

Volume II of II

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Kershaw County

L Casey Manning, Circuit Court Judge

RECEIVED

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S C. Supreme Court

ORIGINAL

JOHNNY A GAINNEY,

PETITIONER,

V

STATE OF SOUTH CAROLINA,

RESPONDENT

APPENDIX

ROBERT M DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

JOHN W MCINTOSH
Chief Deputy Attorney General

SALLEY W ELLIOTT
Senior Assistant Deputy Attorney General

BRIAN PETRANO
Assistant Attorney General

P O Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

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1 ALSO HAS THE ACTUAL DANGER BECAUSE YOU HAD A MAN
2 OUTSIDE WHICH THE EVIDENCE SHOWS WAS HIGH ON
3 COCAINE AND ALCOHOL AND HE HAD THE AXE AND THE
4 KNIFE REMEMBER THE KNIFE?

5 SO HERE CHALK UP FOR THE DEFENSE EITHER
6 WAY ACTUAL BELIEF, OR HE ACTUALLY WAS IN DANGER
7 NOW, HE DID NOT KNOW ABOUT THE AXE HE
8 TESTIFIED HE DID NOT SEE THE AXE, BUT IT WAS THERE
9 SO HE HAS GOT THAT ONE EITHER WAY

10 NOW, THE THIRD ELEMENT IS IF THE DEFENSE IS
11 BASED ON BELIEF OF IMMINENT DANGER, A REASONABLY
12 PRUDENT MAN OF ORDINARY FIRMNESS AND COURAGE WOULD
13 HAVE ENTERTAINED THE SAME BELIEF THAT IS AN
14 ORDINARY MAN WOULD THINK THE SAME THING

15 AND WE WILL GO THROUGH THIS IN A MINUTE,
16 BUT WE SUBMIT THAT WHEN YOU ARE IN THE HOME AND YOU
17 ARE AWAKENED BY VIOLENCE, THAT AN ORDINARY MAN IS
18 GOING TO KNOW SOMETHING IS TERRIBLY, TERRIBLY WRONG
19 OUTSIDE AND THERE IS A VIOLENT PERSON OUTSIDE

20 AND SO WE BELIEVE YOU CAN CHALK UP NUMBER
21 THREE FOR THE DEFENSE

22 FOURTH, THE DEFENDANT HAD NO OTHER PROBABLE
23 MEANS OF AVOIDING DANGER OF LOSING HIS LIFE OR
24 SUSTAINING SERIOUS BODILY INJURY OTHER THAN TO ACT
25 AS HE DID IN THE PARTICULAR INSTANCE

1 NOW, NUMBER FOUR GOES INTO THIS DUTY TO
2 RETREAT IF YOU ARE OUT SOMEWHERE IN PUBLIC AND
3 ONE OF THESE CONFLICTS START, YOU HAVE A DUTY TO
4 GET IN YOUR CAR AND LEAVE, OR WALK AND LEAVE, BUT
5 YOU HAVE A DUTY TO LEAVE

6 WHEN YOU ARE AT YOUR OWN HOUSE YOU DON'T
7 HAVE TO RETREAT THE LAW TAKES THAT DUTY AWAY
8 YOU CAN STAND YOUR GROUND ON YOUR OWN PREMISES

9 SO WE SAY NUMBER FOUR -- WE COULD SAY
10 NUMBER FOUR DOESN'T COUNT, BUT THE EVIDENCE SHOWS
11 IN THIS CASE THAT IN FACT MR GAINNEY AND MS.
12 TALBERT DID TRY OTHER MEANS OF RESOLVING THIS
13 DIFFICULTY

14 THEY WENT TO THE MAGISTRATE THEY TRIED TO
15 GO THROUGH CHANNELS THEY TRIED TO RESOLVE IT
16 PEACEFULLY

17 MR GAINNEY HAD THE CONFRONTATION THE WEEK
18 BEFORE WITH MR PRICE HE FIRED A WARNING SHOT
19 NOW, THAT WOULD LET ME KNOW HE WAS SERIOUS

20 NOW, WHAT WAS THE DIFFERENCE BETWEEN
21 OCTOBER THE 20TH AND OCTOBER THE 9TH? ON OCTOBER
22 THE 9TH MR GAINNEY WAS ALREADY AWAKE HE WAS IN
23 CONTROL OF THE SITUATION HE WAS NOT IN THIS
24 SITUATION OF CHAOS AND TERROR AND HE WAS ABLE TO
25 JUST FIRE A WARNING SHOT UP IN THE AIR, LET THE MAN

1 KNOW HE IS SERIOUS, AND RUN HIM OFF YOU SEE?

2 BUT IT IS ALTOGETHER DIFFERENT WHEN YOU ARE
3 IN YOUR BED ASLEEP AND YOU ARE AWAKENED BY
4 VIOLENCE

5 NOW, WE BELIEVE THAT THERE IS SELF-DEFENSE
6 IN THIS CASE THE STATE CANNOT PROVE THEIR CASE
7 BEYOND A REASONABLE DOUBT THERE HAS GOT TO BE A
8 REASONABLE DOUBT ON ALL OF THESE ELEMENTS OF SELF-
9 DEFENSE

10 THE MAN WAS UNDER ATTACK. MAYBE HE DIDN'T
11 RESPOND AS IF HE WOULD IF HE HAD A LAW PROFESSOR
12 SITTING OVER HIS SHOULDER ADVISING HIM ON EXACTLY
13 HOW TO CONDUCT HIMSELF IN THIS TYPE OF A SITUATION
14 BY THE LEGAL TEXT BOOKS

15 YOU SAW MR GAINNEY TESTIFY I THOUGHT THAT
16 WAS VERY IMPORTANT THE WORD THAT CAME TO MY MIND
17 IS "PATHETIC " HE'S NOT A WORD SMITH HE IS NOT
18 ARTICULATE HE IS NOT EVEN LITERATE BUT HE WAS
19 DOING THE BEST HE COULD UNDER THE CIRCUMSTANCES

20 NOW, THERE ARE SOME MORE LAWS, AND THIS
21 COMES FROM OUR CASES, THAT YOU NEED TO KNOW ABOUT
22 SELF-DEFENSE

23 THERE IS AN OLD CASE, AND IT TALKS ABOUT
24 YOU DON'T HAVE TO WAIT UNTIL THE DEFENDANT GETS THE
25 DROP ON YOU

1 NOW, THAT IS NOT THE KIND OF LANGUAGE THAT
2 I USE, GETTING THE DROP ON SOMEBODY IT SAYS YOU
3 CAN GO AHEAD AND ACT BEFORE HE GETS THE DROP ON
4 YOU BUT THE DROP MEANS AN ADVANTAGE

5 LET ME JUST TELL YOU THIS I WATCH THESE
6 BASKETBALL GAMES, OKAY? THE PLAY-OFFS YOU SEE
7 THE ADVANTAGE GO BACK AND FORTH FROM ONE TEAM TO
8 THE NEXT SOMETIMES IT WILL LOOK LIKE THIS TEAM IS
9 JUST GOING TO KILL THIS TEAM, AND THEN THIS TEAM
10 WILL COME BACK AND THEY WILL HAVE THE ADVANTAGE

11 NOW, THIS IS NOT BASKETBALL WE ARE TALKING
12 ABOUT TODAY, THIS IS MUCH MORE IMPORTANT BUT THE
13 ADVANTAGE IN ONE OF THESE CONFLICTS CAN SHIFT. IF
14 YOU HAVE A GUN, THE OTHER PERSON HAS A KNIFE, YOU
15 HAVE THE ADVANTAGE YOU RUN OUT OF BULLETS, HE HAS
16 THE ADVANTAGE THE ADVANTAGE CAN SHIFT

17 AND IF YOU HAVE THE ADVANTAGE IN SELF-
18 DEFENSE, YOU DON'T HAVE TO WAIT UNTIL THE OTHER
19 PERSON GETS THE ADVANTAGE OVER YOU

20 AND THAT IS IMPORTANT, BECAUSE YOU REMEMBER
21 WHEN MR GAINNEY WAS TALKING ABOUT HIS FIELD OF
22 VISION THIS IS STATE'S EXHIBIT 21 HE'S LOOKING
23 OUT THIS KITCHEN WINDOW AND HE IS ONLY GOING TO BE
24 ABLE TO SEE THE MAN FROM HERE BY THE TRUCK UNTIL HE
25 GETS TO ABOUT THIS POINT HERE, AND THEN HE LOSES

1 ONCE THE MAN GETS HERE, WE CAN'T SEE HIM ANY MORE
2 WE CAN'T CONTROL THE SITUATION NOW WE CAN'T
3 DEFEND OURSELVES UNTIL HE IS RIGHT ON TOP OF US
4 SO HE HAD TO ACT BETWEEN HERE AND HERE AND THAT
5 IS WHAT IS CALLED TAKING THIS ACTION WHILE YOU HAVE
6 THE ADVANTAGE

7 NOW, THERE IS ANOTHER LAW THAT IS VERY,
8 VERY IMPORTANT UNDER SOUTH CAROLINA LAW, IF YOU
9 HAVE THE RIGHT TO TAKE THE FIRST SHOT, YOU HAVE THE
10 RIGHT TO KEEP ON SHOOTING UNTIL THE DANGER PASSES
11 IF YOU HAVE THE RIGHT IN SELF-DEFENSE TO TAKE THE
12 FIRST SHOT, THEN YOU DON'T HAVE TO LEAVE YOUR OWN
13 PREMISES, YOU HAVE THE RIGHT TO KEEP ON SHOOTING
14 UNTIL THE DANGER IS GONE

15 AND WHEN YOU BELIEVE THAT SOMEONE IS ARMED
16 AND FIRING AT YOU THROUGH YOUR WINDOWS, I SUBMIT
17 THAT THAT DANGER DOESN'T PASS UNTIL THAT PERSON IS
18 OUT

19 THESE ARE THE LAWS OF THE STATE OF SOUTH
20 CAROLINA THAT APPLY TO THIS CASE

21 NOW, I WANTED TO GO OVER WITH YOU AN
22 ANALYSIS OF MR. GAINEY AND WHAT WENT THROUGH HIS
23 MIND THAT MORNING

24 FROM THE TESTIMONY WE HAVE HEARD THE FIRST
25 THING HE HEARS THAT MORNING IS A LOUD NOISE, WHICH

1 IS THE WINDOW BREAKING HE TESTIFIES HE THOUGHT IT
2 WAS SHOTS

3 NOW, HOW DOES A WINDOW BREAK AT 6 30 A M ?
4 AND YOU SEE ALL THE PICTURES THIS IS DARK HOW
5 DOES A WINDOW BREAK? IT COULD BE JUST MAGIC THE
6 STATE SAYS THEY DON'T KNOW HOW THESE WINDOWS BROKE
7 LET'S MAKE IT MULTIPLE CHOICE MAYBE IT WAS JUST
8 MAGIC IT COULD BE SOMEBODY THREW A BRICK THROUGH
9 THE WINDOW, OR A ROCK IF THAT HAPPENED YOU WOULD
10 HAVE THE ROCK OR BRICK THE WINDOW COULD HAVE BEEN
11 KNOCKED OUT BY A GUN SHOOTING THROUGH THE WINDOW
12 THEN YOU WOULD NOT FIND THE BULLET, PARTICULARLY
13 NOT IN THE DARK AND THE OFFICER SAID THEY GO BACK
14 IN THERE LATER AND COMB THE HOUSE AND THEY DON'T
15 FIND ANY BULLETS BUT MR GAINNEY DIDN'T HAVE THAT
16 LUXURY HE WAS FUMBLING IN THE DARK ANOTHER WAY
17 TO KNOCK OUT THE WINDOWS WOULD BE WITH A CLUB, SOME
18 SORT OF BASEBALL BAT, THE AXE, SOME SORT OF
19 INSTRUMENT THAT WAY YOU KNOCK OUT THE WINDOW
20 THERE IS NOTHING IN THERE FROM AN INSTRUMENT UNTIL
21 YOU DRAW IT BACK OUT

22 IF YOU ARE MR GAINNEY AND YOU DON'T KNOW
23 WHAT IS GOING ON AND HOW THESE WINDOWS ARE
24 BREAKING, WHAT DO YOU ASSUME?

25 YOU KNOW, IT IS KIND OF LIKE THE WAY I DEAL

1 WITH SNAKES YOU WATCH THESE NATURE SHOWS AND THEY
2 TELL YOU, YOU KNOW, POISONOUS SNAKES HAVE THESE
3 MARKINGS, NON-POISONOUS SNAKES LOOK LIKE THIS I
4 WATCH THOSE, BUT WHEN I SEE A SNAKE IN THE WOODS I
5 CAN'T REMEMBER ALL THAT, SO I JUST ASSUME THE SNAKE
6 IS A POISONOUS SNAKE THAT WAY IF HE IS NON-
7 POISONOUS I AM NOT IN DANGER I DON'T WANT TO
8 ASSUME HE IS NON-POISONOUS AND THEN HE TURN OUT TO
9 BE POISONOUS I ALWAYS ASSUME MY SNAKES ARE
10 POISONOUS SNAKES

11 MR GAINNEY, IF HE ASSUMES IT IS A CLUB, HE
12 GOES OUTSIDE TO CHECK IT OUT, SEE WHAT THIS FELLOW
13 WITH THE CLUB IS DOING AND IT TURNS OUT TO BE A
14 GUN, HE LOSES HIS LIFE IF HE ASSUMES FROM THE
15 START THAT IT IS A GUN, THEN HE CAN OPERATE MORE
16 SAFELY WITH THAT ASSUMPTION

17 NOW, HE GOES ON DOWN THE HALLWAY AND THE
18 WINDOWS ARE BREAKING OUT ONE AFTER ANOTHER
19 REMEMBER HE SAID, "DON'T TURN ON THE LIGHTS DON'T
20 LIGHT US UP " HE DIDN'T WANT TO BE A TARGET

21 HE DOESN'T KNOW WHAT IS HAPPENING WHY ARE
22 THE WINDOWS BREAKING OUT? MAYBE SOMEBODY IS JUST
23 OUT THERE PLAYING A PRACTICAL JOKE THAT WOULD BE
24 CHOICE A OR MAYBE SOMEBODY IS SHOOTING AT HIM
25 THAT WOULD BE CHOICE B MAYBE SOMEBODY IS OUT

1 THERE TRYING TO KNOCK IN THE WINDOWS TO CLIMB IN
2 AND BREAK IN THE HOUSE HE DOESN'T KNOW

3 WHAT ARE YOU GOING TO ASSUME? YOU ASSUME
4 THE SNAKE IS POISONOUS YOU ASSUME SOMEONE IS
5 SHOOTING.

6 WHY WAS MR. PRICE BREAKING OUT THE WINDOWS?
7 WE DON'T KNOW IT LOOKS LIKE, THOUGH, HE WAS
8 TRYING TO BREAK IN

9 UNDER THE LAW OF SOUTH CAROLINA, MR. GAINNEY
10 IS ENTITLED TO ACT ON APPEARANCES HE CAN GO WITH
11 THE WAY THINGS LOOK

12 AND THE STATE SAYS, "AH, WELL, HE WASN'T
13 TRYING TO BREAK IN, HE DIDN'T CHOP THE DOOR DOWN "

14 BURGLARS DON'T CHOP THE DOOR DOWN THAT IS
15 TOO MUCH WORK BURGLARS BREAK THE WINDOW AND THEY
16 CLIMB IN

17 MR. GAINNEY BELIEVED THAT WHOEVER WAS OUT
18 THERE IS TRYING TO GET IN AND GET HIM SELF-
19 DEFENSE HE IS ENTITLED TO ACT ON APPEARANCES

20 THERE IS ANOTHER LAW THAT SAYS HE CAN BE
21 MISTAKEN AS LONG AS HE IS ACTING ON THE WAY IT
22 LOOKED, THE APPEARANCE, REASONABLY

23 NOW, LET'S GO THROUGH THE EVIDENCE THE
24 FIRST DAY WE HEARD FROM THE OFFICERS AND ONE
25 THING THEY TESTIFIED TO IS THE NINE SHELL CASINGS

1 TAKEN OUT OF THAT KITCHEN

2 NOW, THERE IS A LITTLE CONTROVERSY AS TO
3 HOW MANY SHOTS HIT MR PRICE, IT WAS EITHER SIX OR
4 SEVEN THERE IS TWO SHOTS THAT HIT THE TRUCK BUT
5 THE SHOTS, WE SUBMIT, THAT HIT MR PRICE CAME FROM
6 THE KITCHEN NINE SHELL CASINGS SEVEN SHOTS HIT
7 HIM TWO HIT THE TRUCK ALL OF THE EVIDENCE IS IN
8 CONSISTENCY WITH THAT

9 NOW, THIS THEORY THE STATE HAS, THAT HE
10 WENT OUTSIDE AND SHOT HIM POINT BLANK, IS A
11 WONDERFUL THEORY THE ONLY PROBLEM WITH IT IS THE
12 EVIDENCE DOESN'T SUPPORT IT THERE IS NO EVIDENCE
13 OF CLOSE RANGE SHOT

14 THE ONLY EVIDENCE, THE ONLY TINY PIECE OF
15 EVIDENCE THEY HAVE TO CLING TO IS THIS GSR TEST ON
16 MR PRICE'S HANDS WHICH PROBABLY SHOWED THAT HE HAD
17 FIRED A FIREARM BECAUSE THAT IS WHAT THEY WERE
18 CHECKING FOR AND IT WAS POSITIVE AND THAT IS WHAT
19 THE LADY TESTIFIED TO

20 BUT YOU REMEMBER SHE SAID THAT THIS IS THE
21 GASSIER STUFF, LIKE THE FLOUR THAT YOU THROW THE
22 PROBLEM IS THE LIGHT STUFF IS WHAT SHE FOUND, SHE
23 DIDN'T FIND THE HEAVY STUFF, THE GUN POWDER, THE
24 HEAVIER PARTICLES THEY ARE NOT PRESENT ON THAT
25 RIGHT HAND NOW, HOW DID THE LIGHT STUFF GET THERE

1 AND THE HEAVY STUFF DIDN'T?

2 AND, BY THE WAY, SHE FOUND GUNSHOT RESIDUE
3 ON THE LEFT HAND, WHICH NEVER GOT SHOT AT ALL, AND
4 ON THE BACK OF THE RIGHT HAND, WHICH NEVER GOT SHOT
5 AT ALL

6 IF THAT IS EVIDENCE OF A CLOSE RANGE SHOT,
7 HOW DID IT GET OVER HERE AND OVER HERE? AND HOW
8 COME THE HEAVIER RESIDUE WAS NOT PRESENT?

9 NOW, DO YOU REMEMBER MS TALBERT
10 TESTIFYING, AND SHE DID SAY THAT SHE HEARD MR
11 PRICE SAY, "PLEASE DON'T SHOOT ME ANY MORE " AND I
12 SUBMIT TO YOU THAT IF HE DIDN'T SAY IT HE PROBABLY
13 THOUGHT IT, BUT SHE SAYS THAT SHE HEARD IT BUT SHE
14 CAN'T TELL YOU WHEN IT IS NOT ON THE TAPE SHE
15 DOESN'T REFER TO IT ON THE TAPE SHE SAYS ON THE
16 TAPE, "I DON'T HEAR ANYTHING "

17 AND IF YOU LISTEN TO THE TAPE, WHICH THE
18 TAPE WILL BE WITH YOU IN THE JURY ROOM, LISTEN TO
19 THE PART WHERE HE COMES IN AND TELLS HER THAT RANDY
20 PRICE HAS BEEN SHOT SHE GOES TO PIECES

21 I SUBMIT TO YOU WHEN YOU LISTEN TO THAT
22 TAPE, SHE IS EITHER AN ACADEMY AWARD WINNING
23 ACTRESS OR THAT IS THE FIRST THAT SHE KNOWS THAT HE
24 HAS BEEN SHOT

25 THE 911 OPERATOR SAYS, "CAN YOU HEAR

1 ANYTHING? CAN YOU SEE ANYTHING?" SHE DOESN'T
2 RESPOND, BECAUSE, AS SHE TESTIFIED, SHE WAS IN THE
3 HALLWAY

4 I ASKED HER, "WERE YOU SCARED OF MR
5 PRICE?" AND SHE SAID, "WELL, I HAD ONE IN THE HOUSE
6 WITH A GUN AND I HAD ONE OUTSIDE WAVING AN AXE "
7 SHE SAID, "I WAS SCARED OF BOTH OF THEM "

8 NOW, YOU MUST REMEMBER THAT THIS STORY
9 ABOUT THE "PLEASE DON'T SHOOT ME" NEVER CAME UP
10 UNTIL DECEMBER THE 28TH, AND THAT WAS SEVEN DAYS
11 AFTER THE TEST CAME BACK POSITIVE FOR GUNSHOT
12 RESIDUE ON MS. TALBERT'S HAND THAT IS WHEN THIS
13 STORY CAME UP

14 BUT YOU CAN'T HEAR IT ON THE TAPE THERE
15 IS NO REFERENCE TO IT ON THE TAPE SHE TELLS THE
16 911 OPERATOR, "I DON'T HEAR ANYTHING "

17 NOW, I ASKED THE GENTLEMAN WHO TESTIFIED
18 FIRST TODAY, AND I COULDN'T UNDERSTAND THAT
19 EXACTLY, WHEN HE WAS TALKING TO MR MOAK HE KNEW
20 JUST WHERE THE SHOOTER WAS STANDING, AND THEN WHEN
21 HE TALKED TO ME AND THEN HE TALKED TO MR. MOAK
22 AGAIN, "WELL, YOU KNOW, I'M NOT SURE IF I CAN TELL
23 YOU EXACTLY WHERE THOSE SHELLS WERE EJECTED," AND
24 THAT SORT OF THING

25 THE REASON I WAS ASKING HIM THAT WAS THIS

1 THESE ARE YOUR SHELL CASINGS YOU SEE? THIS IS
2 YOUR BODY BUT THE BODY IS LYING FACING THE TRUCK
3 LET ME SEE IF I CAN FIND A PHOTOGRAPH FACING THE
4 PICKUP

5 NOW, THIS IS WHERE THE STATE'S VERSION OF
6 THE FACTS FALLS APART IF MR GAINNEY WANTS TO GO
7 OUT HERE AND HAVE A SHOW-DOWN WITH MR PRICE, LET'S
8 SAY THE MURDER THEORY, YOU THINK HE IS GOING TO
9 STAND BACK HERE AND TALK TO THE BACK OF HIS EAR?
10 AND IF MR PRICE IS BEGGING FOR HIS LIFE, ISN'T HE
11 GOING TO BE LOOKING AT THE PERSON THAT IS GETTING
12 READY TO SHOOT AT HIM?

13 I ASKED THE OFFICER OR THE SLED MAN COULD
14 THE PERSON HAVE COME AROUND HERE WHERE HE WOULD BE
15 FACING MR PRICE, COULD THESE SHELL CASINGS HAVE
16 COME FROM SOMEONE IN THIS POSITION FACING MR PRICE
17 SO THEY HEAD-ON HAVE THIS CONFRONTATION HERE, OR
18 MR PRICE IS SAYING "PLEASE DON'T SHOOT ME " NO
19 THESE WERE SOMEBODY STANDING BACK HERE

20 SO IN ORDER TO BELIEVE THE STATE'S VERSION,
21 LET ME SEE HOW TO DEMONSTRATE THIS, IF MR PRICE IS
22 LYING HERE, HE IS FACING THAT DIRECTION, I'M
23 STANDING BACK HERE GETTING READY TO SHOOT HIM YOU
24 KNOW? WHY WOULD I DO THAT? IF I AM MAD AT HIM AND
25 I WANT TO GET MR PRICE, I AM GOING TO COME AROUND

CLOSING ARGUMENT BY MR WELLS

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1 OVER HERE AND FACE HIM "AH, YEAH, YOU KNOW, BREAK
2 OUT MY WINDOWS, WILL YOU?" I'M GOING TO HAVE A
3 CONFRONTATION I'M NOT GOING TO TALK TO HIM FROM
4 THE BACK THAT DOESN'T MAKE ANY SENSE

5 NOW, DR YACoub, ALL SEVEN SHOTS DISTANT
6 SHOTS SHE CHECKED THE SHIRT FOR STIPPLING AND GUN
7 POWDER AND POWDER BURNS NOTHING AND THEY HAD A
8 WHITE SHIRT, BASICALLY I MEAN, IT IS WHITE TO ME
9 YOU LOOK AT THE PICTURES YOU WILL HAVE THE
10 PICTURES WITH YOU IN THE JURY ROOM IF THERE WAS
11 GUN POWDER, SHE WOULD HAVE SEEN IT. NO POWDER
12 AROUND ANY OF THE WOUNDS, AROUND THE HEAD, NOTHING
13 ALL OF THESE WOUNDS EXCEPT TWO GO INTO THE LEFT
14 SIDE THEY ARE ALL FROM THIS ANGLE HERE WINDOW
15 UP THERE, THIS ANGLE HERE THERE ARE TWO, ONE TO
16 THE RIGHT ARM, ONE TO THE RIGHT HAND FROM THE RIGHT
17 SIDE THE REST OF THEM COME IN FROM THE LEFT AND
18 THEY ARE MOVING LEFT TO RIGHT THERE IS REALLY ONE
19 WOUND THAT YOU NEED TO BE CONCERNED WITH THAT IS
20 WHAT SHE CALLED WOUND NUMBER TWO

21 AND HER WOUND NUMBER TWO WAS INFLECTED THE
22 LEFT TEMPLE, SLIGHTLY DOWNWARD AND TO THE RIGHT
23 LEFT TEMPLE, SLIGHTLY DOWNWARD AND TO THE RIGHT
24 THERE IS SHOT NUMBER TWO FROM THE WINDOW

25 WE HAD THE SLED AGENT WHO DID THE GSR TEST

1 AND SHE TOLD YOU THAT THAT RIFLE COULD BE TESTED
2 FOR HOW FAR IT, THIS PARTICULAR RIFLE, WILL PUT OUT
3 EITHER ONE OF THESE CLOUDS, HEAVY OR LIGHT, BECAUSE
4 WE DON'T KNOW ALL THE EVIDENCE WE HAVE IS DISTANT
5 SHOTS NO EVIDENCE OF CLOSE RANGE THE STATE HAS
6 THE BURDEN OF PROOF BEYOND A REASONABLE DOUBT
7 THEY DON'T HAVE EVIDENCE OF CLOSE RANGE +

8 NOW, IN THE DEFENSE TESTIMONY TODAY WE
9 PRESENTED THE DOCTOR WHO TOLD YOU THAT MR. GAINNEY
10 HAD HAD WHAT, THREE STROKES? AND WE DID THAT FOR
11 THE PURPOSE OF SHOWING YOU THAT THIS WAS NOT A
12 HEALTHY MAN, THIS WAS NOT A MAN TO BE OUT THERE
13 GRAPPLING IN THE YARD WITH A 40-YEAR-OLD IN ANY
14 KIND OF A PISTOL CONFRONTATION

15 WE PRESENTED THE TESTIMONY OF MS. SHACKER
16 FROM SLED WHO DID THE TOXICOLOGY ON MR. PRICE. SHE
17 TESTIFIED THAT HIS BLOOD ALCOHOL LEVEL WAS 178, I
18 THINK, 176. I ASKED HER ABOUT THOSE SCORES
19 BECAUSE IN COMMON PARLANCE WHEN I AM OUT WITH MY
20 FRIENDS, WHEN THEY TALK ABOUT DUI THEY TALK ABOUT
21 BLOWING A "10" -- BLOWING A "10 " THEY DON'T TALK
22 ABOUT BLOWING A 10, BUT THAT IS ACTUALLY WHAT IT
23 IS, A 10. THEY TALK ABOUT BLOWING A "10 "

24 IF A "10" IS DUI, THIS IS AN "18 " CLOSE
25 TO DOUBLE OF THE DRIVING LIMIT THAT IS THE

1 ALCOHOL THAT IS THE DEPRESSANT

2 HE WAS ALSO FOUND WITH COCAINE AT A LEVEL
3 -- SHE SAID ZERO IS I HAVEN'T TAKEN ANY, 10 IS AN
4 ABSOLUTE OVERDOSE HE WAS AT A "4 " HALFWAY
5 THERE

6 SHE ALSO TESTIFIED THAT COCAINE GIVES YOU
7 THAT SUPERMAN SYNDROME, A SYNDROME OF BEING ABLE TO
8 DO ANYTHING

9 AND SHE ALSO TESTIFIED, I ASKED HER ABOUT
10 CRACK COCAINE BECAUSE I HAD ASKED MS. TALBERT WHICH
11 TYPE OF COCAINE RANDY PRICE GENERALLY USED, AND SHE
12 SAID CRACK, THE ROCK

13 AND REMEMBER THE TOXICOLOGIST SAID THAT
14 THAT GIVES YOU THIS HIGH FASTER IT IS THE PURE
15 FORM

16 THAT IS WHAT MR GAINNEY HAD OUT IN HIS
17 YARD HE HAD SUPERMAN WITH AN AXE IN HIS FRONT
18 YARD AND HE TOOK THE SHOT

19 NOW, WHAT ARE YOU GOING TO DO? IT IS A
20 TOUGH CASE THIS IS A CASE TO DETERMINE WHETHER
21 THE HOMEOWNER CAN DEFEND HIS HOME AT NIGHT MR
22 GAINNEY I SUPPOSE COULD HAVE GONE OUTSIDE,
23 INVESTIGATED, GATHERED THE FACTS, BUT IF THAT HAD
24 BEEN A GUN KNOCKING OUT THOSE WINDOWS, HE WOULD BE
25 DEAD HE DIDN'T KNOW AND YOU HAVE TO JUDGE THIS

1 CASE BASED ON WHAT HE KNEW THEN, WHAT WAS HIS STATE
2 OF MIND

3 AND WHEN YOU JUDGE THIS CASE -- AND HE
4 TESTIFIED THAT THAT MAN BENT OVER THAT TRUCK BED,
5 HE DIDN'T KNOW WHAT HE WAS GETTING OR NOT GETTING
6 -- BEFORE YOU JUDGE MR. GAINEY, I WANT EVERY ONE OF
7 YOU TO LOOK AT THIS PICTURE. THIS IS A STATE'S
8 EXHIBIT. THAT IS THE MURKY DARKNESS IN WHICH HE
9 WAS LOOKING AT. AND THAT IS THE MURKY DARKNESS IN
10 WHICH HE WAS MAKING DECISIONS THAT WERE GOING TO
11 MAKE HIM OR BREAK HIM, SAVE HIS LIFE OR LOSE HIS
12 LIFE. THIS IS INFORMATION THAT HE WAS GETTING

13 DID HE HANDLE IT PERFECTLY? I DON'T KNOW
14 WOULD I HAVE HANDLED IT EXACTLY THE WAY HE DID? I
15 DON'T KNOW. IS THERE A MORE PERFECT WAY TO HANDLE
16 IT? THERE PROBABLY IS.

17 BUT JUDGE HIM ON WHAT HE KNEW AND WHAT HE
18 SAW THAT DAY, AND YOU CANNOT COME BACK WITH ANY
19 VERDICT OTHER THAN NOT GUILTY. THERE IS A
20 REASONABLE DOUBT HERE.

