUR SOCIETY OF MURDER, THE MURDER OF ANOTHER HUMAN BEING.

I UNDERSTAND THAT THE LEGISLATURE SET A PENALTY, A MINIMUM PENALTY, IN THIS STATE OF 30 YEARS AND THAT IN SOME CASES THAT WOULD BE APPROPRIATE, THAT IS AN APPROPRIATE SENTENCE FOR THE CRIME OF MURDER. YOUR HONOR, I WOULD ASK YOU FOR MERCY IN THIS CASE ON THIS YOUNG MAN WHO IS, WHO IS A 23 YEAR OLD MAN WHO HAS NOT HAD THE BEST OF LUCK OR FORTUNE IN HIS LIFE AND HIS LIVED IN A SET OF CIRCUMSTANCES THAT BROUGHT HIM TO BE HERE.

YOUR HONOR, I WOULD ASK, IT'S APPARENT TO ME, YOUR HONOR, I'M NOT A WITNESS IN THE CASE, I UNDERSTAND THAT, BUT I'VE KNOWN DAVID FOR SEVEN YEARS AND, YOUR HONOR, I WISH HE, I WISH YOU COULD KNOW THE MATURITY THAT HE'S GONE THROUGH IN THE PAST SEVEN YEARS FROM WHO HE WAS AT

THAT POINT TO WHO HE IS NOW AS A 30-YEAR OLD YOUNG MAN ADULT MALE.

YOUR HONOR, I'M ASKING YOUR HONOR TO CONSIDER DAVID, HIS YOUTH AT THAT TIME, THE FACT THAT HE HAS NOT, JUST HIS BACKGROUND, YOUR HONOR, AND THE LIMITATIONS THAT HE'S HAD ON HIM, THE LACK OF OPPORTUNITIES THAT HE'S HAD, AND HAVE MERCY ON HIM, YOUR HONOR, AT THIS POINT AND GIVE HIM A MINIMUM SENTENCE THAT'S GOING TO GUARANTEE HE WILL DO 30 YEARS OF IMPRISONMENT IN SOUTH CAROLINA BEFORE HE'S ELIGIBLE FOR ANY KIND OF RELEASE.

YOUR HONOR, THANK YOU VERY MUCH FOR HAVING LISTENED TO US AND GIVING US THE TIME AND WE APPRECIATE YOUR TIME, YOUR HONOR.

THE COURT: YES, SIR, MR. DIGGS. DID, DID YOUR CLIENT WISH TO ADDRESS THE COURT IN ANY FASHION?

MR. DIGGS: YOUR HONOR, HE DOESN'T. I DON'T WANT THE COURT TO READ INTO THAT HE DOESN'T, THAT HE DOESN'T HAVE ANY REMORSE. JULIAN WAS A FRIEND OF HIS. HE DID CARE FOR JULIAN AND, YOUR HONOR, HE DOES HAVE REMORSE AND I WANT THE COURT TO KNOW THAT.

THE COURT: ALL RIGHT, SIR, I UNDERSTAND THAT AND I APPRECIATE THAT AND I, I WOULD UNDERSTAND THAT BASED ON LEGAL ADVICE THAT HE MAY NOT WISH TO MAKE ANY COMMENTS TO THE COURT AT THIS TIME.

MR. DIGGS: THANK YOU.

THE COURT: YES, SIR. ALL RIGHT, 2006-GS-26-1652 THE STATE OF SOUTH CAROLINA COUNTY OF HORRY V. THEODORE DAVID WILLS, JR. REGARDING THE OFFENSE OF MURDER THE SENTENCE OF THE COURT IS DEFENDANT IS COMMITTED TO THE STATE DEPARTMENT OF CORRECTIONS FOR A DETERMINATE TERM OF 40 YEARS. THE DEFENDANT IS GIVEN CREDIT FOR THE TIME THAT HE HAS ALREADY SERVED, THANK YOU VERY MUCH.

MR. RICHARDSON: THANK YOU, YOUR HONOR.

END OF REQUESTED TRANSCRIPT - - - -

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**FORM 5**

STATE OF SOUTH CAROLINA )
)
COUNTY OF Horry )
)
Theodore David Wills Jr. #239761 )
Full name and prison number (if any) of Applicant. )
)
v. )
)
State of South Carolina )
)

IN THE COURT OF COMMON PLEAS

20 14 CP26 7915

**APPLICATION FOR POST-CONVICTION RELIEF**

14 DEC PM 3:16

## INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Liber Correctional Institution
2. Name and location of Court which imposed sentence General Sessions Court Horry County
3. Name(s) of co-defendant(s) (if any) Mark Willard
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
   (a) 06-GS-1652 (Murder)
   (b) _____
   (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
   (a) October 29, 2007; sentenced to 40 years
   (b) _____

Revised 3/2003

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty ✓✓✓

(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?

Yes

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. South Carolina Court of Appeals

ii. The Supreme Court of South Carolina

iii. _____

(b) the result in each such Court to which you appealed:

i. South Carolina Court of Appeals - [redacted] Affirmed Sep 22th 2010

ii. South Carolina Suprem Court -

iii. _____

(c) the date of each such result:

i. September, 22th 2010

ii. August 25, 2014

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. ~~Beba~~ Writ of Certiorari, Rehearing

ii. _____

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) _____

(b) _____

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) See attached Memorandum of Law

(b) _____

(c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) See attached Memorandum of Law

(b) _____

(c) _____

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? Yes

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO / This is my first

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No

(d) any other petitions, motions or applications in this or any other Court? yes

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. Rehearing, Writ of certiorari

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. S.C court of appeals

ii. S.C Suprem Court

iii. _____

iv. _____

(c) the disposition thereof:

i. ~~Remanded~~ Affirmed

ii. Rehearing ~~Denied~~ Denied

iii. _____

iv. _____

(d) the date of each such disposition:

i. Rehearing Denied Aug 22, 2014

ii. September 10, 2010

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. Order for Rehearing, Order for Writ of certiorari

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) The ineffective assistance of counsel is exclusively PCR grounds

(b) The Jurisdictional claim can be raised at any time

(c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? _____ 339

(b) your trial, if any? Yes

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. William I. Diggs, 1700 oak street, suite D Myrtle

ii. Beach S.C 29577

iii. Joseph Savitz P.O Box 11589, Columbia S.C 29211 Lanelle Canty Dupont

(b) the proceedings at which each such attorney represented you:

i. Joseph Savitz P.O Box 11589, Columbia S.C 29211

ii. Lanelle Canty Dupont - Appeal

iii. William I. Diggs - Trial

19. State clearly the relief you seek in filing this application:

That my conviction be reversed for a new trial

20. Are you now under sentence from any other court that you have not challenged?

No

STATE OF SOUTH CAROLINA )
)
County of )

VERIFICATION

20 14 CP26 7915

I, , being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Theodore Earl Wills Jr.

SWORN to and subscribed before me this 24th day of November, 2014.

Lindream Bryant (L.S.)
*Notary Public*

My Commission Expires: May 26, 2020

14 DEC -1 PM 3:16
CLERK OF COURT

Revised 3/2003

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF 20 14 CP26 7915

I, , hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

(1) I am the applicant in this action and I believe I am entitled to redress.

(2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Theodore Earl Wills Jr.
*Applicant*

SWORN or affirmed to and subscribed before me this 24th day of November, 2014.

Ludrecan Bryant
*Notary Public*

My Commission Expires: May 26, 2020

RICHLAND COUNTY
14 DEC -1 PM 3:16
RELEASE HEREIN IS HARD
CLERK OF COURT



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| | |
|---|---|
| STATE OF SOUTH CAROLINA ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF HORRY ) | Case No. 20 14 CP26 7915 |
| Theodore David Wills, Jr., SCDC No. 239761, ) | |
| Applicant, ) | MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR POST-CONVICTION RELIEF |
| v. ) | |
| The State, ) | |
| Respondent. ) | |

HORRY COUNTY
14 DEC -1 PM 3:16
CLERK OF COURT

The applicant, above-named, presents the Memorandum of Law in Support of Application for Post-Conviction Relief (PCR) and would show the following unto the Court.

## STATEMENT OF THE CASE

The applicant was indicted by the Horry County Grand Jury for murder (06-GS-26-1652) during the April 2006 term of General Sessions Court. He went to trial on October 1-3, 2007, before the Honorable Steven H. John, presiding Judge, and jury. He was represented by William I. Diggs, Esquire. The State was represented by Bradley C. Richardson, Horry County Solicitor. The jury found him guilty of murder, and Judge John sentenced him to 40 years in prison.

Following applicant's conviction, he filed a Motion for New Trial on October 12, 2007. On 10-18-07, Judge John Denied the Motion. Applicant filed a timely appeal from the conviction and Denial of the Motion.

On appeal, the applicant was represented by Joseph L. Savits of the SC Office of Indigent Defense. On 9-22-10, the South Carolina Court of Appeals Affirmed the appeal in Opinion No. 4742. The Remittitur was issued on 10-28-10.

## ARGUMENT

10(a)-11(a) The applicant was denied the right to effective assistance of trial counsel by counsel's failure to object to the trial judge's conclusive presumption jury charge on inferred malice.

To prove ineffective assistance of counsel, applicant must show that counsel's performance fell below an objective standard of reasonableness and that, but for counsel's errors, there is a reasonable probability the result at trial would have

been different; a reasonable probability is one sufficient to undermine confidence in the outcome of trial. Dawson v. State, 572 S.E.2d 445 (S.C. 2002).

Accordingly, during the jury charge on "inferred malice", the judge charged the jury as follows (Tr.p. 284-285):

> Court: Regarding inferred malice that is shown from a total disregard for human life.
> Inferred malice can also arise when the deed is done with a deadly weapon.
> A deadly weapon is an article, instrument, or substance which is likely to cause death or great bodily harm.
> Whether or not an instrument has been used as a deadly weapon depends upon the facts and circumstances of each case.

In reviewing this charge, the applicant contends that, in the absence of any additional instruction that "the use of a deadly weapon is simply an evidentiary fact to be taken into consideration with all other evidence in the case" this charge could have led the jury to conclude that "inferred malice" could be found solely upon the evidence of an accused use of a deadly weapon to commit a homocide. See, e.g., State v. Franklin, 425 S.E.2d 758 (S.C.App. 1992); Carter v. State, 392 S.E.2d 184 (S.C. 1990); Yates v. Evatt, 111 S.Ct. 1884,1892 (1991)(holding that a mandatory presumption instructs jury that it must infer the elemental fact if the prosecution proves certain predicate facts beyond a reasonable doubt).

The applicant further contends that the substance of the trial judge's charge denied him the right to due process by erroneously creating a "conclusive", rather than a "permissive", presumption that lessened the prosecution's burden of proof as to the element of malice. Malice instruction allowing jury to presume malice from defendant's intentional acts and from use of a deadly weapon lowered state's burden of proving the element of malice beyond a reasonable doubt, and impermissibly shifted burden to defendant to rebut presumption. Gibson v. State, 586 S.E.2d 119 (S.C. 2003). Instructions which create burden-shifting or "conclusive presumption are unconstitutional. State v. Andrews, 479 S.E.2d 808 (S.C.App. 1996).

Finally, as the judge's charge essentially created a conclusive presumption of inferred malice, trial counsel's failure to object to this charge was ineffective assistance of counsel that deprived applicant of the right to a fair trial. Dawson, Supra; See also Strickland v. Washington, 104 S.Ct. 2052,466 U.S. 668 (1984).

10(b)-11(b) The applicant was denied the right to effective assistance of trial counsel by counsel's failure to properly advise him against agreeing to provide the prosecution with a proffered statement which could be used against him pending the results of a polygraph examination.

To show prejudice, as required to prevail on ineffective assistance of counsel claim, a defendant must show that, but for counsel's errors, there is a reasonable probability the results of the trial would have been different. Stevenson v. State, 516 S.E.2d 434 (S.C. 1999).

The applicant contends that upon advice of his counsel he entered into a proffered agreement with the prosecution to provide a proffered statement and subject himself to a polygraph examination regarding his statement. Tr.p. 42. The terms of the agreement were as follows (Tr.p. 43-44):

> Upon examination by polygraph, if the responses given by Theodore David Wills, Jr., shows deception or indicates he...is the person or one of the persons that shot the victim, the terms of the profferare null and void and any statement made by Theodore David Wills, Jr., may be used against him by the State for any legal purpose including but not limited to consideration for charging, bond, disposition of the charge through plea or trial of Theodore David Wills and impeachment.

By contrast, prior to the proffered agreement and statement, the applicant was not charged with murder, but rather was charged with "obstruction of justice" and "accessary after the fact of murder". Tr.p. 108-109. Consequently, upon completion of the polygraph examination by the State's Examiner, SLED Intern Julie Duff, it was determined that applicant was beeing deceptive and, as a direct consequence, he was charged with murder.

The applicant therefore submits that counsel rendered him ineffective assistance that prejudiced his defense as there is a "reasonable probability that his conviction of the pre-existing "obstruction of justice" and "accessary after the fact of murder" would have been a different result from his conviction for murder had counsel advised against the polygraph examination leading to his murder charge and conviction. Stevenson, Supra, Strickland, Supra.

10(c)-11(c) The applicant was denied the right to effective assistance of trial counsel's failure to object to hearsay testimony.

In order to prove ineffective assistance of counsel, defendant must show that his counsel's performance was deficient and that deficient performance prejudiced his defense so as to deprive him of a fair trial. Cobbs v. State, 408 S.E.2d 223 (S.C. 1991).

In this case, the applicant gave a proffered statement regarding his involvement in a murder and agreed to submit to a polygraph examination concerning his statement. Tr.p. 42. During an in camera hearing, the prosecution offered testimony by SLED Expert Polygraph Examiner, Special Agent Ricky W. Charles. Tr.p. 57. Agent Charles testified that his SLED Intern Julie Duff, who would not appear at trial, conducted applicant's polygraph examination. He further testified about Agent Duff's polygraph results. Tr.p. 60-62. He also testified that he, Agent Duff, and Lt. Denis Coggins, Chief of SLED Polygraph Program, all conducted what is called a "blind analysis" of the polygraph given to applicant, and they had concluded that applicnat had been deceptive in his responses about his involvement in the murder. Tr.p. 66-74; p. 102-104.

As Agent Charles's testimony was intended as "nonverbal conduct" of Agent Duff and Lt. Coggins to assert the administering and authenticity of the polygraph examination, it was impermissible hearsay that violated applicant's Sixth Amendment right to confrontation. See State v. Townson, 467 S.E.2d 138 (S.C.App 1996)(Gestures such as pointing finger, may be hearsay if gestures were intended as communication); S.C. Rule of Evi., Rule 801(a); State v. Sierra, 523 S.E.2d 187 (S.C. App. 1999)(the right to cross-examine a prosecution witness is of constitutional dimention, being essential to a fair trial as guarnateed by the Sixth Amendment and the Fourteenth Amendment Due Process Clause.

The applicant thus contends that counsel's failure to object and specifically argue the hearsay and confrontation issues rendered counsel's performance deficient as to prejudice his right to a fair trial. Cobb, Supra; Strickland, Supra.

10(d)-11(d) The applicant was denied the right to effective assistance of trial counsel by counsel's failure to object to vedio showing applicant dressed in prison clothes.

To prove ineffective assistance of counsel, PCR applicnat must show (1) deficient performance by his counsel and (2) prejudice resulting therefrom.

The applicnat submits that, without objection from counsel, the judge allowed the prosecution to introduce a vedio of applicnat dressed in prison clothes during trial. Tr.p. 222, L. 20—p. 223, L.9. In Humbert v. State, 548 S.E.2d 862 (S.C. 2001), the S.C. Supreme Court agreed with the PCR Court that trial counsel was ineffective for allowing jury to view applicant in prison clothes, but that to prevail on such claim an applicant must show prejudice under the Strickland analysis.

To establish the prejudice prong, the applicant submits that he was prejudiced, notwithstanding a curative instruction, because being viewed in prison clothes impermissibly placed his character in issue and undermined his presumption of innocence. In criminal cases the state may not attack the character of the accused

unless he first places it in issue. State v. Taylor, 508 S.E.2d 870 (S.C. 1998). Moreover, Courts have, with few exceptions, determined that an accused should not be compelled to appear for trial in prison clothing because of possible impairment of the presumption so basic to the adversary system-the presumption of innocence. The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies in the foundation of the administration of our criminal law. See Estelle v. Williams, 96 S.Ct. 1691,425 U.S. 505,30 L.Ed.2d 481,491 (1985). The Court have therefore required an accused to object to being viewed in prison clothes. See Griffin v. Illinois, 76 S.Ct. 585,351 U.S. 12 (1956).

As Applicant's counsel did not object to jury being allowed to view him in prison clothing, he was denied effective assistance of counsel that deprived him of a right to a fair trial. Whitner v. State, 492 S.E.2d 777 (S.C. 1997); Strickland , Supra.

10(e)-11(e) The applicant was denied the right to effective assistance of trial counsel by counsel's failure to object to admission of evidence of prior bad acts.

A PCR applicant alleging ineffective assistance of counsel must show both error and prejudice to win relief in a PCR proceeding. Joseph v. State, 331 S.E.2d 780 (S.C. 2002).

Here, prior to showing a vedio interivew of applicnat in prison uniform, the judge instructed the jury, in relevant part, as follows (Tr.p. 223, L. 1-9):

> Court: Now regarding that you will see from the vedio Mr. Wills has been recently arrested and obviously he was in custody at that point in time and "when that happens you obviously must wear the jail issued clothing." You are to gain no impression from that...That's just a circumstance when somebody is arrested that's what happens, "so obviously you don't let that affect your judgment as to what the proceedings are regarding that..." (Emphasis added).

The applicant submits that the judge's instruction that "you don't let that affect your judgment as to what that proceeding are regarding that" clearly distinguished "that criminal proceeding" from the criminal proceeding for which applicant was on trial. As such, the instruction itself impermissibly admitted evidence of applicant's prior bad acts. Ordinarily, evidence of another independent crime is not admissible against defendant if he objects. See State v. Thomas, 151 S.E.2d 855 (S.C. 1961); State v. Conyer, 233 SE.2d 95 (S.C. 1977).

The applicnat therefore contends that counsel's failure to object to the judge's introduction of his prior bad act evidence was ineffective assistance that prejudiced his right to a fair trial.

10(f)-11(f) The applicant was denied the right to effective assistance of trial counsel by counsel's failure to object to improper "golden rule" argument by the prosecution.

To prove counsel was ineffective, a PCR applicant must show counsel's performance was deficient and the deficient performance cause prejudice to applicant' case. Satterwhite v. State, 481 S.E.2d 709 (S.C. 1997).

Accordingly, during closing argument, the prosecution made the following comments (Tr.P. 266, L. 17-21):

> First, let your verdict speak for Julian Lee (victim), his wife, his child. Let them know that the law protect "us all", will protect "us" from the greed of individuals that seek to betray "us",...(Emphasis added)

In this instances, the prosecution's engaged in a "golden rule"[1] argument that asked the jury to become advocates of the victim, his family, and community, instead of factfinders which entitled applicant to reversal of his conviction. A solicitor's comments during closing argument of murder prosecution, in which solicitor told jury that they spoke on behalf of victim, constituted "golden rule argument" that impermissibly asked jurors to become advocate of victim, and thus reversal of conviction was required. See State v. Reese, 597 S.E.2d 169 (S.C.App. 2004).

The applicant submits that his counsel rendered ineffective assistance that prejudiced his case by failing to object to this argument to obtain a distince ruling thereon to preserve this issue for appellate review. Satterwhite, Supra. Strickland, Supra.

10(g)-11(g) The applicant's conviction is a nullity as there was no presentment of indictment charging him with a criminal offense for trial in general sessions court. - Also see Exhibit 1-5 on back

The issue presented here for review is not a challenge to the general sessions court's grant of authority to hear and determine criminal cases. That authorigy is granted by Article V, §11 of S.C. Constitution and will not be at issue here. Instead, applicant is contending that general sessions court could not exercise its original criminal jurisdiction to try and convict him of a murder offense charged in an indictment that was not "true billed" and presented by a lawfully constituted grand jury. The law requires the presentment of a grand jury as a condiction prece-

1. A "golden rule argument" is one in which an attorney invites the jurors to place themselves in the position of a party. see State v. Caldwell, 388 S.E.2d 816 (1996).

lent to the trial of a cause, the grand jury, being a constituent part of the court, and without its presentment the court has no jurisdiction of the cause (or criminal offense). See, e.g., State v. Hann, 12 S.E.2d 729 (1960); State v. Wheeler, 193 S.E.2d 515 (S.C. 1972); State v. McClure, 280 S.C.2d 159 (1982); S.C. Constitution Articles I and V, Sections 11 and 22.

In this case, applicant submits that his indictment indicates that he was indicted during the April 27, 2006, term of general sessions court in Horry County. Conversely, there is no term of general sessions court during the month of April in Horry County according to S.C. Code of Law, §14-5-810 (Schedule for Court terms in Horry County). In conjunction, S.C. Code 14-9-210 imposes a duty upon the solicitor to prepare and submit, through the presiding judge of general sessions court, a bill of indictment to the "grand jury, while in attendance upon general sessions, for return of a "true bill or no bill indictment".

Simply put, in keeping with the mandatory provisions of Section 14-9210, the State has no authority to obtain a "true bill indictment" except during a time when the general sessions court is in session to convene and oversee the grand jury process. Any act of the court or State taken outside the statutory and constitutional restructions would, by necessity, be null and void since the grand jury must be impaneled under the "original jurisdiction" of general sessions court to deliberate and return indictments. The grand jury of each county...shall consist of eighteen members, twelve of whome must agree in a matter before it can be submitted to the (general sessions) court. Art. V., §22, S.C. Const.

Finally, as the prosecution has failed to comply with Constitutional and Statutory Laws, jurisdictional in nature, in obtaining applicnat's indictment, he submits that his conviction is a nullity and should be voided. A conviction obtained without presentment of a grand jury will be voided on appeal. Anderson v. State, 527 S.E.2d 398 (S.C.App. 2000).

## CONCLUSION

WHEREFORE, for the foregoing reason, the Honorable Court should reverse the conviction and grant applicant a new trial.

This 24th day of November, ~~2000~~ 2014

Respectfully Submitted

/s/ Theodore David Wills Jr.

Theodore David Wills, Jr.,
Perry Correctional Institution
[illegible]
[illegible], S.C. 29642

Date: 11-24-14, 2014

Ms. Yolanda Huggins
Clerk of Court-Horry County
P.O. Box 477
Conway, S.C. 29528

Re: PCR Application

Dear Ms. Huggins:

Enclosed please find my Original Post-Conviction Application and Memorandum of law in Support of same for filing with your office and service upon proper officials.

Thank you for your kind attention to this matter.

Sincerely Yours

/s/ Theodore David Wills Jr.

Theodore David Wills, Jr.,
SCDC No. 319751
Perry Correctional Institution
420 Oaklawn Road-Q2
Pelzer, S.C. 29669

cc: file

EXHIBIT #1



**CLERK OF COURT**

Horry County
SOUTH CAROLINA

*Committed to Excellence*

MELANIE HUGGINS-WARD
CLERK OF COURT
1301 2ND AVENUE
CONWAY, SC 29526
(843) 915-5080 • Fax: (843) 915-6081

April 8 2010

David Wills #239761
Perry Correctional Institution
Q-2-A #201
430 Oaklawn Road
Pelzer SC 29669

Re: Court Schedule/Grand Jury

Dear Mr. Wills:

I have enclosed a court schedule for the month of April 2006. In checking with the Solicitor, have been advised there has been no special Grand Jury called for the month of April 27 2006.

Sincerely,
Melanie Huggins-Ward

Melanie Huggins-Ward
Horry County Clerk of Court

EXHIBIT #2



**CLERK OF COURT**

Horry County
SOUTH CAROLINA
*Committed to Excellence*

MELANIE HUGGINS-WARD
CLERK OF COURT
1301 2ND AVENUE
CONWAY, SC 29526
(843) 915-5080 • Fax: (843) 915-6081

December 31 2009

David Wills #239761
P.C.I. Q-2-A #201
430 Oaklawn Road
Pelzer SC 29669

RE: Motion/Warrant/Circuit Court Calendar

Dear Mr. Wills:

This is in response to your letter regarding the above reference.