21 DON'T STAY BACK IN YOUR JURY ROOM FOR HOURS
22 AND HOURS. YOU HAVE GOT TO COME BACK IN THIS
23 COURTROOM AND TELL THIS COMMUNITY THAT A HOMEOWNER
24 IN KERSHAW COUNTY CAN DEFEND HIS HOME. YOU HAVE
25 GOT TO TELL THEM THIS IS NOT OPEN TO DEBATE. WHEN

CLOSING ARGUMENT BY MR MEADORS

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1 YOU HAVE SUPERMAN OUTSIDE YOUR HOUSE WITH AN AXE,
2 YOU CAN TAKE SUCH STEPS AS YOU NEED TO TAKE TO
3 DEFEND YOUR HOME

4 LADIES AND GENTLEMEN, THE JUDGE IS GOING TO
5 GIVE YOU A VERDICT FORM THAT VERDICT FORM WILL
6 STAY IN THIS COURTHOUSE FOREVER IT WILL BE HERE
7 FROM NOW ON AND IT WILL BE A RECORD OF WHAT YOU
8 HAVE DONE IF THAT VERDICT FORM COMES BACK NOT
9 GUILTY, THE FOREMAN WILL SIGN IT, BUT IF I WERE YOU
10 I'D WANT TO SIGN IT TOO I WOULDN'T LET HIM HAVE
11 ALL THE CREDIT I'D WANT TO PUT MY NAME ON THAT
12 VERDICT I WOULD WANT PEOPLE TO KNOW THAT I
13 BELIEVE THAT A HOMEOWNER, A LAW ABIDING CITIZEN IN
14 KERSHAW COUNTY CAN DEFEND HIMSELF FROM A MAN HIGH
15 ON CRACK COCAINE TO COME TO HIS HOUSE TO DO
16 VIOLENCE PUT YOUR NAME ON THAT VERDICT

17 THANK YOU VERY MUCH

18 MR MEADORS MAY IT PLEASE THE COURT?

19 THE COURT SURE

20 (WHEREUPON, THE FOLLOWING CLOSING
21 ARGUMENT WAS MADE BY MR MEADORS,
22 ON BEHALF OF THE STATE)

23 MR MEADORS THANK Y'ALL FOR BEING HERE
24 THANK YOU FOR THE ATTENTION YOU HAVE GIVEN THIS
25 CASE THANK YOU FOR YOUR COMMON SENSE AND

1 EXPERIENCES THAT YOU BRING HERE BECAUSE I THINK
2 THAT IS ALL YOU NEED TO DECIDE THIS CASE----COMMON
3 SENSE AND YOUR EXPERIENCES IN DECIDING WHAT IS
4 CREDIBLE AND BELIEVABLE

5 HE JUST SAID THAT THIS CASE IS A CASE THAT
6 DETERMINES WHETHER A HOMEOWNER CAN DEFEND HIS
7 PROPERTY RESPECTFULLY, THAT IS LUDICROUS HE HAS
8 GOT A GREAT ARGUMENT HE HAS GOT THE WRONG CASE

9 THIS IS NOTHING TO DO ABOUT DEFENDING YOUR
10 PROPERTY THIS ISN'T A CASE WHERE SOMEBODY IS
11 BREAKING IN, THEY ARE FIXING TO RAPE YOU, THEY ARE
12 TRYING TO BURGLARIZE YOUR HOUSE

13 HE SAID -- I DON'T KNOW WHERE SOME OF THIS
14 CAME FROM WHEN HE WAS ARGUING MR GAINNEY IS COMING
15 DOWN THINKING SOMEBODY IS BREAKING IN HIS HOUSE I
16 DON'T KNOW WHERE THAT CAME FROM, THINKING THEY ARE
17 COMING INSIDE ALL I KNOW IS MR GAINNEY SAID, "IF
18 HE WOULD GET IN HIS TRUCK I WOULD LET HIM DRIVE
19 ON." I DON'T KNOW WHEN THAT FEAR CAME IN THAT HE
20 IS TALKING ABOUT IN CLOSING ARGUMENT I DON'T KNOW
21 ABOUT THAT

22 AND HE IS SAYING WHAT DOES A BURGLAR DO
23 WELL, FOLKS, DOES A BURGLAR GO AROUND AND BREAK SIX
24 WINDOWS AND THEN COME BACK AND TRY TO BREAK IN WHEN
25 HE HAS WOKEN YOU UP? DOES THAT APPEAL TO YOUR

1 COMMON SENSE?

2 THIS CASE ISN'T ABOUT DEFENDING A HOME,

3 YOUR RIGHTS IF IT WAS, HE WOULDN'T HAVE ARRESTED

4 HIM, I WOULDN'T PROSECUTE HIM NOBODY BELIEVES IN

5 THE RIGHT TO BEAR ARMS MORE THAN I DO IF SOMEBODY

6 COMES INTO MY HOUSE, AND I WOULD WANT TO DO THE

7 RIGHT THING THIS ISN'T THE CASE FOR THAT HE IS

8 TRYING TO MAKE THAT THE CASE THIS ISN'T THAT

9 CASE THIS IS A SMOKE SCREEN HE IS TRYING TO

10 APPEAL TO YOUR PASSIONS WE ARE REALLY NOT ALLOWED

11 TO SAY -- PUT OURSELVES IN YOUR POSITION AND SEND A

12 MESSAGE TO THE COMMUNITY THAT IS REALLY NOT A

13 PROPER ARGUMENT I DIDN'T OBJECT SO I'M GOING TO

14 DO IT TOO WE GO ON THAT IS NOT PROPERTY YOU

15 SEND A MESSAGE HERE TODAY IF YOU COME BACK SAYING

16 NOT GUILTY THAT THIS IS THE WILD, WILD WEST YOU

17 REALLY DO YOU SEND A MESSAGE TO DO AWAY WITH THE

18 SHERIFF'S OFFICE AND THE SHERIFF'S DEPARTMENT OR

19 THE PROSECUTOR'S OFFICE THAT IS THE ONLY MESSAGE

20 THAT A NOT GUILTY SENDS HERE DON'T GET CAUGHT UP

21 WITH THAT APPEALING TO YOUR PASSIONS AND PREJUDICE

22 THERE THAT THIS IS THE HOMEOWNER IF THIS HAPPENS

23 IT IS GOING TO GO WILD PEOPLE ARE GOING TO COME

24 IN RIGHT AND LEFT BREAKING IN THIS ISN'T THAT

25 SCENARIO

1 AND I WILL GO THROUGH AND TELL YOU WHY. HE
2 CALLED HIM PATHETIC I DON'T THINK HE IS PATHETIC
3 HE HELD A JOB FOR 25 YEARS, GOT A C D L DRIVER'S
4 LICENSE, GETS UP AND WORKS EVERY DAY HE CAN
5 ANSWER QUESTIONS HE KNEW WHAT WAS GOING ON HE
6 IS NOT PATHETIC HE WANTS YOU TO THINK HE IS
7 PATHETIC HE IS NOT PATHETIC

8 AND HE KNOWS -- HE KNOWS THAT IF THE SHOTS
9 ARE FIRED OUTSIDE, HE KNOWS -- HE KNOWS THAT IF
10 THEY ARE FIRED OUTSIDE IT IS NOT IN HEAT OF
11 PASSION, IT IS MURDER

12 AND WHEN I STARTED OFF THIS CASE, I SAID IS
13 THIS MURDER OR MANSLAUGHTER? I AM GOING TO ARGUE
14 THEM BOTH IN MY OPENING, I HAVE NEVER DONE IT AS
15 WE GO THROUGH THE EVIDENCE, I WAS WRONG. IT IS
16 MURDER HE TOLD US IT WAS MURDER AND THAT IS NOT
17 A GAME THAT IS -- I ASKED HIM. AND THAT IS WHY
18 -- THAT IS WHY THEY HAVE GOT TO GET THOSE SHOTS
19 INSIDE, BECAUSE THEY KNOW AND THEY KNOW YOU WILL
20 KNOW THAT IF ANY OF THOSE SHOTS COME FROM OUTSIDE
21 IT IS MURDER

22 IS THERE ANY QUESTION THAT THEY CAME FROM
23 OUTSIDE? AND I AM GOING TO GO THROUGH THESE I AM
24 GOING TO BE AS QUICK AS I CAN, BUT I AM GOING TO GO
25 THROUGH IN DETAIL

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1 AND WHERE IS THE MURKY SHOT HE WANTED YOU
2 TO SHOW THAT HE SAID -- THE MURKY SHOT HE FIRST
3 SEES WHEN HE SHOOTS SEVEN TIMES AND HITS EVERY ONE
4 OF THEM FROM INSIDE DOES THAT APPEAL TO YOUR
5 COMMON SENSE?

6 CAROLYN TALBERT, WHO MY GOSH IS BELIEVABLE,
7 TALKS ABOUT THE CRACK COCAINE HE IS IN ON HE
8 DIDN'T EVEN MENTION THAT "PLEASE DON'T SHOOT ME,"
9 DID HE? YOU KNOW WHY HE DIDN'T? BECAUSE HE AIN'T
10 GOT AN ARGUMENT HE AIN'T GOT AN ARGUMENT ABOUT
11 IT WE DON'T BELIEVE HER WHEN SHE SAYS HOW BAD HE
12 IS ON DRUGS, BUT WE AIN'T GOING TO MENTION THAT
13 "PLEASE DON'T SHOOT ME" BECAUSE IT IS TRUE IT
14 RINGS WITH TRUTH

15 AND YOU KNOW WHAT? THAT HAD TO HAVE BEEN
16 OUTSIDE THAT HAD TO HAVE BEEN ON THE GROUND HE
17 WOULD HAVE TO HAVE ALREADY BEEN SHOT IT WOULD
18 HAVE HAD TO HAVE BEEN CONSISTENT WITH THESE BLOWS
19 RIGHT THERE "PLEASE DON'T SHOOT ME" OR "SHOOT ME
20 AGAIN "

21 YOU KNOW, HE TALKS ABOUT, I'M NOT QUITE
22 SURE, RESPECTFULLY, MR WELLS, WHAT HE WAS TALKING
23 ABOUT COMING AROUND HERE HE SAID HE COULD COME
24 RIGHT HERE AND SHOOT AT HIM

25 I SAID WELL, YOU KNOW, I GUESS HE DIDN'T

1 HE DIDN'T EVEN GIVE HIM THE RESPECT TO SHOOT HIM
2 STRAIGHT IN, DID HE? HE SHOT HIM LIKE A DOG FROM
3 THE SIDE ALL OF THEM FROM THE LEFT THAT'S
4 MURDER

5 AND OF COURSE NOW, I'M LEAVING AS I'M
6 LEAVING I'VE GOT TO ACCOUNT FOR THOSE FIVE SHELL
7 CASINGS YOU KNOW WHAT IS FUNNY? NOW THAT DR
8 YACOB INITIALLY MADE A MISTAKE AND FIGURED THESE
9 TWO MIGHT JUST BE ONE -- IF YOU TAKE -- AND I AM
10 GOING TO GO THROUGH THAT NUMBER SIX, FOR INSTANCE,
11 WENT THROUGH HERE THERE WOULD BE FIVE MORE SHOTS
12 OUT HERE THAT WENT INTO HIS BODY FIVE SHELL
13 CASINGS OUT HERE ON THE GROUND COINCIDENCE? I
14 DON'T BELIEVE IN COINCIDENCE HE HAS GOT TO
15 EXPLAIN IT BECAUSE AFTER HE IS THROUGH SHOOTING HIM
16 HE IS HEADING BACK IN THE HOUSE "I THINK I WANT
17 TO TAKE THE SAFETY OFF AND IT TAKES ME FOUR TIMES
18 TO GET THAT SAFETY OFF AND I JUST KEEP SHOOTING "
19 IS HE LIKE A WAR VETERAN PROUD OF SHOOTING HIM OVER
20 THERE, SCARING OFF THE DEAD? HE CAN'T EXPLAIN THE
21 SHELL CASINGS BECAUSE HE BLEW HIM AWAY WHEN HE WAS
22 OUTSIDE AFTER HE BEGGED FOR HIS LIFE THIS AIN'T
23 NOTHING TO DO WITH DEFENDING YOUR HOME HE HAS GOT
24 TO EXPLAIN IT SO HE IS SAYING TO Y'ALL, "BELIEVE ME
25 WHEN I CAME BACK I JUST WENT BOOM-BOOM-BOOM-BOOM "

1 IF THAT WAS TRUE, THESE SHELL CASINGS WOULD BE OVER
2 HERE -- OVER HERE HE IS HEADING BACK IN THE
3 HOUSE IT HAS NOTHING TO DO WITH DEFENDING YOUR
4 HOME

5 MY DAD GAVE ME A BOOK YEARS AGO I CAN'T
6 REMEMBER THE GUY'S LAST NAME, BUT "YOUR GREATEST
7 POWER" -- "YOUR GREATEST POWER " A SHORT BOOK
8 AND YOUR GREATEST POWER, Y'ALL KNOW WHAT IT IS,
9 YOUR GREATEST POWER IS CHOICE, TO MAKE A CHOICE, TO
10 MAKE CHOICES WE ALL MAKE CHOICES IN LIFE THAT
11 IS OUR GREATEST POWER

12 AIN'T NO QUESTION, RANDY MADE SOME BAD
13 CHOICES THAT DAY HE MADE SOME BAD CHOICES EVEN
14 GOING OVER THERE I DON'T KNOW WHETHER HE BROKE
15 OUT THE WINDOWS OR NOT

16 AND THAT IS ANOTHER THING I WANT TO SAY I
17 DON'T KNOW WHAT MR WELLS IS TALKING ABOUT THIS
18 BROKE THE WINDOWS I NEVER SAID THERE WAS A
19 DISPUTE ABOUT THAT I THINK THERE IS A QUESTION OF
20 WHEN THE WINDOWS WERE BROKEN AND WHO DID IT, NOT
21 WHAT DID IT AND DO I THINK THE WINDOWS WEREN'T
22 SHOT INTO? YOU DAGGUM RIGHT I DO THERE IS NO
23 EVIDENCE THESE WINDOWS WERE EVER SHOT INTO NONE
24 OF THOSE 10-PAGE STATEMENTS DID HE EVER ONCE SAY,
25 "I SHOT IN THERE " THE ONLY TIME HE SAYS "SHOT"

1 WAS TODAY WHEN HE SAYS, "OH, IT MIGHT HAVE BEEN A
2 SHOT OR SOMETHING ELSE BREAKING THE WINDOW "
3 THEY SEARCHED THE KITCHEN DID THEY SEE
4 ANY BULLET FRAGMENTS OR ANYTHING COMING IN? NO
5 "MR GAINNEY, WERE THERE ANY BULLETS COMING
6 AT YOU?"
7 "WELL, THEY DIDN'T HIT ME "
8 THERE AIN'T NO EVIDENCE OF SOMEBODY
9 SHOOTING INSIDE THIS BROKE THE WINDOWS THE MAN
10 WHO HAD SEVERAL AXES THAT ARE LOCKED INSIDE THE
11 LOCK WAS ON THERE WHEN THEY GOT THERE YOU HEARD
12 THE TESTIMONY, "WE DIDN'T FIND ANY AXES THERE " I
13 SUBMIT THIS IS HIS AXE WHO BROKE THE WINDOWS? I
14 DON'T KNOW I DON'T THINK IT MATTERS AS I'M GOING
15 TO GO THROUGH TO YOU ANY SCENARIO IN THIS CASE WE
16 END UP WITH MURDER WE END UP WITH MURDER NO
17 MATTER WHAT SCENARIO I THINK WE'VE GOT A GOOD
18 ARGUMENT
19 AND CAROLYN SAYS -- AND WE CAN BELIEVE HER
20 NOW I THINK, WE CAN BELIEVE HER ABOUT THE COCAINE
21 CAN WE BELIEVE HER ABOUT THIS? CAROLYN SAYS HE
22 GOES IN -- HE SAYS HE GOES IN TO THE WINDOW
23 CAROLYN SAYS HE WAS DOWN EITHER SITTING OR
24 SQUATTING SHOOTING, SHOOTING UP HERE FIRST HE
25 COMES IN HERE

1 HIS FIRST STATEMENT, "I CAME INTO THE
2 KITCHEN I STARTED SHOOTING " NOTHING ABOUT THAT
3 911 TO START WITH, BUT FIVE DAYS LATER, GOT TO GET
4 THAT 911 IN THERE "I TRIED, BUT I CALLED THE
5 WRONG NUMBER ON 911 "

6 BUT I THOUGHT HE WAS SCARED, MR. WELLS I
7 THOUGHT HE WAS SCARED WHEN HE HEARD THOSE THINGS
8 SO HE IS GOING TO STOP AND CALL 911, THEN GO IN
9 THERE "BUT, YOU KNOW, IF HE HAD GONE BACK TO HIS
10 TRUCK, I REALLY WASN'T SCARED, I WAS GOING TO LET
11 HIM DRIVE OFF ONLY WHEN HE STARTED TO COME BACK
12 AT ME, THAT ABOUT FIVE FEET " IS THAT THE
13 REASONABLE APPEARANCES? "BUT, YOU KNOW, I DIDN'T
14 EVEN TELL ANYBODY THAT IN THESE FIRST TEN
15 STATEMENTS I GAVE NO, I DIDN'T FIRST TIME I
16 EVER SAID THAT WAS TODAY "

17 BECAUSE HE'S GOT A PROBLEM OUT HERE HE'S
18 GOT A PROBLEM HE MURDERED RANDY PRICE HE
19 MURDERED HIM SO HE'S GOT TO COME UP WITH
20 SOMETHING TO EXPLAIN IT HIS FIRST STATEMENT, GO
21 BACK THERE AND READ IT, HIS FIRST STATEMENT, "HE
22 GOES BACK I SEE HIM GOING BACK TO THE TRUCK. I
23 SHOT HIM " HE NEVER SAYS -- HE NEVER, NEVER, NEVER
24 SAYS, "I SAW HIM COMING BACK TO THE HOUSE," UNTIL
25 TODAY THAT DIDN'T HAPPEN

1 WHEN IS HE GOING TO REMEMBER BETTER, TWO
2 HOURS AFTER HE TAKES THE STATEMENT OR TODAY?

3 "CAPTAIN, CAPTAIN, HE WAS COMING BACK AT
4 ME, CAPTAIN. GOOD GOSH, I DIDN'T HAVE ANY CHOICE "

5 NO, SIR HE SAYS, "HE IS BACK AT HIS
6 TRUCK I SEEN HIM AND UNLOADED " DO YOU THINK HE
7 WOULD HAVE TOLD HIM THAT DAY IF HE WAS COMING BACK
8 AT HIM? OF COURSE HE WOULD HE IS TELLING YOU
9 NOW

10 THE GREATEST POWER, THAT'S WHERE I WAS I
11 THINK, YOUR POWER TO CHOOSE I WISH RANDY HADN'T
12 BEEN OVER THAT NIGHT, HE MIGHT STILL BE HERE TODAY
13 I DON'T KNOW IF RANDY BROKE THOSE WINDOWS OUT OR
14 NOT LET'S ASSUME HE DID HE BROKE THE WINDOWS
15 OUT HE COMES BACK TO THE TRUCK AND HE IS PUTTING
16 THE AXE BACK IN THE TRUCK. THE AXE IS IN THE
17 TRUCK THEN ACCORDING TO MR GAINNEY UNTIL TODAY,
18 "I SHOOT HIM "

19 MR GAINNEY SAID, "I NEVER SAW HIM WITH A
20 GUN " MR GAINNEY SAID, "I NEVER SAW HIM WITH THE
21 AXE " EVEN IF HE BROKE THE WINDOWS, WHERE IS THAT
22 THREAT? IF ANY OF YOU BELIEVE THAT HE DID START TO
23 COME BACK TO THE HOUSE, AND I SUBMIT THAT THAT IS
24 INCREDIBLE, AND I DIDN'T MEAN THAT TO SOUND BAD IF
25 YOU DO BELIEVE THAT, BUT I AM JUST HITTING THE

1 FACTS AND MY VIEW OF IT, BUT IF YOU BELIEVE THAT
2 AND HE IS WALKING BACK, THE AXE IS UP, HE'S GOT
3 NOTHING IN THERE, AND SO IN GAINNEY'S MIND, IF YOU
4 BELIEVE WHAT HE SAYS, "WELL, I WAS FIXING TO LET
5 HIM DRIVE OFF " WELL, HE COULDN'T BE SCARED AT
6 THAT POINT BUT WHEN HE TURNED TO MAKE A STEP WITH
7 NOTHING ON, THEN HE JUST UNLOADS? DOES THAT MAKE
8 SENSE? HE DIDN'T COME BACK IF HE BROKE THE
9 WINDOWS AND IS PUTTING THE AXE UP AND WE SUBMIT TO
10 YOU HE JUST FIRES

11 NOW, FOLKS, DR YACoub -- IF I CAN FIND HER
12 DRAWING I DON'T KNOW WHAT I DID WITH IT IT IS
13 UP HERE, I THINK NUMBER TWO AND NUMBER FIVE
14 DECIDE THIS CASE NUMBER TWO AND FIVE DECIDE THE
15 CASE BECAUSE, RESPECTFULLY, IF YOU GET HIT WITH
16 TWO YOU GO DOWN, IF YOU GET HIT WITH FIVE, YOU GO
17 DOWN ONE OF THEM HAS GOT TO BE ON THE GROUND NO
18 OTHER WAY AROUND IT NO OTHER WAY AROUND IT, IF
19 YOU BELIEVE DR YACoub'S TESTIMONY

20 FIVE GOES IN HERE, YOU LOST ALL CONTROL OF
21 YOUR LEGS, YOUR VERTEBRA, YOU GO DOWN TWO WOULD
22 HAVE HAD TO COME LATER IF TWO COMES IN HERE, YOU
23 GO DOWN FIVE WOULD HAVE HAD TO COME LATER I
24 SUBMIT TO YOU THAT IS BEYOND, NOT A REASONABLE
25 DOUBT, ALL DOUBT NOTHING ELSE BUT ONE OF THOSE

1 TWO WOULD HAVE HAD TO HAVE BEEN ON THE GROUND, AND
2 HE HAS TOLD YOU THAT IS MURDER I DON'T EVEN HAVE
3 TO ARGUE THAT MR GAINNEY HAS DONE THAT NOW HE
4 IS TRYING TO SAY IT DIDN'T HAPPEN AND HE IS COMING
5 BACK. BUT IF IT DID, LIKE THIS EVIDENCE SAID, DO
6 WHAT HE SAYS MAYBE HE WANTS YOU TO DO IT MAYBE
7 HE IS CONFESSING IN A WAY MAYBE HE IS
8 TWO AND FIVE, ONE OF THEM WOULD HAVE PUT
9 HIM DOWN IF HE IS STANDING AT THE TRUCK, WHICH WE
10 SAY IS TOTALLY CONSISTENT WITH THE PICTURES, THESE
11 MAY NOT BE THE EXACT RIGHT FRAME, BUT THEY ARE
12 CLOSE, LOOK AT THE PICTURES BACK THERE IF HE IS
13 PUTTING THE AXE UP, IF HE IS HEADED THIS WAY, HIS
14 HEAD IS BACK THIS WAY, WE SUBMIT TO YOU IT IS
15 LOGICAL CONSISTENT WITH THE EVIDENCE AND THE
16 INFERENCE, HE COULD HAVE GOTTEN SIX FIRST SHE
17 SAID THAT COULD HAVE TAKEN HIM DOWN, THAT SOME
18 PEOPLE COULD HAVE MOVED AROUND AND WALKED AFTER
19 THAT THAT COULD HAVE TAKEN HIM DOWN DEFINITELY
20 TWO WOULD HAVE DEFINITELY FIVE WOULD HAVE
21 NOW, MR GAINNEY HAS GOT HIM UP HERE
22 SHOOTING A COUPLE OF TIMES THIS IS INCREDIBLE
23 HE'S GOT HIM SHOOTING UP HERE AND HITTING UP HERE A
24 COUPLE OF TIMES AND THEN MOVING WELL, THAT
25 COULDN'T HAVE BEEN TWO OR FIVE THAT COULDN'T HAVE

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1 BEEN TWO OR FIVE OR HE WOULD HAVE BEEN DOWN WHEN
2 HE RECEIVES TWO OR FIVE, HE GOES DOWN THE OTHER
3 ONE HAS GOT TO COME AFTER THAT IT HAS GOT TO,
4 DOESN'T IT? SO HE HITS HIM HERE THE STATE
5 SUBMITS HE COULD HAVE GONE DOWN WITH THAT OR TWO OR
6 FIVE

7 WHAT DO WE KNOW AFTER THAT? "PLEASE DON'T
8 SHOOT ME PLEASE DON'T SHOOT ME " WELL, THAT
9 MEANS THAT WOULD HAVE HAD TO HAVE BEEN AFTER FIVE,
10 WOULDN'T IT, TALKING? IT WOULD HAVE HAD TO HAVE
11 BEEN BEFORE FIVE THAT DEFINITELY WOULD HAVE BEEN
12 BEFORE TWO FOR HIM TO SPEAK "PLEASE DON'T SHOOT
13 ME " THREE COULD HAVE COME THROUGH NOW, ONE IS
14 THE GRAZE, ALL COMING FROM THE LEFT SIDE DON'T
15 LET THESE ARROWS CONFUSE YOU THEY ARE ALL COMING
16 FROM THE LEFT SIDE, CONSISTENT WITH WHERE HE IS
17 LAYING, CONSISTENT WITH MR GAINNEY'S -- CONSISTENT
18 TO WHERE HE SAID, "WELL, I MIGHT HAVE SHOT THREE OR
19 FOUR SHOTS OUT THERE" ON OCTOBER 20TH, OF COURSE
20 NOW THEY ARE UP IN THE AIR BACK TO THE RIGHT GOING
21 THE OTHER WAY

22 ONE LET'S THINK ABOUT THIS ONE HAD TO
23 COME BEFORE SEVEN THE SEVEN SHOT, YOU COULDN'T
24 MOVE YOUR HAND UP THE DOCTOR SAYS YOU WOULDN'T
25 HAVE BEEN ABLE TO MOVE YOUR HAND UP TO DO THAT

1 WELL, YOU KNOW, THAT HAD TO COME BEFORE
2 TWO "PLEASE DON'T SHOOT ME PLEASE DON'T SHOOT "
3 IT WOULD HAVE HAD TO HAVE COME BEFORE FIVE BECAUSE
4 HE COULD SPEAK THREE COULD HAVE COME HE COULD
5 HAVE BEEN ON THE GROUND WITH SIX HE COULD HAVE
6 THEN RECEIVED ONE, THREE IN THE SIDE, ONE COMING
7 DOWN -- AND, FOLKS, HE IS ON THE GROUND. HE IS ON
8 THE GROUND LIKE THIS HE IS OVER THERE HE HAS
9 GOT HIM ON UP "PLEASE DON'T SHOOT ME PLEASE
10 DON'T SHOOT ME DON'T SHOOT ME " IT COMES IN AND
11 EXITS OUT THIS WAY THIS WAY WAS HE RUNNING
12 AROUND THE YARD HITTING THAT AS HIS HAND? GUN
13 POWDER RESIDUE ON THIS HAND AND I THINK MR WELLS
14 HAS GOT IT BACKED UP THE HARD PARTICLES ARE THE
15 RESIDUE THAT COME FORTH IT HAD TO BE SIX OR SEVEN
16 FEET

17 WELL, DOTTIE, DO YOU BELIEVE DOTTIE? IF
18 YOU BELIEVE DOTTIE, THAT COULDN'T HAVE COME FROM 27
19 FEET 8 INCHES IT COULD NOT HAVE SHE COULDN'T
20 HAVE GOT THAT CLOUD OF GUN POWDER RESIDUE
21 IMPOSSIBLE IT HAD TO BE FOR SIX FEET OR LESS
22 WHAT DOES THAT MEAN? HE SHOT HIM OUTSIDE.

23 SHE SAID THERE IS NO WAY THAT CAME FROM 27
24 FEET 8 INCHES, WHICH IS WHERE ALL HE SAID --
25 ACTUALLY NOT HE HAS ACTUALLY TODAY BACKED HIMSELF

1 UP FARTHER THAN 27 FEET 8 INCHES BECAUSE THAT GLASS
2 IS IN THE WAY I STILL THINK HE MIGHT HAVE BROKEN
3 THAT GLASS THAT IS FOR Y'ALL TO DECIDE I DON'T
4 THINK IT MATTERS BUT HE IS NOW BACK 28, 29, 30
5 FEET IF YOU ARE GOING TO PUT HIM BACK BY THAT
6 THING, HITTING SEVEN TIMES IN THAT MURKY DARKNESS
7 I THOUGHT HE HAD FULL VISION, BACK IN AUGUST THE
8 YEAR BEFORE THAT HE WAS COMPLAINING OF OR WAS HE
9 JUST MAKING THAT UP, HIS TRUCK, HITS SEVEN TIMES
10 BACK BEYOND THE GLASS HE GOES DOWN
11 THE FIRST SHOT IS HERE THE SECOND SHOT
12 HIT HERE FOLKS, THE THREE -- THAT IS CONSISTENT
13 WITH THE CLOUD HERE, HERE, COMING AROUND HERE
14 THIS BULLET COMES IN, AND THIS I DON'T THINK HE
15 ARGUED, I WILL ARGUE IT, THIS BULLET COMES THROUGH
16 HERE, IT IS THE LEAD THAT STUFF ON THE HAND
17 COULDN'T HAVE COME FROM THAT. SHE SAYS IT IS
18 DIFFERENT THESE THREE ELEMENTS WE GOT HERE,
19 ANTIMONY, BARIUM AND THE OTHER ONE, Y'ALL REMEMBER,
20 THAT WAS THE CONCENTRATION HERE WHICH HAD THE CLOUD
21 FROM THE RIFLE WHICH HAD TO BE SIX FEET OR LESS, IT
22 COULDN'T HAVE BEEN MORE IT COULDN'T HAVE BEEN
23 27 8, THAT HAD TO COME FROM HERE SO IF YOU
24 BELIEVE THE DOCTOR THAT HAD TO COME FROM HERE
25 NOW, THIS COULD HAVE BEEN A SEPARATE BULLET IT IS

1 STILL GOING TO BE SIX FEET OR LESS THE DOCTOR
2 SAYS THAT IS HERE OR IT IS HERE AND A SEPARATE
3 BULLET ANOTHER SHOT CONCLUSIVELY WE SAY GOES
4 OUTSIDE TWO OR FIVE, IT HAS GOT TO BE -- YOU
5 CAN'T HAVE TWO BOTH STANDING UP THERE IS NO BLOOD
6 DRIPPING DOWN EITHER THEY WERE ALL OUTSIDE ALL
7 FIVE OF THEM, WHERE HE'S GOT A BETTER AIM AND HE'S
8 SHOOTING DOWN THERE, HE IS BEGGING FOR HIS LIFE
9 BOOM-BOOM-BOOM-BOOM-BOOM
10 CHOICES HE MADE HIS CHOICE, FOR HIS
11 WINDOWS THAT WERE BROKEN, IF ANY WERE BROKEN BUT
12 HE WASN'T MAD ABOUT THAT "I WAS GOING TO LET HIM
13 DRIVE OFF " HE IS TRYING TO HAVE IT NOT JUST TWO
14 WAYS, HE IS TRYING TO HAVE IT 20 WAYS TRYING TO
15 HAVE IT 20 WAYS SO NOW HE'S GOT HIM COMING BACK
16 AT HIM
17 HOW ELSE CAN I PROVE TO Y'ALL AS THE
18 EVIDENCE PROVED TO Y'ALL HE SHOT OUTSIDE, THE SHOTS
19 WERE OUTSIDE SO HE COULDN'T HAVE DONE ONE --
20 COULDN'T RECEIVE ONE BEFORE SEVEN, COULDN'T
21 RECEIVED ONE BEFORE TWO, COULDN'T RECEIVE ONE
22 BEFORE FIVE
23 WE GO TO THREE, WHICH IS STATE'S 25 YOU
24 COME BACK AND SIGN A NOT GUILTY VERDICT AFTER
25 SEEING STATE'S 25 I'M SORRY, BUT MR. WELLS PUT

1 THE PRESSURE ON Y'ALL ABOUT SIGNING THIS VERDICT
2 I HOPE EVERYONE SIGNS IT, UNDERLINES IT, JOHN
3 HANCOCK FOR MURDER, BECAUSE THAT IS THE ONLY
4 MESSAGE THAT NEEDS TO BE SENT IN THIS CASE

5 TWENTY-FIVE TWENTY-FIVE IS THE CASE
6 ANOTHER FOR SURE THREE SHOTS WE GOT OUTSIDE LOOK
7 AT THE BLOOD. DID HE -- HE DIDN'T EVEN ARGUE THIS
8 IN HIS CLOSING THAT IS AMAZING BECAUSE YOU
9 CAN'T ARGUE AROUND IT IF YOU HIT A BOTTLE OF
10 KETCHUP, PUSH IT UP THERE, WHICH WAY IS IT GOING TO
11 GO? IT IS GOING TO GO DOWN IF HE HAD BEEN
12 STANDING UP THERE WOULD HAVE BEEN SOMETHING GOING
13 DOWN THERE AIN'T NO DOWN IN THIS SHE SAID THE
14 EXIT WOUND ON NUMBER THREE, THE ABRASION IS
15 CONSISTENT WITH IT BEING AGAINST A HARD SURFACE
16 BEING AGAINST A HARD SURFACE I DIDN'T GET IT THAT
17 WELL FROM HERE, BUT THAT IS WHAT SHE SAID

18 AND THEN, LO AND BEHOLD, WE FIND THAT
19 BULLET FRAGMENT, I DON'T KNOW WHERE EXACTLY IT IS,
20 BUT IT IS CONSISTENT WITH GOING THROUGH THERE IT
21 IS NEAR THE HEAD WE DON'T HAVE IT PINPOINTED, I'M
22 SORRY BUT IT IS IN THAT AREA COINCIDENCE? LOOK
23 AT THE BLOOD

24 THAT LAST WITNESS I'M TELLING YOU IS
25 TALKING TO YOU RIGHT HERE RANDY IS SHOWING YOU

1 THE GOOD AND THE BAD "YEAH, I'VE GOT A DRINKING
2 PROBLEM I TOOK SOME COCAINE EARLIER I BEEN
3 OUT " LOOK AT HIS CLOTHES HE HAD BEEN OUT ON THE
4 TOWN HE IS NOT GOING IN BURGLARIZING CLOTHES
5 HE'S GOT ON -- LOOK AT HIS CLOTHES IN THERE HE'S
6 GOT ON KHAKIS, NICE SHOES, HE'S GOT ON LIKE A
7 SHIRT, A COMMON SHIRT HE'S BEEN OUT ALL NIGHT
8 THINKING ABOUT CAROLYN HE WENT OVER THERE I
9 DON'T KNOW IF HE BROKE THE WINDOWS OR NOT WAS HE
10 STILL MAD ABOUT HIM COMING THE OTHER DAY AND SHE
11 SAID -- REMEMBER CAROLYN SAID HE WILL USUALLY BANG
12 ON THE DOOR SAID HE BANGED ON THAT DOOR THAT DAY
13 HE COMES UP AND SAYS, "I'M JUST GOING TO KILL HIM,"
14 AND THEN HE GOES BACK TO BREAK HIS WINDOWS OUT
15 YOU ACTUALLY ARE SPEAKING TO ME I CAN'T EXPLAIN
16 THIS TO YOU THAT WELL HE TRIED TO GIVE YOU AN
17 EXPLANATION I SAY IT IS INCORRECT HE'S BACKING
18 UP AND SHOOTING BETTER BACKING UP AND SHOOTING
19 BETTER AND HOW DOES HE HIT THAT TRUCK FROM BACK
20 THERE WHERE HE IS BY THE REFRIGERATOR NOW, GOING TO
21 GET IN THE TRUCK AND THESE BULLETS ARE TAKING U-
22 TURNS, LEFT TURNS I MEAN, HOW DO YOU GET ALL
23 THOSE SHOTS AND GET HIM WHERE HE IS OUT THERE? YOU
24 CAN'T GET TWO AND FIVE OUT THERE DID THEY HIT AT
25 THE SAME TIME? HE'S GOT TO HIT HERE, RUN BACK

1 HERE, HIT HERE, SHOOTING HIS THREE SHOTS OFF TO THE
2 RIGHT AS HE IS COMING TO EXPLAIN THE SHELL CASINGS
3 TO Y'ALL

4 PLEASE LOOK AT 25 I KNOW Y'ALL ARE
5 GETTING TIRED OF ME GETTING DOWN, SO I WON'T DO IT
6 BUT HE IS DOWN ON HIS BACK CONSISTENT WITH
7 GUNSHOT RESIDUE CONSISTENT BEING IN THE CLOUD
8 CONSISTENT HIS HEAD DOWN LIKE THAT

9 THIS FOUR OR FIVE, YOU REMEMBER WHAT SHE
10 SAID ABOUT THAT? THIS IS A GREAT CASE, NOT FOR THE
11 HOMEOWNER, FOR THE MURDERER SHE SAID THIS RIGHT
12 HERE WAS CONSISTENT SHE COULD SEE HOW AN IMPRINT
13 -- THERE IS PICTURES IN THERE WAS DONE LIKE THAT.
14 FOLKS, IS THERE ANY OTHER EXPLANATION HE WAS LIKE
15 THAT? HE IS DOWN LIKE THAT? DOES IT ALL FIT
16 TOGETHER?

17 AND THREE COMES IN LIKE THAT AND THE
18 BLOOD -- THE BLOOD IS GOING DOWN THERE IT IS NOT
19 -- IT WOULDN'T HAVE GONE THAT WAY IF HE WAS
20 STANDING

21 AND LISTEN TO MR GAINNEY IS HE ASKING YOU
22 TO? HE SAID, "IF I SHOT HIM LIKE THAT, CONVICT ME
23 OF MURDER "

24 I HAD A WHOLE BUNCH MORE I WAS GOING TO
25 SAY, BUT I'M NOT GOING TO I HAVE TO VERY BRIEFLY

1 -- HE IS FIXING TO CHARGE YOU ON THE LAW HE IS
2 THE LAW HE IS THE LAW HE IS GOING TO CHARGE YOU
3 ON REASONABLE DOUBT IT IS PROOF THAT LEAVES YOU
4 FIRMLY CONVINCED OF THE DEFENDANT'S GUILT THE
5 HECK WITH THAT, IT IS COMMON SENSE HE IS GOING TO
6 CHARGE YOU IT IS COMMON--GOOD 'OLE COMMON SENSE,
7 WHAT IT SOUNDS LIKE LISTEN TO WHAT HE SAYS YOU
8 KNOW IF IT HAPPENED

9 THIS AIN'T A CASE ABOUT DEFENDING YOUR
10 HOMEOWNERS--DEFENDING YOUR HOME, AND IF YOU DO THIS
11 PEOPLE ARE GOING TO GO ON AND -- IT IS NOT FAIR TO
12 ARGUE THAT THIS ISN'T THE CASE

13 LISTEN I WAS GOING TO PLAY THE 911 I'M
14 NOT GOING TO DO THAT Y'ALL HEARD IT YOU CAN GO
15 BACK THERE AND LISTEN TO IT EXPLAIN TO ME --
16 EXPLAIN THIS TO ME EXPLAIN THIS TO ME HOW
17 CAROLYN WHEN SHE IS CALLING THAT 911 KNOWS IT IS
18 RANDY RIGHT OFF THE BAT.

19 I LET MY WIFE LISTEN TO THAT THING SHE
20 SAID, "WELL, HOW DID SHE KNOW IT WAS RANDY?" GOOD
21 QUESTION

22 HE SAYS NOW, "I DIDN'T KNOW THAT WAS RANDY
23 UNTIL LATER ON " HE KNEW IT WAS RANDY TO START
24 WITH TOLD CAROLYN HE SAYS IN THE STATEMENT, "I
25 THOUGHT IT WAS RANDY "

1 FOLKS, GO BACK AND LOOK IN THE STATEMENTS
2 TOO SOME OF YOU MAY WANT TO GIVE HIM MANSLAUGHTER
3 UNDER THE CIRCUMSTANCES----HE HAD BEEN DOING DRUGS
4 AND DOING ALCOHOL YOU KNOW, AT FIRST, I SAT BACK
5 -- I TELL YOU THE TRUTH, AT FIRST I WAS THINKING
6 MAYBE THAT I SHOULD GIVE HIM A LITTLE BREAK, GIVE
7 HIM A LITTLE BREAK AND GIVE HIM MANSLAUGHTER
8 RANDY IS OVER THERE DRINKING, DOING DRUGS, ALL
9 RIGHT, DID GO TO HIS HOUSE GET OVER THAT HURDLE
10 TOO, PLEASE AND WE SUBMIT THAT IS A SMALL HURDLE
11 YEAH, HE DID GO TO HIS HOUSE AND I WAS
12 FIRST THINKING, "WELL, MAYBE THAT WILL MAKE THEM
13 GIVE HIM MANSLAUGHTER " FOLKS, THIS AIN'T NO
14 MANSLAUGHTER CASE THIS IS A MURDER CASE IT IS A
15 MURDER CASE
16 I FORGOT WHERE I WAS GOING, BUT UNLAWFUL
17 KILLING OF ANOTHER WITH MALICE AFORETHOUGHT
18 MALICE MR WELLS TELL YOU MALICE AFORETHOUGHT YOU
19 HAVE GOT TO THINK ABOUT IT, YOU HAVE GOT TO PLAN
20 THAT IS NOT THE LAW YOU DON'T -- I THINK HE SAID
21 PREMEDITATION IN HIS OPENING THAT IS NOT THE LAW
22 MALICE IS A MEANNESS, A WICKEDNESS, EVILNESS ONE
23 PERSON SHOWS TO THE OTHER, BOOM-BOOM-BOOM-BOOM IT
24 CAN BE CREATED IN AN INSTANT YOU CAN INFER MALICE
25 FROM SHOOTING A GUN, FROM THE FIRING OF A GUN YOU

1 ARE ALLOWED TO INFER MALICE YOU DON'T HAVE TO
2 PLAN IT SOMETHING CAN HAPPEN, YOU CAN ACT MEAN
3 AND WILD AND, BOOM, THERE IT IS YOU CAN INFER
4 MALICE FROM THE ACTIONS OF THE SHOOTING OF A GUN
5 IT DOESN'T HAVE TO BE PLANNED AT ALL IT IS A TERM
6 OF ART

7 UNLAWFUL KILLING OF ANOTHER WITH MALICE
8 AFORETHOUGHT MEANNESS IF YOU BELIEVE HE WAS
9 SHOT OUTSIDE, IT IS MURDER MR GAINNEY TOLD YOU
10 THAT WE HAVE PROVED IT BY DOTTIE FILIATREULT, WE
11 HAVE PROVED IT BY DR YACOB, WE HAVE PROVED IT BY
12 RANDY'S BODY THAT IS MURDER

13 PICKING BACK UP WHERE I LOST THE THOUGHT A
14 MINUTE AGO, VOLUNTARY MANSLAUGHTER UNLAWFUL
15 KILLING OF ANOTHER, OF A PERSON IN HEAT OF PASSION
16 YOUR PASSIONS MUST BE AROUSED I DON'T KNOW IF I
17 SHOULD HAVE GIVEN IT TO START WITH, BUT WALKING IN
18 AND SEEING YOUR SPOUSE WITH AN ADULTEROUS
19 SITUATION, IS THERE ANY MORE AROUSING OF A PASSION
20 THAT YOU COULD HAVE?

21 IN THAT CASE THE QUESTION THEN BECOMES
22 SUBJECTIVE AND OBJECTIVE WAS THE PERSON'S
23 PASSIONS ACTUALLY AROUSED? AND IF THEY WERE, WOULD
24 THE REASONABLE PERSON'S PASSIONS HAVE BEEN AROUSED
25 BY THAT? YES WITH A PROVOCATION OF THIS SUCH

CLOSING ARGUMENT BY MR. MEADORS

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1 THAT WOULD HAVE MADE THE REASONABLE PERSON ACT THAT
2 WAY YES

3 AND ALL OF THIS IS ASSUMING THAT YOU
4 BELIEVE RANDY DID THE BREAKING I AM GOING TO TAKE
5 YOU DOWN -- I AM GOING TO TRY TO COVER ALL
6 POSSIBILITIES

7 VOLUNTARY MANSLAUGHTER HEAT OF PASSION

8 WE NEXT MOVE TO LEGAL PROVOCATION THE
9 PROVOCATION MUST BE SUFFICIENT AN EXAMPLE OF
10 THAT, IF I WOULD SAY SOMETHING MEAN TO Y'ALL OR
11 YELLED AT YOU, YOU CAN'T COME BACK AND KILL ME
12 WORDS ALONE AREN'T ENOUGH SUFFICIENT LEGAL
13 PROVOCATION CATCHING IN ADULTERY THAT IS
14 ENOUGH THE LAW DOES SAY IF YOU ARE DEFENDING YOUR
15 PROPERTY, IF YOU WILL, BREAKING OUT WINDOWS, THAT
16 MAY BE ENOUGH TO RISE TO SUFFICIENT LEGAL
17 PROVOCATION

18 I WANT TO TELL Y'ALL, HE DIDN'T EVEN ARGUE
19 IT, I WANT TO TELL Y'ALL, IT COULD RISE TO THAT
20 AND THEN, HERE IS THE KEY WHY VOLUNTARILY DOESN'T
21 FIT ON THIS, WE SAY, YOUR PASSIONS MUST NOT HAVE
22 COOLED AND THERE WASN'T TIME FOR THEM TO COOL AND
23 YOU GO BACK TO THE OLD REASONABLE PERSON, WOULD
24 THEY HAVE COOLED TOO

25 IF YOU WANT TO GIVE HIM A BREAK, AND WE

1 SUBMIT IT WILL BE A BREAK, IT WOULD BE VOLUNTARY
2 MANSLAUGHTER BUT TO FIND THAT BASED ON THE
3 EVIDENCE, THE FACTS, YOU WOULD HAVE TO BELIEVE WHEN
4 HE CAME BACK OUT HERE, BEST CASE SCENARIO, WHICH I
5 DON'T AGREE WITH, BEST CASE SCENARIO, I DON'T THINK
6 IT IS INFERRED, HE COMES OUTSIDE, THINKS HE IS
7 BREAKING IN, SHOT HIM AND THEN HE GETS OUT THERE
8 OVER HIM THERE AIN'T NO SELF-DEFENSE IN THAT HE
9 IS DOWN ON THE GROUND AND HE SHOOTS HIM LIKE A DOG
10 THAT IS WHAT TAKES HIM BACK OUT OF VOLUNTARY INTO
11 MURDER I SAY THE EVIDENCE SHOWS IT AND HE SAYS
12 THAT WE SUBMIT HE CAN'T EVEN REFUTE THAT OUTSIDE
13 YOU'VE GOT A RIGHT TO DO THAT.

14 IF YOU BELIEVE IT WAS SELF-DEFENSE, DON'T
15 BELIEVE IT, I MEAN -- THE JUDGE IS GOING TO CHARGE
16 YOU THE ONLY THING THAT TOLD NUMBER ONE THAT HE
17 MENTIONED IN MY OPINION IS TO BE WITHOUT FAULT
18 THAT IS TRUE RANDY CAME THERE AND THAT IS
19 CHOICES HE MADE THE CHOICE TO COME THERE I WISH
20 HE HADN'T I WILL GIVE HIM THAT BUT I HAVE
21 ALWAYS SAID IT IS LIKE FOUR CHAIRS

22 BUT THEN YOU GO INTO ACTUALLY BELIEVE HE
23 MUST HAVE ACTUALLY BELIEVED HE WAS IN IMMINENT
24 DANGER OF LOSING HIS LIFE OR SUSTAINING SERIOUS
25 BODILY INJURY OR HE ACTUALLY WAS

1 WELL, WE KNOW HE ACTUALLY WASN'T HE TOLD
2 YOU THAT TODAY HE WAS GOING TO LET HIM DRIVE OFF
3 HE HAS ADDED TODAY THAT HE IS COMING BACK HIS
4 LAWYER TOLD YOU HE WAS TALKING IN HERE A LOT OF
5 THAT I DIDN'T HEAR IN THE TESTIMONY HE IS
6 INFERRING FROM THE EVIDENCE HE IS NOW SAYING HE
7 ACTUALLY WAS FROM HERE TO HERE HAS NEVER SAID
8 THAT BEFORE TODAY I SUBMIT TO YOU HE WASN'T

9 IF HE ACTUALLY WAS, THAT GETS INTO, THE
10 JUDGE IS GOING TO TELL YOU, HE HAS GOT A RIGHT TO
11 ACT ON APPEARANCES

12 AND THEN THE LAW EVEN GOES ON AND SAYS HE
13 COULD BE MISTAKEN

14 BUT, FOLKS, DON'T GET HUNG UP ON THAT BACK
15 THERE BECAUSE THERE IS NO MISTAKING -- FIRST OF
16 ALL, IF HE COMES BACK AND SOMEHOW YOU BELIEVE THAT
17 TODAY ON THE THIRD STATEMENT HE HAS GIVEN THAT HE
18 IS COMING BACK, HE SAYS HE AIN'T GOT A GUN, HE
19 AIN'T GOT AN AXE, HE WAS JUST FIXING TO LET HIM GO
20 HE'S GOT A RIGHT TO ACT ON APPEARANCES.

21 BUT, FOLKS, IT DIDN'T EVEN HAPPEN THE
22 ONLY APPEARANCE OUT THERE IF YOU BELIEVE HE WAS
23 PUTTING THE AXE UP HERE IS HE JUST SHOT HIM HE
24 NEVER WAS COMING BACK

25 SO IT MUST BE THAT HE ACTUALLY BELIEVED HE

1 WAS IN IMMINENT DANGER OF LOSING HIS LIFE IF IT
2 IS BASED ON BELIEF, A REASONABLE MAN WOULD HAVE
3 ENTERTAINED THE SAME BELIEF

4 I DON'T KNOW WHAT TO SAY ABOUT THAT HE
5 SAID HE SHOT HIM AS HE WENT TO THE TRUCK HE NEVER
6 WAS COMING BACK UNTIL TODAY A REASONABLE MAN
7 MIGHT HAVE SHOT SOMEBODY THAT HAD BROKEN WINDOWS
8 INTO HIS HOUSE IT IS NOT A BURGLARY. WE ARE NOT
9 GOING TO RAISE UP A RED FLAG BUT THEN A
10 REASONABLE MAN ONCE HE HAD HIM ON THE GROUND
11 WOULDN'T SHOOT HIM ALL THOSE OTHER TIMES BEST
12 CASE SCENARIO YOU BELIEVE THAT

13 IF HE ACTUALLY WAS IN DANGER, A REASONABLE
14 MAN WOULD HAVE STRUCK THE FATAL BLOW IN ORDER TO
15 SAVE HIMSELF OR SERIOUS BODILY INJURY OR LOSING HIS
16 LIFE HE WASN'T IN DANGER OF ANYTHING, AND HE SAID
17 IT, BUT LOSING SOME WINDOWS, IF RANDY BROKE THE
18 WINDOWS OUT BUT ASSUME HE DID HE IS IN DANGER
19 OF BREAKING THE WINDOWS SURE WASN'T IN DANGER OF
20 LOSING HIS LIFE OR GETTING SERIOUS BODILY INJURY
21 WHEN RANDY IS ON THE GROUND BEGGING FOR HIS LIFE
22 WHEN HE GETS SHOT FIVE MORE TIMES AND IF YOU
23 DON'T BELIEVE HE WAS SHOT, HE WAS SHOT ON THE
24 GROUND, LET HIM GO

25 AND THEN FOURTH THE DEFENDANT HAD NO

1 OTHER PROBABLE MEANS OF AVOIDING THE DANGER OF
2 LOSING HIS LIFE OR SUSTAINING SERIOUS BODILY INJURY
3 THAN TO ACT AS HE DID

4 THE JUDGE WILL CHARGE YOU HE HAS NO DUTY TO
5 RETREAT WELL, THAT'S TRUE. YOU HAVE NO DUTY TO
6 RETREAT BUT THAT DOESN'T GIVE YOU THE RIGHT TO
7 TURN YOUR HOUSE INTO A FORT AND ATTACK RANDY
8 NEEDED THE SELF-DEFENSE CHARGE WHEN HE IS ON THE
9 GROUND YOU DON'T HAVE TO LEAVE YOUR HOUSE WE
10 SUBMIT RANDY WAS THERE HE WAS LEAVING AND THEN HE
11 COMES OUT ON THE OFFENSIVE NO, HE DOESN'T HAVE TO
12 RETREAT, BUT IF HE HAS GOT ANY OTHER MEANS OF
13 AVOIDING KILLING HIM, IF HE'S NOT IN DANGER, HE'S
14 GOT TO DO IT

15 WHEN I FIRST STARTED OUT I WAS GOING TO
16 ARGUE THIS CASE ABOUT WHERE YOU DRAW THE LINE
17 WHERE YOU DRAW THE LINE ABOUT DEFENDING YOUR HOUSE
18 AND, YOU KNOW, IF SOMEBODY IS BREAKING IN YOUR
19 HOUSE AND I WAS TAKING MY DAUGHTER MAGGIE TO
20 SOCCER PRACTICE A FEW WEEKS AGO AND I HAD THIS 911
21 TAPE IN THERE AND IT JUST STARTED PLAYING AND I
22 DON'T PLAY IT FOR THEM BUT THEN SHE JUST ASKED ME
23 ABOUT IT AND I TURNED IT OFF AND I GAVE HER THE
24 FACTS

25 I SAID, "WHAT DO YOU THINK, MAGGIE?"

1 SHE SAID, "WELL, DID HE HURT HIM?"

2 "NO, HE JUST BROKE OUT SOME WINDOWS "

3 THE COURT ALL RIGHT, MR. MEADORS, YOU
4 CAN'T DO THAT YOU CAN'T DO THAT I WILL STOP
5 YOU. I DON'T CARE ABOUT THAT YOU CAN'T DO THAT
6 YOU CAN'T SAY WHAT YOUR DAUGHTER THOUGHT ABOUT IT
7 YOU CAN ARGUE TO THIS JURY

8 MR. MEADORS BUT THAT IS WHAT HE WAS
9 DOING

10 THE COURT I SAID YOU CAN'T DO IT

11 MR. MEADORS IF YOU BELIEVE HE BROKE THE
12 WINDOWS OUT, YEAH, MAYBE SOME MALICIOUS INJURY AND
13 MAYBE A LITTLE MORE I DON'T KNOW BUT HE DIDN'T
14 NEED TO BE GUNNED DOWN LIKE A DOG HE DIDN'T NEED
15 TO BE SHOT DOWN DEAD MAYBE SOMETHING SHOULD HAVE
16 HAPPENED TO HIM WE DON'T TEACH THAT IN SCHOOL
17 MAYBE SOMETHING SHOULD HAVE HAPPENED TO HIM

18 WE'VE GOT ONE FORM OF GOVERNMENT IN THIS
19 COUNTRY FOR 226 YEARS, AND HE ARGUED THIS, TALKING
20 ABOUT THE MESSAGE IN KERSHAW COUNTY WE HAVE HAD
21 ONE FORM OF GOVERNMENT IN 226 YEARS AND THAT IS
22 WHY PEOPLE BOMB OUR COUNTRY AND DON'T LIKE US
23 BECAUSE WE SURVIVE BECAUSE OF THIS SYSTEM WE
24 SURVIVE BECAUSE OF A BODY OF LAWS AND WE HAVE THE
25 RIGHT TO BEAR ARMS BUT WE ALSO HAVE LAWS, WE HAVE

1 POLICE, WE HAVE RULES THAT GOVERN US AND WE
2 GOVERN OURSELVES YES, WE HAVE FREEDOMS, BUT WE
3 ALSO KNOW WHEN TO LIMIT THAT FREEDOM THAT IS WHY
4 WE SURVIVE THAT IS WHY WE KEEP GOING AND THAT
5 IS WHAT THIS CASE IS ABOUT THAT IS WHAT THIS CASE
6 IS ABOUT

7 FOLKS, THE CHOICE, THIS CHOICE THAT WAS
8 MADE BY MR GAINNEY THAT DAY -- AND LOOK AT HIS
9 STATEMENT AND, EXCUSE ME, "I WAS MAD I WAS PEED
10 OFF I WASN'T GOING TO LET ANYBODY BREAK MY
11 WINDOWS OFF YEAH, THAT WAS RANDY THAT WAS RANDY
12 OUT THERE THAT IS SOMETHING STUPID RANDY WOULD
13 DO I WAS MAD I SHOT HIM I SHOT HIM OUT THERE
14 I WENT OUT THERE, CAPTAIN, SHOT THREE ON THE
15 PORCH " ACTUALLY HE SHOT THEM ALL ON OUT THERE
16 "I WENT ON OUT AND I SHOT, I GUESS THIS IS WHEN I
17 SHOT THREE OR FOUR MORE," NOT COMING BACK IN

18 HE MADE HIS CHOICE HE MADE HIS CHOICE
19 BECAUSE HE WAS MAD AT THE VERY LEAST WE SUBMIT IT
20 IS A MANSLAUGHTER, BUT I SUBMIT THAT IS OFF THE
21 TABLE NOW AT MR GAINNEY'S REQUEST, AT MY REQUEST,
22 AT THE EVIDENCE'S REQUEST IT CRIES OUT -- IT
23 CRIES OUT FOR A VERDICT OF MURDER

24 WHEN YOU GO BACK THERE IN JUST A MINUTE, I
25 KNOW Y'ALL ARE SICK OF HEARING ALL OF US, AND I'M

1 SORRY I TALKED SO LONG, WHEN YOU GO BACK THERE,
2 FOLKS, LOOK AT THE EVIDENCE, LOOK AT THE BODY
3 DIAGRAM THINK ABOUT TWO AND FIVE LOOK AT 20
4 LOOK AT 20 LOOK AT 25, EXCUSE ME LOOK AT 25
5 LOOK AT THE EXIT WOUND ON THE HAND POWDER BURNS
6 MR WELLS YOUR HONOR, I OBJECT TO THE
7 ARGUMENT OF POWDER BURNS THERE WAS NO TESTIMONY
8 AS TO POWDER BURNS.
9 MR MEADORS THE GUNSHOT RESIDUE ON THE
10 HAND I THINK EVERYBODY KNEW WHAT I WAS TALKING
11 ABOUT THE GUNSHOT RESIDUE ON THE HAND GO BACK
12 THERE AND LOOK AT IT AND MAKE YOUR CHOICE
13 EXERCISE YOUR GREATEST POWER AND GO BACK THERE AND
14 REALIZE THAT THIS IS RANDY PRICE'S ONLY DAY IN
15 COURT AND MAKE A DECISION BASED ON THE EVIDENCE
16 THAT RANDY PRICE'S LIFE IS WORTH MORE THAN A WINDOW
17 PANE, TWO WINDOW PANES, THREE WINDOW -- SIX WINDOW
18 PANES, IF HE DID IT BUT THAT FRONT DOOR SHOWED NO
19 SIGN OF BREAKING INTO, OR THE BACK DOOR HE WAS
20 NOT THERE TO PHYSICALLY HURT ANYBODY HE WAS THERE
21 BECAUSE HE WAS IN LOVE WITH CAROLYN THEY HAVE HAD
22 A VOLATILE RELATIONSHIP IT ALWAYS HAS BEEN
23 ACTING LIKE A CHILD "SOMETHING STUPID RANDY WOULD
24 DO " AND COME BACK WITH A VERDICT THAT SPEAKS THE
25 TRUTH, NOTHING TO DO WITH HOMEOWNERS, BUT SPEAKS

JURY OUT

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1 THE TRUTH THAT MORNING, THAT MORNING THAT HE MADE A
2 CHOICE TO COMMIT MURDER

3 THANK YOU

4 THE COURT OKAY, JURORS, THE FINAL PHASE
5 IS I INSTRUCT YOU ON THE LAW I RECOGNIZE IT IS
6 GETTING A LITTLE LATE, YOU KNOW, BUT WE DO WHAT WE
7 CAN IF THE CASE HAD RUN AS IT NORMALLY WOULD HAVE
8 WE WOULD HAVE ARGUED AND CHARGED THIS MORNING
9 RATHER THAN TODAY

10 THE CHARGE TAKES A LITTLE WHILE I DON'T
11 WANT TO STRETCH ANYBODY OUT TAKE A QUICK TEN
12 MINUTES, A QUICK TEN DON'T TALK ABOUT THE CASE
13 QUITE YET THEN COME BACK

14 (WHEREUPON, THE JURY RETIRED
15 TO THE JURY ROOM)

16 THE COURT ALL RIGHT, WE ARE AT EASE FOR
17 ABOUT TEN

18 (BREAK)

19 THE COURT MR MEADORS, ONCE YOU SAID THE
20 RIFLE WAS LOADED, DIDN'T YOU? WHEN YOU WERE
21 CARRYING IT AROUND YOU SAID, "I WOULD "---

22 MR MEADORS I MISSED -- I'M NOT
23 FOLLOWING YOU, JUDGE I'M SORRY

24 THE COURT WHEN YOU WERE SWINGING THE
25 RIFLE AROUND YOU SAID YOU WOULD DO THIS EXCEPT IT

1 HAS CARTRIDGES IN IT

2 MR MOAK I BELIEVE HE HAD IT BACKWARDS,
3 YOUR HONOR

4 THE COURT YES

5 MR MOAK HE DOESN'T UNDERSTAND FIREARMS
6 THAT WELL

7 THE COURT WELL, THAT IS WHAT I'M SAYING
8 I NEED TO KNOW WHETHER IT IS LOADED OR NOT---

9 MR MEADORS IT IS NOT

10 THE COURT ---BEFORE I SEND IT BACK TO
11 THE JURY

12 MR MEADORS I DON'T EVEN REMEMBER SAYING
13 THAT

14 MR MOAK YOUR HONOR, AGENT PAAVEL, THE
15 FIRST THING HE DID WHEN I HANDED IT TO HIM WAS HE
16 CHECKED IT

17 THE COURT THAT IS FINE THAT'S FINE

18 MR MOAK HE WAS TRYING TO DEMONSTRATE
19 THE SAFETY, BUT HE COULDN'T DO THAT WITH IT
20 UNLOADED

21 THE COURT. THEY JUST DON'T GET A LOADED
22 GUN

23 MR MEADORS THAT WAS DURING MY CLOSING

24 MR MOAK I CAN HAVE DANNY CATOE CHECK IT
25 FOR YOU IF YOU WANT

JURY CHARGE

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1 MR MEADORS IT IS NOT LOADED, JUDGE
2 THE COURT THAT'S FINE THE ONLY REASON
3 I MENTION IT IS BECAUSE OF WHAT YOU SAID
4 OFFICER CATOE IT IS EMPTY
5 THE COURT ALL RIGHT
6 MR MOAK OF COURSE WE WILL BE SENDING IT
7 BACK WITH SOME 22 SHELLS IN CASE THEY WANT TO LOAD
8 IT
9 THE COURT I HATE TO SEND THE AXE BACK
10 TOO
11 ALL RIGHT, IF THEY ARE READY, BRING THEM
12 BACK WE NEED TO GET GOING THEY WILL BE HERE A
13 LONG TIME MAYBE MAYBE TEN MINUTES
14 (WHEREUPON, THE JURY RETURNS
15 TO OPEN COURT)
16 (WHEREUPON, THE COURT CHARGED
17 THE JURY AS FOLLOWS)
18 JURY CHARGE
19 THE COURT OKAY, JURORS, IF I COULD HAVE
20 YOUR ATTENTION
21 YOU UNDERSTAND WHAT THE CASE IS ABOUT
22 BASED UPON INFORMATION FURNISHED LAW ENFORCEMENT,
23 EVENTUALLY AN INDICTMENT WAS ISSUED AN INDICTMENT
24 IS NOT EVIDENCE I AM NOT EVEN SENDING IT BACK
25 I WILL TELL YOU THAT IT ALLEGES, THAT IS

1 WHAT IT DOES, THAT JOHN GAINNEY, JOHNNY A GAINNEY,
2 ACTUALLY, IN KERSHAW COUNTY AROUND OCTOBER 20,
3 2001, FELONIOUSLY, WILLFULLY, AND WITH MALICE
4 AFORETHOUGHT KILLED ONE STEPHEN R PRICE BY MEANS
5 OF SHOOTING THE VICTIM SEVERAL TIMES WITH A RIFLE
6 AND THAT HE DIED AS A RESULT OF THAT THAT IS WHAT
7 THE INDICTMENT ALLEGES