I have enclosed a printout of Warrant G525934 for Accessory Before the Fact that was dismissed 11-8-07. In addition, I have enclosed the court calendar as requested.

No motions filed for a special grand jury as we have not had any special grand juries.

Sincerely,

Melanie Huggins-Ward
Melanie Huggins-Ward
Horry County Clerk of Court

EXHIBIT #3

352



# Terms of Circuit and Family Court
## April 2006

| Circuit Number | 4/3/2006 | 4/10/2006 | 4/17/2006 | 4/24/2006 |
|---|---|---|---|---|
| 15 | Common Pleas Non-Jury<br>Breeden, John L.<br><br>**BABB**<br><br>General Sessions<br>Horry<br>John, Steven H.<br><br>**EUBANK**<br><br>General Sessions<br>Horry<br>Thomas, Paula H.<br><br>**HURLEY** | Common Pleas<br>Horry<br>Cottingham, Edward B.<br><br>**MCCALL** 10, 11, 12, 13<br>**NO CR NEEDED** 14<br><br>General Sessions<br>Horry<br>Russo, Thomas A.<br><br>**BAKIS-RAY**<br><br>General Sessions<br>Horry<br>Burch, Paul M.<br><br>**MCDANIEL** 10, 11, 12<br>**NO CR NEEDED** 13, 14<br><br>General Sessions<br>Horry<br>Cottingham, Edward B.<br><br>**MCCALL** 10, 11, 12, 13<br>**NO CR NEEDED** 14<br><br>Common Pleas Non-Jury 13<br>Georgetown<br>Culbertson, Benjamin H.<br><br>**HURLEY** 13 | Common Pleas<br>Horry<br>Breeden, John L.<br><br>**BABB**<br><br>Common Pleas<br>Horry<br>John, Steven H.<br><br>**EUBANK**<br><br>Common Pleas Non-Jury<br>Thomas, Paula H.<br><br>**NO CR NEEDED** 17, 18, 19, 20<br>**HURLEY** 21<br><br>Common Pleas<br>Horry<br>Russo, Thomas A.<br><br>**BUCKNER** 17<br>**NO CR NEEDED** 18<br>**BUCKNER** 19<br>**NO CR NEEDED** 20, 21<br><br>General Sessions<br>Georgetown<br>Cottingham, Edward B.<br><br>**MCCALL** 17, 18, 19, 20<br>**NO CR NEEDED** 21<br><br>Common Pleas<br>Georgetown<br>Cottingham, Edward B. | Common Pleas<br>Horry<br>Cooper, Thomas W.<br><br>**BUCKNER** 24, 25, 26, 27<br>**NO CR NEEDED** 28<br><br>General Sessions<br>Georgetown<br>Cottingham, Edward B.<br><br>**MCCALL** 24, 25, 26, 27<br>**NO CR NEEDED** 28<br><br>Common Pleas<br>Horry<br>Thomas, Paula H.<br><br>**HURLEY** 24 am<br>**NO CR NEEDED** 24 pm<br>**HURLEY** 25, 26, 27 am<br>**NO CR NEEDED** 27 pm, 28<br><br>Common Pleas<br>Georgetown<br>Russo, Thomas A.<br><br>**BABB** 24<br>**MCDANIEL** 25, 26, 27<br>**NO CR NEEDED** 28 |

CERTIFIED TRUE COPY,
By:
South Carolina Court Administration

EXHIBIT #4

353



April 2006 Go To Date

# Terms of Circuit and Family Court
## April 2006

| Circuit Number | 4/3/2006 | 4/10/2006 | 4/17/2006 | 4/24/2006 |
|---|---|---|---|---|
| 15 | Common Pleas Non-Jury<br>Breeden, John<br><br>**BABB**<br><br>General Sessions<br>Horry<br>John, Steven<br><br>**EUBANK**<br><br>General Sessions<br>Horry<br>Thomas, Paula<br><br>**HURLEY** | Common Pleas<br>Horry<br>Cottingham, Edward<br><br>**MCCALL** 10, 11, 12, 13<br>**NO CR NEEDED** 14<br><br>General Sessions<br>Horry<br>Russo, Thomas<br><br>**BAKIS-RAY**<br><br>General Sessions<br>Horry<br>Burch, Paul<br><br>**MCDANIEL** 10, 11, 12<br>**NO CR NEEDED** 13, 14<br><br>General Sessions<br>Horry<br>Cottingham, Edward<br><br>**MCCALL** 10, 11, 12, 13<br>**NO CR NEEDED** 14<br><br>Common Pleas Non-Jury 13<br>Georgetown<br>Culbertson, Benjamin<br><br>**HURLEY** 13 | Common Pleas<br>Horry<br>Breeden, John<br><br>**BABB**<br><br>Common Pleas<br>Horry<br>John, Steven<br><br>**EUBANK**<br><br>Common Pleas Non-Jury<br>Thomas, Paula<br><br>**NO CR NEEDED** 17, 18, 19, 20<br>**HURLEY** 21<br><br>Common Pleas<br>Horry<br>Russo, Thomas<br><br>**BUCKNER** 17<br>**NO CR NEEDED** 18<br>**BUCKNER** 19<br>**NO CR NEEDED** 20, 21<br><br>General Sessions<br>Georgetown<br>Cottingham, Edward<br><br>**MCCALL** 17, 18, 19, 20<br>**NO CR NEEDED** 21<br><br>Common Pleas<br>Georgetown<br>Cottingham, Edward | Common Pleas<br>Horry<br>Cooper, Thomas W.<br><br>**BUCKNER** 24, 25, 26, 27<br>**NO CR NEEDED** 28<br><br>General Sessions<br>Georgetown<br>Cottingham, Edward<br><br>**MCCALL** 24, 25, 26, 27<br>**NO CR NEEDED** 28<br><br>Common Pleas<br>Horry<br>Thomas, Paula<br><br>**HURLEY** 24 am<br>**NO CR NEEDED** 24 pm<br>**HURLEY** 25, 26, 27 am<br>**NO CR NEEDED** 27 pm, 28<br><br>Common Pleas<br>Georgetown<br>Russo, Thomas<br><br>**BABB** 24<br>**MCDANIEL** 25, 26, 27<br>**NO CR NEEDED** 28 |

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EXHIBIT #5

WITNESSES

Raul Dennis/HCPD

ARREST WARRANT NO. CAW200604021

CDR: 0116 §16-03-0010,0020

DOA: 11-01-01

ACTION OF GRAND JURY

TRUE BILL

APR 2 7 2006

Foreman of Grand Jury

VERDICT

Foreman of Petit Jury Date:

DOCKET NO. 2006-GS-26- 1652

THE STATE OF SOUTH CAROLINA

COUNTY OF HORRY

SRH 66398

COURT OF GENERAL SESSIONS

APRIL TERM 2006

THE STATE
VS

THEODORE DAVID WILLS JR. M/B

[redacted] 29577

DOB: [redacted]

SS#: [redacted]

ATTORNEY: WILLIAM P. DIGGS

INDICTMENT FOR:

**MURDER**

ORIGINAL

J. GREGORY HEMBREE, SOLICITOR

10/03/07 Guilty
Sent. scheduled for
Oct. 29, 2007 @ 2:

355

EXHIBIT # 15

WITNESSES

Raul Dennis/HCPD

ARREST WARRANT NO. CAW200604021

CDR: 0116 §16-03-0010,0020

DOA: 11-01-01

ACTION OF GRAND JURY

TRUE BILL

APR 2 7 2006

Foreman of Grand Jury

VERDICT

Foreman of Petit Jury Date:

DOCKET NO. 2006-GS-26-1652

THE STATE OF SOUTH CAROLINA

COUNTY OF HORRY

SRH 66398

COURT OF GENERAL SESSIONS

APRIL TERM 2006

THE STATE
VS

THEODORE DAVID WILLS JR. M/B

29577

DOB:

SS#: [redacted]

ATTORNEY: WILLIAM P. DIGGS

INDICTMENT FOR:

**MURDER**

ORIGINAL

J. GREGORY HEMBREE, SOLICITOR

10/03/07 Guilty
Sent. scheduled for
Oct 29, 2007 @ 2:

11-24-14 356

20 CP26

Dear Mrs. Melanie Huggins-Ward,

Enclosed is my application for Post Conviction Relief, and my Memorandum of Law In Support of said application. I would like to have back a signed and time dated stamped copy of this paper work upon your submitting this to the courts of proper athurotiy. Respectfully yours

Theodore David Wills Jr. #239761
Lieber Correctional Institution
P.O Box 205
Ridgeville S.C 29472

| | |
|---|---|
| STATE OF SOUTH CAROLINA<br>COUNTY OF HORRY | IN THE COURT OF COMMON PLEAS<br>FOR THE FIFTEENTH JUDICIAL CIRCUIT |
| Theodore Wills Jr., #239761,<br><br>Applicant,<br><br>v.<br><br>State of South Carolina,<br><br>Respondent. | Case No. 2014-CP-26-7915<br><br>**RETURN** |

Respondent, making its Return to the Application for Post-Conviction Relief filed December 01, 2014,[1] would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. In April 2006, the Horry County Grand Jury indicted Applicant for murder (2006-GS-26-1652). William I. Diggs, Esquire, represented Applicant. On October 1, 2007, Applicant proceeded to trial before the Honorable Steven H. John and a jury. The jury found Applicant guilty as indicted. Judge John sentenced Applicant to forty (40) years imprisonment.

Applicant filed a timely notice of appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on September 22, 2010. See State v. Wills, 390 S.C 139, 700 S.E.2d 266 (Ct. App. 2010). The Applicant's Petition for Rehearing was denied on October 28, 2010.[2] His appellate counsel filed a timely petition for review in the South Carolina Supreme Court, who granted certiorari and affirmed the Court of Appeals on July 16, 2014. See State v. Wills, 409

[1] Application for post-conviction relief was originally filed November 29, 2010, however, as Applicant had a direct appeal to the South Carolina Supreme Court still pending, Respondent made a Motion to Dismiss Without Prejudice on January 26, 2011. All appeals have now been answered.

[2] In his "Memorandum of Law" attached to his PCR Application, the Applicant erroneously states that the Remittitur was issued on this date.



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S.C. 183, 762 S.E.2d 3 (2014). Applicant's Petition for Rehearing was denied on August 22, 2014.

II.

In his Application, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. "Ineffective assistance of counsel"
   a. "counsel's failure to object ... jury charge"
   b. "counsel's failure to properly advise [Applicant] against agreeing to provide the prosecution with a proffered statement"
   c. "counsel's failure to object to hearsay testimony"
   d. "counsel's failure to object to vedio showing applicant dressed in prison clothes" [sic]
   e. "counsel's failure to object to admission of evidence of prior bad acts"
   f. "counsel's failure to object to improper 'golden rule' argument"
2. Insufficiency of indictment
   a. Grand Jury didn't meet during April

Respondent denies Applicant is entitled to relief on any of these claims, and demands strict proof thereof. Any claims not specifically enumerated in the Application or amendments thereto will be opposed by Respondent at the evidentiary hearing. All amendments should be made well in advance of hearing and should be filed in compliance with Rule 11, SCRCP.

Attached to this Return and incorporated herein are the records of the Horry County Clerk of Court regarding the subject conviction(s), Applicant's records from the South Carolina Department of Corrections, the trial transcript, and Applicant's appellate records. Any records not attached will be forwarded upon receipt. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

Respondent submits Applicant's allegation of ineffective assistance of counsel is without merit. In a post-conviction relief action, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S.at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The court strongly presumes that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove trial counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, trial counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

Respondent submits Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Applicant alleges that the court lacked original criminal jurisdiction because there was no term of general sessions court during the month of April.[3] Respondent contends this allegation is without merit. A grand jury may meet at any time ordered by a circuit judge. See S.C. Code Ann. §§ 14-5-910 to -940 (allowing for terms of court not provided for by law). Accordingly, a grand jury is not unlawfully impaneled simply because it does not meet during a term of court as provided for in sections 14-5-620 to -820. See State v. Jeffcoat, 26 S.C. 114, 1 S.E. 440, 441 (1887) ("[M]erely changing the time for holding the court did not make the grand jury illegal."). Absent evidence to the contrary, the court must presume that a properly returned indictment is valid. State v. James, 321 S.C. 75, 472 S.E.2d 38, 40 (Ct. App. 1996) (citing Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 (1995)); State v. Thompson, 305 S.C. 496, 409 S.E.2d 420 (Ct. App. 1991). Applicant's indictments are valid on their face because they state all the necessary elements of the crime, the date of the offense, and the name of the accused. Id. at 75, 472 S.E.2d at 40. Likewise, each indictment is stamped "True Billed" and signed by the Grand Jury foreperson. See Pringle, 287 S.C. at 410, 339 S.E.2d at 128. Finally, any insufficiency or defect in the indictment must be challenged before the jury is sworn. State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); Edwards v. State, 372 S.C. 493, 642 S.E.2d 738 (2007).

[3] Applicant was indicted on April 27, 2006.

V.

Respondent denies each and every allegation not hereinbefore expressly admitted, qualified, or explained.

VI.

WHEREFORE, having made its return, Respondent requests an evidentiary hearing be held.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

JESSICA E. KINARD
Assistant Attorney General

By: _____
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-3737

Feb. 2, 2018

| | |
|---|---|
| STATE OF SOUTH CAROLINA<br><br>COUNTY OF HORRY<br><br>THEODORE DAVID WILLS,<br>#00239761<br>Applicant,<br><br>v.<br><br>STATE OF SOUTH CAROLINA<br><br>Respondent | IN THE COURT OF COMMON PLEAS<br>FIFTEENTH JUDICIAL CIRCUIT<br>CASE NUMBER 2014CP2607915<br><br>MOTION TO AMEND APPLICATION FOR POST CONVICTION RELIEF |

2017 FEB 20 AM 8:09
CLERK OF COURT
HORRY COUNTY, SC

**MOTION**

NOW COMES the Applicant, Theodore David Wills, by and through undersigned counsel, and moves for this Honorable Court to allow Applicant to amend his post conviction relief application, filed *pro se* on December 1, 2014. The Uniform Post-Conviction Procedure Act "permits the PCR judge 'when appropriate' to allow an 'amendment of the application.'" *Cade v. State*, No. 2007-UP-371, 2007 WL 8372954 at *1, *1 (Ct. App. Sept. 18, 2007) (quoting S.C. Code Ann. 17-27-70 (a)). In conjunction with the Act, Rule 15(b), SCRCP, permits a party to may amend his application, as with any other pleading, with leave from the PCR judge. *Id.* at *2 (citing *Simpson v. Moore*, 367 S.C. 587, 599, 627 S.E.2d 701, 708 (2006)); *see also* Rule 71.1 (a), SCRCP, ("The South Carolina Rules of Civil Procedure shall apply to the extent that they are not inconsistent with the Act.") Applicant so moves this Honorable Court for leave to amend to add and supplement the application's existing grounds now that undersigned counsel has been retained. Undersigned counsel is still in the process of gathering documents and

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information from Applicant's trial counsel, William I. Diggs, and former PCR counsel, Daniel A. Selwa, II.

WHEREFORE, the Applicant, Theodore David Wills, respectfully moves this Honorable Court for leave to amend his application for post conviction relief.

Respectfully submitted,

William G. Yarborough

William G. Yarborough
Attorney for the Applicant
522 North Church Street
Greenville, SC 29601
(864) 331-1612
SC Bar No.: 10271

Horry County, SC
February 14, 2017

364

**FORM 5**

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | |
| | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF HORRY | ) | |
| | ) | |
| THEODORE DAVID WILLS, JR.<br># 239761<br>Full name and prison number (if any) of Applicant | ) | 2014-CP-26-07915 |
| | ) | |
| v. | ) | |
| | ) | **AMENDED APPLICATION FOR** |
| | ) | |
| State of South Carolina. | ) | **POST-CONVICTION RELIEF** |
| | ) | |

FILED
HORRY COUNTY
2017 JUN -1 PM 3:32
RENEE R. ELVIS
CLERK OF COURT
HORRY COUNTY SC

## INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lieber Correctional Institution
2. Name and location of Court which imposed sentence Horry County General Sessions
3. Name(s) of co-defendant(s) (if any) Mark Willard
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
   (a) 2006-GS-26-1652-Murder
   (b) _____
   (c) _____

5. The date upon which sentence was imposed and the terms of the sentence:

(a) October 29, 2007 – 40 years – Murder

(b) _____

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty ___

(b) after a plea of not guilty _X_

(c) after a plea of nolo contendere _

7. Did you appeal from the judgment of conviction or the imposition of sentence?

Yes

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. South Carolina Court of Appeals_____

ii. South Carolina Supreme Court____

iii. _____

(b) the result in each such Court to which you appealed:

i. Affirmed conviction.

ii. Affirmed the court of appeals.

iii. _____

(c) the date of each such result:

i. September 22, 2010

ii. August 25, 2014

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. State v. Wills, 390 S.C. 139, 700 S.E.2d 266 (Ct. App. 2010).

ii. State v. Wills, 409 S.C. 183, 762 S.E.2d 3 (2014).

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) n/a

(b) _____

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) The plea agreement was null and void after the material breach of the terms and thus Applicant's alleged admissions in conjunction with the plea agreement are inadmissible per se and were improperly admitted at trial.

(b) The government improperly used the Applicant's alleged admissions in its case-in-chief when such admissions are only usable as impeachment evidence.

(c) The State wrongfully used unreliable polygraph test results to obtain the only substantive evidence against the Applicant, claiming that the Applicant had violated the agreement by being untruthful without identifying any specific statements where the Applicant had deceived the State.

(d) The withdrawal of the plea agreement due to the unreliable polygraph results was patently unfair to the Applicant, especially considering that the State later used the same polygraph evidence as the only evidence against Applicant.

(e) There was insufficient evidence of the Applicant's guilt since the State's only evidence was the Applicant's alleged admissions which were admitted improperly. Thus, the trial court erred in denying the Applicant's motion for a directed verdict in violation of the Applicant's 4th and 14th Amendment due process rights.

(f) Ineffective assistance of counsel pursuant to Strickland v. Washington.

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) The terms of the plea agreement should be construed strictly against the State as the drafter. The terms stated that the agreement would be rendered null and void upon violation of the agreement. By claiming that the Applicant violated the agreement and then withdrawing it, the State nullified the entire agreement including the waiver provision. Thus, the Applicant's alleged admissions should have been excluded under Rule 410 since the terms of the agreement were nullified and no longer controlling.

(b) The government used the Applicant's alleged admissions in its case-in-chief when such evidence should only be usable as impeachment evidence.

(c) The State wrongfully used unreliable polygraph test results to obtain the only substantive evidence against the Applicant. The State claimed that the Applicant had made

deceptive statements but never identified the deception which rendered the plea agreement proceeding fundamentally unfair to the Applicant.

(d) The withdrawal of the plea agreement due to the unreliable polygraph results was patently unfair to the Applicant, especially considering that the State later used the same polygraph evidence as the only evidence against Applicant. The State withdrew the agreement alleging that the Applicant's statements were false only to present those same statements later to the jury as true. This turnabout produced a patently unfair proceeding for the Applicant that impaired the integrity of the judicial process and resulted in a miscarriage of justice.

(d) The only substantive evidence against the Applicant was his alleged admissions which were wrongfully admitted. Due to the lack of evidence, the trial court erred in denying the Applicant's motion for a directed verdict in violation of his due process rights under the 4th and 14th Amendments.

(e) Trial counsel was ineffective pursuant to Strickland v. Washington for failing to object to an erroneous jury charge regarding implied malice.

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? Yes

(b) any petition in State or Federal Courts for habeas corpus or post-conviction relief? Yes

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No

(d) any other petitions, motions or applications in this or any other Court? No

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. Application for Post-Conviction Relief

ii. n/a

iii. n/a

iv. n/a

(b) the name and location of the Court in which each was filed:

i. 11/29/2010, Horry County Common Pleas

ii. n/a
iii. n/a
iv. n/a

(c) the disposition thereof:

i. Dismissed due to pending appeal
ii. n/a
iii. n/a
iv. n/a

(d) the date of each such disposition:

i. 2/11/2011
ii. n/a
iii. n/a
iv. n/a

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. n/a
ii. n/a
iii. n/a
iv. n/a

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. (a)
ii. (b)
iii. (c)
iv. (d)
v. (e)

(b) the proceedings in which each ground was raised:

i. _____
ii. _____
iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) Ineffective assistance of counsel cannot be brought up on appeal.

(b) ___

(c) ___

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? Yes

(b) your trial, if any? Yes

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes

(e)preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. William I. Diggs, 1700 Oak Street, Suite D, Myrtle Beach, SC 29577

ii. Joseph Savitz, P.O. Box 11589, Columbia, SC 29211

iii. _____

(b) the proceedings at which each such attorney represented you:

i. Arraignment, trial, sentencing, and 1st PCR.

ii. Appeal

iii. _____

19. State clearly the relief you seek in filing this application:

That the Applicant's conviction be overturned and/or a new trial be granted on the merits.

20. Are you now under sentence from any other court that you have not challenged?

No.

FILED
HORRY COUNTY
2017 JUN -1 PM 3:32
RENEE N. ELVIS
CLERK OF COURT
HORRY COUNTY, SC

STATE OF SOUTH CAROLINA )
)
County of Horry )

VERIFICATION

I, Theodore David Wills, Jr., being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

T. David Wills

SWORN to and subscribed before me this 31st day of May, 2017.

Theresa Gburn (L.S.)
*Notary Public*

My Commission Expires: 3/20/24

STATE OF SOUTH CAROLINA )
) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY )

THEODORE DAVID WILLS, Jr. )
Plaintiff(s) )

vs. )

THE STATE OF SOUTH CAROLINA )
Defendant(s) )

# CIVIL ACTION COVERSHEET

-CP -


Submitted By: William G. Yarborough, III
Address: 522 N. Church Street
Greenville, SC 29601

SC Bar #: 10271
Telephone #: 864-331-1612
Fax #:
Other:
E-mail: wgyarborough@gmail.com



FILED
HORRY COUNTY
2017 JUN -1 P 3:32
RENEE L. ELLIS
CLERK OF COURT
HORRY COUNTY, SC


NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

## DOCKETING INFORMATION *(Check all that apply)*

**If Action is Judgment/Settlement do not complete*

☐ JURY TRIAL demanded in complaint. X☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

## NATURE OF ACTION *(Check One Box Below)*

**Contracts**
- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ Employment (120)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Other (199)

**Torts - Professional Malpractice**
- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)

Previous Notice of Intent Case # 20___-NI-_____-_____
- ☐ Notice/ File Med Mal (230)
- ☐ Other (299)

**Torts – Personal Injury**
- ☐ Assault/Slander/Libel (300)
- ☐ Conversion (310)
- ☐ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☐ Personal Injury (350)
- ☐ Wrongful Death (360)
- ☐ Other (399)

**Real Property**
- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☐ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Building Code Violation (460)
- ☐ Other (499)

**Inmate Petitions**
- X PCR (500)
- ☐ Mandamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599)

**Administrative Law/Relief**
- ☐ Reinstate Drv. License (800)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture-Petition (840)
- ☐ Forfeiture—Consent Order (850)
- ☐ Other (899)

**Judgments/Settlements**
- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Transfer of Structured Settlement Payment Rights Application (760)
- ☐ Confession of Judgment (770)
- ☐ Petition for Workers Compensation Settlement Approval (780)
- ☐ Other (799)

**Appeals**
- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Public Service Comm. (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999)

**Special/Complex /Other**
- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Motion to Quash Subpoena in an Out-of-County Action (660)
- ☐ Sexual Predator (510)

Submitting Party Signature: William G. Yarborough Date: 30 May 2017

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Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

copy

ORIGINAL 372

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF HORRY | ) | 2014-CP-26-07915 |
| THEODORE WILLS, JR., | ) | |
| Plaintiff, | ) | **Transcript of Record** |
| vs. | ) | |
| STATE OF SOUTH CAROLINA, | ) | September 19, 2017 |
| Defendant. | ) | |

**B E F O R E:**

Honorable William H. Seals
Horry County Courthouse
Conway, South Carolina

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

William G. Yarborough, III, Esquire
**Attorney for Petitioner**

Johnny E. James, Jr., Esquire
**Attorney for Respondent**

Kay H. Richardson
**Circuit Court Reporter**

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No. ID EV

(No exhibits were marked or admitted.)