8 THE INDICTMENT FOLLOWS THE STATUTE AND
9 ALLEGES THE CRIME OF MURDER, MURDER BEING THE
10 UNLAWFUL KILLING OF ONE HUMAN BEING BY ANOTHER WITH
11 MALICE AFORETHOUGHT, EITHER EXPRESS, IMPLIED OR
12 INFERRED

13 NOW, MR GAINNEY IS PRESUMED INNOCENT OF ALL
14 CHARGES I EXPLAINED THAT TO YOU AT THE START.
15 THAT PRESUMPTION STAYS WITH HIM UNLESS AFTER FULL
16 DELIBERATIONS, AFTER I HAVE COMPLETED THE
17 INSTRUCTIONS TO YOU, YOU FIND THAT THE STATE HAS
18 MET ITS BURDEN OF PROOF AND FOUND THAT THE STATE
19 HAD CONVINCED 12 OF YOU, EACH OF YOU UNANIMOUSLY
20 BEYOND A REASONABLE DOUBT THAT MR GAINNEY WAS
21 GUILTY OF SOME CRIME EMBRACED WITHIN THIS
22 INDICTMENT

23 NOW, I SAY "EMBRACED WITHIN THE INDICTMENT"
24 BECAUSE THE GREATER CHARGE INCLUDES ALL LESSER
25 CHARGES IT CAN BE CONSIDERED BASED UPON THE

JURY CHARGE

545

1 EVIDENCE PRESENTED AND THE FORMS OF VERDICT WILL
2 BE EITHER NOT GUILTY, IF THE STATE HAS NOT
3 CONVINCED YOU THAT MR GAINNEY SHOULD RESPOND TO THE
4 CHARGES, BY A GUILTY VERDICT, OR GUILTY OF MURDER
5 OR GUILTY OF MANSLAUGHTER

6 MANSLAUGHTER IS THE UNLAWFUL KILLING OF ONE
7 HUMAN BEING BY ANOTHER WITHOUT MALICE, EXPRESS OR
8 IMPLIED, AND THROUGH SUFFICIENT LEGAL PROVOCATION
9 OR WHILE THE PROVOCATION HAS NOT HAD TIME TO COOL

10 I WILL EXPLAIN THIS TO YOU IN A LITTLE MORE
11 DETAIL, BUT THE BOTTOM LINE, THE INDICTMENT ALLEGES
12 THE COMMISSION OF THE CRIME OF MURDER A LESSER
13 INCLUDED OFFENSE OF MURDER IS MANSLAUGHTER

14 THE ORDER IN WHICH THE VERDICT FORM WILL BE
15 CONSIDERED BY YOU JURORS HAS NO BEARING. IT IS
16 TYPED ON THERE FIRST I THINK NOT GUILTY, GUILTY OF
17 MURDER, GUILTY OF MANSLAUGHTER IT COULD HAVE SAID
18 GUILTY OF MURDER, GUILTY OF MANSLAUGHTER, NOT
19 GUILTY

20 YOU WILL ONLY REACH ONE VERDICT YOU COULD
21 NOT FIND MR GAINNEY GUILTY OF MANSLAUGHTER AND
22 MURDER THAT IS AN EITHER/OR SITUATION THE
23 PRESENCE OF MALICE, AS I WILL DEFINE IT FOR YOU,
24 AFORETHOUGHT BEING CRITICAL ON THE ISSUE OF WHETHER
25 A CRIME CONSTITUTES MURDER OR MANSLAUGHTER

1 NOW, WHILE I AM NOT SENDING THE INDICTMENT
2 BACK, IN THE INDICTMENT ITSELF -- CERTAIN THINGS
3 ARE NOT IN DISPUTE IT IS UNDISPUTED REALLY THAT
4 AT THE TIME IN QUESTION STEPHEN R PRICE WAS KILLED
5 BY JOHNNY A GAINEY THAT IS NOT AT ISSUE SO THE
6 REAL ISSUE FOR YOU TO DECIDE, AS I AM GOING TO
7 EXPLAIN IN A LITTLE BIT, IS WHETHER THE KILLING WAS
8 JUSTIFIED AND TO THAT I AM GOING TO INSTRUCT YOU
9 IN SOME DETAIL ON THE LAW OF SELF-DEFENSE

10 THE BOTTOM LINE, MR GAINEY IN FACT SHOT
11 AND KILLED STEPHEN A PRICE IF THE SHOOTING AND
12 KILLING WAS NOT JUSTIFIED, HE IS GUILTY OF EITHER
13 MURDER OR MANSLAUGHTER IF IT WAS JUSTIFIED
14 THROUGH THE USE OF SELF-DEFENSE, HE IS NOT GUILTY
15 OF EITHER CHARGE

16 THE ELEMENTS OF SELF-DEFENSE AS THE
17 ATTORNEYS HAVE GONE OVER WITH YOU A COUPLE OF TIMES
18 APPLY TO BOTH MURDER AND MANSLAUGHTER

19 NOW, JURORS, A COUPLE OF THINGS MURDER IS
20 THE MOST SERIOUS CHARGE THAT WE HAVE I THINK YOU
21 UNDERSTAND THAT MURDER IS THE MOST SERIOUS CHARGE
22 THAT THE STATE CAN ALLEGE AGAINST AN INDIVIDUAL
23 MANSLAUGHTER IS RIGHT UP THERE MANSLAUGHTER IS A
24 SERIOUS OFFENSE ALSO ANY TIME ONE PERSON DIES
25 THROUGH ACTIONS OF ANOTHER, IT IS A SERIOUS

JURY CHARGE

547

1 OFFENSE I THINK Y'ALL UNDERSTAND THAT

2 BUT THE ISSUE THAT YOU HAVE TO DECIDE IS
3 WHETHER THE STATE MEETS ITS BURDEN OF PROOF BY
4 CONVINCING YOU THAT MR GAINNEY IS GUILTY OF EITHER
5 MURDER OR MANSLAUGHTER BASED UPON THE ADMITTED
6 FACTS

7 YOU ARE NOT SENDING MESSAGES THIS PLACE OR
8 THAT PLACE I MEAN, I HAVE INSTRUCTED YOU
9 THROUGHOUT, DURING BREAKS AND OVERNIGHT NOT TO
10 DISCUSS THE CASE WITH ANYBODY WHAT WE ARE TALKING
11 ABOUT IS ONE SPECIFIC INCIDENT SOMETIMES IT IS
12 HARD TO BE JURORS IT IS ALSO HARD TO BE THE
13 JUDGE, YOU KNOW SOMETIMES I HEAR THINGS WITHOUT A
14 JURY PRESENT I MAKE THE FINAL DECISION ONE WAY OR
15 THE OTHER I CAN'T WORRY ABOUT WHAT THE PRESS
16 PRINTS ABOUT IT OR WHAT PEOPLE THINK ABOUT IT
17 NEITHER CAN YOU YOU TOOK AN OATH TO TRULY DECIDE
18 THIS CASE BASED UPON THE ADMITTED EVIDENCE AS THOSE
19 FACTS ARE PROVEN TO YOU AND APPLY TO THE LAW THAT I
20 AM ABOUT TO INSTRUCT YOU ON SO YOUR ISSUE IS TO
21 WEIGH ALL THE EVIDENCE IN THE CASE AND DECIDE WHICH
22 OF THESE THREE VERDICT FORMS WILL BE RETURNED.

23 NOW, MR FOREMAN, IT TAKES A UNANIMOUS
24 DECISION OF ALL 12 JURORS TO REACH A VERDICT
25 AGAIN, THERE ARE ONLY THREE FORMS I WILL GO OVER

1 THAT A COUPLE MORE TIMES BECAUSE I AM NOT
2 EMPHASIZING ONE OVER THE OTHER, I HAVE TO SAY THEM
3 IN ONE FORM OR THE OTHER AS I MENTIONED.

4 YOU ALONE NEED TO SIGN TWELVE JURORS
5 DON'T NEED TO SIGN THEY COULD IF THEY WANTED TO,
6 BUT JUST YOU. TWELVE JURORS HAVE TO AGREE AFTER
7 YOU SIGN AND YOU COME BACK IN, THE CLERK WILL ASK
8 YOU IF THAT IS THE VERDICT OF THE ENTIRE JURY, AND
9 YOU WILL ALL INDICATE THAT IT IS YOU DON'T HAVE
10 TO SIGN ON HERE ALL THE JURORS ONLY HAVE TO SIGN
11 WHEN IT IS A CAPITAL MURDER CASE WHERE SOMEONE IS
12 GOING TO BE EXECUTED ALL OTHER CASES, CIVIL AND
13 CRIMINAL, THE FOREMAN ALONE NEEDS TO SIGN OTHER
14 JURORS CAN SIGN, I'M NOT SAYING -- YOU DON'T HAVE
15 TO YOU CAN SIGN BUT THE FOREMAN SIGNS ONLY IN
16 THE PLACE THAT IT SAYS FOREPERSON

17 WHILE DELIBERATIONS OCCUR, MR FOREMAN, YOU
18 ACT AS SPOKESPERSON FOR THE JURY I AM INSTRUCTING
19 YOU THE LAW IN THE ABSTRACT. I MEAN, I HAVE TO
20 TELL YOU OF COURSE WHO THE VICTIM WAS, WHO THE
21 DEFENDANT IS BEYOND THAT, THE INSTRUCTIONS THAT I
22 AM GIVING YOU ARE NOT FACT SPECIFIC WHETHER OR
23 NOT MR GAINNEY ACTED IN SELF-DEFENSE IS WHAT Y'ALL
24 ARE GOING TO HAVE TO DECIDE AND HE DOES NOT HAVE
25 ANY BURDEN TO PROVE THAT HE DID, THE STATE HAS THE

JURY CHARGE

549

1 BURDEN TO PROVE THAT HE DID NOT, BEYOND A
2 REASONABLE DOUBT AND THAT APPLIES TO EITHER
3 MURDER OR MANSLAUGHTER, AS I HAVE MENTIONED

4 IF QUESTIONS OCCUR DURING DELIBERATIONS,
5 MR FOREMAN, IF YOU WOULD WRITE THEM DOWN WITH SOME
6 SPECIFICITY I WILL CONFER WITH COUNSEL AND SEE IF I
7 CAN ANSWER THE QUESTION

8 HOWEVER, WHAT WEIGHT YOU ARE TO ATTRIBUTE
9 TO VARIOUS TESTIMONY OR WHETHER MR GAINNEY IS
10 GUILTY OR NOT GUILTY OF ANYTHING, THAT IS WHAT
11 Y'ALL HAVE TO DECIDE I CAN'T HELP YOU WITH THAT
12 I CAN'T TELL YOU WHAT WEIGHT TO ATTRIBUTE TO ANY
13 ADMITTED TESTIMONY AND I CAN'T ADD ANYTHING TO THE
14 EVIDENCE THAT HAS BEEN INTRODUCED

15 A LOT OF EVIDENCE WAS PREMARKED AND WE
16 STILL HAVE NUMEROUS EXHIBITS, AS YOU UNDERSTAND
17 ANYTHING THAT HAS BEEN INTRODUCED INTO EVIDENCE
18 WILL BE BACK IN THE JURY ROOM WHILE YOU DELIBERATE
19 I MADE THEM CHECK THE RIFLE AGAIN TO MAKE SURE
20 THERE WERE NO BULLETS IN THERE JUST A SECOND AGO.
21 BUT, ANYWAY, EVERYTHING THAT HAS BEEN INTRODUCED
22 INTO EVIDENCE WILL BE BACK THERE

23 CERTAIN THINGS THAT YOU SAW YOU CAN
24 CONSIDER, BUT THEY ARE NOT INTRODUCED INTO
25 EVIDENCE FOR INSTANCE, I THINK AT ONE POINT THERE

1 WAS A BLOW-UP OF SOMETHING, MAYBE MORE THAN ONE
2 THE UNDERLYING DOCUMENT IS IN EVIDENCE, YOU WILL
3 HAVE IT WITH YOU THE BLOW-UP WILL NOT BE BACK
4 THERE, IF YOU WANT TO SEE THE BLOW-UP
5 SO THE BOTTOM LINE, IF IT HAS BEEN
6 INTRODUCED INTO EVIDENCE YOU WILL HAVE IT WITH YOU
7 AND YOU CAN CONSIDER IT IF YOU SAW IT DURING THE
8 TRIAL YOU CAN CONSIDER IT I CAN'T ADD ANYTHING TO
9 IT IF YOU WANTED TO ASK A WITNESS A QUESTION THAT
10 WAS NOT ANSWERED, I AM SORRY YOU HAVE TO DECIDE
11 THE CASE BASED UPON ADMITTED TESTIMONY WE CAN'T
12 ADD ANYTHING TO IT THE CASE IS OVER THAT IS,
13 WHEN THE STATE SAID, "WE REST," THE STATE MEANT,
14 "WE DON'T HAVE ANY OTHER EVIDENCE TO PRESENT "
15 WHEN DEFENSE COUNSEL SAYS, "WE REST," THAT MEANS
16 THEY DON'T HAVE ANY OTHER EVIDENCE TO PUT IN ALL
17 THE EVIDENCE IS IN IT IS UP TO YOU JURORS TO
18 WEIGH THE EVIDENCE AND DECIDE HOW THE CASE WILL BE
19 RESOLVED
20 NOW, A COUPLE OF TIMES I HAVE TOLD YOU THAT
21 THE STATE HAS THE BURDEN OF PROOF, AND THAT BURDEN
22 OF PROOF IS THAT THEY MUST CONVINCING EACH OF YOU
23 JURORS BEYOND A REASONABLE DOUBT ON EACH ISSUE THAT
24 THEY HAVE THE BURDEN ON
25 NOW, SOMETHING THAT I AM NOT GOING TO

JURY CHARGE

551

1 DEFINE FOR YOU IN ANY GREAT DETAIL IS WHAT
2 CONSTITUTES A REASONABLE DOUBT THE COURTS
3 BASICALLY JUST SAY THAT I AM TO TELL YOU THAT A
4 REASONABLE DOUBT IS THE KIND OF DOUBT THAT WOULD
5 CAUSE AN ORDINARY PERSON TO HESITATE TO ACT
6 BEYOND THAT I'M NOT GOING TO INSTRUCT YOU ON THAT
7 I CAN TELL YOU THAT FOR FOUR OR FIVE TIMES IF YOU
8 WOULD LIKE, BUT THAT IS WHAT IT IS REASONABLE
9 DOUBT IS WHEN YOU ARE CONDUCTING YOUR ORDINARY
10 AFFAIRS, DAY-TO-DAY AFFAIRS, IF BASED ON
11 INFORMATION IN FRONT OF YOU YOU WOULD HESITATE TO
12 ACT, THAT IS, TAKE ACTION OR NOT TAKE ACTION, THAT
13 WOULD CONSTITUTE A REASONABLE DOUBT.

14 NOW, YOU JURORS, AND YOU ALONE, PASS UPON
15 THE CREDIBILITY OF THE WITNESSES AGAIN, I AM
16 INSTRUCTING YOU THE LAW IN THE ABSTRACT I AM NOT
17 DIRECTING THESE REMARKS TO ANY PARTICULAR WITNESS
18 THAT TESTIFIED

19 FIRST, OBVIOUSLY YOU WOULD USE YOUR COMMON
20 SENSE WHEN YOU DAILY, JURORS, DEAL WITH
21 INDIVIDUALS, WHAT THEY REPRESENT TO YOU AND YOU
22 MAKE DETERMINATIONS AS TO WHETHER INFORMATION
23 RELAYED TO YOU IS BELIEVABLE OR NOT YOU USE THOSE
24 SAME CRITERIA THAT YOU USE IN YOUR EVERYDAY AFFAIRS
25 IN EVALUATING TESTIMONY

1 THERE ARE A COUPLE OF KEYS THAT I WILL JUST
2 MENTION TO YOU CERTAINLY YOU WOULD TAKE INTO
3 ACCOUNT THE DEMEANOR, ANOTHER WAY OF SAYING THE
4 APPEARANCE OF THE WITNESS YOU WOULD CONSIDER
5 WHETHER A WITNESS'S TESTIMONY IS CONSISTENT OR
6 INCONSISTENT OBVIOUSLY THE OPPORTUNITY THAT THE
7 WITNESS HAD TO SEE, HEAR OR OBSERVE WHAT THE
8 WITNESS TESTIFIED TO IS ANOTHER FACTOR ANY
9 INTEREST THAT A WITNESS HAD IN THE OUTCOME OF THE
10 PROCEEDINGS IS SOMETHING ELSE YOU CAN TAKE INTO
11 ACCOUNT WHETHER A WITNESS IS HESITANT OR
12 FORTHRIGHT IN ANSWERING QUESTIONS AND WHETHER
13 TESTIMONY FROM A PARTICULAR WITNESS BECOMES
14 STRONGER OR WEAKER BY OTHER EVIDENCE OR OTHER
15 TESTIMONY OF THE CASE ARE OTHER FACTORS THAT YOU
16 CAN CONSIDER

17 YOU JURORS ARE NOT BOUND TO ACCEPT IN ITS
18 ENTIRETY THE TESTIMONY OF ANY PARTICULAR WITNESS
19 IN OTHER WORDS, YOU CAN PICK AND CHOOSE PORTIONS OF
20 ADMITTED TESTIMONY THAT YOU FEEL ARE BELIEVABLE
21 AFTER YOU HAVE DONE THAT, THE RELATIVE WEIGHT THAT
22 YOU ATTRIBUTE THE BELIEVABLE TESTIMONY IS ENTIRELY
23 UP TO YOU

24 WHERE A DEFENDANT TESTIFIES, JURORS, AND
25 THE STATE INTRODUCES PRIOR STATEMENTS THAT THEY

JURY CHARGE

553

1 HAVE MADE, YOU CAN CONSIDER PRIOR STATEMENTS MADE
2 BY A DEFENDANT AGAIN, THIS IS IN THE ABSTRACT
3 THERE WERE SOME IN THIS, INTRODUCED DURING THIS
4 TRIAL BUT YOU MUST FIND THAT BEFORE THE DEFENDANT
5 MADE THE STATEMENT THEY WERE FREELY AND VOLUNTARILY
6 GIVEN AFTER THE DEFENDANT HAD BEEN GIVEN THEIR
7 MIRANDA RIGHTS AND WARNINGS I COULD RUN OVER
8 THEM IT IS GETTING A LITTLE LATE THEY ARE
9 PRINTED ON A CARD THAT IS INTRODUCED INTO EVIDENCE
10 THOSE ARE THE MIRANDA RIGHTS

11 YOU HAVE THE RIGHT TO REMAIN SILENT YOU
12 HAVE THE RIGHT TO HAVE AN ATTORNEY IF YOU CAN'T
13 AFFORD ONE, ONE WILL BE APPOINTED FOR YOU YOU
14 HAVE THE RIGHT TO HAVE THE ATTORNEY PRESENT WITH
15 YOU AT ALL TIMES YOU CAN SPEAK IF YOU WANT TO,
16 YOU DON'T HAVE TO IF YOU START SPEAKING YOU CAN
17 STOP IF YOU DO SPEAK IT WILL BE INTRODUCED INTO
18 EVIDENCE AGAINST YOU, AND SO FORTH

19 YOU HAVE TO BE TOLD THAT EACH TIME, AND
20 THEY HAVE TO NOT BE THREATENED IN ANY MANNER OR
21 PROMISED ANYTHING

22 AND IF AFTER HAVING BEEN GIVEN THEIR
23 MIRANDA RIGHTS AND WARNINGS THE INDIVIDUAL FREELY
24 AND VOLUNTARILY MAKES A STATEMENT, YOU CAN CONSIDER
25 THE STATEMENT IT IS INTRODUCED INTO EVIDENCE

1 DURING THE TRIAL, AND I DIDN'T EXPLAIN AT
2 THAT TIME, SEVERAL INDIVIDUALS WERE JUST REFERRED
3 TO, THEY ASKED ME TO QUALIFY THEM AS EXPERTS I
4 JUST SAID OKAY EVERYONE THAT WAS OFFERED, THE
5 OTHER SIDE SAID WE AGREE THEY ARE AN EXPERT

6 NOW, THAT DOES NOT MEAN YOU MUST ACCEPT
7 WHAT THOSE INDIVIDUALS TESTIFIED TO AS BEING THE
8 TRUTH IT IS UP TO YOU JURORS TO USE YOUR STANDARD
9 TEST IN EVALUATING EXPERT TESTIMONY ALL THAT THEY
10 ASK ME TO DO WHEN THEY SAY, "I WOULD LIKE TO
11 QUALIFY A PERSON AS AN EXPERT," IS THEY MUST
12 DEMONSTRATE A PERSON BEING TENDERED AS AN EXPERT
13 THAT THROUGH EDUCATION, TRAINING OR A COMBINATION
14 OF THOSE FACTS THE INDIVIDUAL HAS ACQUIRED MORE
15 KNOWLEDGE IN A PARTICULAR FIELD THAN YOU OR I HAVE

16 YOU KNOW, LIKE IF YOU HAVE A PHYSICIAN,
17 THEY FINISHED MED SCHOOL, THEY PRACTICE I MEAN,
18 YOU KNOW, THEY KNOW MORE ABOUT MEDICINE THAN YOU OR
19 I THEY MIGHT NOT -- THEY MIGHT MAKE A WRONG
20 DIAGNOSIS NOW AND THEN, BUT THEY ARE GOING TO MAKE
21 A LOT MORE RIGHT DIAGNOSES THAN YOU OR I

22 SO ONCE A PERSON IS QUALIFIED AS AN EXPERT,
23 THAT PERSON IS ENTITLED TO GIVE OPINIONS WITHIN
24 THEIR FIELD OF EXPERTISE YOU ARE NOT BOUND TO
25 ACCEPT THEM THE VALUE OF ANY OPINION, OF COURSE,

JURY CHARGE

555

1 DEPENDS UPON THE UNDERLYING FACTS ASSUMED ON WHICH
2 THE OPINION IS BASED

3 BASICALLY, YOU JUST TAKE AN EXPERT WHEN
4 THEY ARE QUALIFIED YOU CONSIDER THEIR EDUCATION,
5 BACKGROUND AND TRAINING AND THE UNDERLYING FACTS ON
6 WHICH THEY GIVE THEIR OPINION, AND THEN YOU
7 EVALUATE THAT TESTIMONY JUST LIKE THEY WERE ANOTHER
8 INDIVIDUAL THOSE ARE JUST ADDITIONAL FACTORS YOU
9 WOULD TAKE INTO ACCOUNT

10 IN ADDITION TO TESTIMONY, VARIOUS DOCUMENTS
11 HAVE BEEN INTRODUCED, A GOOD MANY DOCUMENTS
12 ACTUALLY EVIDENCE CONSISTS OF TWO TYPES, EITHER
13 DIRECT EVIDENCE OR INDIRECT EVIDENCE

14 INDIRECT EVIDENCE IS CALLED CIRCUMSTANTIAL
15 EVIDENCE DIRECT EVIDENCE AND INDIRECT EVIDENCE,
16 CIRCUMSTANTIAL EVIDENCE, STAND ON THE SAME FOOTING
17 THE STATE HAS THE BURDEN OF PROOF BEYOND A
18 REASONABLE DOUBT THROUGHOUT THE DEFENDANT DOES
19 NOT HAVE TO PROVE THAT THEY DID NOT DO SOMETHING,
20 IN OTHER WORDS NO BURDEN OF PROOF ON THE
21 DEFENDANT AT ANY POINT

22 INDIRECT EVIDENCE REQUIRES THE DRAWING OF
23 AN INFERENCE IF THE PERSON STATES SOMETHING THAT
24 HE OR SHE HAS OBSERVED THROUGH SENSES, THAT IS
25 DIRECT EVIDENCE IT MAY NOT BE TRUE SOMEBODY

1 COULD COME IN NOW AND SAY IT IS RAINING OUTSIDE.
2 THAT WOULD BE DIRECT EVIDENCE, BUT IT MIGHT NOT BE
3 THAT IS PROBABLY NOT, OKAY, BUT THAT IS DIRECT
4 EVIDENCE A PERSON COMES IN DOESN'T SAY ANYTHING,
5 THEY ARE PUTTING DOWN AN UMBRELLA AND WATER IS
6 RUNNING ALL OFF OF THEM, YOU ASSUME IT IS RAINING
7 OUTSIDE IT MIGHT NOT BE, HE MIGHT HAVE JUST
8 STEPPED IN THE BATHROOM OR SOMETHING

9 ANYWAY, YOU CAN TAKE ALL THE ADMITTED
10 EVIDENCE IN THE CASE, PUT IT ALL TOGETHER AND DRAW
11 SUCH REASONABLE INFERENCES AS YOU FEEL THE EVIDENCE
12 WARRANTS IN REACHING YOUR DECISION DIRECT
13 EVIDENCE AND CIRCUMSTANTIAL EVIDENCE STAND ON THE
14 SAME FOOTING THROUGHOUT

15 NOW, I'M GOING TO DEFINE MURDER FOR YOU
16 MURDER IS THE UNLAWFUL KILLING OF ONE HUMAN BEING
17 BY ANOTHER HUMAN BEING WITH MALICE AFORETHOUGHT,
18 EITHER EXPRESS, IMPLIED OR INFERRED.

19 NOW, A COUPLE OF THINGS ARE NOT REQUIRED TO
20 OBTAIN A CONVICTION FOR MURDER EVERYBODY WATCHES
21 A LOT OF T V YOU KNOW, YOU HEAR PREMEDITATED
22 MURDER AND THINGS LIKE THAT OUR STATUTE JUST SAYS
23 MALICE AFORETHOUGHT MALICE, AS I'M GOING TO
24 DEFINE FOR YOU IN JUST A MINUTE, MUST EXIST BEFORE
25 A VERDICT OF GUILTY OF MURDER CAN BE RETURNED, BUT

JURY CHARGE

557

1 IT DOES NOT NEED TO BE PRESENT IN THE MIND OF A
2 PERSON WHO IS COMMITTING MURDER FOR ANY SPECIFIC
3 LENGTH OF TIME IT CAN BE ALMOST -- IT CAN
4 ACTUALLY BE IMMEDIATELY BEFORE THE PERSON IS
5 STABBED OR SHOT OKAY OR A PERSON CAN KILL
6 SOMEONE AND HAVE MALICE AFTER THE FACT, THAT
7 DOESN'T COUNT IT HAS TO BE AFORETHOUGHT IT HAS
8 TO BE BE BEFOREHAND

9 MOTIVE IS SOMETHING ELSE THAT IS NOT
10 NECESSARY FOR THE STATE TO PROVE TO GET A
11 CONVICTION OF MURDER THEY SIMPLY MUST PROVE THAT
12 ONE HUMAN BEING KILLED ANOTHER WITH MALICE
13 AFORETHOUGHT, EXPRESS, IMPLIED OR INFERRED

14 NOW, MALICE INDICATES A FORMED PURPOSE AND
15 DESIGN TO DO A WRONGFUL ACT UNDER CIRCUMSTANCES TO
16 EXCLUDE ANY LEGAL RIGHT TO DO IT MALICE IS A TERM
17 OF ART THAT IMPORTS WICKEDNESS AND EXCLUDES A JUST
18 CAUSE OR EXCUSE

19 NOW, WHEN I SAY THINGS LIKE MALICE MAY BE
20 EXPRESS, IMPLIED OR INFERRED, I AM NOT TALKING
21 ABOUT DIFFERENT KINDS OF MALICE, IT JUST GOES TO
22 THE WAY MALICE CAN BE PROVED

23 EXPRESS MALICE IS, FOR INSTANCE, WHERE
24 SOMEONE WOULD SAY, "I AM GOING TO GET MY SHOTGUN
25 AND GO KILL X," AND THE PERSON DOES GO GET THEIR

1 SHOTGUN AND GOES AND KILLS X THAT IS EXPRESS
2 MALICE

3 IMPLIED MALICE OR INFERRED MALICE IS WHERE
4 MALICE MAY BE ARRIVED AT BY YOU JURORS THROUGH THE
5 USE OF CIRCUMSTANTIAL EVIDENCE WHERE YOU CAN
6 CONCLUDE MALICE EXISTS BY DEDUCTIVE REASONING AND
7 UNDER GIVEN CIRCUMSTANCES YOU FIND THAT MALICE HAS
8 ARISEN ALTHOUGH THERE IS NO EXPRESS OR DIRECT
9 EVIDENCE OF AN INTENT TO KILL

10 MALICE CAN BE INFERRED OR IMPLIED IF IT IS
11 PROVED BEYOND A REASONABLE DOUBT THAT THERE WAS A
12 WILLFUL, DELIBERATE AND INTENTIONAL DOING OF AN
13 UNLAWFUL ACT WITHOUT JUST CAUSE OR EXCUSE

14 NOW, THE PROOF OF THIS UNLAWFUL ACT,
15 HOWEVER, IF PROVEN, WOULD MERELY BE A PIECE OF
16 EVIDENCE FROM WHICH THE INFERENCE OR IMPLICATION OF
17 MALICE COULD ARISE YOU JURORS ARE FREE TO ACCEPT
18 OR REJECT THAT INFERENCE

19 IN ADDITION, EVEN IN THE ABSENCE OF A
20 SPECIFIC FIXED AND DELIBERATE INTENT TO TAKE THE
21 LIFE OF AN INDIVIDUAL, IT IS THE LAW OF THIS STATE
22 THAT WHERE ONE INTENTIONALLY KILLS ANOTHER
23 INDIVIDUAL WITH A DEADLY WEAPON OR WITH A DANGEROUS
24 INSTRUMENTALITY, SUCH AS A KNIFE, A GUN, AXE,
25 WHATEVER, THE USE OF A DEADLY WEAPON PERMITS JURORS

JURY CHARGE

559

1 TO INFER MALICE, BUT IT DOES NOT REQUIRE YOU TO
2 INFER MALICE

3 IN OTHER WORDS, IF FACTS ARE PROVED BEYOND
4 A REASONABLE DOUBT SUFFICIENT TO RAISE AN INFERENCE
5 OF MALICE TO YOUR SATISFACTION THROUGH THE USE OF A
6 DANGEROUS WEAPON OR INSTRUMENTALITY, THAT EVIDENCE
7 WOULD SIMPLY BE ANOTHER EVIDENTIARY FACT PRESENTED
8 IN THE CASE FOR YOU JURORS TO CONSIDER ON THE ISSUE
9 OF WHETHER MALICE CAN BE INFERRED AND YOU JURORS
10 ARE FREE TO ACCEPT OR REJECT THAT INFERENCE, IT
11 BEING A PERMISSIVE INFERENCE DEPENDING UPON YOUR
12 VIEW OF THE EVIDENCE

13 GOING BACK TO RETURN A VERDICT OF MURDER,
14 THERE MUST BE MALICE AFORETHOUGHT, WHICH MEANS THAT
15 MALICE MUST BE CONCEIVED IN THE MIND OF THE
16 DEFENDANT PRIOR TO THE ACT PRODUCING THE FATAL
17 RESULT THE LAW DOES NOT REQUIRE THAT MALICE MUST
18 EXIST FOR ANY APPRECIABLE LENGTH OF TIME BEFORE THE
19 COMMISSION OF THE ACT

20 AND, AGAIN, MALICE IS A WORD SUGGESTING
21 WICKEDNESS, HATRED, AND A DETERMINATION TO DO WHAT
22 ONE KNOWS TO BE WRONG WITHOUT JUST CAUSE OR LEGAL
23 PROVOCATION

24 THOSE ARE THE ELEMENTS OF MURDER, JURORS
25 NOW, MANSLAUGHTER WHAT WE ARE TALKING

1 ABOUT IS VOLUNTARY MANSLAUGHTER, SINCE THERE IS A
2 FORM CALLED INVOLUNTARY MANSLAUGHTER THAT I AM NOT
3 GOING TO DEFINE FOR YOU, BUT VOLUNTARY MANSLAUGHTER
4 IS THE UNLAWFUL KILLING OF ANOTHER WITHOUT MALICE,
5 EXPRESS OR IMPLIED IT IS DEFINED AS THE UNLAWFUL
6 KILLING OF A HUMAN BEING IN SUDDEN HEAT OF PASSION
7 UPON SUFFICIENT LEGAL PROVOCATION IT INVOLVES
8 INTENT ON THE PART OF A DEFENDANT TO KILL ANOTHER
9 PERSON, BUT NOT MALICE THUS, VOLUNTARY
10 MANSLAUGHTER IS THE UNLAWFUL KILLING OF A HUMAN
11 BEING WITHOUT MALICE IN SUDDEN HEAT OF PASSION ON
12 SUFFICIENT LEGAL PROVOCATION AND THAT IF MALICE
13 EXISTED THE KILLING WOULD CONSTITUTE MURDER EVEN
14 THOUGH DONE IN HEAT OF PASSION UPON PROVOCATION BY
15 THE DECEASED

16 IN DETERMINING WHETHER AN ACT THAT CAUSED
17 DEATH WAS COMPELLED BY HEAT OF PASSION OR BY
18 MALICE, ALL SURROUNDING CIRCUMSTANCES AND
19 CONDITIONS ARE TO BE TAKEN INTO ACCOUNT BY YOU
20 JURORS, INCLUDING PREVIOUS RELATIONS AND
21 CONNECTIONS TO THE TRAGEDY AS WELL AS THOSE
22 EXISTING AT THE TIME OF THE KILLING

23 EXAMPLES OF ACTS OF PROVOCATION THAT WOULD
24 BE SUFFICIENT TO NEGATE MALICE ARE PULLING A KNIFE
25 ON A DEFENDANT, POINTING A GUN AT A DEFENDANT,

JURY CHARGE

561

1 SPITTING IN A PERSON'S FACE, ASSAULT ON A FAMILY
2 MEMBER, SUDDEN MUTUAL COMBAT WHEN ONE DOES NOT KNOW
3 THEY ARE GOING TO BE COMPELLED INTO CONFRONTATION,
4 FINDING ONE'S SPOUSE IN THE ACT OF ADULTERY, OR
5 FINDING SOMEONE MOLESTING YOUR CHILD INSULTING
6 WORDS, NO MATTER HOW TERRIBLE, ARE NOT ENOUGH TO
7 MITIGATE A HOMICIDE FROM MURDER TO MANSLAUGHTER

8 NOW, AS I MENTIONED, IT IS UNDISPUTED MR
9 GAINNEY SHOT MR PRICE THE ISSUE IN THE CASE IS
10 WHETHER WHAT TRANSPIRED THAT RESULTED IN THE DEATH
11 OF STEPHEN R PRICE IS JUSTIFIED

12 JUSTIFICATION CAN BE ESTABLISHED BY SELF-
13 DEFENSE I AM GOING TO GO OVER THE ELEMENTS OF
14 SELF-DEFENSE WITH YOU THERE ARE FOUR AND THEN I
15 AM GOING TO AMPLIFY THOSE ELEMENTS

16 AGAIN, JURORS, I HAVE TO STRUCTURE THE
17 INSTRUCTIONS I GIVE YOU BASED UPON ADMITTED FACTS
18 I INTEND NO INFERENCE ON THOSE FACTS THAT IS FOR
19 YOU JURORS TO DECIDE BASED UPON THE WEIGHT THAT YOU
20 ATTRIBUTE TO ADMITTED EVIDENCE AND THE INFERENCES
21 YOU DRAW FROM THE ADMITTED EVIDENCE

22 I HAVE TOLD YOU A COUPLE OF TIMES THAT THE
23 STATE HAS THE BURDEN OF PROOF BEYOND A REASONABLE
24 DOUBT THROUGHOUT WHILE SELF-DEFENSE CONTAINS THE
25 WORD "DEFENSE," AND YOU THINK OF A DEFENSE, IF

1 SOMEONE HAS A DEFENSE THEY MUST PROVE IT IN SELF-
2 DEFENSE A DEFENDANT DOES NOT HAVE TO PROVE THEY
3 ACTED IN SELF-DEFENSE, THE STATE HAS TO PROVE THAT
4 THEY DIDN'T BEYOND A REASONABLE DOUBT

5 SO IF THE EVIDENCE CONVINCES YOU, JURORS,
6 THAT SELF-DEFENSE HAS BEEN ESTABLISHED, THEN YOU
7 WOULD FIND THE DEFENDANT NOT GUILTY

8 THERE ARE FOUR ELEMENTS THAT MUST BE
9 ESTABLISHED TO YOU JURORS' SATISFACTION BY EVIDENCE
10 IN THE CASE

11 FIRST, THE DEFENDANT MUST BE WITHOUT FAULT
12 IN BRINGING ON THE DIFFICULTY

13 SECOND, THE DEFENDANT MUST HAVE ACTUALLY
14 BELIEVED HE WAS IN IMMINENT DANGER OF LOSING HIS
15 LIFE OR OF SUSTAINING SERIOUS BODILY INJURY, OR HE
16 WAS ACTUALLY IN SUCH DANGER

17 THIRD, IF THE DEFENSE IS BASED UPON A
18 BELIEF OF IMMINENT DANGER, A REASONABLE PRUDENT MAN
19 OF ORDINARY FIRMNESS AND COURAGE WOULD HAVE
20 ENTERTAINED THE SAME BELIEF IF THE DEFENDANT
21 ACTUALLY WAS IN IMMINENT DANGER, THE CIRCUMSTANCES
22 WERE SUCH IT WOULD WARRANT A MAN OF ORDINARY
23 PRUDENCE, FIRMNESS AND COURAGE TO STRIKE THE FATAL
24 BLOW OR FIRE A FATAL SHOT IN ORDER TO SAVE HIMSELF
25 FROM SERIOUS BODILY HARM OR LOSING HIS OWN LIFE

JURY CHARGE

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1 FOURTH, THE DEFENDANT HAD NO OTHER PROBABLE
2 MEANS OF AVOIDING THE DANGER OF LOSING HIS OWN LIFE
3 OR SUSTAINING SERIOUS BODILY INJURY THAN TO ACT AS
4 HE DID UNDER THE PARTICULAR INCIDENT HOWEVER, IF
5 THE DEFENDANT IS ON HIS OWN PREMISES, HE HAS NO
6 DUTY TO RETREAT BEFORE ACTING IN SELF-DEFENSE

7 NOW, THOSE ARE THE ELEMENTS OF SELF-
8 DEFENSE, JURORS I AM GOING TO AMPLIFY THEM THE
9 FACT THAT I AM GOING TO REPEAT CERTAIN THINGS HAS
10 NO INFERENCE, IT IS JUST THAT I WAS ASKED TO JUST
11 RUN OVER THE BASIC THINGS WITH YOU, NOW I AM GOING
12 TO GO OVER THEM IN A LITTLE MORE DETAIL

13 SELF-DEFENSE IS A COMPLETE DEFENSE AND IF
14 IT IS ESTABLISHED YOU MUST FIND THE DEFENDANT NOT
15 GUILTY THE STATE HAS THE BURDEN OF DISPROVING
16 SELF-DEFENSE BY PROOF BEYOND A REASONABLE DOUBT
17 IF YOU HAVE A REASONABLE DOUBT OF THE DEFENDANT'S
18 GUILT AFTER CONSIDERING ALL THE EVIDENCE ADMITTED,
19 INCLUDING THE EVIDENCE OF SELF-DEFENSE, THEN YOU
20 MUST FIND THE DEFENDANT NOT GUILTY ON THE OTHER
21 HAND, IF YOU HAVE NO REASONABLE DOUBT ON THE
22 DEFENDANT'S GUILT AFTER CONSIDERING ALL THE
23 EVIDENCE, INCLUDING THE EVIDENCE OF SELF-DEFENSE,
24 THEN YOU MUST FIND THE DEFENDANT GUILTY EITHER OF
25 MURDER OR MANSLAUGHTER

1 THE FOLLOWING ELEMENTS ARE REQUIRED TO
2 ESTABLISH SELF-DEFENSE

3 FIRST, THE DEFENDANT MUST BE WITHOUT FAULT
4 IN BRINGING ON THE DIFFICULTY IF THE DEFENDANT'S
5 CONDUCT WAS THE TYPE WHICH WAS REASONABLY
6 CALCULATED TO AND DID PROVOKE THE DEADLY ASSAULT,
7 THE DEFENDANT WOULD BE AT FAULT IN BRINGING ON THE
8 DIFFICULTY AND WOULD NOT BE ENTITLED TO AN
9 ACQUITTAL ON SELF-DEFENSE

10 THE SECOND ELEMENT OF SELF-DEFENSE IS THAT
11 THE DEFENDANT WAS ACTUALLY IN IMMINENT DANGER OF
12 DEATH OR SERIOUS BODILY INJURY OR THAT THE
13 DEFENDANT ACTUALLY BELIEVED THAT HE WAS IN IMMINENT
14 DANGER OF DEATH OR SERIOUS BODILY INJURY.

15 IF THE DEFENDANT WAS ACTUALLY IN IMMINENT
16 DANGER, IT MUST BE SHOWN THAT THE CIRCUMSTANCES
17 THEN EXISTING WOULD HAVE WARRANTED A PERSON OF
18 ORDINARY FIRMNESS AND COURAGE TO STRIKE THE FATAL
19 BLOW TO PREVENT DEATH OR SERIOUS BODILY INJURY

20 IF THE DEFENDANT BELIEVED HE WAS IN
21 IMMINENT DANGER OF DEATH OR SERIOUS BODILY INJURY,
22 THE EVIDENCE MUST ESTABLISH THAT A REASONABLE
23 PRUDENT PERSON OF ORDINARY FIRMNESS AND COURAGE
24 WOULD HAVE HAD THE SAME BELIEF

25 IN DECIDING WHETHER THE DEFENDANT ACTUALLY

JURY CHARGE

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1 WAS OR BELIEVED HE WAS IN IMMINENT DANGER OF DEATH
2 OR SERIOUS BODILY INJURY, YOU JURORS MUST CONSIDER
3 ALL THE FACTS SURROUNDING THE CRIME, INCLUDING THE
4 PHYSICAL CONDITION AND CHARACTERISTICS OF THE
5 DEFENDANT AND THE VICTIM

6 THE DEFENDANT DOES NOT HAVE TO SHOW --
7 AGAIN, THE DEFENDANT DOES NOT HAVE TO SHOW
8 ANYTHING, THE BURDEN IS ON THE STATE TO PROVE THAT
9 HE DID NOT ACT IN SELF-DEFENSE -- THAT HE WAS IN
10 ACTUAL DANGER IT IS ENOUGH IF THE DEFENDANT
11 BELIEVED HE WAS IN IMMINENT DANGER AND A REASONABLE
12 PRUDENT PERSON OF ORDINARY FIRMNESS AND COURAGE
13 WOULD HAVE HAD THE SAME BELIEF

14 THE DEFENDANT HAS THE RIGHT TO ACT ON
15 APPEARANCES, EVEN THOUGH THE DEFENDANT'S BELIEF MAY
16 HAVE BEEN MISTAKEN IT IS FOR YOU TO DECIDE
17 WHETHER THE DEFENDANT'S FEAR OF IMMEDIATE DANGER OR
18 DEATH OR SERIOUS BODILY INJURY WAS REASONABLE AND
19 WOULD HAVE BEEN FELT BY AN ORDINARY PERSON IN THE
20 SAME CIRCUMSTANCE

21 EVIDENCE OF PRIOR DIFFICULTIES BETWEEN THE
22 DEFENDANT AND THE VICTIM MAY BE CONSIDERED IN
23 DECIDING WHETHER A THREAT EXISTED, WHETHER THE
24 DEFENDANT HAD A REASON TO BELIEVE A THREAT EXISTED,
25 HOW SERIOUS THAT THREAT WAS

1 THE RELATIVE SIZES, AGES AND WEIGHTS OF THE
2 DEFENDANT AND THE VICTIM MAY BE CONSIDERED IN
3 DECIDING THE APPARENT OR ACTUAL NEED FOR FORCE IN
4 SELF-DEFENSE AND THE AMOUNT OF FORCE NEEDED,
5 BEARING IN MIND THAT A PERSON KILLING SOMEBODY IS
6 AN EXTREME MEASURE, AND THAT SHOULD BE WEIGHED
7 THE REPUTATION OF THE VICTIM AS A VIOLENT
8 PERSON MAY BE CONSIDERED IN DECIDING WHETHER THERE
9 WAS A NEED FOR FORCE, WHETHER THE DEFENDANT HAD
10 REASON TO BELIEVE THERE WAS A NEED FOR FORCE AND
11 WHETHER DEADLY FORCE WAS REASONABLY NECESSARY
12 PRIOR INSTANCES OF VIOLENCE BY THE VICTIM
13 MAY BE CONSIDERED IN DECIDING WHETHER THE DEFENDANT
14 ACTUALLY BELIEVED HE WAS IN IMMINENT DANGER OR WAS
15 ACTUALLY IN IMMINENT DANGER
16 INTOXICATION OR DRUG USE OF A VICTIM MAY BE
17 CONSIDERED IN DECIDING WHETHER THE DEFENDANT'S FEAR
18 OF DEATH OR BODILY HARM WAS REASONABLE
19 THE FINAL ELEMENT OF SELF-DEFENSE IS THAT
20 THE DEFENDANT HAD NO PROBABLE WAY TO AVOID THE
21 DANGER OR SERIOUS BODILY INJURY THAN TO ACT AS THE
22 DEFENDANT DID IN THIS PARTICULAR INSTANCE
23 IF THE DEFENDANT WAS ON HIS PREMISES, THE
24 DEFENDANT HAD NO DUTY TO RETREAT BEFORE ACTING IN
25 SELF-DEFENSE A DEFENDANT HAS NO DUTY TO RETREAT

JURY CHARGE

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1 IF BY DOING SO THE DANGER OF BEING KILLED OR
2 SUFFERING SERIOUS BODILY INJURY WOULD INCREASE

3 A PERSON CANNOT BE REQUIRED TO MAKE AN
4 EXACT CALCULATION AS TO DEGREE OR AMOUNT OF FORCE
5 WHICH MAY BE NEEDED TO AVOID DEATH OR SERIOUS
6 BODILY INJURY THEREFORE, IN SELF-DEFENSE THE
7 DEFENDANT HAS THE RIGHT TO USE THE FORCE NEEDED TO
8 AVOID DEATH OR SERIOUS BODILY HARM THE FORCE USED
9 IN SELF-DEFENSE DOES NOT HAVE TO BE LIMITED TO THE
10 DEGREE OR AMOUNT OF FORCE USED BY THE VICTIM THE
11 DEFENDANT HAS A RIGHT TO USE SO MUCH FORCE AS
12 APPEARED TO BE NECESSARY FOR COMPLETE SELF-
13 PROTECTION AND WHICH A PERSON OF ORDINARY REASON
14 AND FIRMNESS WOULD HAVE BELIEVED TO HAVE BEEN
15 NEEDED TO PREVENT DEATH OR SERIOUS BODILY HARM A
16 DEFENDANT DOES NOT HAVE TO WAIT UNTIL HIS ASSAILANT
17 GETS THE DROP ON HIM A DEFENDANT HAS A RIGHT TO
18 ACT UNDER THE LAW OF SELF-PRESERVATION AND PREVENT
19 HIS ASSAILANT FROM GETTING THE DROP ON HIM IF IT IS
20 APPARENT OR REASONABLY APPARENT THE ASSAILANT IS
21 TAKING STEPS TO GET THE DROP ON HIM

22 IF THE DEFENDANT IS JUSTIFIED IN DEFENDING
23 HIMSELF IN FIRING THE FIRST SHOT, THEN THE
24 DEFENDANT IS ALSO JUSTIFIED IN CONTINUING TO SHOOT
25 UNTIL IT IS APPARENT THAT THE DANGER OF DEATH OR

1 SERIOUS BODILY INJURY HAS COMPLETELY ENDED
2 OF COURSE, COMMENTING ON THAT, IF A
3 DEFENDANT CAN AVOID TAKING THE LIFE, THAT IS AN
4 EXTREME MEASURE, HE SHOULD NOT TAKE A LIFE UNLESS
5 AN ORDINARY REASONABLE PERSON WOULD HAVE FELT THAT
6 IS WHAT SHOULD HAVE BEEN DONE UNDER THE SAME OR
7 SIMILAR CIRCUMSTANCES
8 NOW, JURORS, AGAIN, THERE ARE ONLY THREE
9 FORMS OF VERDICT I HAVE EXPLAINED TO YOU THAT THE
10 INDICTMENT IS NOT EVIDENCE YOU UNDERSTAND
11 ARGUMENTS OF COUNSEL, I HAVEN'T ADDRESSED THAT,
12 ARGUMENTS OF COUNSEL ARE NOT EVIDENCE YOU SHOULD
13 LISTEN AND CONSIDER -- YOU DID LISTEN -- YOU SHOULD
14 CONSIDER CAREFULLY THE ARGUMENTS OF COUNSEL THEY
15 ARE ADVOCATES AND THEY ACCENTUATE VARIOUS POSITIONS
16 AND ASK YOU TO DRAW CERTAIN INFERENCES YOU ARE
17 NOT BOUND TO ACCEPT ANY INFERENCE OR TAKE AS PROVEN
18 ANYTHING THAT THEY SAY THEY HAVE -- DON'T
19 MISSTATE THINGS TO YOU, IT IS JUST THEY HAVE THEIR
20 POSITIONS TO REPRESENT AND THEY WERE NOT THERE,
21 THEY WERE NOT WITNESSES, THEY JUST RELATE TO YOU
22 WHAT THEY FEEL WAS TESTIFIED TO DURING THE TRIAL
23 AND THEY SUGGEST TO YOU INFERENCES YOU SHOULD DRAW
24 FROM THE TOTALITY OF THE EVIDENCE YOU SHOULD
25 CONSIDER THOSE, BUT THOSE ARGUMENTS ARE NOT

JURY CHARGE

569

1 EVIDENCE I THINK YOU UNDERSTAND THAT EVIDENCE
2 IS SWORN TESTIMONY AND EXHIBITS THAT ARE
3 INTRODUCED

4 NOW, WHAT YOU HAVE IS A VERDICT FORM WITH
5 YOU, WHICH IS NOT EVIDENCE ONLY ONE OF THREE
6 FORMS OF VERDICT YOU DECIDE ON JURORS, 12 OF YOU
7 MR FOREMAN, YOU CHECK OFF OR CIRCLE OR DRAW A LINE
8 AROUND THE FORM THAT YOU AGREE ON YOU CAN ONLY
9 REACH ONE FORM OF VERDICT AND THEN YOU SIGN AND
10 IF YOU WOULD STEP OUT BELIEVE IT OR NOT, I KEPT
11 THE INSTRUCTIONS AS SHORT AS I COULD YOU KNOW, IF
12 THE ATTORNEYS WANT ME TO AMPLIFY THE VARIOUS
13 POINTS, I MIGHT HAVE TO BRING YOU BACK OUT OR IF
14 YOU NEED IT ONCE YOU DELIBERATE, I CAN -- I HAVE
15 PLENTY OF BOOKS I CAN READ FROM

16 DON'T START TALKING ABOUT IT QUITE YET IF
17 YOU WOULD, STEP OUT

18 (WHEREUPON, AT 5 25 P M. THE
19 JURY RETIRED TO THE JURY ROOM)

20 THE COURT ALL RIGHT, STATE, DO YOU NEED
21 ANYTHING ELSE?

22 MR MEADORS NO, SIR, I DON'T THINK SO
23 JUST FOR MY CLARIFICATION, ON THAT SELF-DEFENSE
24 WHEN YOU WERE SAYING YOU COULD CONSIDER THE
25 INTOXICATION OF THE VICTIM OR THE DEFENDANT?

1 THE COURT IT IS STRAIGHT FROM THE
2 CHARGE

3 MR MEADORS I JUST DIDN'T HEAR DID YOU
4 SAY VICTIM?

5 THE COURT I READ WHATEVER

6 MR MEADORS THAT'S FINE, JUDGE DON'T
7 EVEN LOOK IT UP

8 THE COURT THE BOTTOM LINE IS UNDER THE
9 NEW AND IMPROVED CHARGE BOOKS THAT THEY GAVE US ON
10 THE COMPUTER THAT I HAD HER RUN OUT, THEY CAN
11 CONSIDER ALL CHARACTERISTICS OF THE DEFENDANT, AND
12 IF IT TURNS OUT THAT THE VICTIM, I MEAN, THE VICTIM
13 AND THE DEFENDANT, SIZE, AGE---

14 MR MEADORS I THOUGHT YOU HAD JUST SAID
15 VICTIM AND NOT DEFENDANT THAT IS WHAT I HAD
16 THOUGHT, YOU JUST SAID THE VICTIMS I DIDN'T---

17 THE COURT IT IS BOTH WAYS

18 MR MEADORS OKAY, THAT'S FINE

19 THE COURT THE VICTIM AND THE DEFENDANT
20 WELL, I MEAN, IT IS IN THERE INTOXICATION THE
21 SUPREME COURT CHECKED OFF ON IT AND SAID WE ARE
22 SUPPOSED TO CHARGE IT IF THERE IS EVIDENCE OF IT

23 MR WELLS, DO YOU NEED ANYTHING?

24 MR WELLS NO OBJECTION, YOUR HONOR

25 THE COURT NOW, ONE THING I DID NOT

JURY CHARGE

571

1 CHARGE AND I AM AWARE OF IT, AND I DON'T MIND
2 INSTRUCTING THEM ON IT, BUT HE DIDN'T SUGGEST THAT
3 IN HIS TESTIMONY IF HE WAS ACTING TO DEFEND WHOEVER
4 THE LADY WAS

5 MR MEADORS I DON'T THINK ANYTHING CAME
6 OUT ON THAT

7 THE COURT I MEAN, I KNOW IT DIDN'T
8 EXCEPT SUBCONSCIOUSLY IT COULD BE, BUT IT IS THE
9 SAME CHARGE ON IT, THOUGH I THINK IF THE JURY
10 WONDERS ABOUT THAT THEY WILL SEND BACK A QUESTION
11 ON IT I DON'T MIND TELLING THEM, YOU KNOW, IF HE
12 WAS ACTING---

13 MR WELLS YOUR HONOR, WE WOULD REQUEST
14 THAT CHARGE

15 THE COURT ALL RIGHT

16 MR MEADORS JUDGE, BEFORE YOU BRING THEM
17 OUT, WE WOULD OBJECT TO THAT THERE WAS NO
18 EVIDENCE OF THAT HE TESTIFIED

19 THE COURT YES, BUT IT IS SUBJECTIVE AND
20 I AM SUPPOSED TO LOOK AT SUBJECTIVE HE THINKS IT
21 MIGHT BE, WHAT IS HIS NAME, PRICE, BACK OF HIS MIND
22 HE THINKS IT MIGHT BE THEY JUST HAD PROBLEMS WITH
23 HIM SHE IS THERE IN THE HOUSE WITH HIM. BUT I'M
24 JUST GOING TO TELL THEM, MR WELLS, IF YOU WANT TO,
25 THAT SHE -- IT IS THE SAME PRINCIPLE

1 MR WELLS YES, YOUR HONOR
2 THE COURT HE STANDS -- WITHOUT
3 REINSTRUCTING THEM ON IT, I MEAN, WITHOUT GOING
4 BACK OVER THE FOUR THINGS
5 MR WELLS THAT'S RIGHT, YOUR HONOR
6 THE COURT SHE HAS GOT TO BE---
7 MR WELLS I UNDERSTAND
8 THE COURT AND SO FORTH
9 MR WELLS I UNDERSTAND
10 THE COURT ALL RIGHT, BRING THEM BACK
11 (WHEREUPON, AT 5 29 P M THE JURY
12 RETURNED TO OPEN COURT FOR THE
13 FOLLOWING ADDITIONAL CHARGE)
14 THE COURT ALL RIGHT, JURORS, IN JUST A
15 SECOND WHEN YOU GO BACK THIS TIME YOU CAN START
16 DELIBERATING THEY WILL BE BRINGING THE EVIDENCE
17 BACK TO YOU
18 THERE IS JUST ANOTHER PROPOSITION OF THE
19 LAW OF SELF-DEFENSE, I HAVE TO INSTRUCT YOU ON
20 EVERY POSSIBLE SCENARIO
21 IF YOU TAKE ANOTHER PERSON'S LIFE IN
22 DEFENSE OF ANOTHER PERSON WHO IS A HOUSEHOLD MEMBER
23 OR WHO IS IN YOUR HOUSEHOLD, THE RIGHT TO INTERVENE
24 TO PROTECT ANOTHER PERSON IS SUBJECT TO THE SAME
25 RIGHTS AND LIMITATIONS ON THE ISSUE OF SELF-

JURY QUESTION

573

1 DEFENSE

2 IN OTHER WORDS, IF SOMEBODY IS IN THE HOUSE
3 WITH YOU AND SOMEBODY ATTACKS THEM, YOU CAN COME TO
4 THEIR AID JUST AS THOUGH THEY WERE ACTING IN SELF-
5 DEFENSE, PROVIDED THE PERSON WHOSE AID YOU COME TO
6 WAS WITHOUT FAULT IN BRINGING ON THE CONTROVERSY,
7 AND SO FORTH AND SO FORTH SAME ELEMENTS OF SELF-
8 DEFENSE OKAY?

9 (WHEREUPON, AT 5 30 P M THE
10 JURY RETIRED TO THE JURY ROOM)
11 THE COURT ALL RIGHT, Y'ALL CHECK YOUR
12 EXHIBITS

13 (WHEREUPON, AT 5 35 P M THE
14 JURY WAS INSTRUCTED TO BEGIN
15 DELIBERATIONS)

16 (WHEREUPON, AT 8 31 P M THE
17 FOLLOWING OCCURRED)

18 THE COURT SINCE YOU CAN'T HAVE
19 MEANINGFUL CONVERSATION WITH JURORS, THEY DON'T
20 SEND OUT QUESTIONS WITH ADEQUATE SPECIFICITY TO
21 ADDRESS THEM, THEY JUST SEND OUT DEFINITION OF
22 (1) MALICE AND (2) AFORETHOUGHT

23 SO, ANYBODY HAVE ANY SUGGESTIONS ON WHAT I
24 SHOULD TELL THEM? I WOULD RATHER HEAR IT NOW THAN
25 I TELL THEM SOMETHING AND YOU SAY, "JUDGE, YOU

1 SHOULD HAVE SAID SUCH AND SUCH "

2 I DON'T WANT TO HAVE TO CHARGE THEM THE
3 WHOLE THING AGAIN, WHICH THEY MIGHT WANT, BECAUSE
4 YOU CAN'T JUST BREAK IT DOWN

5 MR MEADORS WHATEVER YOUR HONOR THINKS
6 THE DEFINITION OF MALICE ITSELF AND AFORETHOUGHT
7 LIKE THE QUESTION IS, THE BEST YOU COULD JUST
8 ANSWER THOSE

9 THE COURT FROM PAST EXPERIENCE, JURORS
10 TEND TO CONFUSE MALICE WITH INTENT TO KILL, SO I'M
11 GOING TO ADDRESS THAT WHETHER THEY ASK FOR IT OR
12 NOT

13 MR WELLS ALL RIGHT

14 THE COURT I AM GOING TO TELL THEM, YOU
15 KNOW, THE STATE HAS GOT TO PROVE THAT HE COMMITTED
16 A CRIME BEYOND A REASONABLE DOUBT, INCLUDING
17 EVIDENCE OF SELF-DEFENSE I AM NOT TELLING THEM
18 WHAT TO DO BEFORE THEY CAN FIND HIM GUILTY OF
19 ANYTHING THEY HAVE TO FIND THAT HE DIDN'T ACT IN
20 SELF-DEFENSE, THAT IT WAS AN INTENTIONAL KILLING,
21 MORE OR LESS

22 (WHEREUPON, AT 8 34 P M THE JURY
23 RETURNED TO OPEN COURT FOR THE
24 FOLLOWING)

25 THE COURT ALL RIGHT, JURORS, I NEVER

JURY QUESTION

575

1 SAID IT WAS EASY BEING A JUROR, YOU KNOW AND
2 UNFORTUNATELY WE CAN'T HAVE ANY MEANINGFUL
3 CONVERSATION WITH Y'ALL, YOU KNOW IF WE COULD
4 HAVE SOME CONVERSATION WITH YOU IT COULD CLEAR UP
5 THE THINGS YOU DISCUSSED, BUT I TOLD YOU AT THE
6 START I HAVE TO GIVE YOU THE LAW IN THE ABSTRACT,
7 I CAN'T BE FACT SPECIFIC WITH IT I CAN'T TELL YOU
8 WHETHER YOU SHOULD FIND X OR YOU SHOULD FIND Y
9 THAT IS UP TO YOU THE LAW THAT I GIVE YOU, IT IS
10 ALWAYS IN THE ABSTRACT

11 NOW, YOU JUST ASKED THAT I DEFINE MALICE
12 AND I DEFINE AFORETHOUGHT

13 ALL RIGHT, IT IS NOT THAT SIMPLE, ALTHOUGH
14 I AM GOING TO TRY TO LIMIT IT TO THAT BECAUSE I
15 HAVE TO REALLY CHARGE YOU ON MURDER AND
16 MANSLAUGHTER AND ALL THAT STUFF AGAIN IF YOU REALLY
17 WANT IT, BUT IF YOU DON'T, IF YOU NEED FURTHER
18 INSTRUCTIONS AFTER I CONCLUDE THIS IF YOU WOULD
19 WRITE IT DOWN BUT THINK IT OUT AND DO MORE THAN
20 JUST ONE WORD OKAY?

21 NOW, AS YOU UNDERSTAND, THE INDICTMENT
22 CHARGES JOHNNY GAINNEY WITH THE CRIME OF MURDER
23 MURDER IS THE FELONIOUS KILLING OF ONE HUMAN BEING
24 BY ANOTHER WITH MALICE AFORETHOUGHT, EXPRESS OR
25 IMPLIED OR INFERRED OKAY?