**(SEPTEMBER 19, 2017 - 10:11 A.M.)**

BY THE COURT:

MR. JAMES: If it may please the Court?

THE COURT: Yes, sir.

MR. JAMES: My name is Johnny Ellis James, Jr. and I have the honor and privilege to represent the State of South Carolina as Respondent in the action before the Court today.

The State would call the matter of *Theodore Wills, Jr. versus State of South Carolina*. That is docket number 2014-CP-26-7915. Mr. Wills is present here today in the courtroom and he is represented by Mr. Bill Yarborough, Esquire. Mr. Wills was convicted on October 1st, 2007 for the crime of murder.

MOTIONS:

MR. JAMES: Your Honor, the State has not made a written motion in this matter at this time; however, the State would respectfully submit a partial motion to dismiss Mr. Wills' allegations, specifically (a) through (e) in his application. Your Honor, the State's grounds for this is that the allegations are not set forth in the context of ineffective assistance of counsel, rather they are set forth in the form of a direct appeal issue, specifically that the plea agreement was null and void and that the statements proffered as part of that plea agreement were wrongfully admitted. That issue was specifically raised in our view at trial and was specifically

raised in our view on direct appeal, and therefore is not properly before this Court today. And that is the extent of the State's motion in that regard.

THE COURT: All right.

Mr. Yarborough?

MR. YARBOROUGH: Your Honor, if the Court please, if you read Number 10 in toto, maybe it's not as eloquent as it could be at times, but the -- what (a) through (e) is also referring to is ineffectiveness of counsel pursuant to *Strickland vs. Washington*, and so we feel that those issues are properly preserved and properly in the PCR application, and we'll develop those today.

THE COURT: All right.

MR. YARBOROUGH: And I -- just for the record, I do want to point out that if you read (a) through (e), and then (f) is *Strickland v. Washington*, maybe I should've said also or including, but I assumed that the Court would read it in toto and I think that there are all kind of pieced together and I think the case law is pretty clear that it does -- an allegation in the first part can be brought in and ineffective assistance of counsel in the last part.

THE COURT: All right. I'm gonna deny the motion.

MR. JAMES: Thank you, Your Honor.

THE COURT: All right. Mr. Yarborough, ready when you are.

MR. YARBOROUGH: Your Honor, we'd call Mr. Diggs.

WILLIAM I. DIGGS, HAVING BEEN DULY SWORN, TESTIFIED AS FOLLOWS:

CLERK: State your name for the Court. Okay?

MR. DIGGS: My name is William Isaac Diggs. I go by Bill.

DIRECT EXAMINATION OF WILLIAM ISAAC DIGGS BY MR. YARBOROUGH:

Q: Mr. Diggs, did represent Mr. Wills?

A: Yes.

Q: And were you his lawyer throughout this process?

A: Yes, sir.

Q: Okay. And back -- and I know it's been a while but I guess he had some other charges that he was in the jail for when you began representing him?

A: He did. I don't recall specifically what they were, if they weren't related to this case. I know he was incarcerated when I started representing him, and so I'm not -- I just don't remember a lot about the specifics.

Q: Sure.

A: What the charges were if there were any unrelated to this particular case.

Q: At some point is it safe to say that y'all ended up getting into some type of negotiations with the solicitor's office?

A: Yes, certainly.

Q: Okay. And as part of those negotiations, y'all entered into a proffer agreement?
A: Yes, sir.
Q: Okay. And that proffer agreement is outlined pretty specifically in the trial transcript; is that correct?
A: I think so.
Q: Okay.
A: I didn't see -- when I was going through the transcript, I didn't see it specifically laid out in there anywhere but there were certainly a lot of references to it.
Q: A lot of references to it? I think there's enough of it in there to get to the point that y'all entered into this agreement, and what was your understanding of what the agreement -- what did you advise your client that that agreement would do?
A: Well, my recollection is that -- and of course, we -- David and I talked about the case and he confided in me or, you know, explained to me what basically was going on in that case.
Q: Right.
A: And my understanding was -- I think there were charges at that time of obstruction of justice and accessory after the fact.
Q: Right.
A: But he'd been incarcerated for some time. I can't

remember specifically how long it was but my understanding was if we -- after we'd spoken, and there were several solicitors involved in that case, but my understanding was that we entered into this agreement basically it would result in a situation, if David were truthful, that it would get him out and, basically, the case would end.

Q: Okay. And that's not what happened, right?

A: No, of course not. It went to trial and he was convicted.

Q: And -- but the evidence against him at trial was his statement, right?

A: Yeah, they didn't have any evidence to my knowledge.

Q: Right. And I think the trial transcript is pretty clear that the only evidence was his statement and the, I guess, the video of that statement?

A: Yeah, you know, the solicitor indicated he made references, you know, to the fact that this other fellow was gonna be prosecuted or had been prosecuted. I don't recall what the status of it was at that time but there's certainly an indication they, or the solicitor's office, was leading everyone to believe that there would be other prosecutions in the case.

Q: And you believe when you entered into the polygraph -- we'll get to the polygraph in a minute -- to the proffer agreement that Mr. Wills was not gonna be prosecuted?

A: Correct.
Q: And what happened? What ---
A: I think the State breached the agreement, if you want to know from my perspective.
Q: Right. And, I mean, hindsight is 20/20 but ---
A: Certainly.
Q: And ---
A: Well, you know, David and I had discussed the case. I felt like he had always been truthful with me.
Q: Right.
A: And if you go back, I can't remember exactly how long this interview lasted with the video recording and everybody there asking him questions, but you can get a flavor, you know, in the transcript of the reassurances that we were getting from the solicitor's office that David didn't have anything to worry about. Sure, that we'd go through this process, he would explain to them what he knew about the case, he would be truthful, and he doesn't have anything to worry about. That's specifically referenced in the transcript.
Q: Right.
A: Okay. And in the argument that we were making before Judge John.
Q: Sure, and it -- were you shocked that they used his statement against him?
A: Well, I think surprised, mad -- I was mad that they were

using it and that the chose to prosecute him. And, I'm very angry even now if the situation -- that no one else has ever been prosecuted for the case. I don't know what the status us.

Q: I don't think anybody else had been prosecuted but David and it appears from a review of the transcript, would you agree with me, that his own words ---

A: Oh, certainly, yeah.

Q: Did -- let's talk about the polygraph itself. Did you go with him to the polygraph or do you recall?

A: I can't recall. I think through the course of my practice there were a lot of clients that went through polygraph procedures and I think the standard procedure was that I didn't -- you know, I wasn't there in the room when the polygraph took place.

Q: Sure.

A: Even when we did those in the office privately out of the -- away from public scrutiny, I wasn't allowed to be in the room when the polygraph was actually administered. So, I'm pretty sure -- I don't recall but I'm pretty sure I would not have been present. I probably was outside in the hallway or somewhere close by.

Q: Did you have anybody review the polygraph results?

A: I don't recall. I don't think so.

Q: Was he an appointed case?

A: I can't recall. I think that he probably wasn't. I think I probably was retained but, to be honest with you, I can't remember.

Q: Did you believe that David had told them the truth?

A: Yeah; yes, sir.

Q: So, I mean, you thought he had told them the truth as well?

A: Right.

Q: And the only mechanism that the State had in order to breach this agreement that -- was this polygraph result?

A: Right; yes, sir.

Q: And to your knowledge, those results were never questioned or tested?

A: You mean by me?

Q: Yeah.

A: Well, I certainly questioned -- I didn't hire an independent person. I think, you know, looking back on it in hindsight, that would be one area I could've done things differently.

Q: Sure.

A: And really focused in on that but, you know, I didn't -- the record is as it is. I didn't really -- I did not hire an expert to review that material and that's where we are.

Q: Okay. And again, the -- you advised David that -- to take the polygraph ---

A: Yes.
Q: I mean, to take the polygraph and to enter into the proffer agreement with the understanding that it wasn't gonna be used against him?
A: Right. And you go back and you look even in the transcript, I think it was Scott Hixson that pointed out, David, you can answer, you don't need to worry about it, everything is gonna be okay. You're not gonna be in trouble. That statement is made by the solicitor in the -- in the interview that, you know, that was videotaped and that was put into evidence.
Q: I mean, that ---
A: And to be honest with you, I think that supersedes all of the -- I think that supersedes Miranda, the proffer agreement, the rules of evidence, that was an agreement that was made right there at that time orally between the solicitor's office and David.
Q: And with your advice ---
A: Yes.
Q: With your advice as counsel?
A: Yeah, if he'd said, now, wait a minute, you're getting in dangerous territory here, I would've cut it off right at that moment.
Q: Sure.
A: But I was reassured, no, nothing is gonna happen here,

you can be honest. And I mean, in those situations, I can't imagine -- you know, I think the only caveat was David couldn't be the trigger man. I mean, that was not created by the proffer agreement, but ---

Q: And there's no ---

A: But everything else, you know, was gonna be okay. All David had to do was tell the truth in those circumstances. And I, you know, even to this day, I don't think he was the trigger man. I don't think the State thinks he was the trigger man.

Q: Right.

A: But I would've stopped it if there had been any indication from the State at that time that they were having second thoughts about their agreement, you know, with us. Go ahead and be honest. I mean, tell us, David, what happened and you're gonna be fine.

Q: And we've been doing this a long time, I mean, the bottom line is it's the lawyer's responsibility to protect the client.

A: Of course.

Q: And here sometimes things happen and it doesn't work out the best but that was your role?

A: Right.

MR. YARBOROUGH: One second, Your Honor.

BY MR. YARBOROUGH:

Q: I think at some point, it became an issue at trial, I think, during the trial transcript, I think it's Page 49 ---

MR. WILLS: Page 47, Line 1 and 2.

A: 47?

Q: 47. And I think we've gone over it.

A: Yes, sir.

Q: Was there -- was there anything else in there besides the polygraph that -- I mean, besides the proffer and the polygraph that led to his conviction?

A: I don't know if I'm following your question. I don't know of anything.

Q: Okay. I mean, and I think the solicitor is asked at some point on Page -- if there's any other information, and I don't think he ever answers that question. And so I was just wondering if there was another answer to the question, if you felt like there was any other evidence against David.

A: You know, I just don't have any recollection about it. I think -- I'm trying to put myself back at that time and try to tell you what I would've done. I probably thought they had some additional evidence, but certainly not against David, you know, that would show that he was the shooter in the case.

Q: Right. Have you ever had a chance to review the Supreme Court's ---

A: Court of Appeals?

Q: Well, the -- actually, I think it was Judge Beatty's

opinion in the Supreme Court. Have you ever had a chance to look at that? In that it goes into an analysis about Rule 410.

A: Yeah.

Q: And I'm kind of wondering did you ---

A: Yes, I think I've read it.

Q: Okay. Did you have -- hindsight is 20/20 but do you wish you would've made an argument under Rule 410 that the evidence should've only been admissible pursuant to some type of impeachment evidence?

A: Yeah, I think I did. I think what I argued at trial was that they could use that evidence in any legal fashion other than against him in the trial of the case.

Q: Okay, but that's ---

A: But that's maybe in an after-the-fact, like a Fourth Amendment violation or something like that.

Q: Fourth Amendment violation, but that isn't what happened. They used it before the fact.

A: Right, correct.

Q: And I know that -- do you feel like you made a strong enough argument under that rule at that time for ---

A: I don't know. If it -- if it had occurred to me, I would've made the argument. I mean, I wouldn't have softened it, you know, or held back; I would've made the argument if I felt it was there.

Q: And then I wonder -- in your directed verdict motion, and I know you argued that there wasn't enough evidence to convict him at trial, but ---

A: Right.

Q: Did you think about making it like a corpus delicti argument that ---

A: I think I did. We argued that what the State was doing was cherry picking items from a different timeframe altogether and putting them together where they didn't necessarily have a right to be put together, where they didn't belong. Some conversation that David might've had six months ago -- okay, well, we're gonna take that -- okay, that indicates, okay, something, and then they put it all together and tried to present it as being a series of facts that took place within a 30-second timeframe, you know, at the time Julian Lee was killed. And, you know, that's not what the evidence was in the case.

Q: Correct. And there again, I mean, the ball kind of sat in your court that -- to keep that evidence out and ---

A: I can tell you I think it's accurate to say I made every argument to keep it out that I could think of at the time. If I didn't specifically say Rule 4 -- was it 410 or '11, I can't remember.

MR. JAMES: 403.

A: 403.

Q: And then, I guess ---
A: I think it covers basically the substance of the rule.
Q: Right. If -- and just to short circuit this a little bit, if David gets up and testifies that he relied on you for this statement not to come in, would you agree with that?
A: Oh, I think David relied on me. I think he had confidence in me at the time and I think he followed my advice.
Q: Total confidence and you worked with him and it was your belief that this statement would not be used against him?
A: I didn't think it would be used against him and I felt like it was gonna be to his benefit.
Q: Right, and so the bottom line is that that didn't happen and so he ---
A: Right.
Q: So, if he says he relied on you, that's correct?
A: Yeah, I would think.
Q: Okay.
A: Yes.
Q: Thank you. I don't have any further question at this time.

THE COURT: Mr. James?

CROSS EXAMINATION OF WILLIAM I. DIGGS BY MR. JAMES:

Q: Mr. Diggs?
A: Yes, sir.

Q: Do you recall what the lie was that Mr. Wills gave during the polygraph?
A: I think the deception was indicated about the shooter and that -- there was never a lie, but there was deception with respect to the shooter. There was one other thing I can't recall specifically at this time. They said he was showing deception on ---
Q: Would it help to refresh your memory if I pointed it out in the transcript where they discuss it?
A: Yes, sir.
Q: Look over at Page 70.
A: 70?
Q: 7-0.
A: Okay.
Q: And this is in direct examination with Agent Charles and he indicates that Mr. Wills -- they detected deception in his answer to question of whether Mark Willard shot Julian Lee ---
A: Right.
Q: As well as whether he did not shoot Julian Lee.
A: Right.
Q: And he answered no as to the question of whether he shot Julian Lee and they determined that was deceptive.
A: Right. That was the crux of the case.
Q: Right. Is that consistent with the information that Mr. Wills provided to you in private as his attorney?

A: David provided the information to me in private that was the same information that he made in his statement to the solicitor's office. You understand my response?
Q: Yes. That the statement that he gave you and the statement that he gave to the police were consistent.
A: Consistent, yes.
Q: Going into that polygraph, did you have any reason to anticipate that there would be any sign of deception?
A: No. And if I felt like, you know, 20/20 hindsight, maybe it would've been better to give David some other advice, but I felt like David had been truthful with me. I knew David's family and had known him for a long time, cousins and related people, and I felt like he would've been truthful with me and would've been comfortable in opening up about it, and so I felt comfortable that he was telling me the truth and to go ahead and move forward with this strategy or this approach.
Q: You indicated earlier your understanding of the offer was that if he proffered truthfully, everything would be dropped?
A: Well, either that or it was gonna be handled in a way that would set him free ---
Q: How would you describe that offer in terms of how good it is?
A: I think it would be the best that I could do, you know, without going back and have everything dismissed. I don't think that was -- I don't remember that being an option, but

---

Q: You don't remember what being an option?

A: Dismissing everything completely, a complete dismissal of every -- all the charges. I don't know how that they would make, you know, those peripheral charges about after the fact and the obstruction. I didn't anticipate -- I didn't see any way that those charges, that we could do anything that would result in those charges being dismissed.

Q: Okay. Did you feel that you had -- obviously, you counseled Mr. Wills to enter into this proffer agreement, correct?

A: Yeah.

Q: And did you feel any professional obligation to advise him to enter into that agreement?

A: I felt like it was the best thing for him to do and I realized he was probably gonna rely on what I told him. And I, you know, whatever I suggested, and that's -- that is what made me feel like he was being truthful.

Q: In your experience with Mr. Wills, did you ever discern any mental deficiency or any compulsion that would've given you reason to believe that he might be dishonest or deceptive in the polygraph?

A: No, I viewed him as a pretty normal person. You know, I viewed it as a situation that he would do well in and come out in a positive way.

Q: Was there a heck of a lot of case law on this issue prior to your running into it with Mr. Wills?
A: The polygraph or ---
Q: The admissibility of the proffered statement based on the polygraph?
A: I'm embarrassed to say I just can't recall. Probably -- it was probably -- I just don't have -- I can't recall. You know, at that time I had done a lot of appellate work in my career and probably should've been familiar with whatever the law was at that time. As I sit here today, I just can't recall specifically what cases have been decided and what would have been applicable.
Q: Did you follow the process of this case as it went up through appeals?
A: Once it went into Appellate Defense, I didn't. I never had any contact with them. That was pretty typical. There were a lot of cases that I handled at the trial level that went to Appellate Defense and they just were real -- they didn't do a lot of contact with the trial attorneys, at least when I was the attorney. So, I didn't have very much contact with them at all. And, you know, I used to work there. I was the chief attorney there and I hired Joe Savitz, if I'm not mistaken. Joe did the appeal of this case. So, we might've talked about it but I don't recall specifically any discussion about it.

Q: You argued vociferously against this proffer coming in at trial, did you not?

A: Yes, yes.

Q: In fact, the *Denno* hearing on this statement lasted multiple days, right?

A: Yeah.

Q: And if you look through the transcript, it makes up the better portion of this transcript that we have before the Court for review, correct?

A: Yes, absolutely.

Q: And you earlier stated that you made every argument against it that had occurred to you to make?

A: Yes.

Q: All right.

A: And I think -- you know, maybe it's just -- looking at the way -- judging myself about it but I think, you know, I think I made every argument that was available for me to make. Sometimes, you don't use the magic words that need to be used or could've been used to make it a little more obvious but I think we made most of the arguments that could've been made. And I would've -- well, I'll stop there.

Q: But those issues were thoroughly preserved for appeal, correct?

A: I think so; yes, sir.

Q: And it went up on appeal before the Court of Appeals,

correct?

A: Yes.

Q: And then even further to the Supreme Court of South Carolina, correct?

A: Yeah. I can't recall, you know, as I sit here this morning but, you know, apparently it did. I'll take your word for it.

Q: How long have you been practicing law, Mr. Diggs?

A: Since 1980.

Q: How much of that is criminal?

A: I went to work at Appellate Defense in '84 and did criminal law from there all the way through until 2014.

Q: In your experience as a practicing attorney, was this the first proffer agreement you had advised somebody to enter into?

A: No, there would've been many.

Q: And had any of those proffer agreements been breached before?

A: Not that I recall. I think this case is unique. And if you look at the trial transcript, it's a unique case.

Q: Was there anything unusual in the working terms of the proffer that jumped out to you?

A: I would say no.

MR. JAMES: I beg the Court's indulgence.

BY MR. JAMES:

Q: Do you have any experience reading polygraph examination reports?
A: Not beyond what a typical criminal attorney would do. We did a lot of polygraph work on clients. I would very often bring an examiner into my office to examine clients just to see how they would do. I didn't do that in David's case and I don't have any experience beyond that, what you would typically learn, you know, through your representation of clients and use of polygraph people in the preparation of a defense. But, I didn't do that with David.
Q: Why not?
A: I -- the only thing I can think of is probably because he was incarcerated there and I, I didn't think it would be practical -- I had always done it in a way and a time to make that private so that the State wouldn't know about it. And I didn't see a way at that time that I could do it at J. Reuben Long without somebody, you know, discovering what was going on. So, I didn't do that with David.
Q: Did David ever tell you that he was individual who shot?
A: No, no, he didn't.
Q: Would you, today, if you were engaged in criminal representation, tell a similarly situated client to enter into a proffer agreement?
A: Yeah, I would. What I would do different about this case or that case would be a lot stronger on the science and the

procedure behind the polygraph and, you know, how to go about challenging it better and making a stronger argument to the judge.

Q: But you did in this case make a challenge to the science on the polygraph to the best of your ability at that time?

A: Yes.

MR. JAMES: Your Honor, I have no further questions.

THE COURT: All right. Any redirect?

MR. YARBOROUGH: Yes, please, Your Honor.

REDIRECT EXAMINATION OF WILLIAM I. DIGGS BY MR. YARBOROUGH:

Q: Basically, as I understand it that the State, at trial, used the statement which they believe to be ---

A: False.

Q: --- false and ---

A: To convict him.

Q: Which is the -- is interesting in itself that the State -- I mean, now hindsight is 20/20 but wouldn't that have been a good objection at the time that it was perjured testimony and that perjured testimony should -- and that issue ---

A: I think we made an argument or at least there were discussions about that that I recall and maybe I didn't make a specific motion.

Q: Right. But, if the Supreme Court said that that could've been an issue, that ---

A: Right.

Q: And the other thing I, if -- the other area that he keep asking what was taken up to the Supreme Court and what was on the Court of Appeals.

A: Right.

Q: This issue of ineffective assistance of counsel has never been argued before. This is the first time. And -- is that correct?

MR. JAMES: Your Honor, objection, leading.

THE COURT: Sustained.

BY MR. YARBOROUGH:

Q: Are you aware anywhere in the -- that it's ever been argued that this was ineffective assistance of counsel?

A: No.

Q: And that didn't happen during the trial or during the appellate process; is that correct?

A: Correct.

Q: So, this has been the -- would you agree that this is the first time that Mitchell [sic] Wills has had a chance to raise that issue?

A: David, yeah.

Q: Yeah. And you'd agree he relied on you?

A: Oh, yes.

Q: And hindsight is 20/20 but it didn't work out the way you wanted it to?

A: Correct.

Q: Thank you. I don't have any further questions.

THE COURT: All right.

MR. JAMES: Your Honor, there is one question I forgot to ask in my initial cross that I would like go into with Mr. Diggs so that I don't have to call him back.

MR. YARBOROUGH: No problem, Your Honor.

THE COURT: All right. Go ahead.

RECROSS EXAMINATION OF WILLIAM I. DIGGS BY MR. JAMES:

Q: In the application, Mr. Diggs, there is also aside from all the polygraph issues an allegation regarding an implied malice charge, if you will flip to Page 284 and 285 in the trial transcript.

A: Okay.

MR. JAMES: I beg the Court's indulgence, Your Honor, just one minute.

A: Starting on Line 25?

BY MR. JAMES:

Q: When did this trial take place?

A: 2007.

Q: All right. Are you familiar with the case *State v. Belcher*?

A: Kind of, yes, sir.

Q: Do you recall when *State v. Belcher* came down?

A: I don't recall the year.

Q: Would it surprise you if it came down in 2009?

A: No.
Q: Okay. So, there was a charge that malice can be inferred from the use of a deadly weapon.
A: Right.
Q: Do you feel that that was applicable to this case?
A: We had -- when I was in Appellate Defense we had an opportunity to argue a lot of malice instruction arguments and so it was something that I was pretty familiar with. So, if at that time, if I had felt like there was a problem with the charge, I would've objected.

MR. JAMES: Thank you, Your Honor. I have no further questions.

THE COURT: All right.

REDIRECT EXAMINATION OF WILLIAM I. DIGGS BY MR. YARBOROUGH:

Q: So, that objection wasn't made, correct?
A: I don't think so, correct.
Q: And just for the record, was there any evidence of malice on David's part?
A: On David's part, no. You know, under the timing, the way things went forward, no, and based on my understanding of what happened. I mean ---
Q: Let's go just a little bit out of -- in regards to the polygraph itself, at some point, the Judge asked you in the *Jackson Denno* hearing, Without getting into the polygraph, how did the State determine the statement to be untrue?