1 THE CHARGE INCLUDES MANSLAUGHTER, WHICH IS
2 KILLING ANOTHER PERSON WITHOUT MALICE UNDER
3 SUFFICIENT LEGAL PROVOCATION, AND SO FORTH

4 THE STATE HAS THE BURDEN OF CONVINCING YOU
5 12 JURORS BEYOND A REASONABLE DOUBT THAT MR GAINNEY
6 DID NOT DO THE KILLING IN SELF-DEFENSE THEY HAVE
7 TO -- I'M NOT TELLING YOU HOW TO MAKE YOUR
8 DECISION, BUT FIRST -- OFTENTIMES JURORS, I DON'T
9 KNOW, YOU KNOW, INTENT TO KILL AND MALICE ARE NOT
10 REALLY THE SAME THING YOU CAN KILL SOMEONE WITH
11 MALICE, AS I DEFINED, IF YOU ARE ACTING IN SELF-
12 DEFENSE THE JURY WOULD STILL FIND THE INDIVIDUAL
13 GUILTY SO FIRST I THINK YOU NEED TO PASS ON THE
14 ISSUE OF WHETHER MR GAINNEY ACTED IN SELF-DEFENSE,
15 AS I DEFINED THAT TO YOU AND I HAVE NO OPINION ON
16 THAT THAT IS JUST WHAT HAS TO TRANSPIRE BEFORE
17 YOU CAN FIND HIM GUILTY OF EITHER MURDER OR
18 MANSLAUGHTER

19 NOW, WHAT YOU ASKED IS THE DEFINITION OF
20 MALICE MALICE, OF COURSE, IS A TERM OF ART IT
21 IS JUST A LEGAL TERM IT IS NOT SOMETHING THAT YOU
22 TALK ABOUT ALL THE TIME MALICE INDICATES A FORMED
23 PURPOSE AND DESIGN TO DO A WRONGFUL ACT UNDER
24 CIRCUMSTANCES THAT WOULD EXCLUDE ANY LEGAL RIGHT TO
25 DO THAT MALICE IS A TERM OF ART THAT IMPARTS

JURY QUESTION

577

1 WICKEDNESS AND EXCLUDES A JUST CAUSE OR EXCUSE IT
2 IS SOMETHING THAT SPRINGS FROM WICKEDNESS, FROM
3 DEPRAVITY, FROM A DEPRAVED SPIRIT ALL THOSE WORDS
4 LIKE THAT

5 MALICE CAN BE EXPRESS, AS I TOLD YOU THAT
6 IS WHEN SOMEBODY SAYS, "I HATE THAT S O.B , I'M
7 GOING TO GO GET MY GUN AND KILL HIM " THAT IS
8 EXPRESS MALICE WE DON'T HAVE THAT HERE, YOU
9 UNDERSTAND THAT

10 IF MALICE EXISTS IN THIS CASE, AND THAT IS
11 FOR YOU TO DECIDE BASED UPON YOUR VIEW OF THE
12 EVIDENCE, IT WOULD HAVE TO BE PROVED BY
13 CIRCUMSTANTIAL EVIDENCE

14 NOW, IF A PERSON KILLS ANOTHER WITH THE USE
15 OF A DEADLY WEAPON, YOU CAN CONSIDER THAT ON THE
16 ISSUE OF MALICE IT IS POSSIBLE FOR A JURY TO
17 INFER BECAUSE SOMEONE USED A DEADLY WEAPON AND
18 KILLED SOMEONE THAT MALICE EXISTED. BUT THAT IS
19 JUST A PERMISSIBLE INFERENCE YOU ARE NOT BOUND BY
20 THAT YOU TAKE ALL THE CIRCUMSTANCES IN THE CASE
21 AND WEIGH THAT

22 AFORETHOUGHT JUST SIMPLY MEANS BEFORE THE
23 FATAL SHOT IS FIRED THE PERSON MUST KNOW WHAT HE IS
24 DOING OKAY? JUST LIKE BEFOREHAND I EXPLAINED
25 TO YOU EARLIER, AND IT MIGHT HAVE CONFUSED YOU,

1 THAT PREMEDITATION THAT YOU SEE ON TV IS NOT AN
2 ELEMENT WHAT WE DO IS AFORETHOUGHT, A PERSON HAS
3 TO HAVE MALICE BEFORE THEY SHOOT SOMEONE IT JUST
4 HAS TO PREDATE TAKING THE FATAL ACTION LIKE THAT
5 SOMEONE COULD ACTUALLY KILL SOMEONE WITHOUT
6 MALICE AND THEN SAY, "BOY, I'M GLAD I KILLED HIM,"
7 YOU KNOW IF THEY DIDN'T HAVE MALICE BEFORE THEY
8 DID IT, THAT IS NOT AFORETHOUGHT IT DOESN'T HAVE
9 TO EXIST IN THE MIND OF THE PERSON WHO KILLS
10 SOMEONE FOR ANY SPECIFIC LENGTH OF TIME, IT JUST
11 MUST PREDATE THE FIRING OF THE BULLET, THE STABBING
12 SOMEONE, WHATEVER
13 YOU KNOW, THAT IS REALLY ALL YOU HAVE ASKED
14 ME TO DEFINE I COULD GO ON AND ON WITH IT
15 MALICE IS AN ABSOLUTE ELEMENT OF MURDER IT IS NOT
16 APPLICABLE ON THE CHARGE OF MANSLAUGHTER
17 YOU MUST CONSIDER ALL THE EVIDENCE IN THE
18 CASE AND IF YOU FIND, INCLUDING THE EVIDENCE
19 TOUCHING ON SELF-DEFENSE, AND IF YOU FIND THE STATE
20 CONVINCED YOU BEYOND A REASONABLE DOUBT THAT MR
21 GAINNEY IS GUILTY OF MURDER OR MANSLAUGHTER, HE
22 CAN'T BE GUILTY OF BOTH, INCLUDING EVIDENCE OF
23 SELF-DEFENSE, YOU WOULD FIND HIM GUILTY IF NOT,
24 FIND HIM NOT GUILTY
25 IF YOU NEED ANY FURTHER INSTRUCTIONS, WRITE

JURY QUESTION

579

1 DOWN A LITTLE MORE DETAIL, BUT I CAN'T TELL YOU
2 THIS HAPPENED OR THAT HAPPENED AND YOU SHOULD REACH
3 THAT CONCLUSION

4 (WHEREUPON, AT 8 40 P M THE
5 JURY RETIRED TO THE JURY ROOM
6 TO CONTINUE DELIBERATIONS)
7 THE COURT· MS McCURDY, THERE IS THE
8 NOTE

9 (JURY QUESTION MARKED AS COURT
10 EXHIBIT 1)

11 MR MEADORS JUDGE, JUST FOR MY
12 EDIFICATION, DID YOUR HONOR SAY THERE WASN'T ANY
13 EVIDENCE OF EXPRESS MALICE IN THIS CASE? I
14 COULDN'T HEAR YOU I THOUGHT YOU SAID THAT ISN'T
15 THE CASE HERE

16 THE COURT I SAID IF A PERSON SAID, "I
17 HATE THAT S O B AND I'M GOING TO GET MY GUN AND GO
18 KILL HIM," AND I DID THAT, THAT WOULD BE EXPRESS
19 MALICE

20 MR MEADORS OKAY I KNOW YOU DID, AND I
21 JUST THOUGHT AFTER THAT YOU SAID---

22 THE COURT WELL, I MEAN, I MIGHT HAVE,
23 BUT I DIDN'T THINK I DID

24 MR MEADORS I AM JUST THINKING ABOUT THE
25 TAPE WHERE HE SAID, "I MEANT TO KILL HIM " THERE

VERDICT

580

1 IS EXPRESS MALICE IN HERE IN THIS CASE

2 THE COURT UNDER A WEIRD VIEWPOINT, YEAH,
3 IF THE JURY FOUND IT

4 MR MEADORS YES, SIR THAT IS ALL I WAS
5 SAYING

6 THE COURT ALL RIGHT THEY WILL EITHER
7 HAVE A VERDICT IN 30 MINUTES OR THEY WON'T HAVE ONE
8 TONIGHT

9 (BREAK)

10 THE COURT OKAY, THE JURY HAS REACHED A
11 VERDICT IS THE STATE READY TO RECEIVE THE
12 VERDICT?

13 MR MEADORS YES, SIR

14 THE COURT IS THE DEFENSE READY?

15 MR WELLS YES, YOUR HONOR

16 THE COURT ALL RIGHT, NOW WE DON'T KNOW
17 WHAT THE VERDICT IS WE HAVE HAD FAMILY MEMBERS OF
18 THE VICTIM HERE AND THEY HAVE BEEN VERY MILD-
19 MANNERED AND HAVEN'T SAID ANYTHING I DON'T NEED
20 ANYBODY CARRYING ON ONE WAY OR THE OTHER AFTER THE
21 VERDICT OKAY? THAT'S ALL I KNOW IT IS HARD
22 ONE WAY OR THE OTHER IT IS GOING TO BE HARD SAME
23 THING OKAY

24 (WHEREUPON, AT 8 46 P M THE
25 JURY RETURNED TO OPEN COURT

VERDICT

581

1 TO REPORT ITS VERDICT)

2 THE COURT OKAY, MR FOREMAN, HAS THE
3 JURY REACHED A VERDICT?

4 FOREMAN YES, WE HAVE

5 THE COURT ALL RIGHT I NEED FOR YOU TO
6 HAND THE SIGNED VERDICT, NOT READ IT, TO MR DOWEY
7 (COURT VIEWS VERDICT FORM)

8 CLERK THANK YOU, YOUR HONOR

9 THIS IS THE STATE OF SOUTH CAROLINA, COUNTY
10 OF KERSHAW, STATE OF SOUTH CAROLINA VERSUS JOHNNY
11 A GAINNEY, DEFENDANT

12 WE, THE JURY, BY UNANIMOUS CONSENT, FIND
13 THE DEFENDANT, JOHNNY A GAINNEY, GUILTY OF
14 MANSLAUGHTER

15 SIGNED BY JAMES P EPPS, JR , FOREPERSON

16 MR FOREPERSON, AND LADIES AND GENTLEMEN OF
17 THE JURY, IF THIS IS YOUR VERDICT, PLEASE SIGNIFY
18 BY RAISING YOUR RIGHT HAND

19 (ALL JURORS COMPLY)

20 THE COURT ANYTHING ELSE REQUIRED OF THE
21 JURY PANEL?

22 MR MEADORS NO, SIR THANK YOU

23 MR WELLS NOTHING FROM THE DEFENSE

24 THE COURT OKAY JURORS, THIS IS THE
25 SITUATION I AM GOING TO SENTENCE HIM IN A MINUTE

1 YOU ARE WELCOME TO HANG AROUND, YOU ARE WELCOME TO
2 LEAVE

3 MURDER CARRIES 30 YEARS TO LIFE
4 MANSLAUGHTER IS UP TO 30 YEARS BOTH OF THEM ARE
5 WHAT YOU CALL NO PAROLE SITUATIONS, YOU KNOW IF I
6 GAVE SOMEBODY FOR MURDER 30, THEY WOULD SERVE 30
7 IF I GAVE THEM LIFE, THEY WOULD SERVE LIFE
8 MANSLAUGHTER, WHATEVER I GIVE HIM HE SERVES
9 VIRTUALLY 100 PERCENT OF IT

10 THAT IS IT YOU ARE WELCOME TO HANG
11 AROUND MS McDONALD SAID IF YOU NEED A STATEMENT
12 SAYING YOU HAVE BEEN HERE, BECAUSE YOUR SERVICE IS
13 COMPLETED FOR THE WEEK, SHE WILL STEP OVER TO THE
14 OFFICE WHENEVER WE BREAK DOWN AND YOU CAN GET IT
15 IF YOU DON'T NEED THE STATEMENT, IT WILL BE
16 INCLUDED WITH YOUR CHECK, WHICH WILL BE MAILED
17 WHEN, TOMORROW PROBABLY?

18 CLERK YES, SIR

19 THE COURT THE CHECK WILL BE MAILED
20 TOMORROW SO Y'ALL CAN HANG AROUND OR Y'ALL CAN
21 GO

22 I AM READY TO SENTENCE

23 (JURY EXCUSED)

24 THE COURT OKAY, MR WELLS, OF COURSE YOU
25 CAN MAKE ANY MOTIONS THAT YOU HAVE

MOTIONS

583

1 MR WELLS YOUR HONOR, AT THIS TIME I
2 WOULD MAKE A MOTION FOR A JUDGMENT N O V , OR IN
3 THE ALTERNATIVE FOR A NEW TRIAL BASED ON THE
4 EVIDENCE AND THE ARGUMENT MADE PREVIOUSLY, RENEWING
5 ALL MOTIONS THAT I HAVE PREVIOUSLY MADE

6 THE COURT IN THE CRIMINAL ARENA I CAN
7 ONLY GRANT A NEW TRIAL I CAN'T SUBSTITUTE MY
8 JUDGMENT FOR THE JURY AND BASED UPON A REVIEW OF
9 THE FACTS IT IS A JURY QUESTION AS TO WHETHER
10 MANSLAUGHTER OR NOT GUILTY WAS OUT THERE

11 (PAUSE)

12 THE COURT YOU CAN FILL IN THE CODES AND
13 EVERYTHING LATER LET'S MOVE WITH IT

14 (PAUSE)

15 THE COURT OKAY, MR GAINNEY, YOU NEED TO
16 COME AROUND

17 (DEFENDANT APPROACHES FOR SENTENCING)

18 THE COURT DOES THE STATE HAVE ANYTHING
19 ELSE THEY WANT PUT IN?

20 MR MEADORS JUDGE, JUST VERY, VERY, VERY
21 BRIEFLY

22 THE COURT TAKE AS MUCH TIME AS YOU WANT
23 I AM IN NO HURRY I JUST LIVE TWO BLOCKS FROM
24 HERE

25 MR. MEADORS JUDGE, I HAVE SPOKEN TO THE

1 FAMILY THEY HAVE ASKED IF I WOULD JUST SPEAK FOR
2 THEM

3 THE COURT SURE

4 MR MEADORS JUDGE, THEY LOVED RANDY
5 AND THEY ARE JUST SORRY HE DIED THE WAY HE DID I
6 THINK THAT IS ALL WE NEED TO SAY THEY DECIDED TO
7 JUST LET ME SPEAK FOR THEM THEY HAVE BEEN IN HERE
8 IN SUPPORT, AND I WANT TO THANK THEM FOR THEIR
9 COOPERATION WITH THE SHERIFF AND MYSELF AND THE
10 SOLICITOR'S OFFICE

11 THE COURT MR WELLS, ANYTHING YOU WOULD
12 LIKE TO SAY?

13 MR WELLS JUDGE, I THINK AS FAR AS THE
14 EVIDENCE FROM THE INCIDENT THAT HAPPENED YOU HAVE
15 HEARD ALL THE EVIDENCE AND YOU HAVE NOT ONLY HEARD
16 THAT YOU HAVE HEARD MY SUMMATION OF THE EVIDENCE,
17 BUT I WOULD ASK YOU TO CONSIDER IN MR GAINNEY'S
18 CASE THAT HE IS 51 YEARS OLD AND HE HAS NOT BEEN A
19 BURDEN ON THE SYSTEM HE HAS NOT BEEN A TROUBLE
20 MAKER IN KERSHAW COUNTY THIS IN KERSHAW COUNTY I
21 BELIEVE IS THE FIRST TIME HE HAS BEEN IN TROUBLE
22 IS THAT RIGHT?

23 MR MEADORS YEAH, THAT'S TRUE, YES, SIR

24 MR WELLS THE ONLY TROUBLE HE HAS BEEN
25 IN, I MEAN, HE IS NOT A SUBSTANCE ABUSER OR ANY

SENTENCING

585

1 OTHER KIND OF THING, SO I WOULD ASK YOU TO CONSIDER
2 HIS PAST RECORD IN PASSING SENTENCE AND ALSO THE
3 PROVOCATION THAT HAS BEEN TESTIFIED TO

4 THE COURT OKAY, MR GAINNEY, YOU HAVE THE
5 RIGHT OF ALLOCUTION, THEY CALL IT WOULD YOU LIKE
6 TO SAY ANYTHING?

7 MR GAINNEY DO WHAT?

8 THE COURT YOU HAVE THE RIGHT TO SPEAK IF
9 YOU WOULD LIKE BEFORE I SENTENCE YOU ANYTHING YOU
10 WOULD LIKE TO SAY?

11 MR GAINNEY NO, SIR

12 THE COURT YOU DON'T WANT TO SAY
13 ANYTHING?

14 MR GAINNEY I AIN'T GOT NOTHING TO SAY

15 THE COURT ALL RIGHT WELL,
16 UNFORTUNATELY, I THINK I PROBABLY SENTENCE MORE
17 HOMICIDES THAN ANY ACTING JUDGE NOW, PARTLY BECAUSE
18 I AM SECOND IN SENIORITY AND PARTLY BECAUSE I'M IN
19 RICHLAND COUNTY ALL THE TIME WHERE THEY HAVE 80
20 SOMETHING HOMICIDES A YEAR HOMICIDES, YOU KNOW,
21 WHERE SOMEBODY DIES, NOT ALWAYS MURDER OR
22 MANSLAUGHTER, FELONY DUI'S AND THINGS LIKE THAT I
23 WEIGH ALL THE SITUATION OF COURSE, NOTHING IS
24 GOING TO BRING THE DECEDENT BACK, YOU UNDERSTAND
25 THAT

1 MR GAINNEY YES, SIR

2 THE COURT AND YOU CERTAINLY WERE NOT

3 SEEKING HIM OUT, AS FAR AS I CAN TELL YOU HAD NO

4 BAD BLOOD AGAINST HIM, OR ANYTHING LIKE THAT, NEVER

5 HAD A CONFRONTATION WITH HIM IN THE LIGHT MOST

6 FAVORABLE TO YOU, YOU ARE AWAKENED AND YOU TAKE

7 ACTION YOU THINK IS REASONABLE, IN THE LIGHT MOST

8 FAVORABLE TO YOU THE JURY FOUND THAT YOU WERE

9 PROVOKED BUT YOU SHOULDN'T HAVE KILLED HIM

10 SO WHAT I DO, FOR BETTER OR WORSE, MR

11 GAINNEY, IS PRETTY SIMPLE IF A PERSON IS NOT AT

12 FAULT AND DO NOT GO INTO A CONFRONTATIONAL

13 SITUATION AND ARE NOT ARMED WHEN A CONFRONTATION

14 ARISES, I GIVE THEM WHAT I THINK IS A MINIMAL

15 SENTENCE, WHICH IS PRETTY SEVERE BECAUSE OF YOUR

16 HEALTH PROBLEMS AND YOUR AGE AND EVERYTHING, AND

17 THEN I ADD TO IT BASED ON A PERSON'S PAST CONDUCT

18 AND THE SEVERITY OF IT, AND SO FORTH BUT THE

19 MINIMAL SENTENCE THAT I GIVE IN THESE SITUATIONS IF

20 YOU KILL THEM IS USUALLY 15 YEARS THAT IS WHAT I

21 SENTENCE YOU TO

22 MR MEADORS THANK YOU, YOUR HONOR

23 (WHEREUPON, THE TRIAL ADJOURNED)

24

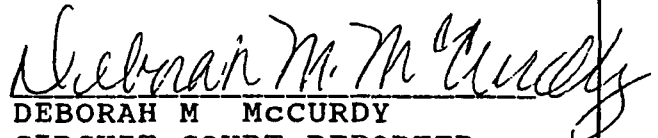
25

CERTIFICATE

I, THE UNDERSIGNED DEBORAH M McCURDY,
OFFICIAL COURT REPORTER FOR THE FIFTH JUDICIAL
CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY
CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND
COMPLETE TRANSCRIPT OF RECORD OF ALL THE
PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE
TRIAL OF THE CAPTIONED CAUSE IN THE CRIMINAL
COURT FOR KERSHAW COUNTY, SOUTH CAROLINA, ON THE
14TH, 15TH AND 16TH OF MAY, 2002

I DO FURTHER CERTIFY THAT I AM NEITHER OF
KIN, COUNSEL NOR INTEREST TO ANY PARTY HERETO

NOVEMBER 8, 2002


DEBORAH M McCURDY
CIRCUIT COURT REPORTER

MY COMMISSION EXPIRES
MAY 24, 2009

DEBORAH M McCURDY
CIRCUIT COURT REPORTER

WITNESSES

Thomley

KCSD

COURT OF GENERAL SESSIONS

March

TERM 2002

THE STATE

VS

Johnny A. Gainey

ACTION OF GRAND JURY

TRUE BILL

 MAR 25 2002
Foreman of Grand Jury

VERDICT

Foreman of Petit Jury

Date

The State of South Carolina,

County of Kershaw

Indictment for Murder

16-13-10
Felony
0116

STATE OF SOUTH CAROLINA)

In the Court of Common Pleas

County of Kershaw)

2004CP 28377

Johnny A. Hainey #284181
Full name and prison number if any of applicant.)

APPLICATION FOR

POST-CONVICTION RELIEF

v)

State of South Carolina
Name of Respondent)CLERK OF COURT
KERSHAW COUNTY SC
01/11/04 AM 11:35INSTRUCTIONS - 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 it clear to which question any such continued answer refers.

Since every application must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicant should, therefore, exercise care to assure that all answers are true and correct.

If the applicant 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 applicant was convicted.

- 1 Place of detention Penana Correctional Institution - 22-B-144 - 610 Hwy. 9 West - Bennettsville, South Carolina 29512
- 2 Name and location of Court which imposed sentence Kershaw County General Sessions - P.O. Box 1557 - Camden, South Carolina 29020
- 3 The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed
 - (a) 2002-B5-28-432 murder
 - (b) _____
 - (c) _____
- 4 The date upon which sentence was imposed and the terms of the sentence
 - (a) May 14th-16th, 2002 fifteen (15) years
 - (b) _____
 - (c) _____

5 Check whether a finding of guilty was made

(a) after a plea of guilty _____

(b) after a plea of not guilty after a plea of not guilty

(c) after a plea of nolo contendere _____

6 Did you appeal from the judgment of conviction or the imposition of sentence? _____

yes

7 If you answered "yes" to (6), list

(a) the name of each Court to which you appealed

1

the South Carolina Court of Appeals

11

111

(b) the result in each such Court to which you appealed

1

Dismissed

11

111

(c) the date of each such result

1

March 1st, 2004

11

111

(d) if known, citations of any written opinion or orders entered pursuant to such results

1

Up. Op. No. 2004-UP-146

11

111

8 If you answered "no" to (6), state your reasons for not so appealing

(a)

N/A

(b)

(c)

9 State concisely the grounds on which you base your allegation that you are being held in custody unlawfully

(a) Ineffective assistance of trial counsel

(b) subject matter jurisdiction

(c) See initial brief, hereto appended

10 State concisely and in the same order the facts which support each of the grounds set out in (9)

(a) See: Initial Brief; hereto filed for all grounds
alleged in (9)

(b) _____

(c) _____

11 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 petitions in State or Federal Courts for habeas corpus or post-conviction relief?

no

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7) no

(d) any other petitions, motions or applications in this or any other Court?

no

12 If you answered "yes" to any part of (11), list with respect to each petition, motion or application

(a) the specific nature thereof

I The South Carolina Court of Appeals- on Petition for
II rehearing
III _____
IV _____

(b) the name and location of the Court in which each was filed

I The South Carolina Court of Appeals
II _____
III _____
IV _____

(c) the disposition thereof

I Petition dismissed and denied
II _____
III _____
IV _____

(d) the date of each such disposition

I April 22nd, 2004
 II _____
 III _____
 IV _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition

I (none)
 II _____
 III _____
 IV _____

13 Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? no

14 If you answered "yes" to (13), identify

(a) which grounds have been presented

I N/A
 II _____
 III _____

(b) the proceedings in which each ground was raised

I N/A
 II _____
 III _____

15 If any ground set forth in (9) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented

(a) first time challenge on all grounds alleged in (9)
 (b) _____
 (c) _____

16 Were you represented by an attorney at any time during the course of

(a) your arraignment and plea? no
 (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 application with respect to this conviction, which you filed? no

17 If you answered "yes" to one or more parts of (16), list

(a) the name and address of each attorney who represented you

i John W. Wells, Esq. - P.O. Box 10 - Lugoff, South Carolina 29078
 ii Joseph L. Savitz, Esq. - 1122 Lady St. - Suite 240 - Columbia, S.C. 29201
 iii _____

(b) the proceedings at which each such attorney represented you

i trial and sentencing
 ii Direct Appeal
 iii _____

18 State clearly the relief you seek in filing this application

conviction and sentence vacated or new trial
granted

19 Are you now under sentence from any other court that you have not challenged?

no

STATE OF SOUTH CAROLINA)

COUNTY OF Lexington)

VERIFICATION

I, Anthony Davis, 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

Anthony Davis

Sworn to and subscribed before me

This 12th day of MAY, 2004.

Deborah W. Burch L.S.
Notary Public for South Carolina

My Commission Expires 08-06-2009

FILE FOR RECORD
MAY 21 AM 11 36
J
CLERK OF COURT
LEXINGTON COUNTY SC

APPLICATION TO PROCEED WITHOUT PREPAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, Anthony Davis, 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 or 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 proceeding or give security therefor

Anthony Davis
Applicant

Sworn to and subscribed before me

This 12th day of MAY, 2004.

Deborah W. Burch L.S.
Notary Public for South Carolina

My Commission Expires 08-06-2009

ORIGINAL

STATE OF SOUTH CAROLINA)
)
 COUNTY OF KERSHAW)

IN THE COURT OF COMMON PLEAS

JOHNNY A GAINES, 284181,)
 Applicant,)
)
 v)
 THE STATE,)
 Respondent)

04-CP-28-377

AMENDED APPLICATION
 FOR POST-CONVICTION RELIEF

06 JUN 13
 KERSHAW COUNTY SC

At the instruction of the Applicant in the above-captioned matter, his undersigned counsel, asks that his Application for Post-Conviction Relief be amended to include the following additional allegations

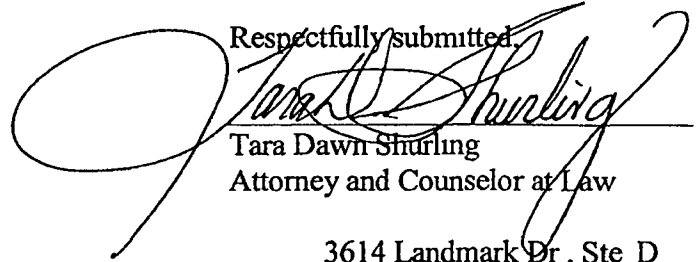
- 1 Applicant alleges that the trial court lacked subject matter jurisdiction to enter judgment against the Applicant where his indictment for murder was fatally defective in that it failed to state the time and place of death of the victim
- 2 Trial counsel was ineffective for failing to challenge the sufficiency of the indictment against him for murder
- 3 Applicant alleges that Trial Counsel was ineffective for not impressing upon the Court that the deceased victim was a drug addict and alcoholic with a history of criminal activity and violence
- 4 Applicant alleges that Trial Counsel was ineffective for not bringing out Applicant's limited physical and mental capacities
- 5 Trial counsel was ineffective for failing to obtain a forensic pathologist to review the victim's autopsy to determine whether the physical evidence supported the State's theory of the case
- 6 Trial counsel was ineffective in that he failed to adequately prepare and submit the Applicant's self-defense claim

The Applicant asserts that the combined effect of the errors alleged in his original Application for Post-Conviction Relief as well as the amendments contained herein, establish that he received ineffective assistance of counsel both prior to and during his trial in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution as well as

cc Shuler
 4.6.13

Article I, Section 14 of the South Carolina Constitution

Respectfully submitted,

Tara Dawn Shurling
Attorney and Counselor at Law3614 Landmark Dr , Ste D
Columbia SC 29204
803-738-8622
803-738-1600 (Fax)

ATTORNEY FOR APPLICANT

This 8th day of June, 2006
Columbia, SC

ORIGINAL

STATE OF SOUTH CAROLINA)
)
 COUNTY OF KERSHAW)

IN THE COURT OF COMMON PLEAS

JOHNNY A GAINES, 284181,)
 Applicant,)
)
 v)
 THE STATE,)
 Respondent)

04-CP-28-377

CERTIFICATE OF SERVICE

06 JUN 13 AM 11 18
 CLERK OF COURT
 KERSHAW COUNTY SC

The undersigned hereby certifies that one copy of the Amendment to Application for Post-Conviction Relief has been served upon the Honorable Alison Renee Lee by fax, and upon opposing counsel, Robert L Brown, Assistant Attorney General by fax on this the 9th day of June 2006

Brenda Sue Thompson
 Brenda Sue Thompson
 Legal Assistant to Tara Dawn Shurling

SWORN TO BEFORE me this 9th day
 of June, 2006
Gaylon Warner (L S)
 Notary Public for South Carolina
 My Commission Expires 2-21-12

STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW

IN THE COURT OF COMMON PLEAS

04-CP-28-377

Johnny A. Gaaney, #284181,

Applicant,

v

RETURN

State of South Carolina,

Respondent

FILED FOR RECORD
04 OCT -6 AM 11 50
JOYCE McDONALD
CLERK OF COURT
KERSHAW COUNTY S.C.

The Respondent, making its Return to the application for post conviction relief (PCR) filed May 21, 2004, would respectfully show this Court

I

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. The Applicant was indicted at the March 2002 term of the Richland County Grand Jury for murder (02-GS-28-00432). He was represented by Deborah Ahrens and Jason Chehosky, Esquire. On May 15, 2002, he underwent trial by jury and was convicted of voluntary manslaughter. He was represented by John Wells, Esquire. He was sentenced by the Honorable J. Ernest Kinard to confinement for a period of fifteen years. A timely notice of intent to appeal was filed and perfected on the Applicant's behalf. In an unpublished opinion, 04-UP-146, the Court of Appeals on March 1, 2004, affirmed the conviction.

Attached herewith and incorporated herein by reference are the records of the Richland County Clerk of Court regarding the subject convictions, the Applicant's records from the South

Carolina Department of Corrections, the guilty plea transcript, appellate records, and the application for PCR. Any of the above not so attached will be forwarded upon receipt.

II

In his current Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

- 1 Ineffective assistance of counsel
- 2 Circuit court lacked subject matter jurisdiction
- 3 Fourth Amendment violation
- 4 Miranda rights violated

III

The Respondent interprets each of the Applicant's allegations to be claims that he received ineffective assistance of counsel. 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, 334 S. E. 2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "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." Strickland v. Washington, 466 U. S. 668, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 692 (1984), Butler, Id.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, Id. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S. C. 115, 386 S. E. 2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S C at 117, 386 S E 2d at 625, *citing* Strickland. 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, 300 S C at 117-18, 386 S E 2d at 625. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v Lockhart, 474 U S 52, 106 S Ct 366, 88 L Ed 2d 203 (1985).

The Respondent submits that the 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, the 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

The Respondent therefore requests that this Court convene an evidentiary hearing solely on the issue of ineffective assistance of counsel. As to all other allegations, the Respondent moves for summary dismissal pursuant to S C Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

V

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied

VI

WHEREFORE, having made its Return, the Respondent requests that a hearing be held solely on the allegations made in the Applicant's application for relief

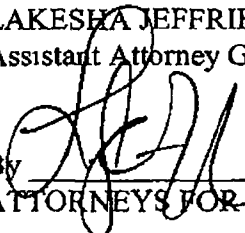
Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W McINTOSH
Chief Deputy Attorney General

SALLEY W ELLIOTT
Assistant Deputy Attorney General

LAKESHA JEFFRIES
Assistant Attorney General

By 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P O Box 11549
Columbia, SC 29211
Telephone (803) 734-3737

September 30, 2004



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTIK
ATTORNEY GENERAL

STATE OF SOUTH CAROLINA
IN THE CIRCUIT COURT

Case No 2004-CP-28-377

JOHNNY A. GAFFEY, S C D C NO 284181,

Applicant,

v

STATE OF SOUTH CAROLINA,

Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Return of the Respondent been served upon opposing counsel, Tara Dawn Shurling, by mailing one (1) copy in an envelope properly addressed with postage prepaid this 5th day of October 2004, to the below address

Ms Tara Dawn Shurling, Esquire
Law Offices of Tara Dawn Shurling
3614 Landmark Drive, Suite D
Columbia, South Carolina 29204

ROBERT M. PEELE III
LEGAL ASSISTANT

FILED FOR RECORD
04 OCT -6 AM 11 50
JOYCE McDONALD
CLERK OF COURT
Kershaw County S.C.

ORIGINAL

STATE OF SOUTH CAROLINA)
)
 COUNTY OF KERSHAW)

IN THE COURT OF COMMON PLEAS

JOHNNY A GAINEY, 284181,)
 Applicant,)

04-CP-28-377

v)
 THE STATE,)
 Respondent)

AMENDED APPLICATION
 FOR POST-CONVICTION RELIEF

At the instruction of the Applicant in the above captioned matter, his undersigned counsel, asks that his Application for Post-Conviction Relief be amended to include the following additional allegations

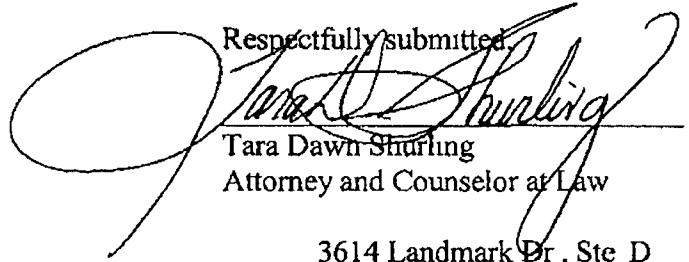
- 1 Applicant alleges that the trial court lacked subject matter jurisdiction to enter judgment against the Applicant where his indictment for murder was fatally defective in that it failed to state the time and place of death of the victim
- 2 Trial counsel was ineffective for failing to challenge the sufficiency of the indictment against him for murder
- 3 Applicant alleges that Trial Counsel was ineffective for not impressing upon the Court that the deceased victim was a drug addict and alcoholic with a history of criminal activity and violence
- 4 Applicant alleges that Trial Counsel was ineffective for not bringing out Applicant's limited physical and mental capacities
- 5 Trial counsel was ineffective for failing to obtain a forensic pathologist to review the victim's autopsy to determine whether the physical evidence supported the State's theory of the case
- 6 Trial counsel was ineffective in that he failed to adequately prepare and submit the Applicant's self defense claim

The Applicant asserts that the combined effect of the errors alleged in his original Application for Post Conviction Relief as well as the amendments contained herein, establish that he received ineffective assistance of counsel both prior to and during his trial in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution as well as

cc Shuler
 4 6
 12

Article I, Section 14 of the South Carolina Constitution

Respectfully submitted,

A large, stylized handwritten signature in black ink, which appears to read "Tara Dawn Shurling". The signature is written over a horizontal line.

Tara Dawn Shurling
Attorney and Counselor at Law

3614 Landmark Dr, Ste D
Columbia SC 29204
803-738-8622
803-738-1600 (Fax)

ATTORNEY FOR APPLICANT

This 8th day of June, 2006
Columbia, SC

ORIGINAL

STATE OF SOUTH CAROLINA)
)
 COUNTY OF KERSHAW)

IN THE COURT OF COMMON PLEAS

JOHNNY A GAINES, 284181,)
 Applicant,)
)
 v)
 THE STATE,)
 Respondent)
 _____)

04-CP-28-377

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Amendment to Application for Post-Conviction Relief has been served upon the Honorable Alison Renee Lee by fax, and upon opposing counsel, Robert L. Brown, Assistant Attorney General by fax on this the 9th day of June 2006

Brenda Sue Thompson
 Brenda Sue Thompson
 Legal Assistant to Tara Dawn Shurling

SWORN TO BEFORE me this 9th day
 of June, 2006
Angela Warner (LS)
 Notary Public for South Carolina

My Commission Expires 2-21-12

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF KERSHAW) 2004-CP-28-0377

Johnny A Gainey,)
Plaintiff/Applicant,)
vs) TRANSCRIPT OF RECORD
The State of South Carolina,)
Defendant)

December 5, 2006
Columbia, South Carolina

B E F O R E

HONORABLE L CASEY MANNING, JUDGE

A P P E A R A N C E S
TARA D SHURLING, ESQUIRE
Attorney for Plaintiff/Applicant

ROBERT L BROWN, ESQUIRE
Attorney for the State

Crystal Holmes
Official Court Reporter

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E X H I B I T S

NO DESCRIPTION

I D EVD

(REPORTER'S NOTE NO EXHIBITS WERE INTRODUCED AT THE
HEARING)

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I N D E X

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
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John W Wells

By Ms Shurling	5			
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Steven Taylor

By Ms Shurling	13/32			
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Vanessa Taylor

By Ms Shurling	21			
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Johnny Gainey

By Ms Shurling	23			
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Ray Jordan

By Ms Shurling	33			
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Cecil Gainey

By Ms Shurling	38			
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Certificate of Reporter 44

1
2
3 TUESDAY, DECEMBER 5, 2006

4 MR BROWN May it please the Court

5 THE COURT Yes, sir

6 MR BROWN This is Johnny Gainey versus the
7 State of South Carolina It's docketed at 2004-CP-28-
8 377 out of Kershaw County The return gives an
9 accurate procedural history and I will defer to the
10 Applicant at this time

11 THE COURT All right, Ms Shurling

12 MS SHURLING Thank you, Your Honor For
13 the record I'm Tara Shurling I was court appointed
14 to represent Johnny Gainey who's case is docketed at
15 04-CP-28-377 This is a Kershaw County case
16 Your Honor, I would inquire as to whether you
17 have a copy of the Amended Application for Post
18 Conviction Relief in your packet?

19 THE COURT Yes, I do

20 MS SHURLING Okay Thank you, Your Honor
21 At this time, Your Honor, we would ask that trial
22 counsel, Mr John Wells, take the stand

23 THE COURT Come around, Mr Wells

24 (JOHN W WELLS, after being duly sworn,
25 testified as follows)

1 THE COURT Thank you Go ahead, Ms
2 Shurling

3 MS SHURLING Thank you
4 (Pause)

5 THE COURT You may proceed, Ms Shurling

6 MS SHURLING Thank you

7 DIRECT EXAMINATION

8 BY MS SHURLING

9 Q Mr Wells, do you recall representing Johnny
10 Gainey?

11 A I do

12 Q And have you had an opportunity to review the
13 transcript at all since you tried the case back
14 in '02?

15 A Yes, I have

16 Q Is it fair to say that self-defense was sort of
17 the pivotal issue in this case?

18 A That's correct

19 Q Were you aware that your client, Mr Gainey, had
20 had some fairly serious health considerations?

21 A Yes, I was

22 Q Did you consider introducing additional evidence
23 about his physical and mental infirmities in an
24 effort to bolster your case of self-defense?

25 A Well, we called his treating physician as a

1 witness to prove that he was disabled

2 Q Did you consider presenting any additional
3 witnesses to the fact that he was unable to
4 handle his own affairs, that he was frail and in
5 ill health?

6 A No, I did not consider that

7 Q Were you aware that such witnesses would have
8 been available?

9 A No, I was not

10 Q Okay Did you talk with your client, Mr Gainey,
11 for example about the fact that he had had a
12 personal representative, a conservator --
13 guardian -- a guardian ad litem, I believe,
14 appointed to represent him?

15 A When I was appointed, Mr Gainey was in jail in
16 the Kershaw County Detention Center and I met
17 with Mr Gainey a number of times and we
18 discussed all aspects of the case I remember
19 him telling me that -- you know, naturally I
20 asked him what he did for a living And I
21 remember him telling me he was on social
22 security

23 I believe he told me that he had a guardian
24 but I can't remember I knew that he had been --
25 he was not a good student in school Had not

1 done well academically

2 Q Okay And of course, you had presented through
3 is physician's testimony evidence that he had
4 strokes and was in frail health?

5 A That's correct

6 Q Okay There was a question at trial about an ax
7 that had been on Mr Gainey's property that had
8 allegedly been used by the victim and had
9 disappeared Do you recall that?

10 A Well, the State had -- there's a picture of the
11 ax that was in the truck

12 Q Pardon me, yes

13 A So the ax is in the deceased man's truck when the
14 police got there to do the investigation So I
15 remember about the ax but I don't remember it
16 being missing

17 MS SHURLING A moment's indulgence, Your
18 Honor

19 (Pause)

20 Q Mr Wells, was there any issue at trial about the
21 distance from which the shot was fired?

22 A There were 14 shots fired, nine shots -- there
23 were nine shell casings found in the kitchen of
24 his house There were five found in the yard
25 And it was a big issue at trial as to the

1 distance of the shots There was no powder burns
2 on the victim's clothes The pathologist, Dr
3 Yakoub (phonetic) admitted that all seven shots
4 that hit Randy Price were distance shots

5 Q Okay So given that admission, you did not feel
6 that the testimony of the pathologist was
7 necessary or pertinent to your claim of self-
8 defense?

9 A We did not hire a pathologist I was noticing in
10 my file today as I reviewed it, we had actually
11 issued a subpoena to Dr Yakoub So we must have
12 felt at that time that her testimony would be
13 favorable to us I had been to Newberry and I
14 had interviewed Dr Yakoub about this case and
15 knew to some degree what she would say Of
16 course, the State has a way of kind of twisting
17 things around with the State pathologist

18 So perhaps if we had had our own, that might
19 have been beneficial

20 Q You made an argument for self-defense at trial
21 What -- what was the law in South Carolina at the
22 time with regard to a person's duty to retreat
23 from their home?

24 A Well, a person has no duty to retreat from their
25 own home I mean, that was my understanding of

1 the law

2 Q Okay

3 A But the most important legal issue was the right
4 to keep shooting Once you have the right to
5 shoot, you have the right to keep shooting And
6 we went over that with Judge Kinard I was
7 reading the motion for a directed verdict but he
8 ruled that the time at which you are supposed to
9 stop shooting was a jury issue

10 The way you have 14 shots fired, one of them
11 fatal Two issues, one was how many shots he was
12 entitled to fire and the other one was, which
13 shot killed him We knew which bullet killed him
14 but we didn't know in the sequence of shots where
15 that shot came

16 Q Okay And did you present for Judge Kinard's
17 consideration the law that indicates that once
18 you have triggered the right to use deadly force,
19 that you have a right to continue using such
20 force until such time as you're no longer in
21 fear?

22 A Yes, I'm sure I argued that

23 Q Okay And you in fact argued that to the jury in
24 this case in your closing arguments, didn't you?

25 A Yes, I did

1 Q Did you consider asking a more -- asking for a
2 more specific jury instruction on that particular
3 aspect of the law of self-defense?

4 A I can't remember I know I have the jury
5 instruction The request to -- for instruction's
6 in my file but I can't remember exactly how we
7 worded that request for instruction

8 Q Okay

9 A I can look it up if you want me to

10 Q Would you please?

11 MS SHURLING I apologize for the delay,
12 Your Honor, but this is A pivotal issue

13 THE COURT That's all right

14 (Pause)

15 A All right When a person is justified in firing
16 the first shot, he is justified in continuing to
17 shoot until it is apparent that the danger to his
18 life and body has ceased, State versus Hendrix, a
19 1978 case And this is a copy of that requested
20 charge

21 THE COURT Is that what Judge Kinard
22 actually charged, Mr Wells?

23 MS SHURLING That was my next question

24 Q To your recollection, was that charge or one
25 similar to it given in this case?

1 A Yes, I believe it was

2 Q Okay

3 A I haven't read -- reread the charge but I know
4 that Judge Kinard did not argue with me about the
5 appropriate nature of that charge

6 MS SHURLING A moment's indulgence, Your
7 Honor

8 (Pause)

9 Q Take a look, if you will please, to page 567 of
10 the trial transcript, if you have it And take a
11 look starting at line 22 going over to 568 and
12 see if that isn't almost verbatim the language
13 that you requested

14 A That appears to be what I requested to charge
15 And I certainly would not argue with a judge who
16 charged something that closely ---

17 Q Thank you

18 A --- to what I requested

19 Q How long was the jury out in this case?

20 A I can't recall It was not a really long time
21 It was a matter of several hours, I think

22 Q And ultimately Mr Gainey was convicted of
23 voluntary manslaughter?

24 A Yes, he was

25 Q And Judge Kinard gave him a sentence of 15 years?

1 A That's correct

2 Q Did you consider in your case in mitigation
3 presenting additional testimony or statements
4 from persons who could have testified to how
5 extremely difficult it would be for someone in
6 Mr Gainey's physical condition to survive in a
7 penal institution?

8 A No, I didn't

9 Q In retrospect, do you feel that you should have
10 presented such evidence in mitigation?

11 A Yes

12 Q Mr Wells, I know that this was a difficult case
13 for you And looking back over your file
14 preparing for this hearing, is there anything you
15 can think of here today that you believe you
16 could have done that might have made a difference
17 in the jury's final determination in this case?

18 A No We had a really -- I did not get a good jury
19 and in my opinion Mr Gainey never should have
20 been convicted He was attacked in his own home
21 and he shot the fellow who attacked him But I
22 was unable to convince the jury that he was
23 entitled to fire the fatal shot

24 Q Did you consider filing a motion for
25 reconsideration of sentence in this case?

1 A No And I'll tell you, Judge Kinard had told me
2 throughout the trial that if he got convicted of
3 manslaughter, that was what he was going to give
4 him I mean, he was going to give him 15 years
5 That's the Judge Kinard rule, 15 years

6 Q What plea offers were there in the case?

7 A None

8 Q None at all?

9 A None

10 Q You were dealing with Mr Meadors and Mr Ronald
11 Moak in this case, is that correct?

12 A That's right

13 Q Did you try to get a plea bargain in the case?

14 A No, I did not

15 Q Okay So your client had indicated he would not
16 plea under any circumstances?

17 A That's correct

18 Q Had you had discussions with your client about
19 the kinds of sentences he would be looking at if
20 he were convicted?

21 A Yes I mean, he was charged with murder So we
22 knew that was a life sentence, no question about
23 it

24 Q And likewise, did you discuss with him even if he
25 were convicted of manslaughter what the potential

1 sentences would be?

2 A I'm sure that we talked about that I can't
3 remember -- recall that specific conversation

4 Q Mr Wells, I know this is sort of a difficult
5 question But have you ever had cases where you
6 entertained plea negotiations with the State even
7 without your client actively saying that they're
8 willing to consider a plea?

9 A Yes

10 Q Okay And I guess basically in an effort to get
11 an offer that you can then present to the client
12 and hopefully the client changes their mind?

13 A Yeah We often try to convince a client to plead
14 guilty when they're opposed to doing so Of
15 course, I know more about the risk usually than
16 the client does

17 Q Sure Why didn't you do that in this case?

18 A Mr Gainey told me that he wanted to go to trial
19 He did not believe he had done anything wrong
20 And Mr Meadors and -- Mr Meadors, I think, had
21 the authority in the case and he just never -- he
22 never made me an offer of any type of plea I
23 think that he discussed one time -- I think he
24 said that they might ask for five years or
25 something like that but Mr Gainey was not

1 willing to do five years I mean, he -- he
2 wanted -- he kept on saying, I want to go home
3 He was in jail up until the trial He was not
4 able to make bond

5 Q Now, your witnesses that you did put up were Mr
6 Gainey's doctor?

7 A That's correct

8 Q Someone from SLED?

9 A The SLED expert was the toxicologist And she
10 testified that the victim had cocaine in his
11 system at the time of the incident

12 Q Now the young lady who was purported to have been
13 the girlfriend of the deceased testified for the
14 State, correct?

15 A That's correct

16 Q Although her testimony was somewhat ambiguous in
17 places with regard to your client's culpability,
18 is that right?

19 A That's a fair characterization

20 Q Okay Did you consider presenting -- well, let
21 me back up for the minute Judge Kinard did give
22 a jury instruction, didn't he, that one of the
23 things the jury was entitled to take into
24 consideration was evidence of the reputation of
25 the deceased for violence, didn't he?

1 A I don't recall that but I think -- if it's in the
2 transcript, then he did

3 Q Did you consider presenting any evidence at trial
4 of the deceased's representation for hostility
5 and violence in the community?

6 A No And I cannot remember that he had one I
7 mean, I remember that he was probably an abuser
8 of alcohol and drugs to some degree But I can't
9 recall any criminal record or anything like that
10 that would indicate violent behavior

11 Q Was there not testimony that the girlfriend had
12 sought shelter from Mr Gainey because of the
13 boyfriend?

14 A Yes

15 Q And she had sought shelter from him because her
16 boyfriend was abusive when he was drunk and on
17 drugs?

18 A Yes

19 Q Okay And my question is, did you attempt to
20 ascertain from anyone else whether this man had a
21 reputation for being a mean drunk?

22 A I can't remember I don't think that I did

23 Q Okay And in retrospect, might such testimony
24 have been helpful to you in putting forth your
25 position of self-defense?

1 A Yes, it might have

2 Q Okay Can you think of anything else, Mr Wells,
3 that in retrospect might have made a difference
4 in the jury's decision in this case?

5 A No, I can't think of anything else

6 MS SHURLING A moment's indulgence, Your
7 Honor

8 THE COURT All right

9 (Pause)

10 MS SHURLING No further questions, Your
11 Honor

12 THE COURT Mr Brown?

13 MR BROWN No questions, Your Honor

14 THE COURT You may step down, Mr Wells

15 (The witness leaves the witness stand)

16 THE COURT Anything further?

17 MS SHURLING Yes, sir I would call Mr
18 Steve Taylor

19 THE COURT Steve Taylor

20 (STEVEN TAYLOR, after being duly sworn,
21 testified as follows)

22 THE COURT All right Please take a seat
23 Tell us your full name and spell your last name for
24 the record, sir

25 THE WITNESS My full name is Steven Taylor,

1 T-a-y-l-o-r

2 MS SHURLING Thank you

3 DIRECT EXAMINATION

4 BY MS SHURLING

5 Q Thank you, Mr Taylor How did you first come to
6 know Mr Gainey?

7 A I got a job at the same shop that Johnny worked
8 at We worked together

9 Q Okay And did there actually come a time when
10 you were appointed by the court in Kershaw County
11 to be his guardian?

12 A I was appointed the payee over his disability
13 check, yes, ma'am

14 Q Okay And what was the reason for that
15 assignment of responsibility to you?

16 A Because Johnny had done had two or three strokes
17 right behind one another and the state said that
18 he was incapable of taking care of his own
19 finances

20 Q And during that time period, did you see Mr
21 Gainey pretty often?

22 A At least every day probably

23 Q Okay And was he physically frail in addition to
24 being mentally not alert?

25 A No, you could tell that the strokes had affected

1 him from what he used to be

2 Q Okay Was he in your estimation a physically
3 weak person at the time this incident happened?

4 A Yes, ma'am, I would say he was

5 Q And based on your dealings with him on a day to
6 day basis, would -- would he in your estimation
7 have been capable of physically defending himself
8 against an assault?

9 A No, ma'am

10 Q Okay Now were you at his trial?

11 A No, ma'am, not a lot, I worked in the daytime

12 Q Okay Did you go to his home one time shortly
13 after this incident?

14 A Yes, ma'am

15 Q Do you recall him asking you to locate some axes
16 that belonged to him?

17 A No, ma'am, I don't

18 Q Do you recall looking in his barn at tools for
19 him?

20 A Yeah

21 Q Okay And at the time do you recall seeing axes
22 in the barn?

23 A Yeah I saw some old axes in the barn out there

24 Q Okay And were -- what was the condition of
25 those axes?

- 1 A Maybe just like old junk axes Johnny picked up
2 and saved
- 3 Q Okay Were they dusty?
- 4 A Yeah
- 5 Q Were spider webs on them?
- 6 A I can't -- I can't really remember but, I mean,
7 they were in a barn laying around so, yeah,
8 they'd probably be spider webs on them
- 9 Q Okay Did they appear to have been moved anytime
10 recently?
- 11 A Not from what I saw, no, ma'am
- 12 Q Okay Did anybody ever ask you about this
13 information when you were getting ready for
14 trial?
- 15 A No, ma'am
- 16 Q When he was getting ready for trial, I'm sorry?
- 17 A Huh-uh
- 18 Q Okay How about your wife? I believe her name
19 is Vanessa?
- 20 A Uh-huh
- 21 Q Did she help you out with Mr Gainey at all?
- 22 A No I pretty much just handled Johnny's
23 finances, made sure that his bills was took care
24 of
- 25 Q Okay Did she go with you to his residence when

1 you would go check on him and talk to him?

2 A Oh, yeah

3 Q So she would have been around him on a fairly
4 regular basis like you during that time period?

5 A Yes, ma'am

6 MS SHURLING Okay Thank you, no further
7 questions Please answer any the State has

8 MR BROWN No questions, Your Honor

9 THE COURT All Right You may step down,
10 sir

11 (The witness leaves the witness stand)

12 MS SHURLING Your Honor, we'd call Vanessa
13 Taylor to the stand

14 THE COURT All right Come around, Ms
15 Taylor

16 MS SHURLING I would ask for you to be
17 excused, Mr Taylor, but I assume you want to wait
18 for your wife

19 MR TAYLOR Yes, ma'am

20 (VANESSA TAYLOR, after being duly sworn,
21 testified as follows)

22 THE COURT Please take a seat, ma'am Tell
23 us your full name and spell your last name for the
24 record

25 THE WITNESS My name's Vanessa Taylor, T-a-

1 y-l-o-r

2 DIRECT EXAMINATION

3 BY MS SHURLING

4 Q Mrs Taylor, the last witness was your husband?

5 A Yes, ma'am

6 Q And is it accurate that you, with your husband,
7 had the occasion to see Mr Gainey a good bit
8 back in 2002?

9 A Yes, ma'am, he was our neighbor

10 Q And were you personally familiar, from your own
11 personal observations, with his physical
12 condition at the time?

13 A Yes, ma'am

14 Q How would you describe his physical condition at
15 the time?

16 A He was -- he had -- Johnny used to be in --
17 worked with my dad I've known him since I was
18 about 13 And, you know, he was a good strong
19 man when he was younger but his health had failed
20 a good bit to where we checked on him just about
21 every day If he didn't come to our house, we
22 went to his

23 Q Okay He had had strokes?

24 A Yes, ma'am

25 Q In your estimation, was he physically in any

1 condition to defend himself?

2 A No, ma'am, there's no way He -- even when he
3 was going to his car, you know, he had trouble
4 getting in and out his car, you know, depending
5 on, basically the weather If it was cold, you
6 know, arthritis and depending on his blood
7 pressure So it was different things, you know

8 MS SHURLING No further questions

9 MR BROWN No questions

10 THE COURT All right You may step down
11 (The witness leaves the witness stand)

12 MS SHURLING I call Mr Johnny Gainey to
13 the stand

14 THE COURT Come around, Mr Gainey

15 (JOHNNY GAINNEY, after being duly sworn,
16 testified as follows)

17 THE COURT All right Please take a seat
18 sir Tell us your full name and spell your last name
19 for the record

20 THE WITNESS Johnny Gainey, G-a-i-n-e-y

21 DIRECT EXAMINATION

22 BY MS SHURLING

23 Q Mr Gainey, I want you just to listen to my
24 questions and answer them real slow and
25 carefully, okay?

1 A All right

2 Q All you've got to do is answer the questions
3 directly and tell the truth, all right?

4 A All right

5 Q Prior to your trial, did you talk to your lawyer
6 about people that could present testimony about
7 your physical condition back during the time
8 period when this thing happened?

9 A Well, I -- I thought I told him but I must
10 haven't I -- there's a Dickie Land (phonetic)
11 -- I know Dickie Lane was one of them I tried --
12 I thought I told him but I must didn't

13 Q Well, do you know whether or not you told him
14 about those people and they didn't come or
15 whether you just didn't tell him about them, you
16 don't know?

17 A I don't remember where I told him or not I
18 thought I told him

19 Q Well ---

20 A I must hadn't

21 Q Well did -- did your lawyer ask you about who in
22 your circle of friends and family might could
23 present testimony about what your physical
24 condition was like?

25 A No

1 Q Okay And if he'd asked you, would he (sic) have
2 told you (sic) about those people?

3 A I could have tried to think of somebody to tell
4 him

5 Q Okay Well how about John Stanley Champion?

6 A Well, he's -- he run a beer joint over there in
7 Camden And he -- Ray rented the -- rent the
8 building from him and Ray hired me to work for
9 him That's how I know John Champion He come
10 down to the beer joint

11 Q Okay And would he have been familiar with your
12 reputation for peacefulness in the community?

13 A Yes, ma'am

14 Q And would he have been available to give
15 testimony to that?

16 A Yes, ma'am

17 Q Okay And how about the folks that just
18 testified, the Taylors, Mr and Mrs Taylor,
19 Vanessa and Steve, would you have told your
20 lawyer about them?

21 A Yeah, I probably would of if he, you know, asked
22 me

23 Q Okay And there's somebody named Stanley
24 Williams Why did you want Mr Williams as a
25 witness?

- 1 A He's a good friend
- 2 Q Okay How long has he known you?
- 3 A Probably a year
- 4 Q Pardon?
- 5 A A year
- 6 Q A year?
- 7 A Yes, ma'am
- 8 Q And how did you know him?
- 9 A I met him at the beer joint He come in there
10 and drink beer and stuff like that, just sat and
11 talked We sat there and talked
- 12 Q What was your prior criminal record like, Mr
13 Gainey?
- 14 A Huh?
- 15 Q What was your prior criminal record like?
- 16 A I ain't had no record
- 17 Q Never been in trouble with the law in your life?
- 18 A The only trouble one time back there in 60
19 something with breaking and entering
- 20 Q Okay And you don't have a record for that?
- 21 A I don't think they -- they might have a record
22 for it They ain't -- they aint't brought it up
23 in trial
- 24 Q Okay So they arrested you and charged you but
25 it never went to trial?

1 A They charged me for drunk driving at the trial

2 Q Okay

3 A They said got drunk driving -- drunk driving
4 charge

5 Q But that charge back in the 60's, you never went
6 to court for?

7 A No, never went to court It was just dismissed
8 or whatever they call it

9 Q Oh, okay So you didn't have anything on your
10 record at all?

11 A No, nothing but that drunk driving

12 Q Okay Now, at trial, the State presented
13 testimony that -- that at least appeared to be
14 trying to create the impression that you might
15 have broken your own windows out your trailer,
16 right?

17 A Yeah, that's what they said

18 Q Okay And they presented testimony that no axes
19 were found on your property, didn't they?

20 A Yes, ma'am They said they looked in the
21 building, they didn't find no axes, my two axes
22 in the building

23 Q Okay

24 A I know where I kept them

25 Q So you feel that they tried to create the

1 impression that that ax in the truck might have
2 been planted by you?

3 A Yes, ma'am

4 Q And that you might have broken your own windows
5 out?

6 A Yes, ma'am

7 Q Okay And so you wanted Mr Steve Taylor as a
8 witness to the fact that your axes were still
9 right there on your property, where they had
10 always been

11 A Yes, ma'am, they were in the barn that night when
12 I went to bed

13 Q Okay And you think that if your attorney had
14 questioned Mr Taylor about that and presented
15 evidence about that, it might have made a
16 difference to the jury?

17 A Yes, ma'am

18 Q And when you had Mr Taylor go find those axes in
19 the barn, you left them there, didn't you?

20 A I left them in there standing up there by the
21 door time you go in the barn

22 Q Okay

23 A That was where I left them

24 Q Okay So if your lawyer had gone out to the
25 scene and looked around, he could have found

1 those axes himself in the barn?

2 A Yeah If he didn't want to get dirty Now, you
3 go in my building you get dirty?

4 Q Okay Now, you and I talked about what the
5 possible penalty for manslaughter is, haven't we?

6 A Do what now?

7 Q You and I have talked about the fact that
8 manslaughter carries up to 30 years, haven't we?

9 A Yes, ma'am, I think we did

10 Q Okay And you understood -- I just have to be
11 sure you understand the risks, okay We talked
12 about the fact that if His Honor were to grant
13 you a new trial, if you were convicted by a whole
14 brand new jury of manslaughter, that in theory
15 you could get up to 30 years, you understand
16 that?

17 A Yes, ma'am

18 Q And you're willing to take that risk?

19 A Yes, ma'am

20 Q You feel like in your current health condition
21 you'll survive 85 percent of your 15 year
22 sentence?

23 A No

24 Q And I assume that's a major consideration in
25 deciding whether or not to risk a 30 year one,

1 right

2 A Yeah

3 Q Okay Other than testimony from Mr Champion and
4 Mr Williams, can you think of anything else --
5 and of course the testimony in evidence about the
6 axes Can you think of anything else that your
7 lawyer could have done and didn't do that might
8 have given you a better chance at the jury
9 accepting your self-defense claim?

10 A No, ma'am, I can't think of nothing else

11 Q How about the victim's reputation in the
12 community?

13 A Well, that's what I said I mean, they should a
14 got a record of how bad a person he was
15 Everybody around Camden knowed how bad a person
16 he was About breaking and stealing and stuff
17 like that And that's what I say and I ain't done
18 nothing but he done all -- everything --
19 everything you can name from breaking into
20 people's houses stealing stuff and selling it and
21 stuff like that

22 So that's what I say, if they'd find out
23 about his record and told the jury how bad a
24 record he got, it might have looked good on my
25 side

1 Q And you feel trial counsel was ineffective for
2 neglecting to try to get that evidence in at
3 trial?

4 A Yes, ma'am

5 Q Mr Gainey, have I pretty much covered everything
6 you wanted to cover in your PCR?

7 A (No response)

8 Q With the exception of the testimony of Mr
9 Champion or Mr Williams?

10 A Ray Jordan back there, he might testify

11 Q Okay Other than him, I'm sorry, he's our next
12 witness

13 A Well that's fine

14 Q Okay Other than Mr Jordan and Mr Champion and
15 Mr Williams who couldn't be here today?

16 A I can't think of a name right now

17 Q Okay

18 A Ray knows his name

19 MS SHURLING Okay Thank you, no further
20 questions?

21 THE WITNESS All right, thank you

22 THE COURT Mr Brown

23 MR BROWN No questions, Your Honor

24 THE COURT All right You may step down, Mr

25 Gainey

1 (The witness leaves the witness stand)

2 MS SHURLING Your Honor, I unfortunately have
3 neglected to ask an important question of Mr Taylor I
4 would ask that I be allowed to recall him for one quick
5 question

6 THE COURT Who's Mr Taylor, someone back
7 there?

8 MS SHURLING Mr Taylor

9 THE COURT Any objection, Mr Brown

10 MR BROWN Yes, Your Honor

11 THE COURT Basis of your objection?

12 MR BROWN It's unnecessary

13 THE COURT Come on back up and let her ask the
14 question

15 (Steven Taylor returns to the witness stand)

16 THE COURT You're still under oath, sir

17 MR TAYLOR Yes, sir

18 DIRECT EXAMINATION CONTINUES

19 BY MS SHURLING

20 Q I apologize for not asking to begin with Mr
21 Taylor, were you personally familiar with Mr
22 Gainey's reputation for peacefulness in the
23 community?

24 A Yeah, I knew Johnny wasn't a troublemaker

25 Q And if you had been called upon to testify as a

1 character witness at trial, would you have
2 testified to his reputation for peacefulness in the
3 community?

4 A Yes, ma'am, I would have

5 MS SHURLING Thank you No further questions

6 MR BROWN No questions

7 THE COURT All right You may step down, sir

8 (The witness leaves the witness stand)

9 MS SHURLING Mr Raymond Jordan, please

10 (RAYMOND JORDAN, after being duly sworn,
11 testified as follows)

12 THE COURT All right Please take a seat sir
13 Tell us your full name and spell your last name for the
14 record

15 THE WITNESS Ray Jordan, J-o-r-d-a-n

16 DIRECT EXAMINATION

17 BY MS SHURLING

18 Q Mr Jordan, you're retired, aren't you?

19 A Yes, ma'am

20 Q Where are you retired from working?

21 A From the BF Goodrich in Elgin

22 Q Okay And back in 2001, 2002, did you know

23 Mr Johnny Gainey?

24 A Yes, ma'am, I've known him for 10 or 15, 20 years,
25 I recon

1 MS SHURLING Your Honor, I believe this
2 witness has a little bit of a hearing loss on one side
3 I'm going to stand on this side to make it easy for
4 him to hear me

5 THE COURT I'm not going to stop you

6 THE WITNESS Yeah, I've got a hearing aid I
7 can't hear too good

8 BY MS SHURLING

9 Q Can you hear me now?

10 A Yes, uh-huh

11 Q Okay Did Mr Gainey's attorney ever talk to you
12 prior to his trial?

13 A Say that again?

14 Q Did his lawyer ever interview you before Mr Gainey
15 went to trial?

16 A No, ma'am, I don't think so We went and paid him
17 and he -- yes, ma'am, he talked to us a little bit
18 about the trial, yes, ma'am

19 Q Were you familiar with Mr Gainey's failing health?

20 A Yes, ma'am

21 Q And were you familiar with how the strokes had
22 affected him mentally?

23 A Yes, ma'am

24 Q And were you privy to conversation during this time
25 period about him having a guardian appointed?

1 A Yes, ma'am

2 Q You knew about all of that?

3 A Yes, ma'am, uh-huh

4 Q Okay In your personal opinion, based on your
5 personal observations of Mr Gainey, would he have
6 been physically capable of defending himself
7 against a physical attack during this time period?

8 A No, ma'am, not from a man like that, no, ma'am

9 Q Okay And were you familiar with Mr Gainey's
10 reputation in the community?

11 A Yes, ma'am, very well

12 Q Did he have a reputation in the community as a
13 peaceful person?

14 A He was a very nice person, friendly and honest and
15 no violence about him at all

16 Q Were you familiar with the victim's reputation for
17 violence and aggression in the community?

18 A Yes, ma'am, very well, ma'am

19 Q If called upon to testify, would you have testified
20 at trial to Mr Gainey's reputation for
21 peacefulness?

22 A Yes, ma'am, Mr Gainey's very peaceful

23 Q And likewise, would you have been willing to
24 present testimony to the deceased's reputation in
25 the community for aggression and violence?