A: It was just based on their opinion. They looked at what they called the deviation on the readout, the deviations and they score from zero to three in each direction positive and negative. Based on their opinion, they felt like he was showing deception.

Q: And wasn't one of the problems with this is that at that point you'd gotten into this polygraph argument and that wasn't gonna come in in front of the jury like and so it ---

A: The reason we were making that argument was to try to convince the Judge to exclude it.

Q: Right. And you -- at that point, there -- there was no other way for the State to determine ---

A: Right.

Q: There's not -- there wasn't ---

A: Truth serum.

Q: Yeah, and there wasn't some type of collateral -- you know, in a lot of these proffer statements -- I did a lot of them as an Assistant United States Attorney, but a lot of these polygraph, you're looking for collateral testimony in order to put the case together, correct?

A: Yes.

Q: And in this case, there was no -- there's no other collateral prosecute -- elements, anything the prosecution could bring in because during the State's case, if I'm correct, they talked -- they had a witness that talked about

the position of the body and then a witness that went to the crime scene and that was it; is that correct?

A: Yes. But if you remember, in the State's -- one of the comments that the solicitor made to the jury was about prosecutions taking place in other -- regarding other individuals, which we objected to, and I can't specifically recall, but to me it indicates -- I mean, they were trying to insinuate there was other evidence, you know, that they had available that hadn't been given to us and that's why we objected to that. I didn't feel like the State had a right to tell the jury that. I think that was in the opening statement that they made.

Q: Right, because there wasn't any?

A: Right -- well, I guess.

Q: Yeah. And that -- I guess that should've gone to the argument of a directed verdict, is that ---

A: Well, yeah, but you know when we were making that argument, I wasn't really concerned, maybe I should've been but I was looking at what the evidence was in the record that we had at the time and that was what we based our motion on.

Q: Sure. Thank you.

THE COURT: All right. Thank you, Mr. Diggs.

A: Thank you.

THE COURT: You can step down.

All right. Call your next witness.

MR. YARBOROUGH: I call Mr. Wills.

MR. JAMES: Your Honor, may this witness be excused?

THE COURT: Any objection?

MR. YARBOROUGH: No objection.

THE COURT: All right. Have a good day.

THEODORE DAVID WILLS, JR., HAVING BEEN DULY SWORN, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION OF THEODORE WILLS, JR. BY MR. YARBOROUGH:

Q: Will you state your name for the record?

A: Theodore David Wills, Jr.

Q: Mr. Wills, you were convicted in Horry County of the charge of murder?

A: Yes, sir.

Q: And when was that?

A: In 2007, October the 1st.

Q: And who represented you?

A: William Diggs.

Q: And did you have a relationship with Mr. Diggs?

A: Pretty fair relationship.

Q: How long had you known him?

A: For maybe nine years prior.

Q: Did you trust him?

A: With my life.

Q: And did you rely on his advice?

A: Totally.

Q: Right. And had you relied on his advice in the past?

A: Yes, I have.

Q: So, it wasn't like the first time -- somebody you just met, you knew him.

A: Yes.

Q: And had he always given you good advice in the past?

A: Yes, he has.

COURT REPORTER: Sir, you don't have lean up quite so close; it'll pick you up. You can slide up just a little bit but don't lean in. Okay?

Q: Yeah, just right there. And how old are you?

A: Forty.

Q: And how old were you when all this stuff happened?

A: Twenty-seven.

Q: Did you have a lot of experience with the court system?

A: No, I have not.

Q: Had you ever heard of a proffer agreement?

A: No, I haven't. The first time I ever heard of it when Mr. Diggs tried to explain it to me.

Q: Okay. And tell me how you explained it to you?

A: He told me that if I done what they asked me to do, that I wouldn't be charged for a crime and I would leave and go -- be able to go home after the court proceeding.

Q: And actually, the -- did your mom think you were coming home?

A: Yeah, she did. She's in the courtroom now and you can ask if you would like.
Q: Were you prepared to go home?
A: Yes, sir.
Q: And were you shocked when you got charged?
A: Yes, I was.
Q: Okay. Let's talk about this. How did you end up -- you signed this proffer agreement, right?
A: Yes, I did.
Q: Okay. And how far did you go in school?
A: To the 11th grade.
Q: And did you understand the legal terms that were in that proffer agreement?
A: No, I didn't.
Q: And that proffer agreement is part of the record, right?
A: No, it wasn't.
Q: Well, it's -- y'all went over it in court ---
A: Yes.
Q: --- at that time. And that proffer agreement, I mean if you look at the areas in the transcript that the judge was somewhat confused by the terms of the proffer agreement?
A: Yes, he was.
Q: Right, and they talk about while you were in court?
A: Yes, sir.
Q: Okay. So, did -- did you understand this could hurt you?

A: No, it was only told to me that it would help me.
Q: All right. That's what Mr. Diggs told you?
A: And the solicitor.
Q: And the solicitor. They both told you that this proffer agreement could help you?
A: They both told me that.
Q: Okay. And so did you sit down with Mr. Diggs, the solicitor, the investigator ---
A: I sat down with Mr. Diggs, his paralegal Johana, the solicitor at the time, Scot Hixson, two detectives, and everybody told me that I had nothing to worry about, answer any of the questions because it was all part of a proffer agreement. I could be truthful, open, and honest, and tell them everything and I wouldn't have nothing to worry about.
Q: Okay. And did you do that?
A: Yes, I did.
Q: And at some point, did they use that information against you?
A: Yes, they did. They used it to convict me of 40 years.
Q: Well, they didn't convict you of 40 years, they convicted you of what?
A: Murder.
Q: Okay. And were you surprised when they took you to trial for murder?
A: Yes, I was because my initial charge was accessory after

the fact and obstruction of justice. After I took the polygraph test, I immediately was charged with murder.

Q: Okay. And what did your attorney advise you about that?

A: As far as?

Q: What was gonna happen with that case?

A: All he told me the case -- I wouldn't never be charged with it as long as I did what I was supposed to do, as long as I told the truth and ---

Q: But what I'm talking about is after you got charged, what did your attorney tell you about the proffer agreement?

A: As far as?

Q: Could they use it against you or not?

A: Oh, no, he say he couldn't use the proffer agreement against me and he couldn't use nothing in the proffer agreement against me.

Q: Okay. So, did y'all get ready for trial?

A: No.

Q: What do you mean no?

A: We didn't get ready for trial. I took ---

Q: Okay, so ---

A: They came and take my statement and after they took the statement about a year later, they came with the polygraph test.

Q: Okay. So, when you say they took your statement, you're talking about this time that you met with the -- all these

people, and that was not at the jail, that was at the law enforcement center?

A: No, that was at the jail.

Q: When y'all went into a room there?

A: Right.

Q: And that was put on video tape?

A: Right.

Q: Okay. And so that's -- it's a whole year from the time that statement is taken until the time the polygraph was done?

A: Right.

Q: How did -- how did you know you were gonna have to take a polygraph?

A: Mr. Diggs told me after the initial sit-down with the proffer agreement or whatever he said was part of was one and the same, the proffer agreement and the polygraph test was one

---

Q: Did you understand that the proffer agreement had the polygraph information in there?

A: No, I did not.

Q: You -- did you read it?

A: I kind of skimmed through it and I told him that I didn't understand it properly and he advised me to still go forward with it because the solicitor said that I had nothing to worry about the incident as part of the agreement process.

Q: So, he advised you -- you went through it and just signed

it based on his explanation?

A: Yes, sir.

Q: Okay. And you wouldn't do that for just anybody off the street?

A: No, I would not.

Q: Why did you do it for Mr. Diggs?

A: Because Mr. Diggs never lied to me, he never misled me, he always told me the truth.

Q: Did you hear him testify here today?

A: Yes, I did.

Q: And is it consistent with what he told you throughout this whole process?

A: Yes, sir.

Q: Okay. Let's talk about you went down to do the polygraph. Where was the polygraph given to you?

A: At -- on the old court in Conway, downtown, across from the new courthouse.

Q: How did you get there?

A: The two detectives.

Q: They took you down there?

A: Right.

Q: Was Mr. Diggs there?

A: No, he was not. And when I asked for him, they say he wasn't allowed to be there.

Q: Okay. So, you went ahead and took the polygraph anyway?

A: Yes, I did.
Q: At that point, had Mr. Diggs told you were gonna take a polygraph?
A: No, he didn't.
Q: You didn't know that at that point?
A: No.
Q: Okay. Did anybody in his office tell you were gonna take a polygraph?
A: No, they did not.
Q: Did anybody go over with you the questions that were in the polygraph?
A: No, they didn't.
Q: Did you feel like you told the truth at the polygraph?
A: I know I told the truth.
Q: All right. And has anybody ever gone over the scores with you of that polygraph?
A: No, they just gave me a readout that had four questions, yes or no answers, and they said that I showed deception.
Q: Showed deception?
A: Deception.
Q: Right. And do you recall which ones of those recalled deception on?
A: I can't really remember. It's been a long time.
Q: But it would be in the transcript?
A: It would be in the transcript.

Q: Okay. So, did you argue with them at that point about the deception?

A: Yes, I did. I asked them how do you show deception on a test that's designed to show whether or not you're telling the truth or lying?

Q: All right.

A: And they told me that I would get the results from my lawyer and then I would go from there.

Q: Did you ever go from there with the lawyer and the results?

A: No, I did not.

Q: He never went over them with you?

A: Never.

Q: Did you ever take another polygraph?

A: No, I didn't.

Q: Did you talk to him about taking another polygraph?

A: We spoke about it and we never got around to it because he didn't say -- he didn't really like trust them knowing that I was locked up and there would be no way for me to take it without them knowing.

Q: Kind of what he said in here, right?

A: Right.

Q: Did you feel like you had been deceptive at all?

A: No.

Q: Did you ever understand that those statements could be

used against you?
A: No.
Q: All right. Would you have ---
A: Had -- the only reason I took the -- entered into it is because of my attorney's advice. He never misled me, he always advised me right, so I felt like he was advising me right then, so I did it.
Q: Okay. At that point, were you aware, had you gone over any discovery with Mr. Diggs about this alleged murder case?
A: No, I didn't, because I was never charged with murder. I was charged with accessory before the fact and obstruction of justice. When they came to me and told me I was going to trial for murder, I never seen an indictment, I never had time to prepare. I went straight from taking the polygraph to something that I thought that I was going home on to being charged with a murder and going to trial.
Q: Okay. And when you say you thought you were going home, who told you were you going home?
A: Mr. Diggs and the solicitor at the time, which was Scott Hicks [sic] and both detectives.
Q: They said that if you took the polygraph you could go on home?
A: If I took the polygraph, I was going home.
Q: Did you know that polygraph had anything to do with this proffer agreement?

A: I knew that the proffer agreement -- I knew that the polygraph had something to do with the proffer agreement because it was explained that it was one in the same, if I take the proffer agreement, once I give the statement, I got to take a polygraph to make sure the statement and ---

Q: I guess my question is, Why did it take a year?

A: That I couldn't answer. The only thing I can say is it took year if I had to guess ---

MR. JAMES: Objection. He already said that he couldn't answer, that's speculation ---

THE COURT: Sustained.

BY MR. YARBOROUGH:

Q: Don't guess, just testify. To your knowledge was there any evidence against you besides this ---

A: No; no, sir. No evidence, none whatsoever, no evidence to -- of murder and ---

Q: Did you have anything to do with that?

A: No, sir.

Q: You told them that?

A: I told them that.

Q: And they didn't have any evidence against you?

A: None.

Q: Did anybody ever discuss with you impeachment evidence?

A: No, sir.

Q: Do you know what that is?

A: No, sir.
Q: And nobody else ever got you to look at taking another polygraph?
A: No, sir.
Q: Did you ever have an opportunity or are you aware, did you ever move to withdraw from the proffer agreement?
A: To withdraw ---
Q: Yes.
A: As far as myself or with Mr. Diggs?
Q: Both. Either you withdrawing from the agreement or Mr. Diggs withdrawing from the agreement?
A: No, sir.
Q: And so you never took that step to say, hey, Mr. Diggs, we need to tell them this is going on too long; we need to tell them I don't want to be in this agreement anymore?
A: Right. Had I knew that null and void meant null and void to me, meaning it was only gonna be to hurt me -- the proffer agreement was explained to me and designed -- they say it was designed to totally help me.
Q: Right.
A: Nothing else.
Q: And that was -- Mr. Diggs old you that, the prosecutor told you that and the investigators told you that?
A: Yes, sir.
Q: And that's not what happened?

A: That's not what happened.
Q: And you're asking this Court to reverse your case for ineffective assistance of counsel because of that, right?
A: Yes, sir.
Q: It's not some confusion thing, that's what you're asking?
A: That's what I'm asking.
Q: I don't have any further questions.
THE COURT: All right.
Mr. James?
Go ahead.

CROSS EXAMINATION OF THEODORE DAVID WILLS, JR. BY MR. JAMES:

Q: Good morning, Mr. Wilson.
A: Good morning.
Q: Tell me again, what was your understanding of the proffer agreement?
A: If I -- that if I complied, that I had nothing to worry about.
Q: And what is your understanding of nothing to worry about?
A: That I wouldn't be charged, that I wouldn't have to face no jail time, that I wouldn't have anything to do with anything besides giving my statement and going home.
Q: And did that sound like a good deal to you at the time?
A: Yes, it did.
Q: And did you want to take that deal at that time?
A: Under the advice of my lawyer, yes, I did.

Q: But you agreed with the advice of your lawyer?
A: Of course.
Q: Do you have any mental conditions or intellectual disabilities?
A: No, sir.
Q: I didn't think you did. At that time, were you under the influence of any drugs or alcohol or any other intoxicating substances?
A: No, sir.
Q: Did anybody coerce you or force you to enter into that proffer agreement?
A: The solicitor told me I had nothing to worry about in entering to this agreement, no matter what I said as long as I was not the person that shot and killed this person, I had nothing to worry about.
Q: So, your understanding was as long as you weren't the trigger man, this was going to help you.
A: As long as I wasn't the trigger man, as long as I wasn't involved -- as long as I wasn't -- whatever I was telling them, that I wouldn't -- no matter what it was, it would not be held against me because it was all part of a proffer agreement.
Q: Did you tell them that you in fact were not the trigger man?
A: Yes, I did.

Q: And is that one of the questions that came back marked as deceptive -- I'm sorry -- one of the answers that came back marked as deceptive?

A: I don't know that.

Q: You don't recall?

A: I don't know how to read a polygraph examination, so that mean that would be not ---

Q: Do you recall a trial? Do you recall your trial?

A: Yes, sir.

Q: All right. Do you recall at trial that they indicated that your answer to the question, did you shoot Julian Lee, and you answered no? Do you recall the State testifying that that was deceptive?

A: No.

Q: I could refresh your memory but I don't think it's particularly necessary.

I have no further questions, Your Honor.

THE COURT: All right. Anything further?

MR. YARBOROUGH: No, sir, Your Honor.

THE COURT: All right. You may step down. Thank you.

Call your next witness.

MR. YARBOROUGH: That's our case, Your Honor.

THE COURT: All right. The State is recognized.

MR. JAMES: Just one moment, Your Honor.

THE COURT: Sure.

Your Honor, the State calls Scott Hixson to the stand.

SCOTT HIXSON, HAVING BEEN DULY SWORN, TESTIFIED AS FOLLOWS:

CLERK: State your name for the Court.

MR. HIXSON: Scott Hixson.

DIRECT EXAMINATION OF SCOTT HIXSON BY MR. JAMES:

Q: Good morning, Mr. Hixson, how are you doing today?

A: Good morning, sir. How are you?

Q: I'm doing all right. What do you do for a living, Mr. Hixson?

A: I'm the Chief Deputy Solicitor here in the Fifteenth Judicial Circuit, which is Horry and Georgetown County.

Q: And how long have you been in that position?

A: Several years now, but I've been working for the Fifteenth Circuit since 2001 as an assistant solicitor and then a deputy in Georgetown and now chief deputy.

Q: Was this your position -- let me take a step back. Do you recall the case of *State vs. Theodore David Wills*?

A: I do. I do. I was an assistant solicitor at that time and here in Horry County.

Q: What was your involvement in that case? Were you the solicitor assigned to that case?

A: I was; I was. I don't specifically remember if I got it on call or if -- at that time my deputy solicitor would've been Fran Humphries, if he gave it to me or not, but I know

initially I had primary responsibility for it.
Q: Do you recall entering into a proffer agreement with Mr. Wills?
A: I do. I recall that. I don't remember the specific terms of it; I'd have to review the document. It should've been a written proffer. At that time we had and still do have formal proffer forms that were kind of generally told to not change the language of them to maintain the four corners of the proffer document. And the only real substantive changes are whether the defendant's statement would be used against him or not used against him. I don't recall specifically what the content of the one that Mr. Wills with Mr. Diggs executed and he gave a statement under.
Q: All right. And why did you enter into a proffer agreement with Mr. Wills specifically?
A: Well, in conversations with Mr. Diggs in trying to resolve the case, the case itself was rather thin for lack of a better term. There wasn't a lot to it. There was -- there was some -- the main piece of evidence that I can specifically recall was a car entering and leaving the area where -- I haven't thought about this for a long time, so I'm a little vague on it, but ---
Q: I kind of sprung this on you, so ---
A: Yeah, so, but I do recall a car matching, I think it was a red Taurus, Mr. Wills had a read Taurus, and it was seen in

the area where maybe gunshot ---

MR. YARBOROUGH: Objection, Your Honor. I think this is all outside of the scope of what was in the trial transcript. He -- I mean, none of that was in the transcript that you have.

THE COURT: All right. Where are we going with it?

MR. JAMES: Just getting into why he entered into the proffer agreement and just going to go into what it was that he may've told Mr. Wills as part of entering into the proffer agreement.

THE COURT: Why don't we just go ahead and jump into that.

MR. JAMES: Okay.

BY MR. JAMES:

Q: Skipping ahead, what assurances if any did you give to Mr. Wills or to Mr. Diggs as his attorney about this proffer agreement?

A: I don't specifically remember other than what's contained in the four corners of the proffer agreement. In other words, I'm confident what I usually say is, you know, tell the truth. I recall specifically saying don't straddle the fence here. You understand if you're telling the truth and you're not the trigger man involved in it, then you're only kind of dealing with, you know, accessory type charges. The case itself was thin enough that absent him being a trigger man, there wasn't

a lot of potential liability he was facing. So, it's kind of the same stuff we say, you tell the truth, you pass a polygraph, and you say I didn't shoot the man, I wasn't here, and we could kind of back that up. Then it would be pretty normal for me to say, you're not facing a whole lot of liability. As I recall, Mr. Wills had another armed robbery charge at the time, so I know that there were other -- as I recall, it was an armed robbery in a vehicle. I don't remember if it was still pending at the same time that Julian Lee's case was pending but I know it was more than one charge that Mr. Wills -- that I dealt with at that time back, how many years ago it was. So, but I do specifically remember sitting down with Allen -- Detective Allen Large, he was the one that doing the interview. And I remember Bill Diggs being there specifically with Theodore Wills talking to him actually outside our presence. We left, he talked to Mr. Wills. I remember him starting the tape recording. I remember at that time he was saying things in the proffer agreement that I knew that were not true because we had some physical evidence that indicated that wasn't the case. I remember saying to Mr. Diggs, you know, there's no sense in going on if you're gonna say things that we knew that are absolutely not true, specifically the car and some items that counsel just objected to me talking about, so I won't continue to talk about that. And at that time, I know that Mr. Wills and Mr. Diggs talked

again and came back and said, yes, he's ready to tell you what was going on, and then the proffer continued. In that discussion, I specifically was surprised, and it caused a problem down the road, how forthright he was with his level of involvement that I didn't expect him to say and I -- what I'm referring to specifically about sharing the money, there's an allegation he was sharing money and proceeds. He said, I didn't have anything to do with hurting Mr. Lee but he shared in the money that came from it, and then disposed of a weapon off where the Socastee new overpass bridge was and showed a level of involvement and admitted to under a proffer agreement, and I said, oh, my goodness, he knows more about what's going on than I thought. But he's under a proffer, absent being a trigger man, he's still under the terms of the proffer. At that point in time, I specifically remember this, just so you're aware, what he said, man, he's heavily involved but he's still under a proffer. And I started having a conversation with him, with the detective because he was so forthright that I said this guy's is telling the truth. He's absolutely telling what happened. As a result, I made myself a witness in that case because I was actually on the recording talking to the defendant with his attorney present and ultimately had to be conflicted off of it and Brad Richardson is the one that prosecuted it. That's the reason I didn't do that, that Brad did, because Mr. Wills was so straight up that

I could not believe that he would fail a polygraph because he was talking about a level of detail that I misjudged. I thought he had to have been telling the truth till the polygraph came back and as a result I became a witness and had to be conflicted, if that makes sense.

Q: All makes perfect sense. So, you were no longer on the case at the time the polygraph was taken?

A: I probably was because I don't know when the polygraph came back deceptive as to the trigger man issue. I think that is when we notified Mr. Diggs, and this is probably a little too close to speculation because I don't specifically remember.

Q: Well, don't speculate. I don't want you to do that.

A: Okay. I know when I realized that the proffer -- when the proffer was -- I remember having a conversation at that time with Deputy Solicitor Humphries and kind of saying you can't do this now because you potentially could be called as a witness to that proffer agreement. We're gonna give it to somebody else cause you can't do it now in case at that time I needed to be witness to that statement.

Q: So, did you order the polygraph?

A: I don't recall. I'm not -- I don't recall if I did or not. It would be normal to verify, pursuant to the proffer agreement, that's what's in the terms of proffer agreement to see whether or not Mr. Wills is telling the truth about his

level -- it's a recorded statement, so y'all should have the statement he gave in the proffer.

Q: Okay.

A: I don't specifically recall if I did. I don't know if I did or Mr. Richardson did or Fran Humphries did, but I know that he was ultimately polygraphed on the statement he gave in the proffer.

Q: The line gets a little bit hazy at that point in the case?

A: Yeah, that's a long time ago.

Q: Do you recall being present at the polygraph?

A: I don't recall that. I normally am not, but I don't recall that.

Q: Okay.

A: To finish the story in that regard, once that happened, I didn't have any more involvement in it because I was conflicted off of it and said I can't -- you know, I can't prosecute it and chill the defense's ability to put up a complete defense because suddenly I'm there, so I was -- learned my lesson of never opening your mouth during the course of an interview with a defendant no matter now believable and everything that they seem to be, you've got to -- I don't even go in the rooms anymore, I stay out of it.

Q: Did you ever make any firm promises to Mr. Wills or to his attorney about how this case would be disposed with a

valid proffer?

A: No, sir. Because I don't have information on the nature of his involvement. I don't know -- that's what the purpose of a proffer agreement is with his attorney to get an idea of what we're talking about. I know that I always say and it's true that I say, if you didn't do anything wrong, you don't have anything to worry about. You cooperate and tell the truth and your truth is -- I'm confident that I said something in that regard because that -- I believe that. But that's why the four corners of a proffer agreement, with his attorney there, saying if you're not the shooter and you're not -- you know, you don't have a whole lot to worry about as compared to going 30 to life for a murder, you know. And so I'm sure that -- to some regard, you know, the truth will set you free type things that are with counsel present, I'm talking to him about if you didn't shoot him and you didn't do this, then what criminal liability do you have absent an accessory type charge.

MR. JAMES: I have no further questions for this witness.

THE COURT: All right. Cross?

MR. YARBOROUGH: Thank you, Your Honor.

CROSS EXAMINATION OF SCOTT HIXSON BY MR. YARBOROUGH:

Q: For the record, we've spent a great deal of time talking about the video tape of the proffer, which as I understand is in part of the original criminal trial and I'd ask to have the

-- I'm not -- I know how they do it in Greenville, I don't know how they do it here -- I'd ask that that be made part of the record for your review in this case or for another court at some point. I think it would be helpful to all parties ---

THE COURT: Any objections?