1 A No, ma'am, far from it

2 Q Okay You would have been willing to testify to
3 Mr Gainey's reputation for peacefulness?

4 A Yes, ma'am

5 Q Would you have been willing the testify to the dead
6 man's reputation as a violent aggressive person?

7 A Yes, ma'am, very violent, yes, ma'am

8 Q And you were familiar with his general reputation
9 in the community for being that kind of person?

10 A Yes, ma'am

11 Q And you would have had no problem testifying to
12 that?

13 A No, ma'am, not at all

14 Q How long have you lived in this area?

15 A All my life

16 Q And you don't have a prior criminal record
17 yourself, do you?

18 A No, ma'am

19 Q Okay You're a member of a local church in that
20 area?

21 A Yes, ma'am

22 MS SHURLING No further questions, thank you

23 MR BROWN No questions, Your Honor

24 THE COURT Are you Baptist?

25 THE WITNESS Sir?

1 with I'll tell you that now

2 MS SHURLING I'm going to come stand close

3 by Can you hear me?

4 THE WITNESS Yes, ma'am

5 MS SHURLING Okay

6 DIRECT EXAMINATION

7 BY MS SHURLING

8 Q Okay Mr Gainey, what's your relationship to the
9 Applicant, Mr Johnny Gainey?

10 A Brother

11 Q He's your brother?

12 A Yes, ma'am

13 Q Okay And back in 2001, 2002, what was your
14 brother's physical condition?

15 A He had I think a little light stroke and high blood
16 pressure

17 Q Okay And had those -- had the stroke left him
18 physically weaker than he had been before?

19 A It had changed him some

20 Q Okay Based on your personal observations of your
21 brother back during this time period, would he have
22 been able to physically defend himself if someone
23 physically attacked him?

24 A I -- I -- I would say no

25 Q Okay I know he's your brother but you're under

1 oath, are you familiar with your brother's
2 reputation in the community for peacefulness and
3 truthfulness?

4 A As far as -- as long as I been a brother, I ain't
5 never known him to get in no real -- no big trouble
6 or nothing like that

7 Q Okay And is he a peaceful man?

8 A Yes, ma'am

9 Q If you had been called upon to stand up and give
10 testimony in support of your brother's case, would
11 you have been willing to come to court to testify
12 for him?

13 A Yes, ma'am

14 Q Were you there most of the trial anyway?

15 A Ma'am?

16 Q Were you there at the trial?

17 A Yes, ma'am

18 Q And you would have been willing to testify in
19 support of your bother?

20 A Yes, ma'am

21 Q You don't have a prior criminal record yourself, do
22 you?

23 A No, ma'am

24 MS SHURLING Okay Thank you, no further
25 questions

1 Mr Brown?

2 MR BROWN Nothing

3 THE COURT All right Call the next case

4 I'll tell you what Let me give y'all a 10
5 minute break

6 MS SHURLING Thank you

7 MR BROWN Thank you

8 (The Court was in recess)

9 MS SHURLING I needed to put one additional
10 matter on the record After the recess of the case --
11 I'm Tara Shurling, for the record, representing Mr
12 Johnny Gainey

13 THE COURT I'm glad your name hasn't changed

14 MR SHURLING A Mr -- a Mr Dickie Land came
15 up to me after the testimony that was just presented
16 He came voluntarily with another witness and presented
17 previously unknown to me information that I would want
18 to present, vis-a-vis his testimony

19 However, in order for that testimony to have
20 the appropriate value, he needs to have available the
21 photographs that were introduced by the Defense at the
22 jury trial And since this is a Kershaw County case, I
23 can't go next door at the Clerk's office and get them

24 So I am asking that I be allowed to depose Mr
25 Dickie Land at the same time that I depose the other

1 witnesses

2 THE COURT Well, Ms Shurling, this is the
3 second time this morning you've asked to depose
4 witnesses that should have been available today The
5 issue in this case, it seems to me, within the self-
6 defense defense, is why did he shoot him what, he shot
7 15 shots, I think it was He hit him -- how many times
8 did he hit him?

9 MR BROWN 14 shots, seven hits

10 THE COURT All right So how is this going to
11 help me decide that issue?

12 MS SHURLING I'll make -- be happy to make a
13 proffer I'll be happy to call Mr Land if you'd like,
14 Your Honor

15 THE COURT What's your position, Mr Brown?

16 MR BROWN My position is it's cumulative
17 evidence It's already been presented through four
18 witnesses It's not going to do anything but to further
19 cloud the subject which is as Your Honor stated

20 MS SHURLING I need to at least make a
21 proffer, Your Honor There was testimony at trial,
22 approximately page 148 going through 149, 150, that an
23 ax was found in the seat of the -- back seat of the
24 deceased's car

25 THE COURT Well, that's fine but what does

1 that have to do with whether or not he fired 14 shots?

2 MS SHURLING There was a question about
3 whether or not the windows in the victim's home had been
4 broken with an ax prior ---

5 THE COURT I understand that But the
6 question is, why did he shoot at the man 14 times?

7 MS SHURLING It's relevant to his degree of
8 fear of the deceased, Your Honor And I was approached
9 just now by Mr Dickie Land who is from Kershaw County
10 who advises me that he is prepared to offer testimony
11 that he knew the deceased and the deceased ---

12 THE COURT Ms Shurling, I'll let you have to
13 the end of the week to submit an affidavit that I will
14 consider I'll give them a chance to look at If
15 there's anything additional that crops up from that
16 affidavit, I might keep the case open beyond that

17 But it appears to be cumulative to me but I'll
18 be happy to look at it in the form of an affidavit based
19 on the proffer you just made

20 MS SHURLING Thank you, Your Honor

21 THE COURT All right, okay

22 MR BROWN Thank you, Your Honor

23 ----- END OF TRANSCRIPT OF RECORD -----

24

25

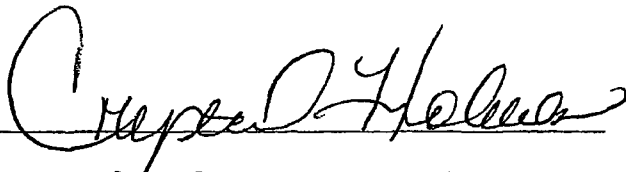
CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

I, Crystal Roach, Official Court Reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the hearing of the captioned case, relative to appeal, in the Court of Common Pleas for Kershaw County, South Carolina, on the 5th day of December, 2006

I do further certify that I am neither of kin, counsel nor interest to any party hereto

June 29, 2009


Crystal Holmes, Court Reporter

STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW

JOHNNY A. GAINEY, #284181,

Applicant,

v

STATE OF SOUTH CAROLINA,

Respondent

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

CASE NO 04-CP-28-0377

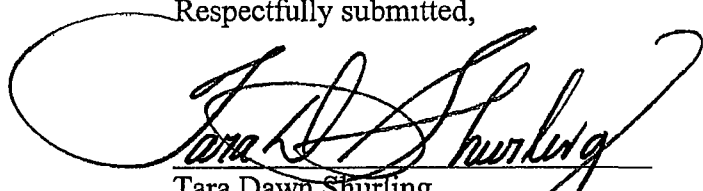
MOTION TO CLOSE EVIDENTIARY
RECORD

08 JUL 30 4:11 05
CLERK OF COURT
KERSHAW COUNTY S.C.

JRD

NOW COMES the Applicant in the above-captioned matter, acting by an through undersigned counsel. This matter comes before the Court by way of an Application for Post-Conviction Relief. An evidentiary hearing was convened on December 5, 2006. At the conclusion of this hearing, the record was left open to afford the Applicant the opportunity to depose two witnesses who were too ill to attend the hearing. Counsel for the Applicant has determined that the witnesses are no longer needed to complete the record in this case, and hereby moves to close the record.

Respectfully submitted,



Tara Dawn Shurling
Attorney and Counselor at Law
3614 Landmark Dr., Suite D
Columbia, S C 29204
(803) 738-8622
(803) 738-1600 (fax)
tdslaw@bellsouth.net
Attorney for the Applicant

This 28th day of July, 2008

STATE OF SOUTH CAROLINA)
COUNTY OF KERSHAW)
Johnny A. Gaaney, 284181,)
Applicant,)
v)
State of South Carolina,)
Respondent)

IN THE COURT OF COMMON PLEAS
2004-CP-28-0377

ORDER CLOSING RECORD

FILED
2009 APR -3 AM 11:25
CLERK OF COURT
KERSHAW COUNTY

The Respondent, State of South Carolina has moved the court to close the record in the above captioned case. The evidentiary hearing in this matter was heard on December 5, 2006. At the conclusion of the hearing, the record was left open for the deposition of two witnesses for the Applicant who were too ill to attend the hearing. As of June 19, 2007, the depositions had not been taken. It is this Court's finding that the record should be closed in its entirety and that the extremely limited funds available for indigent defense should not be expended for the PCR transcript. The Respondent has indicated that their proposed Order dismissing PCR was submitted on June 25, 2007 and that the proposed Order of Dismissal is complete as is, and that there is no need to delay this action further and to supplement the record after several years, with the PCR transcript.

IT IS THEREFORE ORDERED

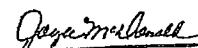
- 1 That the record in the above-captioned post-conviction relief action is closed, and that no indigent defense funds need be expended to obtain the PCR transcript and further delay this Court's decision.

AND IT IS SO ORDERED this 1 day of April, 2009


L. Casey Manning
Presiding Judge
Fifth Judicial Circuit

 South Carolina

ATTEST True, Correct & Certified
Copy of Original on File in this
Court


Clerk of Court Kershaw County

STATE OF SOUTH CAROLINA

COUNTY OF KERSHAW

Johnny A. Gaaney, 284181,

Applicant,

v

State of South Carolina,

Respondent

IN THE COURT OF COMMON PLEAS

2004-CP-28-0377

ORDER OF DISMISSAL

FILED FOR RECORD
 2010 JAN 25 PM 1:43
 CLERK OF COURT
 KERSHAW COUNTY SC

PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed May 21, 2004, and amended June 8, 2006. The Respondent made its Return on September 30, 2004. An evidentiary hearing into the matter was convened on December 5, 2006, at the Richland County Courthouse. The Applicant was present at the hearing and was represented by Tara Dawn Shurling, Esquire. The Respondent was represented by Robert L. Brown of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. Applicant also presented testimony from trial counsel, John Wells, Esquire, Steve Taylor, Vanessa Taylor, Raymond Jordan and Cecil Gaaney. This Court also had before it the records of the Kershaw County Clerk of Court, the transcript of the proceedings against the Applicant, and the Applicant's records from the South Carolina Department of Corrections.

The records before this Court indicate that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland

**ATTEST True, Correct & Certified
 Copy of Original on File in this
 Court.**

Jayne McDaniel
 Clerk of Court Kershaw County

County Clerk of Court The Applicant was indicted at the March 2002 term of the Richland County Grand Jury for murder (02-GS-28-00432) On May 15, 2002, he underwent trial by jury and was convicted of voluntary manslaughter He was represented by John Wells, Esquire He was sentenced by the Honorable J Ernest Kinard to confinement for a period of fifteen years A timely notice of intent to appeal was filed and perfected on the Applicant's behalf In an unpublished opinion, 04-UP-146, the Court of Appeals on March 1, 2004, affirmed the conviction

In his current application for post-conviction relief, the Applicant alleges he is being held in custody unlawfully for the following reasons

- 1 The trial court lacked subject matter jurisdiction to enter judgment against the Applicant where his indictment for murder was fatally defective in that it failed to state the time and place of death of victim,
- 2 Trial counsel was ineffective for failing to challenge the sufficiency of the indictment against him for murder,
- 3 Trial counsel was ineffective for not impressing upon the Court that the deceased victim was a drug addict and alcoholic with a history of criminal activity and violence,
- 4 Trial counsel was ineffective for not bringing out Applicant's limited physical and mental capacities,
- 5 Trial counsel was ineffective for failing to obtain a forensic pathologist to review the victim's autopsy to determining whether the physical evidence supported the State's theory of the case, and
- 6 Trial counsel was ineffective in that he failed to adequately prepare and submit the Applicant's self-defense claim

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing This Court has further had the opportunity to

observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S C Code Ann § 17-27-80 (1985)

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71 1(e), SCRCRCP, Butler v State, 286 S C 441, 334 S E 2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "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." Strickland v Washington, 466 U S 668, 104 S Ct 2052, 2064, 80 L Ed 2d 674, 692 (1984), Butler, 286 S C 441, 334 S E 2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S C 441, 334 S E 2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry v State, 300 S C 115, 386 S E 2d 624 (1989).

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, 300 S C at 117, 385 S E 2d at 625, (citing Strickland). 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, 300 S C at 117-18, 386 S E 2d at 625.

As to the allegation that the trial court lacked subject matter jurisdiction to enter judgment against the Applicant where his indictment for murder was fatally defective in that it failed to state the time and place of death of victim, this Court finds this claim is without merit. Defects in the indictment do not affect subject matter jurisdiction. See State v. Gentry, 363 S C 93, 610 S E 2d 494 (2005), See also U S v Cotton, 535 U S 625, 122 S Ct 1781 (2002). The indictment is a notice document, and any challenges to its sufficiency must be made in accordance with S C Code Ann § 17-19-90 (2003). See also S C Code § 17-19-20 (2003). Subject matter jurisdiction is the power of a court to hear a particular class of cases, and it has nothing to do with the indictment document. See Gentry, 363 S C 93, 610 S E 2d 494, Dove v. Gold Kist, Inc., 314 S C 235, 442 S E 2d 598 (1994).

In post-conviction relief, an Applicant wishing to raise challenges to the sufficiency of an indictment must do so in the context of ineffective assistance of counsel, basically alleging that his trial counsel failed to properly move to quash the indictment in accordance with S C Code Ann § 17-19-90 (2003). A claim of this nature is subject to the procedural bars in the Uniform Post-Conviction Procedure Act – notably the statute of limitations and successiveness. See S C Code §§ 17-27-45, -90 (2003).

An Applicant may still challenge the subject matter jurisdiction of the trial court, and such a claim is one that may be raised at any time. See Brown v. State, 343 S C 342, 540 S E 2d 846 (2001), overruled in part by Gentry, 363 S C 93, 610 S E 2d 494. However, “[c]ircuit courts obviously have subject matter jurisdiction to try criminal matters.” Gentry, 363 S C at 101, 610 S E 2d at 499, See also S C Const Art V, § 7. Thus, Applicant must present evidence that his case is of some class over which the circuit court does not have the authority to preside.

Applicant's conviction involved a criminal charge in General Sessions Court. Thus, the circuit court had subject matter jurisdiction.

As to the allegation that trial counsel was ineffective for failing to challenge the sufficiency of the indictment against him for murder, this Court finds this claim is without merit. The South Carolina Supreme Court has held that a murder indictment is sufficient "if the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, the defendant to know what he is called upon to answer, and if an acquittal or a conviction thereon may be pleaded as a bar to any subsequent prosecution." Joseph v. State, 351 S.C. 551, 561, 571 S.E.2d 280, 285 (2002) (citing State v. Owens, 346 S.C. 637, 648, 552 S.E.2d 745, 751 (2001)). Additionally, a review of the indictment shows that the indictment states, "[t]hat Johnny A. Gaaney did in Kershaw County on or about October 20, 2001, feloniously, willfully and with malice aforethought, kill one Stephen R. Price by means of shooting the victim several times with a rifle and that the said victim died as a proximate result thereof." A reading of the body indicates that Johnny A. Gaaney killed Stephen R. Price in Kershaw County on or about October 20, 2001. See Winns v. State, 363 S.C. 414, 611 S.E.2d 901 (2005). Had Mr. Price died on a date other than the one in question or in some other location than Kershaw County, the indictment may be flawed. However, that is not the case here. The indictment is valid and was sufficient to place Applicant on notice. There was no question what the charge was and therefore Applicant has failed to meet his burden of proof in establishing that counsel was ineffective. Accordingly, this allegation is denied and dismissed.

As to the allegation that trial counsel was ineffective for not impressing upon the Court that the deceased victim was a drug addict and alcoholic with a history of criminal activity and violence, this Court finds this claim is without merit. Rule 404(a)(2) of the South Carolina Rules

of Evidence allows, “[e]vidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor” Additionally, our Supreme Court has held that a defendant has the right to introduce evidence attacking the reputation of a victim for violence, but it cannot be done by showing specific instances of violence State v Boyd, 126 S C 300, 119 S E 839 (1923) Trial counsel testified that he was familiar with the victim’s reputation in the community but did not believe he could prove anything other than victim’s possible alcohol and drug abuse Counsel testified he was not aware of any criminal history that could have been presented Additionally, the Applicant presented only one witness, Raymond Jordan, who stated he could have testified as to the victim’s character A review of the record shows that trial counsel presented testimony from Laurie Shacker of the South Carolina Law Enforcement Division who performed toxicology tests on the victim Ms Shacker testified that victim’s blood alcohol content was well beyond the legal limit for driving and his blood showed cocaine usage within six hours prior to the incident Based on the presentation of this testimony, counsel clearly was able to establish that the victim was intoxicated which is what character trial counsel testified he was familiar with Based on the testimony presented at the post-conviction relief hearing and the evidence presented at trial, this Court finds that Applicant has failed to meet his burden of proof in establishing ineffective assistance of counsel Accordingly, this allegation is denied and dismissed

As to the allegation that trial counsel was ineffective for not bringing out Applicant’s limited physical and mental capacities, this Court finds that this claim is without merit A review of the record shows that trial counsel presented the testimony from Dr Alice Brooks who

testified that she treated Applicant in August and September of 2000 Dr Brooks testified that Applicant had suffered from an acute stroke She testified that his symptoms were blurred vision and that she had recommended vocational rehabilitation based on Applicant's inability to drive because of his condition Additionally, trial counsel put the best witness on the stand to demonstrate Applicant's limited physical and mental condition—the Applicant himself Applicant testified at the trial that he had three or four mini strokes and that he drew disability because of his inability to work There is no indication that Applicant was mentally ill or otherwise incompetent to stand trial or be convicted for this crime Additionally, the question in this trial was not whether Applicant was unable to defend himself at all but rather how much force was necessary Additionally it was important for the jury to see the amount of shots fired and the location that the shots came from The evidence at trial showed that the victim was by his truck in the driveway Applicant fired approximately fourteen shots at the victim of which nine came from inside the home and several more were fired outside the home In support of his position, Applicant presented testimony from several witnesses who could have attested to Applicant's frail nature and disability This Court is not persuaded that this testimony would have made a difference in the trial The testimony presented was merely cumulative to testimony presented at the trial by Dr Brooks and by the Applicant Accordingly, this allegation is denied and dismissed

As to the allegation that trial counsel was ineffective for failing to obtain a forensic pathologist to review the victim's autopsy to determining whether the physical evidence supported the State's theory of the case, this Court finds that this claim is without merit Trial counsel testified that he retained the services of and subpoenaed Dr Yakoub Counsel testified that he visited Dr Yakoub in Newberry to discuss the scientific findings Counsel testified that

Dr Yakoub was seated at counsel table and able to tell counsel what questions to ask the State's pathologist. Counsel testified that he chose not to seek testimony from Dr Yakoub because Dr Yakoub would have had to agree with much of the State's findings. Additionally, Applicant failed to present testimony from an independent pathologist to show that counsel was somehow deficient in failing to present testimony from a pathologist. Our Appellate Court's have repeatedly held that prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post conviction relief. Underwood v State, 309 S C 560, 425 S E 2d 20 (1992), Bassette v Thompson, 915 F 2d 932 (4th Cir 1990), cert denied, 499 U S 982 (1991). The Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v State, 315 S C 385, 434 S E 2d 266 (1993), Glover v State, 318 S C 496, 458 S E 2d 538 (1995). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v State, 333 S C 298, 509 S E 2d 807 (1998). Without testimony from a pathologist, this Court cannot speculate that the independent testimony would have had any benefit to the Applicant's case. It is certainly plausible that the testimony could have damaged the Applicant's case by solidifying the State's presentation of evidence. Accordingly, this allegation is denied and dismissed.

As to the allegation that trial counsel was ineffective in that he failed to adequately prepare and submit the Applicant's self-defense claim, this Court finds this claim is without merit. Counsel demonstrated at the post-conviction relief hearing that he understood that self-defense was the defense and of the utmost importance in this case. It is clear from the evidence presented at the trial through witnesses and opening and closing arguments that self-defense was

the defense presented at trial. As counsel testified, the important issue at trial was at what point Applicant should have quit shooting. Counsel testified he was aware that Applicant had the right to continue shooting until he no longer felt in danger. However, it is clear that shots were fired from two locations. Additionally, the pathologist testified that the seven shots which hit the victim were fired from some distance. There has been no evidence presented to show that counsel was anything less than adequately prepared and he rendered service beyond the professional norms required of a criminal defense attorney. Accordingly, this allegation is denied and dismissed. As discussed above, the Applicant has failed to carry his burden in this action. Therefore, this Court finds that the application must be denied and dismissed.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the 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.

Except as discussed above, this Court finds that the Applicant failed to raise the remaining allegations set forth in his application at the hearing and has, thereby, waived them. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S C 339, 415 S E 2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S C 153, 158-59, 355 S E 2d 282 (Ct App 1987). The Applicant's failure to address these issues at the hearing indicates a voluntary and

intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

This Court advises 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 227 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 Respondent

AND IT IS SO ORDERED this

day of

13 Jan., ²⁰¹⁰~~2007~~ 2010

L Casey Manning
Presiding Judge
Fifth Judicial Circuit

Cela, South Carolina

01/13

121

STATE OF SOUTH CAROLINA)

COUNTY OF KERSHAW)

JOHNNY A GAINES, #284181,)

Applicant,)

v)

STATE OF SOUTH CAROLINA,)

Respondent)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

CASE NO 04-CP-28-377

RULE 59(e), SCRCP, MOTION TO
ALTER OR AMENDFILED FOR RECORD
2010 FEB -3 AM 10 39
JULIE T. CHALD
CLERK OF COURT
KERSHAW COUNTY S C

NOW COMES the Applicant in the above-captioned matter, acting by and through undersigned counsel, respectfully moving, pursuant to Rule 59(e), SCRCP, this Court to alter or amend its Order of Dismissal filed on January 25, 2010¹ In support of this motion, the Applicant would show unto this Honorable Court the following

At the Post-Conviction Relief hearing held in this matter on December 5, 2006, the Applicant presented numerous witnesses who would have been available to testify about the Applicant's character for peacefulness had they been called as witnesses at the Applicant's trial. The Applicant alleged that defense counsel was ineffective for failing to present these witnesses. This argument was not addressed or ruled upon by the Court in the Order of Dismissal. Inasmuch as the Applicant believes that he was entitled to relief on this issue, based on the evidence presented at the hearing, he would respectfully move this Court to reconsider its Order of Dismissal and grant relief. Alternatively, the Applicant would request an amended Order addressing this issue and thereby preserving his right to raise the issue on appeal.

¹ This Order was received by counsel for the Applicant on January 26, 2010

CONCLUSION

WHEREFORE, having set forth his grounds, the Applicant respectfully requests that this Court reconsider its Order of Dismissal and issue such order as it just and proper

Respectfully submitted,



Tara Dawn Shurling
Attorney and Counselor at Law

Law Office of Tara Dawn Shurling, PA
3614 Landmark Dr , Suite D
Columbia, SC 29204
803-738-8622
803-738-1600 Fax
E-mail tdslaw@shurlinglaw.com

ATTORNEY FOR APPLICANT

This 2nd day of February, 2010

STATE OF SOUTH CAROLINA)

COUNTY OF KERSHAW)

JOHNNY A GAINNEY, #284181,)

Applicant,)

v)

STATE OF SOUTH CAROLINA,)

Respondent)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

CASE NO 04-CP-28-377

CERTIFICATE OF SERVICE

FILED
CLERK OF COURT
KERSHAW COUNTY, S.C.

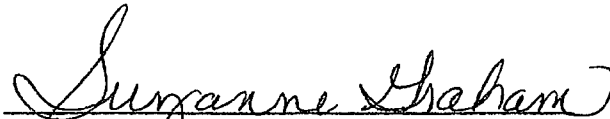
2010 FEB -3 AM 10 39

FILED FOR RECORD

The undersigned hereby certifies that a true copy of the Rule 59(e) Motion to Alter or Amend in the above matter has been served on opposing counsel this the 2ND day of February, 2010, by mailing one (1) copy in a stamped envelope properly addressed to

Brian T Petrano
Assistant Attorney General
Office of the Attorney General
P O Box 11549
Columbia, SC 29211

The original having been sent to the Kershaw County Clerk of Court for filing



Suzanne Graham
Paralegal to Tara Dawn Shurling

SWORN TO BEFORE ME this 2nd day of
February, 2010

Sharon H McCollister (L S)
Notary Public for South Carolina

My Commission Expires Jan 16, 2017

STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW

Johnny A. Gaaney, #284181

Applicant,

v

State of South Carolina,

Respondent

IN THE COURT OF COMMON PLEAS

2004-CP-28-0377

ORDER

FILED FOR RECORD
2011 OCT 14 AM 11:30
JULIA L. MCCALL
CLERK OF COURT
KERSHAW COUNTY, S.C.

This matter comes before the Court by way of the Applicant's motion to alter or amend pursuant to Rule 59, SCRCP. This matter originally came before the Court by way an Application for post-conviction relief (PCR) filed May 21, 2004. A hearing was held at the Richland County Courthouse on December 5, 2006. The Applicant was present and represented by Tara Dawn Shurling, Esquire. The Respondent was represented by Assistant Attorney General Robert L. Brown. By Order dated January 25, 2010, this Court dismissed the Application.

This Court had the opportunity to view the witnesses and their testimony at the PCR hearing and to pass upon their credibility. This Court finds that the testimony of Stephen Taylor, Vanessa Taylor, Ray Jordan, Cecil Gaaney, and the Applicant himself, was not credible, and that the testimony of trial counsel was credible. This Court finds that trial counsel's representation was within the spectrum of reasonableness in not presenting witnesses to the "peacefulness" of the Applicant. This Court pointed out at the hearing that the central issue in the case was, why had Applicant fired 14 shots at the victim, 5 of those shots being fired from outside the home, and hit the victim with 7 of those shots from a considerable distance, not a question of the Applicant's character. (Trans. pp. 42-43). This Court is not persuaded that testimony that the Applicant was "peaceful" would have made a difference at trial. For this reason, the Court

counsel testified that the sentencing court had indicated to him that the sentence would not have been different had Applicant presented more witnesses as to his physical condition or temperamental disposition (Trans p 13, lines 1-5) Therefore, the Applicant failed the second prong of the Strickland test in that he was able to demonstrate no prejudice from trial counsel's failure to call witnesses to testify to the "peacefulness" of the Applicant

Based upon careful reconsideration of all of the evidence in this case and upon full consideration of the Applicant's motion and supporting memorandum, this Court is not persuaded to alter or amend the judgment This Court further finds that oral argument would not aid in the reconsideration of the original judgment The previous order fully comports with the requirements of Rule 52(a) SCRCP

IT IS THEREFORE ORDERED

1 That the Applicant's motion to alter or amend judgment is denied and dismissed

AND IT IS SO ORDERED this 10 day of Oct., 2010 11(2011)

[Signature], South Carolina

[Signature]
The Honorable L. Casey Manning
Presiding Judge
Fifth Judicial Circuit

671

ARREST WARRANT

G-649809

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
KERSHAWTHE STATE
against

JOHNNY A GAINNEY

Address [REDACTED] LANE

29032

Phon [REDACTED] SSN [REDACTED]

Sex ☒ Race W Height [REDACTED] Weight [REDACTED]

DL State [REDACTED] DL# [REDACTED]

DOB [REDACTED] Agency ORI# [REDACTED]

Prosecuting Agency [REDACTED]

Prosecuting Officer [REDACTED]

Offense Murder

Offense Code [REDACTED]

Code/Ordinance Sec 16-3-20

This warrant is CERTIFIED FOR SERVICE in the

☐ County/ ☐ Municipality ofThe accused
is to be arrested and brought before me to be
dealt with according to law

Signature of Judge (L S)

Date

RETURN

A copy of this arrest warrant was delivered to

defendant Johnny A Gainney

on 10-20-2001

B MORRIS #55

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
KERSHAWPersonally appeared before me the affiant Captain David Thomley who
being duly sworn deposes and says that defendant Johnny A Gainneydid within this county and state on October 20, 01 violate the criminal laws of the
State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of KERSHAW)

in the following particulars

DESCRIPTION OF OFFENSE MURDER

16-3-20

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
THE DEFENDANT DID ON OCTOBER 20, 2001 WITH MALICE AFORETHOUGHT CAUSE THE DEATH OF
STEPHEN R PRICE BY SHOOTING THE VICTIM SEVERAL TIMES WITH A 22 CALIBER RIFLE
THE VICTIM WAS STRUCK SEVERAL TIMES THROUGHOUT HIS BODY AS A RESULT OF THE
DEFENDANT'S ACTIONS THIS INCIDENT OCCURRED AT [REDACTED] EVENING VIEW LANE, CASSATT,
KERSHAW COUNTY, SOUTH CAROLINA

Sworn to and subscribed before me)

on 10-20-01)

Signature of Issuing Judge (L S)

Signature of Issuing Judge

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
KERSHAW

AFFIDAVIT

Form Approved by
S C Attorney General
July 26 1990
SCCA 518

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 OCTOBER 20, 2001 defendant JOHNNY A GAINNEY

did violate the criminal laws of the State of South Carolina (or ordinance of

☒ County/ ☐ Municipality of KERSHAW) as set forth below

DESCRIPTION OF OFFENSE MURDER

16-3-20

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

Signature of Issuing Judge (L S)

Signature of Issuing Judge

Judge Code 801

Judge's Address P O DRAWER 1528

CAMDEN, SC 29020

Judge's Telephone (803) 425-1500

Issuing Court ☒ Magistrate ☐ Municipal ☐ Circuit

BAIL set by

Judge _____

on _____

Type and Amount _____

Name of Surety _____

PRELIMINARY HEARING held at

Judge _____

on _____

Defense Attorney _____

Decision _____

DISPOSITION before _____

Judge _____

on _____

by _____

(indicate jury trial bench trial plea nol pros etc)

Disposition _____

Sentence _____

JURORS

WITNESSES

Name _____

Address _____

Telephone _____

Name _____

Address _____

Telephone _____

Name _____

Address _____

Telephone _____

Name _____

Address _____

Telephone _____

Name _____

Address _____

Telephone _____

Name _____

Address _____

Telephone _____

Name _____

Address _____

Telephone _____

Name _____

Address _____

Telephone _____

CODEFENDANTS

WITNESSES

Thomley KCSD

DOCKET NO 2002-GS-28-00432

The State of South Carolina,

County of Kershaw

COURT OF GENERAL SESSIONS

March TERM 2002

THE STATE

vs

Johnny A. Gainey

ARREST WARRANT NO G649809

ACTION OF GRAND JURY

TRUE BILL

MAR 25 2002

Foreman of Grand Jury

Indictment for Murder

16-13-10
Felony
0116

VERDICT

Foreman of Petit Jury

Date

10-06-04A00923-EFV

FORM 5 (12/87)

STATE OF SOUTH CAROLINA)
COUNTY OF Kershaw)

INDICTMENT FOR MURDER

At a Court of General Sessions, convened on March 25, 2002,
the Grand Jurors of Kershaw County present upon their oath

COUNT ONE — MURDER

That Johnny A. Gainey
did in Kershaw County on or about October 20, 2001,
feloniously, wilfully and with malice aforethought, kill one Stephen R. Price
by means of shooting the victim several times with a rifle
and that the said victim died as a proximate result thereof

Against the peace and dignity of the State, and contrary to the statute in such case made and
provided



SOLICITOR