MR. JAMES: I have no objection to that. If it's cited to and introduced in the original trial, then I think ipso facto it can come before this court on PCR. I don't know where the physical video is off the top of my head but if the court -- we can find it.

MR. YARBOROUGH: We can find it and I can -- I can get somebody to get it to you for your recollection, because I would like to point out at this point that if you go to Page 237 of the trial transcript -- can I approach the witness, Your Honor?

THE COURT: You may.

BY MR. YARBOROUGH:

Q: I don't have a copy because I didn't think it would be part of this, but -- if you look at what I have underlined. Can you read that into the record?

A: Sure. I'm not sure what I'm reading. Is this the trial -- Page 30, Scott Hixson, who was an assistant solicitor here in this circuit ---

Q: Which is you, yeah?

A: It -- yeah -- but prefaces the question with, you don't

have anything to worry about answering it. And for Your Honor ---

Q: That's what you told Mr. Wills at that point is that if he answers the questions, you don't have anything to worry about, right?

A: Yes. I mean, I don't know the context of where this is written, obviously, because it's -- I see what I say if I had -- I know that at the time that I'm giving the statement he is under a proffer agreement to tell the truth completely, that he's under -- he does have things to worry about if he violates the proffer and he doesn't tell the truth and specifically if he fails as it relates to being a trigger man, but ---

Q: Right, but he wasn't the trigger man.

A: I don't know that. I mean, I know ---

Q: I know, but that became the problem in this whole thing is that Mr. Wills, the only evidence against him was this proffer statement. He doesn't say he's the trigger man and you made a deal with him that if he's not the trigger man then he's not gonna be punished, right?

A: Well, I didn't say not punished because once again ---

Q: He wasn't gonna be charged with murder, is that -- that's what you just said.

A: Well, he was charged with murder at the time.

Q: Well, I mean, he wasn't gonna be prosecuted for murder.

A: I never said that; that's not true. All I indicated is that you're gonna -- well, you have nothing to worry about, I guess is a relative term. And I guess that conversation I had was clear with Mr. Diggs as a proffer agreement, that agreement is the four corners of the proffer agreement and ---

Q: But still, you're in a -- we're in a room and we've all gotten in places we don't like to get in to.

A: Sure.

Q: And this was probably one of them at that point. But you're in a room with him and you start giving him some information and you're not his lawyer but you're a representative of the State, correct?

A: Yes.

Q: And what comes out of your mouth is, here in this circuit, you don't have anything to worry about answering it. That comes out of your mouth.

A: That's what's written on the page. I don't know what context that is -- I'm not trying to be argumentative but in vacuum that's rough for me to answer that, I can't ---

Q: Let's go on and look at the -- down a little bit further on Page 237, Your Honor. Can you tell me a little bit more about -- because on the surface it will look like certainly you got paid but hit on somebody that you had a lot to do with the hit. Now, this is all part of the proffer so you understand that you don't have anything to worry about

answering it.
A: That helps me a lot more. It helps me to understand the context.
Q: But I mean, that's what you're telling him. I mean, this guy is the guy -- he's a junior, he's gotten through his junior year in high school or gotten into the junior year in high school and you're a lawyer and you're sitting there with his lawyer and with a couple of investigators and that's what you tell him.
A: What I specifically remember, which it'd be interesting to know whether the terms of that written proffer says his statements can or cannot be used against him and that's very probative to what his level of potential criminal liability is. In other words, if the written proffer that his attorney signed with him says his statements contained in the proffer, if he doesn't violate it, can't be used against him, that's very meaningful.
Q: Okay. Well, the -- you testified in the trial, right?
A: No.
Q: You didn't come ---
A: No, no.
Q: Have you looked at the transcript? That's exactly what the Judge had trouble with.
A: I found out about this about three minutes ago, so this was 10 years ago, so ---

Q: No, you didn't -- you didn't come to the trial 10 years ago?
A: No, no, no. I -- once ---
Q: You didn't go to the *Jackson Denno* hearing, you didn't do ---
A: No, sir.
Q: Okay. And those were the issues the Judge had trouble with because the, the -- and these were proffer agreements that were used at this point 10 years ago that the wording is hard to follow. I mean, this isn't the first time this has come up, but the wording was hard to follow, would you agree with that?
A: I don't know if the wording is. I can't agree with that. I mean, that's what I asked. There are two standard proffer agreements we used at that time but they basically are the same ones and the only real difference is this statement may be used against you if you violate the proffer or your statement may not be used against you as a contractual matter, and so ---
Q: As a contractual matter, was it to be used against him?
A: So, if that is the truth, then if I cannot use his statement in a proffer and he doesn't violate the proffer, he doesn't have anything to worry about.
Q: Right. And ---
A: That's a true -- that's true then. If he specifically,

just to add a little more context to it, one of the reasons I started asking Mr. Wills questions is because I -- at that time I don't recall that the investigator had mentioned anything about receiving money for this process, that it was a murder for hire, potentially as a case theory. And so when Mr. Wills mentioned about receiving money for it and splitting it and all that, I went, man, if you're -- if you're -- this just went from a guy that was shot in the back out in the -- out behind a building to exchanging money for what happened in this, that level of potential culpability just went way up but he's still operating under a proffer agreement that if he doesn't violate the proffer -- if that proffer says you can't use that statement, he's in a really good spot and that's true.

Q: And so -- and that was true, he was in a -- he said they're telling you the truth and by advice of counsel, right, through the lawyer?

A: He was sitting right beside him, oh, absolutely the advice ---

Q: He's sitting there and he's telling you stuff and then you're going, wow, this is great, this is good.

A: I'm not kidding, I was really stunned that he admitted -- admitted that he participated in the murder for hire and he was under a proffer agreement. At that moment in time, I went, I think I made a big mistake. I actually thought big

mistake, I think he may admit to a murder for hire right here and he's under a proffer agreement.

Q: So, his lawyer should've never put him in that position, right?

A: I can't answer that. I thought actually at that moment in time it as a stroke of genius on their part because if I can't use his statement against him and he completes this proffer agreement and he admitted to receiving half the -- and I apologize, I'm trying to remember a long time ago ---

Q: And his lawyer has already testified to what you ---

A: Man, he admitted, and that's why honestly I started asking questions because I was really stunned that Mr. Wills was so forthright and ---

Q: And you keep on -- tell me this stuff, give me this information, that's what you're telling him. You're getting the information from him, and you're taking advantage of the proffer agreement. You're saying, hey, you ain't got nothing to worry about as long as you tell me the truth, right?

A: No, this -- I'm not taking advantage of the proffer agreement. He has counsel sitting right beside him. He felt like it was in his best interest to do what he was doing. He -- I thought that seemed like he did a really good job putting himself in position to be protected. I don't want say immune from prosecution because once again I've yet to see the document whether or not that -- I don't want to testify to

something I can't remember. I haven't seen it. But if it relates to him not being able to use any statements, that if he's truthful on the polygraph, then he is -- he doesn't violate the terms of the proffer and so if he's ---

MR. YARBOROUGH: Your Honor, if I wasn't clear before, I think the proffer agreement itself is also part of the record, it's read in a number of times during the -- but I'd also like to make that a court's exhibit.

THE COURT: Everything is in there. I've seen all this that you're talking about.

MR. YARBOROUGH: Okay, good.

BY MR. YARBOROUGH:

Q: And you weren't at the trial, so you ---

A: No, sir.

Q: I'll leave it with this, you did tell him you don't have anything to worry about answering it?

A: That's what's in the transcript. I don't have an individual recollection of it, but I have no reason to challenge the ---

Q: Right, and that would've been in the ---

A: I don't remember that.

Q: --- in the ---

A: I do remember in the proffer agreement initially or in the interview with Detective Large that there appeared to be reticence between Mr. Wills and his attorney that, that there

wasn't much information, wasn't very forthright. And I do remember saying, there's no sense in going through this if you're not going to tell everything that happened. I mean, that's part of the proffer agreement, the nature of it is to be forthright and elicit information without being asked and all that, that's the nature of the contract. And I remember stopping and Allen -- Detective Large stopping and those guys talking for a period of time or so. And I said, you tell me if you want to keep going forward or not, that's up to you. And I remember them coming back and say yes he would like to continue to operate under the proffer agreement. And that's when the bulk of the statement was after that lack of -- they were clearly talking and counsel was talking to Mr. Wills all through it, during it, and taking breaks from it. I recall that.

MR. YARBOROUGH: One moment, Your Honor.

BY MR. YARBOROUGH:

Q: It's all reflected on the tape, correct?

A: Yes. I don't recall anything -- I think Mr. Diggs at one point in time asked about turning the tape off so he could talk to Mr. Wills, I think, but I -- once again, it's ---

Q: Well, the tape will speak for itself.

A: Yeah, after ---

Q: Thank you. No further questions.

THE COURT: Redirect?

MR. JAMES: No further questions for this witness, Your Honor.

THE COURT: All right. Thank you. You have a good day.

MR. HIXSON: Thank you, Your Honor,

THE COURT: Call your next witness.

MR. JAMES: State has no further witnesses, Your Honor.

BY THE COURT:

THE COURT: All right. Anything further from the applicant?

MR. YARBOROUGH: No, nothing further from the applicant.

THE COURT: I'll take the matter under advisement and give you my ruling soon

MR. JAMES: Your Honor, about acquiring the actual tape of the proffer ---

THE COURT: It's in the transcript, isn't it? Isn't all of that written down in the transcript?

MR. YARBOROUGH: The proffer is in there. The tape itself was admitted into evidence. The tape is like an hour and ten minutes?

MR. HIXSON: Probably. I recall seeing a transcript of it, but I don't recall ---

MR. JAMES: It's a long tape.

MR. YARBOROUGH: Yeah, there is a transcript. I didn't know -- Judge, I thought, because it is somewhat complicated about what's on the tape, what's not on the tape, what's in

the transcript, I didn't know if it might be beneficial for the court for us to take a chance to brief this issue a little bit with the facts and submit those to the court?

THE COURT: I don't think I need it but, I mean, I've got the transcript and I've read it all and looked at it all and heard from you in great detail and you as well.

MR. JAMES: Thank you, Your Honor.

MR. YARBOROUGH: Thank you.

THE COURT: Thank you.

(ADJOURNED - 11:33 A.M.)

C E R T I F I C A T E

I, the undersigned, Kay H. Richardson, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the hearing held in the case of *Theodore David Wills versus State of South Carolina*, held in the Court of Common Pleas for Horry County, Horry County Courthouse, Conway, South Carolina, on September 19, 2017.

I do hereby certify that I am neither of kin, counsel, nor interest to any party hereto.

Kay H. Richardson
Official Court Reporter

February 28, 2018.

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| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | FOR THE FIFTEENTH JUDICIAL CIRCUIT |
| COUNTY OF HORRY | ) | |
| Theodore Wills Jr., S.C.D.C. No. 239761, | ) | Case No.: 2014-CP-26-07915 |
| Applicant, | ) | |
| v. | ) | **ORDER OF DISMISSAL** |
| State of South Carolina, | ) | |
| Respondent. | ) | |

FILED
HORRY COUNTY
2018 JAN -5 PM 2:10
JENNIFER J. ELLIS
CLERK OF COURT
HORRY COUNTY, SC

This matter comes before the Court by way of an application for post-conviction relief filed by Theodore Wills Jr. ("Applicant") on December 1, 2014. Respondent made its return on or about February 2, 2016. The Court convened an evidentiary hearing into the matter on Tuesday, September 19, 2017, at the Horry County Courthouse in Conway, South Carolina. Applicant was present at the hearing and represented by William G. Yarborough, III, Esquire. Johnny Ellis James Jr., of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, William I. Diggs, Esq. ("Counsel"), and Scott Hixson, Esq., of the Fifteenth Circuit Solicitor's Office ("Hixson"), also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original trial transcript, the records of the Horry County Clerk of Court regarding the subject convictions, Applicant's direct appeal records, and the pleadings. The Court finds as follows:

## I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the April 2006 term of the Horry County Grand Jury for murder (2006-GS-26-01652). William I. Diggs, Esq. represented Applicant, and Bradley C. Richardson, of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On October 1, 2007, Applicant proceeded to trial before the Honorable Steven H. John and a jury. The jury found Applicant guilty as indicted on October 3, 2007. On October 29, 2007, Judge John sentenced Applicant to imprisonment for a term of 40 years.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Joseph L. Savitz, III, Esq., who raised the following issue:

> The trial judge committed reversible error by allowing Wills' statement into evidence, since it resulted from a proffer agreement with the State and was thus inadmissible under Rule 410, SCRE.

By opinion decided September 22, 2010, the South Carolina Court of Appeals affirmed Applicant's convictions. State v. Wills, 390 S.C. 139, 700 S.E.2d 266 (Ct. App. 2010). By and through counsel Robert M. Dudek, Esq., Applicant petitioned the Supreme Court of South Carolina for a writ of certiorari, which was granted by order dated February 13, 2012. By and through counsel Lanelle Cantey Durant, Esq., Applicant thereafter briefed the Supreme Court as to the following issue:

> Whether the Court of Appeals erred by ruling the trial judge did not commit reversible error by allowing Petitioner Wills' statement into evidence, since it resulted from a proffer agreement with the State and was thus inadmissible under Rule 410, SCRE.

The parties proceeded to oral arguments on December 6, 2012. The Supreme Court affirmed the Court of Appeals on July 16, 2014. State v. Wills, 409 S.C. 183, 762 S.E.2d 3 (2014). The Remittitur was issued on August 22, 2014.

**Present Application**

In his post-conviction relief application, as amended by filing on June 1, 2017, Applicant alleges he is being held unlawfully for the following reasons:

1. "The plea agreement was null and void after the material breach of the terms and thus Applicant's alleged admissions in conjunction with the plea agreement are inadmissible per se and were improperly admitted at trial."
    a. "The terms of the plea agreement should be construed strictly against the State as the drafter. The terms stated that the agreement would be rendered null and void upon violation of the agreement. By claiming that Applicant violated the agreement and then withdrawing it, the State nullified the entire agreement including the waiver provision. Thus, the Applicant's alleged admissions should have been excluded under Rule 410 since the terms of the agreement were nullified and no longer controlling."
2. "The Government improperly used the Applicant's alleged admissions in its case-in-chief when such admissions are only usable as impeachment evidence."
    a. "The government used the Applicant's alleged admissions in its case-in-chief when such evidence should only be usable as impeachment evidence."
3. "The State wrongfully used unreliable polygraph test results to obtain the only substantive evidence against the Applicant, claiming that the Applicant had violated the agreement by being untruthful without identifying any specific statements where the Applicant had deceived the State."
    a. "The State wrongfully used unreliable polygraph test results to obtain the only substantive evidence against the Applicant. The State claimed that the Applicant had made deceptive statements but never identified the deception which rendered the plea agreement proceeding fundamentally unfair to the Applicant."
4. "The withdrawal of the plea agreement due to the unreliable polygraph results was patently unfair to the Applicant, especially considering that the State later used the same polygraph evidence as the only evidence against Applicant."
    a. "The withdrawal of the plea agreement due to the unreliable polygraph results was patently unfair to the Applicant, especially considering that the State later used the same polygraph evidence as the only evidence against Applicant. The State withdrew the agreement alleging that the Applicant's statements were false only to present those same statements later to the jury as true. This turnabout produced a patently unfair proceeding for the Applicant that impaired the integrity of the judicial process and resulted in a miscarriage of justice."

5. "There was insufficient evidence of the Applicant's guilt since the State's only evidence was the Applicant's alleged admissions which were admitted improperly. Thus, the trial court erred in denying the Applicant's motion for a directed verdict in violation of the Applicant's 4th and 14th Amendment due process rights.
    a. "The only substantive evidence against the Applicant was his alleged admissions which were wrongfully admitted. Due to the lack of evidence, the trial court erred in denying the Applicant's motion for a directed verdict in violation of his due process rights under the 4th and 14th Amendments."
6. "Ineffective assistance of counsel pursuant to Strickland v. Washington."
    a. "Trial counsel was ineffective pursuant to Strickland v. Washington for failing to object to an erroneous jury charge regarding implied malice."

## II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

### A. Respondent's Partial Motion to Dismiss

At the outset of the evidentiary hearing, Respondent motioned to dismiss the first five allegations, restated above, arguing that they comprised direct appeal issues and claims of actual innocence not cognizable in a post-conviction relief action. Applicant argued that the application should be read *in toto*, and that the allegations should be read entirely under the umbrella of Applicant's final, general allegation of ineffective assistance of counsel. Consistent with its ruling from the bench at the evidentiary hearing, this Court agrees with Applicant, and finds that the interests of justice are best served by reading the Application *in toto*. Accordingly, Respondent's partial motion to dismiss is **DENIED**.

**B. Ineffective Assistance of Counsel**

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Butler at 442, 334 S.E.2d 441 (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Id.

"[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Butler at 442, 334 S.E.2d 441 (quoting Strickland at 690). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). "Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689; Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this

prong, attorney performance is measured by its "reasonableness under professional norms." Cherry at 117, 386 S.E.2d at 625 (citing Strickland at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry at 117-18, 386 S.E.2d at 625 (citing Strickland at 694). The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 696-97.

***IAC Allegation #1 – Misadvice to Proffer, Failure to Argue Against Use of Statements***

Reading the application *in toto*, Applicant argues that Counsel misadvised Applicant to enter into the proffer agreement and failed to adequately and effectively argue that the use of his proffered statements against him at trial was improper. The law applicable to this question is, as noted by Respondent at the evidentiary hearing, set forth by the holdings on Applicant's own direct appeal. "[A]greements between defendants and the State should be interpreted 'in accordance with general contract principles.'" State v. Wills, 390 S.C. 139, 700 S.E.2d 266 (Ct. App. 2010). While Rule 410 of the South Carolina Rules of Evidence generally render inadmissible any statements made in the course of plea discussions, a defendant may waive the protections afforded by Rule 410. State v. Wills, 409 S.C. 183, 185, 762 S.E.2d 3, 4 (2014).

By letter dated August 25, 2005, Assistant Solicitor Scott Hixson offered Applicant the opportunity to enter into a proffer agreement with the State. Appx. 185-87, State v. Wills, App.

Case No. 2010-178266. The terms of that proffer provided that Applicant would "submit himself to agent(s) of the State for the purpose of debriefing regarding this matter and all other matters materially bearing on this matter[,]" and that Applicant would "submit himself to a polygraph examination(s) to verify all information provided to the State at the election of the State." Id. Further, the proffer established that if the responses given by Applicant during the polygraph returned an indication of deception, the terms of the proffer would be null and void and any statements made by Applicant could be used against him by the State for any legal purpose. Id. In exchange for his cooperation, Applicant's statements would not be used against him, he would not be subject to any further charges in connection with the subject of the proffer, and the State would take it into consideration in determining an appropriate sentencing recommendation. Id. Applicant and Counsel both signed the proffer on August 26, 2005. Id. Applicant met that same day with Det. Troy Allen Large, of the Horry County Police Department, and proffered a statement in the presence of Counsel and Hixson.

Applicant thereafter submitted to a polygraph examination on September 19, 2005. Tr. 44, ll. 2-3. In an extensive pre-trial Jackson v. Denno hearing, Special Agent Ricky W. Charles, of the South Carolina Law Enforcement Division, testified that the results of the polygraph examination indicated that Applicant "showed deception on the test." Tr. 67, ll. 9-11. In particular, S/A Charles testified that Applicant was deceptive to questions regarding who actually shot the victim:

> Q: Agent Charles, with regard to Question R-4, are you lying about Mark Willard shooting Julian Lee in that field, what was the examinee's response?
>
> A: He answered, no.
>
> Q: And what were you able to discern from that answer?

A: When we numerically evaluated the chart we determined that he was deceptive to that question when he answered no.

Q: And in response to R-6 did you shoot Julian Lee what was the examinee's response?

A: He answered, no.

Q: And were you able to determine whether the defendant was showing deception or not on that question?

A: Numerically when the charts were evaluated it was determined that he was deceptive with that question.

Q: Finally to speed things up, with regard to question R-8 and R-10, are you lying about Donnell Green throwing that gun used in the shooting in the water? Twelve is, did you lie about being paid by the Johnson brothers to shoot Julian Lee, what were the defendant's responses with regard to those questions?

A: He answered, no, to both.

Q: And were you able to determine anything with regard to that question?

A: No, numerically both of those were scored inconclusive or no opinion.

Tr. 70-71.. Counsel argued against the use of the proffered statement in the case in chief on grounds that "the proffer agreement itself doesn't really tell [Counsel] or [Applicant] that this statement is going to be introduced during the trial, the course of the trial for the jury to hear." Tr. 125, ll. 7-10. Counsel argued the proffer was ambiguous and that the ambiguity should be "construed strictly against the State." Tr. 125, ll. 15-17. Counsel further contended that the voluntariness of the statement was inextricably intertwined with the validity of the interpretation of the polygraph itself, and that, despite ample opportunity, the State never bothered to attempt a second polygraph examination. Tr. 125-27. The trial court ultimately ruled that the proffered statement could come in, but that no reference to the polygraph examination would be permitted.

Tr. 131-36. The recording of Applicant's statement was introduced as an exhibit during the State's case-in-chief and published to the jury. Tr. 229-31.

At the evidentiary hearing, Counsel testified that his understanding of the agreement was that if Applicant was truthful, all of the charges would be dropped and that the State would, with Applicant's assistance, prosecute the others involved in the killing. Counsel reported that the State gave him assurances the proffered statement would not be used against Applicant. Counsel felt that the State breached the agreement. Counsel recalled that he argued the statement could be used only for impeachment purposes.

On cross-examination, Counsel expressed his belief that Applicant had been truthful, as well as his belief that the offer presented would have been the best possible outcome for his client. Counsel felt at the time that the deal was very good. Counsel indicated that he, with other clients, had entered into many other proffers in his 34 years as a practicing attorney, but could recall no other instances of a breach in proffer. When asked if he considered independently conducting a polygraph examination on his client, Counsel noted that Applicant was incarcerated prior to trial and that, consequently, such a venture was not possible. Counsel noted that Applicant was a "normal person" who did not suffer from any mental problems. Notably, Counsel affirmed that he would still today advise clients to enter into proffer agreements. On re-direct by Applicant, Counsel noted that the issue Applicant faced had been new ground and that hindsight is twenty-twenty.

Applicant testified that both Counsel and the solicitor indicated the proffer would help him, and that he could be truthful, open, and honest in his statements. Applicant was surprised the State took him to trial for murder after the proffer. Counsel told Applicant that the State would not be able to use the proffered statements against him. Applicant maintained that he

never lied and was honest throughout the process. Applicant claimed that nobody told him he would have to take a polygraph. Applicant affirmed that he was never offered and never took a second polygraph examination.

Hixson testified that the State made the offer of a proffer because the case was thin. Hixson recalled telling Applicant not to "straddle the fence" in his statements. Hixson recalled that Counsel was present during the proffer, and that Applicant was initially dishonest at the outset of the proffer. Upon warning, Hixson further recalled, Applicant became surprisingly forthright, admitted to getting money, and effectively made himself a witness. Hixson was surprised upon learning that Applicant failed the polygraph examination. Hixson denied making any firm promises as to the resolution of the case. On cross-examination, Hixson firmly denied pledging to not prosecute Applicant for murder. Hixson denied that he had been seeking to take advantage of Applicant and, at the time, believed Counsel had made a stroke of genius.

As to Counsel's decision to advise Applicant to enter into the proffer agreement, the Court finds no deficiency on the part of Counsel. Looking back, the decision to enter into the proffer agreement obviously did not inure to Applicant's benefit, but proper analysis of an allegation of ineffective assistance of counsel requires this Court to make every effort to set aside the distorting effect of hindsight and consider the decisions of counsel based on the information and circumstances available to him at the time they are made. Strickland, 466 U.S. at 689. Proffer agreements are a common element of plea negotiations premised upon cooperation between defendants and the State. The testimony from Counsel, Applicant, and Hixson was consistent that the deal was very advantageous to Applicant and that all were surprised that he failed the polygraph examination. There were no indications that the cooperating agreement was likely to fail, either due to some dishonesty apparent to Counsel or due to some mental or

emotional disability on the part of Applicant. Counsel thoughtfully and strategically considered the potential benefit the proffer presented to his client and advised his client appropriately. Accordingly, this Court can find no deficiency on the part of Counsel in his advice to Applicant to enter into the agreement, nor prejudice therefrom, and Applicant's request for relief based upon that advice is **DENIED**.

As to Counsel's arguments against the admissibility of the statements in the State's case-in-chief, this Court finds that Counsel effectively and zealously argued against their admissibility for any purpose other than impeachment, secured a complete ruling from the trial judge, and preserved an unanswered question in South Carolina law for appeal. Applicant advances a number of strong and compelling arguments against the admissibility of his proffered statement, not all of which were advanced in so complete a manner at trial. However, each of Applicant's arguments were explicitly considered by the Supreme Court of South Carolina on direct appeal, as evidenced by now-Chief Justice Beatty's vociferous dissent, in which Justice Hearn concurred. See State v. Wills, 409 S.C. 183, 185-206, 762 S.E.2d 3, 4-15 (2014). The arguments advanced by Applicant were not adequate to turn the opinion in the Supreme Court and, as such, this Court cannot now conclude that they would have done so at the trial level. Accordingly, the Court finds no deficiency on the part of counsel, nor prejudice therefrom, and Applicant's request for relief by way of this allegation is **DENIED**.

***IAC Allegation #2 – Failure to Object to Jury Instruction on Implied Malice***

Applicant alleges that Counsel was ineffective for failing to object to the trial court's instructions to the jury regarding the implication of malice from the use of a deadly weapon. On October 12, 2009, the Supreme Court of South Carolina held "that where evidence is presented that would reduce, mitigate, excuse or justify a homicide (or assault and battery with intent to

kill) caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon. State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009). However, the Supreme Court recognized its decision in Belcher represented "a clear break from our modern precedent," and circumscribed the holding to apply only to Belcher and "for all cases which are pending on direct review or not yet final where the issue is preserved." Id. Belcher does not apply retroactively to convictions challenged on post-conviction relief. Id., 385 S.C. at 613, 685 S.E.2d at 810.

At trial, the court instructed the jury as follows:

> Regarding inferred malice[,] that is shown from conduct which shows a total disregard for human life. Inferred malice can also arise when the deed is done with a deadly weapon. A deadly weapon is any article, instrument, or substance which is likely to cause death or great bodily harm. Whether or not an instrument has been used as a deadly weapon depends upon the facts and circumstances of each case.

Tr. 284-85 (formatting omitted). Counsel did not object.

At the evidentiary hearing, Counsel testified that the charge was good law at the time of trial, which took place from October 1-3, 2007. This Court agrees, not only because Belcher is not retroactive, but because there was no evidence presented at trial to reduce, mitigate, excuse, or justify the homicide. The victim was simply murdered, with no hide nor hair of evidence to show that it was done in self-defense or that lesser-included charge was appropriate. Accordingly, the Court finds no deficiency on the part of Counsel, nor prejudice therefrom, and Applicant's request for relief by way of this allegation is **DENIED**.

## III. CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED:**

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

**AND IT IS SO ORDERED this** 19 **day of** December, **2017.**

WILLIAM H. SEALS, JR.
Presiding Judge
Fifteenth Judicial Circuit

Marion, South Carolina

THE STATE OF SOUTH CAROLINA
**In The Court of Appeals**

The State, Respondent,

v.

Theodore David Wills, Jr.,
Appellant.

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Appeal From Horry County
Steven H. John, Circuit Court Judge

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Opinion No. 4742
Submitted September 1, 2010 – Filed September 22, 2010

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**AFFIRMED**

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Senior Appellate Defender Joseph L. Savitz, III, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Attorney General S. Creighton Waters, all of Columbia; and Solicitor J. Gregory Hembree, of Conway, for Respondent.

**PER CURIAM:** Theodore David Wills, Jr. appeals his murder conviction and forty-year sentence, arguing the trial court erred in admitting his statement in violation of Rule 410, SCRE. We affirm. **[1]**

## FACTS

Wills was charged with murdering Julian Lee. Prior to his trial, Wills entered into a proffer agreement with the State, reviewed and signed by his attorney, whereby he agreed to truthfully divulge the events and circumstances surrounding Lee's death in exchange for the State's consideration and a recommended sentence. The agreement contained

several conditions, including Wills's submission to a polygraph examination to test the veracity of his statement. Additionally, the agreement provided:

> [U]pon examination(s) by polygraph, if the responses given by Theodore David Wills Jr. show deception, are inconsistent with information previously provided or indicates he is the person or one of the persons that shot the victim, the terms of this proffer are null and void and any statements made by Theodore David Wills Jr. may be used against him by the State for any legal purpose, including, but not limited to, considerations for charging, bond, disposition of charges through plea or trial of Theodore David Wills Jr. and impeachment.

After Wills gave a video-taped proffer statement, the polygraph was administered and the State determined Wills was untruthful.

At trial, Wills opposed the statement's introduction, and after a Jackson v. Denno, 378 U.S. 368 (1964), hearing, the trial court found the statement was voluntary and admissible on the conditions both parties would refrain from mentioning the polygraph, and the videotape would be redacted where Wills referenced his previous incarceration and the polygraph. Wills was convicted as charged and sentenced to forty years' imprisonment. This appeal followed.

## STANDARD OF REVIEW

The admission of evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). An abuse of discretion occurs when the trial court's conclusions either lack evidentiary support or are controlled by an error of law. Id.

## LAW/ANALYSIS

"Rule 410[, SCRE,] provides . . . a statement made during plea negotiations with a prosecuting authority, even if a guilty plea is not entered or is later withdrawn, is not admissible." State v. Compton, 366 S.C. 671, 679, 623 S.E.2d 661, 665 (Ct. App. 2005).

In Compton, this court addressed the admissibility of a defendant's statements procured pursuant to an agreement with the State. Id. Otis James Compton was questioned about an unsolved murder prior to pleading guilty to unrelated counts of burglary. Id. at 675, 623 S.E.2d at 663. At all times, Compton remained a person of interest in the murder investigation. Id. While incarcerated, Compton pled to additional charges unrelated to the murder and was placed in a holding cell. Id. Compton initiated a conversation with his holding cellmate regarding the unsolved

murder, admitting his involvement. Id. Approximately two months later, the cellmate was transferred to Compton's prison and asked by investigators to listen to Compton about the unsolved murder. Id. at 675-76, 623 S.E.2d at 663. The cellmate acquiesced and reported several conversations to investigators. Id. at 676, 623 S.E.2d at 663.

Eight months after his initial plea, Compton contacted investigators regarding the unsolved murder and entered into a written agreement labeled "Plea Agreement" whereby Compton agreed to fully and truthfully cooperate in the murder investigation. Id. at 676, 623 S.E.2d at 663-64. In exchange for his cooperation, the State agreed to reduce all sentences Compton was serving for the unrelated burglary charges. Id. at 676, 623 S.E.2d at 664. As a result of his cooperation during the investigation, Compton was indicted for murder. Id. Pretrial, Compton moved to suppress his statements, arguing they were subject to an immunity agreement and precluded by Rule 410, SCRE. Id. The trial court admitted the statements after finding no reasonable expectation of immunity existed and the statements were not procured during plea negotiations. Id.

On appeal, this court examined the "Plea Agreement," and determined the agreement did not contain an immunity clause. Id. at 676-78, 623 S.E.2d 664-65. In construing the agreement, our court stated "immunity agreements and plea agreements are to be construed in accordance with general contract principles." Id. at 677, 623 S.E.2d at 664. Thus, "[t]he court must enforce an unambiguous contract according to its terms, regardless of the contract's wisdom or folly, or the parties' failure to guard their rights carefully." Id. at 678, 623 S.E.2d at 665. Likewise, this court determined the admission of Compton's statements did not offend Rule 410, SCRE. Id. at 679, 623 S.E.2d at 665. This court held Rule 410, SCRE, did not preclude the admission because the statements were not procured in the course of plea negotiations when the negotiation "related to the reduction in sentence for the burglary" convictions. Id. Specifically, our court stated the discussions "were not in furtherance of Compton making a plea on any charges." Id.

Applying the principles of Compton to the instant facts, an ambiguity in South Carolina law seems to emerge. Our case law unequivocally establishes agreements between defendants and the State should be interpreted "in accordance with general contract principles." Id. at 677, 623 S.E.2d at 664. However, by examining the admissibility of Compton's statements **[2]** under Rule 410, SCRE, our court has left the precise question of whether an agreement can waive the application of the Rules of Evidence unanswered.

While no South Carolina case law specifically discusses whether a defendant can waive the exclusionary provisions of Rule 410, SCRE, the United States Supreme Court addressed waiver of the exclusionary

provisions of Rule 410, FRE, in United States v. Mezzanatto, 513 U.S. 196, 200 (1995). **[3]** Gary Mezzanatto was arrested and charged with possession with intent to distribute methamphetamine after attempting to sell an undercover officer drugs. Id. at 198. The controlled buy was arranged by an informant who was arrested a few hours before Mezzanatto for operating a methamphetamine laboratory in his residence. Id. at 197-98. Pretrial, Mezzanatto and his attorney contacted the prosecutor to discuss the possibility of cooperating with the government. Id. at 198. The prosecutor informed Mezzanatto he was under no obligation to talk; however, the prosecutor stated Mezzanatto would have to be completely truthful if he wanted to cooperate with the government. Id. Additionally, Mezzantto orally agreed, with advice of his counsel, "that any statements he made during the meeting could be used to impeach any contradictory testimony he might give at trial if the case proceeded that far." Id.

During the meeting, Mezzanatto attempted to minimize his involvement in distributing methamphetamine and claimed he had not visited the methamphetamine laboratory at the informant's residence for at least a week before his arrest. Id. at 199. After showing Mezzanatto video surveillance of his vehicle at the methamphetamine laboratory the day before his arrest, the government terminated the meeting due to Mezzanatto's deceit. Id.

Accordingly, Mezzanatto was tried, and during his cross-examination, the prosecutor impeached him using the statements procured during the cooperation meeting. Id. Mezzanatto was ultimately convicted. Id. On appeal to the Ninth Circuit Court of Appeals, Mezzanatto's conviction was reversed. Id. The Ninth Circuit "held [Mezzanatto's] agreement to allow admission of his plea statements for purposes of impeachment was unenforceable." Id. The United States Supreme Court granted certiorari and reversed the Ninth Circuit, stating: "The presumption of waivability has found specific application in the context of evidentiary rules. Absent some 'overriding procedural consideration that prevents enforcement of the contract,' courts have held that agreements to waive evidentiary rules are generally enforceable even over a party's subsequent objections." Id. at 202 (citation omitted). Furthermore, the Court held "absent some affirmative indication that the agreement was entered into unknowingly or involuntarily, an agreement to waive the exclusionary provisions of the plea-statement Rules is valid and enforceable." Id. at 210.

Here, the principles of Mezzanatto are instructive in determining whether Wills's statements were properly admitted. First, we note the proffer agreement between Wills and the State constituted a plea negotiation and triggered the exclusionary provisions of Rule 410, SCRE. Likewise, any statements procured in execution of the agreement were unequivocally in furtherance of Wills entering a plea on his pending charges. Second, construing the proffer agreement in accordance with general contract

principles, regardless of the agreement's wisdom or lack thereof, the agreement unambiguously provides Wills's statement can be used against him by the State for any legal purpose if the State determines Wills was deceitful. Thus, we hold the proffer agreement waived the protections of Rule 410, SCRE. Next, we must determine whether an affirmative indication that Wills entered the agreement unknowingly or involuntarily exists. Because Wills entered the proffer agreement with advice of counsel, evidenced by counsel's co-signature, and the record lacks support for a finding to the contrary, we find the agreement was knowingly and voluntarily entered. Therefore, the trial court properly admitted Wills's statements as evidence against him at trial.

Accordingly, Wills's conviction is

**AFFIRMED.**

**WILLIAMS, PIEPER, and KONDUROS, JJ., concur.**

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[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

[2] Compton was also subjected to a polygraph, and the State determined he was deceitful. Compton, 336 S.C. at 676, 623 S.E.2d at 664. However, in his appeal, we declined to address whether Compton's breach of the agreement contributed to his statements' admissibility because the issue was not properly before this court. Id. at 679 n.2, 623 S.E.2d at 665 n.2.

[3] Rule 410, SCRE, is substantially similar to Rule 410, FRE. Compare Rule 410, FRE, and Mezzanatto, 513 U.S. at 197 ("Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(e)(6) provide that statements made in the course of plea discussions between a criminal defendant and a prosecutor are inadmissible against the defendant."), with Rule 410, SCRE, and Compton, 366 S.C. at 679, 623 S.E.2d at 665 ("Rule 410 provides that evidence of a guilty plea that is later withdrawn or evidence of a plea of nolo contendere is inadmissible against a defendant. Furthermore, statements made in the course of court proceedings related to such pleas are not admissible. Likewise, a statement made during plea negotiations with a prosecuting authority, even if a guilty plea is not entered or is later withdrawn, is not admissible.").

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

The State, Respondent,

v.

Theodore David Wills, Petitioner.

Appellate Case No. 2010-178266

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**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS**

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Appeal from Horry County
Steven H. John, Circuit Court Judge

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Opinion No. 27416
Heard December 6, 2012 – Filed July 16, 2014

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**AFFIRMED**

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Appellate Defender LaNelle Cantey DuRant, of South Carolina Commission on Indigent Defense, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Deputy Attorney General S. Creighton Waters, all of Columbia; and Solicitor John Gregory Hembree, of Conway, for Respondent.

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**JUSTICE PLEICONES:** We granted certiorari to review the decision of the Court of Appeals affirming the circuit court's decision to admit petitioner's statement made in connection with a proffer agreement. *State v. Wills*, 390 S.C. 139, 700 S.E.2d 266 (Ct. App. 2010). We affirm.

The first question raised by this case is whether a criminal defendant may waive the protections afforded by Rule 410, SCRE.[1] If we decide that he may, the next issue is whether the Court of Appeals was correct in holding that petitioner did so here.[2] We answer both questions "yes."

Rule 410, SCRE, titled "**INADMISSIBILITY OF PLEAS, PLEA DISCUSSIONS, AND RELATED STATEMENTS**," provides:

> Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:
>
> (1) a plea of guilty which was later withdrawn;
>
> (2) a plea of nolo contendere;
>
> (3) any statement made in the course of any court proceedings regarding either of the foregoing pleas; or
>
> (4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.
>
> However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a

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[1] Although it is questionable whether the Rule 410 issue was preserved for appellate review, it formed the basis for the Court of Appeals' decision upon which we granted certiorari, and we therefore address the merits.

[2] The Court of Appeals' opinion contains a full explanation of the facts of this case, including the terms of the Proffer Agreement.

> criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

We agree with the Court of Appeals that a criminal defendant may waive the protections afforded by Rule 410. Here, petitioner and his attorney executed an agreement wherein petitioner agreed that if a subsequent polygraph examination demonstrated deception, inconsistencies, or that petitioner shot the victim, then "the terms of this proffer are null and void **and** any statements made by [petitioner] may be used against him by the State for any legal purpose, including . . . disposition of charges through plea or trial . . . and impeachment." Proffer Agreement section 2 (emphasis supplied). Further, section 7 provides in relevant part not only that petitioner's violation of the Agreement would render the Proffer's terms null and void, but also that "the State shall have the right to use any information obtained through this Proffer in any fashion, whether direct [or] collateral . . . ." Applying the rules of contract construction here, "regardless of the agreement's wisdom or lack thereof," we agree with the Court of Appeals that, on this record, petitioner's Proffer Agreement, entered with the advice and consent of counsel, waived the protections of Rule 410, SCRE.

The decision of the Court of Appeals is

**AFFIRMED.**

**TOAL, C.J., KITTREDGE, J., concur. BEATTY, J., dissenting in a separate opinion in which HEARN, J., concurs.**

**JUSTICE BEATTY:** I dissent as I believe the majority reaches an incorrect result because it fails to appreciate and analyze the significant issues presented by this case. For reasons that will be discussed, I would find the trial judge erred in allowing the State to use Petitioner's statement during its case-in-chief as it violates principles of contract law and Rule 410 of the South Carolina Rules of Evidence.[3] More importantly, a decision authorizing the State to present a false statement to the jury in order to procure a conviction should not stand as it unquestionably compromises the integrity of our system of justice. Accordingly, I would reverse the decision of the Court of Appeals and remand the matter for a new trial.

## I. Factual/Procedural History

On October 13, 2001, officers with the Horry County Police Department were called to investigate a remote location off of Highway 90 in Horry County. Upon arrival, they discovered the body of a young male who had been shot two times in the back. Law enforcement, using fingerprint evidence, later identified the victim as Julian Lee. As a result of the investigation, Petitioner was charged with accessory after the fact and obstruction of justice.

In August 2005, Detective Allen Large of the Horry County Police Department was contacted by the Fifteenth Circuit Solicitor's Office to interview Petitioner, who was incarcerated at J. Reuben Long Detention Center. In response to a plea offer from the State, Petitioner and his attorney, Bill Diggs, met with Detective Large, Detective Neil Livingston, and Assistant Solicitor Scott Hixson to discuss a proffer agreement.[4] In essence, the proffer agreement provided that in

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[3] Rule 410, SCRE (providing that pleas, plea discussions, and related statements are inadmissible against a defendant who made the plea or was a participant in the plea discussions, except in limited circumstances).

[4] "A 'proffer agreement' is generally understood to be an agreement between a defendant and the government in a criminal case that sets forth the terms under which the defendant will provide information to the government during an interview, commonly referred to as a 'proffer session.' " *United States v. Lopez*, 219 F.3d 343, 345 n.1 (4th Cir. 2000). "The proffer agreement defines the obligations of the parties and is intended to protect the defendant against the use of his or her statements, particularly in those situations in which the defendant has revealed incriminating information and the proffer session does not mature into a plea agreement or other form of cooperation agreement." *Id.*

exchange for Petitioner's truthful account of the events surrounding the victim's murder the State would take into consideration his cooperation in offering a sentence recommendation.

The proffer agreement provided in relevant part:

1. Theodore David Wills Jr. shall submit himself to agent(s) of the State for the purpose of debriefing regarding this matter and all other matters materially bearing on this matter. He shall be completely truthful concerning his involvement in this matter, and completely truthful concerning the involvement of all other individuals in this matter. He shall truthfully and completely answer all questions posed by agent(s) of the State bearing materially on this matter and shall provide without prompting all information concerning this matter in a complete and truthful manner even if such information is not elicited by agent(s) of the State by direct question. Any and all information provided by Theodore David Wills Jr. under the terms of this proffer may be recorded in any fashion at the election of the State;

2. Theodore David Wills Jr. shall submit himself to a polygraph examination(s) to verify all information provided to the State at the election of the State. The polygraph examiner(s) shall be selected by the State and, for the purpose of this Proffer, are designated agent(s) of the State; upon examination(s) by polygraph, if the responses given by Theodore David Wills Jr. show deception, are inconsistent with information previously provided or indicates he is the person or one of the persons that shot the victim, the terms of this proffer are null and void and any statements made by Theodore David Wills Jr. may be used against him by the State for any legal purpose, including, but not limited to, considerations for charging, bond, disposition of charges through plea or trial of Theodore David Wills Jr. and impeachment;

. . . .

4. In return for Theodore David Wills Jr.'s full compliance with all terms stated within this Proffer, statements provided during his debriefing will not be used in a criminal prosecution currently pending against him by this Office. The State will not seek any additional charges against Theodore David Wills Jr. in connection with the subject of this Proffer;

. . . .

7. Violation of any term of this Proffer renders all terms null and void; the State shall have the right to use any information obtained through this Proffer in any fashion, whether direct [or] collateral to this matter.

Petitioner and his attorney signed the proffer agreement. Subsequently, Petitioner signed a written waiver of his *Miranda*[5] rights. Petitioner then provided a statement that was recorded in the presence of his attorney, the detectives, and the assistant solicitor. In his statement, Petitioner claimed he drove his brother Donnell Green, Mark Willard, and the victim to the remote location during the early morning hours of October 13, 2001. According to Petitioner, he and the victim believed they were going to rob some drug dealers and "score some quick cash." Petitioner stated he saw Willard shoot the victim and that he heard a second shot as he ran away.

On September 19, 2005, Petitioner submitted to a polygraph examination, which was administered by SLED Agent Ricky Charles's intern. Based on his review of the polygraph results, Agent Charles concluded that Petitioner was deceptive in his statement. Agent Charles did not specify how Wills was deceptive or whether the deception was material to the agreement. As a result, the State claimed the proffer agreement was null and void and proceeded to charge Petitioner with murder.

At the beginning of the trial, the State indicated it intended to use Petitioner's statement as part of its case-in-chief. Counsel for Petitioner objected to the admission of the statement as it was given "in exchange for participation by the State in a plea agreement process." Counsel challenged the proffer agreement as "inherently flawed" because an "unreliable" polygraph examination was used to determine Petitioner's truthfulness. Based on these circumstances, counsel asserted the statement was involuntary and should be suppressed.

In response to defense counsel's objection, the judge held a hearing pursuant to *Jackson v. Denno*, 378 U.S. 368 (1964). After hearing arguments and reviewing the recorded statement, the trial judge found the statement was given voluntarily as Petitioner was apprised of his *Miranda* rights and signed the proffer agreement. The judge, however, cautioned the parties not to make any reference to the use of a

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[5] *Miranda v. Arizona*, 384 U.S. 436 (1966).

polygraph examination. The judge also permitted defense counsel to explain to the jury that Petitioner made the statement in response to the proffer agreement.

During its case-in-chief, the State played the recorded statement to the jury. At the conclusion of the State's case, defense counsel moved for a directed verdict and renewed his objection to the admissibility of the statement. The judge denied the motion and reaffirmed his previous rulings. Petitioner, who did not testify or present any evidence, was ultimately convicted of murder and sentenced to forty years' imprisonment.

On appeal, Petitioner argued the trial judge erred in allowing the jury to hear the statement as it arose out of a proffer agreement and, thus, was inadmissible under Rule 410 of the South Carolina Rules of Evidence. Because the inculpatory admissions were the "centerpiece" of the State's case, Petitioner asserted his conviction should be reversed and the case remanded for a new trial.

The Court of Appeals affirmed Petitioner's conviction and sentence. *State v. Wills*, 390 S.C. 139, 700 S.E.2d 266 (Ct. App. 2010). In so ruling, the court stated that "[o]ur case law unequivocally establishes agreements between defendants and the State should be interpreted 'in accordance with general contract principles.' " *Id.* at 143, 700 S.E.2d at 268 (quoting *State v. Compton*, 366 S.C. 671, 677, 623 S.E.2d 661, 664 (Ct. App. 2005)). The court noted, however, that the "question of whether an agreement can waive the application of [Rule 410] [had been] unanswered." *Id.* at 144, 700 S.E.2d at 268. In answering this question, the court relied on the United States Supreme Court's ("USSC") decision in *United States v. Mezzanatto*, 513 U.S. 196 (1995), wherein the USSC held that "absent some affirmative indication that the agreement was entered into unknowingly or involuntarily, an agreement to waive the exclusionary provisions of the plea statement Rules is valid and enforceable." *Id.* at 145, 700 S.E.2d at 269 (quoting *Mezzanatto*, 513 U.S. at 210). Applying *Mezzanatto*, the court concluded that the proffer agreement: (1) triggered the exclusionary provisions of Rule 410 as it constituted a plea negotiation; and (2) unambiguously provided that Petitioner's statement could be used against him by the State for any legal purpose if the State determined Petitioner was deceitful. *Id.* at 145, 700 S.E.2d at 269. Finally, the court found the judge properly admitted the statement as Petitioner knowingly and voluntarily entered into the agreement. *Id.* at 146, 700 S.E.2d at 269.

This Court granted Petitioner's request for a writ of certiorari to review the decision of the Court of Appeals.

## II. Discussion

## A. Arguments

In challenging the decision of the Court of Appeals, Petitioner asserts the facts of the instant case are distinguishable from *Compton* and *Mezzanatto* since those cases did not involve a "polygraph examiner as the decision maker on whether [Petitioner] was telling the truth." Because polygraph examinations are "inherently unreliable," Petitioner contends an arbitrary factor was injected into the agreement. In view of the polygraph provision and the vague terms of the agreement, Petitioner claims it "literally invites solicitors to find ways not to honor a plea agreement."

If the decision of the Court of Appeals is upheld, Petitioner argues the purpose and policy of Rule 410 will be undermined. Specifically, Petitioner avers that *Mezzanatto* only permitted statements made during plea negotiations to be used for impeachment purposes and "did not necessarily provide a basis for the prosecution to use those statements in its case-in-chief." Additionally, Petitioner contends he did not knowingly enter into the proffer agreement as the provision that his statement could be used for "any legal purpose" was vague.

## B. Error Preservation

As a threshold matter, the State claims any issue regarding Rule 410 is not preserved for this Court's review as defense counsel failed to cite this rule during his arguments to the trial judge. The State also asserts that the argument before this Court is a "different permutation" than the issues raised to the Court of Appeals. The State claims appellate counsel raises a new argument that the agreement should be declared null and void because the determination of Petitioner's deception was based on an unreliable polygraph examination.

In my view, the issue regarding Rule 410 was properly preserved for this Court's review. Although defense counsel did not cite Rule 410 in his trial arguments, he was aware of its provisions as he emphasized that Petitioner's statement was given during the course of plea negotiations and was inadmissible except for the limited purpose of impeachment. Moreover, the judge clearly understood counsel's argument as he framed the issue as follows: "[T]he real purpose of this motion hearing is to determine whether or not the statement of [Petitioner] which he gave pursuant to this proffer can be used in the course of this trial." Based on the trial arguments, appellate counsel then specifically challenged the trial judge's ruling as erroneous under Rule 410.

Because the substance of Rule 410 was raised to and ruled upon by the trial judge and the Court of Appeals, I address the merits of this issue as it was properly preserved for this Court's review. *See State v. Oglesby*, 384 S.C. 289, 293, 681 S.E.2d 620, 622 (Ct. App. 2009) (finding issue regarding Rule 106, SCRE was preserved for appellate review even though defendant failed to specifically cite the rule); *see also State v. Jennings*, 394 S.C. 473, 481, 716 S.E.2d 91, 95 (2011) (recognizing that for an issue to be properly preserved it has to be raised to and ruled on by the trial court).

**C. Analysis**

Having found the issue properly preserved, I believe the Court must answer the ultimate question of whether a defendant may execute a total waiver of the exclusionary provisions of Rule 410. In answering this question, the analysis involves a series of sequential questions. Initially, it is necessary to determine whether a defendant may waive the exclusionary provisions of Rule 410 via a *Miranda* waiver. If a *Miranda* waiver is not sufficient, then the focus turns to the terms of the proffer agreement. Using principles of contract law as a guide, it is necessary to consider the effect of a breach of the proffer agreement and decide the resultant remedy, i.e., the extent to which the State may utilize statements made by a defendant pursuant to a proffer agreement.

The analysis of each of these questions is premised on this Court's commitment to protect and preserve the integrity of the judicial process. It stands to reason that the integrity of the judicial process is challenged when the State is allowed to introduce a statement that the State has declared false and deceitful yet, at the same time, insists that the judge and jury accept the statement as truthful. This Court must determine to what extent such a statement may be used without assaulting the integrity of the judicial process.

Cognizant of this Court's duty to ensure the legitimacy of this process, I now assess whether the proceedings in the instant case undermined the purpose for and the protections afforded by Rule 410 and, in turn, Petitioner's right to a fair trial.

**(1)**

Statements given during plea negotiations are generally inadmissible as they are protected by Rule 410, which provides:

> Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the

> defendant who made the plea or was a participant in the plea discussions:
>
> (1) a plea of guilty which was later withdrawn;
>
> (2) a plea of nolo contendere;
>
> (3) any statement made in the course of any court proceedings regarding either of the foregoing pleas; or
>
> (4) **any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.**
>
> However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

Rule 410, SCRE (emphasis added).[6]

In reviewing the legislative history of Rule 410, it is clear Congress recognized that statements made during the course of plea negotiations are decidedly different than other voluntary statements and, thus, sought to limit their admissibility. *See* Advisory Committee Notes to Rule 410, FRE ("As with compromise offers generally . . . free communication is needed, and security against having an offer of compromise or related statement admitted in evidence effectively encourages it."); Paul F. Rothstein, *Federal Rules of Evidence Rule 410* (3d ed. 2012) (discussing legislative history of Rule 410 and stating, "The rule has a number of purposes, the most significant of which is to encourage the early disposition of criminal cases without the cost, expense, and uncertainty of trial. It protects the accused from being placed in the untenable position of having a right to withdraw a guilty plea but being forced to take the stand in order to explain that decision at trial." (footnote omitted)). Were there not this distinction, it would

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[6] Rule 410 is the substantive equivalent of the federal rule. *See* Notes to Rule 410, SCRE ("Except for subsection (3), this rule is identical to the federal rule. Subsection (3) was amended because South Carolina has no equivalent to Rule 11 of the Federal Rules of Criminal Procedure.").

have been unnecessary for Congress to promulgate a rule to protect statements made during plea negotiations.

In examining this distinction, the Fifth Circuit Court of Appeals explained that "[p]lea negotiations are inadmissible, but surely not every discussion between an accused and agents for the government is a plea negotiation." *United States v. Robertson*, 582 F.2d 1356, 1365 (5th Cir. 1978). "Suppressing evidence of such negotiations serves the policy of insuring a free dialogue only when the accused and the government actually engage in plea negotiations: 'discussions in advance of the time for pleading with a view to an agreement whereby the defendant will enter a plea in the hope of receiving certain charge or sentence concessions.' " *Id.* (quoting ABA Standards, Introduction at 3). The court noted that "plea negotiations contemplate a bargaining process, a 'mutuality of advantage,' and a mutuality of disadvantage. That is, the government and the accused both seek a concession for a concession, a Quid pro quo. The accused contemplates entering a plea to obtain a concession from the government. The government contemplates making some concession to obtain the accused's plea." *Id.* at 1365-66 (citations omitted). Thus, in assessing the admissibility of a defendant's statement, it is necessary to "distinguish between those discussions in which the accused was merely making an admission and those discussions in which the accused was seeking to negotiate a plea agreement." *Id.* at 1367.

The Tennessee Court of Criminal Appeals cited the reasoning in *Robertson* to specifically differentiate between statements that are made during plea negotiations and those that are made following a *Miranda* waiver. *State v. Hinton*, 42 S.W.3d 113, 122 (Tenn. Crim. App. 2001). In *Hinton*, the defendant was convicted of first-degree felony murder, attempted first-degree murder, and especially aggravated robbery. *Id.* at 116. On appeal, the defendant raised several issues, including that the trial judge erred in denying his motion to suppress an inculpatory statement that he made during plea negotiations. *Id.* at 119-26.

Initially, the court found the statement was made during the course of plea discussions with an attorney for the prosecuting authority and, thus, Rule 410 protections were implicated. *Id.* at 119-23. Because the defendant gave the statement after being advised of his *Miranda* rights, the court considered whether the statement, which fell within the purview of the rules, was nevertheless admissible. *Id.* at 123. The court found the statement was inadmissible as "the administration of *Miranda* warnings is insufficient to inform the defendant of his rights pursuant to Rules 410 and 11(e)(6)." *Id.* at 126. In reaching this conclusion, the court stated:

> We do not believe that *Miranda* warnings, which do not mention the rights provided by Rules 410 and 11(e)(6), can make a defendant aware of the nature of those rights. **Furthermore, the purposes and protections of *Miranda* are substantially different from the purposes and protections of Rules 410 and 11(e)(6). The purpose of *Miranda* warnings is to secure the privilege against self-incrimination, ensuring that confessions are voluntary and intelligent.** *See State v. Stephenson*, 878 S.W.2d 530 [(Tenn. 1994), *overruled on other grounds by, State v. Saylor*, 117 S.W.3d 239 (Tenn. 2003)]. **The purpose of the protections of Rules 410 and 11(e)(6), on the other hand, is to foster frank and open discussions that lead to plea agreements.** *See* Cohen, et al., § 410.1 at 224 ("Rule 410 . . . is designed to encourage out-of-court settlements by reducing the possible adverse consequences of participating in negotiations."). Perhaps if the rights protected by and the purposes of *Miranda* and the plea-statement rules were the same, such that an explanation of one right would serve to explain the nature of the other, a warning and waiver of one would serve as a warning and waiver of the other. However, such is not the case.
>
> We hold that the administration of *Miranda* warnings is insufficient to inform the defendant of his rights pursuant to Rules 410 and 11(e)(6). Because the defendant in the present case was given *Miranda* warnings and nothing more, the record affirmatively indicates that the defendant did not knowingly waive his rights pursuant to the plea-statement rules.

*Id.* at 126 (emphasis added).

Based on this reasoning, the court determined that "the defendant did not knowingly waive the specific rights afforded by Rule 410 and 11(e)(6)." *Id.* at 124. The court further found the erroneous admission of the statement could not be deemed harmless as "[t]he crux of the state's case consisted of the defendant's statement." *Id.* at 126.

I find the reasoning of *Hinton* persuasive. Applying the foregoing to the facts of the instant case, I believe the trial judge reached his decision under the mistaken belief that the *Miranda* waiver was sufficient to automatically deem Petitioner's statement admissible. This was error as the judge gave no consideration to Rule 410. Because *Miranda* warnings and Rule 410 protections serve distinctly different purposes, Petitioner's *Miranda* waiver did not render a

presumptively inadmissible plea statement admissible for the State's use in its case-in-chief. *See Roberts v. Commonwealth*, 896 S.W.2d 4 (Ky. 1995) (finding that statement made by defendant to police officer during plea discussions was not involuntary where defendant was given *Miranda* warnings, had executed a waiver form prior to giving the statement, and there was no evidence that defendant was coerced or threatened; concluding that Commonwealth could not, however, use the defendant's statement against him on retrial as the statement was made in the course of plea discussions and was protected by Rule 410); *Barnett v. State*, 725 So. 2d 797, 800-01 (Miss. 1998) (finding Rule 410 prohibited the admission of a statement at trial where defendant gave the statement, after receiving *Miranda* warnings, in conjunction with plea negotiations).

(2)

Because Petitioner's *Miranda* waiver did not negate the protections of Rule 410, I direct my attention to the terms of the proffer agreement. It is generally recognized that proffer agreements are to be construed in accordance with principles of contract law. *State v. Compton*, 366 S.C. 671, 623 S.E.2d 661 (Ct. App. 2005). However, "[a] plea agreement is not simply a contract between two parties; rather, it implicates the integrity of the criminal justice system and requires courts to exercise judicial authority in considering the agreement." 9 Fed. Proc., L. Ed., *Fulfillment of Plea Agreement-Interpretation of the Agreement*, § 22:960 (Supp. 2013). "As such, the application of contract principles to the interpretation of a plea agreement is tempered by constitutional implications." *Id.* Specifically, proffer agreements, like plea agreements "are unique contracts in which special due process concerns for fairness and the adequacy of procedural safeguards obtain." *United States v. Parra*, 302 F. Supp. 2d 226, 236 (S.D.N.Y. 2004) (citations omitted).

Accordingly, "[o]ne tenet of contract law [that courts] *have* steadfastly applied to plea agreements . . . is that of *contra proferentem*, the principle that ambiguities in contracts 'are to be construed unfavorably to the drafter.' " *United States v. Transfiguracion*, 442 F.3d 1222, 1228 (9th Cir. 2006) (quoting *Black's Law Dictionary* 328 (7th ed. 1999)). "In context of plea agreements, the government is usually the drafter and must ordinarily bear the responsibility for any lack of clarity." *Id.* (citation omitted). Moreover, "[a]s a defendant's liberty is at stake, the government is ordinarily held to the literal terms of the plea agreement it made so that the government gets what it bargains for but nothing more." *Id.* (citations omitted).

Thus, under the above-outlined principles of contract law, I would find the plain terms of the proffer agreement precluded the State from introducing Petitioner's statement during its case-in-chief. As drafted by the State, section 7 of the proffer agreement states that "[v]iolation of any term of this Proffer renders **all terms null and void**." (Emphasis added.) Accordingly, by claiming that Petitioner violated the agreement, the State nullified the entire agreement, including the waiver provision. In essence, the State rescinded the agreement and avoided its contractual obligations by merely alleging Petitioner's statement was deceptive and nothing more. This rescission rendered Petitioner's statements inadmissible per se.[7]

I find support for this decision in the factually similar case of *State v. Pitt*, 891 A.2d 312 (Md. 2006), wherein the Court of Appeals of Maryland analyzed "the proper balance when the defendant breaches the plea agreement and the State, in response, rescinds the agreement." *Id.* at 316. In *Pitt*, the defendant was arrested on a burglary charge. *Id.* Because the defendant expressed interest in "cutting a deal," the State drafted a plea agreement. *Id.* After waiving his *Miranda* rights, the defendant signed the agreement. *Id.* Under the agreement, the defendant committed "fully and truthfully [to] disclose to the State any and all knowledge and information he may have concerning the investigation" of the burglary. *Id.* In return for the defendant's complete and truthful cooperation, the State agreed to *nol pros* all charges against the defendant arising from the investigation. *Id.* The agreement also specifically provided that, in the event of the defendant's breach, by knowingly withholding evidence from the State or by being less than completely truthful, the State could "prosecute [the defendant] for any offenses in which the State agreed not to prosecute in exchange for cooperation by [the defendant] with the investigation." *Id.* It also permitted the State to "use against [the defendant] in all prosecutions the information and documents that he ha[d] disclosed to the State during the course of his cooperation." *Id.* The plea agreement also contained a provision that the defendant submit to a polygraph examination. *Id.* at 317 n.4.

When the lead investigator became concerned that the defendant had not been forthcoming with all information, he confronted the defendant and requested that he submit to a polygraph examination. *Id.* at 317. The defendant immediately acknowledged that he had not disclosed everything and admitted to committing the burglary with an accomplice, but still wanted the State to honor the plea deal. *Id.*

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[7] In my view, an attorney who allows a client to enter into this type of agreement may be at risk for an allegation of ineffective assistance of counsel.

As a result, the State considered the defendant's contract "null and void due to him not completely disclosing the information." *Id.* All of the defendant's statements to the police with respect to the burglary investigation were admitted at his trial. *Id.* After he was convicted of first-degree burglary, the defendant appealed his conviction. *Id.*

The Maryland Court of Special Appeals reversed. *Id.* The court concluded that, "although inducements in the context of plea agreements are proper, 'when the State rescinded the plea agreement, statements obtained under it immediately lost their voluntary status and became inadmissible at trial.' " *Id.* at 317 (quoting *Pitt v. State*, 832 A.2d 267, 277 (Md. Ct. Spec. App. 2003)). The State petitioned the Court of Appeals of Maryland for a writ of certiorari to review the decision. *Id.* The court granted the writ of certiorari to address "the admissibility of statements made during plea negotiations when the plea agreement contains a provision making such statements admissible at trial in the event of breach." *Id.*

Ultimately, the court of appeals affirmed the decision of the intermediate appellate court. *Id.* In so ruling, the court recognized that "when the State rescinds a plea agreement for any reason, the obtained statements are rendered inadmissible *per se*." *Id.* at 322. Expanding on the holdings of its prior decisions, the court stated:

> The *reason* for the State's repudiation of the agreement is immaterial with respect to the admissibility of the statement. Whether its reason be sound or unsound, technical or substantial, in good faith or simply because the prosecutor had misgivings or a change of heart, or was utterly arbitrary, is of no matter. The justification *vel non* of the rescission, repudiation, or breach of the agreement by the State goes to whether the defendant is entitled to have the agreement enforced; it does not affect the admissibility of the statement obtained under it.

*Id.* at 322 (quoting *Allgood v. State*, 522 A.2d 917, 927 (Md. 1987) and citing *Wright v. State*, 515 A.2d 1157 (Md. 1986)). The court noted that this holding was "to ensure that neither the defendant nor the State benefits from breaching the plea agreement." *Id.* at 325.

I am persuaded by this reasoning as it comports with the applicable principles of contract law and properly preserves the protections of Rule 410. Here, the State rescinded the proffer agreement based on its assessment that Petitioner breached the agreement by purportedly failing the polygraph examination. Thus, by their actions, the parties were returned to the position as if

there were no proffer agreement. *See* 17A Am. Jur. 2d *Contracts* § 584 (2004) ("Rescission voids the contract ab initio, meaning that it is considered null from the beginning and treated as if it does not exist for any purpose. . . . The effect of rescission of an agreement is to put the parties back in the same position they were in prior to the execution of the contract."). In the absence of a proffer agreement, Petitioner's statements were deemed inadmissible for any purpose under Rule 410. Accordingly, I would find the Court of Appeals erred in affirming the decision of the trial judge.

In view of this decision, the State would be prohibited from introducing Petitioner's statements in the event of a retrial.[8] Because this decision is dispositive, I need not address Petitioner's remaining arguments. However, in order to provide guidance in future cases, I use the instant case as an opportunity to analyze the effect of a valid Rule 410 waiver.

**(3)**

Alternatively, even if the terms of the proffer agreement did not render it "null and void" and there was no rescission on the part of the State, I would find that Petitioner's breach would not have automatically waived the protections of Rule 410. *See* Christopher B. Mueller and Laird C. Kirkpatrick, 2 *Federal Evidence* § 4:67 (3d. ed. 2012) ("In this situation, it is not the agreement that confers the right to exclude, but Fed. R. Evid. 410, and breaching the agreement does not end the protection accorded by the Rule.").

Instead, it is necessary to consider the effect of a breach and decide the resultant remedy, i.e., the extent to which the State may utilize statements made by a defendant pursuant to a proffer agreement. In doing so, it is necessary to assess the terms of Rule 410 as interpreted by the USSC in the seminal case of *United States v. Mezzanatto*, 513 U.S. 196 (1995).[9] In *Mezzanatto*, the USSC held that "absent some affirmative indication that the agreement was entered into unknowingly or involuntarily, an agreement to waive the exclusionary provisions

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[8] The State, however, is not without some benefit as these statements were inevitably used for informational purposes in the murder investigation and initiating charges against Petitioner.

[9] Although Federal Rule of Evidence 410 and our Rule 410 are substantially similar, I look to federal interpretations merely for guidance as this Court is not bound by the USSC's interpretation of the federal rule when we are called upon to interpret our state evidentiary rules.

of the plea-statement Rules is valid and enforceable." *Id.* at 211. The Court, however, only considered the enforceability of such waivers for impeachment purposes.

Justice Thomas, writing the plurality opinion, premised his analysis on the fact that a criminal defendant may waive many rights, including constitutional rights, by voluntary agreement. *Id.* at 201. As a result, the Court concluded that "[b]ecause the plea-statement Rules were enacted against a background presumption that legal rights generally, and evidentiary provisions specifically, are subject to waiver by voluntary agreement of the parties, we will not interpret Congress' silence as an implicit rejection of waivability." *Id.* at 203-04. The Court further found the defendant "bears the responsibility of identifying some affirmative basis for concluding that the plea-statement Rules depart from the presumption of waivability." *Id.* at 204.

Justice Ginsburg concurred in a separate opinion, which was joined by Justices O'Connor and Breyer, wherein she expressed concern regarding a waiver that would allow the Government to use the defendant's statements in its case-in-chief as this "would more severely undermine a defendant's incentive to negotiate, and thereby inhibit plea bargaining." *Id.* at 211. Because the Government did not seek such a waiver in Mezzanatto's case, she found the Court did not need to "explore" this question. *Id.*

Justice Souter dissented in a separate opinion, which was joined by Justice Stevens. *Id.* at 211-18. The dissent rejected the plurality's holding as there was no consideration given to Congress' intent to preclude waiver. *Id.* at 212-16. The dissent also identified two potential consequences of the majority's decision. *Id.* at 216. First, the dissent noted that "defendants are generally in no position to challenge demands for these waivers, and the use of waiver provisions as contracts of adhesion has become accepted practice." *Id.* at 216. Second, the dissent believed the plurality's decision would inevitably lead to "the practical certainty that the waiver demanded will in time come to function as a waiver of trial itself." *Id.* at 217. The dissent explained that "[i]f objection can be waived for impeachment use, it can be waived for use as affirmative evidence, and if the Government can effectively demand waiver in the former instance, there is no reason to believe it will not do so just as successfully in the latter." *Id.*

Thus, the majority of the Court opposed the Government's use of a defendant's statement as affirmative evidence in its case-in-chief.

Because *Mezzanatto* only addressed whether a defendant's waiver of the exclusionary provisions of Rule 410 authorized the prosecution to use the defendant's statement for impeachment purposes, it is necessary to determine whether the reasoning in *Mezzanatto* should be extended to permit the use of the statement during the prosecution's case-in-chief.

Although our appellate courts have referenced Rule 410, they have not addressed *Mezzanatto* or considered a defendant's written waiver of the protections of Rule 410. However, to a limited extent, these decisions express this Court's inclination to prohibit the use of a defendant's statements made during the course of plea negotiations. For example, in *State v. Thompson*, 329 S.C. 72, 495 S.E.2d 437 (1998), this Court held that the State should not have been permitted to impeach the defendant with privileged information, which was revealed by the defendant during a psychiatric evaluation and disclosed by the defense attorney to the State during plea negotiations. In so ruling, we found the attorney-client privilege, which was not waived by the defendant, extended to his communications with the psychiatrist. *Id.* at 76, 495 S.E.2d at 439. We noted that this analysis had "limited, future application" as scenarios such as the one presented would be governed by Rule 410(4), which provides that a statement made during plea discussions is "not admissible against the defendant." *Id.* at 77 n.1, 495 S.E.2d at 440 n.1. We clarified, however, that "result which would be reached under Rule 410(4) is consistent with the holding in this case." *Id.* Even though *Thompson* is instructive, it is not dispositive of the instant case as *Thompson* did not involve a waiver.

Given the absence of definitive case law in our state and federal jurisdiction, I have looked to other federal jurisdictions for guidance. These courts have identified three levels of waiver: (1) impeachment, (2) rebuttal, and (3) case-in-chief. David P. Leonard, *The New Wigmore: A Treatise on Evidence: Selected Rules of Limited Admissibility* § 5.11 (Supp. 2013).

Some legal scholars have expressed concern over extending the holding in *Mezzanatto* to permit use of a defendant's proffer statements in the Government's case-in-chief. *See* 23 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure: Evidence* § 5350 (West Supp. 2012) ("Federal prosecutors have exercised the powers granted by *Mezzanatto* to impose procedures far different than those presupposed by the drafters of Rule 410."). They have emphasized that an overreaching extension of *Mezzanatto* constitutes a waiver of a defendant's constitutionally protected rights as "the only defense arguments the defendant can make, without opening the door to the incriminating plea statements, consist of (1) arguing sufficiency of the evidence, (2) impeaching

government witnesses, and (3) making general statements as to the defendant's innocence." Adam Robison, Comment, *Waiver of Plea Agreement Statements: A Glimmer of Hope to Limit Plea Statement Usage to Impeachment*, 46 S. Tex. L. Rev. 661, 677 (Spring 2005).

One scholar has identified three consequences of finding that a defendant may execute a total waiver of Rule 410, stating:

> The consequences of finding that Rule 410 is a waivable right are also problematic. First, an exception to the Rule to allow use of otherwise inadmissible statements will eventually swallow the Rule, completely undermining the purpose of enacting the Rule in the first place. Congress would not have enacted Rule 410 if it intended the Rule to be circumvented so easily and frequently that circumvention became the norm, rather than the exception. A second problematic consequence is that the case-in-chief waiver essentially serves as a waiver of the right to trial. When a defendant decides to engage in plea discussions that ultimately fail, the use of his statements at trial in the prosecution's case-in-chief eliminates the need for the prosecution to bring any other evidence to trial because his statements serve as his confession to the crime. Therefore, a case-in-chief waiver becomes a waiver of trial.
>
> By extension, a third consequence arises. A case-in-chief waiver also amounts to a waiver of the defendant's Fifth Amendment rights. The Fifth Amendment guarantees to every citizen the right against forced self-incrimination in criminal trials. Under the Fifth Amendment, a defendant shall not be forced to produce evidence against himself. One purpose of the Fifth Amendment is to preserve the integrity of the judicial system by requiring the prosecution to shoulder the entire burden of proof. Because the prosecution must prove every element of the offense, the Fifth Amendment protects the defendant from forcibly helping the prosecution convict him. If a defendant chooses not to testify at his own trial, but he has signed a Rule 410 waiver allowing the prosecution to introduce his incriminating statements made during plea negotiations in its case-in-chief, the defendant's right to choose not to testify and incriminate himself has been breached.

Julia A. Keck, *United States v. Sylvester: The Expansion of the Waiver of Federal Rule of Evidence 410 to Allow Case-in-Chief Use of Plea Negotiation Statements*, 84 Tul. L. Rev. 1385, 1399 (May 2010) (footnotes omitted).

I am persuaded by these authorities and, thus, conclude that the reasoning in *Mezzanatto* should not be extended to permit a case-in-chief waiver. I believe a decision to limit the prosecution's use of a defendant's statements to impeachment effectuates the purpose and protections of Rule 410. Moreover, such a decision is consistent with this Court's opinion in *Thompson*, wherein we held that the State should not have been permitted to impeach the defendant with privileged information, which was disclosed by the defense attorney to the State during plea negotiations.

As evidenced by the facts of the instant case, the fears of the dissent in *Mezzanatto* have become a reality. Specifically, the State's case against Petitioner was based entirely on his statement and, thus, the waiver "function[ed] as a waiver of trial itself." *Mezzanatto*, 513 U.S. at 217 (Souter, J., dissenting).

**(5)**

Finally, I take this opportunity to express my concern regarding the State's use of a polygraph examination to conclusively determine Petitioner's truthfulness and, in turn, declare the agreement null and void. Because our appellate courts have repeatedly recognized the unreliability of these tests,[10] I believe it was inherently unfair for the State to use subjective results to procure the only substantive evidence against Petitioner. *See People v. Garcia*, 169 P.3d 223, 228 (Colo. Ct. App. 2007) (concluding defendant's statements, which were made during a polygraph examination as part of plea negotiations, were inadmissible as substantive evidence of guilt under Rule 410; stating, "To penalize defendant for cooperating with the prosecution's request by introducing his statements as substantive proof of guilt is palpably unfair and undermines the public policy of encouraging fair compromises."). Moreover, to allow the prosecution to declare the agreement null and void for reason of deception and then not require the prosecution to identify the deception and its materiality to the agreement is fundamentally unfair and violates the general principles of contract law.

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[10] *See Lorenzen v. State*, 376 S.C. 521, 533, 657 S.E.2d 771, 778 (2008) ("Although this Court in *Council* [*v. State*, 335 S.C. 1, 24, 515 S.E.2d 508, 520 (1999)] declined to recognize a *per se* rule against the admission of polygraph evidence, it indicated that the 'admissibility of this type of scientific evidence should be analyzed under Rules 702 and 403, SCRE and the *Jones* factors.' ").

Furthermore, even if Petitioner agreed to the State's use of a polygraph to determine truthfulness, I cannot condone the admission of a statement in the State's case-in-chief that has been deemed false. By concluding that Petitioner was being deceptive in his answers, the State found Petitioner's statement to be false. Yet, the State presented this statement to the jury with the intention that the jurors believe it as truthful. The State relied on this false statement as the primary basis to procure a conviction. In essence, the State's action suborns perjury. Because this Court is called upon to uphold the integrity of this state's legal system, I would decline to permit such an affront to the integrity of the judicial process. *See Riddle v. Ozmint*, 369 S.C. 39, 48, 631 S.E.2d 70, 75 (2006) ("A 'prosecutor's deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice.' " (*quoting Giglio v. United States*, 405 U.S. 150, 153 (1972)).

## III. Conclusion

Based on the foregoing, I would hold the Court of Appeals erred in affirming the trial judge's decision to permit the State to use Petitioner's plea statements during its case-in-chief. Initially, I would find Petitioner's *Miranda* waiver did not operate to waive the protections of Rule 410. Instead, the admissibility of the statements was dependent upon the terms of the proffer agreement. Utilizing the principles of contract law, I believe the agreement was nullified in its entirety when the State found that Petitioner breached the agreement. Because the State rescinded the agreement, it was void *ab initio* and the parties were returned to their original positions. Thus, Petitioner's plea statements were deemed inadmissible pursuant to Rule 410.

As to future cases, I would find that a breach of a proffer agreement on the part of the defendant permits the State to use a defendant's plea statements only for purposes of impeachment. I believe such a decision preserves the protections of Rule 410 and effectively maintains the integrity of the judicial process. Finally, I would caution the State against rescinding an agreement on the sole basis of a failed polygraph examination as these tests are inherently unreliable. Given the lack of reliability, I believe it is patently unfair for the State to use these subjective results as the sole basis for asserting that the defendant was untruthful and, thus, breached a proffer agreement. The inequity is amplified when the State is allowed to use the same statement in its case against the defendant.

I am deeply trouble by the majority's haste to lend the Court's imprimatur to the knowing misleading of the jury by the use of acknowledged false testimony.

No interpretation of contract law should suborn perjury. Even if we assume the defendant's statement was false, what rule of law allows a court to ignore the primary role of the prosecutor and the jury to seek the truth?

Based on the foregoing, I would reverse Petitioner's conviction and remand the matter for a new trial.

**HEARN, J., concurs.**

DEC 17 2001 G525934 G525934

STATE OF SOUTH CAROLINA

[X] County/ [ ] Municipality of HORRY

THE STATE

against

THEODORE DAVID WILLS JR

ress: MYRTLE BEACH, SC

ne: SSN:

M Race: B Height: 6 2 Weight: 200

State: DL #:

Agency ORI#:

secuting Agency:

secuting Officer:

SORY BEFORE THE FACT TO A FELONY, G

AL PROVISION Offense Code:

le/Ordinance Sec. 16-01-0040, 0050

warrant is CERTIFIED FOR SERVICE in the County/ [ ] Municipality of _____. The accused to be arrested and brought before me to be lt with according to law.

_____ (L.S.)
Signature of Judge

:

RETURN

:opy of this arrest warrant was delivered to endant Theodore David Wills JR

11/01/2001

Signature of Constable/Law Enforcement Officer

TURN WARRANT TO:

Case Carola Office 476

STATE OF SOUTH CAROLINA )
[X] County/ [ ] Municipality of HORRY )

AFFIDAVIT

S.C. Attorney General July 28, 1990 SCCA 518

Personally appeared before me the affiant DET RAUL DENIS HCP who being duly sworn deposes and says that defendant THEODORE DAVID WILLS JR did within this county and state on 10/13 2001 violate the criminal laws of the State of South Carolina (or ordinance of [ ] County/ [ ] Municipality of _____) in the following particulars:

DESCRIPTION OF OFFENSE: 16-01-0040, 0050
ACCESSORY BEFORE THE FACT TO A FELONY, G ENERAL PROVISION

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

SEE ATTACHED AFFIDAVIT

248-1521

01078130

FILED
HORRY COUNTY
01 DEC 27 PM 4:10
JEANNE J. ROBERTS
CLERK OF COURT

Sworn to and subscribed before me on 10/30/2001

G. Derek Blanton (L.S.)
Signature of Issuing Judge

Signature of Affiant

Affiant's Address 2560 N MAIN ST
CONWAY, SC 29526

Affiant's Telephone 0002481310

STATE OF SOUTH CAROLINA )
[X] County/ [ ] Municipality of HORRY )

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that on 10/13/2001 defendant THEODORE DAVID WILLS JR did violate the criminal laws of the State of South Carolina (or ordinance of [ ] County/ [ ] Municipality of _____) as set forth below:

DESCRIPTION OF OFFENSE: 16-01-0040, 0050
ACCESSORY BEFORE THE FACT TO A FELONY, G ENERAL PROVISION

Now, therefore, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable.

G. Derek Blanton
G. DEREK BLANTON (L.S.)
Signature of Issuing Judge

Judge Code: 858

Judge's Address 1106 GLENS BAY ROAD
SURFSIDE BEACH, S.C.

Judge's Telephone 8432383277

Issuing Court: [X] Magistrate [ ] Municipal [ ] Circuit

ORIGINAL

DEC 28 2001

G-525935 G525935

STATE OF SOUTH CAROLINA

[X] County/ [ ] Municipality of HORRY

THE STATE
against
THEODORE DAVID WILLS JR

ress: MYRTLE BEACH, SC

ne: _____ SSN: _____

: M Race: B Height: 6 2 Weight: 200

State: DL #: _____

B: _____ Agency ORI#: _____

secuting Agency: _____

secuting Officer: _____

HSTING JUSTICE

_____ Offense Code: _____

de/Ordinance Sec. C/L, 17-25-0030

s warrant is CERTIFIED FOR SERVICE in the County/ [ ] Municipality of _____. The accused to be arrested and brought before me to be lt with according to law..

_____ (L.S.)
Signature of Judge

te: _____

RETURN

copy of this arrest warrant was delivered to fendant Theodore David Wills
11/1/2001

Signature of Constable/Law Enforcement Officer

ETURN WARRANT TO:

[X] County/ [ ] Municipality of HORRY

AFFIDAVIT

July 28, 1980
SCCA 518

Personally appeared before me the affiant DET RAUL DENTS HCP wh being duly sworn deposes and says that defendant THEODORE DAVID WILLS JR did within this county and state on 10/13 2001 violate the criminal laws of th State of South Carolina (or ordinance of [ ] County/ [ ] Municipality of _____ ) in the following particulars:

DESCRIPTION OF OFFENSE: C/L, 17-25-0030
OBSTRUCTING JUSTICE

I further state that there is probable cause to believe that the defendant named above did comm the crime set forth and that probable cause is based on the following facts:

FILED
HORRY COUNTY
01 DEC 27 PM 4:10
JEANNE J. ROBERTS
CLERK OF COURT

SEE ATTACHED AFFIDAVIT

Sworn to and subscribed before me on 10/30/2001

G. Derek Blanton (L.S.)
Signature of Issuing Judge

_____
Signature of Affiant

Affiant's Address 2560 N MAIN STREET
CONWAY, SC 29526

Affiant's Telephone 0002481310

STATE OF SOUTH CAROLINA
[X] County/ [ ] Municipality of HORRY

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe th on 10/13/2001 defendant THEODORE DAVID WILLS JR did violate the criminal laws of the State of South Carolina (or ordinance of [ ] County/ [ ] Municipality of _____ ) as set forth below:

DESCRIPTION OF OFFENSE: C/L, 17-25-0030
OBSTRUCTING JUSTICE

Now, therefore, you are empowered and directed to arrest the said defendant and bring him or her bef me forthwith to be dealt with according to law. A copy of this Arrest Warrant defendant at the time of its execution, or as soon thereafter as is practicable.

G. Derek Blanton (L.S.)
G. DEREK BLANTON
Signature of Issuing Judge

Judge Code: 858

Judge's Address 1106 GLENS BAY ROA
SURFSIDE BEACH, S.

Judge's Telephone 8432383277

Issuing Court: [X] Magistrate

ORIGINAL

TO SOLICITOR

Ticket or Warrant No.: (T 522454-05

STATE OF SOUTH CAROLINA
COUNTY OF Horry

IN THE (✓) COURT OF GENERAL SESSIONS
( ) MAGISTRATE'S COURT
( ) MUNICIPAL COURT OF

STATE OF SOUTH CAROLINA
v.
Theodore Wills
Name of Defendant

ORDER SPECIFYING METHODS AND CONDITIONS OF RELEASE
(Bail Proceeding Form 2)

Offense Charged: Accesory to Felony-After the fact (Murder), Obstructing Just

At a bail proceeding conducted by undersigned judge, for the defendant named above, it was determined by the court (check one or both):

☐ The release of the defendant on recognizance will not reasonably assure his appearance as required.
☐ The release of the defendant on recognizance will result in an unreasonable danger to the community.

This determination was based upon the following findings of fact:

[Considerations: Nature and circumstances of the offense charged, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and any record of flight to avoid prosecution or failure to appear at other court proceedings.]

THEREFORE, IT IS HEREBY ORDERED:

1. That the above named defendant be released from custody on the condition that he will personally appear before the designated court at the place, date and time required to answer the charge made against him and do what shall be ordered by the court and not depart the State without the permission of the court and be of good behavior.
2. That the above named defendant be released from custody provided as follows (check one):

CASH IN LIEU OF BOND

☐ The defendant, acknowledging himself to be indebted to the State of South Carolina, deposits $_____ to secure his release from custody. Should the defendant fail to comply with all terms and conditions of this Order, this sum of money is subject to being forfeited to the State.

CASH PERCENTAGE IN LIEU OF BOND

☐ The defendant acknowledges himself to be indebted to the State of South Carolina in the sum of $_____. This release to be obtained by payment to the court of _____ ( %) of this bond in cash, this amount being $_____. The defendant will be obligated to the State in the full amount of $_____, such sum to be levied on his real and personal property for the use of the State, should he fail to perform the conditions of this Order.

APPEARANCE RECOGNIZANCE WITH SURETY

☑ The defendant will provide good and sufficient surety approved in the court, in the form set forth on the reverse side, acknowledging an indebtedness to the State in the amount of $ 15,000.

3. That the defendant shall appear at (check one):

☑ the term of the court of general sessions beginning on [Date:] Call of Court at [Time:] ___:___ o'clock, ___M., at [Place:] Horry County Courthouse and remain there throughout that term of court. If no disposition is made during that term, the defendant shall appear and remain throughout each succeeding term of court until final disposition is made of his case, unless otherwise ordered by the court.

☐ the session of magistrate/municipal (circle one) court beginning on [Date:] _____ at [Time:] ___:___ o'clock, ___M., at [Place:] _____. If no final disposition is made during that session, the defendant shall appear at such other times and places as ordered by the court.

Initials of Defendant TW

4. That the defendant will notify the court promptly if he changes his address from the one contained in this order and he will comply with those conditions described on the reverse side, which are marked.

_____ 11/13/01
Signature of Judge Date

ACKNOWLEDGEMENT BY DEFENDANT

I understand that if I violate any condition of this Order, including any conditions included on the reverse side of this Order, a warrant for my arrest will be issued.

I understand and have been informed that I have a right and obligation to be present at trial and should I fail to attend the court, the trial will proceed in my absence.

It has been explained to me that if I fail to appear before the court as required, an additional criminal charge will be instituted against me. If the failure to appear is in connection with a felony charge, or while awaiting sentence, or pending appeal or certiorari after conviction, the penalty is a fine of not more than $5,000 or imprisonment for not more than five years, or both; if I fail to appear in connection with a misdemeanor charge, the penalty is a fine of not more than $1,000 or imprisonment for not more than one year, or both.

I acknowledge the receipt of a copy of this Order and understand the conditions of my release and the penalties applicable to me in the event I violate any condition of the Order or fail to appear as required.

Address: 1 Ine

City/State/Zip: Kuboh, SC 29577

Theodore Wills
Signature of Defendant

Date

Social Security Number/Telephone No.

Attorney Representing Accused (If known)

ORIGINAL AND ONE COPY OF THIS FORM ARE TO BE COMPLETED IN EVERY BAIL PROCEEDING IN WHICH IT IS USED.
Original copy for the Trial Court – Copy for the Defendant

SCCA/511 (3/90) FORM CONTINUES ON BACK

11 08

FILED IN HORRY COUNTY
DEC 07 2001
FRANCES LANIER
CLERK OF COURT

FRANCES LANIER
CLERK OF COURT
DEC 20 2001
TO SOLICITOR

479

WITNESSES

Raul Dennis/HCPD

DOCKET NO. 2006-GS-26- 1652

THE STATE OF SOUTH CAROLINA

COUNTY OF HORRY

SRH 66398

COURT OF GENERAL SESSIONS

APRIL TERM 2006

ARREST WARRANT NO. CAW200604021

CDR: ~~0116 §16-03-0010,0020~~

DOA: 11-01-01

THE STATE
VS

THEODORE DAVID WILLS JR. M/B

DOB: 29577
SS#: [redacted]

ACTION OF GRAND JURY

TRUE BILL

APR 2 7 2006

Foreman of Grand Jury

ATTORNEY: WILLIAM P. DIGGS

INDICTMENT FOR:

**MURDER**

ORIGINAL

VERDICT

Foreman of Petit Jury Date:

J. GREGORY HEMBREE, SOLICITOR

10/03/07 Guilt
Sent. scheduled fo
Oct. 29, 2007 @ 2:

480

WITNESSES

Raul Dennis/HCPD

ARREST WARRANT NO. CAW200604021

CDR: ~~0116 §16-03-0010,0020~~

DOA: 11-01-01

ACTION OF GRAND JURY

TRUE BILL

APR 2 7 2006

Foreman of Grand Jury

VERDICT

Foreman of Petit Jury Date:

DOCKET NO. 2006-GS-26- 1652

THE STATE OF SOUTH CAROLINA

COUNTY OF HORRY

~~SRH~~ 66398

COURT OF GENERAL SESSIONS

APRIL TERM 2006

THE STATE
VS

THEODORE DAVID WILLS JR M/B

SC 29577

DOB:

SS#: [redacted]

ATTORNEY: WILLIAM P. DIGGS

INDICTMENT FOR:

**MURDER**

ORIGINAL

J. GREGORY HEMBREE, SOLICITOR

10/03/07 Guilty
Sent. scheduled fo
Oct. 29, 2007 @ 2:

481

# State of South Carolina
# Office of the Solicitor
# Fifteenth Judicial Circuit

REPLY TO
P.O. BOX 1276
CONWAY, SC 29526
843-248-1309

REPLY TO
P.O. BOX 1688
GEORGETOWN, SC 29442
843-546-3751

J. GREGORY HEMBREE
Solicitor

August 25, 2005

William Issac Diggs, Esquire
1700 Oak Street, Suite D
Myrtle Beach, SC 29577
(843) 626-4243
Fax (843) 626-5123

RE: State v. Theodore David Wills Jr.
Charge: October 2001 Murder of Julian Lee, Obstruction of Justice, Accessory After the Fact

Dear Mr. Diggs:

By this letter, the State extends to your client the opportunity of a Proffer in this matter subject to the following material terms:

1. Theodore David Wills Jr. shall submit himself to agent(s) of the State for the purpose of debriefing regarding this matter and all other matters materially bearing on this matter. He shall be completely truthful concerning his involvement in this matter, and completely truthful concerning the involvement of all other individuals in this matter. He shall truthfully and completely answer all questions posed by agent(s) of the State bearing materially on this matter and shall provide without prompting all information concerning this matter in a complete and truthful manner even if such information is not elicited by agent(s) of the State by direct question. Any and all information provided by Theodore David Wills Jr. under the terms of this proffer may be recorded in any fashion at the election of the State;

2. Theodore David Wills Jr. shall submit himself to a polygraph examination(s) to verify all information provided to the State at the election of the State. The polygraph examiner(s) shall be selected by the State and, for the purpose of this Proffer, are designated agent(s) of the State; upon examination(s) by polygraph, if the responses given by Theodore David Wills Jr. show deception, are inconsistent with information previously provided or indicates he is the person or one of the persons that shot the victim, the terms of this proffer are null and void and any statements made by Theodore David Wills Jr. may be used against him by the State for any legal purpose, including, but not limited to, considerations for charging, bond, disposition of charges through plea or trial of Theodore David Wills Jr. and impeachment.

3. Theodore David Wills Jr. shall appear as a witness in the trial(s) of all individuals in this matter who are designated as defendants by the State through indictment; and Theodore David Wills Jr. shall testify truthfully, completely, and consistently with prior statements made to the State upon being called upon to do so; failure to testify in the manner specified above will render the terms of this Proffer null and void and will subject Theodore David Wills Jr. to prosecution for perjury as well as full prosecution on all charges deemed appropriate by the State in connection with this matter; use of statement(s), should Theodore David Wills Jr. violate this term of the Proffer, are the same as provided in Paragraph Two of this Proffer;

4. In return for Theodore David Wills Jr.'s full compliance with all terms stated within this Proffer, statements provided during his debriefing will not be used in a criminal prosecution currently pending against him by this Office. The State will not seek any additional charges against Theodore David Wills Jr. in connection with the subject of this Proffer;

5. In return for Theodore David Wills Jr.'s full compliance with all terms stated within this Proffer, the State shall take into consideration the materiality of his truthful testimony and degree of cooperation in the election of charge(s) and recommendation of sentencing for your client in this matter;

6. The State agrees to fully inform the Court of Theodore David Wills Jr.'s degree of cooperation and the relative benefit to the State at time of sentencing;

7. Violation of any term of this Proffer renders all terms null and void; the State shall have the right to use any information obtained through this Proffer in any fashion, whether direct of collateral to this matter, and

8. This Proffer is the entire agreement between the parties; any agreement reached between the parties prior to the date of acceptance of this Proffer is made null and void by this Proffer; the terms of this Proffer may be amended only in writing and only by agreement of the parties.

Should your client wish to accept the terms of this Proffer, please have him sign on the signature line provided. Please witness his signature by signing on the signature line provided for that purpose. Please return the original to me as soon as possible. Thank you for your prompt attention to this matter.

Respectfully

Scott Hixson
Assistant Solicitor, 15th Judicial Circuit
Conway, SC
(843) 915-8640

Theodore David Wills Jr. — Date: 5-26-05

William I. Diggs
Attorney for Defendant — Date: 5-26-05

# SOUTH CAROLINA LAW ENFORCEMENT DIVISION
# POLYGRAPH REPORT

484

This is an official report of the South Carolina Law Enforcement Division Polygraph Department and is to be used in connection with an official criminal investigation. This report is intended only for the use of the agency to which it was disseminated and may contain information that is either privileged or confidential. Its contents are not to be distributed outside your agency except to those with appropriate legal interest.

Robert M. Stewart, Chief
South Carolina Law Enforcement Division

| Date of Examination | Examinee | Examination Results | Polygraph Case |
|---|---|---|---|
| September 19, 2005 | David Wills | **Deception Indicated** | P05 - 591 |

| Polygraph Examiner | Victim | Location of Examination |
|---|---|---|
| S/A Rick Charles | Julian Lee | SLED - Conway |

Testing Issue

Victim was found shot to death in a field. Examinee admitted he was present when victim was shot and he provided the name of a suspect who allegedly shot victim. Examinee denied shooting victim. He claimed that two brothers paid to have victim shot. He said his brother threw the gun off a bridge into the water.

Examiner's Results

Responses indicative of attempted deception were noted to the relevant issue.
The following relevant questions were used:

R4) Are you lying about Mark Willard shooting Julian Lee in that field?
Examinee Response: No

ORIGINAL

R6) Did you shoot Julian Lee?
Examinee Response: No

R8) Are you lying about Donnelle Green throwing that gun used in the shooting in the water?
Examinee Response: No

R10) Did you lie about being paid by the Johnson brothers to shoot Julian Lee?
Examinee Response: No

| Testing Format | Instrumentation: |
|---|---|
| AFMGQT | Axciton computerized polygraph |

Post-Test Interview/Comments

Examinee was advised of the results of the examination. He is represented by an attorney.

This opinion should be considered a final report; however, all examinations undergo a Quality Control Review. Should this Quality Control Review change the results of this examination, your agency will be promptly notified by written report.

| Officer's Signature | Agency | Date Notified |
|---|---|---|
| | Horry County Police Department | September 19, 2005 |
| Examiner's Signature | Agency | Date of Report |
| | South Carolina Law Enforcement Division | September 19, 2005 |